To Swear . . . or Not to Swear Document Signers: The Default of Notaries Public and a Proposal to Abolish Oral Notarial Oaths

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INTRODUCTION

[O]ur system would crumble if people didn’t believe in the promise to tell the truth.¹

Annually in this country, millions of governmental and commercial documents include the notarizations of the signatures of one or more of the document signers.² Among the features of many of those notarizations is supposed to be the administration of oral oaths or affirmations³ to the signers.⁴ “Most notarial certificates recite they are

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3. Affirmations are somewhat different than oaths, although both have the same legal consequences. PETER J. VAN ALSTYNE, NOTARY PUBLIC ENCYCLOPEDIA 13 (2001). (“Such declarations or affirmations are permitted in all jurisdictions in the United States. They have the same force and effect in law as statements made under oath.”) See infra notes 68-86 and accompanying text.

4. See generally Michael L. Closen, The Lost Art of Administering Notarial Oaths, AM. NOTARY (Am. Soc’y of Notaries, Tallahassee, Fla.), 2d Quarter 2001, at 6. One of the principal types of notarial acts is the jurat, which is a notarization of the present signature of a document signer who also swears to or affirms the truth of the substance of the document. An affidavit is one of the most common documents that typically contains a jurat. “An affidavit is any voluntary ex parte statement reduced to writing and sworn to or affirmed before
' subscribed and sworn to' before the notaries who witness them. Indeed, the more than 4.5 million United States notaries perform almost all of the many millions of notarizations, and those notaries are supposed to some person legally authorized to administer an oath or affirmation. "3 AM. JUR. 2d Affidavits § 1 (2000). "An oath does not necessarily become an affidavit, but an affidavit does necessarily include an oath." RICHARD B. HUMPHREY, AMERICAN NOTARY MANUAL 136 (4th ed. 1948).

5. Closen, supra note 4, at 6. The notarization described is the "jurat." See Administering Oaths, Affirmations and Jurats, NAT'L NOTARY (Nat'l Notary Ass'n, Canoga Park, Cal.), Mar. 1999, at 23 [hereinafter Administering Oaths] ("[A] jurat demonstrates the signer has sworn to the truthfulness of a document's contents.").

Affidavits and depositions... are formal classes of documents requiring swearing or affirming... [A]n infinite number of documents require... verification. Verification is the confirmation of the truth of facts in a document, attested by swearing or affirming. Virtually every paper submitted to a court needs verification. Countless numbers of documents in courts, commerce and governmental administration require verification.

ALFRED E. PIOMBINO, NOTARY PUBLIC HANDBOOK 71 (1996); see also Debby Kearney, Acknowledgments v. Oaths, NOTARY VIEW, Winter 1993, at 6. Kearney points out that the administration of oaths is among the "two most performed notarial acts." Id. Presumably, she means that oaths are supposed to be performed that often, rather than that oral oaths are administered so frequently by notaries.

6. See The NNA 2002 Notary Census, NAT'L NOTARY (Nat'l Notary Ass'n, Canoga Park, Cal.), May 2002, at 12, 15 (announcing the total number of U.S. notaries to be 4,528,522); see also Michael L. Closen & Christopher T. Shannon, The 10 Commandments of Notarial Practice for Lawyers, FLORIDA BAR NEWS, June 1, 1999, at 32; see also Michael L. Closen, Why Notaries Get Little Respect, NAT'L L.J., Oct. 9, 1995, at A23 (opining that nearly 4.5 million notaries represents "a preposterous overabundance" of them). One associated concern is the excessive number of unnecessary notarizations that are performed in this country. VAN ALSTYNE, supra note 3, at 241. ("Notarial overkill, while on the surface, is benign. But, when effectuated on a large scale, notarial overkill can bring about deleterious effects from which it is overwhelmingly difficult to recover."); Closen & Shannon, supra, at 32. ("One reason for the overabundance of underqualified notaries... is the millions of useless notarizations that are performed.")

7. Michael L. Closen, Reform the Potential Attorney-Notary Conflict, NAT'L L.J., July 6, 1998, at A24. ("Millions of documents are notarized every day by the more than 4.2 million U.S. notaries."). It should be noted that some governmental officials (other than notaries) are given notarial authority by various statutory provisions. For instance, "[t]he following persons may take an oath, affirmation, or acknowledgment in the state [of Alaska]: (1) a justice, judge, or magistrate of a court of the State of Alaska or of the United States; (2) a clerk or deputy clerk of a court of the State of Alaska or the United States; (3) a notary public; (4) a United States postmaster; or (5) a commissioned [military] officer." ALASKA STAT. § 09.63.010 (Michie 2000). In Mississippi, "ex officio notaries public" include "[a]ll justice court judges and clerks, circuit and
administer the prescribed oral oaths and affirmations. State and territorial statutes everywhere require oaths or affirmations for certain specified kinds of notarizations, and especially for jurats, verifications, and affidavits. The administration of the oaths and affirmations subjects the document signers to the legal obligations of truthfulness and to possible sanctions pursuant to the law of perjury and false swearing for knowing falsifications. Moreover, many chancery clerks, and assistant secretaries of state... by virtue of their offices, and possess all the powers and discharge of duties belonging to the office of notary public." [MISSISSIPPI] NOTARIES PUBLIC APPLICATION & REFERENCE GUIDE 6 (1997). Recently enacted legislation in Rhode Island "[g]rants notary powers to city and town council members and two police officers from each state and local police department." John Jones, Legislative Updates, AM. NOTARY (Am. Soc'y of Notaries, Tallahassee, Fla.), 4th Quarter 2001, at 23. And "[i]t is clear... that immigration officers have the authority to administer oaths." U.S. v. Chu, 5 F.3d 1244, 1248 (9th Cir. 1993) (citing 8 C.F.R. § 287.5 (1993). See also Kumpe v. Gee, 187 S.W.2d 932, 934-35 (Tex. App. 1945) (discussing the authority of certain public functionaries, such as United States foreign consular officials and officers in the United States military forces, to perform notarial responsibilities).

8. While the most common name for such notarizations is the "jurat," they may also be labeled differently. See, e.g., [WYOMING] NOTARIES PUBLIC HANDBOOK 9 (1999), ("Jurats are the authentication of a signature made under oath or affirmation."); [MICHIGAN] NOTARIES PUBLIC GUIDE (1999), (Where "the jurat indicates that the document was 'sworn to before me,' then an oath must be administered."); JESSE WHITE, [ILLINOIS] NOTARY PUBLIC HANDBOOK (2000) ("Sometimes referred to as a 'jurat,' verification upon oath or affirmation is a declaration that a statement is true and was made by a person upon oath or affirmation).

9. Thomas W. Tobin, The Execution "Under Oath" of U.S. Litigation Documents: Must Signatures Be Authenticated?, 31 J. MARSHALL L. REV. 927, 928 (1998) ("Every state requires that interrogatories and other responses to discovery demands be either verified or answered under oath. Some states also require the verification of pleadings.").

10. EDWARD MILLS JOHN, THE AMERICAN NOTARY AND COMMISSIONER OF DEEDS MANUAL 47 (2d ed. 1904) ("An affidavit ... is a declaration or statement in writing, sworn to or affirmed before some officer having authority to administer an oath or affirmation."); VAN ALSTYNE, supra note 3, at 12. ("Affidavits are used commonly throughout the legal system and in business. Whenever a signature to an affidavit is notarized, and not all affidavits are notarized, it must be notarized by a jurat.").

11. Kearney, supra note 5, at 6 ("A person who makes a false oath or affirmation is subject to criminal charges for perjury."). Under federal statutes, perjury results when a person under oath "willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true." JOHN, supra note 10, at 55. The purpose of the notarial oath or affirmation is to lend credibility to an instrument, because the document signer is identified and vows to the truth of its contents—not because the notary has verified the accuracy of its contents. Notaries are not the document police. "Notarizations do
private documents also include notarial certificates because one or more of the parties decide to include them, although the notarial language is not required by statute. A faulty notarization, including a fault concerning the required oath or affirmation, may subject an instrument to legal challenge, a finding of the instrument's invalidity, and consequently to the unraveling of the underlying transaction of which the instrument is a part. The Idaho Notary Public Act even contains a unique provision to the effect that the "[f]ailure of the notary public to administer an oath or affirmation when the notary certificate indicates that he has administered it invalidate[s] the notarial act." Hence, the oral notarial oaths and affirmations constitute important elements of many current governmental and not prove, legalize, validate or make enforceable a document.... The notary merely certifies that the oath was administered to the signer, but never certifies that the document contents are true." Notarial Certificate Wording Is Your Wording, THE NOTARY, Nov./Dec. 2001, at 4 [hereinafter Notarial Certificate]. "The notarization is a transaction separate and apart from the document itself. It provides security to the people relying on the transaction that the signature was not made by an imposter, but rather by the person who is identified as the signer." Id.

12. Michael L. Closen, 10 Steps To Sound Risk Management For Companies with Notaries, NAT'L NOTARY (Nat'l Notary Ass'n, Canoga Park, Cal.), Nov. 2001, at 25; Closen, supra note 4, at 7 ("The foremost effect of the failure to administer oral oaths or affirmations is the risk to the validity of notarized signatures."). As one example, in Schmidt v. Feldman, 497 S.E.2d 23 (Ga. App. 1998), an affiant was not sworn by the notary who executed the jurat portion of an affidavit. The appellate court concluded that, because the affidavit was not "sworn to," the affidavit itself was invalid. In turn, the suit of which it was an essential part was dismissed due to the omission of this vital jurisdictional element.

At the very least, the worth of a document may be diminished because "[s]ome courts have concluded that document signers to whom oral oaths are not actually administered are not bound by the law of perjury." Closen, supra note 4, at 7. See, e.g., State v. Assuntino, 429 A.2d 900 (Conn. 1980) (concluding that the failure to obtain an oath or affirmation in support of a wire tap application rendered the wire tap order invalid); see also Understanding Oaths and Affirmations, NOTARY VIEW, SPRING 1995 at 4 (concluding that "[t]he lack of understanding [by notaries] of these basic duties [of taking acknowledgments and administering oaths and affirmations] causes confusion and often leads to errors in notarizations, even among the most experienced notaries").

13. Idaho Code, § 51-117 (c) (Michie 2000). Of course, notary authorities regularly warn of the risks of incomplete and erroneous notarizations.JOHN, supra note 10, at 2 ("Grave complications are likely to arise from a notary's mistakes ... "). An improper notarial acknowledgment or jurat can end up "perhaps undoing the very document" on which it appears. Leon Friedberg, Notaries and the Law: Working with the Legal System, NOTARY BULL. (Nat'l Notary Ass'n, Canoga Park, Cal.), Oct. 2001, at 13.
commercial transactions.\textsuperscript{14} Our governmental and commercial systems truly depend upon vows of truthfulness.

However, for a host of reasons, the notarial oath and affirmation administration function is widely misunderstood, disparaged, and neglected. The fact is that at least eighty percent to ninety percent of the time notaries do not actually administer the oral oaths or affirmations which are supposed to be performed.\textsuperscript{15} "The consequence of the failure of notaries to really administer such oaths or affirmations constitutes a disservice to document signers, to the third parties who rely upon notarized signatures, and to the office of notary public."\textsuperscript{16} The effects include both a significant fault with many governmental and commercial

\textsuperscript{14} The oaths and affirmations cannot be viewed in isolation from the complete notarial process, including especially the recital in the notarial certificate that it has been sworn to and the notarial seal which is typically stamped or impressed onto the certificate. The historic "affixation of a [notary] seal has impart[ed] an appropriate sense of officiality." \textit{Do Use A Notary Seal On Each Document}, NOTARY BULL. (Nat'l Notary Ass'n, Canoga Park, Cal.), Aug. 1995, at 11. It must also be remembered that the notary is a commissioned public officer whose official status contributes to the stature of the oath or affirmation and the whole notarization. \textit{See generally} Michael L. Closen, \textit{The Public Official Role of the Notary}, 31 J. MARSHALL L. REV. 651 (1998) (discussing the various features of the official status of notaries).

\textsuperscript{15} One notary survey found that notaries failed to administer oaths ninety one percent of the time. \textit{See} PIOMBINO, \textit{supra} note 5 and accompanying text. Additionally, there is considerable anecdotal evidence that notaries fail to actually administer oral oaths and affirmations. As an example, in one perjury trial a notary who was a secretary in a lawyer's office "testified she never administered an oath in the process of notarizing affidavits." \textit{White v. State}, 717 P.2d 45, 47 (Nev. 1986).

If notaries perform notarizations without document signers personally present, then there can be no oral oaths or affirmations administered to those absent signers. "Undoubtedly the most frequent and most serious omission by notaries in law offices and other settings when performing notarizations is the failure to require the presence of document signers." \textsuperscript{16} Closen & Shannon, \textit{supra} note 6, at 32. "This glaring failure permits impostors and other scoundrels to far more readily commit successful document fraud." \textit{Id.} Moreover, the law of perjury or false swearing could not apply either in such cases. \textit{See generally}, John C. Anderson & Michael L. Closen, \textit{Document Authentication in Electronic Commerce: The Misleading Notary Public Analog for the Digital Signature Certification Authority}, 17 J. MARSHALL J. COMPUTER & INFO. L. 833, 855-68 (1999) (detailing the problems and faults with notaries public in the United States).

\textsuperscript{16} \textit{Id.} at 6; \textit{see} VAN ALSTYNE, \textit{supra} note 3, at 23; ("When a signature to a document has been properly authenticated by a notary, the notarial certificate attesting to that fact is relied on by third parties."). PIOMBINO, \textit{supra} note 5, at xxii; ("[T]he advanced stage of decay and neglect that the office of notary public has suffered . . . hold grave consequences.").
instruments, and also a fundamental fault with the notarial system itself. The question that necessarily follows is whether problems with oral oaths and affirmations of notarizations can be effectively remedied, or whether the practice should be abolished altogether. Legally, it must be emphasized that an oath or affirmation can be achieved in writing at least as effectively as it can be orally. Arguably, an oral notarial oath or affirmation is not effective until it has been noted in a written certificate of notarization anyway.

17. See Deborah M. Thaw, There's No Room for Cheating Among Notaries, NAT'L NOTARY (Nat'l Notary Ass'n, Canoga Park, Cal.), Nov. 2000, at 5 ([W]here I to abbreviate this ceremony [in conjunction with oral notarial oaths and affirmations], what would I be encouraging? Over time, the meaning of the oath would begin to deteriorate. Whenever Notaries perform poorly and don't adhere to basic principles and proven practices, there is the danger of undermining the notarial act.).

18. E.g., WEST VIRGINIA NOTARY HANDBOOK (1998), at 8 ("Oaths can be administered either in writing or verbally."); HUMPHREY, supra note 4, at 136 ("When one orally swears, he is making an oath; when he swears in writing, he is making affidavit."); Interestingly, most oral oaths are also recorded or documented in writing. Thus, when public officials are sworn into office, they also execute written oaths of office. When document signers swear to or affirm the truth of the substance of the instruments they sign before notaries, the notaries execute written jurats, attached to the documents as the certificates of notarization and evidencing that the documents have been "sworn to." Further, a thorough notarization should also include the completion by the notary of a journal entry reflecting the details of the official act performed. Adviser Column, NAT'L NOTARY (Nat'l Notary Ass'n, Canoga Park, Cal.), Sept. 1999, at 29 ("Like any other notarial act, the administration of the oath or affirmation should be recorded in the Notary journal, and the oath-taker should sign the journal as the principal."). Establishing or creating a paper trail to document an oath or affirmation is a sound practice to provide better evidence of what transpired than a mere oral oath or affirmation provides. Interestingly, the oaths of office taken by notaries before entering upon their official positions are accomplished in writing even if orally administered as well. Thun, supra note 1, at 10.

19. UNIFORM LAW ON NOTARIAL ACTS § 7(a) ("A notarial act must be evidenced by a certificate signed and dated by a notarial officer."); HUMPHREY, supra note 4, at 10 ("[E]very notarial step taken, becomes effective only if and when it shall have culminated in [the notary's] official certificate."); Understanding Oaths and Affirmations, supra note 12, at 4 (The notary "must complete a proper notarial certificate indicating that an oath or affirmation was taken."); "The certificate is the notary's official statement regarding the notary act." Jennifer Workman, Avoid Issues of Notary Misconduct, AM. NOTARY (Am. Soc'y of Notaries, Tallahassee, Fla.). 4th Quarter 2001, at 13. Moreover, the notarial seal has historically served as the important visible symbol of the notary office and its authority. See generally Karla J. Elliott, The Notarial Seal—The Last Vestige of Notaries Past, 31 J. MARSHALL L. REV. 903 (1998) (discussing the historical place of the notarial seal and its contemporary
This Article will begin by exploring the history of oral oaths, including the purposes of oaths and affirmations. Next, this article will address the law of perjury and false swearing as it relates to the current practice of notarial oaths. This article will also examine the history of notaries public and their authority to administer oral oaths and affirmations. This article will also describe the current practices with respect to oral notarial oaths and affirmations, including the various difficulties encountered on all sides of the setting (that is, from the point of view of: oath-takers, affirmation-takers, parties who rely upon documents bearing notarizations of signatures, notaries public, and employers of notaries public). Finally, this article will suggest that oral notorial oaths and affirmations should be abolished and replaced with written self-authentication procedures comparable to those already in place for some twenty-five years to cover certain limited circumstances under federal law, and adopted in several states as well.

