Articles

Notarial Records and the Preservation of the Expectation of Privacy

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All too often . . . [the] sense of [notarial] responsibility has been thwarted by a lack of good information on the proper performance of notarial acts.

Edmund G. Brown

A WOULD-BE STALKER approaches a California notary public, a government official holding a state commission, to obtain a copy of a notary record entry because that record includes the address of the intended victim whose signature had been recently notarized by the notary. California law requires notaries to maintain notary journals...
or ledgers and to provide copies of entries to members of the public upon written request. Currently, this California notary public, as in every state and territory except Wisconsin, would either be required to provide access to the recorded information about a document signer to someone who happened to be stalking the signer, or would be provided with no statutory directive at all about whether to allow access to the notary record to such an individual. Hence, notaries in all the jurisdictions other than Wisconsin could allow access to their "public records" to stalkers without violating notary statutes.

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.\(^7\) The more than 4.2 million notaries public in the United States undoubtedly perform hundreds of thousands of notarizations of signatures on documents daily,\(^8\) and notaries routinely include personal and financial identifiers in notarial journal records for many millions of document signers each year.\(^9\) Notary records regularly contain sufficient information about individuals that skillful thieves with access to that data could readily use it to commit identity thefts and other financial crimes.\(^10\)

Individuals are gambling with their identities and their security when they go to their local notaries for services and those notaries keep records of official acts.\(^11\)

Yet, the prestigious National Notary Association ("NNA"), the largest notary public membership and education organization in the world and the most active advocacy group in support of sound notarial practices,\(^12\) has recently announced to notaries nationwide that, as a matter of professional responsibility, notary journal entries (which contain the names, addresses, and signatures of document signers and perhaps their driver's license, passport, Social Security, or credit card numbers) regularly include such information as passport numbers, driver's license numbers, Social Security numbers, and/or credit card numbers of document signers whose signatures are notarized. See infra notes 311-13, 316-24 and accompanying text.

\(^7\) See Closen & Orsinger, supra note 5, at 6 (observing that "[t]here is a far better opportunity for unscrupulous people to commit financial crimes today than ever, especially the crime of 'identity theft' ").

\(^8\) See National Notary Ass'n, The 1997 NNA Notary Census, Nat'l Notary, May 1997, at 30 (stating that there were 4,290,634 United States notaries in 1997); Michael L. Closen, Reform the Potential Attorney-Notary Conflict, Nat'l L.J., July 6, 1998, at A24 (estimating that "[m]illions of documents are notarized every day").

\(^9\) Notary journal entries, for reasons to be explored later, regularly include such information as passport numbers, driver's license numbers, Social Security numbers, and/or credit card numbers of document signers whose signatures are notarized. See infra notes 311-13, 316-24 and accompanying text.

\(^10\) See Closen & Orsinger, supra note 5, at 6 (explaining that "millions of people each year provide enough data that skillful con artists with access to the information could readily commit identity thefts and other crimes").

\(^11\) See id. (remarking that "[p]eople are gambling with their identities when they go to their local notaries").

numbers) should be open to scrutiny "to any person" who presents a prescribed written request for such entries. Indeed, the NNA announcement, consistent with the notary statute of the NNA's home state of California, goes even further and also directs notaries public to provide copies of journal entries "to any person" who submits the prescribed written request. California is only one of several states and territories that permits unlimited or virtually unlimited access by the general public to notary journals. Oddly enough, the California statute further mandates that all notaries keep their journals under lock and key to ensure that no one but the notary has access to the journal. But, all a criminal has to do is ask nicely (in writing), and the lock is opened, and the journal is furnished. This is absurd. Contrary to the approach adopted by the NNA, California, and several other jurisdictions, notarial journals and other notarial records should be treated as confidential and their security rigorously protected against public disclosure. Interestingly, in May of 2000, Wisconsin enacted pioneering legislation that correctly makes notarial records confidential and mandates that such records should generally be subject to access only with the consent of document signers. As of now, no other state in the nation has adopted a law that does either of these

13. See NNA Notary Public Code, supra note 12, § VIII-B-1. While the cited provision does not require that a third party provide any reason for requesting access to a journal entry, a rather curious fact is that another section of the Code presents an inconsistent statement: "The Notary shall not divulge information about the circumstances of a notarial act to any person who does not have clear lawful authority and a need to know." Id. § IX-B-1.

14. See supra note 4 and accompanying text.

15. See NNA Notary Public Code, supra note 12, § VIII-B-1.

16. See infra notes 347-55.


A notary public shall keep one active sequential journal at a time, of all official acts performed as a notary public. The journal shall be kept in a locked and secured area, under the direct and exclusive control of the notary. Failure to secure the journal shall be cause for the Secretary of State to take administrative action against the commission held by the notary public pursuant to Section 8214.1.

Id.

18. Note the obvious inconsistency between section 8206(c) and section 8206(a)(1). See id. § 8206(a), (c). Apparently, California's legislature wants to ensure that their citizens remain polite. According to section 8206(c), all one must do is request to see a copy of the journal entry and pay thirty cents rather than steal it. See id. § 8206(c). Does this statute really protect its citizens?

This Article explores the actual practices of notaries public in creating notarial records, and the legal and ethical factors relating to the security of and the accessibility to such records. Incidentally, it must be explained that a "quick fix" to the confidentiality problem is definitely not to prohibit notary journal recordkeeping. As will be explained later, such recordkeeping is a highly valuable practice among notaries that must be encouraged rather than abandoned.

For the moment, consider just one aspect of the notarial setting and how it should impact analysis of the subject of notary records and their treatment. Many notarizations occur in the context of very personal and private dealings—so private that many people do not even want it to be known they have executed certain documents, let alone for any of the substance of those papers to become known. 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 regularly notarized. 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 regularly notarized. The signatures

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20. See Closen & Orsinger, supra note 5, at 6 (referring to the new Wisconsin law as "the first-of-its-kind notary record confidentiality statute").

21. Unfortunately, a few states which had required the maintenance by notaries of records of notarial acts have abolished those mandates.

22. Completion of a journal record for each notarization is so important that it was included as one of the ten commandments proposed for notarial practices in law offices. See Michael L. Closen & Christopher T. Shannon, The 10 Commandments of Notarial Practice for Lawyers, Fla. Bar News, June 1, 1999, at 32. The notary journal has been called "the notary's most important notarial tool." Van Alstyne, supra note 6, at 802. This recordkeeping should be mandated for notaries and also for certification authorities (or cybernotaries). See Michael L. Closen & R. Jason Richards, Cyberbusiness Needs Supernotaries, Nat'l L.J., Aug. 25, 1997, at A19 (complaining that the various state digital signature statutes at the time had not required "that a record of electronic communications be preserved to document the conduct of cybernotaries and the transactions involved"). Interestingly, the current draft of the revised Model Notary Act contains a provision requiring electronic notaries to maintain either a traditional paper journal or an electronic one. See MODEL NOTARY ACT § 18-1 (Proposed Revision 2000).


on civil and criminal litigation documents, including bankruptcy, divorce, and traffic violation cases, are also consistently notarized.\textsuperscript{26} Moreover, as already noted, notarial journal records may contain certain personal identification information about document signers such as their names, addresses, signatures, and other identifiers.\textsuperscript{27} Most assuredly, many document signers would not wish such information to be disclosed, and they should be entitled to expect that notaries public will keep such information confidential. Crooks bent on perpetuating forgeries and frauds would like nothing more than to obtain a signature replica to practice copying or to connect a person’s name and address to some other financial identifier like a Social Security or credit card number.\textsuperscript{28} Still worse, in these days of increasing accounts of stalking and the violence that can accompany it,\textsuperscript{29} providing the home or business addresses of document signers from notary records to would-be stalkers could contribute to tragic consequences.\textsuperscript{30} The
law should not require or encourage practices that will provide valuable information to criminals on a silver platter.

Privacy has become a matter of great consequence, particularly the privacy about one's own personal identifiers and financial information.\textsuperscript{31} Thus, the subject of this Article is one of substantial importance, yet it has remained largely overlooked historically. While it is a topic of quite fundamental substance, there are no legal cases, law review articles, or legal encyclopedia annotations dealing with the subject of the privacy interests in and the security of notary records.\textsuperscript{32} Few statutory provisions deal squarely with any of the issues addressed here.\textsuperscript{33} Only in very recent years has a genuine interest and debate arisen within the notarial community about this topic,\textsuperscript{34} but the recognition of the issues addressed in this Article as matters of national significance has not yet been widely entertained. As so often happens, sadly, it may be that such recognition awaits some notorious instances of breach of privacy to awaken both governmental agencies and the private sector.\textsuperscript{35}

\textsuperscript{31} See infra notes 37–86 and accompanying text.

\textsuperscript{32} Although the topic of privacy interests in and security of notary records has not been treated substantially, the authors maintain that with the increasing frequency of legal issues concerning the Internet and notary records, such coverage will likely appear in legal cases, law review articles, and legal encyclopedias.

\textsuperscript{33} See, e.g., Wis. Stat. Ann § 137.01(5m) (West Supp. 2000); Cal. Gov't Code § 8206(a)(1) (West Supp. 2000); see also infra notes 259–76. The result is that notaries are given to statutory directives and must resort to their own discretion as to what to do about confidentiality and access to records. "With more than 4.2 million notaries in this country, chaos would prevail if they were left to their discretion to perform notarizations whenever they felt and in whatever manner they felt was implied by notary statutes." 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, 511 (1999).

\textsuperscript{34} More attention has recently been focused on this subject in the literature among the notary organizations. See, e.g., Thun, supra note 3 (representing the National Notary Association); Van Alstyne, supra note 6 (representing the Notary Law Institute). The Notary Public Code of Professional Responsibility of 1998 contains a detailed provision on notary records and record access. See NNA Notary Public Code, supra note 12, § VIII.

\textsuperscript{35} As an illustration of the kind of thing we have in mind, at the time this Article was being published, the controversy about the outcome of the 2000 Presidential election was raging, including calls to abolish the antiquated Electoral College in light of the real possibility that a contemporary candidate who won the popular national vote would nevertheless lose the Presidency by being defeated in the Electoral College. We should hope that the antiquated way of dealing (or not dealing) with notary record privacy can be dealt with in a more deliberate manner. In light of the fact that the law almost always lags behind technology and then must react to technological advances, our greatest concerns about notary record confidentiality are technology driven because the increasing effectiveness and availability to cybercriminals of computers and the Internet provides the potential to piece together bits of data about potential victims. "Law has been relegated to a reactionary position, unable and unwilling to lead the parade of technology." John C. Anderson &
In the end, this Article proposes adoption of statutes that go beyond what California and Wisconsin have done to secure the privacy interests of document signers in the contents of notary journals and other notarial records. Part I presents a brief look at the evolution of privacy rights that have become so cherished in this country, with special emphasis upon concerns about documentary records, disclosure of their contents, and identity theft. Part II contains a short history of the notary’s role in America, focusing especially upon the early notary recordkeeping function. Part III addresses contemporary record maintenance and security within notarial practice around the country, emphasizing laws relating to notary journals and access to them. In this Part of the Article, the correctness of former Governor Brown’s introductory remark\(^{36}\) will become understood. Indeed, his 1978 criticism will seem mild by comparison when today’s circumstances are revealed. Part IV examines the question of whether document signers should enjoy a genuine expectation of privacy in notarial records. Part V explores the various risks of unwarranted and unauthorized breaches of confidentiality of those notarial records. Part VI of the Article sets out specific recommendations for legislation to govern notarial recordkeeping and to protect the confidentiality of those records.

I. Brief Overview of the Evolution of Privacy Interests

[T]he right to be alone [is] the most comprehensive of rights and the right most valued by civilized man.

\textit{Louis Brandeis\(^{37}\)}

While the profound nature of the right of personal privacy in this country is self-evident, this section briefly traces the development of the interest in privacy, particularly in connection with our central focus on document security. Unquestionably, this brief overview cannot be complete, as entire articles,\(^{38}\) books,\(^{39}\) and even multi-volume

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36. \textit{See supra} note 1 and accompanying text.


works have been devoted to the subject of the right to privacy. While some key points in the chronology must be addressed, it should be recognized that other observers might very well include events which this Article omits or reapporportion the emphasis this Article attributes to some events.

Can it truly be that individual privacy, which was unknown to and unrecognized by our law prior to the 1880s, constitutes, as Justice Brandeis suggested, the most cherished of the legal rights of civilized beings? In fact, the right of privacy to one's identity has certainly become paramount in our society, at least in the context of contemporary times. How did this evolution happen?

The seeds of the primacy of privacy were planted at the time of the founding of this nation by the colonists, who in essence came here to be left alone to cultivate early America. Ultimately privacy represents freedom, and it was a fervent demand for religious and political freedom that led to the settlement of the colonies and their separation from English rule. In the early days of the new country, central themes of the law evidenced principles genuinely rooted in the concept of privacy. For instance, at the heart of the national development and expansion was private land ownership, and with it the ideal of the right to the peaceful or quiet enjoyment of one's real


41. See Olmstead, 277 U.S. at 478 (Brandeis, J., dissenting).

42. See William Shakespeare, As You Like It act 3, sc. 2. Discussing the importance of privacy and of remaining free, Shakespeare notes through his character, Orlando, "I do desire we may be better strangers." Id.

43. See Winthrop D. Jordan et al., The Americans: A History 25 (McDougal, Littell & Company 1992). The authors noted:

In 1608 one congregation of Separatists decided to flee from England to Holland, where the authorities were very tolerant in religious matters. After several years, however, they became discouraged, mostly because some of their young people were drifting away from the Puritan faith. So they decided to risk migrating to America, where they felt they could live successfully as an independent religious congregation. They obtained financial backing and a grant of land in the northern part of Virginia. Id. at 25.

44. See generally Roger A. Cunningham et al., The Law of Property 14–22 (2d ed. 1993) (tracing the history and collapse of the feudal system of landholding in England, as well as the later development of private land ownership in England, the American colonies, and the United States as a descendant of the feudal system).
estate. The concept of the sanctuary of one's castle or home from governmental intrusion and interference remains of utmost value. In the constitutional arena, the demand for "life, liberty, [and] property" free from government deprivation "without due process of law" inherently reflects a focus on the right of freedom and in reality on the right of privacy.

Eventually, in 1888, Judge Thomas Cooley capsulized the concept of privacy in his famous passage, "the right to be let alone." Just two years later appeared the seminal law review article entitled The Right to Privacy by Samuel Warren and Louis Brandeis, which is justifiably credited with providing the analytical basis for occasional judicial recognition of the concept of privacy over the following generation and more steadily thereafter.

Society came to embrace the right of privacy far more willingly than some judges. It was to be technology that would lie at the core of most people's fear about invasion of the realm of personal privacy, for "there have been a series of developments that have advanced in quantum leaps the way we work and live." In turn, acceptance by the general public of the notion of a right of privacy was readily forthcoming. George Gallup, Jr., who polled prominent individuals about the effects of technology, published the results in 1984 and included this conclusion: "Technological progress, according to the opinion leaders we surveyed, will account for the greatest changes in the United States and in the world by the year 2000." Gallup's incisive prophecy has proven true, and with the great advances in technology, one's right to

45. See id. at 415 ("In the main ... it is true that the right physically to exclude others is the most nearly absolute of the many property rights that flow from the ownership or other rightful possession of land.").
46. See id. at 414 (quoting "Pitt's ringing declaration that 'the poorest man may in his cottage bid defiance to all the force of the Crown ... the King of England cannot enter').
47. U.S. CONST. amend. XIV, § 1 (providing that "no state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"). See also U.S. CONST. amend. V (providing that no person shall "be deprived of life, liberty or property, without due process of law").
48. THOMAS COOLEY, TORTS 29 (2d ed. 1888). Indeed, this famous phrase has been accepted by some sources as a definition of the right of privacy. See BLACK'S LAW DICTIONARY 1356 (4th ed. 1968).
50. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 849-51 (5th ed. 1984) (tracing the developments after publication of this "famous article"); see also JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 757 (4th ed. 1991) (commenting that the Warren and Brandeis article was "the leading original analysis of this concept").
52. Id. at 70.
privacy has become even more sacred than it was for the early colonists who fled British rule. Until recently, the technology most in question was the print and publishing technology, which enabled both government agencies and the private sector to gather and store data about individuals and to publish and disseminate such information to large numbers of people who were increasingly literate and curious. The country became dependent upon paper documents of all kinds, used to record and evidence almost every conceivable human activity from one's birth to death. Most assuredly, many of these documents contained personal and sensitive information that could be embarrassing or damaging if revealed.

As time progressed, advancing technology would play more and more of a part in promoting the need for recognition and protection of the right to privacy, particularly the privacy of one's personal identity. The instruments of long-distance and mass communications—the telegraph, teletype, telephone, and television—contributed to privacy concerns. More relevant to this Article are the instruments of document creation, reproduction, and distribution—the typewriter, carbon paper, the mimeograph machine, the photocopier, the com-

53. "Technology has advanced the speed with which documents can be created and transmitted." Anderson & Closen, supra note 35, at 842. This technology included a series of creations—telegrams, telexes, mailgrams, carbon paper, mimeograph machines, photocopiers, computers, and so forth. See id. By the late 1800s, the growth and power of the newspaper industry and the potential threat it posed to individual privacy led Warren and Brandeis to author their famous article The Right to Privacy. See supra notes 49-50 and accompanying text.

54. We have felt a need in this country to create a paper record about practically everything we do, including birth certificates, education records, marriage licenses, all other licensures, military service records, real estate transaction documents, banking and financial records, health care records, criminal investigation reports, tax records, litigation records, death certificates, and so forth.

55. For instance, health records may contain embarrassing details about an individual's physical and/or mental health, such as addictions, phobias, sexually transmitted diseases, suicidal ideations, and the like. Education, military, and employment records may contain damaging information about individuals, such as discipline cases and punishments, patterns of tardiness, instances of dereliction of duties, and so on. Tax, banking, and financial records may contain troublesome data about individual's financial standing and integrity, such as debts, foreclosures, bankruptcies, litigation, and so forth.

56. The obvious reason for this result was that increasingly the creation and compilation of documents involved personal information about people, and that information was linked to them by personal identifiers, such as names, signatures, addresses, Social Security numbers, driver's license numbers, financial account and credit card numbers, and the like. See infra notes 57-60.

57. Indeed, it was the technology behind the modern newspaper, allowing it to be rapidly and widely disseminated, that sparked the landmark privacy article by Warren and Brandeis. See Warren & Brandeis, supra note 49.
puter, the facsimile machine, the Internet, and e-mail.\textsuperscript{58} Gallup also predicted in 1984, \textit{"[o]n a much grander scale, with all the information that continues to be plugged into the government's computers... citizens in the near future will face a great potential threat to their civil liberties."}\textsuperscript{59} Actually, the penultimate civil liberty, the right to privacy, has been threatened by both governmental and private sector gathering and recording of data, as well as their willing dissemination of data or their inept handling and securing of data.\textsuperscript{60}

Throughout the last century of these impressive technological advances, the law promoted the cause of a right of privacy. Commentators analyzed, refined, and championed it.\textsuperscript{61} For example, Professor Gerald Dickler in 1936,\textsuperscript{62} and especially Professor William Prosser in 1960,\textsuperscript{63} identified particularized features of the broader concept of personal privacy. The four specific privacy interests enumerated as entitled to protection against unlawful invasions included (1) appropriation of an individual's name and/or likeness,\textsuperscript{64} (2) unreasonable or
highly offensive intrusion into an individual's seclusion,\textsuperscript{65} (3) highly objectionable public disclosure of private facts about an individual,\textsuperscript{66} and (4) placing an individual in a false or untruthful light before the public.\textsuperscript{67} Importantly, the first three of those interests frequently involve confidential information recorded in documents, which is unjustifiably and unlawfully accessed and misused.

A significant outcome of these events was the inclusion in 1977 in the Restatement (Second) of Torts of a set of four distinct privacy rights subject to legal protection.\textsuperscript{68} The new torts were consistent with those theories identified especially by Professor Prosser.\textsuperscript{69} And, of course, the Restatement is supposed to re-state the common law as decided by the courts.\textsuperscript{70} Many state and federal courts have broadly accepted the concept of a right of privacy in both the tort\textsuperscript{71} and constitutional law\textsuperscript{72} fields, although the United States Supreme Court has remained reluctant to fully approve the doctrine.\textsuperscript{73}

\textsuperscript{65} See id. at 854–56.
\textsuperscript{66} See id. at 856–63.
\textsuperscript{67} See id. at 865–67.
\textsuperscript{68} See \textit{Restatement (Second) of Torts} § 652A (1977).
\textsuperscript{69} See \textit{William L. Prosser, Handbook of the Law of Torts} § 117, at 804–12 (West 1971). Prosser asserts:

\textit{To date the law of privacy composes four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff "to be let alone." Whether there may be invasion of other interests which are properly to be included under the same generic term of "privacy" is a matter to be considered later.}

Prosser, supra note 63, at 389 (footnote omitted). Prosser lists the four privacy rights as (1) appropriation; (2) intrusion; (3) disclosure of private facts; and (4) false light in the public eye. See Prosser, supra; see also Prosser, supra note 63.

\textsuperscript{70} It is obvious, as the name "Restatement" suggests, that it is "[a] series of volumes authored by the American Law Institute that tell what the law in a general area is . . . ." \textit{Black's Law Dictionary} 1313 (6th ed. 1990).
\textsuperscript{71} See \textit{Keeton et al.}, supra note 50, at 849–60 (tracing the series of court decisions and other developments leading to the general acceptance of the concept of privacy in tort law).

\textsuperscript{72} See \textit{Nowak & Rotunda}, supra note 50, at 757–63, 771–72 (describing acceptance of the concept of privacy in a narrow field of decisions involving such sensitive matters as sterilization, contraception, marriage and family relationships, and abortion).

\textsuperscript{73} Instead, the Supreme Court strictly confined the application of a right of privacy to a very narrow set of sensitive areas of personal conduct—to too narrow a set in the view of the authors. For example, the Supreme Court's refusal to recognize choices about intimate sexual relationships as protected by the right of privacy in \textit{Bowers v. Hardwick}, 478 U.S. 186 (1986), which involved a challenge to Georgia's anti-sodomy statute, represents one more missed opportunity to advance fundamental justice in the field of privacy. See Michael L. Closen et al., \textit{AIDS: Testing Democracy—Irrational Responses to the Public Health Crisis and the Need for Privacy in Serologic Testing}, 19 \textit{J. Marshall L. Rev.} 835, 894–97 (1986) (describing and criticizing the \textit{Bowers} decision); Michael L. Closen, \textit{The Decade of Supreme Court Avoid-
With and without support from some quarters of the judiciary, as the country enters the new millennium the concept of privacy has attained a still greater significance as a result of the technological revolution.74 “In terms of social impact, the computer is on a par with the railroad, automobile, and telephone.”75 Whereas there was a time when many people knew of a right to privacy, but did not truly think much about it, the Internet has brought a new awareness and immediacy to the issue of an individual’s right to privacy.76 It is much like the old saying that if we knew what was really in hot dogs we would eat fewer of them, or we would pay more and get better quality frankfutters. If more people knew the genuine risks to their financial and personal confidences in cyberspace, they would not venture there, or would pay more and obtain a higher level of security when they enter that domain. The Internet has become the realm that individuals associate as being the biggest potential threat to their privacy, and they

74. See The Gallup Organization, Computers and the Internet, http://www.gallup.com/poll/indicators/indputernet.asp (last visited Nov. 13, 2000). The poll asked: “In general, how much confidence do you have that if someone uses a credit card to pay for something on the Internet, the credit card number will be secure and not stolen or misused in some way? Are you—completely confident, very confident, somewhat confident, not too confident, or not at all confident?” Id. Of those surveyed, only 4% were completely confident, 18% were very confident, 32% were somewhat confident, 22% were not too confident, and 24% were not confident at all. See id.; see also Anderson, supra note 58 (discussing government monitoring or eavesdropping capabilities and efforts that can monitor e-mail and fax transmissions).


[Senator] Kyle said his bill was necessary because current law fails to recognize “either the victim or the crime.” The Secret Service made nearly 9,500 arrests last year in which identity theft was an issue amounting to $745 million in losses to individuals and financial institutions. Losses have nearly doubled in the past two years, he said, adding “Ninety-five percent of financial crimes arrests involve identity theft.”

Id. “Because of an increase in ‘identity theft’ . . . a great deal of attention is being focused on privacy questions.” Thun, supra note 3, at 14.
have every reason to worry. People have long known that technology can be a double-edged sword—double-edged because advances that promise to better the lot of some in society often threaten others in the process." In a year 2000 lecture, United States Secretary of Commerce William Daley acknowledged that privacy is the biggest issue facing e-commerce today. Consistent with the concerns of the public and in a move that even prompted recent front-page newspaper headlines, President Clinton urged more privacy protections for consumers.

Throughout the last century, but with heightened fervor as time passed, legislatures have adopted laws protecting a wide array of privacy interests of their constituents. Very regularly, these most recent laws implicate data collection and document security. Quite arguably, this increasingly fast-paced legislative protection of privacy interests constitutes the other central reason (in conjunction with advances in technology) for the widespread appreciation for privacy in this country. Numerous laws are now being proposed and enacted specifically to protect personal privacy and to criminalize identity theft.

Because the legislatures represent the will of the citizenry, statutory protections of private matters symbolize the populist view of the prominence of concerns for individual privacy—including one's identity.

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77. See supra notes 75–76; infra note 85. "Cases of forgery and false identification are on the increase in our society." STATE OF NEBRASKA, NOTARY REFERENCE GUIDE 2 (n.d.).
78. GALLUP, supra note 51, at 69.
79. See United States Secretary of Commerce William Daley, Address at the John Marshall Law School (Feb. 9, 2000).
80. See, e.g., Charles Babington, Clinton Urges More Privacy for Consumers, CHI. SUN-TIMES, May 1, 2000, at 1 (including reference to a "measure [for] stricter safeguards for . . . credit card and checking account information").
82. However, the unfortunate reality is that the legislation is often too little, too late. "In every instance to date, technology has handily outpaced both statutory and common law in establishing the foundational and experiential bases for determining reliability." Anderson & Closen, supra note 35, at 843. Thus far, this has been the case in the field of notary record privacy as well.
84. See supra notes 81–83.
In late 1999, when a Wall Street Journal poll asked people what they feared most in the new millennium, breach of their privacy topped the list (ahead of terrorism, global warming, overpopulation, and all other problems). Therefore, it appears that Justice Brandeis was correct in his assessment of the right of privacy as "the right most valued by civilized man."

II. History of the Notary and Notarial Records

[Notaries] witness the signatures on all that paper that keeps the nation ticking.

Wall Street Journal

The heritage of today's notary public in this country can be traced back to about the time of Cicero in ancient Rome around the first century B.C. The first forerunners of the modern notaries were scribes who were men of learning at a time when most of the populace was illiterate, and who from very early times acted as public officials. Under Roman law, these scribes recorded public proceedings, registered or authenticated instruments, and drafted private documents. The tablione or notarius was expected to be an individual

85. See Privacy Rights Clearing House, What's Missing from This Picture (NAAG Speech) Privacy Protection in the New Millennium, http://www.privacyrights.org/ar/nagg-mill.htm (June 22, 2000) ("One of the most compelling surveys was the Wall Street Journal poll conducted in the Fall 1999. Americans were asked what they feared most in the new millennium. Privacy came out on top (29%), substantially higher than terrorism, global warming, and overpopulation (no higher than 23%).").
89. See Closen et al., supra note 1, at ix (quoting Nevada Attorney General Del Pappa, who commented that notaries have played a role since "Roman times when the art of writing was not widespread"); Seth, supra note 88, at 865; Closen & Dixon, supra note 88, at 875 (commenting that "[w]riting was not widespread" in ancient Rome).
90. See Seth, supra note 88, at 865; Closen & Dixon, supra note 88, at 875 (stating that notaries in ancient Rome held "the public trust in office"). The notarius of ancient Rome "was appointed as a public official." STATE OF WYOMING, NOTARIES PUBLIC HANDBOOK 1 (June 1999).
91. See Seth, supra note 88, at 865.
92. See ALFRED E. PIOMBINO, NOTARY PUBLIC HANDBOOK PRINCIPLES, PRACTICES & CASES 2 (Nat'l ed. 1996); Seth, supra note 88, at 865.
93. See Closen & Dixon, supra note 88, at 875; Jill Roberts, Through the Ages, NAT'L NOTARY, Nov. 2000, at 14 (proposing that "[b]oth the civil- and common-law Notaries of today can claim the same ancestor in the notarius of ancient Rome").
of education and integrity. 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 various civil law countries of Europe, eventually including England.94

Importantly, one of the early functions of the civil law notary was to serve as a recordkeeper.95 “[T]he notary acts as a kind of public record office. He is required to retain the original of every instrument he prepares and furnish authenticated copies on request.”96 Following their civil law histories, both Louisiana and Puerto Rico still continue the practice of requiring substantial recordkeeping of original documents by their notaries.97 These jurisdictions require stringent training and testing of notaries, which is evidenced by the fact that they rank among jurisdictions with fewer notaries.98 Around the rest of the

94. See Seth, supra note 88, at 865–66; Closen & Dixon, supra note 88, at 875 (stating that “[n]otaries then began to spread out into the provinces of the [Roman] Empire including what are now England, France, and Spain”); see also Closen et al., supra note 1, at 1 (observing that “[h]istorically, the notary has symbolized genuiness and truth”). Eventually, the United States Supreme Court referred to notaries as universally recognized officials. “[T]he court will take judicial notice of the seals of notaries public, for they are officers recognized by the commercial law of the world.” Pierce v. Indseth, 106 U.S. 546, 549 (1883). Indeed, the Minnesota Supreme Court went further and called the notary public “a kind of international officer.” Wood v. St. Paul Ry. Co., 44 N.W. 308, 308 (Minn. 1890). In time, legislation began to provide expressly that notarial acts performed in one country should be recognized elsewhere. “A notarial act has the same effect under the laws of this State as if performed by a notarial officer of this State if performed within the jurisdiction of and under authority of a foreign nation or its constituent units ....” Uniform Law of Notarial Acts § 6(a) (1982).

95. See Closen et al., supra note 1, at ix. Nevada Attorney General Del Pappa has been quoted as saying: “Notaries have played a role in history dating back to Roman times . . . . Notaries put documents in writing . . . and held them in safekeeping.” Id. “Notaries were originally scribes . . . who recorded and registered public and judicial proceedings . . . .” Seth, supra note 88, at 865.

96. Piombino, supra note 92, at 3 (quoting John H. Merryman, The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America (1969)). See also Seth supra note 88, at 866–67 (same).


98. With only some 7,000 notaries, Puerto Rico ranked about forty-sixth among United States jurisdictions in 1997, and Louisiana’s 50,000 notaries placed it twenty-sixth among United States jurisdictions. See National Notary Ass’n, supra note 8, at 31.
world, the civil law notary is the predominant kind of notary and is recognized as a highly trained and experienced professional. Most often in the civil law jurisdictions, in order for one to be a notary, he or she must also be an attorney. This is the case, for example, in Puerto Rico and many Hispanic countries. One consequence of the heightened qualifications and status of notaries elsewhere in the world is that there remain relatively few of them. For instance, there are fewer than 550 notaries in Japan, and there are only about 7,500 notaries in all of France.

While the civil law notary predominates throughout the world, the English notary developed into a unique species of notarial officer. In England, notaries appeared on the scene around the thirteenth century. For the next few hundred years, their importance grew as notaries developed experience in two distinct fields, although

99. "The civil law [notary] tradition is dominant in Western Europe, all of Latin America, and many parts of Asia, Africa, and the Middle East." PIOMBINO, supra note 92, at 3 (quoting MERRYMAN, supra note 96).

100. See CLOSEN ET AL., supra note 1, at 1. "In Puerto Rico, in the civil law countries, and particularly in Japan and in the countries of Central and South America . . . notaries are recognized as well-trained professionals with significant authority [and] in some of those other jurisdictions, only attorneys can be notaries . . . ." Id. Japanese notaries "are of such high integrity, diligence and legal knowledge that they are extremely qualified to be Notaries." SHINICHI TSUCHIYA, A COMPARATIVE STUDY OF THE SYSTEM AND FUNCTION OF THE NOTARY PUBLIC IN JAPAN AND THE UNITED STATES 2 (Nat'l Notary Ass'n 1996). See generally Pedro A. Malavet, The Foreign Notarial Legal Services Monopoly: Why Should We Care?, 31 J. MARSHALL L. REV. 945 (1998).

101. See CLOSEN ET AL., supra note 1, at 1. "[M]ost Japanese notaries are former judges or public prosecutors with extensive legal experience." TSUCHIYA, supra note 100, at 2. "Civil law notaries are lawyers . . . ." Seth, supra note 88, at 884.

102. See Closen, supra note 2, at 699 (pointing out that "[i]n most jurisdictions of Central and South America and in Puerto Rico, only lawyers can also occupy the position of notario público").

103. "At present, there are 540 Notaries working in the 300 Notary offices throughout Japan . . . ." TSUCHIYA, supra note 100, at 2. "The Japanese Notary system was established 110 years ago, based on the French system, and has since been altered by the influence of the German system. It is a Civil Law system which was remodeled to adapt to Japanese culture and tradition." Id. at 1.

104. See Deborah M. Thaw, The Feminization of the Office of Notary Public: From Femme Covert to Notaire Covert, 31 J. MARSHALL L. REV. 703, 704 (1998). As further examples, there are about 7,500 notaries in Germany, about 4,500 in Italy, and about 2,000 in Spain. See Seth, supra note 88, at 884–85.

105. See Martin Silverman, The Work of an English Notary, AMERICAN NOTARY, 2d Qtr. 1999, at 10 (referring to notarial practice as "this rare branch of the law" in England and Wales); see also Seth, supra note 88, at 884 (observing that "there are three distinct groups of notaries practicing in the world today: civil law notaries, English notaries and United States notaries"); see generally C.W. BROOKS ET AL., NOTARIES PUBLIC IN ENGLAND SINCE THE REFORMATION (1991).

106. See Seth, supra note 88, at 867.
that significance eventually would wane.\textsuperscript{107} In the ecclesiastical courts, notaries prepared documents including reports of proceedings and served as recordkeepers.\textsuperscript{108} In secular matters, they prepared mainly commercial instruments—particularly those that would be sent abroad.\textsuperscript{109} Prior to 1279, English notaries obtained their authority from the Roman Pope, but in 1279 the Pope delegated that power to the Archbishop of Canterbury.\textsuperscript{110} This power became truly vested in the Archbishop of Canterbury in 1533 with the departure of the English Church from its Roman foundation.\textsuperscript{111}

Since the Reformation, there has been a decline in the substantive functioning of the four categories of the English notary—general notaries, district notaries, ecclesiastical notaries, and scrivener notaries.\textsuperscript{112} Much of their work was taken over by solicitors,\textsuperscript{113} for there was not a sufficient volume of work to be done to allow individuals to serve full-time as notaries, except in London.\textsuperscript{114} Indeed, an “attempt by the solicitors to [completely] take over the notary [was] repulsed” in the 1880s.\textsuperscript{115} A consequence of this decline is that there have remained very few notaries throughout English history. For example, in 1863 there were only seven district notaries for Dover which had a population of almost 25,000 people; only nine district notaries for Yarmouth with a population of over 34,000; only six notaries for Hartlepool with more than 29,000 people; only two notaries for Swanson with over 45,000 people; and only three notaries for Sunderland having a population of more than 85,000 people.\textsuperscript{116} By “the mid-1920s there were about 500 notaries of all categories in England and Wales.”\textsuperscript{117} Another consequence of the erosion of strictly notarial duties was the decline of the historical impact of English notaries. “The

\textsuperscript{107} It is undeniable today, that notaries occupy but a small niche in English legal life . . . .” \textsc{Brooks et al., supra} note 105, at 2.

\textsuperscript{108} See \textsc{Seth, supra} note 88, at 867; \textsc{Brooks et al., supra} note 105, at 1.

\textsuperscript{109} See \textsc{Seth, supra} note 88, at 867; \textsc{Brooks et al., supra} note 105, at 1.

\textsuperscript{110} See \textsc{Silverman, supra} note 105, at 10; see also \textsc{Seth, supra} note 88, at 867 (pointing out that the Pope authorized the Archbishop of Canterbury to appoint notaries in England).

\textsuperscript{111} See \textsc{Silverman, supra} note 105, at 10.

\textsuperscript{112} See \textsc{Brooks et al., supra} note 105, at 133.

\textsuperscript{113} See \textit{id.} at 2 (“Most aspects of legal practice associated with notaries in civil law countries are in England now performed by solicitors.”).

\textsuperscript{114} See \textit{id.} at 132–33; see also \textsc{Seth, supra} note 88, at 885 (pointing out that a small group of about thirty-five scrivener notaries practice exclusively in London).

\textsuperscript{115} \textsc{Brooks et al., supra} note 105, at 132.

\textsuperscript{116} See \textit{id.}

\textsuperscript{117} \textit{Id.} at 136.
notary public features only slightly in historical accounts of English law and institutions."\(^{118}\)

Beginning in the early nineteenth century, Parliament passed a series of laws regulating notaries, regarding such matters as their training, examination, and authority.\(^{119}\) 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.\(^{120}\) The majority of notaries in England are solicitors.\(^{121}\) They serve as public officials preparing and authenticating documents meant principally for use in international commerce.\(^{122}\) In England and Wales, there are now about 1,000 notaries,\(^{123}\) and one English notary explained, "I keep a copy of everything that I notarize as well as a written record of what I have done."\(^{124}\) Thus, the traditions of both the civil law notary and the English notary have included the feature of recordkeeping as a central function.

Although the first notary to set foot in the Americas was a Spanish notary who accompanied Christopher Columbus to San Salvador in 1492,\(^{125}\) no other notaries are known to have acted in North America until relatively soon after its colonization.\(^{126}\) 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

\(^{118}\) Id. at 1.

\(^{119}\) See id. at 121–41.

\(^{120}\) See Silverman, supra note 105, at 10 (pointing out that the appointment authority still rests with the Archbishop of Canterbury, and that author ‘had to pass rigorous written examinations’ to become an English notary).

\(^{121}\) See id. (observing that in England and Wales “almost all Notaries are solicitors (attorneys)”).

\(^{122}\) See Brooks et al., supra note 105, at 136 (observing that “[t]he main function of the English notary today remains the preparation and authentication of legal documents intended to take effect outside the United Kingdom”); Silverman, supra note 105, at 10 (noting that “[i]n England and Wales, Notaries are largely concerned with the verification of documents and information that will be used in other countries around the world”).

\(^{123}\) See Silverman, supra note 105, at 10 (estimating that “[p]resently there are between 920 and 950 ‘General’ Notaries in the whole of England and Wales together with a select group of ‘Scrivener’ Notaries who practice within the City of London”); see also Seth, supra note 88, at 885.

\(^{124}\) Silverman, supra note 105, at 11.

\(^{125}\) See Roberts, supra note 93, at 14 (recounting that “[i]n 1492 . . . Queen Isabella relied on a Notary to keep track of the treasures gathered by Christopher Columbus during his exploration of the New World”); see also Ronni L. Ross, The American Notary: Celebrating a 350-Year Heritage, Nat’l Notary, Nov. 1989, at 11 (pointing out that Spanish notary (then called an escribano) Diego de Arana of Cordova accompanied Columbus to San Salvador in 1492).

\(^{126}\) See generally Seth, supra note 88.
acceptable in international trade unless they followed the European practice and custom of having such documents prepared and authenticated by notaries. 127 While some colonial notaries acted under authority of a commission granted in England from the Archbishop of Canterbury, 128 most were appointed by local authorities in each of the colonies. The first notary appointed in any of the colonies was commissioned in the Province of New Haven in 1639, 129 followed by appointments in the Massachusetts Bay Colony in 1644, 130 in Virginia in 1662, 131 in New York in 1664, 132 in South Carolina in 1741, 133 in Delaware in 1765, and North Carolina before 1777. 134 All of the colonial notarial offices "developed from the practice of seventeenth century English notaries." 135

The colonial notaries were men of substance who were literate and trusted to perform their notarial duties with diligence and integrity. 136 Dubiously, however, the first notary appointed in the colonies, Thomas Fugill of New Haven, was removed from notarial office due to fraudulent practices. 137 Surprisingly, the first notary appointed in the Massachusetts Bay Colony, William Aspinwall, was also removed as a notary due to his dishonest practices. 138 To quote a well-founded conclusion of one seasoned notary authority, "[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 com-

127. The American colonists copied the notarial "system developed in England to authenticate documents used in international commerce. Each colony, soon after establishment and as it became involved in trade, found it necessary to appoint a public official whose signature and seal on a document . . . assured its acceptance throughout the world." Seth, supra note 88, at 864. See Closen & Dixon, supra note 88, at 876 ("What eventually spurred the development of the [American] notary public was trade with Europe. Trading partners needed reliable bills of exchange witnesses by a knowledgeable and responsible person with no interest in the deal being struck.").

128. See Seth, supra note 88, at 876 (stating, for example, that in colonial Massachusetts "notaries appointed by the Archbishop of Canterbury appear to have practiced . . . from time to time"); see also Ross, supra note 125, at 11 (commenting that "[e]arly American colonial Notaries still received their authority through Canterbury").


130. See Seth, supra note 88, at 872.

131. See id. at 879.

132. See id. at 880.

133. See id. at 881.

134. See id.

135. Id. at 863–64.

136. See id. at 867.

137. See National Notary Ass'n, supra note 129, at 3; Seth, supra note 88, at 869.

138. See Seth, supra note 88, at 875.
An important footnote to Aspinwall’s removal from the notary office was that he refused to turn over his notarial records to the colonial government. Aspinwall took the view that his notarial records were private records which belonged exclusively to him, though he ultimately compromised his position and delivered those records to the leading clergyman of the colony.

The notaries of the colonies were of considerable importance to early commerce in part because they were so few in number. They kept extensive records of the documents they prepared and authenticated, although most of these records have not survived. Such detailed recordkeeping was consistent with the experience of English notaries in the ecclesiastical courts. As the number of people and colonies grew, so did the amount of commerce including international trading and the number of notaries. But, as the number of lawyers and justices of the peace also increased, the functions of notaries were removed and turned over to those men more directly part of the legal establishment. Curiously, the roles of both justices of the peace and notaries public eventually became so diminished that, in recent United States history, some jurisdictions have merged the functions of the two offices. The decline in the substance of the role of notaries in this country was parallel to the decline suffered by English notaries at the hands of solicitors there.

In the early United States, notaries continued to be relatively few in number and to be men of considerable substance. Indeed, the President of the United States or the governors of the states appointed

139. Id. at 869. See also Closen, supra note 8, at A24 ("If history foretells the future, we face serious dangers as a result of our inept approaches to document verification . . . . Arguably, things have gone down hill" since 1639, when the first notary in America was removed from office due to his misconduct.).
140. See Seth, supra note 88, at 875; Van Alstyne, supra note 6, at 777.
141. See Seth, supra note 88, at 875; Van Alstyne, supra note 6, at 777.
142. See Closen, supra note 8, at A24 (pointing out that "[i]n early times, . . . there were few notaries"). Notaries were so few in number that they "were exempted from military service [because it was] believed that the lack of a Notary would be a tremendous burden on the functioning of a community." National Notary Ass’n, supra note 129, at 3.
143. See Seth, supra note 88, at 864 (observing that "[m]any relevant [colonial notarial] documents have disappeared").
144. See id. at 867-68; see also BROOKS ET AL., supra note 105.
145. See infra notes 147, 155 and accompanying text.
146. See National Notary Ass’n, 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."); see also Coleman v. Roberts, 21 So. 449 (Ala. 1896) (confering justice of the peace authority upon notaries public).
147. See supra notes 113–15 and accompanying text.
some of the first United States notaries. As the country expanded, many states severely limited the number of notaries, often to just one notary for a county, parish, city, or island. Each state adopted a statute that both created and empowered notaries public. And as the population of the country grew dramatically in the nineteenth and twentieth centuries, the number of notaries increased exponentially. Gradually, the statutory limits on the number of notaries diminished, until most states abandoned such limits altogether.

Simultaneously, the extent of notarial responsibilities continued to erode in substantial ways. For instance, their responsibilities for the preparation of important commercial documents such as bank protests and marine protests nearly evaporated. This stripping away

148. See Closen, supra note 6, at A23 (noting that “notaries were sometimes presidential appointees”); Closen & Dixon, supra note 88, at 876.

149. 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, 718 (1997) (reporting that in the early United States “[m]any statutes limited the number of notaries who could be commissioned within a city or county, and often the number was just one”).

150. See Closen ET AL., supra note 1, at 6 (“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. There is both a Uniform Law on Notarial Acts and a Model Notary Act . . . .”); Closen & Dixon, supra note 88, at 876 (stating that all fifty states have adopted notary statutes). See generally ANDERSON’S MANUAL FOR NOTARIES PUBLIC (8th ed. 1999) (setting out the notary statutes of the fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands).

151. See Thaw, supra note 104, at 718. Thaw noted:

[I]n the late 1800s and early 1900s . . . [t]he number of notaries in exploding major cities was growing almost exponentially. In Connecticut, for example, there were fifteen notaries in 1800, thirty-two in 1812, sixty-four in 1827, 10,789 in 1932, and 48,000 in 1990. In California, no more than 405 notaries could be commissioned in 1853 to serve the entire state, which today has nearly 150,000 notaries.

152. See Roberts, supra note 93, at 15 (revealing that in the twentieth century “state legislatures removed the limits on the number of Notaries in given cities and counties”); see also Ross, supra note 125, at 11 (stating that “[t]hough the states at first placed tight restrictions on the number of Notaries, the nation’s explosive growth through the 1800s and early 1900s caused an unprecedented demand for Notaries and the restrictions were lifted”).

153. See Closen & Dixon, supra note 88, at 877 (emphasizing that “[o]ver the course of history, notaries’ powers have changed substantially”); Roberts, supra note 93, at 15 (pointing out that “[o]ver the years, the U.S. Notary’s duties have been whittled away by technological advances and legislative action”).

154. See UNIFORM LAW ON NOTARIAL ACTS § 2(e) (1982) (referring to “a protest of a negotiable instrument” as one of the authorized notarial acts). The protest is:

an antiquated and rarely performed notarial act . . . . Nowadays, protests are an anachronism—as out of place as a clipper ship among modern ocean liners. But they linger on in the law. Even though every Notary is authorized to execute a
of the duties of notaries continued the earlier pattern of expanding
the role of justices of the peace, lawyers, and judges. Recorders of
deeds and other public officers even took over part of the recordkeep-
ing function of early notaries.

During the 1800s, the office of recorder had not yet been estab-
lished, so Notaries were responsible for holding the original of doc-
uments they notarized. As states began appointing recorders of
public documents, Notaries were called upon to perform this func-
tion less and less, until today, when only civil law Notaries are re-
quired to maintain the originals of documents they notarize.

Eventually, the United States Supreme Court accurately described the
duties of the notary public as "essentially clerical and ministerial." Even in those states that permit notaries today to do more than ad-
minister oaths and notarize signatures on documents, the other nota-
rial functions authorized by statute are quite nominal and ministerial,
allowing virtually no room for discretion or judgment to be exercised.
For example, a few states authorize notaries to conduct wedding cere-
monies, or to inventory the contents of abandoned bank lock

protest, any Notary without the proper training, experience or supervision is fool-

ish to attempt one.

Interestingly, the responsibility of English notaries to protest bills of exchange or to pro-
cess bank protests has become "rare" even though a statute remains in effect giving English
notaries authority to do so. See Silverman, supra note 105, at 10. By 1984, the Model Notary
Act omitted the making of protests from the authorized functions of notaries. See Model
Protests are rarely performed today . . . . Further, protests generally require a degree of
legal and financial expertise that most notaries do not have.").

155. See Roberts, supra note 93, at 14–15 (explaining that "some of the Notary’s func-
tions have been relinquished to other officials over the centuries" and since colonial times
notaries have lost "the duties of conveyencing and preparing documents to attorneys").

156. A special public official created by some states was the commissioner of deeds
(domestic or foreign), and this official with extra-territorial authority was to take acknowl-
edgments of deeds and other instruments to be recorded or filed in her or his home
jurisdiction (another part of the same state or in the home state). Some states still have
commissioners of deeds. See Piombino, supra note 92, at 6–7. "In colonial times, Notaries
performed the functions of modern-day county recorders, keeping the originals of all doc-
uments they notarized and issuing handwritten copies." Ross, supra note 125, at 10. See also
Closen & Dixon, supra note 88, at 877.

157. Consuelo Israelson, Working Together to Avoid Document Rejection, Nat’l Notary,
July 2000, at 16. See also Roberts, supra note 93, at 15 (suggesting that "the Notary of colo-
nial days might look askance at losing the duties of . . . archiving materials to county
recorders").


159. See Closen et al., supra note 4, at 208 (pointing out that "[f]or reasons shrouded
in mystery, three states—Florida, Maine, and South Carolina—allow notaries to perform
civil marriages"). It is only the actual ceremony that is performed by the notary (not the
boxes, and several states authorize notaries to issue document copy certifications.

In the more than 350 years since the first appointment of a notary in the American colonies, undoubtedly the most significant developments in the notarial arena have been the drastic reduction in the importance of the functions to be performed by notaries, the substantial increase in the volume of documents required by law or private agreements to bear notarized signatures, and the exuberant growth in the ranks of notaries. As the comment of the Wall Street Journal that began this section of the Article suggests, notaries are called upon to notarize signatures on "all that paper," far too much paper.

more significant procedures of granting and filing marriage licenses), and "[t]ypically . . . the ceremony is quite short." Id.

160. See, e.g., Va. CODE ANN. §§ 6.1-334 to -337 (Michie 1999) (addressing the issue of notaries opening and inventorying the contents of safe deposit boxes); N.Y. BANKING LAW § 335 (McKinney 1990); see also National Notary Ass'n, Opening Safe Deposit Boxes, Nat'l Notary, Nov. 1995, at 21.

161. See Uniform Law on Notarial Acts § 2(d) (1982) (referring to the "certifying or attesting [of] a copy of a document or other item" as one of the authorized notarial acts); Model Notary Act § 1-105(3) (1984) (defining a copy certification to be "a notarial act in which a notary certifies having made a photocopy of a document that is neither a public record nor publicly recordable").

162. See Closen & Dixon, supra note 88, at 877 (remarking that "as the number of lawyers grew and literacy became more widespread, the powers of the notary were gradually limited").

163. See Closen, supra note 8, at A24 (observing that "notarization is an essential element of countless commercial, governmental and litigation documents"); Linda S. Adams, Out and About with Mobile Notaries, American 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"); see also Berton, supra note 87.

164. See infra notes 169-72 and accompanying text.

165. See Berton, supra note 87; see also Anderson & Closen, supra note 35, at 847 (referring to "the enormous volume of commercial and governmental instruments required to be notarized").

166. See infra notes 520-22. "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." State of Nebraska, supra note 77, at 2. "Why do so many documents need to be notarized?" Closen, supra note 6, at A24. Many a notarization "serves no real purpose." Id. It should be pointed out that other people do not seem to be complaining much about the volume of documents which require signatures thereon to be notarized. Indeed, more and more legislation and regulations are proposed and adopted requiring notarization as part of the process. See, e.g., Post Office Will Battle Fraud with Notarization, Notary Bull., Dec. 1999, at 1 (describing "new regulations requiring commercial mailbox renters to provide additional proof of identity, including notarized application forms when applying for a private mail drop box"); New Bill Would Allow Parents Leeway to Refuse Immunizations, Notary Bull., Aug. 1999, at 14 (reporting about proposed Illinois legislation that "would permit parents to
One of the reasons for the expansion in the number of notaries was the opening of the notarial office to women in the early twentieth century. In less than 100 years, the notarial office went from being foreclosed to women to one consisting of approximately 75–80% women. In a single twenty-five year period, the ranks of the notary in this country increased remarkably from 1.83 million in 1972 to about 4.29 million in 1997. The numbers across the country continue to rise, as for example Wisconsin has reported an increase of 20,000 more notaries between 1997 and 2000. The office of notary public is by far the largest public office in the United States. There are now at least fourteen states each having more than 100,000 notaries: (1) Florida with more than 340,000 notaries; (2) Texas with 327,000; (3) New York with more than 240,000; (4) South Carolina with more than 205,000; (5) Illinois with more than 180,000; (6) New Jersey with about 178,000; (7 & 8) Ohio and Georgia with about 172,000 each; (9) North Carolina with 170,000; (10) Michigan with 160,000; (11) Massachusetts with 144,000; (12) California with 130,000; (13) Virginia with 126,000; and (14) Tennessee with 102,000. This means there are more notaries nationwide than there are people in each of about thirty of the states, and there are more notaries than police officers, elementary and secondary school teachers, lawyers, doctors, or active duty military personnel.