I. BRIEF HISTORY OF ORAL OATHS AND AFFIRMATIONS

A. Oral Oaths

Oaths have been utilized in cultures spanning the globe since the beginning of recorded history. The origin of oaths as significant symbolic gestures in public and private contexts dates back at least 4500 to 5000 years. Literacy was not widespread at the time, so people recognized that the oral oath was meaningful because it
was accompanied by physical acts or gestures which were understood to be important and meaningful. For instance, standing up, uncovering the head, raising the right hand, and touching an altar (or later a Bible or other religious text) became universally recognized even by those who could neither write nor read. “An oath made solemn by touching a sacred object” became known as a corporal oath. Additionally, since members of the general public either practiced religion, possessed religious beliefs, or at a minimum were aware of organized religion, religious references also served to impress upon oath-takers (including those who could not write or read) the significance of the oath. The references to deities and religions were important to “keep the person from breaking an oath.”

The first recitals of oaths and performances of accompanying gestures as features of legal functions have been traced back at least to the ancient period of about 3000 B.C. to 2500 B.C. During that period in Mesopotamia, the Babylonians and Sumerians employed hand gestures as

24. See id. at 12 (quoting Professor of Law Bernard Hibbits of the University of Pittsburgh as saying, “In societies where few if any people could read these gestures were an important way of demonstrating to the populace that an official act had taken place”). Interestingly, the illiteracy of the masses played a significant role in the origination of the post of notary public in both ancient times and in the early days of colonial America. Trusted and literate notaries were needed to serve as the record keepers of important transactions. “During the time of ancient Rome, few lay persons could write, and signatures were all but impossible” which contributed to the origin of the post of notarius. ANDERSON’S MANUAL FOR NOTARIES PUBLIC 7 (8th ed. 1999) [hereinafter ANDERSON’S MANUAL].

25. Oaths generally “[s]hould be administered while standing with the head uncovered and the right hand raised.” JOHN, supra note 10, at 303. “A Jewish person should be sworn on the Old Testament; a Mohammedan on the Koran.” ANDERSON’S MANUAL, supra note 24, at 17.

26. BLACK’S LAW DICTIONARY 1099 (7th ed. 1999); 67 C.J.S. Oaths & Affirmations § 2, at 6 (“A corporal oath is an oath taken by lifting up an arm or other bodily member or by any bodily assent to the oath.”). Similar to the visual components of the corporal oath administration process there came to be visual components on notarized instruments themselves in the form of the waxen seals which served as signatures on written documents. See Michael L. Closen & G. Grant Dixon III, Notaries Public from the Time of the Roman Empire to the United States Today, and Tomorrow, 68 N.D. L. REV. 873, 875 (discussing the use of clay or metal disks engraved with the family coat of arms and impressed into hot wax that had been dripped onto a document).


28. Thun, supra note 1, at 12.
part of their more important legal actions. Oaths are mentioned throughout the Bible. The origins of oaths as part of legal proceedings has been traced back to early Roman and Germanic law. In the [ancient] Greco-Roman world, the practice of taking oaths was ubiquitous. Oaths were not restricted to the law court but permeated the political, social and religious life of all people who lived in the Mediterranean world. Indeed, some philosophers of the time "criticized the trivial use of oaths and discouraged the practice of using oaths at all."

During the medieval period, some oath-takers were tested by being forced to submit to trials by ordeal. "They would have to hold a hot iron, be immersed in water, or perform other dangerous physical acts. If they survived, their oath was deemed to be good. If they failed, their oath was held to be bad."

In the earliest judicial systems, oaths became especially important. "The use of oaths in legal proceedings in which evidence is given is an ancient part of the common law. "[T]here is evidence that the use of oaths extends back to Roman times. Throughout history, an oath has served a powerful purpose. "It serves a symbolic function: a weighty reminder of one's obligation to the truth." In reality, the main reason for the oath is to deter perjury. "[T]he oath's advantage is not just to help in prosecuting artful dodgers; it's in impelling testifiers not to dodge in the first place."

29. Id.
31. The oath's "use was a settled practice among the ancient Romans." HUMPHREY, supra note 4, at 141. See infra note 48 and accompanying text.
32. Fitzgerald, supra note 30, at 732 [2].
33. Id.
34. Thun, supra note 1, at 12 (quoting Professor Bernard Hibbitts of the University of Pittsburgh School of Law).
35. Indeed, the offense of perjury was initially limited to occurrence during legal proceedings. George W. Aycock, Note, Nothing but the Truth: A Solution to the Current Inadequacies of the Federal Perjury Statutes, 28 VAL. U. L. REV. 247, 247 (1993) ("Perjury was limited to false oaths in judicial proceedings under the common law.").
37. "Oaths, affirmations, and jurats are a critical part of the legal process . . ." Administering Oaths, supra note 5, at 23.
38. Katie Hickox, No Truth, No Consequences: If Congress Wants to
For as the United States Supreme Court proclaimed in a 1945 opinion: "All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth." 39

In modern times, many statutes require the administration of oaths or affirmations. 40 Some of those laws relate directly to judicial proceedings, such as statutes establishing the requirements for affidavits, 41 while other laws invoke the obligation for oaths and affirmations — including affidavits — in non-judicial settings. 42 Most often, such laws do not specify the precise formalities or language to which oaths and affirmations must adhere. 43 However, even when statutes prescribe specific formalities, the law only requires substantial compliance. 44

Oaths have become so prevalent and commonplace in modern times that many people may not take special note of them or appreciate how significant they truly are. 45 The Pledge of Allegiance to the flag is an oath taken daily by millions of our citizens. 46 The exchange of wedding vows is

Discourage Testifiers from Lying, Maybe it Should Ask Them to Tell the Truth, WASH. MONTHLY, Nov. 1992, at 28.


40. See John H. Wigmore, Notaries Who Undermine Our Property System, 22 ILL. L. REV. 748, 749 (1928) ("The notary's certificate of acknowledgment of a deed is the pillar of our property rights. All titles depend on official records; and all official records depend on the notary's certificate of acknowledgment."). And a jurat must be sworn to; such statutes include those for the administration of oaths of office to elected and appointed officials. See supra note 5; infra notes 65-71 and accompanying text. Notaries public must take an oath of office upon their initial and renewal appointments. See, e.g., 5 ILL. COMP. STAT. ANN. § 312/2-104 (West 1993) (setting out the required "oath" for notaries public upon their appointment to office).

41. HUMPHREY, supra note 4, at 137 (pointing out that the affidavit "is one of the commonest things in the court room").

42. Incidentally, an affidavit is also "one of the commonest things in the business world." HUMPHREY, supra note 4, at 137-38. A jurat is one of the "component parts" of an affidavit. ANDERSON'S MANUAL, supra note 24, at 18.

43. U.S. v. Yoshida, 727 F.2d 822, 823 (9th Cir. 1983) ("No particular formalities are required for there to be a valid oath."); PIOMBINO, supra note 5, at 68 ("While an oath is an unequivocal act, it requires no particular ritual.").

44. "Considerable latitude is generally allowed as to the form in which the oath or affirmation may be administered, and a substantial compliance therewith is sufficient." 3 AM. JUR. 2d Affidavits § 11 (1998).

45. WORLD BOOK ENCYCLOPEDIA Oath 478 (50th ed. 1966)("All of us are familiar with oaths in everyday life.").

46. Id. (An "oath is a pledge or promise."). Thus, the pledge of allegiance is a kind of oath, just as is the oath of allegiance taken by an individual upon being admitted to citizenship. Id. at 479.
an exchange of oaths of loyalty and faithfulness. Individuals take oaths of admission or membership upon entry to numerous organizations from the Boy Scouts and Girl Scouts, to sororities and fraternities, to the various branches of the armed forces. "[A]liens take an oath of allegiance on being naturalized" as citizens. Countless people give testimony under oath in all manner of legal proceedings. Before individuals undertake public service as election judges, jurors, notaries public, arbitrators, and police officers, they submit to oaths of diligence and fidelity. "High school students filling out college applications must attest to their truthfulness. Some states won't even let you drive unless you first take an oath. There is no limit, it often seems, to the venues in which Americans lean on the oath to steer their consciences to honesty."

Notaries themselves take oaths of office upon entry to and renewal of their official positions. It appears that notaries public in this country, because they serve as governmental officers, have always been required to take oaths of office upon entering their posts. Indeed, as early as the 1600s, notaries in the American colonies were required to take oaths of office before commencing their official duties. An average of about 4000 notary

47. “[N]otaries are official witnesses on behalf of the state to certain transactions, among which in [Florida, Maine, and South Carolina], is the entering into the oaths of marriage.” VAN ALSTYNE, supra note 3, at 213. Other common extrajudicial oaths include the oath of a person to “stop smoking cigars or drinking intoxicating liquors,” or “to show good faith in a private transaction.” WORLD BOOK ENCYCLOPEDIA, supra note 45, at 478.

48. Id. at 479 (“Military Oaths are taken by persons who enter the armed forces.”).

49. NEW AMERICAN ENCYCLOPEDIA Oath 1022 (1939).

50. “The Judicial oath is probably the most common form of pledge. It is used in a court of law. The person taking such an oath swears to the court that all his statements are true. A witness at a trial is given such an oath.” WORLD BOOK ENCYCLOPEDIA, supra note 45, at 478. NEW AMERICAN ENCYCLOPEDIA, supra note 49, at 1022 (“[W]itnesses in court trials take an oath as to the truth of evidence to be given by them.”).

51. See HUMPHREY, supra note 4, at 136-37 (noting that oaths are administered to jurors and election officers).

52. Hickox, supra note 38, at 28.

53. JOHN, supra note 10, at 4 (“A [notarial] commission, or license, is issued on the filing of the bond and oath of office . . .”).

54. JOHN, supra note 10, at 4 (“An oath of office is required from notaries in all the States.”); see also HUMPHREY, supra note 4, at 19 (noting that a “bond and oath [are] required of a notary public”).

55. See John E. Seth, Notaries In The American Colonies, 32 J. MARSHALL L.
commissions in the United States are issued each business day, and the contemporary commissioning process includes oaths of office for all of them. Most of those oaths are completed in writing, rather than being orally administered. Hence, the very first example of an oath or affirmation confronted by most notaries in the course of their official notarial responsibilities is written, rather than oral.

An interesting historical sidelight is that some notarial oaths of office mandated by the states have required the notarial applicants to "acknowledge a belief in God." When there has been no alternative for notary applicants, some applicants have sued to challenge the constitutionality of such oath requirements. Ultimately, the courts have found unconstitutional the officially mandated references to a God or a Supreme Being in such notary oaths of office.

Rev. 863, 874 (1999) (setting out, for example, the notarial oath of office of 1647 of the General Court of Massachusetts). In 1662, in the Colony of Virginia and in 1663, in the Colony of Maryland, the first notaries were appointed and sworn into office. Id. at 879-80. Additionally, the occasional colonial notary acting with authority of the Archbishop of Canterbury had also been sworn into office in England. Id. at 876 (noting the example of English notary Richard Jenney's who in 1760 was practicing in the Massachusetts Bay Colony "by Royal Authority duly admitted and sworn.").

56. "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." Closen et al., supra note 2, at 252. "On every business day in this country, an average of some 4,000 notary commissions expire." Michael L. Closen, The De Facto Notary Doctrine and How To Avoid Tardy Notarizations, THE NOTARY, May/June 2001, at 4.

57. In New Mexico, it is contemplated that an oath of office for a notary public will be executed in writing and filed with the state. See [NEW MEXICO] NOTARY PUBLIC HANDBOOK 8 (1996) (quoting N. M. STAT. ANN. § 14-12-3(B) (Michie 1978)) (stating that "[e]ach applicant for appointment as a notary public shall submit to the Secretary of State the oath prescribed by the constitution."). During the time this paper has been in preparation, the author's Illinois commission was about to expire, and the author filed a renewal application for a fourth term to be an Illinois notary public (for years 13-16). On each of the four occasions the author has applied to be an Illinois notary, the oath was executed in writing, was not administered orally, and was filed in the office of the Secretary of State. See also JOHN, supra note 10, at 4 (stating that the required notarial oath of office "is usually attached or noted on their [notary] bond").

58. See Michael L. Closen & G. Grant Dixon III, Notaries Public From the Times of the Roman Empire to the United States Today and Tomorrow, 68 N.D. L. Rev. 873, 880 (discussing the legal attacks upon the requirement in some notarial oaths of office that the declarants acknowledge their belief in a God).

B. Affirmations

An affirmation, unlike the standard oath, does not invoke a reference to a Supreme Being. An affirmation is "a solemn declaration, but not under oath: permitted to one who has conscientious objections to taking oaths." Hence, an affirmation may be religion-neutral, or it may constitute a serious religious vow (simply omitting reference to swearing, or to a God, or to a Supreme Being). The key to either an oath or affirmation is that the declarant should become lawfully bound in good conscience to utter the truth.

While it is probably thought that the availability of the affirmation as an alternative to the traditional oath constitutes a relatively recent development, our country has had two centuries of affirmations. Indeed, in 1789, the United States Constitution included the option for the President to "take the following [prescribed] Oath or Affirmation" of office. An 1850 federal statute declared that oaths, acknowledgments, and "affirmations" which had theretofor been taken or made before a Justice of the Peace could thereafter be taken or made before a Notary Public with equal legal force and effect. An 1878 law prescribed the oath or affirmation of office required of federal civilian and military officials.

Incidentally, in England, affirmations were recognized as an adequate substitute for an oath. The 1890 edition of the authoritative Brooke's Notary, comments that England's notaries had always believed they were authorized to

60. ANDERSON'S MANUAL, supra note 24, at 17 ("An affirmation is a solemn declaration without oath.").
62. An alternative to an oath is a "solemn religious affirmation." JOHN, supra note 10, at 55.
63. "All witnesses are to be sworn according to the peculiar ceremonies of their religion, or in such manner as they may deem binding on their own consciences." JOHN, supra note 10, at 55.
64. U.S. CONST., art. II, Sec. 1.
65. The 1850 law was reenacted continuously. See, e.g., JOHN, supra note 10, at 52 (quoting U.S. Rev. Stat. § 1778 (1878)).
66. Id. at 53 (quoting U.S. Rev. Stat. § 1756 (1878)).
administer oaths and "affirmations." The English Oaths Act of 1888 specifically recognized and approved of affirmations as alternatives to traditional oaths.

Individuals should have the opportunity to make a legally binding vow that does not invoke a reference to the word "swear" or "God." "Some religious groups, such as the Quakers, do not approve of swearing by an oath." Atheists should also enjoy such a choice. The English Oaths Act of 1888 expressly approved of the taking of an oath or affirmation by a person who had "no religious belief," announcing that such lack of religious belief "shall not for any purpose affect the validity of such oath." Interestingly, under that Oaths Act the affirmation-taker was required to state the reason for the affirmation preference. In the United States, some old forms of affirmations even required affirmation-takers to affirmatively refuse to swear an oath and to solemnly affirm instead. To the extent that U. S.

69. "Those persons who consider it blasphemous to invoke God's name in worldly matters, are permitted to give an affirmation." Close et al., supra note 27, at 187.
70. "Those persons who do not believe in a Supreme Being . . . are permitted to give an affirmation." Close et al., supra note 27, at 187. Statutory and case law have long provided methods for the administration of a legally recognized pledge of truthfulness to one who is an atheist. “[If a person entertains no religious belief [,] he may be permitted to solemnly declare and affirm.” Bookman v. City of New York, 93 N.E. 190, 191 (N.Y. 1910). Certainly, notaries as public officers have the responsibility to treat all persons with equal respect and not to deny services on the basis of the religion or lack thereof of the consumers of notarial services. “The Notary shall not refuse to perform a lawful and proper notarial act because of the signer's race, nationality, ethnicity, citizenship, religion, politics, lifestyle, age, disability, gender or sexual orientation.” Notary Public Code of Prof’l Responsibility, Guiding Principle I, art. A-3 (Nat’l Notary Ass’n 1998). It should be noted, however, there were some old decisions that would have barred an atheist from taking an oath or affirmation. “One having no religion, believing in no God, and not accountable here or hereafter, cannot become a witness.” John, supra note 10, at 50.
71. English Oaths Act of 1888, § 3 (quoted in Cranston, infra note 105, at 416).
72. “Every person upon objecting to being sworn, and stating as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath.” English Oaths Act of 1888, § 1 (quoted in Cranston, infra note 105, at 416).
73. See John, supra note 10, at 304 (suggesting this affirmation language:
law has placed the responsibility largely upon oath-takers and affirmation-takers to see to it that they are given oaths or affirmations in conformity with their religious or non-religious beliefs, it has adopted an approach comparable to England's. However, attitudes about sensitive matters such as religious beliefs and personal autonomy have changed — though some notary statutes have remained the same. To not infringe upon anyone's privacy, people should not have to provide reasons for their elections to submit to affirmations rather than oaths. Perhaps, the officer administering the oath or affirmation should take the initiative and ask declarants whether they would prefer an oath or affirmation and whether they would prefer any other formalities to the ceremony. However, when serving

“...
as notary or arbitrator, the author employs a different approach. The more sensible practice certainly would seem to be for the officer administering the oath or affirmation to construct language and corporal elements that incorporate an oath or affirmation in one neutral and inoffensive ceremony, while at the same time creating sufficient dignity to be lawfully binding.77

Three other important features are shared by oaths and affirmations. First, just as there may be corporal elements attending the administration of an oath, an affirmation may also include comparable features.78 The legal consequence to the declarant is the same for both, namely that the one who makes the vow is bound to speak truthfully or to face criminal sanctions.79 In fact, the terms are regularly used interchangeably, and an oath is almost always understood to include an affirmation as well.80

Second, in order to become bound to make vows of legal consequence, the declarants must give some affirmative

laying their hands upon the Koran, they would reveal their specific religious choices. If done in the fashion mentioned, the notary should employ the least intrusive questions and manner so as not to go beyond the minimal inquiry or procedure necessary to both comply with the religious and personal scruples of the oath or affirmation taker and assure that a legally sufficient vow is achieved.