The swelling of the ranks of notaries has not elevated their standing in the business and legal communities. As the United States Su-
The Supreme Court observed quite critically, "the significance of the position [of notary public] has necessarily been diluted by changes in the appointment process and by the wholesale proliferation of notaries."  

There are four million notaries too many in this country, but the millions of dollars in revenue generated for state and local governments and business interests guarantee there will be no concerted effort to drastically reduce the number of notaries. A conservative estimate is that notaries pay more than $28 million annually to state and local governments in commissioning fees alone. 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.).


176. See Closen, supra note 6, at A24.

177. In order to calculate this estimate, the fee for notaries in each of fifty states and territories was divided by the length of a notary commission in that jurisdiction to provide an average annual fee for each United States notary ($334.40 total + 50 jurisdictions = $6.69 average annual notary fee). By multiplying that number times the number of United States notaries the total estimate of notary commission fees is over $28 million ($6.69 average annual fee x 4.2 million notaries = $28.09 million). See National Notary Ass'n, Comparison of Notary Provisions, NAT'L NOTARY, May 2000, at 27. Incidentally, the average length of a notary commission is about four years. See Close & Dixon, supra note 88, at 887; see also Model Notary Act § 2-1-2 (1984) (suggesting the term of a notary commission be four years). And, of course, the states continue to legislate to raise the fees charged to obtain and maintain notary commissions. For example, in 2000 New York doubled the length of the notarial term, and doubled both the application fee and the fee for a notary to make a change of name or address. John Jones, Legislative Update, AMERICAN NOTARY, 4th Qtr. 2000, at 21.

The position of the notary in the United States today (outside of Louisiana and Puerto Rico) has become trivial in comparison to the role the notary has played in the past. The notary is not required to be particularly educated relative to the rest of the population. There are no general education requirements for one to become a notary, except in Wisconsin where an eighth grade education is required. Hence, a barely literate, grade school dropout could become a notary and perform notarizations on significant documents in almost every jurisdiction. While several state statutes mandate that a notary applicant be literate in the English language, these requirements, which seem troublesome on public policy and constitutional grounds, are not enforced. Although some paperwork must be filed by notary applicants, such filings may in fact be prepared by parties other than the applicants themselves. Theoretically then, virtually all state statutes would allow their notaries to be functionally illiterate.

Unlike their foreign counterparts, notaries in the United States are not required to be business or legal professionals, and overwhelm-

179. See Closen, supra note 6, at A23 (referring to the "trivialized position" of United States notaries); Closen & Richards, supra note 21, at A19 (remarking that "this debasement of the office [of notary public] in America is likely to become a problem for international commerce"); Closen & Dixon, supra note 88, at 885 (explaining that "in Louisiana, with its civil law tradition, notaries have much more expansive powers"); see also supra notes 101-02.


181. Ten states and one territory have a requirement that notaries be able to read and write English: Colorado, Georgia, Guam, Illinois, Kansas, New Mexico, Rhode Island, Utah, Washington, West Virginia, and Wyoming. See id. at 23; see also Model Notary Act § 2-101(b)(3) (1984) (suggesting that one must be able to "read and write English" as a qualification to be a notary); Model Notary Act § 3-1(b)(4) (Proposed Revision 2000) (same).

182. Since notaries are allowed to notarize signatures on foreign language documents (in languages other than English), why must United States notaries be literate in English? “At first blush, the need for this qualification appears self-evident. But reflecting upon the exact nature of notarial acts may cause the need for this requirement to become less clear.” Closen & Dixon, supra note 1, at 81.

[T]he English literacy requirement might properly be subject to modification. With the diversity of languages in the United States, many commercial and legal transactions are conducted in languages other than English. The real concern should be that the notary be literate in the language of the document to be notarized or at least in the language of the individual to whom the oath is administered . . . .

Closen & Dixon, supra note 88, at 879.

ingly they are neither. 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. Frankly, many of these individuals are virtually judgment-proof. Few notaries join notary membership organizations, and fewer still participate in voluntary continuing education programs for notaries. Notaries in the United States do not have to attend a substantial, prescribed course of notarial studies, except in North Carolina (where a short course at a junior college is mandated) and recently in Florida. No state has adopted mandatory continuing education for notaries public. Only a handful of states require a notary applicant to pass a notary examination, and only a few of those examinations are proctored. One of the best pieces of evidence of the

184. See Closen, supra note 6, at A24 (opining that United States notaries have become "an embarrassment when it comes to international commerce"). "The marginal role of American notaries is in stark contrast to the seriousness with which the responsibility is taken in many foreign countries." Id. at A23.

185. See State of Oregon, Notary Public Application Materials for New or Re-Applying Notaries 1 (May 1994) (noting that some "become a notary . . . by employment requirements"). The Oregon pamphlet mentions that employers may "pay for your employee's notary public commission, seal and journal." Id. at 20. See also Piombino, supra note 92, at 15 (stating that perhaps "the majority of notaries have their bond purchased by a third party, notably their employers").

186. "Many [notaries] begrudge their employers for making them take on additional duties of notarization that always seem to impinge on their regular jobs at the most inconvenient times." National Notary Ass'n, supra note 183, at 12.

187. For instance, Professor Closen has attended or presented at at least fifty notary education programs, and has observed first-hand the sparse attendance of notaries. See Closen, supra note 6, at A23 (commenting that "few notaries make use of" on-the-job notary training and that "attendance is generally very sparse" at notary education seminars); Valera, supra note 12, at 998 (estimating the membership of the two largest notary membership organizations to be only about 175,000-200,000 of the 4.2 million notaries public); see also Closen & Richards, supra note 22, at A19 (noting "the historic underqualification of notaries in this country").

188. See National Notary Ass'n, supra note 180, at 23.

189. "As of July 1, 2000, all new notaries public in Florida must have three hours of training before being commissioned." Richard C. Authier, Notary Education Now Mandatory in Florida, American Notary, 4th Qtr. 2000, at 17.

190. See generally National Notary Ass'n, supra note 180, The Revised Model Notary Act recommends adoption of mandatory education and testing requirements in order for one to obtain a commission and in order for one to renew his or her commission. See Model Notary Act §§ 3-1(b) (5), 3-5, 4-3 (Proposed Revision 2000).

191. Fourteen states and territories (including the civil law jurisdictions of Louisiana and Puerto Rico) require some form of notary exam: Alaska, California (proctored exam), Connecticut, District of Columbia, Guam, Hawaii, Louisiana (except for attorneys), Maine,
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 at $2 or less. And, a few states still set the charges for jurats at between $0.25 and $1. Some twenty states do

New York, North Carolina, Oregon, Puerto Rico (where one must also be an attorney), Utah, and Wyoming. See National Notary Ass'n, supra note 180, at 23. In Ohio, an exam may be required if the endorsing judge so orders. See id.; see also STATE OF OREGON, supra note 185, at 4, 6 (referring to a required open book notary examination); Model Notary Act § 2-203 (1984) (recommending notaries pass a written examination on notarial law and practice). Although the Wyoming handbook contains both a written notary examination and the answers, "[c]ompletion of the test is encouraged but not mandatory." STATE OF WYOMING, supra note 90, at 22.

192. See Closen, supra note 6, at A23 (noting that "in a majority of the states, the maximum charge for ordinary notarizations is $2 or less"). In Illinois, legislation has been proposed to double the maximum fee for a notarial act from $1 to $2. See Jones, supra note 179, at 20. Even when the maximum fees are raised, the increase is typically quite modest. Thus, in 2000, Connecticut raised its maximum notarial fee from $2 to $5. See id. In Arizona, notaries receive the following fees: "1. For acknowledgements, no more than two dollars per signature. 2. For oaths, and affirmations without a signature, no more than two dollars. 3. For jurat, no more than two dollars per signature. 4. For certified copies, no more than two dollars per page certified." Ariz. Rev. Stat. Ann. § 41-316 (West Supp. 1999).

N.Y. EXEC. LAW § 136 (McKinney 1991) provides:
A notary public shall be entitled to the following fees: 1. For administering an oath or affirmation, and certifying the same when required, except where another fee is specially prescribed by statute, two dollars, 2. For taking and certifying the acknowledgement or proof of execution of written instrument, by one person, two dollars, and by each additional person, two dollars, for swearing each witness thereto, two dollars.

Id. See also OHIO REV. CODE ANN. § 2303.20(N) (Anderson 1998) (allowing notaries to receive "[t]wenty dollars for acknowledging all instruments in writing").

As long ago as 1984, the official comments to the Model Notary Act reported: "Considering the notary's liability, time, and expense in acquiring a commission and properly operating as a notary, a fee of $5 per notarized signature is fair and reasonable. (California was the first state to enact a $5 per signature fee level, effective January 1, 1984)." Model Notary Act, Art. III cmt. (1984). "[B]ecause notaries earn at most a paltry fee for their services, they generally have little or no financial incentive to learn and perform their duties." John C. Anderson & Michael L. Closen, 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, 889 (1999).

193. See, e.g., Ala. CODE § 36-20-6 (1991). Section 36-20-6 provides:
Notaries public are entitled to the following fees: the sum of $1.50 and necessary postage for all services rendered in connection with the protest of any bill of exchange for acceptance, or of any bill of exchange, promissory note, check or other writing for payment and shall not charge any other fees therefor; for any oath, certificate and seal taken under subdivision (1) of section 36-20-5, $5; for giving copies from register, $.20 for each 100 words; for each certificate and seal to such copy, $.25; and for giving any other certificate and affixing seal of office, $.50.

Id. Kentucky notary law states:
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 approximately 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.

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

The fees of notaries public for the following services shall be not more than set out in the following schedule: Every attestation, protestation, or taking acknowledgment of any instrument in writing and certifying the same under seal including but not limited to, the notarization of votes of absentee voters, $0.50. Recording same in book to be kept for that purpose, $.75. Each notice of protest, $.25. Administering oath and certificate thereof, $.20.

KY. REV. STAT. ANN. § 64.3000 (Banks-Baldwin Supp. 1999). New Jersey provides that “[f]or service specified in this section, commissioners of deeds, notaries public, judges and other officers authorized by law to perform such service, shall receive a fee as follows: For administering an oath or taking an affidavit, $.50. For taking proof of a deed, $1.00. For taking acknowledgment, $1.00.” N.J. STAT. ANN. § 22A:4-14 (West 1997). See also Model Notary Act, Art. III cmt. (1984) (commenting that “[u]nfairly and unreasonably low statutory fees work against the public interest in discouraging professionalism on the part of notaries”).

194. See Closen, supra note 6, at A23; Closen & Osty, supra note 178, at 13.

195. See Closen & Richards, supra note 22, at A19 (stating “no state mandates that [notaries] carry errors and omissions insurance”); see also Piombino, supra note 92, at 14 (noting that a notary bond “is distinctly different from an insurance policy”).

196. For example, the Wyoming bond is just $500. See State of Wyoming, supra note 90, at 22; see also Piombino, supra note 92, at 14 (pointing out that as of 1996 the bond amounts ranged from $500 to $10,000). The bond amounts should be significant if they are to be effective. In 1850, for example, California set its bond at $5,000. See Close ET AL., supra note 1, at 5 (quoting National Notary Ass’n, A History of Notaries in California, Notary Home Study Course, at 53 app. A (Cal. Supp. 1989)). Back in 1984, the Model Notary Act was suggesting a $10,000 bond level. See Model Notary Act § 2-103 (1984). “Lawmakers should set the bond penalty high enough to offer substantive protection to the public . . . .” Id. at Art. II cmt. Still today, the average bond amounts range between only $2,000 and $5,000.

197. See Closen, supra note 6, at A23 (commenting that “the required [notary bond] amount is so low that it is useless and misleading”); Closen & Osty, supra note 178, at 14 (opining that “[t]he notary bonding practice now in place in Illinois constitutes a hoax”); see also Piombino, supra note 92, at 15 (noting that two states in 1987 and 1992 repealed mandatory notary bond requirements); see generally Osty, supra note 178.

198. See Piombino, supra note 92, at xxii (remarking that there is “evidence of the advanced stage of decay and neglect that the office of notary public has suffered”). There is not nearly enough official interest in the office of notary public. See Closen & Richards, supra note 22, at A19 (emphasizing “the traditional lack of federal interest in notaries”).
fraud by properly identifying document signers. Moreover, notaries are required, or at least strongly encouraged, to compile records about document signers, including confidential personal and perhaps commercial information. It is alarming that this largely unregulated recordkeeping function is being undertaken by a vast array of untrained and indifferent individuals bearing government commissions.

III. Contemporary Notary Recordkeeping and Record Security

[Member notaries] resolve ... [t]o never divulge the contents of any document nor the facts of execution of that document without proper authority.

*American Society of Notaries*

At present in this country, the general custom required for notaries in notarizing signatures on transactional documents is to complete two forms for each notarization: (1) a certificate of notarization which is a part of, or attached to, the transactional instrument being executed; and (2) an entry contained in a permanently bound, chronologically sequenced notary ledger or journal. These two notarial forms should be regarded as interconnected and interdependent. The first form noted, the certificate of notarization, is required in all jurisdictions for the notarization of signatures on documents, except in Maryland. The completion of the certificate of

199. See Closen & Orsinger, supra note 5, at 6 (stating that "most notaries have limited commercial experience and are quite indifferent about their official duties").

200. See infra notes 259-75, 279.

201. *ASN CODE OF ETHICS*, supra note 23.


204. See Van Alstyne, supra note 6, at 783 (discussing the interplay of the notarial certificate and the journal entry).


206. See National Notary Ass’n, *Legislative Reviews, Notary Bull.*, Aug. 1996, at 6 (announcing that a recent Maryland law “[a]llows Notaries to ‘date, sign, and seal or stamp’ a document that does not bear a notarial certificate”). Even there, a notary may, and should, complete a certificate of notarization.
notarization truly constitutes the act of notarization. The ideal certificate should include at least five items of information.\textsuperscript{207} The five items should be: (1) the venue (the state and usually the county where the notarial act occurs);\textsuperscript{208} (2) the date of the notarial act (always the present date at the time of the notarial ceremony; the certificate should never be pre-dated or post-dated);\textsuperscript{209} (3) the legibly written or printed name of the document signer whose signature is to be notarized (this should not be the actual signature to be notarized, for that ordinarily appears at the end of a document just above the certificate of notarization);\textsuperscript{210} (4) the signature of the notary (just as it appears upon the notarial commission and seal, if any);\textsuperscript{211} and (5) the notarial seal,\textsuperscript{212} if any (while some fourteen states do not require notaries to employ the use of seals,\textsuperscript{213} no state forbids the affixing of a seal,\textsuperscript{214} and all notarial certificates should be sealed).

\begin{itemize}
\item \textsuperscript{207} See, e.g., 5 ILL. COMP. STAT. 312/6-103, 6-105 (1993) (including in the elements of a certificate of notarization the name of the document signer, the jurisdiction, the date, the signature of the notary, and the seal of the notary); see also Model Notary Act § 4-102(a) (1984) (identifying at least seven items that should be included in every journal entry).
\item \textsuperscript{208} See, e.g., Or. Rev. Stat. § 194.565(1) (1989) (referring to "the jurisdiction in which the notarial act is performed"); Uniform Law on Notarial Acts § 7(a) (1982) (same). The short standard forms of notarial certificates provide spaces for both the state and county to be identified. See id. § 8.
\item \textsuperscript{209} See, e.g., Or. Rev. Stat. § 194.565(1); Uniform Law on Notarial Acts § 7(a) (1982). "Never post-date or ante-date any oath or acknowledgement." State of Wyoming, supra note 90, at 10.
\item \textsuperscript{210} The short standard form certificate of notarial acts provided in the Uniform Law provides a blank space for the "name(s) of the person(s) who sign(s) a document and whose signature(s) is/are notarized." Uniform Law on Notarial Acts § 8(1) (1982). It should be emphasized that the name should be typed or printed so that it can be easily read, because so many people have signatures that are not truly legible.
\item \textsuperscript{211} See, e.g., Uniform Law on Notarial Acts § 7(a) (1982).
\item \textsuperscript{212} One reason that all documents bearing notarizations of signatures should also include seals or stamps of the notaries is to reduce the risk of confusion about documents and mistaken rejection of documents tendered for filing.
\end{itemize}

If the recorder does not realize that a document was sent from a state with different notarial requirements, the document may be seen as being improperly notarized. For example, if a notary is not required to use a seal in New York. But if a New York document is recorded in a state that does require its notaries to use a seal, the recording officer may not realize this, and reject the document.

Israelson, supra note 157, at 17. Indeed, the notarial seal is so important and customary that in one old case the Supreme Court declared that it would "take judicial notice of the seals of notaries public." Pierce v. Indseth, 106 U.S. 546, 549 (1883). See generally Karla J. Elliott, The Notarial Seal—The Last Vestige of Notaries Past, 31 J. Marshall L. Rev. 903 (1998).

\begin{itemize}
\item \textsuperscript{213} See National Notary Ass'n, supra note 177, at 27 (listing the following fourteen states as not requiring use of seals: Alabama (on acknowledgments), Connecticut, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, New Jersey, New York, Rhode Island, South Carolina, Vermont, and Virginia).
\end{itemize}
Other information might be included in the certificate, such as the time of the notarization, the date of expiration of the notarial commission (which might be a part of the notary seal), the method by which the document signer was identified by the notary (personal knowledge, credible witness(es), or satisfactory evidence of identity established by documents of identification), and an indication that the document was sworn to or affirmed by the document signer. Importantly, the certificate of notarization is part of the transactional document, or is attached to the transactional document, and remains there. Thus, the original certificate of notarization is taken away by the document signer, leaving the custody of the notary. Seldom do notaries make photocopies for their own records of the certificates of notarization which they execute. 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 no-

214. See, e.g., OR. REV. STAT. § 194.565(1) (1989) (stating that the certificate "may include the official stamp or seal of office"); UNIFORM LAW ON NOTARIAL ACTS § 7(a) (1982) (same).

215. Placing the time of the notarization on a notarial certificate would be appropriate in any situation where the transactional document might be time sensitive. Certainly, some notaries routinely record the time of the notarization as part of their journal recordkeeping. See ROTHMAN, supra note 1, at 31 (noting the "[d]ate and time of official act" should be included in each journal entry); see also VAN ALSTYNE, supra note 2, at 39 (including the "date and time of the notarial act" as a component of a journal entry).

216. Inclusion of the notary commission expiration date is important to serve as a reminder so that a notary will not perform notarizations after the lapse of the commission. Many states require the inclusion of commission expiration dates in certificates of notarization. In Oregon, for example, the date of expiration of the notarial commission must be included in the certificate. See OR. REV. STAT. § 194.565(1) (1989). The certificate of notarial acts "must also indicate the date of expiration, if any, of the commission of office, but omission of that information may subsequently be corrected." UNIFORM LAW ON NOTARIAL ACTS § 7(a) (1982).

217. There are three basic ways for a notary to identify a document signer. One method is "[t]he notary’s personal knowledge" of the signer. STATE OF WYOMING, supra note 90, at 8.

218. One basic method by which a notary may identify a document signer is through the "[c]onfirmation by a credible witness" or witnesses. Id.

219. One of the basic ways for a notary to identify a document signer is to check "[v]alid identification documents" constituting "satisfactory evidence" of identification of the signer. Id. at 4, 8.

220. For example, in Wyoming each certificate of notarization is required to include "[h]ow identity was proven." Id. at 12.

221. Of course, the essence of the jurat form of a notarial act includes the feature that the document signer takes "an oath or affirmation vouching for the truthfulness of the signed document." Id. at 3. Hence, a certificate of notarization for a jurat should always read to the effect that it was "subscribed and sworn/affirmed to" by the signer.
tary. Even document signers themselves will sometimes falsely claim they did not execute documents, if in hindsight they have changed their minds about the wisdom of their transactions and if they think they can get away with destroying the documents or charging that their signatures were forged.\footnote{222}{"Baseless lawsuits filed by signers who 'change their mind' about execution of a document, sometimes many years later, occur on occasion." National Notary Ass'n, supra note 28, at 17. "A signer . . . may have second thoughts about a document and claim that a signature was forged." Marc A. Birenbaum, Protecting Your Invaluable Journal, NAT'L NOTARY, Nov. 1997, at 12. See also MODEL NOTARY ACT, Art. IV cmt. (1984) (noting that signers of documents may have "second thoughts" and claim "they never appeared before the notary").}

In other words, there is ordinarily no recordkeeping by the notary related solely to the execution of the certificate of notarization. Because the notary does not retain the original or a copy of the certificate, notaries are required or advised to maintain scrupulously a recordbook of their notarial acts. Preparation of this record, which should be completed prior to the execution of the certificate of notarization,\footnote{223}{See STATE OF OREGON, supra note 185, at 20 (reminding notaries to "complete [their] journal entry first"). The Oregon handbook states: "You should complete the entry entirely before filling out the notarial certificate to prevent signers from leaving before you make the important record of the notarization in your official journal." Id. The Wyoming handbook states that "[a] notary public should complete the journal entry immediately before notarization occurs . . . ." STATE OF WYOMING, supra note 90, at 18. But the American Society of Notaries directs notaries to complete the certificate of notarization before completing the entry in the notary record book. See AMERICAN SOC'Y OF NOTARIES, ALL STATES RECORD BOOK, at v (1997).} lengthens the time needed to carry out a notarization. "Although the completion of a proper journal entry certainly doubles the time spent on each notarization, the total time involved is still quite short and is worth the added protection it brings to the notarization ceremony."\footnote{224}{Closen & Shannon, supra note 22.} The notary journal, with its detailed description of each notarial act (including the data contained in the certificate of notarization as well as an original signature of the document signers) provides a valuable record in the event of loss, theft, damage, destruction, or alteration of the certificate of notarization or loss of memory of the notary about the specifics of the notarization ceremony.\footnote{225}{See Van Alstyne, supra note 6, at 779 ("The notary journal guides the notary through correct notarial procedures, thus minimizing any potential for serious mistakes. As a result, the . . . journal is a valuable protection . . . against groundless accusations of wrongdoing. It is especially useful for refreshing the notary's memory about a notarial act that took place years ago."); Birenbaum, supra note 222, at 12 (explaining that "[w]ithout a journal entry to aid in recalling the notarization, which typically occurred many years before, most Notaries would find it extremely difficult to remember the exact circumstances").} One lead-
The notary authority has remarked, "[t]he importance of such record keeping is so great that it cannot be overstated."\(^{226}\) The notary journal, which remains with the notary, is the principal focus of concern in this Article.

Just as the original certificate is vital to document signers to prove the notarization of their signatures,\(^{227}\) the notary journal can protect the notary from erroneous claims of faulty notarizations as well.\(^{228}\) The notary journal has been said to be "worth its weight in gold" to the notary.\(^{229}\) 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. Thus, under the doctrine of the presumption of validity of the acts of public officials,\(^{230}\) the certificate of notarization (if it appears on its face to have been executed contemporaneously with the document signing or acknowledgment and to be complete) is presumptively valid.\(^{231}\) It is thus entitled to be

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\(^{226}\) Van Alstyne, \textit{supra} note 6, at 778. Another notary authority made this remark about a notary journal: "Treasure it as an important archive." Birenbaum, \textit{supra} note 222, at 14.

\(^{227}\) In the great majority of jurisdictions that do not require notaries to keep journals, the certificates of notarization containing the signatures and usually the seals of notaries are the only written evidence of notarizations, if notaries do not voluntarily maintain journals. In some eighteen jurisdictions that require notaries to keep journals, the certificates are still quite important because they are written records and remain with the transactional documents in question. As noted previously, forty-nine states and the United States territories require certificates for all notarizations of signatures on documents. \textit{See supra} notes 203, 206-07 and accompanying text. Even in the state of Maryland, there must be a date, signature of the notary, and seal/stamp of the notary to effect a notarization of a signature on a document. \textit{See supra} note 207.

\(^{228}\) \textit{See supra} notes 222, 225. The other associated purpose of notarization of signatures is to prevent attempts at document fraud. "A journal serves first and foremost as a deterrent. Naturally, forgers and impostors are reluctant to leave behind a journal signature, journal thumbprint or recorded details about their demeanor or physical appearance that might incriminate them." Birenbaum, \textit{supra} note 222, at 10.

\(^{229}\) National Notary Ass’n, \textit{supra} note 203, at 16, 18. \textit{See also} Birenbaum, \textit{supra} note 222, at 10 (observing that "the state officials who commission and regulate Notaries almost universally extol the public and private benefits of notarial recordkeeping").

\(^{230}\) This presumption takes a number of forms and applies to public officials generally, not just to notaries. For instance, under the rules of evidence, an exception to the hearsay rule exists for public records. \textit{See} \textit{Fed. R. Evid.} 803(8). "Justification for the exception is the assumption that a public official will perform his duty properly . . . ." \textit{Fed. R. Evid.} 803(8) advisory committee’s note. \textit{See also} Closen, \textit{supra} note 2, at 681 (noting "[c]ase law regularly recites the adage that the acts of public officials enjoy the presumption of validity").

admitted into evidence without further proof of authenticity. Similarly, the journal entries of notaries public (again assuming they appear to be thoroughly completed contemporaneously with the notarizations) would be admissible into evidence under either the business records exception to the rule against admission of hearsay or the public records exception. Furthermore, regular entries in a bound chronological journal would constitute admissible evidence of habit or routine on the part of the notary, in order to demonstrate the notary’s employment of reasonable care.

Panek, 97 N.E.2d 283, 285 (Ill. 1951) (holding that “the certificate of acknowledgment can be overcome only by proof which is clear, convincing and satisfactory, and by disinterested witnesses”); Trowbridge v. Bisson, 44 N.W.2d 810, 812 (Neb. 1950) (stating that an “acknowledgment, in the absence of fraud, will be conclusive in favor of those who in good faith rely upon it”).

232. See Fed. R. Evid. 902 (providing 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”).

233. See Fed. R. Evid. 803(6). Rule 803(6) creates a hearsay exception for records of regularly conducted activity, stating:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Id. The official advisory committee’s note to this provision explains:

The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation.

Fed. R. Evid. 803(6) advisory committee’s note.

234. See, e.g., Fed. R. Evid. 803(8) advisory committee’s note (including among the hearsay exceptions public records and reports). Public records are “[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report.” Id. See also State of Wyoming, supra note 90, at 17 (pointing out that “[e]very journal entry is legally presumed to be truthful”).