77. The author, when swearing in document signers, asks: "Do you solemnly swear or affirm that the contents of this instrument are true and correct?" Additionally, the author also asks the signers to stand and to raise their right hands as the questions are asked of them. These steps seem at one and the same time generic enough not to offend anyone, but serious enough to clearly signify the importance of the vow of truthfulness. Interestingly, the Illinois Notary Public Act requires all newly appointed notaries (including those who renew or reapply) to take an "oath" of office in writing, but that "oath" requires the notary to "solemnly affirm, under penalty of perjury" that the information provided is truthful. Thus, the Illinois law opts for the broader affirmation language as the sole form of the notarial oath. See 5 ILL. COMP. STAT. 312/2-104 (2001) (setting out the language of the notarial oath of office).

78. "For an affirmation, placing a hand over the heart is also an accepted gesture." Administering Oaths, supra note 5, at 23. "One form consists of the person taking the affirmation holding up his right hand while the officer repeats to him the words of the [affirmation]." ANDERSON'S MANUAL, supra note 24, at 17.

79. "The statutes in most states and other jurisdictions provide that an affirmation has the same force and effect as an oath." Id. Occasionally, the one term will be used to define the other. For instance, consider this definition of "oath," as "the affirmation of truth of a statement" (emphasis added). [WYOMING] NOTARIES PUBLIC HANDBOOK 4 (1999).

80. ANDERSON'S MANUAL, supra note 24, at 17 ("Generally, the term 'oath' includes an affirmation.").
indications of their willingness and intention to do so.\footnote{81} It is not enough for an individual to remain mute and to provide no outward sign of approval by conduct of some type. Words, the customary nod of the head, or some such observable behavior is required. Because of the serious nature of an oath or affirmation, a legal pledge will not be inferred.\footnote{82} Furthermore, the sign of approval of an individual must be unequivocal in order to result in a legally meaningful oath or affirmation.\footnote{83} Thus, ambiguous conduct would be unsatisfactory and insufficient to create the legal consequences for falsification that can attend an oath or affirmation. Without an unequivocal sign of a declarants' intention to commit to an oath or affirmation, any statement which is made remains an ordinary statement bearing no legal obligation to its truthfulness.\footnote{84}

Third, the prevailing view holds that a legally empowered individual must administer an oath or affirmation.\footnote{85} One older encyclopedia states that “[o]nly authorized

\footnote{81. Kearney, supra note 5, at 6(“A valid oath or affirmation requires the person taking the oath to give the notary some sign that signifies that he or she is bound in conscience to be truthful.”).}

\footnote{82. “There must be some overt act which shows that there was an intention to take an oath or affirmation on the one hand and an intention to administer it on the other; mere intention, not accompanied by an unambiguous act, is insufficient.” 58 AM. JUR. 2d Oaths and Affirmations § 18 (1989).}

\footnote{83. If there is no clear indication of an intent to submit to a legal vow, then by default any statement amounts only to an unsworn assertion. “Something must be present to distinguish between the oath and the bare assertion.” 39 Oaths and Affirmations § 13 (1999). “To make a valid oath or affirmation, there must be some overt act which shows there was an intention to take an oath or affirmation.” 3 AM. JUR. 2d Affidavits § 11 (1998). See also supra notes 81 and 82 and accompanying text.}

\footnote{84. “Is the formality [with administering oaths] necessary? . . . The answer to this question lies in the mind and intent of the oath-taker. The oath-taker must signify to the notary that he is bound in conscience to the truthfulness of that which is attested and that he knowingly and willingly accepts the threat of criminal penalties for untruthfulness” (emphasis added). Van Alstyne, supra note 3, at 290. “If the attention of the person making the affidavit is called to the fact that it must be sworn to and, in recognition of this, he is asked to do some corporal act and he does it, the instrument constitutes a statement under oath, irrespective of any other formalities” (emphasis added). 3 AM. JUR. 2d Affidavits § 11 (1986). To put it another way, a declarant must “knowingly assume the obligation of an oath.” 67 C.J.S. Oaths & Affirmations § 5 (1978). See also supra notes 81-83 and accompanying text.}

\footnote{85. “The officer who administers an oath must have legal and competent authority, or the person taking it before him, however false, cannot be convicted}
persons can administer oaths." This perception undoubtedly stems from the general, everyday thinking about oral oaths. It would be ludicrous to imagine an oath-taker or affirmation-taker standing in front of a mirror in order to administer an oath or affirmation to herself or himself. However, there is no reason the law cannot establish a self-authentication procedure, which could be undertaken in writing.

II. HISTORY AND ANALYSIS OF PERJURY

"It is not ordinarily a crime to tell a lie. The law of perjury is concerned only with false statements made under specific circumstances," where "the declarant" has "been sworn to speak the truth in a judicial proceeding or in a matter with legal consequences." The story of the origins and evolution of the offense of perjury is a fascinating one, especially when the violation known as false swearing is also considered. The view of perjury has not really changed very dramatically over the course of history. One student of the law of perjury has observed that "[b]ecause many perjury concepts remain unchanged, perjury's history is a living memorial to its past." Perjury was at first regarded to be a religious offense, rather than a legal one. "[P]erjury was a violation of the commandment not to take the name of the Lord in vain." Consequently, any penalty for perjury was inflicted by a higher authority rather than mere civil or criminal law. For example, "witnesses in ancient Israelite and Greek trials

of perjury." JOHN, supra note 10, at 48. "For an oath to be valid and binding, it must not only be administered by a person duly authorized to administer the particular oath, but it must be administered within such person's territorial jurisdiction." 58 AM. JUR. 2d Oath and Affirmation § 21 (1989). "These oaths can be taken in the cases pointed out by the law before the courts, judges of the courts, clerks of the courts, notaries public, commissioners of the circuit courts, and various other officers." 39 AM. JUR. Oaths and Affirmations § 9 (1942).

66. THE NEW AMERICAN ENCYCLOPEDIA 1022 (1939).
68. Aycock, supra note 35, at 247.
69. Fitzgerald, supra note 30, at 732.
were not usually placed under oath." The same was true for witnesses in ancient Athens. "To swear in the ancient world was to invoke the gods as both the witnesses and guardians of an oath," and the penalty for perjury "could even involve punishment after death." "In 1562-63 there came the first statute providing penalties for those who committed perjury and subornation of perjury.

Perjury was first prosecuted by private persons under the civil law, not by the state. "[M]ost witnesses were not placed under oath, and prosecution for false testimony did not depend on whether a witness testified under oath or not." Perjury was a religious or civil wrong, but not criminal. "Those suspected of giving false testimony were prosecuted by private citizens, for false testimony was viewed fundamentally as a civil offense, not a criminal one." Over time, the prevailing opinion about the purpose of the law of perjury changed. "The principal goal of perjury law must... be less to avoid the moral evil of lying under oath and more to avoid the consequences of faulty decisions based on false statements." There has never been and there is not any "truth police." The principal purpose of the law of perjury and false swearing must therefore be the deterrence of falsifications.

Presently, perjury is treated as a criminal offense rather than a religious or civil violation. Every jurisdiction has a statute defining perjury and declaring it to be a crime, sometimes a felony, but a misdemeanor in some

90. Id.
91. Id.
92. Id.
93. Id.
94. McDowell, supra note 36, at 27.
95. Fitzgerald, supra note 30, at 732.
96. Id.
98. The point is, that if lying under oath and affirmation is to occur, there are a host of barriers to the effective identification and prosecution of it after the fact. Thus, we will be far better served to attempt to scare people away from lying. See supra note 38 and accompanying text.
100. See, e.g., WYO. STAT. ANN. § 6-5-301(a) (Michie 2001) (describing that "[a] person commits [the felony of] perjury if, while under a lawfully administered oath or affirmation, he knowingly testifies falsely or makes a false
The modern formulation of perjury makes "both intentionality and materiality essential aspects of the crime." Hence, the falsification must have been knowingly committed, and it must be relevant and important.

After departure from the ancient view of perjury as a religious or civil offense, and with the statutory declaration of perjury as a crime, the traditional understanding has prevailed that perjury, when it occurs, happens as a part of some kind of judicial proceeding or process. For instance, the English Perjury Act of 1911 limited perjury to a falsification occurring "in a judicial proceeding." Broadly, such proceedings could include not only trial proceedings themselves, but also oral and written evidence and statements in such venues as depositions, submissions of affidavits and other documents, grand jury settings, and all kinds of judicial hearings. One commentator has opined, "[P]erjury subverts the judicial process and thus strikes at
our nation’s most fundamental value the rule of law itself.\(^{107}\)

In common parlance, most people who appreciate the distinctions probably refer to the shorthand of “perjury” to include the offense of false swearing as well. Indeed, legal publications regularly categorize materials on false swearing under the perjury heading.\(^{108}\) Yet, it is the case that false swearing should definitely be considered separately from perjury.

Our statutory crime of false swearing is to be distinguished from the crime of perjury. There are material distinctions between them. [T]he statutory offense [of false swearing] was designed to free the prosecution from certain technicalities of proof and to overcome the difficulties of obtaining conviction for acts including certain commissions of falsehood under oath not within the classification of perjury.\(^{109}\)

The offense of false swearing is more broadly defined than perjury. Therefore whenever there is a conviction for perjury there could also have been a conviction for false swearing. However, the reverse outcome does not necessarily follow. The principal distinguishing factor between false swearing and perjury is that “the false oath in perjury must be [made] in a judicial proceeding, whereas in false swearing it need not be [made] in such a proceeding.”\(^{110}\) Many jurisdictions have enacted provisions defining and criminalizing the separate offense of false swearing,\(^{110}\) and

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108. See, e.g., 60 AM. JUR. 2d Perjury 1059-1149 (1988) (Here, the annotation on “Perjury” covers both perjury and false swearing, though it notes that there are definite distinctions in the two terms.)
110. 70 C.J.S. Perjury § 2(b) (1987). Interestingly, the English Perjury Act of 1911 distinguishes between perjury in Section 1 and false swearing in Section 2, defining the offenses differently and providing for differing penalties (reprinted in CRANSTOUN, supra note 105, at 419-21). Perjury, under Section 1 of that law, can occur “in a judicial proceeding,” whereas false swearing, under Section 2, can occur “otherwise than in a judicial proceeding.” Id. A curious Arkansas law draws a slightly different distinction. It declares that false swearing occurs in “other than an official proceeding” (emphasis added). ARK. CODE. ANN., § 5-53-103 (a) (Michie 1997 & Supp. 2001).
111. See, e.g., WYO. STAT. ANN. § 6-5-303(a) (Michie 2001) (defining the crime of false swearing as occurring “other than in a judicial or administrative
it is most often classified as a misdemeanor.\textsuperscript{112} The Maine Notary Public Guide applies the correct terminology and refers to the distinct crime of false swearing. “Intentional falsehoods made while ‘under oath’ before a person qualified to take oaths are punishable as false swearing.”\textsuperscript{113}

The disturbing fact is that very few charges and prosecutions for perjury and false swearing are pursued by law enforcement agencies. “[P]erjury is a low priority for resource-strapped prosecutors.”\textsuperscript{114} In a 1995 report in the American Bar Association Journal, it was pointed out that “[s]ince 1980, . . . the number of people charged with making false statements or committing perjury in federal cases has hovered around 100.”\textsuperscript{115} That figure represents an almost unbelievably low average of less than seven federal prosecutions for perjury or false swearing each year. Simultaneously, there appears to be an ever-increasing incidence of falsifications. That same 1995 report included this observation: “Judges, lawyers and experts on the court system worry that perjury is being committed with greater frequency and impunity than ever before.”\textsuperscript{116} One federal judge remarked, “Perjury is like a naughty word never to be admitted or discussed publicly. It’s the justice system’s dirty little secret that no one wants to admit or confront.”\textsuperscript{117} Another federal judge commented: “Prosecutors say they have so many drug cases, so many white-collar criminal cases, so many bank robberies, that perjury falls to the bottom of the priority list.”\textsuperscript{118}

There has not been a universal classification of perjury or false swearing as a felony or a misdemeanor. And, not surprisingly then, the penalties for the two offenses have

\begin{footnotesize}
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\item See infra note 132 and accompanying text. See also the English Perjury Act of 1911, §§ 1-2 (infra note 132).
\item See, e.g., ARK. STAT. ANN., § 5-53-103 (c) (Michie1997) (announcing the offense of false swearing to be a misdemeanor). Numerous subject-specific statutes include references to the offenses of perjury and/or false swearing, often without defining them. In one Delaware statute about the regulation of harness racing by a state commission, the law declares that “[f]alse swearing on the part of any witness [before the commission] shall be deemed perjury and shall be punished as such.” DEL. CODE ANN., tit. 3, § 10029 (f) (2001).
\item [MAINE] NOTARY PUBLIC GUIDE 23 (1997).
\item Curriden, supra note 99, at 68.
\item Id. at 69.
\item Id. at 68.
\item Id. at 69 (quoting U.S. District Court Judge Marvin H. Shoob).
\item Id. at 70 (quoting U.S. District Court Judge Zita L. Weinshienk).
\end{enumerate}
\end{footnotesize}
varied markedly among the jurisdictions. Historically the penalty for perjury was harsh. "Penalties for a convicted perjurer ranged from cutting out the tongue to death." An early federal statute in this country provided that the penalty for perjury could be as serious as "imprisonment, at hard labor, not more than five years" and a $2000 fine. Today, the penalties for perjury and false swearing in the states and territories are not nearly so severe. Far too often, these offenses are declared misdemeanors, with only modest penalties available. For instance, at one time, New Jersey treated false swearing as a misdemeanor, and perjury as a high misdemeanor. One regularly advanced reason for the relative paucity of prosecutions for perjury and false swearing is that "in most jurisdictions, perjury does not carry heavy penalties." This is in stark contrast to the seriousness with which the offenses have been viewed in other nations. For example, under the English Perjury Act of 1911, perjury was punishable by a maximum of seven years imprisonment or two years imprisonment with hard labor.

"Lying is commonplace in our culture." While we may contemporarily think that the widespread speaking and writing of falsehoods is a fairly recent development, it is not. Surprisingly, even the frequent falsifications by individuals who are under oath or affirmation is not a pattern that recently developed. Professor John

119. Aycock, supra note 35, at 247-48. "[A] great difficulty in administering the law of perjury has been the severity of the penalties specified by the statutes." MODEL PENAL CODE, § 241.1 cmt. 1 at 94 (1980). "Maxima at the time the Model Code was drafted ranged up to 20 years." Id.

120. JOHN, supra note 10, at 55. One encyclopedia of the 1960s declared (perhaps too quickly), that "[p]erjury is usually considered a felony." WORLD BOOK ENCYCLOPEDIA Perjury Vol. 15 (50th ed. 1966), at 256a.


123. See English Perjury Act of 1911, § 1 (as reprinted in CRANSTOUN, supra note 105, at 419-20.)

124. Thun, supra note 1, at 10. Indeed, in what some commentators have described as our morally-changed society today, lying is even more commonplace than previously. "Honesty is no longer the best policy. It is a general mandate, strategically applied." John Leo, My Morals, Myself, U.S. NEWS & WORLD REP., Aug. 13, 2001, at 10.

125. See infra notes 126-28 and accompanying text.

126. In 1928, Professor Wigmore complained of the frequency of official falsifications by notaries. "The scandal of the reckless notary has been allowed to go too far. We are now suffering from our heedless tolerance of his perjury."
Fitzgerald of the University of Miami has remarked that there was "widespread abuse of oaths" in the ancient world. As he wrote, "the belief that perjurers were punished by the divine did not prove a strong deterrent to perjury." Today, members of the public do not even possess much confidence in the truthfulness of what our government officials tell us. Presently, not only is lying commonplace, but also lying under oath commonly occurs. For instance, one commentator has cynically remarked that "lying to Congress [is] one of Washington's more enduring traditions." At least part of the problem with the regularity of falsifications under oath is that few prosecutions for perjury are pursued by law enforcement and prosecutorial agencies. Neither those agencies in the executive branch of state and federal governments, nor state and federal legislators and their staffs, have sufficient resources to effectively "play truth police." Nevertheless, perjurers cannot simply be permitted free reign to deceive with the appearance of integrity that oaths and affirmations lend to the circumstances. Our legal system and our society must take official pledges of truthfulness and perjury far more seriously.

III. HISTORY OF NOTARIES PUBLIC AND NOTARIAL OATHS AND AFFIRMATIONS

The Notary Public remained as a connecting link between past and modern institutions.

The position of notary public dates to "remote

Wigmore, supra note 40, at 748. "It was estimated in 1934 that perjury occurs in 75 percent of all criminal trials." MODEL PENAL CODE, § 241.1 cmt. at 94-95 (1980).


128. Fitzgerald, supra note 30, at 732.

129. Hickox, supra note 38, at 28.

130. Pursuing formal investigations and charges against alleged perjurers is not "sexy" enough to drive prosecutors and legislators to aggressively reveal it. Indeed, investigative journalists may be our best truth police, since their efforts may well scare others away from lying. See supra note 38 and accompanying text.

131. BROOKE, supra note 67, at 3.
TO SWEAR... OR NOT TO SWEAR

antiquity” as well. Just as the illiteracy of the general population contributed to the need for corporal oaths to be developed and utilized (because of their symbolic meaningfulness), the inability of the populace to read and write contributed significantly to the need for a literate and disinterested public official to draft and authenticate written instruments in commercial and governmental affairs. “When writing was the accomplishment of only a few the need of professional assistance in such matters was sufficiently great as to suggest the office of public writers or scribes,” the forerunners of the modern notary public. Though not every nation has an office of public notary, the vast majority of governments have established the post.

In the world today, there are three distinct types of notaries: (1) the civil law notary (the most predominant kind of notary outside of this country); (2) the English notary (representing only about 1000 notaries of various types throughout England and Wales); and (3) the United

132. Id. at 1. See also JOHN supra note 10, at 1 (noting that the forerunners of notaries public “are traceable to the Roman Republic”). Curiously, by contrast, the Japanese notarial system which is founded upon the civil law is of relatively recent vintage, having been established in 1887. SHINICHI TSUCHIYA, A COMPARATIVE STUDY OF THE SYSTEM AND FUNCTION OF THE NOTARY PUBLIC IN JAPAN AND THE UNITED STATES 1 (1996).

133. See supra notes 23-24 and accompanying text.

134. “[I]lliteracy was a major impetus for the origination and expansion of the post of notary public.” Michael L. Closen, Notaries and Literacy Requirements, THE NOTARY, Jan./Feb. 2002, at 4. “The illiteracy of the general population caused the need for a trusted person who could read and write to prepare legal documents and to record proceedings of governmental bodies . . .” Id.

135. BROOKE, supra note 67, at 1.

136. “The notary is recognized as a necessary official in nearly all civilized countries.” JOHN, supra note 10, at 1.

137. “As a result of the unique development of notaries in this country, there are three distinct groups of notaries practicing in the world today: civil law notaries, English notaries, and United States notaries.” Seth, supra note 55, at 884. See also Closen, supra note 134, at 4 (noting the three distinct types of notaries to be the civil law notary, the English notary, and the United States notary).

138. “Eventually, the civil law notary became the role model for notaries worldwide, including Europe, Asia, and the Americas.” Closen, supra note 134, at 4. Interestingly, “[t]he Japanese Notarial system was established [in 1887], 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.” Tsuchiya, supra note 132, at 1.

139. Presently there are between 920 and 950 ‘General’ Notaries in the whole of England and Wales together with a select group of ‘Scrivener’ Notaries
States notary.\textsuperscript{140} "Both civil and common law Notaries of today can claim the same ancestor in the \textit{notarius} of ancient Rome."\textsuperscript{141} 

In contrast, the permanent establishment of the office of notary in the Americas is really only about 350 years old.\textsuperscript{142} Although the first notary in the Americas was a Spanish notary who accompanied Christopher Columbus to San Salvador in 1492,\textsuperscript{143} the true predecessors to today's United States notaries date back to the colonization of North America by the English.\textsuperscript{144} Thus, almost all United States notaries started life originally in the shadow of

\begin{footnotesize}
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  \item \textsuperscript{140} Unfortunately, the United States notary stands alone as a separate type of notary in the world for all of the wrong reasons. They are too many in number and too few in knowledge, training, and experience. Our notaries possess less authority than any other of the world's notaries, and they tend not to be well respected by business people or government officials in other countries. See Closen, supra note 6, at A23-24 (listing many of the problems of United States notaries, including their international reputation). United States notaries "are an embarrassment when it comes to international commerce." Id. at A24. The author has referred to "the already-tarnished image of U.S. notarizations." Closen, supra note 6, at A24.
  \item \textsuperscript{141} Jill Roberts, \textit{Through The Ages}, NAT'L NOTARY (Nat'l Notary Ass'n, Canoga Park, Cal.), Nov. 2000, at 14. 
  \item \textsuperscript{142} See \textit{VAN ALSTYNE}, supra note 3, at 150 (tracing the first notaries appointed in colonial America to the 1639-64 period — some 350 years ago); Closen et al., supra note 2, at 183 (noting that the office of notary in the Americas dates to about 350 years ago). For the date and details of the first notarial appointment; see \textit{infra} note 177.
  \item \textsuperscript{143} In 1492, for instance, Queen Isabella relied on a Notary to keep track of the treasures gathered by Christopher Columbus during his exploration of the New World." Roberts, supra note 141 at 14.
  \item \textsuperscript{144} The English colonists "naturally followed the system they knew: a system developed in England to authenticate documents used in international commerce." Seth, supra note 55, at 864. The English notary has been called the "older brother" of the colonial American notary. Closen et al., supra note 2, at 251. See \textit{infra} note 145 and accompanying text. "Most of the early colonial notaries were appointed under the authority of the [English] Archbishop of Canterbury, while others were appointed by local authority. The American colonists copied the English notarial system to authenticate documents used in international commerce." \textit{VAN ALSTYNE}, supra note 3, at 149-50.
\end{enumerate}
\end{footnotesize}
English notaries, instead of being modeled after the ancient civil law notaries of most of the nations of Europe and Asia. Incidentally, "[f]rom a remote period English notaries have exercised the right to administer oaths and take affidavits." Almost all colonial notaries were appointed in the colonies by their English settlers, although a few notaries had been appointed in England pursuant to delegation through royal authority. With the break from England because of the Revolutionary War, there was also a dramatic departure from English notarial practice.

As the American colonies, and later the original states and territories of the United States began to adopt notary statutes, those laws tended to be quite short and, therefore, incomplete. Many of those laws contained only a few paragraphs; most of them announced that notaries could

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145. The American colonial office of notary "developed from the practice of seventeenth century English notaries." Seth, supra note 55, at 863-64. See also supra note 144.
146. See Closen, supra note 134, at 4. "[T]he civil law notary became the role model for notaries around the world including Europe, Asia, and the Americas. The civil law notary became the world's most powerful and truly professional kind of notary (usually an attorney or at least law trained), and the civil law notary remains the predominant type of notary in the rest of the world.). See generally Pedro A. Malavet, The Foreign Notarial Services Monopoly: Why Should We Care?, 31 J. MARSHALL L. REV. 945 (1998) (discussing the important functioning of the civil law notary, in particular the Latin notario publico).
147. CRANSTOUN, supra note 105, at 19.
149. "The United States notaries were originally fashioned like the English notaries known to the settlers of the early American colonies." Closen, supra note 134, at 4. "After the United States won its independence and adopted a new Constitution, American Notaries no longer derived their authority from the Church of England, but from the individual states." Ross, supra note 148, at 11.
150. "In the United States the office, powers and duties of notaries are regulated by statute." JOHN, supra note 10, at 2.
151. "In the earliest years of notary legislation in this country, notary laws tended to be most nominal. The 1829 Illinois Notary Public Act, for instance, contained only six short provisions and could easily fit onto one standard page. It was woefully incomplete by today's standard for legislation, but that was typical of the era." 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, 507 (1999). Not everyone would agree
give oaths, and some of the earliest acts did not expressly authorize notaries to administer oaths. Consequently, several court cases resulted, deciding the issue of whether notaries public had the inherent legal authority to administer oaths if their local notary statutes did not specifically authorize such practices. One possible method of resolving this issue was to look to established custom and practice, but that kind of process would not have been particularly fruitful. Interestingly, that method would not have been productive even though there are some rather unique statutory provisions respecting notarial powers and authority. "The statutes which define the powers and duties of a notary public frequently grant the notary authority to do all acts justified by commercial usage and the law merchant." Surprisingly, the authority to perform oaths and affirmations has generally been regarded as not inherently incidental to the office of notary public. "At common law, notaries had limited powers and functions." The outcomes of cases were divided, with some courts holding notaries possessed the inherent authority to

that contemporary notary legislation has been adequately expanded to cover the relevant matters. "For years, we [notaries] have stumbled along in a netherworld where [notary] laws are typically skimpy and vague. A few sentences in a statute are often all that is provided to guide, inform, instruct and direct us." Deborah M. Thaw, A New Beacon and Guide for America's Notaries, NAT'L NOTARY (Nat'l Notary Ass'n, Canoga Park, Cal.), Nov. 1998, at 5. Still today, "most notary laws are woefully incomplete in treating the range of matters confronting notaries ..." 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, 709 (1997).

152. "Massachusetts authorized notaries to administer oaths in 1851." Seth, supra note 55, at 884.

153. "The statutes of the United States confer no general authority to notaries public to administer oaths nor as to the manner of administering." JOHN, supra note 10, at 4-5.

154. ANDERSON'S MANUAL, supra note 24, at 7.

155. "The power to administer oaths is not one of the incidents of the office of notary public." JOHN, supra note 10, at 50.

156. "By common law a notary public had no power to administer an oath. " Owsley v. Commonwealth, 428 S.W.2d 199, 200 (Ky. App. 1968) (quoting Anderson v. Commonwealth, 117 S.W. 364 (Ky. 1909)).

157. The division within the courts on this issue has been noted by others. "A notary public of another State must certify that he has power to administer oaths; it cannot be presumed." JOHN, supra note 10, at 5. "The general presumption is that a notary can administer oaths, unless proof to the contrary is offered." Id.
administer oaths, but with the far greater number of
decisions concluding to the contrary that notaries had no
such legal power. To illustrate a modern version of this issue, the
Kentucky notary statute in the 1960s was “silent as the
tomb on the question of the power to administer oaths.” Yet the Kentucky Court of Appeals managed to find the
authority of notaries to perform oaths for affidavits for
search warrants, and that court candidly admitted the
creativity of its method. “By a course as devious and
unpredictable as the tracks of a beagle hound cold trailing a
jackrabbit, we think we have found some law authorizing a
notary public to administer an oath in excess of [the
authority expressly granted in the notary statute].”

Today, all states and territories empower notaries to
administer oaths and affirmations. Both civil law notaries and English notaries are
respected professionals and are most often attorneys as
well. Civil law and English notaries are highly
trained and rigorously tested on their notarial responsibilities,

158. “Even the authority of notaries to administer oaths was often absent
from those [earliest] historic [notary] laws, and while such authority was
occasionally implied or inferred in common law decisions, it was more often
found not to exist absent a statutory grant.” Bruno & Closen, supra note 151, at
507.

159. See, e.g., Kumpe v. Gee, 187 S.W.2d 932, 934 (Tex. Civ. App. 1945)
(announcing that “[a]dministering of oaths and taking of affidavits is not one of
the common law powers of a notary but is conferred only by legislative
enactment” and that “[i]ts existence cannot be presumed”). “The power of a
notary public to administer an oath to an affidavit for an attachment must exist
by virtue of a statute or not at all.” Campbell v. Brady, 11 S.W.2d 687, 687
(Tenn. 1928).


161. Id. at 201.

162. “[E]very jurisdiction today grants notaries the power to administer
oaths and affirmations.” CLOSEN ET AL., supra note 27, at 187. “Generally
speaking, all notaries have the power to administer oaths. . . .” Closen & Dixon,
supra note 26, at 882. But, there is this cautious statement: “In nearly every
state and other jurisdiction the statutes authorize a notary public to administer
an oath.” ANDERSON’S MANUAL, supra note 24, at 18.

otaries . . . were prominent and respected members of the community who
were active in shipping and insurance matters.” Seth, supra note 55, at 878.

164. The English Public Notaries Act of 1801 codified a requirement of
seven years’ apprenticeship. C.W. BROOKS ET AL., NOTARIES PUBLIC IN ENGLAND
(describing the substantial testing requirements for English notaries and
observing that almost all of them are also solicitors). “The civil law notary
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and they remain relatively few in number. 165

Unfortunately, the notarial office in this country has suffered a steady and serious decline throughout most of the last 150 years. 166 We have far too many notaries, 167 even though the number of notaries was severely limited in colonial America and in the early decades of the United States. 168 Today, there are few measures in place to assure that aspiring notaries are knowledgeable about notarial ethics, law, and practice. 169 States seem to care more about


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165. "In the mid-1920s there were about 500 notaries of all categories in England and Wales." BROOKS ET AL., supra note 164, at 136. And, as noted earlier, there are only about 1000 notaries in England and Wales today. See Closen, supra note 134, at 4. See also BROOKS ET AL., supra note 164, at 136 (pointing out the examination requirements for English district notaries and scrivener notaries). "[M]ost civil law and English notaries are attorneys and are required to undergo substantial courses of instruction on notarial practice and to pass rigorous, proctored, written examinations." Closen, supra note 134, at 4.

166. See Closen, supra note 134, at 4

(Over the 350-year history of the U.S. notary, the bulk of notarial duties have been lost either to other officers (such as justices of the peace, attorneys, and county recorders) or to disuse (such as became of the old practices of drafting and serving marine and bank protests and of taking evidentiary depositions).

167. "We have more notaries than we have elementary and secondary school teachers, police officers, active-duty military personnel, doctors and dentists and lawyers." Closen, supra note 6, at A23. There are about 30 states with fewer residents than there are notaries. Id. at A23-A24.

168. "The number of notaries in Massachusetts was small from the founding of the colony to the time of the American Revolutionary War. There was no more than one notary for each town at any one time up to the province period." Seth, supra note 55, at 877. From 1705 until 1751, there was legislative provision for just one notary in the colony of Rhode Island, and he resided in Newport. Then, in 1751, the law authorized the appointment of a notary in Providence. See id. at 879. Indeed, in England in the early 1800s, there was actually a period of a shortage of notaries. See BROOKS ET AL., supra note 164, at 123.

169. Although there are a few jurisdictions which mandate notary education and/or testing (see infra note 181 and accompanying text), there is virtually no attention to notarial ethics through the auspices of the notary oversight agencies in the states and territories. It is only the voluntary notary membership and education organizations that sometimes focus upon ethical
collecting the revenue derived from notary commission application fees than about focusing on the backgrounds and qualifications of our notaries. State-mandated notary education and testing is almost non-existent. Most notaries tend to be uninformed and indifferent about their responsibilities. The present state of diminished authority

issues in conformity with the ethics standards that the two largest of those organizations have developed. See Responsibility Code of the American Society of Notaries, reprinted in 32 J. MARSHALL L. REV. at 1195 (1999)), code of the National Notary Association (reprinted in id. at 1123). See also Vincent Gnoffo, Comment, Notary Law and Practice for the 21st Century: Suggested Modifications for the Model Notary Act, 30 J. MARSHALL L. REV. 1063, 1089 n.218 (1997) (listing the states requiring education or testing for notaries to be only California, Connecticut, Louisiana, New York, North Carolina, and Pennsylvania). Florida has since joined this list.

A conservative estimate is that notaries pay more than $28 million annually to state and local governments in commissioning fees alone.” Id.

“Few of our notaries are required to attend instructional courses on notary practice or to submit to proctored testing.” Closen, supra note 134, at 4. “A few states — such as California, Louisiana, and New York — require proctored [notary] exams, and North Carolina requires completion of a [short] notary course at a community college.” Id. at 5. Incidentally, “Wisconsin is the only state to require a minimum level of general education in order for one to become a notary, although Wisconsin mandates only a minimal eighth grade education.” Id. Proposed state legislation in Pennsylvania would add “the requirement for 3 hours of approved notary education as a condition of issuance of a notary commission ...,” under House Bill 851 and Senate Bill 887. See John Jones, Legislative Updates, AM. NOTARY (Am. Soc'y of Notaries, Tallahassee, Fla.), 4th Quarter 2001. at 21. Recently, proposed legislation to add requirements for notary education and testing under Texas House Bill 3224 died with the adjournment of the state legislature. Id. at 23. Louisiana House Bill 760 recently died in committee, and “would have required all non-attorney Notaries to complete at least 10 hours of continuing legal education per year ...” Legislative Watch, NOTARY BULL. (Nat'l Notary Ass'n, Canoga Park, Cal.), Dec. 2001, at 14. “Only two states, North Carolina and Florida, have been able to enact mandatory education of Notaries into law.” Officials: Education Should Be Required, NOTARY BULL. (Nat'l Notary Ass'n, Canoga Park, Cal.), Dec. 2001, at 12.