235. “Importantly, the consistent business practice of completing a comprehensive journal entry would establish that a notary had acted with reasonable care so as to avoid liability for an allegedly negligent notarization.” Closen & Shannon, supra note 22. It has been said that the regular maintenance of a notary journal shows professionalism of a notary, and shows the notary takes the position seriously. See National Notary Ass’n, supra note 183, at 16–17; see also Fed. R. Evid. 406 (“Evidence of the habit of a person . . . is relevant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit or routine practice.”). Presumably, the regular keeping of a thor-
The common law has developed a rule of conduct for notaries consistent with tort law in many other fields of business and professional endeavors.\textsuperscript{236} Not surprisingly, notaries have the legal responsibility to act with reasonable care in the performance of their notarial functions, such as identifying document signers and completing certificates of notarization.\textsuperscript{237} Some states hold notaries to a heightened duty of care in the performance of their all-important responsibility of identifying document signers.\textsuperscript{238} Notaries do not become the guarantors of the identities of the signers for whom they notarize,\textsuperscript{239} and they have no liability for damages for notarizing imposters' signatures unless they fail to use appropriate care in identifying signers.\textsuperscript{240} The most common failure of notaries is their willingness, in violation of every notary statute,\textsuperscript{241} to notarize the signatures of absent signers.\textsuperscript{242}
But the completion of the bound chronological journal entry, including a signature of the document signer in the journal, represents very solid proof that the signer had actually appeared before the notary.\textsuperscript{243} Further, notaries do not have a legal obligation to complete certificates of notarization perfectly, but have satisfied their duty of care if their certificates are found to be within the boundaries of substantial compliance with statutory requirements.\textsuperscript{244} Notaries have the legal obligation to act honestly and to abide by the notary laws and other statutory directives.\textsuperscript{245} The failure of notaries to act with ordinary care and diligence which results in injury to document signers or other parties who rely upon notarized documents can lead to tort liability for negligent and/or intentional misconduct.\textsuperscript{246} Moreover, dishonest performance of notarial duties can lead to criminal charges and prosecutions for official misconduct\textsuperscript{247} and/or other crimes.\textsuperscript{248} Administrative sanctions against notaries, such as suspensions and revocations of commissions, may result from a notary's lack of diligence or intentional misconduct (including criminal violations), in violation of state imposters and other scoundrels to far more readily commit successful document fraud." \textit{Id. See generally} Charles N. Faerber, \textit{Being There: The Importance of Physical Presence to the Notary}, 51 J. Marshall L. Rev. 749 (1998).

\textsuperscript{243} See \textit{Model Notary Act}, Art. IV cmt. (1984) (observing that "[i]t is especially important for the journal to contain the signature of each person who has requested a notarial act, since a signature offers strong evidence of a person's physical presence").

\textsuperscript{244} For example, the Uniform Law contains a couple of provisions which effectively represent adoption of the substantial compliance doctrine. Regarding completion of the certificate of notarial acts, the Uniform Law states that it "must also indicate the date of expiration, if any, of the commission of office, but omission of that information may subsequently be corrected." \textit{Uniform Law on Notarial Acts} § 7(a) (1982). "A certificate of a notarial act is sufficient if it . . . sets forth the actions of the notarial officer and those are sufficient to meet the requirements of the designated notarial act." \textit{Id.} § 7(b)(4). See Gargan v. State, 805 P.2d 998, 1005 (Alaska Ct. App. 1991) (applying the substantial compliance doctrine); Farm Bureau Fin. Co. v. Carney, 605 P.2d 509, 514 (Idaho 1980) (same); Eveleigh v. Conness, 933 P.2d 675, 682 (Kan. 1997) (same); \textit{see also} Closen, \textit{supra} note 2, at 684–85 (discussing the substantial compliance doctrine).

\textsuperscript{245} See Closen, \textit{supra} note 2, at 689–94 (discussing the potential accountability of notaries for official misconduct and other criminal activity and for administrative sanctions for violation of notary statutes and/or regulations).

\textsuperscript{246} See \textit{Model Notary Act}, Art. VI cmt. (1984) (pointing out that notaries who engage in misconduct can be liable to "all persons who rely on the genuineness of the notarized signature"); Closen, \textit{supra} note 2, at 675–76 (noting the potential liability of notaries for both negligence and intentional misconduct); \textit{see also supra} notes 237–40.

\textsuperscript{247} See \textit{Model Notary Act} § 1-105(9) (1984) (defining, and recommending the inclusion in the notary law of, the offense of official misconduct); Closen, \textit{supra} note 2, at 689–91 (addressing the offense of official misconduct for notaries).

\textsuperscript{248} See Closen, \textit{supra} note 2, at 691 (describing other crimes for which notaries might be held accountable and the applicable penalties).
Additional actions against notaries might lie under theories of breach of contract or breach of fiduciary duties. A variety of practices exist today with respect to notarial record-keeping in this country. And, it is not at all like the recordkeeping function of early American notaries, of English notaries, or of civil law notaries. Today, the Model Notary Act provides that each “notary shall keep [and] maintain . . . a chronological, permanently bound journal of notarial acts.” The Notary Public Code of Professional Responsibility requires as one of the ethical duties of a notary that she or he “record every notarial act in a bound journal or other secure recording device.” Although the Code of Ethics of the American Society of Notaries does not direct notaries to maintain journals, the Society suggests that notaries do so. The Notary Law Institute also advocates that notaries should scrupulously keep journal records. Eighteen states and territories require notaries to maintain records or journals of their notarial acts, including: Alabama, Arizona, California, Colorado, Hawaii, Maryland, Missis-

249. See Closen et al., supra note 1, at 295–300, 307–29 (examining the authority of administrative agencies to oversee and regulate notarial conduct and to sanction notarial misconduct); Closen, supra note 2, at 691–94 (same).

250. See Closen & Dixon, supra note 88, at 891–92 (discussing the doctrine of breach of contract as directed against notaries); Closen, supra note 2, at 662–75 (advocating the application of fiduciary duty doctrine to the functioning of notaries).

251. See Rothman, supra note 1, at 4–5 (observing that “the notarial record book [of early America] served a very different purpose than it does today”).


253. NNA Notary Public Code, supra note 12, § VIII. See also Ariz. Rev. Stat. Ann. § 41-319A (requiring notaries to “keep a paper journal” and mandating that “records of notarial acts that violate the attorney client privilege . . . are not public record”).

254. See generally ASN Code of Ethics, supra note 23.

255. See American Soc’y of Notaries, All States Record Book, at iv (1997) (explaining that “a record book not only provides the notary with a ready made checklist of information to verify prior to the notarization, but it also provides a backup reference if the notarization is questioned at a later date”). This publication of ASN is an actual notary journal, which obviously suggests that ASN supports the use of such a ledger.

256. Peter Van Alstyne is the founder and chief executive officer of the Notary Law Institute, and he advocates that notaries should scrupulously maintain journals. See Van Alstyne, supra note 6. He does so as well in his book which is published by the NLI. See Van Alstyne, supra note 2, at 38–41.

257. “Only a small number of notary public statutes require notaries to maintain a record or journal documenting their notarizations.” Closen & Shannon, supra note 22.


sippi, Missouri, Nevada, North Dakota, Oklahoma, Oregon, Pennsylvania and Texas as well as the District of Co-

A notary public shall keep one active sequential journal at a time, of all official acts performed as a notary public. The journal shall be kept in a locked and secured area, under the direct and exclusive control of the notary. Failure to secure the journal shall be cause for the Secretary of State to take administrative action against the commission held by the notary public pursuant to Section 8214.1.

Every notary public shall keep a journal of every acknowledgment taken by such notary to an instrument affecting the title to real property and, if required, give a certified copy of or a certificate as to any such journal or any of such notary's acts, upon such payment of such notary's fee.

262. See Haw. Rev. Stat. § 456-15 (Supp. 1999) (requiring every notary public to "record at length in a book of records all acts, protests, depositions, and other things, by the notary noted or done in the notary's official capacity").

A notary public shall keep a fair register of all protests and other official acts done by the notary in virtue of the notary's office, and shall, when required, give a certified copy of any record in the notary's office to any person applying for the record on payment of the usual fees for the certified copy by the person applying for it.

264. See Miss. Code Ann. § 25-33-5 (1972) (requiring "[e]very notary public [to] keep a fair register of all his official acts, and [to] give a certified copy of his record, or any part thereof, to any person applying for it and paying the legal fees therefor").


266. See Nev. Rev. Stat. § 240.120 (Michie Supp. 1999) (mandating, subject to certain exceptions, "each notary public shall keep a journal in his office in which he shall enter for each notarial act performed, at the time the act is performed: [lists six requirements in maintaining journal]").

267. See N.D. Cent. Code § 44-06-08 (1993). Section 44-06-08 provides:
Each notary public shall keep a record of all notices, of the time and manner in which the same were served, the names of all the persons to whom the same were directed, and the description and amount of the instrument protested. Such record, or copy thereof, certified by the notary under seal, at all times shall be competent evidence to prove such notice in any court of this state.

268. See Okla. Stat. Ann. tit. 49, § 8 (West 1999) (requiring a notary to "keep a fair record of his official acts, and if required . . . give a certified copy of any record in his office, upon the payment of the fees therefor").

269. See Or. Rev. Stat. § 194.152 (1989) (requiring that a notary "provide, keep, maintain and protect one or more chronological journals of notarial acts performed by the notary public except for administering an oath or affirmation or certifying or attesting a copy").

270. See Pa. Stat. Ann. tit. 57, § 161(a) (West 1996). Section 161(a) of Title 57 states:
lumbia, 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. Those official state recommendations most often appear in state notary handbooks or manuals, which the vast majority of states publish for distribution to notary applicants, notaries, and other interested parties. Today, state recommendations to keep information in a journal or ledger may also appear on official state websites.

Every notary public shall keep an accurate register of all official acts done by him by virtue of his office, and shall, when thereunto required, give a certified copy of any record in his office to any person applying for same. Said register shall contain the date of the act, the character of the act, and the date and parties to the instrument, and the amount of fee collected for the service.

Id.

271. See Tex. Gov't Code Ann. § 406.014(a) (Vernon Supp. 2000) (establishing that "[a] notary public other than a court clerk notarizing instruments for the court shall keep in a book a record of [lists nine requirements for maintaining the journal]"); id. § 406.014(b) (declaring that "[e]ntries in the notary's book are public information").

272. See D.C. Code Ann. § 1-811 (1999) (mandating that, subject to certain exceptions, "[e]ach notary public shall keep a fair record of all his official acts .... and when required, shall give a certified copy of any record in his office to any person upon payment of fees therefor").

273. See 5 Guam Code Ann. § 33401 (2000) (asserting that "[a] notary shall keep, maintain, protect as a public record, and provide for lawful inspection a chronological, permanently bound, official journal of notarial acts, containing numbered pages").


275. See 3 V.I. Code Ann. § 802 (1995) (avowing that "[n]otaries public ... shall take an official oath and keep an official record in which a memorandum of all official acts shall be noted").

276. "Not surprisingly, many Notary regulating officials in states that do not mandate the use of journals, such as Florida and Connecticut, recommend the use of a bound journal because it cuts down on the number of complaints that their offices must investigate by encouraging professional behavior from Notaries." National Notary Ass'n, supra note 203, at 18. "If there is one notarial practice that state Notary program administrators agree on and value more than any other, it is the practice of keeping a journal of notarial acts." Birenbaum, supra note 223, at 10.


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.

Id. Sources such as the official notary public handbooks published by the states "contribute to customary practice and the establishment of a legal standard of due care among notaries." Bruno & Closen, supra note 33, at 528.

While notary handbooks and manuals do not carry the force of law, they constitute extremely important influences on notaries for several reasons. One of those reasons is that many notaries do not read their full state notary statutes, but they may peruse a fairly short notary manual. The notary manuals tend to be written in plain English and are, therefore, less intimidating than many statutory passages for ordinary people (like notaries) to read and understand. Many notaries will not appreciate the distinction between a statute and an official state publication, so that a recommendation in the latter source may carry substantial weight with its readers. Most importantly, an untrained notary applicant or notary public who reads a state law that does not require the maintenance of a journal—which means the statute will likely make no reference whatsoever to a journal—is quite unlikely to know journals even exist, let alone that they should be maintained. Thus, those individuals would be unlikely to keep notary journals.

As would be expected, the state notary manuals and handbooks demonstrate a great variety of approaches to journal maintenance. Some state manuals, such as those of Alaska, Arkansas, and Montana, directly and emphatically recommend that notaries keep such records. For example, the Alaska notary manual points out that it "cannot be emphasized enough the importance of recording every notarization you complete." The Arkansas handbook states, "A register will offer an excellent way of recalling past notarial acts." Montana’s guidebook makes a "very strong recommendation" for no-

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279. See Bruno & Closen, supra note 33, at 530 ("Official state notary handbooks published by the various states do not carry the force of law.").

280. A number of the official state notary manuals do not even include a copy of the state notary statute. See, e.g., STATE OF NORTH DAKOTA, THE BASIC STEPS IN NOTARIZATION (n.d.); STATE OF MICHIGAN, NOTARIES PUBLIC GUIDE (Feb. 1999); STATE OF OKLAHOMA, NOTARY PUBLIC GUIDE (Nov. 1997); STATE OF INDIANA, INDIANA NOTARY PUBLIC PAMPHLET (June 1998); STATE OF WYOMING, NOTARIES PUBLIC HANDBOOK (June 1999).

281. See Bruno & Closen, supra note 33, at 550 (opining notaries "do not necessarily realize" that state notary handbooks "do not carry the force of law").

282. See, e.g., the notary public statutes of Connecticut, Florida, Illinois, South Carolina, and Utah.

283. See, e.g., the notary public statutes of Connecticut, Florida, Illinois, South Carolina, and Utah.

284. STATE OF ALASKA, ALASKA NOTARY HANDBOOK 4 (n.d.).

taries to maintain journals.\textsuperscript{286} Other state handbooks, such as those of Kentucky and New Mexico, offer a more modest suggestion to keep a journal. The Kentucky handbook recites that "it is advisable to keep a record book of your official acts,"\textsuperscript{287} and the New Mexico guide merely says that keeping a journal is "recommended," with no reason given.\textsuperscript{288} Some state guidebooks, such as those of Illinois and Kansas, simply advise notaries of the opportunity to maintain journals for their "own records or protection."\textsuperscript{289} Iowa's manual remains quite neutral on the topic, stating in part: "Iowa law does not require notaries to keep journals. If you choose to keep a journal, you should record [certain specified information]."\textsuperscript{290} Finally, some handbooks, including those of Idaho and North Dakota, make no mention at all of a notary journal or ledger.\textsuperscript{291} In this last group of states, where neither the statutes nor the guidebooks refer to a notary journal, there is much less of a chance that notaries will even be aware of the existence of notary journals.

With regard to the components of notary journal entries, there is a wide array of directives from state statutes and official handbooks.\textsuperscript{292} Among the states which require the keeping of notary journals, some state statutes and handbooks identify some information to be recorded,\textsuperscript{293} while other state laws and handbooks provide no guidance about the contents of a notary journal.\textsuperscript{294} Indeed, Alabama's statute

\textsuperscript{286} See State of Montana, A Guide for Notaries Public Practicing in Montana 3 (June 1995); see also State of Wyoming, supra note 90, at 17 (explaining that while "Wyoming statutes do not require keeping a journal . . . it is wise and highly recommended by the Secretary of State").


\textsuperscript{288} See State of New Mexico, New Mexico Notary Public Handbook 4 (July 1996).

\textsuperscript{289} State of Kansas, Kansas Notary Public Handbook 11 (n.d.).

\textsuperscript{290} State of Iowa, Iowa Notaries Public Handbook 8 (5th ed.).


\textsuperscript{292} See Rothman, supra note 1, at 30 (concluding that "[s]tate statutes vary widely with reference to the Notary's register or record book").

\textsuperscript{293} For example, Arizona mandates that "[t]he notary shall keep a paper journal . . . . Each journal entry shall include at least [six items ranging from the date the act was recorded to the fee that was charged]." Ariz. Rev. Stat. Ann. § 41-319A (West Supp. 1999). Such statutes will inevitably allow for less confusion when journals are used in notarial disputes or trials.

\textsuperscript{294} For example, Colorado simply states that "[e]very notary public shall keep a journal of every acknowledgment taken by such notary to an instrument affecting the title to real property." Colo. Rev. Stat. Ann. § 12-55-111 (West 1999). Although Colorado mandates that each notary keep a journal, it does not specify what information should be recorded in it. Without including specific directives in the statute, a notary is left to his or her own devices as to what should be put in the journal. A lack of decorum in notary journals
requires merely that a notary "keep a fair register of all his official acts," language which may not necessarily implicate a bound journal. Not surprisingly, the official state notary handbooks are even more varied in their guidance about the contents of journal entries in those states that do not require notaries to maintain journals. Some handbooks identify the data to be recorded, but others do not.

Although the components of a notary journal entry are not uniform in all the jurisdictions, certain information is quite standard, such as the components listed in the Model Notary Act. This includes: (1) the present date and time of day; (2) the kind or type of document to be signed (i.e., a will, a deed, a power of attorney, etc.); (3) the kind or type of notarial act to be performed (i.e., a jurat, an acknowledgment, etc.); (4) the fee assessed (if any); (5) the name and address of the document signer; (6) the signature of the document signer; (7) the method used to identify the document signer (i.e., personal knowledge or document(s) of identification); (8) specific details about any document(s) of identification relied upon by the notary (i.e., country of origin of a passport and the passport number, the
state of origin of a driver's license and the license number); and (9) the address where the notarization took place (if not at the notary's business address). The components set out in the Model Notary Act vary only slightly from the components later adopted by the standards of practice within the Notary Public Code of Professional Responsibility. Other sources recommend that additional or different items of information (varying from those items listed just above) be recorded in the notary journal, such as the date the document was signed, and the name, address, and signature of any witness to the signing. One respected notary authority of the 1970s had actually itemized nineteen pieces of information that should be included in a journal entry.

299. See NNA Notary Public Code, supra note 12, § VIII-A-1 (“The Notary shall maintain a complete, sequential record of every notarial act performed by the Notary in a bound journal or other secure recording device allowed by law.”).
300. See Van Alstyne, supra note 2, at 38 (noting that the “notary journal should provide for recordation of . . . the date and time of the notarial act”).
301. See NNA Notary Public Code, supra note 12, § VIII-A-2 (asserting that “[for] every notarial act performed, the corresponding entry in the Notary’s journal shall contain . . . the name, address and signature of each person whose signature was notarized or who served as a witness”).
302. See Rothman, supra note 1, at 31. Rothman sets forth the following checklist of items:

1. Date and time of official act.
2. Date of document or agreement.
3. Date parties signed.
5. Kind of official act (acknowledgment, oath, etc.).
6. Kind of document (grant deed, etc.).
7. Names and addresses (printed) of parties whose signatures were notarized.
8. Signatures of parties whose signatures were notarized in Notary’s record book.
9. Kinds of identification (including card numbers) presented by parties whose signatures were notarized.
10. Number of pages in document.
11. Whether all pages of document and corrections were initialed by the Notary and all parties.
12. Whether all blanks were filled in on the document.
13. Whether a loose certificate or jurat was stapled to the document.
14. Whether an official seal embosser was used.
15. Description or location of property.
16. Names and addresses (printed) of parties whose signatures were NOT notarized.
17. Names and addresses (printed) of witnesses, if any.
18. Signatures of witnesses and kinds of identification presented by them, if any.
19. Any other entries required by law in this state.

Id. See also Van Alstyne, supra note 6, at 783 (discussing the information that should be recorded in each notary’s journal).
However, to the extent that there is a variety of mandates or recommendations about the contents to be recorded in notary journal entries, the major problem is the incomplete approach of too many statutes and handbooks. For instance, the Michigan Notaries Public Guide advises notaries to “record the signer’s name, identification presented, date and other pertinent information.”303 Consider the New Mexico handbook, which suggests that notaries record “the date, title of the document, and name and signature of the person whose signatures were notarized.”304 Such woefully inadequate advice leads to incomplete and less effective journal entries being executed by notaries.

A serious disagreement exists on the question of what documents of identification qualify as satisfactory evidence of the identity of a document signer,305 and, therefore, should be recorded in the notary journal.306 The sensible answer is that a trustworthy document which contains an individual’s signature, physical description, and photograph provides satisfactory evidence of the individual’s identity.307

303. STATE OF MICHIGAN, NOTARIES PUBLIC GUIDE 2 (n.d.) (emphasis added).
304. STATE OF NEW MEXICO, NEW MEXICO NOTARY PUBLIC HANDBOOK 4 (July 1996).
305. “There is considerable debate over what constitutes 'acceptable forms of identification' . . . .” VAN ALSTYNE, supra note 2, at 36. “State standards for identifying signers vary tremendously.” National Notary Ass’n, supra note 238, at 9. One aspect of this debate is whether an expired identification document can serve as a trustworthy source. While the authors believe that a recently expired identification document could be trustworthy, some will disagree. See PIOMBINO, supra note 92, at 58 (“It is prudent to decline to accept any identification document that has expired. An expired identification is legally void.”). But see VAN ALSTYNE, supra note 2, at 37–38 (suggesting that the expiration of an identification document does not necessarily render it or its contents invalid).
306. There are typically three means by which a notary may have “satisfactory evidence that a person is the person whose true signature is on a document.” UNIFORM LAW ON NOTARIAL ACTS § 2(f) (1982). Those three methods include “if that person (i) is personally known to the notarial officer, (ii) is identified upon the oath or affirmation of a credible witness personally known to the notarial officer or (iii) is identified on the basis of identification documents.” Id. See also MODEL NOTARY ACT § 1-105(10)–(11) (1984).
307. In Oregon, one form of satisfactory evidence “means identification of an individual based on at least one current document issued by the federal or a state government with the individual’s photograph, signature and physical description.” OR. REV. STAT. § 194.505(8) (1989) (emphasis added). Section 1-105(11) of the Model Notary Act provides:

“Satisfactory evidence of identity” means identification of an individual based on:
(i) at least 2 current documents, one issued by a federal or state government with the individual’s photograph, signature, and physical description, and the other by an institution, business entity or federal or state government with at least the individual’s signature . . . .

MODEL NOTARY ACT § 1-105(11) (1984). See also MODEL NOTARY ACT, Art. I cmt. (1984) (suggesting “one of the ID cards must contain the bearer’s photograph, physical description, and signature to allow comparison by the notary with the bearer’s actual appearance and with the signature in the notary journal”). All authorities agree that the best IDs contain at least three elements: a photograph, a physical description . . . and a signature
The reasons are obvious. First, an identification document including those three elements would be more difficult to forge or alter than an identification document without one or more of those components. 308 Second, an identification document with those three elements provides a notary with a greater opportunity to effectively assess a signer’s identity. Third, the notary can compare the photograph against the actual physical likeness of the signer who appears before the notary, and the notary can compare the printed physical description on the identification document against the present physical appearance of the live signer. 309 Finally, a notary should have three signatures for comparison—one on the identification document, one presently executed in the notary journal, and one placed on the transactional instrument (the signature to be notarized). 310

Some documents used for identification purposes contain all three of these elements, but some include only one or two of them. For instance, a driver’s license usually contains all three, as does an official state-issued identity card and some foreign country passports. 311 However, a United States passport contains no printed physi-

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308. Forgery and alteration of documents of identification is a serious problem. See CLOSEN ET AL., supra note 1, at 180. “Counterfeiting of documents of identification, especially passports and credit cards, is big business. And, alteration of documents, especially driver’s licenses and state identification cards, is not uncommon. Some counterfeit and altered documents are prepared with such skill that even professional police investigators have difficulty detecting the frauds.” Id. United States passports and credit cards do not contain physical descriptions, and credit cards do not usually contain photographs. “Ironically, identification documents or identification cards—the least secure of the ways to identify a signer, because of the prevalence of fake identification cards—have necessarily become the predominant identification method used by Notaries in our mobile society.” National Notary Ass’n, supra note 238, at 9. Identification documents, such as “Social Security cards, birth certificates, credit cards, employee identification cards and shopping-club cards are . . . easily counterfeited or altered.” Id. at 10.

309. See VAN ALSTYNE, supra note 2, at 37 (suggesting that when a proper identification card is presented, the notary can determine whether “the photograph, signature and physical description match that of the bearer”); National Notary Ass’n, supra note 238, at 10 (noting that “the best IDs” will “allow comparison with the signer’s actual appearance and signature on the document”).

310. See MODEL NOTARY ACT, Art. IV cmt. (1984) (noting that there should be three signatures for comparison during a notarial ceremony—one each on the transactional document, an identification document, and the journal entry).

311. See National Notary Ass’n, supra note 238, at 10 (discussing the specific kinds of identification document).
tical description of its holder.\textsuperscript{312} Some documents commonly accepted as primary or secondary identification typically contain only the name and signature of a party, such as Social Security, credit, and library cards.\textsuperscript{313} These latter cards are not nearly as trustworthy, for they can far more easily be counterfeited or altered.\textsuperscript{314} According to notary expert Alfred Piombino, “There are three significantly unreliable and generally unacceptable forms of identification: Social Security cards, credit cards and birth certificates.”\textsuperscript{315} Importantly, the identification or account numbers on certain of these cards can be quite valuable to criminals who can utilize them to access personal information and financial data and accounts. Credit card numbers, Social Security numbers, and driver’s license numbers come quickly to mind in this regard.\textsuperscript{316}

Incredibly, notaries are regularly advised to accept and record details from these vital personal and financial identification cards without being advised to protect the confidentiality of the information.\textsuperscript{317}

\begin{itemize}
\item \textsuperscript{312} Nevertheless, “[t]he United States passport is considered by many authorities to be among the most reliable and trusted forms of identification . . . .” Piombino, \textit{supra} note 92, at 60. Piombino describes in detail the parts of a United States passport, but of course does not mention a physical description of the holder. \textit{See id.; see also }National Notary Ass’n, \textit{supra} note 238, at 10 (opining that “[p]robably the best of . . . IDs are the ones that have built-in, state-of-the-art security features, such as U.S. passports issued since spring 1994 and the ‘new’ green cards”).
\item \textsuperscript{313} \textit{See} Closen \textit{et al.}, \textit{supra} note 1, at 180 (listing commonly used identification documents including Social Security, credit, and library cards as documents that “do not ordinarily contain photographs” of their bearers). Of course, some documents commonly accepted as identification “do not contain signatures of the individuals identified,” and those would include baptism records, birth certificates, and business cards. \textit{See id.” Social Security cards, birth certificates, credit cards, employee ID cards and shopping-club cards are generally worthless as primary identification for notarizations because they are easily counterfeited or altered and/or lack the signer’s recommended photograph, current physical description and signature.” National Notary Ass’n, \textit{supra} note 238, at 10.
\item \textsuperscript{314} \textit{See} Closen \textit{et al.}, \textit{supra} note 1, at 180 (“Many kinds of documents are customarily used in everyday business and social transactions to identify the participants. These include such easily forged documentation as Social Security cards, baptism records, library cards, marriage licenses, birth certificates, credit cards, and business cards.”).
\item \textsuperscript{315} Piombino, \textit{supra} note 92, at 62. \textit{See also American Soc’y of Notaries, All States Record Book, at vi (1997) (emphasizing that notaries should “NOT rely on Social Security cards, credit cards, or any photo ID card issued by non-government entities”).}
\item \textsuperscript{316} One or more of these identification numbers for a document signer may well be recorded in the notary journal, for even if a notary would not accept a credit card or Social Security card as primary identification the notary may accept a lesser form of ID as corroboration of a signer’s identification. “With a stolen Social Security number, a criminal can assume another person’s identity, gain credit in his or her name, and ruin a good credit rating.” National Notary Ass’n, \textit{supra} note 60, at 3.
\item \textsuperscript{317} The Wyoming handbook declares, “Do not invade the [document signer’s] privacy.” State of Wyoming, \textit{supra} note 90, at 10. Curiously, that advice was set out in the context of a directive to “[m]erely identify the document to be notarized,” \textit{see id.}, rather
Some official state notary handbooks or manuals, including those of Indiana\textsuperscript{318} and Montana,\textsuperscript{319} expressly advise that notary’s consider driver’s licenses and credit cards as satisfactory documents of identification. Oregon law allows notaries to accept “two documents issued by an institution, business entity or federal or state government with at least the individual’s signature,”\textsuperscript{320} and this provision clearly would include Social Security cards and credit cards. The notary public law of Florida lists both passports and driver’s licenses as among the kinds of satisfactory evidence of identity.\textsuperscript{321} The Arizona notary public statute requires each notary to record in the notary journal “[a] description of the identification document [examined in the process of proving identity by satisfactory evidence], its serial or identification number and its date of issuance or expiration.”\textsuperscript{322} The California notary handbook directs notaries to do the same.\textsuperscript{323} The Maine notary handbook provides an example of a journal entry specifying the state of issuance
for the signer’s driver’s license as well as the license number. But, there are no instructions in these laws and handbooks about protecting information privacy.

Most commercially prepared notary journals also include an area or column for any special comments or remarks that the notary may wish to include (i.e., the notarization was refused by the notary for some identified reason, or one or more witnesses also signed the document). Some notary journals now contain an area or column for a thumbprint, because California recently began requiring inclusion of the signers’ right thumbprints in the journal entries for certain real estate documents. Surprisingly and disappointingly, commercially

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The entry should contain the place, the date, the time of the act, a thorough description of the act, the names of all the persons who have asked the Notary Public to perform the appropriate acts, the form of identification and document number from the identification which was accepted by the Notary as valid and the fee, if any, which was charged. The following is an example of a good description of an official act: July 14, 1994. Witnessed signature on 2 trademark applications for Annie Sample, Alabama driver license #1234567, at the CEC office. No fee charged.

Id.

325. See Model Notary Act § 4-102(c) (1984) (requiring that a notary “record in the journal the circumstances in refusing to perform or complete a notarial act”). Among the other matters that might be noted in journal entries are remarks about the competence, willingness, and comprehension of document signers—at least according to some authorities. See National Notary Ass’n, supra note 183, at 18 (saying a journal entry may include “observations about the signer—such as, ‘He appeared nervous.’”). The authors disagree. Notaries do not have the legal responsibility, and as a feature of sound business practice should not attempt, to evaluate document signer competence, willingness, or comprehension. See generally Klint L. Bruno, Comment, To Notarize, or Not to Notarize . . . Is Not a Question of Judging Competence or Willingness of Document Signers, 31 J. Marshall L. Rev. 1013 (1998); Bruno & Closen, supra note 33.

326. See Cal. Gov’t Code § 8206(a) (2) (G) (West Supp. 2000). This section notes:

If the document to be notarized is a deed, quitclaim deed, or deed of trust affecting real property, the notary public shall require the party signing the document to place his or her right thumbprint in the journal. If the right thumbprint is not available, then the notary shall have the party use his or her left thumb, or any available finger and shall so indicate in the journal. If the party signing the document is physically unable to provide a thumbprint or fingerprint, the notary shall so indicate in the journal and shall also provide an explanation of that physical condition.

Id. Other states may follow California’s lead. A bill has been introduced into the Pennsylvania House to require a signer’s thumbprint to be entered in the notary journal. See Jones, supra note 177, at 22. The journal published by the American Society of Notaries includes a space for a thumbprint. See American Soc’y of Notaries, All States Record Book (1997). The recent version of the revised Model Notary Act proposes that a document signer must provide a thumbprint in the notary journal entry. See Model Notary Act § 7-2(a) (6) (Proposed Revision 2000). See generally Vincent J. Gnoffo, Requiring a Thumbprint for Notarized Transactions: The Battle Against Document Fraud, 31 J. Marshall L. Rev. 803 (1998).
printed journals do not tend to include an area or column to indicate that an oath has been administered to document signers.\textsuperscript{327} It is a fact that most notaries do not actually administer oral oaths even though standard jurat wording proclaims documents to have been "subscribed and sworn to" before notaries.\textsuperscript{328} The omission of the oral oath has raised the question of whether a document signer is bound under the law of perjury to a document about which the signer has not orally sworn to the truth of its contents. In addition, the failure to administer the oath may well implicate the validity of, or at least the weight to be accorded to, a document.\textsuperscript{329} The outcomes of legal cases on the perjury issue are divided—though the great majority hold the law of perjury applies because the signer has executed a writing, which declares that it is sworn to, and such a writing satisfies the oath requirement.\textsuperscript{330} If the notary journal included a column in which the notary would be asked to indicate whether an oral oath had been administered, presumably the notary would thereby be reminded and encouraged to actually administer an oath, and the notary would have to falsify the journal entry to indicate that an oral oath had been given if one had not in fact been administered. The most recent version of the notary journal published by the American Society of Notaries includes in every entry a box to be checked when an oath has been administered to a document signer.\textsuperscript{331}

\textsuperscript{327} However, notaries are well advised to note the administration of oaths to document signers in their notary journal entries. See National Notary Ass’n, Adviser, Nat’l Notary, Sept. 1999, at 2 (recommending that “[l]ike any other notarial act, the administration of the oath or affirmation should be recorded in the Notary journal”).

\textsuperscript{328} See Piombino, supra note 92, at xxii (reporting the results of a survey of the actual performance of some 220 notaries in 22 cities and showing that “91.7% failed to administer an oath of any form”). Interestingly, there was a debate at one time about the authority of notaries to administer oaths in the numerous states that had failed to expressly grant that authority in their notary public statutes. While some courts concluded notaries possessed inherent authority to administer oaths, more courts held to the contrary. Compare Simpson v. Wicker, 47 S.E. 966 (Ga. 1904) (finding inherent authority of notaries to administer oaths) with Campbell v. Brady, 11 S.W.2d 687 (Tenn. 1928) (holding there was no inherent authority of notaries to administer oaths); Keefer v. Mason, 36 Ill. 406 (1865) (same); Teutonia Loan & Bldg. Co. v. Turrell, 49 N.E. 852 (Ind. Ct. App. 1898) (same); United States v. Curtis, 107 U.S. 671 (1882) (same).

\textsuperscript{329} See, e.g., White v. State, 717 P.2d 45, 47 (Nev. 1986) ("We agree with the courts which have held that the mere signing of an affidavit before an officer does not constitute the act necessary to constitute an oath.").

\textsuperscript{330} “[A] jurat notarization may omit the administration of an oral oath and still be legally valid.” Bruno & Closen, supra note 33, at 545. See, e.g., Gargan v. State, 805 P.2d 998 (Alaska Ct. App. 1991) (relying upon the fact the document signer has signed a document bearing a written statement that it has been executed under oath).

\textsuperscript{331} See American Soc’y of Notaries, All States Record Book (1997).
Some notaries keep other records of notarial acts regardless of whether notary journals are maintained. Some notaries cling to the custom and practice of civil law notaries and early American notaries and keep a copy of the documents on which signatures are notarized, or at least keep copies of some documents, such as particularly important documents or papers intended to be sent out of the country. And, some notaries mistakenly believe that collecting copies of such documents becomes an effective and appropriate substitute for maintaining a standard notary journal. Thus, wills, deeds, contracts, powers of attorney, and so forth may be photocopied in whole or in part, and the copies retained in notaries' files. At least one state statute (in Arizona) actually permits notaries who are personally acquainted with document signers to satisfy the state's mandatory journal entry law by "retaining a paper . . . copy of the notarized documents for each notarial act." Some notaries keep photocopies of the documents of identification used by a signer to identify himself or herself to the notary—such as driver's licenses, passports, credit cards, Social Security cards, etc. The Model Notary Act actually directs notaries to retain "a duplicate photocopy of each certified copy" that is prepared by

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332. See Rothman, supra note 1, at 4. Rothman states:

Until the office of the Recorder of Public Documents was established in the States, good business practice and often state law provided that the Notary keep a record book or register of his acknowledgments, or proofs of acknowledgments, of deeds as well as some of his other notarial acts. It should be noted that the Notary may often have kept the original documents in his files and thus it was not necessary for him to record the details of the notarization in his record book. Most all states enacted laws requiring that a Notary make a certified copy of any document in his records for anyone upon payment of the proper fee. Id. See also Van Alstyne, supra note 6, at 780 (suggesting that "some notaries . . . retain photocopies of notarial certificates").

333. See Rothman, supra note 1, at 35 (concluding that "[i]f an accurate journal record is maintained, the Notary need not retain a copy of a notarized document unless required by his or her state's laws"). "Making a photocopy does not avoid the need to make a proper notarial record . . . ." Id. "It is common for some notaries to retain photocopies [of certain documents] in the belief it constitutes a valid substitute for a proper notary journal. There is no worthy substitute for the properly maintained notary journal." Van Alstyne, supra note 6, at 780. However, there is an admonition which appears to be somewhat to the contrary in the Code of Professional Responsibility: "The Notary shall not needlessly extract or copy information from the text of a notarized document or from other documents possessed by its signer." NNA Notary Public Code, supra note 12, § IX-A-2.

334. Ariz. Rev. Stat. Ann. § 41-319B (West Supp. 1999) (determining that "[i]f a notary has personal knowledge of the identity of a signer, the requirements [of this section] may be satisfied by the notary retaining a paper or electronic copy of the notarized documents for each notarial act").

335. See Van Alstyne, supra note 6, at 780 (concluding that "[i]t is common for some notaries to retain photocopies of . . . signers' identification cards").
the notary.\footnote{336} It should be abundantly clear that where copies of transactional instruments are kept by notaries, those notaries may have in their possession very important, valuable, and confidential information. As well, where copies of personal documents of identification are kept by notaries, those notaries have in their possession important, valuable, and confidential information about people. At a time when identity theft and financial frauds are increasingly serious problems, everyone should be more careful about recordation and disclosure of personal and financial identifiers.\footnote{337} Ordinary notaries public should be prohibited from copying and retaining these confidential documents.

What level of security is legally required to safeguard notarial journals and other notarial records, and what level of security is really employed by notaries to protect their records? Unfortunately, the security of and access to notary records is completely unregulated in the vast majority of states.\footnote{338} This legislative and administrative default leaves individual notaries to their own discretion on the important questions of whether to disclose the contents of notary records, to whom to do so, and under what circumstances it would be appropriate. This important discretion is vested in individuals who occupy the role of notaries, but who receive absolutely no sensitivity or substantive training about privacy issues. The two major notary membership and education organizations recognize the confidential nature of notarizations and the records maintained by notaries. The National Notary Association Code of Professional Responsibility declares that notaries are to "respect the privacy of each signer."\footnote{339} As the quoted passage introducing this Part of the Article pointed out, the American Society of Notaries Code of Ethics goes so far as to bar notaries from even disclosing "the facts of execution of [a] document."\footnote{340} However,
together their membership totals only some 200,000 of the more than 4.2 million notaries.\textsuperscript{341}

Unfortunately, both the American Society of Notaries ("ASN") and the National Notary Association ("NNA") permit, to some extent, the disclosure of the contents of notary journal entries. The Code of Ethics of the ASN directs notaries "to never divulge the contents of any document nor the facts of execution of that document,"\textsuperscript{342} but there is a caveat to the effect that such disclosure can be permitted upon "proper authority."\textsuperscript{343} However, the ASN has never explained what the phrase "proper authority" means, leaving notaries without assistance on this important question. As pointed out in the introduction to this Article, the NNA actually instructs notaries to disclose the contents of journal entries and even to provide photocopies to persons requesting such access in writing.\textsuperscript{344} Those persons need not have good faith reasons to review notary journal entries under the NNA directive. Both the ASN and NNA have adopted dangerous positions on this issue, and should carefully reconsider their positions. As well, the Model Notary Act provides for access to journal entries and mandates that notaries supply photocopies to requesting parties.\textsuperscript{345} While an individual requesting access must establish her or his identity, specify "the notarial act sought," and sign the notary's journal, the model law does not require the party to provide a good faith reason for the request.\textsuperscript{346} Snoops, criminals, and stalkers can access notary journal entries by following simple procedures under the directives of the ASN, the NNA, and the Model Notary Act. A number of states have enacted laws that also require notaries to open their journals to

\textsuperscript{341} The National Notary Association probably has a membership of some 150,000 to 175,000. See Valera, supra note 12, at 998. The American Society of Notaries has about 25,000 members. See National Notary Ass'n, supra note 8.

\textsuperscript{342} ASN \textsc{Code of Ethics}, supra note 23.

\textsuperscript{343} Id.

\textsuperscript{344} See supra notes 13–15 and accompanying text. "The Notary shall show or provide a copy of any entry in the journal of notarial acts to any person identified by the Notary who presents a written and signed request specifying the month and year, the document type, and the name of the signer(s) for the respective notarization." NNA \textsc{Notary Public Code}, supra note 12, § VIII-B-1.

\textsuperscript{345} See Model \textsc{Notary Act} § 4-104(b) (1984) (mandating that "[u]pon request in compliance with subsection (a), the notary shall provide a photocopy of an entry in the journal at a cost of not more than [cents or dollars] per photocopy"); see also Model \textsc{Notary Act} § 7-4(a)–(c) (Proposed Revision 2000).

\textsuperscript{346} See Model \textsc{Notary Act} § 4-104(b) (1984). The Model Notary Act allows nearly anyone to photocopy a journal entry, but stresses that the journal entries are private. See id. The authors contend that the Act should be amended to resemble Wisconsin's new law. See Wis. \textsc{Stat. Ann.} § 137.01(5m)(a) (West Supp. 2000).
unlimited or nearly unlimited public access, even to the copying of journal entries. Thus, for example, Alabama, Arizona, California, Maine, Mississippi, Montana, Nevada, Pennsylvania, and Texas allow ready access to notary records, possibly including providing photocopies of journal entries to those who request them. It seems bad enough to allow access to notary journals, but providing a photocopy of an entry simply goes to the extreme.

347. See Ala. Code § 36-20-7 (1991) ("Each notary public must keep a fair register of all his official acts and give a certified copy therefrom, when required, on payment of his legal fees.").


349. See Cal. Gov't Code § 8206(c) (West Supp. 2000). Section 8206(c) provides:

Upon written request of any member of the public, which request shall include the name of the parties, the type of document, and the month and year in which notarized, the notary shall supply a photostatic copy of the line item representing the requested transaction at a cost of not more than thirty cents ($0.30) per page.

Id.


The Secretary of State shall recommend that every notary public keep and maintain records of all notarial acts performed. The notary shall safeguard and retain exclusive custody of these records. The notary may not surrender the records to another notary or to an employer. The records may be inspected in the notary's presence by any individual whose identity is personally known to the notary or is proven on the basis of satisfactory evidence and who specifies the notarial act to be examined.

Id. Such a vague statute could lead a reader to believe that a notary's boss, whom the notary knows, may not inspect a journal entry.

351. See Miss. Code Ann. § 25-33-5 (1972) ("Every notary public shall keep a fair register of all his official acts, and shall give a certified copy of his record, or any part thereof, to any person applying for it and paying the legal fees therefor.").

352. See Mont. Code Ann. § 1-5-416(1)(c) (1999) ("Whenever requested and upon payment of the required fees, a notary public shall make and give a certified copy of any record in the notary public's office.").

353. See Nev. Rev. Stat. § 240.120(4) (Michie Supp. 1999) ("A notary public shall, upon the request and payment of [a] fee[,] . . . provide a certified copy of an entry in his journal.").


Every notary public shall keep an accurate register of all official acts by him done by virtue of his office, and shall, when thereunto required, give a certified copy of any record in his office to any person applying for same. Said register shall contain the date of the act, for the character of the act, the character of the act, and the date and parties to the instrument, and the amount of fee collected for the service.

Id.

355. See Tex. Gov't Code Ann. § 406.014(c) (Vernon Supp. 2000) ("A notary public shall, on payment of all fees, provide a certified copy of any record in the notary public's office to any person requesting the copy."); Model Notary Act § 4-102(4) (1984) (suggesting the inclusion in each notary journal entry of "the signature and printed name and address of each person for whom a notarial act is performed").
Providing a photocopy of the journal entry means a replica signature would be turned over, and a would-be forger could obtain and practice copying the signature.\textsuperscript{356}

As noted earlier, Wisconsin has just adopted a unique statute declaring information about notarial acts including notary records to be confidential and restricting access to the content of notarial records to those instances where document signers consent in writing to disclosure.\textsuperscript{357} There is also a peculiar Arizona statute that permits notaries to maintain separate journals for notarizations within the attorney-client privilege and to refuse disclosure of certain records.\textsuperscript{358} It reads, in part: “Records of notarial acts that violate the attorney client privilege or that are confidential pursuant to federal or state law are not public record.”\textsuperscript{359} How could the records of a notarization constitute “confidential [material] pursuant to federal or state law”? The Arizona law does not clarify under what circumstances a notary may treat a notarization as involving the attorney-client privilege. Presumably, that result might obtain whenever an attorney had been involved in drafting or advising about a document on which a signature was notarized, or whenever an attorney was also the notary performing the notarization.\textsuperscript{360} It may be, as some have contended, that this provision establishes a loophole permitting Arizona notaries to conceal any or all of their records from public access.\textsuperscript{361} Parenthetically, an attorney-notary serving in the dual role of counsel in drafting or preparing an instrument and of notary for his or her own client(s) on that same instrument is quite objectionable.\textsuperscript{362}

\textsuperscript{356} See supra notes 28, 298–99. Today’s “crooks can be very skillful at forging documents of identification and forging signatures.” Anderson & Closen, supra note 35, at 846.

\textsuperscript{357} See Wis. Stat. Ann. § 137.01(5m) (West Supp. 2000).


\textsuperscript{359} Id. (requiring the notary “keep a paper journal” and mandating that “records of notarial acts that violate the attorney-client privilege . . . are not public record”).

\textsuperscript{360} Of course, many notaries are attorneys, and it might be argued by some that whenever an attorney-notary performs a notarization the attorney-client privilege attaches. Also, several states have enacted special statutory provisions or exceptions that declare attorney-notaries may notarize signatures on documents those attorneys have drafted or prepared for their own clients. See, e.g., Ill. Comp. Stat. 312/6-104(h) (West 1993); Cal. Gov’t Code § 8224 (West Supp. 2000); Fla. Stat. Ann. § 117.05(6)(c) (West Supp. 2000); Kan. Stat. Ann. § 53-109(c) (1994); N.Y. Exec. Law § 135 (McKinney 1992); S.D. Codified Laws Ann. § 18-1-7 (Michie 1995).

\textsuperscript{361} See supra notes 358–60. For example, in the many businesses that have one or more lawyers on staff, a lawyer might be called in to oversee a notarization so that, arguably at least, the attorney-client privilege may apply. Or, attorneys who are notaries might be called upon to perform more notarizations. See also infra note 362.

\textsuperscript{362} See Closen, supra note 6, at A24 (“A lawyer simply should not serve in both a private and a public role in connection with a single transaction.”); Closen & Dixon, supra
Since 1984, the Model Notary Act has announced the need to "protect [the notary journal] as a public record,"\textsuperscript{363} and has specified that inspection of a journal entry by a third party must be "in the notary's presence."\textsuperscript{364} The model law goes on to direct notaries to "safeguard the journal and all other notarial records as valuable public documents,"\textsuperscript{365} and it mandates that "[t]he journal must be kept in the exclusive custody of the notary."\textsuperscript{366} Only one state has adopted legislation which mandates any kind of physical security for notarial journals during the term of a notary's commission, and that state, California, also enacted its statute quite recently.\textsuperscript{367} Under that law, notaries are required to keep their journals (and seals) under lock and key when not being used by the notaries.\textsuperscript{368} Although that law does not prescribe much detail about the exact security measures required, the other states have no statutorily mandated security procedures of any kind.

It should be pointed out that numerous states do require that upon certain events (the death of a notary, the expiration or revocation of the notary commission, etc.), the notary journal is to be turned over to a specified governmental agency.\textsuperscript{369} Hopefully, the journal is

\textsuperscript{363} MODEL NOTARY ACT § 4-101 (1984).
\textsuperscript{364} Id. § 4-104(a).
\textsuperscript{365} Id. § 4-104(c).
\textsuperscript{366} Id. § 4-104(d).
\textsuperscript{367} See CAL. GOVT CODE § 8206(a)(1) (West Supp. 2000) ("A notary public shall keep one active sequential journal at a time, of all official acts performed as a notary public. The journal shall be kept in a locked and secured area, under the direct and exclusive control of the notary.").
\textsuperscript{368} See id.
\textsuperscript{369} See MODEL NOTARY ACT § 4-104(c) (1984) (providing that "[u]pon resignation, revocation, or expiration of a notarial commission, or death of the notary, the notarial journal and records must be delivered by certified mail or other means providing a receipt to the [office designated by the commissioning official]"). Section 36-20-8 of the Alabama Code provides:

In case of death, resignation, removal or expiration of his term of office, the registers of any notary must, within 30 days thereafter, be delivered to the judge of probate of the county, and any person having the same in possession and refusing to deliver them on demand to such judge is liable to an action for an action for the recovery thereof in the name of such judge.

\textsuperscript{369} ALA. CODE § 36-20-8 (1991). Mississippi law states:

In the case of the death, resignation, disqualification or expiration of the term of office of any notary public, his registers and other public papers shall, within thirty (30) days, be lodged in the office of the clerk of the circuit court of the
actually surrendered and the agency actually protects the security of
the journal, while keeping these valuable records reasonably available
when legitimately needed. However, not all states have such laws and
not all notaries abide by these directives. There was, for instance, the
recent account of a secretary-notary who retired from her job and sim-
ply left her notary journal behind in her desk at the office. Moreover,
the laws that do exist about the surrender of journals do not
necessarily cover other kinds of notarial records, such as the photo-
copies of documents used to identify document signers and the pho-
tocopies of transactional instruments on which signatures are
notarized. Since statutes may not require the protection of these
document copies, the concern is that notaries are left to their own
devices in terms of whether and how to preserve the security of the
information included in such documents. Bear in mind, many of the
more than 4.2 million notaries are not sophisticated business persons
who care much at all about their forced roles as notaries. Can they
necessarily be trusted to protect the privacy of their customers by pro-
viding for long-term record confidentiality?

Closely related to the direct security concerns about notarial
records is the collateral question of how long such records should be
retained. Much of the personal information used to identify docu-
ment signers does not tend to change over time, such as signers’
names and Social Security, passport, and credit card numbers. When
copies of transactional documents (like wills, deeds, powers of attor-
ney, and so forth) have been retained, the documents and the infor-
mation included in them may remain accurate or valid for long

\begin{quote}
\text{county of his residence; and the clerk of that county may maintain an action for them.}
\end{quote}

\textit{commanding that “[i]f any notary die, resign, be disqualified, remove from the county, or
terminate employment within the county, if the notary is a non-resident, the notary’s re-
cord and official and public papers of his or her office, shall, within thirty (30) days be
delivered to the clerk of the county”). For a more expansive summary, see Van Alstyne,
\textit{supra} note 6, at 788, wherein he states:

Notary journals are required to be filed with the state government upon the dis-
continuation of the notary’s service in Alaska, Colorado, Hawaii, Maine, Minne-
sota, Nevada, New Hampshire, North Dakota, West Virginia and Wisconsin. In the
following states the notary must file the journal with county government clerk:
Alabama, Arizona, Arkansas, California, Kentucky, Massachusetts, Michigan, Mis-
sissippi, Montana, Ohio, Oklahoma, Pennsylvania, and Texas.

\textit{Id.}

\textit{370. See National Notary Ass’n, Adviser, Nat’l Notary, May 2000, at 31} (reporting a
case where “[a] co-worker recently retired and left her Notary journals in her desk”).

\textit{371. See discussion and sources cited supra} note 369.
periods of time. It would not be unreasonable to expect that such documents should be preserved and kept reasonably available for a period of at least ten to twenty years. Yet, since the overwhelming majority of states have no regulations requiring notaries to turn their journals or other records over to state agencies or to maintain such records for prescribed periods of time, it can be expected that notarial records are not securely preserved for long periods by most notaries. Even if notaries do retain their records, as time passes, will a constant or heightened level of security of such records be maintained by most notaries?

Disputes about transactions, including challenges to the validity of notarizations on documents supporting such transactions, may not arise until years (often many years) later. Wills and powers of attorney frequently lay dormant for long periods until deaths or serious illnesses befall the parties who have had such documents drawn. Possible faults in land deeds or other real estate documents may not be discovered until much later in the course of subsequent conveyances. Contracts may be agreed upon with performance to last over long periods of time and may be breached years after being formed. As the Wyoming Notaries Public Handbook perceptively observes, "[t]he notarization is effective, valid and binding as long as the document it appears upon remains effective and valid . . . often for decades." Moreover, the statutes of limitation on legal cases revolving around such documents do not begin to run until disputes arise or problems about transactions are discovered, and such statutes are virtually always at least one year in length, and more often at least a few years

372. See NNA Notary Public Code, supra note 12, § VIII-C-2 ("In the absence of official rules for disposal of the journal of notarial acts, the former Notary shall store and safeguard each journal at least 10 years from the date of the last entry in the journal."). Notaries may not be able to recall the details of a notarial act months or years later without the refreshment of their recollections provided by notary journal entries. See National Notary Ass'n, supra note 183, at 18 (quoting one state official who said, "[s]mart notaries keep journals because they don't want to be caught in a bad situation where they can't recall a notarization").