There is an “overabundance of underqualified notaries.” Closen & Shannon, supra note 6, at 32. “After teaching thousands of notary public orientation and refresher seminars, it was quite surprising to discover how little is known about notarial powers and duties, particularly among commissioned notaries public.” PIOMBINO, supra note 5, at xxi. See Michael L. Closen & R. Jason Richards, Notaries Public - Lost in Cyberspace, or Key Business Professionals of the Future?, 15 J. MARSHALL J. COMPUTER & INFO. L. 703, 707 (1997) (stating that “[t]he notary’s business worth (or lack thereof) is largely due to two fundamental and interrelated factors: inadequate knowledge of their responsibilities and, consequently, poor job performance.”). See Anderson & Closen, supra note 15, at 889 (noting that while civil, administrative or criminal liability should be ample incentive for notaries to
and stature of United States notaries is in extreme contrast to the regard accorded to ancient notaries and the condition of modern civil law notaries.\textsuperscript{173} Episodes of notarial misconduct were uncommon in early history.\textsuperscript{174} After all, the first notaries were men of education and experience, who were trusted to serve as impartial public officials.\textsuperscript{176} They were men of esteem, who in turn earned respect from their capable and honorable notarial performances. The 1890 volume of \textit{Brooke's Notary} remarked: “To the credit . . . of the Notaries, it may be here observed, that instances of misconduct in the members of the profession, or of complaints preferred against them . . . very rarely occur.”\textsuperscript{176} In the spirit of full disclosure however, the curious historical fact should be reported that two of the first notaries appointed in the American colonies, including the very first person to possess the title of notary public here, were removed from their offices due to their fraudulent dealings.\textsuperscript{177} As one notary historian has perceptively remarked, “The fact that the first notary in the American colonies was removed from his position because of dishonesty has not gone unnoticed by notary observers and commentators.”\textsuperscript{176} Thereafter, the much more frequent episodes of notarial mistakes and misconduct do not appear until about the mid-1900s. Around that time, the number of notaries in this country exploded to reach one million and

\begin{itemize}
  \item identify and honor such duties, notaries are generally unaware that such liabilities even exist, or are indifferent about those risks. \textit{See also infra} note 412.
  \item This was somewhat the view even in 1904. “[O]ften the office [of notary public] is looked upon as one of slight importance.” \textit{JOHN}, supra note 10, at 6. “In civil law countries, notaries are high public officials empowered with broad legal authority and responsibility. In most countries, the notary is a prominent attorney attaining the notarial appointment after having distinguished himself in the profession of law.” \textit{VAN ALSTYNE}, supra note 3, at 42. “The modern Latin Notary . . . commands more prestige than does the ministerial Notary of the United States.” \textit{Roberts}, supra note 141, at 14.
  \item \textit{But see infra} notes 177-78 and accompanying text.
  \item “These colonial notaries were men of high trustworthiness, of substance and literacy.” \textit{VAN ALSTYNE}, supra note 3, at 150.
  \item \textit{Brooke}, supra note 67, at 9.
  \item “The first person in the American colonies to bear the title of notary public was Thomas Fugill,” who was appointed in the Province of New Haven in 1639. Seth, \textit{supra} note 55, at 868. He was removed from that office several years later due to his fraudulent conduct. \textit{See id.} at 869. In 1644, William Aspinwall was appointed the first notary in the Massachusetts Bay Colony, and he was removed from that office in 1652 due to misconduct. \textit{See id.} at 872, 875.
  \item Seth, \textit{supra} note 55, at 869.
\end{itemize}
then to more than four million notaries before the end of the century.\textsuperscript{179} By the late 1940s, it was estimated that there were about 500,000 notaries in the United States.\textsuperscript{180} In 1972 there were some 1.8 million notaries; in 1977 over 2.6 million; in 1987 more than 3.2 million; in 1990 more than 3.8 million; and by 1997 more than 4.2 million notaries in this country.\textsuperscript{181} The number of notaries is still growing and is now more than 4.5 million.\textsuperscript{182}

Because notaries do not serve full-time in that role, they often work in law firms, title companies, banks, government offices, and many other private businesses.\textsuperscript{183}

179. Among the consequences of the dramatic growth of the notary population are the facts that many people who should not have become notaries have been commissioned as such, that there have become too many notaries to be effectively overseen and supervised, and that they are not being taught and tested to assure their competency. See Closen, supra note 14, at 682 ("Since at least 1858 in the case of Fogarty v. Finlay [10 Cal. 239 (1858)], court decisions have identified notarial mistakes and misdeeds and have regularly held notaries liable for negligent and intentional misconduct. Over the course of this nation's history, countless other instances of inept and dishonest notarial practices have also been noted.") A host of problems began to plague the office of notary by the mid-1800s. "Notaries in this country have suffered a downhill regression commencing in about the second half of the Nineteenth Century. This unrelenting slide toward obscurity has been profound, and for most ordinary notaries the backward momentum may very well be irreversible." Closen & Richards, supra note 151, at 716. "The problem among notaries has been so bad that the country's largest notary membership organization has described it as a "Crisis of Responsibility." Id. See The Crisis of Responsibility, NAT'L NOTARY (Nat'l Notary Ass'n, Canoga Park, Cal.), May 1995, at 11. "[T]he cases of recent vintage have quite regularly found notaries civilly liable for their own negligent and intentional misconduct." Closen, supra note 14, at 676.

180. HUMPHREY, supra note 4, at 15.


182. See The NNA 2002 Notary Census, supra note 6, at 15. See also Closen, supra note 6, at A23 ("[T]he number of notaries is increasing."). The consistent and dramatic growth in the number of notaries over the last 50 to 75 years suggests this trend may continue, especially since there is no particular reason that it should not. For example, "Wisconsin has reported an increase of 20,000 more notaries between 1997 and 2000." Closen et al., supra note 2, at 184. See The Nat'l Notary Ass'n's 2002 Notary Census, supra note 6, at 15.

183. "[E]mployees of banks, accounting firms, hospitals, real estate and mortgage companies, law firms and almost all kinds of other entities may also be notaries public." Closen, supra note 14, at 677. "Notaries are typically not stand-alone service providers. Rather, they usually perform their notarial duties for an employer." Friedberg, supra note 13, at 13. This American experience with part-time notaries is comparable to what has always been the case in England — at least outside the City of London. "There was enough work in the City of London for a small, cohesive group of specialist notaries . . . In the
The notarial function constitutes just a small part of the notary’s full-time employment. The status of the notary as a part-time, ministerial public official has contributed to serious deficiencies in the office. Many notaries seek appointment solely because their employers insist upon it as part of their job responsibilities. Many notaries occupy entry level positions at their employments because higher ranking employees do not want to take on the notarial functions. Most notaries are not paid additional compensation or accorded greater stature by their employers or co-workers. It is often a thankless job. Thus, notaries remain largely underinformed and indifferent about their positions. Since the creation of the office of provinces, on the other hand, although there was a need for notaries, the volume of work was not sufficient to enable a man to practice exclusively as a notary, without also being a solicitor.” BROOKS ET AL., supra note 164, at 131.

184. See HUMPHREY, supra note 4, at 15. “[T]oday’s Notary most likely performs notarial duties on a part-time basis in service to a full-time other career.” Roberts, supra note 141, at 15. For employee-notaries, “[t]heir notary functions ordinarily account for a small part of the activities engaged in while at their jobs.” Closen, supra note 14, at 676.

185. Notaries public “usually become notaries at the request of [their] employers to have the luxury of having a notary available at the workplace.” Notary Law Institute, Employer & Notary Relations, THE NOTARY, Mar./Apr. 1999, at 6. By way of example, an employer such as a “bank may make the holding of a notary commission one of the qualifications for particular jobs at the bank.” Closen, supra note 14, at 678-79.

186. “[M]any notaries tend to be entry-level employees such as clerks, secretaries, paralegals, and the like because no one else wants to perform the menial notarial function.” Closen et al., supra note 2, at 187. It should also be noted that “most notaries are lay citizens, untrained and unskilled in their duties as public officers.” Anderson & Closen, supra note 15, at 888. “Thus, a grade school drop-out barely proficient in the relevant language can become a notary, and can notarize [on] documents involving hundreds of thousands or millions of dollars of transactions.” Closen & Richards, supra note 151, at 722.

187. Some employers may actually adopt the view that since notaries may charge fees for their notarial services, the employers need not compensate notaries separately for their efforts. Indeed, some employers even go so far as to require their notary-employees to turn over the proceeds from notarial services to the employers. “Notaries depend upon their employers for their livelihoods, not upon the nominal fees they may collect for performance of notarial services.” Anderson & Closen, supra note 15, at 898.

188. See generally Lee Berton, It’s A Proud Calling, But The Notary’s Lot Is Full Of Indignities, WALL ST. J., June 15, 1993, at A1 (discussing the feelings of notaries about the thankless nature of their notarial roles). See also Closen & Richards, supra note 151, at 703 (stating “the office of notary public continues to suffer from the stigma of insignificance.”). “The notaries of foreign nations exercise substantially more authority and responsibility than do the notaries of America.” VAN ALSTYNE, supra note 3, at 244.
notary, its principal purpose has been to bring trust and confidence to documents. Notaries have served as impartial witnesses who have helped protect against document fraud by imposters (which included the two key steps of properly identifying the document signers and recording the present dates in the certificates of notarization) and assisted in substantiating documents by performing the oath and affirmation administration function. Interestingly, the notaries of England, as well as their contemporary counterparts, have been possessed of a deep-seeded tradition about the notarial oath and

189. HUMPHREY, supra note 4, at 11 (noting that the notarization “verifies the signature attached to the paper, and identifies the signer”). “Although some of the Notary’s functions have been relinquished to other officials over the centuries, one task remains constant: to act as a trusted, impartial witness.” Roberts, supra note 141, at 14. Without notaries to help guard against document signer fraud, “[t]he potential for fraud would grind the business and legal worlds to a halt.” Closen & Dixon, supra note 26, at 874.

190. “A notary is . . . relied upon in business and law to minimize fraud in signed documents.” Closen & Dixon, supra note 26, at 874.

191. “The Notary shall require the presence of each signer and oath-taker in order to carefully screen each for identity . . .” NOTARY PUBLIC CODE OF PROF’L RESPONSIBILITY, Guiding Principle III (Nat’l Notary Ass’n 1998). Among the 10 commandments proposed for notarial practice for lawyers and law firms was “to require identification from all document signers and to record ID document numbers” in notary journals or ledgers. Closen & Shannon, supra note 6, at 32.

192. One of the functions the notary serves as a “public official [and] disinterested witness” to document signings is to “accurately date[] the notarial certificate.” Closen, supra note 12, at 27. “Among the important facts a notary certifies with a signed notarial certificate is the date the notarial act was performed. The certificate date is important because it evidences a material fact that is pertinent to the verity of the notarial certificate.” VAN ALSTYNE, supra note 3, at 71. See generally Lisa K. Fisher, Dates and Documents, AM. NOTARY (Am. Soc’y of Notaries, Tallahassee, Fla.), 2d Quarter 2000, at 8 (discussing the importance of the dates appearing on documents, and emphasizing that the date of the official notarial act and certificate must always be the present date). Interestingly, under the Japanese notarial system, the second most commonly performed notarial function is to fix definite dates on private documents. Tsuchiya, supra note 132, at 1-2. “If you are asking the Notary to write a date other than today’s date the actual date of notarization on an official notarial form, then you may be accused of soliciting an illegal act, which is itself a crime.” Nat’l Notary Ass’n, Sorry, No Can Do! 2 More Answers to Your Customers’ Everyday Requests for Improper Notarizations, at 7 (1995).

193. Administering Oaths, Affirmations and Jurats, Nat’l Notary (Nat’l Notary Ass’n, Canoga Park, Cal.), Mar. 1999, at 22. “The power to administer oaths and affirmations and to execute jurats comprises a key part of a Notary’s duties.” Id. The affidavit, which is distinguished as a document that is sworn to by the affiant, “is one of the commonest things in the court room, and one of the commonest things in the business world.” HUMPHREY, supra note 4, at 137-38.
affirmation administration role. "English Notaries in general appear to have always considered the administering of oaths, and the taking of affidavits and affirmations, to be within the powers and functions of a Notary."  

Historical necessity, or at least historical convenience, has led to the curious fact that many public officials have been granted authority to administer oaths or affirmations, but that those officials cannot perform notarizations unless they are expressly authorized by statute to do so. On the other hand, it is clearly the case that every public officer authorized to perform notarizations is as well empowered to administer oaths and affirmations as an essential part of some of the notarial functions including the execution of jurat notarizations. One early notary manual pointed out that "[e]very court, every judge or clerk of any court, every justice and every notary public, and every officer or person authorized to take testimony in any action or proceeding, or to decide upon evidence, has power to administer oaths or affirmations." This list would include justices of the peace and arbitrators among those empowered to administer oaths and affirmations. Yet, judges, clerks of courts,  

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194. The notarial oath of office prescribed in the English Public Notaries Act of 1843 was said to have "revised the traditional form of oath taken by a prospective notary." BROOKS ET AL., supra note 164, at 127. 
195. There is a reference in 1830 to the authority of English notaries to receive affidavits. Id. at 124. Surprisingly, this authority may not be possessed by some foreign notaries. "A Japanese Notary is not authorized to administer an oath." TSUCHIYA, supra note 132, at 20. 
196. Every state provides for a variety of officials, civil servants and others with special status to give oaths. The most common of these "oath givers" are notaries public. Examples of others include judges, court clerks, surrogates, sheriffs, members of state legislatures, commissioners in chancery, court reporters, lawyers, examiners of title, and mayors and aldermen of cities, towns and boroughs. Tobin, supra note 9, at 929. See also Kumpe v. Gee, 187 S.W.2d 932, 934 (Tex. Civ. App. 1945) (noting that under one Texas statute of the time eleven public functionaries, including notaries public, were given authority to administer oaths and take affidavits). 
197. VAN ALSTYNE, supra note 3, at 231. "In many states, the authority of a notary is statutorily extended to other public officials, such as judges, county and court clerks to name a few." Id. 
198. THE NOTARY'S MANUAL (5th ed. 1916), at 115. 
199. Arbitrators are vested with the power to administer oaths and affirmations to witnesses in the proceedings conducted before them. See also 67 C.J.S. Oaths & Affirmations § 6 n.23 (1978) (pointing out the statutory
arbitrators, and justices of the peace cannot perform notarizations unless statutorily granted such additional authority. Some public officers such as military officers above specified ranks, on-duty police officers in a few states, justices of the peace in some places, and particular foreign service personnel are granted notarial authority.\(^{200}\)

As the quotation that began this section of the paper suggests, the notary public has survived as a link between the ancient past and the present which currently represents the time of the Internet, e-commerce, and digitalized transactions and signatures.\(^{201}\) The notary has been accurately described as providing a footnote in history,\(^{202}\) for “the notary as a mere ministerial public official has not been at the forefront of commerce or government.”\(^{203}\) Observers have also concluded that the English notary has been relegated to about the same position in history.\(^{204}\) One important question that remains to be answered is what role the notary will have in the world of cyberspace.

IV. CURRENT PRACTICES REGARDING NOTARIAL OATHS AND AFFIRMATIONS

\[\text{[R]esults [of an extensive 1989 survey of notarial performance] are}\]

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\(^{200}\) For a discussion of the notarial powers of military officers, see infra note 354 and accompanying text; and for a discussion of foreign service officers, see infra note 355 and accompanying text.

\(^{201}\) See supra note 121 and accompanying text.

\(^{202}\) “... Notaries Public have always provided fascinating footnotes to American history.” Notaries Public In American History, NOTARY BULL. (Nat’l Notary Ass’n, Canoga Park, Cal.), Apr. 1997, at 3.

\(^{203}\) Closen, supra note 14, at 701. “[A] notary’s duties .... are essentially clerical and ministerial.” Bernal v. Fainter, 467 U.S. 216, 225 (1984). See also RAYMOND C. ROTHMAN, NOTARY PUBLIC PRACTICES & GLOSSARY 2-3 (2d ed. 1998), at (noting that even in colonial times the notaries’ “duties were of a ministerial rather than a judicial nature”).

\(^{204}\) See supra note 145 and accompanying text.

\(^{205}\) See Michael L. Closen & R. Jason Richards, Cyberbusiness Needs Supernotaries, NAT’L L.J., Aug. 25, 1997, at A19 (considering the potential that the “debasement of the office [of notary] in America is likely to become a problem for international commerce, particularly as more and more arrangements and agreements are made in cyberspace”). See also Closen & Richards, supra note 151, at 703 (pointing out that the arrival of e-commerce, digitalized signatures, and electronic verification could provide an opportunity for the improvement of the lot of notaries public).
evidence of the advanced stage of decay and neglect that the office of notary public has suffered.\textsuperscript{206}

A. The Current State of Neglect

Today in this country, and for an extended period of time in modern history, occasions of notarial neglect and intentional misconduct have been commonplace.\textsuperscript{207} There are numerous reported cases illustrating such inadequacies, including criminal and administrative proceedings prosecuting notaries\textsuperscript{208} and civil actions resulting in liability against notaries or, at the very least, pointing out notarial errors and omissions.\textsuperscript{209} A major subdivision of those

\textsuperscript{206} PIOMBINO, supra note 5, at xxii.

207. Indeed, when the author and four other law school professors decided to prepare a casebook on notary law and practice, there was no shortage of cases on notary misconduct from which to select the examples to fill our 600 page book. See CLOSEN ET AL., supra note 27. See also Closen, supra note 6, at A23 ("Notary-related dishonesty appears to be on the rise. Many notarizations do not deserve the level of trust and confidence traditionally given them. Notaries commonly backdate documents and witness signatures for people who do not appear before them personally.").


209. "A notary public, by assuming to perform any official duty or request of a party concerned, impliedly undertakes to discharge it faithfully, and is liable to the extent of any resulting injury if he fails to do so." JOHN, supra note 10, at 10. "The standard for liability of a notary public is one common to tort law. The notary must act as a reasonably prudent notary would act in the same situation." Closen & Dixon, supra note 26, at 888. See generally Nancy Perkins Spyke, Promoting the Intermediate Benefits of Strict Notary Regulation, 31 J.
unpleasant cases are the more despicable examples found in cases invoking discipline against attorneys for engaging in professional misbehavior associated with official notarial functioning. Some observers have even declared lawyers to be the very worst offenders of sound notarial practices and notary law. All United States jurisdictions now authorize notaries to administer oaths and affirmations.

MARSHALL L. REV. 819 (1998) (pointing out the serious problem of notary errors and misconduct and the legal responsibility of notaries, as well as urging stricter regulation to reduce these concerns).