373. The prospect for a sizeable gap between notarial acts and challenges to notarial acts has prompted authorities to urge notaries to retain their journals for long periods of time—perhaps even for the notaries’ lifetimes. It has been recommended that the journal be retained for a long period. "[T]here is no statute of limitation in a notarization. A notarization is effective, valid and binding on the Notary as long as the document it appears on remains effective . . . often for decades." State of Nebraska, Notary Public Reference Guide 4 (n.d.). Peter Van Alstyne has wisely remarked that "the notary, the signer and the parties [rely] on the notarization for indeterminate lengths of time." Van Alstyne, supra note 6, at 788. Therefore, "the public is far better served by requiring the notary to personally retain his or her journal for life." Id. at 790.

long. Under the Uniform Commercial Code, for example, the period of limitations for contracts for the sale of goods is four years. In Illinois, the statute of limitations on actions on written contracts is ten years and on the recovery of real estate ranges from seven to twenty years.

Thus, notary journals and other notarial records should be kept for long periods of time, perhaps a minimum of twenty years. Such records should be kept first by the notary, and thereafter kept on file with the state agency that oversees notaries public. Importantly, such journals and records must be maintained in organized and secure manners. They should be filed in ways that permit reasonably efficient access to them upon appropriate requests. They should also be filed in ways that protect the confidentiality of the document signers who have obtained notarial services.

IV. Expectation of Confidentiality in Notarial Records

One of the most cherished of American Civil Liberties is the person's right to keep his identity private.

Notary Law Institute

It cannot simply be presumed that document signers who seek to have their signatures notarized should be entitled to expect the information about themselves and their documents to be kept private by notaries public. Indeed, some authorities will contend quite strenuously that, because notaries are public officials, notarial records are public records, which are not confidential at all. The advocates of

375. See, e.g., FLA. STAT. ANN. § 95.11(2) (West Supp. 2001) (setting out a five year period of limitations on actions on written contracts or obligations and to foreclose on mortgages); FLA. STAT. ANN. § 95.231(2) (West Supp. 2001) (creating a twenty year period of limitations for claims to real property for which a deed has been recorded or about which a will has been probated); NEV. REV. STAT. ANN. § 11.190(1)(a) (Michie Supp. 1999) (establishing a six-year period of limitations upon contracts and obligations founded upon written instruments).


379. The National Notary Association seems to want to have it both ways. The NNA takes the position that "[o]ur society has always prided itself on freedom of access to information" and that "the Notary has certain responsibilities to provide access to notarial records upon request." Thun, supra note 3, at 14. Yet, the NNA in the same publication admits that notary "records may also include sensitive personal information about signers"
this latter view will argue for unbridled or generally unbridled public access to notarial records. Some authorities assert that in every state or territory that mandates the keeping of notary journals, the general public has a right of access to such records.\textsuperscript{380} The Notary Public Code of Ethics instructs notaries not to reveal information about notarial acts “without proper authority,” but the Code makes no attempt to explain when proper authority would exist.\textsuperscript{381} The Notary Public Code of Professional Responsibility contains a directive to the effect that journal entries should be available to members of the public upon written request and photocopies of journal entries should be provided as well.\textsuperscript{382} As previously noted, the notary statutes of several states also provide for very liberal access by the public to notarial records.\textsuperscript{383} The reason for this view is undoubtedly due in large part to the hasty assumption that because notaries public are public officials, the records they create must be “public records” and, therefore, must be open to the public.\textsuperscript{384}

Of course, just because documents constitute public or governmental records does not mean there is or should be unlimited access

\textsuperscript{380} See Van Alstyne, \textit{supra} note 6, at 784. Van Alstyne states:

> In every state where journal record keeping is statutorily mandated, the journal is also designated a public record . . . . The official records of public offices and officers are inherently public records, including the journal of the notary. . . . [T]he notary does not enjoy a right to withhold the journal from public inspection.

\textit{Id.}

\textsuperscript{381} See \textit{ASN Code of Ethics}, \textit{supra} note 23. It should be noted that in contrast to the extensive document which constitutes the National Notary Association’s Notary Public Code of Professional Responsibility, \textit{supra} note 12, the ASN’s Code is only one page in length consisting of just twelve short statements. See \textit{ASN Code of Ethics}, \textit{supra} note 23. Nor, apparently, is there any other occasion when ASN publications have attempted to explain when there would be “proper authority” authorizing notaries to disclose the contents of journal entries.

\textsuperscript{382} See \textit{NNA Notary Public Code}, \textit{supra} note 12, § VIII-B-1. The NNA Code asserts that “[t]he Notary shall show or provide a copy of any entry in the journal of notarial acts to any person identified by the Notary who presents a written and signed request specifying the month and year, the document type, and the name of the signer(s) for the respective notarization.” \textit{Id.} Although the Code presents this directive as a way to limit access to journals, the authors contend that access to the journal should be more stringent, much like the Wisconsin Bill that was passed in May 2000. See Closen & Orsinger, \textit{supra} note 5.

\textsuperscript{383} See \textit{supra} notes 347–55.

\textsuperscript{384} See Closen & Orsinger, \textit{supra} note 5, at 6 (opining that “there is a considerable confusion about whether their journals become public records that are therefore open to public view and copying”).
to them by ordinary members of the public. Individual tax returns come to mind as one compelling example.\textsuperscript{385} Many public officers prepare countless documents that contain information lawfully intended to be protected from view by the general public. Public hospital records about individual patient care and treatment should be carefully protected.\textsuperscript{386} As other examples, consider the details contained in juvenile court records, adoption reports, student grade records, police investigations (that do not result in charges or prosecutions), and mental health reports.\textsuperscript{387} Citizens have come to rightfully expect that information about sensitive features of people's lives and about commercial or financial aspects of private citizens will be confidential, if such private citizens wish to keep the information private.\textsuperscript{388} This view does not change simply because the information may be contained in a public record. Today, with the mounting in-

\textsuperscript{385}. While there is no question tax returns are "public" records, it is generally understood that there is an inherent privacy expectation to one's financial disclosures. Private individuals do not give up this inherent expectation the way public officials do. The Internal Revenue Code provides as the general rule, for confidentiality of federal individual income tax returns. \textit{See} I.R.C. § 6103(a) (1999).

\textsuperscript{386}. For example, Illinois has several statutes that keep medical treatment records confidential. \textit{See} 410 ILL. COMP. STAT. ANN. 305/2(3) (West 1993) (mandating that "[t]he public health will be served by facilitating informed, voluntary and confidential uses of tests designed to reveal HIV infection"); \textit{see also} 410 ILL. COMP. STAT. ANN. 305/9 (West 1993). This Section states:

No person may disclose or be compelled to disclose the identity of any person upon whom [an HIV] test is performed, or the results of such test in a manner which permits identification of the subject of the test, except to the following persons [proceeds to list several exceptions to the law].

\textit{Id.} Also, "[a]ll information regarding a hospital patient gathered by the hospital's medical staff and its agents and employees . . . must be protected from inappropriate disclosure as provided in this Section," and public disclosure is not mentioned. 210 ILL. COMP. STAT. ANN. 85/6.17(b) (West 1993).

\textsuperscript{387}. In Illinois, any medical information provided to the Secretary of State under the Driver's License Medical Review Law is strictly confidential. \textit{See} 625 ILL. COMP. STAT. ANN. 516/908 (West 1993). Additionally, Illinois treats as confidential "information concerning a prospective employee obtained by the Department [of Human Services]." 20 ILL. COMP. STAT. ANN. 2405/17(b) (West 1993). "[A]ll information received . . . from claims filed under [the Senior Citizens and Disabled Persons Property Tax Relief and Pharmaceutical Assistance Act], or from any investigation conducted under the provisions of the Act, shall be confidential." 320 ILL. COMP. STAT. ANN. 25/8(a) (West 1993). As a final example, "[a]ll records and communications shall be confidential" under the Mental Health and Developmental Disabilities Confidentiality Act. 740 ILL. COMP. STAT. ANN. 110/3(a) (West 1993). Curiously, Illinois even mandates that library circulation records be kept confidential. \textit{See} 75 ILL. COMP. STAT. ANN. 70/1(a) (West 1993).

\textsuperscript{388}. \textit{See supra} note 85. Even many fairly ordinary commercial and personal transactions that involve notarizations have been characterized as "profoundly confidential to the document signers." Van Alstyne, \textit{supra} note 6, at 785.
stances of stalking noted earlier,\textsuperscript{389} people should have the peace of mind to be assured that their home and business addresses contained in notary journals are not readily available to any would-be stalker who asks to see those journals. Additionally, people should not have their personal identifiers, such as driver’s license numbers, credit card numbers, and Social Security numbers, made available to anyone who wants to access those identifiers.

What information is protected within each individual’s right of privacy depends upon the context.\textsuperscript{390} In colonial days, there were no credit card numbers or comparable modern identifiers and identity theft was not as widespread and serious a problem as it is today. Prior to the cyberspace generation, disclosure of credit card numbers, Social Security numbers, and the like was not as dangerous because the technology to readily misuse the information was unavailable. While common law decisions from the early 1900s through the early 1990s occasionally recognized the private nature of people’s financial information,\textsuperscript{391} courts remained relatively unconcerned about the dissemination of names, addresses, and generalized financial information about people (such as the particular credit cards they possess and their shopping habits).\textsuperscript{392} These earlier views need to be reconsidered

\textsuperscript{389} See supra notes 3, 29.

\textsuperscript{390} However, “[g]iven the present status of privacy law in America, and the advent of smaller and more sensitive electronics, the pendulum will continue to sway against the right to privacy. Slowly, we are reaching a point where the possibility of achieving reasonable privacy is virtually impossible.” John C. Anderson, Celebrities’ Privacy: New Twists on Old Excuses, 25 PRIVACY J. 3, 3 (1998).

\textsuperscript{391} For example, one court noted five cases where courts expressed concern about people’s privacy rights in documents, although it distinguished the case being decided from those five. See Dwyer v. American Express Co., 652 N.E.2d 1351, 1355 (Ill. Ct. App. 1995) (citing Zimmerman v. Wilson, 81 F.2d 847 (3d Cir. 1936) (holding examination of information in taxpayers’ bank books would violate the taxpayers’ privacy rights); Brex v. Smith, 146 A. 34 (N.J. Ch. Ct. 1929) (upholding claim for unauthorized intrusion into the plaintiff’s bank account); Hickson v. Home Fed., 805 F. Supp. 1567 (N.D. Ga. 1992) (finding bank disclosure to credit bureau of borrower’s loan payment delinquency could violate borrower’s right to privacy); Suburban Trust Co. v. Waller, 408 A.2d 758 (Md. 1979) (holding bank cannot reveal information about customer’s account or transaction unless compelled by legal process); Mason v. Williams Disc. Ctr., Inc., 639 S.E.2d 836 (Mo. 1982) (finding store’s posting of names of bad check risks invades plaintiff’s privacy)).

\textsuperscript{392} See, e.g., Dwyer, 652 N.E.2d 1351 (finding that a credit card company had not invaded the privacy of its cardholders when it compiled generalized marketing and spending information about its cardholders and rented that information to merchants); Shibley v. Time Inc., 341 N.E.2d 597 (Ohio Ct. App. 1975) (finding no invasion of privacy where a publisher sold subscription lists to direct mail advertisers); Lamont v. Comm’r of Motor Vehicles, 269 F. Supp. 880 (S.D.N.Y. 1967), aff’d, 386 F.2d 449 (2d Cir. 1967), cert. denied, 391 U.S. 915 (1968) (refusing to find an invasion of privacy from the state government selling names and addresses of registered motor vehicle owners to mail-order advertisers);
in light of the current technology which allows cyber-criminals to gather and link bits of data together.\textsuperscript{393} A cause of action should exist for invasion of privacy against notaries who disclose personal identifiers (including document signers' names linked with addresses, signatures, and/or credit card, Social Security, and driver's license numbers), if document signers are injured or damaged due at least in part to the disclosure and if the jurisdictions where the disclosures occur do not have laws directing notaries to allow public access to the information.

Furthermore, the place and manner of conducting notarizations are almost always quite private. Wills and powers of attorney are frequently executed and the signatures notarized behind closed doors in hospital rooms or in attorneys' offices. Other uninvolved people are not invited or present.\textsuperscript{394} Real estate documents are often signed and the signatures notarized at real estate closings conducted out of the presence of the public inside the inner bowels of mortgage or title companies. Loan transactions and important commercial deals will be executed and the signings notarized in purposely secret settings. Hence, the private locations and circumstances of the overwhelming number of notarizations contribute to the expectation that detailed notarial information and records generated in such settings will be accorded confidential treatment from the outset and remain private thereafter; and this reasonable expectation encompasses any and all notarial records. Moreover, people ordinarily guard against general dissemination of certain bits of data that become part of the notarial record—such as their Social Security, credit card, bank account, driver's license, and passport numbers. Many people are protective of their addresses and other contact information—such as home addresses, e-mail addresses, and telephone numbers.\textsuperscript{395} And of course,

\textit{see also} Keeton et al., \textit{supra} note 50, at 854-59 (discussing the development of the tort of intrusion into seclusion).

\textsuperscript{393} See Anderson, \textit{supra} note 390, at 3 (urging, in a different privacy context than notarial records, that courts reconsider their approaches in light of new technology).

\textsuperscript{394} It would probably be fair to postulate that the more substantial or sensitive the underlying transaction, the more likely the notarization of the signature(s) thereon will be carried on in private. In fact, since the professionals who draft and advise clients about such transactions do not wish to lose control of the circumstances, including control of the originals of the transactional documents, the signing and notarization ceremonies regularly occur in the privacy of the professionals' offices. See Van Alstyne, \textit{supra} note 6, at 785 (commenting that "[t]hese transactions are often profoundly confidential to the document signers").

\textsuperscript{395} See \textit{supra} notes 77-86 and accompanying text.
many people carefully limit the release of their ultimate identifiers, their names.\textsuperscript{396}

Importantly, there is nothing about a notarial ceremony that suggests it results in records open to public inspection or public view. Bystanders and strangers are not welcomed to observe. Non-notary witnesses are not usually required or asked to observe. Sensitive documents about sensitive matters are regularly involved. Most state notary laws, as well as the Model Notary Act, do not declare notarial records to be open to the public—but are completely silent on the subject.\textsuperscript{397} Notaries do not warn or advise document signers that notarial records become open to public review.\textsuperscript{398}

Consider the adverse influence that would result if the position were adopted to the effect notarial records become public records open generally to public review. Since only some eighteen states and territories mandate the keeping of notary journals,\textsuperscript{399} notaries in the more than thirty-six other United States jurisdictions may be deterred from maintaining notary journals. Furthermore, document signers may be encouraged to seek out notarial services from notaries who do not keep journals, so as to keep information private. Yet, notary journals are very valuable tools for the purposes of supporting the validity of notarial acts and protecting notaries from charges of notarial misconduct.\textsuperscript{400} If a thorough and accurate journal entry has been pre-

\textsuperscript{396} To confirm this reluctance of individuals to disclose their names, simply notice all the identification badges at companies, schools, conferences, and elsewhere that identify only individuals' first names rather than their surnames. Many people seem to have become accustomed in business settings, both face-to-face and by way of telephone and e-mail, to reveal only their first names.

\textsuperscript{397} See Closen & Orsinger, supra note 5.

\textsuperscript{398} There certainly is precedent for notaries being statutorily required to make disclosures to customers. To illustrate, notaries in some states are required to post a fee schedule of the amounts to be charged for their various notarial services. See \textit{e.g.}, \textsc{Del. Code Ann. tit. 29, § 4310(c)} (1997) (requiring that any "notary public, who keeps a public office, shall always keep hung up, in some convenient and conspicuous place therein, a printed or written list of the [notarial] fees prescribed in this section"); \textsc{5 Ill. Comp. Stat. Ann. 312/3-103(b)} (West 1993) (requiring for certain notaries the posting "at their place of business . . . a schedule of fees established by law which a notary may charge"). As another example, non-attorney notaries in some states are prohibited from adopting the title \textit{notario publico} or any other literal translation of the phrase notary public, and when they advertise their services in a language other than English they are required to post signs or otherwise give notice declaring that they are not attorneys at law. \textit{See \textit{e.g.}, \textsc{5 Ill. Comp. Stat. Ann. 312/3-103(a)}} (West 1993); \textsc{Fla. Stat. Ann. § 17.05(13)} (West Supp. 2001). Thus, notaries could be statutorily directed to disclose or warn customers that the notarial records may be subject to access by the public.

\textsuperscript{399} See supra notes 258–77.

\textsuperscript{400} See supra note 22. After all, notarization is done to support a document/transaction, and a journal entry is done to support the notarization. "American society as a whole
pared in addition to a certificate of notarization, the journal entry will be consistent with the contents of the notary certificate and lend valuable credibility to the notarization.\textsuperscript{401} If any part of the notary certificate were missing or incorrect, the contents of the notary journal entry could be called upon to fill in or cure the defect.\textsuperscript{402} As already pointed out, a notarization need not be perfectly done but need only be in substantial compliance with the law.\textsuperscript{403} And if a contemporaneous and thorough notary journal entry is completed, it will serve as a checklist of the steps a notary should follow in performing a notarization and will prevent notary omissions and errors.\textsuperscript{404} It is to the advantage of both document signers and notaries to have journal entries prepared because those entries provide strong evidence for upholding notarizations.\textsuperscript{405} Additionally, it is to the advantage of the public to have journal entries completed to encourage the integrity of documents bearing notarizations because the public relies upon notarized documents in a variety of settings.\textsuperscript{406} Thus, nothing should be done that will have the effect of discouraging notaries from completing journal entries, or that will have the effect of discouraging document
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." Van Alstyne, supra note 2, at 22.

\textsuperscript{401} See Van Alstyne, supra note 6, at 780 (contending that "[t]he meticulously maintained notary journal is most useful in demonstrating a notary's consistency, especially with regard to proper performance of notarial act[s]"). Because notaries are frequently named in multi-million dollar lawsuits, a carefully kept journal will ensure that the integrity of the notarized documents is upheld and the notarization was performed correctly within the boundaries of the law.

\textsuperscript{402} "The journal . . . provides a reliable record of notarized documents that can be referred to when questions arise in the future . . . ." NNA Notary Public Code, supra note 12, § VIII cmt. In the case of Farm Bureau Finance Co. v. Carney, 605 P.2d 509 (Idaho 1980), the court relied in part upon the affidavit of a witness and information contained in the transactional document to cure defects in a notarial certificate, but a thorough journal entry could have better served that purpose. As observed earlier, the certificate of notarization and the journal entry for a notarization should be regarded as interconnected and truly interdependent. See supra note 204 and accompanying text.

\textsuperscript{403} See supra note 244 and accompanying text.

\textsuperscript{404} The journal will far more likely serve as a checklist for walking the parties through the steps of a notarial ceremony if the journal is completed before, rather than after, the execution of the certificate of notarization. See supra note 223:

\textsuperscript{405} See Closen & Orsinger, supra note 5, at 6 (explaining that it is to the benefit "of document signers, notaries and the public (who rely heavily on notarized documents) that notaries maintain detailed journal entries that will help to assure the validity of notarizations"); Van Alstyne, supra note 6, at 784 ("Under the Federal Rules of Evidence, notary journals are admissible into evidence under the business records exception to the hearsay rule if the journal entries are made in the regular course of the notary's services and at the time of the notarial act.").

\textsuperscript{406} See Closen & Orsinger, supra note 5, at 6.
signers from supporting the practice of the completion of journal entries.

Again, although not everyone would agree on this point, notaries act as agents and fiduciaries of the document signers for whom signatures are notarized and about whom notarial records are created. Notaries are truly unique in this respect. The extent of each agency varies in degree from the next, and the agency of a notary qualifies as a very limited role. Nevertheless, neither its brevity nor its nominal substantive features disqualifies the notary-signer relationship from being an agency.

Your real estate agent might find just one ready, willing, and able buyer to purchase your only house and might do it in a matter of minutes. Your stockbroker might sell or buy your one and only stock, and thus represent you for a very short time. These limited agents are fiduciaries of the principals they serve, just as the notary is a fiduciary of those document signers who are serviced.

407. See Closen, supra note 2, at 655–75 (advocating that notaries be treated as agents and fiduciaries of the document signers for whom notarizations are performed). There are a number of sources that disagree with this position. See id. at 656–57 (setting out some of the contrary views).

408. See Closen, supra note 2, at 662 (pointing out that "[c]itizens do not pay fees to county clerks, aldermen, police officers and other government officials themselves").

409. See id. (stating that "[u]nlike any other contemporary public officer, the fees paid for their services are paid directly to the notaries"). The only other comparable practice had been among some justices of the peace. See 51 C.J.S. Justices of the Peace §§ 15–17 (1967) (noting that, under the old practice, justices of the peace were sometimes allowed to retain as their compensation the sums obtained through fines, fees, and costs in the cases tried before them); see also Piombino, supra note 92, at 27 (asserting that "a notary public is entitled to collect a fee in accordance with the legal limit, as he deems appropriate" and that "collection of a fee is not legally required, but encouraged").

410. See Closen, supra note 2, at 661 (observing "that notaries occupy a most peculiar place in government and business in this country").

411. See id. at 662 (opining "notaries should be recognized as special or limited purpose agents of the document signers for whom they perform notarizations, for that characterization appropriately limits and accurately describes the realities of the notaries' service").

412. See id. at 675, 669 (opining that "notaries also serve as limited-purpose agents of document signers" and acknowledging "the fleeting nature of notarial service").

413. See id. at 658–59 (citing examples of various kinds of limited-purpose agents, such as stock brokers, real estate brokers, doctors, dentists, and private detectives).
Various authoritative sources are of the opinion that notaries are obliged to honor certain duties of confidentiality. As pointed out already, the State of Wisconsin has declared in its notary statute that notaries have the obligation to keep information about notarizations confidential. Both the National Notary Association in its Notary Public Code of Professional Responsibility and the American Society of Notaries in its Notary Public Code of Ethics impose upon the notary the duty to treat notarial acts and records as confidential and the duty not to use information obtained in the course of notarization to compete with the document signer or for the personal gain of the notary. All of these duties are essentially fiduciary duties. To put it differently, one should not be burdened by these duties unless one is a fiduciary—at least a limited fiduciary.

Of course, not every fiduciary undertakes all fiduciary duties because some such duties simply have no application in some fiduciary contexts. The law has identified many fiduciary duties—at least fifteen to twenty of them set out in the Restatement (Second) of Agency. Some of them are finite and would seldom arise, although each could be significant in the right context. The fiduciary duty not to undertake the impossible comes to mind and is one, which by its very nature, would rarely come into play. Several fiduciary duties such as the duty not to undertake the impossible, simply would have no application in the usual notarial context. As an additional example, a notary public does not undertake the commonly owed fiduciary duty to account for money and property received in the course of the

414. See Notary Law Institute, You Owe It to Your Customers: Don't Leave Them in the Dark, THE NOTARY, Sept.–Oct. 2000, at 5 (announcing the view that notaries owe the “fiduciary duty to their customers [to] inform them [about] the notarial process”).


416. See NNA Notary Public Code, supra note 12, § II-A-1 (mandating that “[t]he Notary shall decline to notarize in any transaction that would result, directly or indirectly, in any actual or potential gain or advantage for the Notary, financial or otherwise, other than the fee for performing a notarial act allowed by statute”).

417. See ASN Code of Ethics, supra note 23.

418. See Closen, supra note 2, at 667–74 (explaining application to notaries public of the fiduciary duties of loyalty and confidentiality to their principals and the duties not to appropriate or disseminate information and not to compete with their principals).

419. See id. at 674 (explaining certain “fiduciary duties that can be so important in many other settings appear to have no application to notarial activities”).


421. See Closen, supra note 2, at 674. "As a matter of sound business policy and public policy, notaries should be held to relevant fiduciary standards." Id. at 666 (emphasis added).

422. See Restatement (Second) of Agency § 384 (1957). Of course, notaries have no occasion to attempt any activity in the nature of impossible conduct, because they engage in routine, ministerial activities.
agency because a notary does not serve the function of acquiring or receiving payments of money or property on behalf of a document signer.

However, notaries public do have a legal obligation to honor some fiduciary responsibilities. The notary does accept the fiduciary duty to act with reasonable care in the course of carrying out the agency (in identifying the document signer and recording the notarization of the signature). Reasonable care in performing and recording the notarization would include protecting the confidentiality of the substance of the notarization and its related information, such as details learned about the identities of document signers. The notary also undertakes the duty not to compete with the principal, and the only way that unlawful competition could really be engaged in by the notary would be through the use of information learned about a document signer or the transaction involved, such as details about a transaction or personal or financial information (perhaps account numbers or the signer’s Social Security number). This potentially competitive kind of information may have been recorded by the notary in the notary journal or might be contained in documents photocopied and retained by the notary.

The notary also undertakes the all-important loyalty duty—to place the principal’s interests “first, foremost and exclusive” of all other interests. This broad fiduciary duty of loyalty owed by a notary public to a document signer certainly encompasses the obligation to

423. See Closen, supra note 2, at 674 (discussing the inapplicability to the notary setting of the fiduciary duty to account for money and property received in the course of the agency); see also RESTATEMENT (SECOND) OF AGENCY § 382 (1957).

424. See Closen, supra note 2, at 674–76 (addressing the fiduciary duty to act with reasonable care and the legal standard of due care); see also supra notes 296–37 (noting the application of the tort standard of reasonable care to notaries public); RESTATEMENT (SECOND) OF AGENCY §§ 379, 422–27 (1957).

425. See Closen, supra note 2, at 668 (concluding that “[i]t is nearly indisputable that notaries should, at the very least, owe a fiduciary responsibility to honor the confidentiality of the parties and their documents”); see also RESTATEMENT (SECOND) OF AGENCY § 395 (1957).


427. See Closen, supra note 2, at 669–70 (discussing the duty of the fiduciary not to appropriate information in order to compete with the principal or entrustor).

428. “[D]uring the term of the agency [the law] holds the agent accountable as measured against the highest standard of loyalty.” Michael L. Closen & Gary S. Rosin, Agency and Partnership 138 (1992). See RESTATEMENT (SECOND) OF AGENCY § 587 (1957) (stating that “an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency”).
protect the confidences of a signer. Thus, not only must a notary not use or disclose confidential information to carry out a scheme of competition with a document signer for the notary’s personal benefit, but also the use or disclosure by the notary of confidential signer information that would aid a third party’s competition with the signer or simply injure the signer would be improper under the loyalty duty.