210. "[T]he law of Notaries Public is not generally taught in law schools, and unless a lawyer makes a point of learning the specifics, misconceptions can arise." Friedberg, supra note 13, at 13. See Christopher B. Young, Comment, Signed, Sealed, Delivered Disbarred? Notarial Misconduct by Attorneys, 31 J. MARSHALL L. REV. 1085 (1998) (discussing the pervasive problem of attorney-notaries and attorneys who employ and supervise notaries not knowing and not following notary law and sound notarial practices). See, e.g., Board of Prof. Resp. v. Neilson, 816 P.2d 120 (Wyo. 1991) (detailing the case of an attorney who ordered a notary seal for a notary whose commission had expired and used that seal to fraudulently notarize deeds); Lisi v. Resmini, 603 A.2d 321 (R.I. 1992) (suspending a lawyer from the practice of law where the lawyer directed his employee to notarize forged signatures of absent clients); In re Barrett, 443 A.2d 678 (N.J. 1982) (suspending an attorney from the practice of law where he forged his client's signature and got his secretary to notarize it); In re Smith, 636 P.2d 923 (Or. 1981) (suspending a lawyer from the practice of law where the lawyer got his secretary to notarize the signature of an absent client); In re Boyd, 430 N.W.2d 663 (Minn. 1998) (suspending attorney who prepared false deed and caused it to be notarized); In re Morin, 878 P.2d 393 (Or. 1994) (disbarring attorney who frequently notarized wills outside the presence of clients); In re McAlear, 170 P.2d 763 (Or. 1946) (disbarring attorney because he forged his estranged wife's signature on various deeds and checks and then persuaded an attorney-notary to notarize the signatures).

211. "[L]awyers are perhaps the worst offenders of sound notarial practice and of notary public laws." Closen & Shannon, supra note 6, at 32. "Heavy caseloads, impending deadlines and other demands of legal practice often tempt attorneys to take dangerous shortcuts relating to notarizations." Closen, supra note 7, at A24. "Some of the worst offenders are lawyers who, as notaries, disregard the legal requirements for valid notarizations and, as employers, order their employee-notaries to stamp documents in violation of legal standards." Closen, supra note 6, at A23. In law school, "lawyers are not taught the substance of the notary public statutes. Unless they have read those laws and most attorneys do not know by osmosis the law of document notarization." Id. See also Michael L. Closen & Thomas W. Mulcahy, Conflicts of Interest in Document Authentication by Attorney-Notaries in Illinois, 87 ILL. B.J. 320 (1999) (arguing that when attorney-notaries "notarize the documents they have prepared for their [own] clients... it leads to the appearance of impropriety [and to actual] conflict[s] of interest").

212. "Although not incidental to the office, every jurisdiction today grants notaries the power to administer oaths and affirmations." CLOSEN ET AL., supra note 27, at 187. See, e.g., N.M. STAT. ANN. § 14-12-1(A) (Michie 2000)
Additionally, notaries are sometimes called upon to give oaths or affirmations to witnesses who are to testify in the course of governmental or judicial hearings or proceedings, and to perform the largely ceremonial function of administering the oath of office to elected or appointed officials. Three states even authorize notaries to officiate at weddings and to administer the nuptial vows. However, the far more common setting for the administration of a notarial oath or affirmation is as part of the process of performing a jurat, a form of notarization of the signature on a written instrument. Incidentally, other forms of notarizations that are performed in connection with written instruments, acknowledgments and signature witnessing, for example, do not involve oath and affirmation administration.

The notarial oath and affirmation administration function is regularly touted as an important feature of the various duties of notaries public. The National Notary Association has written that "[t]he power to administer oaths and affirmations and to execute jurats comprise a key part of a Notary's duties." National Notary Association Associate Editor David Thun further stated that "[a]dministering an oath is one of a Notary's most important duties and one that carries a tradition of thousands of years." Lip service is regularly directed toward the

(employing notaries public to administer oaths). See supra note 162 and accompanying text.

213. "Examples of oaths are those administered to individuals who will testify in court or who will give depositions out of court." STATE OF MAINE, NOTARY PUBLIC GUIDE 23 (1997).

214. See CLOSEN ET AL., supra note 27, at 188 (discussing the authority of notaries to administer the oath to persons who assume public offices). See also Summit County Auditor v. Williams, C.A. No. 13580, 1988 Ohio App. LEXIS 4830, at *5-9 (Ohio Ct. App. Nov. 30, 1988) (challenging a notary's power to given an oath of office). Recall the historical curiosity that President Coolidge was given the oath of office by a notary. See supra note 36 and accompanying text.

215. "For reasons that are shrouded in mystery, three states Florida, Maine, and South Carolina allow notaries to perform civil marriages." CLOSEN ET AL., supra note 27, at 208.

216. [WYOMING] NOTARIES PUBLIC HANDBOOK 9 (1999). "Jurats are the authentication of a signature made under oath or affirmation." Id.

217. See infra note 285 and accompanying text.

218. See infra note 271 and accompanying text.

219. Administering Oaths, supra note 5, at 22.

220. Thun, supra note 1, at 10.
notarial oath and affirmation administration function. For example, in at least two states, the failure of a notary to actually administer a required oral oath or affirmation to a document signer is a basis for the revocation of the notary's commission.\textsuperscript{221} But such laws are hardly enforced. If these states actively policed notorial conduct, there would be few notaries left in those states.

Although most notarizations performed on documents take the form of jurats and verifications, most notaries do not actually administer the necessary oaths or affirmations, and fewer still perform the oaths or affirmations in solemn manners befitting of the occasions.\textsuperscript{222} Very few jurisdictions require notaries to undergo education, training, or testing about their official responsibilities.\textsuperscript{223} Notaries do not learn about oaths, affirmations, jurats, and verifications unless they take it upon themselves to find out about these topics. Some sources even mislead notaries concerning the oath and affirmation administration function. To illustrate, the official \emph{Illinois Notary Public Handbook} states: “On rare occasions, a notary may be asked to administer a verbal oath or affirmation” (emphasis added).\textsuperscript{224} To the contrary, notaries are quite frequently asked to complete jurat notarizations.

Overwhelming evidence shows that most notaries do not honor their legal obligations (and sound notarial practices) to administer oaths or affirmations to document signers who execute jurats. One study in 1989 examined the practices of 220 notaries in 22 cities in New York and concluded that “91.7 percent failed to administer an oath of any form.”\textsuperscript{225} Among the list of the most common errors or omissions of notaries identified in both the \emph{Kansas Notary}
Public Handbook\textsuperscript{226} and the Illinois Notary Public Handbook\textsuperscript{227} is the failure of notaries to administer oaths and affirmations. As long ago as 1910, the New York Court of Appeals described the informal state of affairs that had befallen the oath-administration process.\textsuperscript{228} The case involved an oath-giver who merely asked each document signer “Is that true?” every time he executed more than 11,000 affidavits. The court stated that “we are aware that in the transaction of official business in our great governmental and municipal offices there has prevailed a tendency to disregard form and ceremony,”\textsuperscript{229} but concluded that such practices could not be tolerated, as they undermined the letter and spirit of the statutes on oaths.\textsuperscript{230}

In Texas, where a notary purported to take the acknowledgment to a real estate deed over the telephone, the Texas Court of Civil Appeals invalidated the notarization and the deed. The court explained that “a notary’s official acts as expressed by legislation are not insignificant formalities which may be smiled out of the law.”\textsuperscript{231}

The results of a survey about notorial conduct prepared by the author\textsuperscript{232} also reflect the lack of care that many

\textsuperscript{226} Kansas Notary Public Handbook 11 (listing “failing to properly administer the oath” as among “the most common errors or omissions made by notaries in notarizing documents”).

\textsuperscript{227} Jesse White, Illinois Notary Public Handbook 25 (2000) (listing “failing to administer an oath or affirmation (if required)” as one of “the most common errors or omissions made by notaries”). Although some of the Notary’s functions have been relinquished to other officials over the centuries, one task remains constant: to act as a trusted, impartial witness.” Roberts, supra note 141, at 14.

\textsuperscript{228} See Bookman v. City of New York, 93 N.E. 190, 191 (N.Y. 1910).

\textsuperscript{229} Id. at 191.

\textsuperscript{230} The question the court put was whether “plaintiff performed his duties as commissioner of deeds by administering oaths in accordance with the spirit and intent of the statute?” Id. at 191. The answer was as follows: “But this [informality regarding the oath and affirmation administration] should not be allowed to the extent of doing away with the statute.” Id.


\textsuperscript{232} Between 1999 and 2001, the author conducted a survey of 545 law students, asking about their experiences with regard to notarial oaths and affirmations. Two similar questionnaire forms were used – one in 1999, and another in 2001. Although there is no claim that this survey met true scientific standards, a sizeable sampling was obtained, and the results appear to be consistent with other published surveys and anecdotal accounts. Copies of the completed surveys are on file in the author’s office in Chicago.
TO SWEAR... OR NOT TO SWEAR

notaries show. The questionnaires were submitted and returned by a total of 545 law school students at five schools in three states.233 Four hundred and forty seven students indicated that they had one or more notarizations of their signatures performed by notaries public.234 The purpose of the survey was to elicit data about oral notarial oaths and affirmations, and while no pretense has been indulged that this process was truly scientific, it did result in a large volume of information. In fact, the responding law students reported about their experiences in connection with more than 7600 notarizations of their signatures which had been conducted by notaries.235

This survey of 447 law students from three states revealed that 337 of them had never been given an oral oath or affirmation as part of some 6838 notarizations of their signatures on various instruments.236 Interestingly, a core group of fifty seven of those students who had had their signatures notarized between twenty and two-hundred times each were never given an oath or affirmation by any of their notaries during more than 4600 such notarizations.237 In that survey, some 110 respondents answered that they had been given an oath or affirmation by a notary as part of a document signing on at least one

The author wishes to thank my friends and colleagues who helped distribute and collect these surveys in their classes Professors Gerald Berendt, Kevin Hopkins, and Marie Monahan at the John Marshall Law School, Professor Malcom Morris at the College of Law of Northern Illinois University, Professor Nancy Spyke at the School of Law of Duquesne University, and Professor Robert Jarvis at the Nova Southeastern University School of Law.

233. The author used one form of the survey for a small sample of students in 1999, and then changed it in 2001 for the rest of those questioned hopefully because the revised survey allowed him to obtain more precise information. Surveys were distributed and returned by the author and colleagues at the John Marshall Law School in Chicago, Loyola University of Chicago School of Law, the College of Law of Northern Illinois University in DeKalb, Duquesne University School of Law in Pittsburgh, and Nova Southeastern University School of Law in Ft. Lauderdale.

234. Some respondents indicated they had never had their signatures notarized, and their surveys were removed from the sample group. Some ninety eight respondents had never undergone a notarization of their signatures.

235. The approximate grand total of notarizations represented in the survey was 7604. Interestingly, a relatively small group of fifty seven law students accounted for a large number of the notarizations, about 4605 of them.

236. Respondents were asked to identify the approximate number of notarizations of their signatures that had been performed.

237. See supra note 232 and accompanying text.
occasion. However, when those same respondents were asked how many times they were given oaths or affirmations by their notaries, they indicated that oaths or affirmations were performed 288 out of 766 times, or thirty eight percent. It bears repeating that of the 447 law students who had had one or more notarizations performed, 337 had never been asked by their notaries to submit to an oath or affirmation: a very disappointing seventy five percent. Of the grand total of about 7604 notarizations performed, 6838 did not include the administration of an oath or affirmation: an even more disappointing ninety percent.

B. Problems and Unresolved Issues in Contemporary Notarial Practice

1. Employer Liability. The failure of notaries to properly administer oral oaths and affirmations may cause legal accountability for any resulting damages for the employers of notaries due to their own misconduct or under the agency doctrine of vicarious liability. Unfortunately, many employers of notaries are as unfamiliar with notarial practice and law as are their notary-employees. Moreover, such employers are as indifferent as notaries about responsible notarial practices. Some employers

238. Specifically, all respondents were asked one of two questions, depending upon whether they were surveyed in 1999 or 2001. One question asked, “Has a notary public when notarizing your signature ever given you an oral oath or affirmation (by which you attested to the truthfulness of the document you signed)?” The other asked, “How many times did a notary require you to take an oral oath or affirmation during a document notarization?” One choice provided was a zero (“0 times”). Id.

239. The exact percentage was 37.59.

240. The exact percentage was 75.39.

241. The exact percentage was 89.93.

242. Notary “employers (such as lawyers and law firms) may be held vicariously liable for notary-employee mistakes and misconduct.” Closen & Shannon, supra note 6, at 32. See also infra notes 249-53 and accompanying text.

243. “[A] lot of people really don’t understand what Notaries do.” Tip, NAT’L NOTARY (Nat’l Notary Ass’n, Canoga Park, Cal.), Nov. 2001, at 33. In almost every circumstance, this improper attitude [of employers about notarial services] results from the employer’s complete lack of awareness of the law and procedures for notarizations.” Notary Law Institute, Employer & Notary
negligently urge notaries to hurry notarizations or intentionally direct notaries to take shortcuts, such as omitting the oral administration of oaths and affirmations and overlooking the absence of document signers at the time of notarizations (which would mean that no oath or affirmation would be performed for the jurat type of notarization). When employers contribute to notarial violations, they can be held directly accountable under the law of negligence or intentional misconduct. Moreover,

244. "Employers may wish to save the time of their employees" by directing notaries to take shortcuts in performing notarizations. Closen, supra note 14, at 679. "Sometimes, pressure from an employer [on a notary-employee] to be less than scrupulous can be significant." Friedberg, supra note 13, at 13. "[N]otaries should never give in to pressure from anyone — a boss, co-worker, friend, or family member — to commit a fraudulent act." Workman, supra note 19, at 13. "Business people, their staffs and their clients will sometimes engage in cost-cutting and time saving shortcuts. But notarial acts cannot be among those shortcuts, because notarization law is very precise." Closen, supra note 12, at 25. "Unfortunately, notary-employees often face on-the-job pressures from employers who coerce them into completing false certificates." CLOSEN ET AL., supra note 27, at 331. The Notary Public Code recognizes that notarial responsibility "frequently will contradict not the provisions of law but the policies or expectations of the [notary’s] employer." NOTARY PUBLIC CODE, introductory cmt. (1998). Many lawyers and law firms employ notaries. "Among the professional groups that regularly use the services of notaries, attorneys are most often the bullies, the intimidators, the arrogant so-and-sos who say, 'I know the law and you don’t, so just do it.' Well, they usually don’t know notarial law, or they think the rules are trivial. It almost seems that their familiarity with the law has bred a contempt for it." Charles N. Faerber, Being There: The Importance of Physical Presence to the Notary, 31 J. MARSHALL L. REV. 749, 761 (1998) (quoting a National Notary Association Counselor).

245. "It is entirely possible that employers will even contribute to faulty performance by notaries, and consequently employers will be independently liable for injuries caused thereby." Closen, supra note 14, at 679. J. Michael Gottschalk, Comment, The Negligent Notary Public-Employee: Is His Employer Liable?, 48 NEB. L. REV. 503 (1969) (concluding that employers of notaries can frequently face vicarious liability for the misconduct of their employee-notaries); see also Nancy Perkins Spyke, Taking Note of Notary Employees: Employer Liability for Notary Employee Misconduct, 50 ME. L. REV. 23, 57 (1998) (offering suggestions to notary employers as to how they might avoid liability for the acts of notary-employees). See generally Gerald Haberkorn & Julie Z. Wulf, The Legal Standard of Care for Notaries and Their Employers, 31 J. MARSHALL L. REV. 735 (1998) (pointing out the serious liability concerns of employers of
the no-fault agency doctrine of respondeat superior holds employers legally responsible for the errors of their notary-employees.\(^{246}\) The legal basis for both the direct form of employer liability for its own negligence or intentional misconduct, and the vicarious form of employer liability without employer fault, can be found in some notary statutes\(^{247}\) and in some common law decisions about injuries flowing from notarial errors and violations.\(^{248}\) Importantly, employer exposure to legal risk can readily arise from the omission by notary-employees to administer oral oaths and affirmations.

Worse yet, employers (like members of the public at large) are at least as lacking in knowledge about the law and practice of notaries,\(^{249}\) and employers of notaries often

\(^{246}\) "The usual rule is that employers will be vicariously responsible for the actions of their employees that are authorized or occur within the scope of employment. This rule of respondeat superior liability includes accountability for negligent torts and even for intentional torts... under certain circumstances..." Closen, supra note 14, at 677. "Even if not at fault, employers of Notaries may be held legally responsible under the generally recognized agency doctrine of vicarious liability." Closen, supra note 12, at 25.

\(^{247}\) "Some notary public statutes now contain sections establishing the circumstances under which employers will have vicarious legal liability for notarial actions." Closen, supra note 14, at 678. See, e.g., 5 ILL. COMP. STAT. § 312/7-102 (2001) (setting out the statutory elements for vicarious responsibility of employers of notaries); IDAHO CODE § 51-119 (2) (Michie 2000) (same); MO. ANN. STAT. § 486.360 (West 2001) (same). See Closen, supra note 14, at 676-81 (discussing both statutory and common law derivative liability of employers of notaries); see also infra notes 388, 391-92 and accompanying text.

\(^{248}\) There are many, many such cases. For a brief sampling of them, see the cases noted in CLOSEN ET AL., supra note 27, at 335-51; and in Closen, supra note 14, at 676-81; see also supra notes 242, 245-46 and accompanying text. Under the common law as it is applied to notarial practice,

\[\text{since the vicarious liability of employers of notaries is purely derivative (and is truly the result of the long-standing public policy view that the more deeply-pocketed employers should be held accountable for the misdeeds of their employees), employers need not have been guilty of any fault that contributed to third parties' injuries. Put simply, [common law] vicarious liability is a kind of no-fault liability, provided that the tortfeasor-employee [the notary] was acting under the control or right of control of the employer and was acting within the scope of employment.}\]

Closen, supra note 14, at 677.

\(^{249}\) The basic notarial function of notarizing on documents "is not fully understood by many attorneys, business people, members of the public and even by many notaries themselves." CLOSEN ET AL., supra note 27, at 109. See also Closen, supra note 6, at A23-24 (pointing out that employers of notaries and lawyers should be counted among those who do not know or who do not abide by
misdirect their notary-employees to take shortcuts and to violate notary statutes and sound notarial practices.\textsuperscript{250} Among the shortcuts and violations urged by employers may be the omission of oral notarial oaths and affirmations, the administration of which necessarily lengthens the time of notarizations.\textsuperscript{251} Obviously, if employers of notaries direct or encourage notarial misconduct, those employers can face legal liabilities, possibly including punitive damages or criminal accountability.\textsuperscript{252} It is also quite possible that

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\item 250. Sometimes the erroneous practices urged by employers are the result of ignorance, while sometimes employers intentionally suggest or direct faulty practices. In fact, employers cause a substantial number of the notarial errors to occur. "In the case of employee-notaries, they tend to do whatever their employers direct them to do, even if shortcuts and misconduct are involved." Closen, \textit{supra} note 6, at A23. Due largely to pressures and directives from employers to their notary employees to engage in unlawful or unsound notarial practices, the Code of Professional Responsibility requires that notaries resist and refuse such efforts. "The Notary shall give precedence to the rules of law over the dictates or expectations of any person or entity." NOTARY PUBLIC CODE OF PROF'L RESPONSIBILITY, Guiding Principle V (Nat'l Notary Ass'n 1998). The relevant standard from that Code then states in more particularity, "The Notary shall obey and give precedence to any pertinent law, regulation or official directive, or this Notary Public Code of Professional Responsibility, when they conflict with the dictates or expectations of an employer, supervisor, client, customer, coworker, associate, partner, friend, relative or any other person or entity." Standard V-A-1.

\item 251. At the risk of stating the obvious, the omission of any step in the process of a thorough notarization would reduce the length of time necessary to complete the procedure. For instance, the omission of the keeping of a notary journal, as well as the omission of the oral oath or affirmation, would shorten the time required to perform a notarization.

[N]otarial acts cannot be among those matters that are shortchanged, because the law of notarizations is very precise leaving no room for shortcuts. Thus, a notary must not . . . omit to administer an oral oath to a document signer when the notarial certificate recites that the truthfulness of its contents has been 'sworn to.' Such shortcuts may cause a notarization to be invalidated. The slight saving initially is not worth that ultimate risk.

Closen & Shannon, \textit{supra} note 6, at 32.

\item 252. \textit{See} Commercial Union Ins. Co. of New York v. Burt Thomas-Aitken Constr. Co., 230 A.2d 498, 501 (N.J. 1967) (stating "the private employer of a notary public might be liable for the notary's breach of duty if the employer participated in that breach, as for example, if the employer should ask or encourage the notary to act without appropriate inquiry"); \textit{see also} Dickey v. Royal Banks of Mo., 111 F.3d 580, 582 (8th Cir. 1997) (pointing out that a bank officer directed a bank employee-notary to notarize a customer's signature even
employers can face vicarious liability for errors and omissions of their notary-employees even though the employers have not been guilty of any faulty behavior.\textsuperscript{253} Apparently, many employers are willing to run the risk and hope that notarial misconduct will not injure anyone financially or will remain undetected and unreported.

2. \textit{Perjury}. The authority is divided on the question of whether the law of perjury applies when a document signer executes a document to which a jurat notarization is affixed but when no oral oath or affirmation was actually administered.\textsuperscript{254} The preference of the law supports

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\textsuperscript{253} Under the traditional agency doctrine of respondeat superior, the employer need not have been guilty of any misconduct in order to be accountable for the misconduct of an employee who is acting within the scope of employment. See GARY S. ROSIN AND MICHAEL L. CLOSEN, AGENCY, PARTNERSHIPS AND LIMITED LIABILITY COMPANIES (2000), at 453-510 (discussing the liability without fault of employers for the misconduct of their employees). This same theory of vicarious liability may well apply to instances of notary-employee misconduct committed within the scope of employment. "Every employer and supervisor of notaries are jointly and severally liable for all wrongful notarizations performed in the workplace." VAN ALSTYNE, supra note 3, at 74. Several state laws establish the vicarious liability of notary-employers for notary-employee mistakes and misconduct. See, e.g., IDAHO CODE § 51-118 (Michie 2000). Some jurisdictions impose employer liability if the notary acts within the scope of employment in addition to employer consent to the misconduct. See, e.g., MO. REV. STAT. § 486.360 (2001); W. VA. CODE § 29C-6-102 (2001). See generally Simon v. Peoples Bank & Tr. Co., 180 A. 682, 684 (N.J. 1935) (noting that it is a well-settled rule that notary employers are vicariously liable for an employee's notarial misconduct); see also PIOMBINO, supra note 5, at 26 (noting the joint liability of notary-employers for the official misconduct of notary-employees); Closen, supra note 14, at 677-81 (discussing the various descriptions of vicarious liability of notary-employers for notary-employee misconduct); CLOSEN ET AL., supra note 27, at 331-55 (discussing various common law vicarious liability outcomes resulting from notarial misconduct).
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\textsuperscript{254} See, e.g., State v. White, 717 P.2d 45 (Nev. 1986) (holding that the mere signing of a document did not constitute an oath or affirmation by the document signer); accord O'Reilly v. People, 86 N.Y. 154 (1881); Spangler v. District Court, 140 P.2d 755 (Utah 1943); Youngker v. State, 215 So. 2d 318 (Fla. Dist. Ct. App. 1968); Rogers v. People, 422 P.2d 377 (Colo. 1967); Stewart v. State, 142 So. 590 (Ala. Ct. App. 1932). See also State v. Assuntino, 429 A.2d 900, 904 (Conn. 1980) (ruling that "[a]n oath or affirmation is a solemn and formal declaration that the contents of a declaration, written or oral, are true, and it must be administered in accordance with the ceremony and procedures set forth
notarizations and notaries. This preference is so well ingrained in our notarial law that in some cases it is found in statutory law, in some cases in common law decisions, and in most cases, in both. For instance, there is a presumption of regularity of the acts of public officers, including notaries public. So, if a notary is supposed to have administered an oath or affirmation, it will be presumed that the oral oath or affirmation was given.

Moreover, there is an evidentiary presumption of the validity and admissibility of notarial certificates, provided

in General Statutes §§ 1-22 to 1-25); State v. Grant, 404 A.2d 873 (Conn. 1978) (holding that a prosecutor’s affirming and acknowledging the contents, respectively, of a wiretap application did not constitute an oath or affirmation as required by statute).

255. An old Idaho statute provided that a “certificate of acknowledgment must be substantially in the following form.”, thus invoking the substantial compliance doctrine. Pac. Coast Joint Land Bank v. Sec. Products, 55 P.2d 716, 718 (Idaho 1936) (quoting Idaho Code § 54-709 ). See also infra notes 262-64 and accompanying text.

256. “It is the policy of the law to uphold certificates of acknowledgment. . .” Lloyd v. Simons, 105 N.W. 902, 904 (Minn. 1906). Indeed, in that case an alleged written real estate deed along with its notarial certificate of acknowledgment had allegedly been lost. The court accepted oral testimony of two lay witnesses, not including the notary public, to substantiate that the deed had been validly acknowledged before the notary. See Trowbridge v. Bisson, 44 N.W.2d 810, 812 (Neb. 1950) (holding that an “acknowledgment, in the absence of fraud, will be conclusive in favor of those who in good faith rely upon it”) (emphasis added).

257. “Case law regularly recites the adage that the acts of public officials enjoy the presumption of validity. Since notaries are public officers, the case opinions have announced that notarial activities are entitled to the presumption of validity as well.” Closen, supra note 14, at 681. “A notary public’s certificate of acknowledgment, regular on its face, carries a strong presumption of validity” (emphasis added). Lasche v. Lasche Basic Profit Sharing Plan, 111 F.3d 863, 866 (11th Cir. 1997) (citing Butler v. Encyclopedia Britannica Inc., 41 F.3d 285, 294 (7th Cir. 1994)).

258. “[W]hen an oath is administered by a public officer it will be presumed the officer administered the oath in the county within which he or she was authorized to administer oaths, for the presumption is that the officer has done his or her duty.” 58 AM. JUR. 2D Newspapers, Periodicals, and Press Associations to Occupations, Trades, and Professions § 21 (1989).

Indeed, being able to rely on documents is the purpose of having them notarized . . . If business cannot depend on notaries doing [the] simple task [of properly identifying document signers and administering a proper oath to them], then there is no place for notaries in the world of commerce.

they appear to be complete and correct on their faces.\(^{259}\) Since a jurat notarial certificate states that it has been “sworn to,” the legal presumption is entertained that an oral oath or affirmation was administered.\(^{260}\) Significantly, this legal presumption is enjoyed even in the face of statistical and anecdotal evidence to the effect that notaries overwhelmingly omit to give oral oaths or affirmations.\(^{261}\)

Finally, according to the substantial compliance doctrine, a notarization will be upheld so long as there was substantial compliance with the legal requirements for the particular type of notarization in question, including the administering of oaths and affirmations.\(^{262}\) In other words, notaries do not have to be perfect or exacting in their official actions, if they are predominantly complete and correct in what they do.\(^{263}\) This legal standard inspires less

259. “[T]he notary's certificate or jurat, when accompanied with the official seal of office and proper certificates of his official character if the act is to be used beyond his own county or state is received as prima facie evidence.” John, supra note 10, at 2. This is even the law in England. English notarial marine protests “carry a special weight in evidential terms.” Silverman, supra note 139, at 10. “The presumption of validity certainly carries evidentiary weight. That is, a notarization should generally be recognized or accepted without independent proof of its validity.” Closen, supra note 14, at 683.

260. “Where an officer authorized to administer oaths identifies his signature on a jurat together with the signature of the person making the statement, this is prima facie evidence that the declarant was in fact sworn.” Youngker v. State, 215 So. 2d 318, 321 (Fla. Dist. Ct. App. 1968). See also Farm Bureau Fin. Co. v. Carney, 605 P.2d 509, 514 (Idaho 1980) (concluding that there is a presumption notaries “have properly carried out the duties of their office”).

261. See supra notes 225-41 and accompanying text.

262. “A substantial, and not a literal, compliance with the statute in the certificate of acknowledgment to a deed or mortgage of real estate is all that the law requires. . . .” Herron v. Harbour, 182 P. 243, 244 (Okla. 1919). “[W]here substance is found [in certificates of acknowledgment] obvious clerical errors and all technical omissions and defects will be disregarded.” Lloyd v. Simons, 105 N.W. 902, 904 (Minn. 1906). “[I]f there is a substantial compliance with the statute the oath is obligatory and binding.” 58 AM. JUR. New Trial § 21 (1989). “Statutes prescribing the form of an oath are not intended to prescribe an inflexible iron formula, admitting of no deviation in words, but intended rather to direct and point out the essential matters to be embraced in an oath.” 39 AM. JUR. New Trial § 13 (1942).

263. “The courts generally accept the substantial compliance doctrine in notarization cases. That is, as long as there has been substantial compliance with the notarization procedure, it will be found valid. The notarization does not have to have been perfectly executed.” Closen, supra note 14, at 684-85. Notaries are guilty of making many mistakes, some serious and some technical or clerical. “[N]umerous mistakes are made in the document notarization
than rigorous performance by notaries, and in some respects is counterproductive. It is counterproductive if it promotes sloppy notarial performance. It is counterproductive if it promotes increased numbers of legal challenges to notarizations since even under the preferred treatment enjoyed by notarizations, there is no brightline understanding of the substantial compliance standard.264

Some courts have reasoned that the language of the written jurats communicates to the signers the proposition the document has been “sworn to.”265 Hence, the oath is a process, and transactions are often needlessly jeopardized as a result.” Closen, et al., supra note 27, at 109. See, e.g., Pac. Coast Joint Stock Land Bank v. Sec. Products, 55 P.2d 716 (Idaho 1936) (illustrating the making of a clerical error by a Utah notary in failing to fully review the language of a form acknowledgment prepared for use in Idaho to permit its use in Utah and the recognition by the court of the out-of-state notarization containing the clerical mistake). “It is the policy of the law to uphold certificates when substance is found, and not to suffer conveyances, or the proof of them, to be defeated by technical or unsubstantial objections.” Id. at 718. In Roussain v. Norton, 55 N.W. 747 (Minn. 1893), the venue section of the notarial certificate named a non-existent county as the county where the notarization occurred, but since the state was correctly named and notaries had statewide jurisdiction, the court concluded the technical error “is surplusage, and may be disregarded.” Id. at 747. See also Rodes v. St. Anthony & Dakota Elevator Co., 52 N.W. 27, 27 (Minn. 1892) (involving a case in which the mortgagor’s surname was misspelled in the certificate of acknowledgment and in which the court upheld the notarization, concluding “the variance is not material, and arises from a clerical error”).

264. “The ultimate outcome on the question of whether the notarization will be held valid will depend upon a weighing of any conflicting evidence in light of the presumption of validity.” Closen, supra note 14, at 685. “While many assume that every blank must be filled in for the [notarial] certificate to be valid, the more correct principle is that all requisite information must be provided.” Van Alstyne, supra note 3, at 34.

The omission of certain information can prove fatal to the validity of the [notarial] certificate, while the omission of other information is not as serious. “[T]he inadvertent omission of any of [the] required components [of the certificate] may be cured at any time, subject to its availability and the extent to which the notarization has been relied upon by third parties.” Id. at 231. Each case tends to present unique facts describing a defective notarization and requires each court to consider whether the defects are substantial enough to warrant invalidating the notarization, or so insubstantial as to uphold the notarization. See, e.g., Farm Bureau Fin. Co. v. Carney, 605 P.2d 509 (Idaho 1980) (illustrating a case in which the trial judge concluded the notarization was fatally defective, but in which the reviewing court concluded there had been substantial compliance such that the notarization was valid). See cases cited supra note 263.

265. Many cases have concluded the mere signing of a document, which contains language to the effect that it has been sworn to, constitutes submission
written one rather than an oral one. However, such analysis is most troublesome and unpersuasive in a number of respects.

First of all, the nominal recital "sworn to" in the notarial certificate hardly explains clearly to a document signer exactly what has been sworn to. The brief reference "sworn to" might suggest only that the signers pledge they are who they purport to be. After all, the principal function of the notary is to determine that the signer is properly identified — to deter document fraud by an imposter. Or, the "sworn to" phraseology (which often appears in context as part of the longer passage "subscribed and sworn to before" the notary) could be interpreted to mean the signers pledge that they personally appeared before the notary at the time of the notarial act. The law everywhere demands that a document signer in obtaining a jurat notarization must sign the instrument in the immediate physical presence of the notary. Nevertheless, a common and serious fault of notaries is failing to insist upon the personal presence of signers before the notaries at the time

266. See The ID Puzzle, Nat'l Notary (Nat'l Notary Ass'n, Canoga Park, Cal.), Sept. 1996, at 9 (stating "[t]he Notary of the 1990s is heavily relied upon to verify that the signers of certain important documents are who they claim to be"). "Perhaps the notary's most important duty when notarizing a signature is to exercise reasonable care to ascertain the identity of the signer." Peter J. Van Alstyne, Notary Law, Procedures & Ethics 23 (1998).

267. A jurat is a notarial act that motivates a signer to make a truthful statement. While the jurat also requires personal appearance, the document's signer must affix a signature on the document in the Notary's presence and take an oath or affirmation, administered by the Notary, swearing that the contents of the document are true. Tip Sheet, Nat'l Notary (Nat'l Notary Ass'n, Canoga Park, Cal.), July 1999, at 20. "In a jurat, the notary does have to see the signer sign the document and the notary must place the signer under oath before the signer signs the document." Commonwealth of Kentucky Notary Public Handbook 4 (1997). Nevada authorities also direct that for a jurat notarization, it must be sworn to before the notary, and that such oath or affirmation must be administered "first" (before the signing of the document). Nevada Notary Handbook 9 (1997). Regarding a jurat notarization, "[t]he notary must place the signer under oath and then watch the signature being written." Wyoming Notaries Public Handbook 9 (1999).
of notarizations. It could be that "sworn to" is as meaningless to the document signer as other worthless relics of legal and notarial practice, such as the "LS" or "SS" designation which still appears in the venue section of many notarial certificates. Certainly, the two-word phrase "sworn to" cannot possibly thoroughly alert the signer to her legal obligation. In other words, the "sworn to" phrase may well be ambiguous to ordinary people. On the other hand, when proper oral oaths are administered, document signers are told quite plainly what they are swearing to, and they are most definitely alerted to the legal consequence that they are being put under oath. The law demands that some facet of the oath administration process must inform oath-takers that they are doing more than making an ordinary assertion.

Secondly, and even more significantly, it is highly unlikely that the signer's attention has been drawn to the certificate at all, let alone to the "sworn to" passage. After all, the notarial certificate appears at the end of a document and is commonly said to be the exclusive province of the

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268. "Undoubtedly the most frequent and most serious omission by notaries in law offices and other settings when performing notarizations is the failure to require the presence of document signers." Closen & Shannon, supra note 6, at 32.