The citizenry is generally quite well aware of, and determined to preserve, the distinction between public and private matters. One of the best recent indications of this predominant view is illustrated by the public opinion results of the controversy surrounding the sexual misconduct of President Bill Clinton. The majority of citizens seem to have taken the position that the President’s sexual misconduct was within his private sphere, and hence not appropriate as grounds for public sanction. Every citizen should care about the boundary between public and private matters because each one of us has a self-
interest in the fixing of that boundary, at least as applied to each of us individually. Certainly, some of the information created or compiled by notaries in this country is private (i.e., it is sensitive, valuable, and ordinarily protected against general disclosure) and should remain so. Just as certainly, some of the information created or compiled by notaries is of no consequence or importance whatsoever to document signers, such as the amounts of the nominal fees assessed and collected by notaries. Disclosure of such innocuous data is not objectionable.

The question of whether the records of a notary are readily open to public view and copying involves the same tension posed by the question of whether a notary public serves simultaneously as an agent-fiduciary of the document signer whose signature is notarized and whose personal and financial identifiers are included in notarial records. All things considered, document signers should quite reasonably expect certain information included in notarial records to be confidential, and, therefore, not generally open to public view. Both the notarial context and the fiduciary-type responsibilities imposed upon the notary signal that result. It promotes sound business practice and policy, and it coincides with the prevailing view that “the most cherished of American Civil Liberties is the person’s right to keep his identity private.”

V. Risks of Breach of Confidentiality of Notarial Records

It is a secret in the Oxford sense: you may tell it to only one person at a time.

*Oliver Franks*435

For a host of reasons, the prospects are substantial for breaches of confidentiality of notarial records. Many notaries lack interest and dil-

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433. Several bits of data that might be included in a notary journal entry do not intrude upon the privacy of a document signer if revealed, such as: (1) whether an oath or affirmation was administered; (2) whether a signer was identified by personal knowledge of the notary or credible witness(es); (3) the place (the county and/or address where the notarization occurred); (4) the fee collected for the notarial act; (5) the date of the notarization; (6) the date of the document in question; and (7) a thumbprint of the signer. For the list of some 19 pieces of data that might be included in a journal entry, see *supra* note 302.


gence about performance of notarial responsibilities. Some become notaries only at the insistence of their employers. And those notaries do not ordinarily receive extra compensation for performing notarial functions at work. If notaries do collect fees for their services, the sums are so small as not to inspire much concern about being careful and thorough. In describing various problems with notarizations on recordable documents, one Recorder of Deeds in Kansas remarked that “our biggest problem is that some notaries just don’t pay attention.” Similarly, a Minnesota Recorder of Deeds opined, “Probably the single biggest reason for document rejection in our county is due to notaries.” Why should notaries care any more about record confidentiality when most of them are so indifferent about their other duties? Many United States notaries are not sophisticated enough to honor even the Oxford rule of secrecy suggested by the Franks quotation above.

There is no system in place to assure that notaries learn their duties and perform them capably. They make far too many mistakes on simple notarizations of signatures. There is little mandatory edu-

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436. See PIOMBINO, supra note 92, at xxi–xxii (reporting the results of a sample survey of the actual performance of some 220 notaries in twenty-two cities, and showing “shocking” negative results—91.7% failed to administer oaths, 82.5% failed to properly identify the signer, and 97.7% failed to correctly indicate the venue).

437. See Closen, supra note 2, at 495 (emphasizing that “the likelihood of notarial mistakes and misconduct is considerable”).

438. Although notaries are allowed to collect fees for their notarial services, many of them do not, especially in their workplaces, because the provision of notarial services is regarded as a customer service not to be separately paid for by customers. Indeed, some employers, notaries, and legislators have taken this view to the extreme of limiting notary services to “customers only” while notaries are on duty at their workplaces. See Closen, supra note 2, at 685–89 (discussing the public servant role of the notary, particularly while at the place of employment). Moreover, the notarial fees are so small that they cannot truly compensate notaries for their services (including their exposure to personal liability for their functioning). See supra notes 193–94 and accompanying text.

439. “The low fees and prestige of their office cause many Notaries to be cavalier and careless about their duties.” National Notary Ass’n, supra note 183, at 12.

440. Israelson, supra note 157, at 17.

441. Id.

442. See supra note 435 and accompanying text. “The human universals of laziness and ignorance are also factors: some Notaries are just too lazy to care, and others just don’t understand their potential devastating liability.” National Notary Ass’n, note 183, at 12.

443. See Closen & Orsinger, supra note 5, at 6 (noting that notaries “make so many mistakes with simple notarizations”); CLOSEN ET AL., supra note 1, at 109 (observing that “numerous mistakes are made in the document notarization process”).
cation and proctored testing of notary candidates. There is no mandatory continuing education of notaries and almost no mandatory retesting upon renewal of notary commissions. The notarial "system," therefore, is based largely upon the hope and chance that notaries will be responsible in learning and performing their duties. A survey conducted by the Property Records Industry Joint Task Force found notarial errors to be the second most frequent reason for real estate document rejection.

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. As a consequence, employers and customers constantly tempt notaries to take unlawful shortcuts and disregard sound notarial practices. Too many notaries succumb to these temptations. Criminals will surely prey upon unprepared and unsuspecting notaries to obtain from notarial files valuable personal and financial identifiers about document signers. This Article began with one example, the case of the would-be stalker who sought help in getting the address of his victim from a California notary. Expect more criminal schemes attempting to access notary records.

Moreover, notaries are human, and suffer from the same failings as others regarding matters of integrity. The assignment of govern-

444. See Closen, supra note 6, at A23 (opining that "notaries are seriously underinformed" and that "[o]nly a handful of states require tests; even fewer require a specific level of general education or legal training"); see also supra notes 181, 189-92.
445. Moreover, even as to voluntary continuing education programs, "attendance is generally very sparse." Closen, supra note 6, at A23.
446. See Israelson, supra note 157, at 17 (citing the survey that found "notarial errors as the second most common reason, behind incorrect fees, for rejection of real estate documents").
447. See Anderson & Closen, supra note 192, at 899 (noting that employers of notaries may be "equally unaware of the notary employees' legal and ethical responsibilities"). Employers and customers of notaries are often ignorant of notarial practices. See id. at 932.
448. Unfortunately, among the uninformed employers of notaries are many lawyers, and "lawyers are perhaps the worst offenders of sound notarial practice and of notary public laws." Closen & Shannon, supra note 22.
449. "One of the most common situations for notarial misconduct in the workplace occurs when the employer instructs the notary-employee to notarize a signature for a person not physically present." Anderson & Closen, supra note 193, at 901. And, employers are guilty of a variety of other practices that corrupt the conduct of their notary-employees. See Closen, supra note 2, at 679-80.
450. See Thun, supra note 3.
mental commissions does not change the risk that they may be tempted by dishonest opportunities for financial gain.\textsuperscript{451} Indeed, as pointed out earlier, the first notary appointed in the American Colonies\textsuperscript{452} and the first notary appointed in the Massachusetts Bay Colony\textsuperscript{453} were both removed from office due to their fraudulent practices. Unfortunately, their corruption did not represent mere isolated instances, for too many other notaries public have been guilty of dishonesty over the last 350 years.\textsuperscript{454} We face a crisis of integrity and responsibility within the notarial community as well as within society as a whole.\textsuperscript{455} Untrained, untested, indifferent, and unregulated notaries should not be entrusted with personal and financial details about millions of document signers.

It is not suggested, however, that notaries tempted by financial gain will necessarily act alone in misappropriating valuable private information included within their notarial records, as there will be plenty of others interested in conspiring with them in unlawful schemes.\textsuperscript{456} The privacy of the public has been said to be “under siege.”\textsuperscript{457} The attack upon confidential personal and financial information is certain to intensify because of the high stakes involved.\textsuperscript{458} In

\textsuperscript{451} “Many conflictive situations arise because professionals [including notaries public] might obtain significant gains from engaging in misconduct.” Anderson & Closen, \textit{supra} note 192, at 894.

\textsuperscript{452} See National Notary Ass’n, \textit{supra} note 129, at 3; Seth, \textit{supra} note 88, at 869 (referring to the appointment, in 1639, of Thomas Fugill in New Haven).

\textsuperscript{453} See Seth, \textit{supra} note 88, at 875 (referring to the appointment of William Aspinwall in 1644).

\textsuperscript{454} See Closen, \textit{supra} note 6, at A23 (opining that “[n]otary-related dishonesty appears to be on the rise”); Closen & Dixon, \textit{supra} note 88, at 892 (emphasizing that “[t]here is plenty of room for intentional misconduct by notaries,” including conspiring with the parties to transactions).

\textsuperscript{455} See National Notary Ass’n, \textit{supra} note 183, at 11; see also Roberts, \textit{supra} note 93, at 15 (observing that “the incidence of fraud [is] on the rise”); Anderson & Closen, \textit{supra} note 192, at 901 (“Notarial misconduct appears to be a growing problem in law firms.”).

\textsuperscript{456} “Notarial misconduct is usually initiated not by the notary, but by a third party.” Anderson & Closen, \textit{supra} note 192, at 895. “Occasionally, notaries will be offered bribes to violate notarial law and practice or will be induced to join in collusion to defraud by the prospect of financial gain.” \textit{Id.} at 904.

\textsuperscript{457} Patrick Thibodeau, \textit{Privacy High on Democrats’ List}, \textit{Computerworld}, Aug. 21, 2000, at 1 (quoting Congressman Jay Inslee); see also Closen & Orsinger, \textit{supra} note 5, at 6 (commenting that “the security of one’s ‘identity’ has become a sacred ideal slowly creeping toward extinction”).

\textsuperscript{458} See Podgers, \textit{supra} note 28, at 106 (noting that “[e]xpanding cyberspace . . . [has] tremendous business and economic implications”); Clyde H. Wilson & M. Susan Wilson, \textit{Cyberspace Litigation: Chasing the Information Highway Bandits}, \textit{TriAL}, Oct. 2000, at 48, 54 (“We haven’t seen the full extent of the Internet’s potential for use—or misuse. As technology continues to change and advance at warp speed, so will the means and methods of Internet bandits.”).
particular, "identity theft is still a vibrant and growing criminal enterprise." Notaries will be enlisted in that enterprise.

It certainly is the case that among the many problems with the notary system in the United States is the widespread failure to statutorily define, prohibit, and sanction conflicts of interest in the notarial field. Many state notary statutes do not even expressly forbid notaries from notarizing their very own signatures! Not surprisingly, only a small number of states disqualify notaries from notarizing for close family members such as spouses, parents, and children. Prohibition against general financial conflicts of interest are announced in only a small number of state notary laws. Therefore, the 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. Rather, the ideal should be employment of the highest integrity as to every detail.

To compound this felony, few states have budgeted adequate resources to supervise notaries and investigate allegations of notarial

459. Higgins, supra note 81, at 42.


461. For example, the notary statutes of some fifteen to twenty states do not declare that notaries are prohibited from notarizing their own signatures, including Alabama, Alaska, Delaware, Kentucky, Maine, and Ohio.


[A] notary public who is an employee may notarize a signature for his or her employer and this employment is not a financial interest in the transaction nor is he or she a party to the transaction under this subsection unless he or she receives a benefit other than salary and any fee for services authorized by law.


464. Yet, this atmosphere is antithetical to the nature of the notarial act. "[N]otarial acts cannot be among those matters that are shortchanged, because the law of notarizations is very precise—leaving no room for shortcuts." Closen & Shannon, supra note 22, at 32.
neglect and abuses.\textsuperscript{465} Without sufficient investigators and other support mechanisms to administer notary regulation and discipline, the state notary agencies cannot effectively deter misconduct, let alone foster careful and honorable practices by notaries.\textsuperscript{466} Yet, the situation worsens with each passing year, as more and more untrained, untested, and indifferent notaries are commissioned simply by filing nominal applications and paying modest fees.\textsuperscript{467} Most states employ basically an honor system for applicants for notary commissions, for the states do not independently engage in much of a real investigation of background information supplied (or misrepresented or omitted) by applicants for notary commissions.\textsuperscript{468}

At the risk of repeating an obvious point, since the state statutes, in general, do not specifically address the issues of notary record security or confidentiality, notaries are provided with little or no guidance on their responsibilities concerning recordkeeping.\textsuperscript{469} This official neglect of confidentiality issues engenders a lack of uniform practice within a jurisdiction, a lack of concern for the subject, and in turn a lack of thoughtful or sound practices in connection with recordkeeping and its confidentiality.\textsuperscript{470} When Wisconsin lawmakers

\begin{quote}
\textsuperscript{465}. For example, "[t]here is generally no attempt to verify the information" submitted on applications by those applying to be notaries. Closen, supra note 6, at A23. "The reality . . . is that government entities charged with overseeing notaries are usually understaffed and overworked." American Society of Notaries, Questions & Answers, American Notary, 4th Qtr. 2000, at 10.


\textsuperscript{467}. See Closen & Orsinger, supra note 5; see also infra notes 542–43 and accompanying text.

\textsuperscript{468}. "[T]he state must properly screen Notary applicants and weed out the unscrupulous and the unqualified . . . . [P]erfunctory processing should no longer be acceptable." National Notary Ass'n, supra note 183, at 12.

\textsuperscript{469}. The problem of incompleteness in notary statutes extends beyond the issues of notary record security. "Although some notarial powers are granted by statute, there are numerous powers, duties, and privileges which are not enumerated in the black letter statutes . . . . The state statutes which govern notaries are often silent on many areas of notarial practice, for several reasons." Alfred E. Piombino, Notarial Determination of Competence and Willingness, American Notary, 2nd Qtr. 1998, at 4. For instance, the failure of notary laws to thoroughly instruct notaries about satisfactorily identifying document signers has already been noted. "[I]dentification of a signer by a Notary through ID cards is often problematic because of the lack of definitive state laws and official guidelines." National Notary Ass'n, supra note 238, at 9. As another example, consider the previously noted ambiguities about conflicts of interest. See supra notes 419–23 and accompanying text.

\textsuperscript{470}. Without a systematic set of confidentiality statutes, the risks of privacy breaches increase dramatically. Combined with the technological capabilities computer hackers possess, the risk increases even more. In addressing the concern about invasion of privacy, Gallup wrote: "Along with the greatly enhanced information-gathering powers of the ad-
were recently considering legislation about notarial records, their focus was upon small town settings. "[L]egislators were concerned about privacy of records, most notably in small towns, where Notaries may provide easy access to records." But, even in major metropolitan settings, and perhaps especially there, notarial abuses of record privacy may be expected for all the reasons explained above. So much money can be at stake in bank transfers, credit card purchases, and online transactions today that some notaries may think the illegal reward available to them is worth the risk, believing the prospect of detection is slight under the sad state of affairs in which notaries operate.

VI. Recommendations for Preparing and Protecting Notarial Records

The larger war over who has control over personal information is one that will be fought well into the next century. American Bar Association Journal

Several steps should be taken to promote appropriate record-keeping by notaries and to promote the security of notarial records. As the Notary Public Code of Professional Responsibility announces, "[t]he Notary shall respect the privacy of each signer and not divulge or use personal or proprietary information disclosed during execution of a notarial act for other than an official purpose." The states and other territories should amend their notary statutes to incorporate the advanced technology, there is also a great potential for misuse of the new techniques and information." GALLUP, supra note 51, at 82.

472. See National Notary Ass'n, supra note 28, at 17 (remarking that "forgeries and property scams [are] on the rise in urban and suburban areas").
473. See Podgers, supra note 28, at 106 ("Law enforcement efforts often are stymied by national boundaries that criminals and terrorists ignore with impunity [in cyberspace]"); see also Anderson & Closen, supra note 35, at 895 (observing many notaries "buy into the proposition that an improper notarization [or notarial act] is unimportant and/or undetectable"); VAN ALSTYNE, supra note 2, at 36 (referring to "the unprecedented advancements in counterfeit and forgery technology"). "Along with these marvelous advances [in technology] come several potential sources of serious trouble in the years ahead [including] the potential for a new generation of criminals, with the amount of money endangered vastly exceeding anything we have seen in the past . . . ." GALLUP, supra note 51, at 70. As President Clinton said, "We can’t let breakthroughs in technology break down walls of privacy." Babington, supra note 80, at 2.
474. Higgins, supra note 81, at 47. Mr. Higgins is a reporter for the ABA Journal. See id. at 42.
475. NNA NOTARY PUBLIC CODE, supra note 12, § IX.
specific proposals set out below. Although the new legislation in Wisconsin is an excellent model in some respects, it does not go far enough in promoting sound recordkeeping and in deterring breach of record confidentiality. At the same time, the Wisconsin law is unnecessarily broad in prohibiting legitimate disclosure of notary journals.

A. Appropriate Recordkeeping

Notary authority Peter Van Alstyne correctly observes that "[t]he keeping of certain records is an inherent responsibility of nearly every responsible adult . . . [and] business enterprise . . .".476 Besides most notaries, is there any public officer who is not expected and required to maintain records of official acts? Most assuredly, notaries should bear this responsibility,477 and the states should guarantee compliance by enacting laws to require notaries to keep journals. As the previous discussion explained, while maintenance of a thorough chronological ledger of all notarial acts is advantageous to document signers, third parties who rely upon documents, and notaries public, further document keeping should be prohibited. There is no sound reason why notaries should make and keep photocopies of either transactional instruments or documents of identification.478 Doing so merely leads to greater risks of unwarranted use or disclosure of these superfluous papers. Such pages normally are not bound together and may not be kept together, so that their loose method of collection adds further to the risk of the pages being misplaced, lost, stolen, or further copied.479

Each jurisdiction's notary statute should both direct that notary journals be maintained (including the items of information to be recorded for each entry) and restrict what information a notary may collect. The Wisconsin law should be amended to add such provisions. Detailed statutory sections that require notaries to prepare notary journal entries for all notarizations are favored. Those laws should set out precisely the information which is to be recorded in the journal,

476. Van Alstyne, supra note 6, at 779.
477. See Rothman, supra note 1, at 31 (opining that "[i]t is . . . the obligation of every Notary to make an official chronological record of all his notarial acts, regardless of whether such a record is required or described by state law"); see also generally Van Alstyne, supra note 6.
478. Photocopies of documents do not serve as an effective substitute for a permanently bound and chronologically sequenced journal of notarial acts.
479. Moreover, this loose or unbound format would permit removal of documents or insertion of documents after the act of notarization.
including: (1) the date and time of the notarization; (2) the type of
document which is signed or being signed; (3) the kind of notariza-
tion to be performed; (4) the printed name of the document signer
and his or her complete address and phone number (if any); (5) a
signature of the document signer; (6) the method used to identify the
document signer along with the supporting information (such as the
type of identity document and its number); (7) the fee charged and
collected (if any); (8) whether an oral oath was administered; and (9)
the printed names, addresses, and the signatures of any witnesses to
the document. 480 Standard notary journals should also include spaces
for thumbprints and other comments to be recorded. If a thorough
journal entry is completed with each notarization, retention by the
notary of copies of either the transactional instrument on which the
notarization is performed or the identification document(s) ex-
amined to prove the signer's identity would be redundant and would
serve only to create one more source of important information that
might fall into the wrong hands. State statutes should, therefore, ex-
pressly prohibit notaries from making photocopies of either the trans-
actional documents on which signatures are notarized or the identity
documents tendered to establish the identification of document sign-
ners. 481 There should be penalty provisions for the suspension and/or
revocation of commissions of notaries who violate or repeatedly vi-
olate the law, and stiff fines to further deter violation of these provi-
sions. As a footnote to the support for state-mandated notary journal
maintenance, it is expected that such laws will induce many more leg-
islatures to confront the subjects of access to and security of notary
journals.

The physical security of the notary journal is critical to the goal of
protecting the confidentiality of its contents. 482 Thus, the legislatures
should adopt laws, modeled after a provision of the Notary Public
Code of Professional Responsibility and the California statutory sec-
tion on this point, 483 prescribing that notary ledgers must remain ex-
clusively within the possession or control of the notaries whose
notarial acts are recorded therein. That is, when in use, the journal
should be in the immediate presence and possession of the notary.

480. See supra notes 207-20.
481. See supra notes 246-50. Such a provision would represent an extension of the di-
rective that a "Notary shall not needlessly extract or copy information from the text of a
notarized document or from other documents possessed by its signer." NNA NOTARY PUB-
482. See supra notes 338-39.
483. See NNA NOTARY PUBLIC CODE, supra note 12, § VIII; see also supra note 17.
When not in use, the journal should remain under lock and key exclusively within the control of the notary.\textsuperscript{484} In other words, the notary cannot allow the journal to be taken out of the notary’s presence by employers, co-workers, family members, or anyone else; the notary cannot even allow the journal to be examined by any of those individuals.\textsuperscript{485} This restriction protects against both tampering with journals and unauthorized accessing of the contents of journals.\textsuperscript{486} While a document signer is signing the journal entry (and perhaps while entering his or her own name and address in the journal), other journal entries on the same page should be covered over to avoid being observed by the present signer.\textsuperscript{487} A notary cannot entrust another party even to transport or deliver the journal to the notary, if, for example, the notary inadvertently left the journal at home and needed it at the workplace. When not in use by the notary, the journal should be placed in a secure, locked location such as an office, closet, or drawer, to which other persons (even employers) do not have access.\textsuperscript{488}

Employers sometimes believe, incorrectly, that they own notarial materials such as seals and journals of their notary-employees, especially in those instances in which employers have paid the costs of those items and possibly the application and bond fees for employees to become notaries.\textsuperscript{489} But the law on this point is clear. Notarial materials (specifically, notary seals and journals) belong to the notary.\textsuperscript{490} One state, Oregon, does allow employers and employee-nota-

\textsuperscript{484} See supra note 17.
\textsuperscript{485} See Model Notary Act § 4-104 (1984) (noting that “[t]he journal must be kept in exclusive custody of the notary and may not be used by any other notary or surrendered to an employer upon termination of employment”). To allow anyone to peruse the notary’s journal would be a serious breach of trust between the notary and the signer. Such trust should never be broken.
\textsuperscript{486} The Model Notary Act requires that even the authorized inspection of a notary journal entry must be accomplished “in the notary’s presence.” Model Notary Act § 4-104(a) (1984). This limitation is intended “to prevent tampering or intentional damage” to the journal. Id. at Art. IV cmt.
\textsuperscript{487} See Model Notary Act § 7-4(b) (Proposed Revision 2000) (“The regular notary has discretion to withhold or mask from any person the addresses, telephone numbers, and identification card numbers of principals and witnesses recorded in the journal, except when the journal or any entry is subpoenaed by court order or surrendered at the direction of [commissioning official].”).
\textsuperscript{488} See id. § 7-4(c) (“When not in use, the journal shall be kept in a locked and secure area under the exclusive control of the regular notary, and shall not be used by any other notary or surrendered to an employer upon termination.”).
\textsuperscript{489} See supra notes 485, 488.
\textsuperscript{490} See NNA Notary Public Code, supra note 12, § VIII-C-1; see also Model Notary Act § 7-4(e) (Proposed Revision 2000). Although an employer may purchase the materials for an employee:notary, the employer by no means assumes ownership over them. For
ries by agreement to arrange for the notary journal(s) of a departing employee to be left for storage with the employer.\textsuperscript{491} However, this method should be opposed because it is contrary to the central principle that the notary is a public officer; the employer is not. Members of the public entrust valuable information for safekeeping to the notary, not to the notary’s employer. Incidentally, notaries who perform notarizations both at home and at the office should maintain two journals—one at the office, the other at home. This method reduces the risk of loss of the notary ledger while in transit,\textsuperscript{492} although the law of at least one state appears to prohibit notaries from keeping two journals.\textsuperscript{493}

Unfortunately, as already mentioned, the new Wisconsin statute does not establish an obligation on Wisconsin notaries to prepare journal entries for their notarizations of signatures on documents. Hence, Wisconsin remains one of about thirty-six states which do not impose such a statutory obligation. Further, Wisconsin’s new law does not follow California’s lead by requiring the physical securing of notary seals and journals. Such a provision requiring these items to be kept under lock and key would promote both the security of notary journals and consequently the confidentiality of their contents.

\section*{B. Access to Notarial Records}

The new Wisconsin statute should become the model for accessibility of notarial records. Written consent of the document signer should be demanded as a prerequisite to the release of informa-
The Wisconsin law declares notarial records to be confidential, and limits access to them to those situations in which document signers provide written consent to the disclosure of the notarial records, as follows:

CONFIDENTIALITY. (a) Except as provided in par. (b), a notary public shall keep confidential all documents and information contained in any documents reviewed by the notary public while performing his or her duties as a notary public and may release the documents or the information to a 3rd person only with the written consent of the person who requested the services.

(b) Deposition transcripts may be released to all parties of record in an action. A notary public may not release deposition transcripts that have not been made part of the public record to a 3rd party without the written consent of all parties to the action and the deponent. When a deposition transcript has been made part of the public record, a notary public who is also a court reporter may, subject to a protective order or agreement to the contrary, release the deposition transcript or sell the transcript to 3rd parties without the consent of the person who requested the services of the notary public.

(c) Any notary public violating this subsection shall be subject to the provisions of sub. (8) and may be required to forfeit not more than $500.495

Short of a provision that would have barred any disclosure whatsoever of the records, the Wisconsin provision in subsection (a) establishes sweeping protection for the privacy of notarial records. Wisconsin's statute is the most extensive and effective law in the country for promoting the confidentiality of notarial records.496

There is a technical defect with the written consent provision of the Wisconsin law, however, because it requires "consent of the person who requested the [notarial] services."497 Quite often, one person actually requests and pays for services which are performed for someone else. For instance, a spouse may make the request to notarize the signature of the other spouse. The same is true of a parent for a child, or an employer for an employee. But the party with the direct privacy interest in the information in the notary record would be the party whose signature is notarized. Thus, the Wisconsin law should be amended to provide that the consent must come from the person...
whose signature is notarized, to whom an oath or affirmation is administered, or for whom other notarial service is rendered.

Interestingly, the language of the Wisconsin law does not expressly refer to a notary journal or notary record, and the Wisconsin legislature may not have consciously considered or specifically intended its law to apply to notary journals and records. However, the phrase “all documents and information contained in any documents reviewed by the notary public”\(^{498}\) certainly is expansive enough to cover notary journals and other notary records. Other commentators have reached this same conclusion.\(^{499}\)

It should be noted that the Wisconsin provision on written consent of the document signer needs to be clarified, for the language does not specify how the giving of consent is to be accomplished. Hopefully, a document signer could restrict his or her consent to a particular person or entity seeking disclosure; could restrict his or her consent to particular portions of the notarial records (such as parts of the journal entry); and could restrict his or her consent to a particular time frame during which the disclosure could be provided. Certainly, granting written consent to a specific disclosure should not open the door to broader disclosure of information to other parties, to disclosure of other information, or to disclosure at other times. Additionally, there should be some explanation about the form the written disclosure would take in order to protect against over-inclusive disclosures. This would include directives about providing copies of journal entries. Also, there should be a prohibition against further republication, reproduction, or disclosure by a third party who accesses a notary journal entry or portion thereof.

Three exceptions to the very restrictive provision on notarial records disclosure should be included within the Wisconsin law. The first is that disclosure should be permitted even in the absence of written consent where the validity of a specified notarization is challenged and where the notarial records will, of course, provide relevant information on the issue. The most fundamental purpose of the maintenance of a notary journal is to help assure that a valid notarization results.\(^{500}\) The completion of a journal entry should guide the notary

\(^{498}\) Id.
\(^{499}\) See National Notary Ass’n, Wisconsin Enacts New Laws, supra note 5, at 2 (opining that the new “Wisconsin Act . . . also applies to information contained in the Notary’s journal of notarial acts”).
\(^{500}\) See Notary Law Institute, supra note 378, at 3 (advising notaries that “[t]he 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”).
public and the document signer through the steps of a proper notarization,\textsuperscript{501} and it should provide detailed information to corroborate the certificate of notarization or to cure defects in the certificate.\textsuperscript{502} And the journal entry—as part of a series of thoroughly completed, chronological, and bound journal entries—serves as solid evidence of diligence and reasonable care by the notary.\textsuperscript{503} As a matter of basic fairness, the notary who needs the information to support the validity of a notarization, or an interested third party who needs the information in the journal to support or attack a notarization, should have access to the information in the notary journal.

Consider the incongruous and unjust result if a document signer himself or herself would later challenge the validity of a notarization and refuse to consent to disclosure of the contents of the notary journal entry relating to that notarization because the contents of the journal entry would be counter to the interest of the signer and would support the notarization. A document signer should not be permitted to bar the admission of the journal entry from a lawsuit or arbitration, in part because there are steps which could be taken by a judge or arbitrator at the behest of a signer to protect personal identifiers (such as redacting some material, sealing part of the record, or reviewing the journal entry \textit{in camera}). Most troublesome is the possibility under Wisconsin law that if a notary were to mistakenly notarize the signature of an imposter (as sometimes happens),\textsuperscript{504} the contents of the journal entry about the notarization in question could not be released without the written consent of the imposter! The Wisconsin law makes no exception.

The second exception which should be included anticipates the case where a document signer has died, has become incompetent, or cannot be located with reasonable diligence. Under such circumstances, a surrogate (such as a guardian or representative of a decedent's estate) or an administrative law judge should be authorized to provide substitute consent at the discretion of the surrogate or admin-

\textsuperscript{501} See supra note 225; see also National Notary Ass'n, \textit{infra} note 511, at iv ("A record book . . . provides the notary with a ready made checklist of information to verify prior to the notarization.").

\textsuperscript{502} See supra note 225.

\textsuperscript{503} See supra notes 235, 242-43.

istrative judge upon good cause provided by the requesting party. This exception contemplates both the situation where a third party requests the disclosure and the situation where the disclosure is sought by the surrogate for some lawful purpose.

The third exception is rather obvious, namely that the notary journal should be accessible to agents of the state government office which supervises notaries public. This access should be limited, of course, to official business of the administrative agency. There would be numbers of occasions in the course of the oversight of notaries that government agents may legitimately wish to examine notary journals. If, for example, a notary were accused of dereliction of duties, of the unauthorized practice of law, of overcharging document signers, or of notarizing signatures for absent signers, the journal may contain relevant evidence for state officials to examine. Thus, the administrative agency should have access to notary records for official purposes even without the consent of document signers.

Once a notary journal entry has been completed, it should be accessible only to the document signer and the lawful representative of the state notary agency (usually the secretary of state's office), or according to the other two exceptions identified above. A centralized system for receiving, reviewing, and approving or disapproving all such exceptional requests, and for providing access or copies of jour-

505. Of course, in the eighteen jurisdictions which require notaries to maintain journals, the proper, thorough, and contemporaneous keeping of such records would in and of itself constitute a legitimate basis for governmental oversight agents to examine notary journals.

506. "When the performance and integrity of a [licensee] is called into question, the licensing authority has the legal power and responsibility to investigate and act to insure that the public's interests are protected. This is true as well for the notary public." CLOSEN ET AL., supra note 1, at 307.

507. A number of notary statutes expressly cover and prohibit the unauthorized practice of law by notaries. See, e.g., 5 ILL. COMP. STAT. ANN. 312/6-103, 312/6-104(g)–(h), 312/7-109 (West 1993); Model Notary Act § 3-106 (1984). Several administrative or other proceedings have been brought against notaries for the unauthorized practice of law. See, e.g., In re Skobinsky, 167 B.R. 45 (E.D. Pa. 1994); Florida Bar v. Fuentes, 190 So. 2d 748 (Fla. 1966); Biakanja v. Irving, 320 P.2d 16 (Cal. 1958).

508. Numerous notary statutes establish a schedule of maximum fees that may be charged for prescribed notarial acts and set out penalties, including criminal sanctions, that may be imposed for violation of those provisions. See, e.g., Model Notary Act § 3-201 (1984); 5 ILL. COMP. STAT. ANN. 312/3-104 (West 1993).

509. As noted earlier, every state requires document signers to personally appear before notaries for the notarial ceremonies. See Closen & Shannon, supra note 241; see, e.g., Facey v. Dept. of State, 518 N.Y.S.2d 177 (App. Div. 1987) (imposing an administrative penalty upon a notary for notarizing a signature of an absent party).
nal entries, should be established by the governmental agency which oversees notaries public in each jurisdiction through a process of review by administrative law judges. A request for examination or copying of a journal entry should be made in writing to the agency specifying the name of the notary public, the name of the document signer, the date of the notarization (including at least the month and year, in order to permit the notary to find the entry with ordinary effort), and the reason for the request.\textsuperscript{510} Such requests, if approved by the governmental notary agency, should be communicated to the notary who should then provide a photocopy of the specified journal entry to the agency. But no other entries from the journal should be provided.\textsuperscript{511} Importantly, if the requested entry appears on a journal page containing other entries, those other entries should be covered over before copying or somehow redacted after copying (such as by blacking them out or cutting them off).\textsuperscript{512} The notary should then complete a new journal entry for each request that is forwarded by the governmental agency, along with a notation of whether the requested entry was located and supplied to the agency.\textsuperscript{513} In turn, the government agency will be the one to actually provide access to the requesting party, either by allowing the party an opportunity to see the entry or by supplying a copy. Thus, the notary will never provide direct access to a journal entry to any party, even the document signer, but limited access may be provided by the notary oversight agency.

When a written request for disclosure and/or copying of a journal entry is submitted by anyone other than the document signer personally, a copy of such request should be provided by the agency

\textsuperscript{510} These requirements parallel those of the Notary Public Code of Professional Responsibility quite closely. See NNA Notary Public Code, \textit{supra} note 12, § VIII-A-2.

\textsuperscript{511} Most notary journal formats are such that more than one, and usually several, journal entries appear on each page of the record book. See, \textit{e.g.}, National Notary Ass'n, \textit{Journal of Notarial Acts} (1994) (containing eight entries over a two-page spread when the book is open); American Soc'y of Notaries, All States Record Book (1997) (containing four entries per page).

\textsuperscript{512} See Model Notary Act § 7-4(b) (Proposed Revision 2000) (providing that the "regular notary has discretion to withhold or mask from any person the address, telephone numbers, and identification card numbers of principals and witnesses recorded in the journal").

\textsuperscript{513} Other sources suggest that a full record of a request to access a journal entry should be included in the notary's journal. See, \textit{e.g.}, Model Notary Act § 7-4(a) (Proposed Revision 2000). Section 7-4(a) provides:

\begin{quote}
In the regular notary's presence, any person may inspect an entry in the notary's official journal of notarial acts, if: (1) the person's identity is personally known to the notary or proven through satisfactory evidence; (2) the person affixes a signature and thumbprint in the journal in a separate entry . . . .
\end{quote}

\textit{Id.}
immediately to the document signer or the surrogate for the document signer along with a written statement advising the signer or the surrogate of the period of time within which she or he may object and provide reasons to refuse the request in whole or in part. The administrative law judge for the notary agency should consider such written objections prior to deciding whether to grant the request to disclose and/or copy an entry. Written notice of the agency’s decision in favor of disclosure should be provided to the document signer or surrogate sufficiently in advance to allow the document signer or surrogate adequate time to bring a legal action in a state trial court to enjoin the agency from revealing the journal entry. Of course, the agency’s decision to refuse a request for disclosure would also be subject to judicial review at the insistence of the party who made the unsuccessful disclosure request.

The governmental notary agency should also be authorized to grant a request for partial disclosure, perhaps by agreeing there should be a disclosure of a journal entry, but with some information redacted. Presumably, personal and financial identifiers would often be superfluous to an otherwise legitimate request for disclosure of the contents of a journal entry. Future notary journal formats could be designed to facilitate the process of maintaining the confidentiality of personal identifiers. Perhaps personal identifiers could be listed closest to the journal’s margin, allowing the folding of the end of a page to conceal the private data during photocopying.514

Again, consistent with the recommended provisions on requiring recordkeeping and physical security of records, there should be provisions to sanction and deter violation of the access rules suggested above. Notaries who violate the disclosure provisions should be subject to substantial fines and to suspensions and/or to revocations of their commissions, including confiscation of notarial records. The fines should include a range of amounts sizeable enough to put real teeth into these statutes so that notaries will take the subject of notary record privacy seriously. One other objection to the new Wisconsin

514. Presently, other bits of information appear at the edges of the ledger entries. The ASN’s All States Record Book is set up with four entries on each page so that for left-hand pages, the left edge is the outside edge of the ledger, while right-hand pages have the right edge at the outside edge of the ledger. See AMERICAN SOC’Y OF NOTARIES, ALL STATES RECORD BOOK (1997). On the other hand, the NNA’s Journal of Notarial Acts has a single entry spanning the full width of two ledger pages when the book is open. See NATIONAL NOTARY ASS’N, JOURNAL OF NOTARIAL ACTS (1994). This format would permit sensitive information to be placed on the right-hand side of an entry and folded over or covered over in order to conceal and protect it.
law is its very modest fine of a maximum of only $500.\textsuperscript{515} That amount coincides with the $500 notary bond amount required in Wisconsin,\textsuperscript{516} but this bond amount is also woefully small. In fact, of some thirty states which still require notaries to be bonded, Wisconsin's $500 bond is the lowest.\textsuperscript{517} The $500 bond level remaining in effect in Wisconsin and a couple of sister states reflects amounts set in the 1800s and never raised.\textsuperscript{518}

For those jurisdictions which, unfortunately, are going to continue the policy of making notary records open to public access, the document signers should be made clearly aware of the policy. Notaries should be required to advise document signers of the public nature of notary journals in those states and territories.\textsuperscript{519} Notary journals for those jurisdictions should contain conspicuous announcements as part of all journal entries advising document signers of the opportunity for public accessibility to those journals. Such an approach would probably result in one advantageous outcome, mainly that fewer documents would require the signatures thereon to be notarized. Far too many documents in this country require notarizations of signatures. Notarization is often unnecessary for a number of reasons. The parties most often know one another, so that the genuineness of their identities is not truly an issue. Most often, oaths to the truth of the contents of documents are unnecessary because the law of fraud (including consumer fraud) already applies and would provide sufficient legal protection.\textsuperscript{520} Or, as the federal government and many states have al-

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\item \textsuperscript{515} See Wis. Stat. Ann. \textsection 137.01(5m)(c) (West Supp. 2000).
\item \textsuperscript{516} See Wis. Stat. Ann. \textsection 137.01(1)(d) (West 1988). This Section states: Qualified applicants shall be notified by the secretary of state to take and file the official oath and execute and file an official bond in the sum of $500, with surety to be approved by the clerk of the circuit court for his or her county, or, if executed by a surety company, approved by the secretary of state.
\item \textsuperscript{517} See National Notary Ass'n, supra note 177, at 27 (indicating that New Mexico, Wisconsin, and Wyoming all have $500 notary bonds and that $500 is the smallest bond in the country). It should be noted that in Kentucky the bond amount varies from county to county. See id.
\item \textsuperscript{518} "In the three states where the bond is $500, the statutes were enacted between 1849 and 1876 and never have been amended to reflect the modern cost of living." Closen, supra note 6, at A23.
\item \textsuperscript{519} See Notary Law Institute, supra note 414, at 5. Interestingly, the Notary Law Institute has suggested that notaries should have a general responsibility to explain the notarial process to document signers. See id. "There are compelling reasons why notaries should assume a fiduciary duty to their customers by informing them what the notarial process is about." Id.
\item \textsuperscript{520} See Closen et al., supra note 1, at 135 (stating "[i]t has been suggested in some quarters that far too many documents call for notarizations"); Closen, supra note 8, at A24.
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ready recognized, legislation could be adopted providing for a method (a form) for self-authenticating of documents to avoid notarizations in many circumstances. In reality, requiring an otherwise unnecessary notarization only serves to subject a document, and in turn a transaction, to another ground of possible attack in the event the notarization is faulty in some respect. And, many notaries are guilty of making mistakes on even the simplest of notarizations.

For those states and territories that continue to allow public access to notary records, they should tighten their procedures to avoid easy and undocumented access to notary journal information which might be used for unlawful purposes. First, parties requesting access to notary journals should have to deal directly with the state notary public agencies, which are in better positions than ordinary notaries to protect against overbroad disclosures. Second, parties should have to make requests for access in writing, providing their names, addresses, signatures, and thumbprints, and proving their identities. This procedure should help to discourage many criminals from requesting access because it creates written evidence that might be used to track them down and help to prove their criminal plans and conduct. Third, the written requests for access should require the requesting party to identify the notary, the document signer, the date of the notarization (at least the month and year), and a good faith reason for the request for access (other than mere curiosity, so as to discourage

In this system the tail seems to be wagging the dog. "[T]he multitude of documents requiring notarization necessitates that an ample number of notaries be available to satisfy this need." CLOSEN ET AL., supra note 1, at 67.


522. But see Kathleen Key Imes, Contracts—Do They Really Need To Be Notarized?, AMERICAN NOTARY, July-Aug. 1996, at 1 (expressing the view that although notarization is not legally required for a private contract, "it does not hurt to have your legal document notarized, because [notarization provides] another layer of validity to it").

523. As noted earlier, California now requires some document signers to leave a thumbprint in the notary's journal. See supra note 326. Similar legislation has been introduced in Pennsylvania. See id. Under the Model Notary Act, a person requesting access to a journal entry must himself or herself sign the notary's journal. See MODEL NOTARY ACT § 4-104(a) (1984). This requirement is one of the measures employed in the model law "to deter frivolous or unscrupulous 'fishing expeditions' through the journal." Id. at Art. IV cmt. It has been said that "[a]sking for a fingerprint always discourages people with criminal intent from completing their course of action." National Notary Ass'n, supra note 28, at 16. See generally Vincent J. Gnoffo, supra note 326; National Notary Ass'n, A Journal Thumbprint: The Ultimate ID, NAT'L NOTARY, May 1996, at 9.
fishing expeditions for personal information).\textsuperscript{524} Fourth, an appropriate fee should be assessed for considering and processing the request (and again, to discourage some frivolous requests). Fifth, when disclosures of journal entries are made to outside parties, the document signers whose entries were accessed should be informed of the disclosures, including the names and addresses of the parties who had requested access to the records. It is quite troubling that some jurisdictions employ none of these mechanisms to screen and document requests for access to journal entries in order to deter unscrupulous parties and to protect their citizens from easy access to personal identity information in notary journals. In the "war over who has control over personal information," identified by the American Bar Association earlier in this Part of the Article,\textsuperscript{525} state legislators can prevail if they have the foresight and courage to step into the frontlines of the privacy battle.

\section*{Conclusion}

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.

\textit{Director General Roy Penrose}\textsuperscript{526}

It is truly remarkable that a most basic and seemingly simple matter—the nature of the records of a notary public—has remained unresolved for more than 350 years. This uncertainty can be traced back to the first period of practice of notaries in the American colonies, for as was noted previously, William Aspinwall, the first notary in the Massachusetts Bay Colony, asserted his entitlement to keep his notarial records when he left the office of notary.\textsuperscript{527} As well, the uncertainty is traceable directly to the patchwork of legislative treatments of notarial

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\item \textsuperscript{524} The Code of Professional Responsibility directs a notary "not [to] divulge information about the circumstances of a notarial act to any person who does not have . . . a need to know." NNA \textit{Notary Public Code}, \textit{supra} note 12, § IX-B-1.
\item \textsuperscript{525} See \textit{supra} note 474 and accompanying text.
\item \textsuperscript{526} Podgers, \textit{supra} note 28, at 106 (quoting Director General Penrose of the British National Crime Squad).
\item \textsuperscript{527} See \textit{supra} notes 140–41 and accompanying text.
\end{itemize}
recordkeeping,\textsuperscript{528} and to the utter default in dealing with the matter in the notary laws of so many states.\textsuperscript{529}

In the colonial days of this country and through the 1800s in most places, there was virtually no serious danger of identity theft.\textsuperscript{530} It was a simple time, when the population was quite small, the number of notaries was very limited, substantial travel was more difficult, just about everyone seemed to know one another, and notaries were more esteemed and took their responsibilities more seriously.\textsuperscript{531} Most of the modern state notary laws date from the mid- to late-1800s,\textsuperscript{532} a time before legislators had occasion to become concerned about identity thefts from private information contained in driver's licenses, Social Security cards, and credit cards.\textsuperscript{533} Many notary laws have not changed significantly in the last century,\textsuperscript{534} undoubtedly in keeping with the popular viewpoint, "if it ain't broke, then don't fix it."\textsuperscript{535} Even throughout most of the 1900s, as technology, banking, and commerce

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\item \textsuperscript{528} See supra notes 258–77, 292–94, 338, 347–55 and accompanying text. "[T]he path for notaries is disrupted and obscured by the conflicting directions they receive from the sources which are supposed to be their guideposts." Bruno & Closen, supra note 33, at 495.
\item \textsuperscript{529} See Closen & Orsinger, supra note 5, at 6 (stating that many states "leave notary records completely unregulated"). "Unfortunately, the law is not well-developed on the subject of the duties of notaries with respect to confidential information learned in the course of their notarial services." Bruno & Closen, supra note 33, at 536.
\item \textsuperscript{530} See National Notary Ass'n, supra note 238, at 9 (observing that "[o]nly in the 20th century has identification of document signers become the Notary's overriding preoccupation and problem").
\item \textsuperscript{531} "For most of the nearly 2,000 years the office of Notary Public has existed, identification required little effort: most people were anchored in smaller communities, and Notaries personally knew nearly everyone who appeared before them." Id.
\item \textsuperscript{532} Illinois, for example, adopted its first notary public law in 1829, entitled the Illinois Notary Public Act, and it contained only "six short provisions and could easily fit onto one standard page. It was woefully incomplete by today's standards for legislation, but that was typical of the era." Bruno & Closen, supra note 33, at 507. "In the three states where the [notary] bond [still] is $500, the statutes were enacted between 1849 and 1876 and never have been amended to reflect the modern cost of living." Closen, supra note 6, at A23.
\item \textsuperscript{533} The automobile, Social Security system, and automated banking systems are all creations of the 1900s. Legislatures of the 1800s could not possibly have foreseen the industrial and technological revolutions, which have caused all state legislatures to adapt their laws to the changing times.
\item \textsuperscript{534} See supra note 469. This stagnation in the notary legislation arena explains in part why notaries are left with incomplete or conflicting directives about their responsibilities. See, e.g., generally, Bruno, supra note 325; Bruno & Closen, supra note 33.
\item \textsuperscript{535} Notary expert and good friend of the authors, Alfred Piombino, has occasionally used this phrase (or a close proximity of it) in meetings where Professor Closen has attended and challenged certain current notarial practices. See, e.g., Alfred E. Piombino, Notarial Determination of Competence and Willingness, AMERICAN NOTARY, 2nd Qtr. 1998, at 4 (presenting his position that, although notary statutes are incomplete in giving notaries guidance about judging competence and willingness of document signers, the system seems to work and should not be changed).
\end{itemize}
advanced, the population grew, travel expanded, the presence of strangers became more commonplace, and the number of notaries increased,\textsuperscript{536} concerns about misappropriation of personal and financial information remained relatively inconsequential. However, with the advent of widespread financial activity by the use of computers and e-commerce within only the last generation, those simpler days are over. One source has even pinpointed to approximately 1994 as the beginning of the real threat to the security of personal information in cyberspace.\textsuperscript{537}

Notary legislation lags behind the rapidly advancing technology. Nothing much has changed since 1978 when former Governor Brown observed, in the quotation introducing this Article,\textsuperscript{538} that notaries too often lack sound information to guide them in the performance of their official duties. Sadly, the two significant changes since about 1978 are that the number of notaries has exploded—doubling to more than 4.2 million\textsuperscript{539}—and that many more documents require the signatures thereon to be notarized.\textsuperscript{540} In colonial times, when the American notary began to develop a different role than its older brother, the English notary, it did so to accommodate a burgeoning young country.\textsuperscript{541} However, while this is obviously not the young country it once was, this nation continues to confront changing issues. As the country enters a new century, the office of notary public faces an opportunity to adapt itself to better serve changing priorities.

The explosion of the notary population has been likened to an uncontrolled cancer.\textsuperscript{542} To the extent there have not been widespread

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\item \textsuperscript{536} See National Notary Ass'n, supra note 238, at 10 (remarking that "[a]t this time . . . transactions between strangers are commonplace"); see also supra notes 151–52 and accompanying text.
\item \textsuperscript{537} See Higgins, supra note 81, at 45 (observing that "sometime around 1994, the number of complaints [of identity thefts] to government, business and consumer groups began to explode").
\item \textsuperscript{538} See supra text accompanying note 1.
\item \textsuperscript{539} See National Notary Ass'n, supra note 8, at 30.
\item \textsuperscript{540} See Closen, supra note 6, at A24.
\item \textsuperscript{541} Compare supra notes 105–24 and accompanying text with supra notes 127–64 and accompanying text.
\item \textsuperscript{542} There does seem to be an almost uncontrolled spread of notaries. "Notaries are too many in number, too little in authority, and too lacking in respect virtually all of the time." Bruno & Closen, supra note 33, at 494. As long as a notary applicant completes a simple application and pays the modest application fee, "yet another notary is born." Closen, supra note 6, at A23. And this happens hundreds of times a day in this country. See Closen, supra note 2, at 664 (observing that in a "time of declining ethics in this country . . . the profession of notary public has not been immune to the downward spiral toward the lowest common denominator of behavior").
\end{itemize}
breaches of privacy of notarial records to date, that result has been more a matter of luck, rather than design. Hundreds 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, particularly in the field of information confidentiality.\textsuperscript{543}

Our nation has come to place a great premium on privacy.\textsuperscript{544} If a balancing approach were employed,\textsuperscript{545} the scales would tip drastically toward maintaining the privacy of personal information included in notary journals and away from any interest claimed by the public to such personal data.\textsuperscript{546} The general public simply has no reason to be allowed to access information so susceptible to misuse. Notary journals are not for general public reading or for fishing expeditions of the curious or dishonest.\textsuperscript{547} The office of notary is a public office, charged with the obligation to serve public interests such as the confidentiality of notarial records.\textsuperscript{548} The public is entitled to expect no less of its public officials, and the legal system must demand no less of notaries public. The office of notary public cannot be exempt from effectively addressing and legitimately respecting these heightened privacy interests.

\textsuperscript{543} See Closen, supra note 8, at A24 (referring to "the already-tarnished image of U.S. notarizations"). "[N]otaries are often confronted with doubts about their exact duties and about how to properly perform those duties." Bruno & Closen, supra note 33, at 495–96.

\textsuperscript{544} See supra notes 41–86 and accompanying text.

\textsuperscript{545} Although balancing tests are popularly and variously employed throughout legal fields, the authors urge against use of such an approach at all in this context. But other writers have occasionally made reference to the application of a balancing test here. See Van Alstyne, supra note 6, at 785 (suggesting that "[t]he public's right of access to the notary's journal must be weighed against the document signer's right to privacy").

\textsuperscript{546} Indeed, there is no place whatsoever for a balancing approach to be employed that would result in ready access to the general public to all of the information in particular journal entries. The general public has no interest in the contents of notary journals. Occasionally, document signers themselves and identifiable third parties may have genuine business or financial justifications for wanting to determine the legitimacy, or lack thereof, of notarizations of signatures. Then and only then should those signers or third parties be entitled to pursue access to relevant information through a secure procedure established and overseen by the governmental agencies that commission and supervise notaries public. See Van Alstyne, supra note 6, at 785. Van Alstyne remarks that notary journal entries "are not intended for public reading per se. Unless a person seeking to view a notary journal and its entries is doing so with a purpose concerning the validity of or a challenge to a specific notarial act then the request to view the journal is suspect." Id.

\textsuperscript{547} See NNA NOTARY PUBLIC CODE, supra note 12, § VIII-B-1 cmt. (stating that the purpose of this section of the Code is to put "sufficient restraints on the parties seeking the information to prevent 'fishing expeditions'").

\textsuperscript{548} See the respective codes of ethical conduct of the American Society of Notaries, supra note 23, and the National Notary Association, supra note 12; see also Wis. STAT. ANN § 137.01(5m) (West Supp. 2000) (declaring notary records to be confidential).
The legislatures should accept what notary authorities recognize, that the journal is "the notary's most important notarial tool,"\textsuperscript{549} and they should enact statutes mandating that notaries maintain journals. "[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."\textsuperscript{550} Next, the legislatures and the notary profession must take appropriate steps to recognize the privacy concerns of the general public and to safeguard the privacy interests of document signers. The proper role of the notary public is authenticating signatures on documents, not enabling public access to information about signers or their documents. The legislation enacted in California and Wisconsin represents the beginning of what must become a nationwide trend to implement far more thorough laws guaranteeing the confidential status of notary journals and protecting the contents of those journals from unauthorized disclosures, because Director General Penrose was quite correct that criminals will otherwise take advantage of the opportunities to obtain and misuse private information.\textsuperscript{551}

\textsuperscript{549} Van Alstyne, supra note 2, at 802.
\textsuperscript{550} Closen & Shannon, supra note 22.
\textsuperscript{551} See Podgers, supra note 28.