270. Certainly, our law is commonly known to be peppered with instances in which conspicuousness of information is required such as warnings on dangerous or potentially dangerous products, and particularly important or peculiar contract provisions. In simple fairness to document signers, they should be specifically alerted to the legal significance of their actions when submitting to oaths or affirmations. In concluding there was "no direct evidence in the record of an outward act by [a document signer] supporting the conclusion that his attention had been directed to the necessity of swearing to his statement" merely from the fact he executed an instrument reciting it had been sworn to, his conviction for perjury was reversed. White v. State, 717 P.2d 45, 48 (Nev. 1986). "It is the notary's duty by law to ensure the notarial certificate is complete and true." VAN ALSTYNE, supra note 3, at 51 (emphasis added). It is not the responsibility of the document signer. "This declarative wording of the certificate [for an acknowledgement form of notarization] asserts four material facts for which the notary is personally responsible." Id. at 6 (emphasis added).
notary. That certificate is technically a separate document: an official governmental document.\(^{272}\) The document signer signs above and before the certificate, so that there is no assurance she will have read the notarial certificate. The certificate is filled in or completed by the notary, not by the document signer.\(^{272}\) The notary signs the certificate, not the document signer.\(^{274}\) The standard practice does not include

\(^{272}\) "A notarial certificate is not part of the signer's document. It is a separate document authenticating the signature appearing on the signer's document." VAN ALSTYNE, supra note 3, at 18. "It is a state document created by [the notary] to authenticate the signature of a person on their document." Id. at 19.

\(^{273}\) The customary practice almost always is to have the document signer execute the document at the end of its text, this followed by the notarial certificate which is signed by the notary but not by the document signer. However, there are unusual occasions when the drafters of documents will forget to include signature spaces, and document signers will end up signing within the body of the notarial certificates. Or, inexperienced document signers will erroneously sign within the texts of the notarial certificates (or inexperienced notaries will erroneously direct signers to sign within the bodies of the notarial certificates). "The jurat is the clause on the bottom of a document which is evidence that an oath or affirmation was administered." PIOMBINO, supra note 5, at 72. "A major reason most people incorrectly assume the notarization is part of their document . . . is because it traditionally appears immediately adjacent to the customer's signature." VAN ALSTYNE, supra note 3, at 20. Most often notarial certificate language is printed or typed onto the end of a document, leaving blank spaces for completion to indicate the date and place of the notarization and to identify the particular notary who performs the notarization. Almost always, the notary actually fills in the substance in the blanks. However, even if someone else does so, the notary is the public official and is legally responsible for the complete contents of the certificate. "The notary would complete the certificate of notarization. Technically and officially, a legal notarization comprises the steps necessary to complete the certificate of notarization and any required journal entry." CLOSEN ET AL., supra note 27, at 110. "[T]he Notary will complete the jurat language . . . " Administering Oaths, supra note 5, at 23. "The notary is under a duty of law to ensure every word of the acknowledgment certificate is true . . . Once it has been signed and sealed, it becomes the notary's own work product" even if most of the certificate has been pre-printed onto the signer's document. VAN ALSTYNE, supra note 3, at 7.

\(^{274}\) One of the standard requirements of notarial certificates under the notary law of every jurisdiction is the signature of the notary. "A notarial act must be evidenced by a certificate signed and dated by a notarial officer." UNIF. LAW ON NOTARIAL ACTS § 7(a) (1982). See also MODEL NOTARY ACT § 5-101 (1984) (setting out a form certificate for an acknowledgment, including a signature of the notary); id. § 5-103 (setting out a form certificate for a jurat, including a signature of the notary). The document signer's name should be typed or printed legibly in the body of the certificate (id. §§ 5-101, 5-103), but the signer should not actually execute the document in that location. Rather, the standard place for the signer's signature is at the end of the instrument, above and before the notarial certificate. None of the model statutory forms of jurat certificates
an admonition by the notary to the signer to read the notarial certificate. The data from the author’s notary survey confirms this statement. Among some 385 respondents who answered a question relating to this point, only about seventy-two of them (or nineteen percent) had a notary advise them to read the notarial certificates. On the other hand, 312 people (or eighty one percent) never had a notary suggest that they should read their certificates. Furthermore, those individuals who indicated notaries had on occasions advised them to read their notarial certificates indicated that notaries recommended they read the notarial certificates only about twenty eight percent of the time.

Results from the author’s notary survey also clearly establish that a significant portion of those who have had their signatures notarized do not believe they have the legal responsibility to read the contents of the notarial certificates and do not in fact read those certificates. Specifically, thirty percent of respondents answered that they felt no legal obligation to read the notarial certificates.

includes the signature of the document signer, but simply the name of the signer. See, e.g., 5 ILL. COMP. STAT. ANN. § 312/6-105(c) (West 1993) (identifying the “name” of the document signer and oath-taker as an element of the certificate); D.C. CODE ANN. § 45-628(3) (2001) (same); NEV. REV. STAT. ANN. § 240.167 (Michie 2000 & Michie Supp. 2001) (same); N.M. STAT. ANN. § 14-14-8(C) (Michie 1995) (same); WASH. REV. CODE ANN. § 42.44.100(3) (West 2000) (same); WIS. STAT. ANN. § 706.07(8)(c) (West 2001) (same).

275. A smaller number of respondents answered this question because it was included in the 2001 form, but it had not been part of the 1999 version of the survey. The exact percentage was 18.70.

276. The exact percentage was 81.04.

277. Question number eight in the survey asked, “Has a notary public ever advised you to read the language of the notarial certificate when notarizing your signature?” Question number nine next asked, “If the answer to question #8 was ‘yes,’ about how many times?”

278. Those 72 respondents indicated they had had about 1145 notarizations performed, and that notaries had advised them to read the certificates relating to about 325 of those notarizations. The exact percentage was 28.38.

279. Two questions in this regard were asked on the 2001 survey form. Question number six asked, “When you have had your signature notarized on a document, did you read the certificate of notarization on that document?” Question number seven then asked, “Do you believe there is a legal obligation for you to read the language of a certificate of notarization when you have your signature notarized on a document?” Curiously, although document signers do not tend to read the notarial certificates on their instruments, the certificate is an official legal document appended to an instrument and should be examined by both the notary public and the instrument signer. “The notarial certificate is intended to be read.” Notarial Certificate, supra note 11, at 4.
certificates. Approximately twenty eight percent of those surveyed also announced that they had never read the notarial certificates, while about twenty seven percent indicated they "sometimes" read the certificates.

In the standard jurat, the certificate of notarization states, in part, that the document has been "subscribed and sworn to" before the notary. The uniform view of a jurat, then, is that a document signer must both execute an original signature on the instrument while in the physical presence of the notary and orally swear to or affirm the truth of the contents of the instrument during the same signing ceremony in the immediate presence of the notary. These two requirements distinguish a jurat from other kinds of notarial acts, all of which omit one or both of the two jurat requirements. An acknowledgment, for instance, does not have to be presently signed before the notary, but it may have been signed at some earlier time with the signer merely acknowledging that the signature is his or hers on the occasion of its notarization.
Furthermore, an acknowledgment is not sworn to or affirmed by the document signer. As another example, a simple signature witnessing requires the signature to be executed in the presence of the notary but does not involve the swearing to or affirmation of the signer to the truth of the substance of the document.

3. Precise Language of Notorial Oaths and Affirmations. Neither statutory nor common law dictates the precise language to be utilized in notarial oaths and affirmations. Not surprisingly, there is some variety in the forms that they take. The Alaska Notary Handbook purports to quote “the correct wording for a simple oath or affirmation,” as follows:

“Oath: I do solemnly swear that the statements in this document are true, so help me God.”

“Affirmation: I do solemnly affirm that the statements

acknowledgment notarization, but acknowledgments were used by the buyer and seller [of land] to acknowledge their actions in order to furnish the required evidence to the recording officer.

Id. at 9.

285. The short definitions of “jurat” and “acknowledgment” clearly show that, while the former is sworn to, the latter is not. A “jurat” is the “[c]ertificate of officer or person before whom writing was sworn to.” BLACK'S LAW DICTIONARY 990 (rev. 4th ed. 1968). An “acknowledgment” is a “[f]ormal declaration before authorized official, by person who executed instrument, that it is his free act and deed.” Id. at 39. See, e.g., 5 ILL. COMP. STAT. ANN. § 312/6-105(c), (d) (West 1993) (setting out the two short forms for an acknowledgment and for a verification upon oath or affirmation - a jurat). These two forms show the “sworn to” language for a jurat but no such language in the form for an acknowledgment. The same distinction can be found in the suggested statutory forms for jurats and acknowledgments in other states. See, e.g., N.M. STAT. ANN. § 14-14-8(A), (C) (Michie 1995); WASH. REV. CODE ANN. § 42.44.100(1), (3) (West 2000); WIS. STAT. ANN. § 706.07(8)(a), (c) (West 2001).

286. Not all states utilize the procedure for the simple witnessing or attesting of a signature, for many states utilize only the jurat and the acknowledgment forms of notarization. But, numerous states have adopted the simple signature witnessing/attesting notarial format in addition to the other two procedures. See, e.g., 5 ILL. COMP. STAT. ANN. § 312/6-105(d); N.M. STAT. ANN. § 14-14-8(D); WASH. REV. CODE ANN. § 42.44.100(4); WIS. STAT. ANN. § 706.07(8)(d).

287. “The form of administering an oath may be varied to conform to the religious belief of the individual, so as to make it binding on his conscience.” ANDERSON'S MANUAL, supra note 24, at 17. “There are no magic words that are required in administering an oath or affirmation.” Kearney, supra note 5, at 6.

288. ALASKA NOTARY HANDBOOK 13.

289. Id.
in this document are true. 290

According to the Nevada Notary Handbook, "[T]he notarial officer, state[s] the words of the oath or affirmation. The oath taker then repeats these words back to [the notary]." 291 Other sources suggest the oath or affirmation may be accomplished by having the notary recite a question to the oath-taker or affirmation-taker. 292 The Nevada Notary Handbook instructs notaries as follows: "You must first administer an oath by swearing in the document signer. You ask, 'Do you swear that the statements in this document are true so help you God?' The document signer then answers, 'Yes.'" 293 Similar guidance appears in the Maine Notary Public Guide, which states, "[w]hen a Notary Public takes a sworn statement, an oath must be administered to each person sworn and must, in effect, ask each person 'do you swear' to the truth of the statement?" 294 Here is the sample oath included in the Maine Guide for a document signing under oath or affirmation: "Do you (swear/affirm) under penalty of law that you have read and understood ____ and that to the best of your knowledge and belief it is true (so help you God)?" 295

The most significant concern is that the oath or affirmation be composed in such a way as to assure that the declarant feels honor bound in good conscience to state the truth. 296 Moreover, as previously noted, the declarant must do some act to signify this level of commitment in order to distinguish an oath or affirmation from a mere statement having no legal significance. 297

290. Id.
291. [NEVADA] NOTARY HANDBOOK, supra note 75, at 5.
292. This is the suggested practice in Wyoming. "The typical oath a notary may administer is: 'Do you swear (or affirm) that the statements in this document are true?', [to which t]he person should reply, 'I do.'" [WYOMING] NOTARIES PUBLIC HANDBOOK, supra note 8, at 9. After the officer states the contents of the oath or affirmation, "[t]he person being sworn or affirmed then gives an affirmative answer." ANDERSON'S MANUAL, supra note 24, at 17.
293. [NEVADA] NOTARY HANDBOOK, supra note 75, at 9 (emphasis in original).
294. STATE OF MAINE NOTARY PUBLIC GUIDE, supra note 113, at 23.
295. Id. at 24.
296. "The form of administering an oath maybe varied to conform to the religious belief of the individual, so as to make it binding on his conscience." ANDERSON'S MANUAL, supra note 24, at 17.
297. "An oath is an outward pledge, given by the person taking it, that his attestation or promise is made under an immediate sense of his responsibility to
The Indiana Notary Public Pamphlet recites a peculiar and somewhat troublesome version of an oath for a document signer. It provides: "Do you solemnly swear that each and all of the facts contained in this instrument are the truth, the whole truth and nothing but the truth, so help you God?" No other form of oath or affirmation for document signers even remotely like the Indiana one has been discovered. The Indiana drafters obviously borrowed from the standard oath or affirmation employed for witnesses giving testimony in various kinds of judicial and other hearings. However, it is not commonly expected that documents bearing jurats will necessarily be so complete as to represent the "whole truth" about the subject matter of those documents. Such a demand could result in substantial lengthening of instruments, or to the increased risk of challenges to them when they fall short of complete disclosures about their subject matter.

Additionally, neither the statutory nor common law prescribes any specific formalities to administer notarial oaths and affirmations. Although the Kansas Notary Public Handbook recites that the notarial oath "is made with the right hand uplifted or placed upon the Holy Bible," the Wyoming Notaries Public Handbook actually God for the truth of what is stated ... " Id.

298. INDIANA NOTARY PUBLIC PAMPHLET 7 (1996).

299. Here is the sample oath for a witness as suggested to Oregon notaries: "Do you solemnly swear that the information you are about to give (or have given) is the truth, the whole truth, and nothing but the truth, so help you God?" OREGON NOTARY PUBLIC GUIDE 54 (1996). In Pennsylvania, basically the same sample is offered: "Do you solemnly swear that the testimony that you are about to give will be the truth, the whole truth, and nothing but the truth." [Pennsylvania] Sample Notary Statements, at http://www.dos.state.pa.us/bcel/notaries/sample.html (last visited Nov. 6, 2001). West Virginia suggests basically the same sample witness oath: "Do you solemnly swear or affirm, under penalty of perjury, that the testimony you shall give . . . shall be the truth, the whole truth, and nothing but the truth, so help you God?" WEST VIRGINIA NOTARY HANDBOOK, supra note 18, at 8. But, of course, even the form of oaths or affirmations given to witnesses in legal proceedings may vary from place to place. For example, this sample oath was found for use by notaries in Maine: "Do you (swear/affirm) under penalty of law that what you are about to say will be true (so help you God)?" STATE OF MAINE NOTARY PUBLIC GUIDE, supra note 113, at 23.

300. "Although not required to do so by law, Notaries are encouraged to include formal ceremony in the administering of oaths and affirmations." Administering Oaths, supra note 5, at 22-23.

301. KANSAS NOTARY PUBLIC HANDBOOK, supra note 226, at 26. That description is a common one. "One form consists of the person taking the oath or
admits that “[i]t is not clear under the law whether the person you are swearing in must raise his or her right hand.”302 Nor is the law clear about any need to engage in other possible corporal elements, such as standing (rather than sitting) and touching a Bible or other sacred book or object.303 Occasional old practices actually required the oath-taker to kiss a Bible.304 According to the Oregon Notary Public Guide, “Notaries generally have discretion to use the words and gestures that they feel will most compellingly appeal to the conscience of the oath-taker.”305 Again, the result is a variety of actual practices. Some notaries ask document signers to stand while the oath or affirmation is taken; other notaries do not.306 Some notaries stand along with the signers; other notaries remain seated.307 Some notaries ask document signers to raise their right hands; other notaries do not.308 Some notaries will raise their right

affirmation holding up his right hand while the officer repeats to him the words of the oath . . . ” ANDERSON’S MANUAL, supra note 24, at 17.


303.
To further impress upon the person the seriousness of taking the oath, the notary public might incorporate two subtle (and optional), but powerful symbolic gestures. First, ask the person to rise and raise his right hand when taking the oath. Second, ask the person to place his left hand on a Bible or other religious book compatible with the religious beliefs of the person.

PIOMBINO, supra note 5, at 67 (emphasis added).

304. “In some American states the law requires that a person swearing (or affirming) be made . . . to kiss an open Bible.” HUMPHREY, supra note 4, at 140. “Historically, in the taking of an oath in a tribunal or court setting, the person taking the oath sealed their promise to be truthful by kissing a Bible.” VAN ALSTYNE, supra note 3, at 198. “The . . . kissing of the Bible or Testament is not essential to the taking of an oath.” 39 AM. JUR. Oath and Affirmation § 13 (1942).

305. OREGON NOTARY PUBLIC GUIDE, supra note 299, at 54. “Unless otherwise specified by [statute], the wording and gestures of the oath ceremony may be adapted to the beliefs of the oath-taker.” Id.

306. See PIOMBINO, supra note 5, at 67 (recommending that the notary “ask the person to rise” to take an oath or affirmation).

307. In the law of agency, there is a doctrine known as the “equal dignities rule,” which requires that some agency grants must be written if their underlying contracts or subject matter are required to be in writing. It seems that something akin to that notion should apply as between oath-givers and oath-takers. That is, if the oath-taker is asked to raise his/her hand or to stand, then the oath-giver should do likewise. Or, as the old saying goes, “What’s good for the goose, is good for the gander.”

308. “One form consists of the person taking the oath or affirmation holding up his right hand while the officer repeats to him the words of the oath . . . ”
hands during the oath and affirmation administration procedure, but others will not.\textsuperscript{309} Some notaries will ask signers (who do not voice religious objections) to place their left hands on Bibles while oaths are administered.\textsuperscript{310} Some notaries, in keeping with historic practices, may ask oath-takers or affirmation-takers to remove any hats or head coverings that are worn for other than religious purposes.\textsuperscript{311}

Certainly, a strong argument can be made that if we are to have oral oaths and affirmations, they should involve the formalities suggested above such as standing, raising hands, and using a Bible (if not objected to). The inclusion of formalities has the advantage of clearly communicating the significance of the oath or affirmation to the document signers.\textsuperscript{312} Moreover, the heightened sense of ceremony

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\textsuperscript{309} ANDERSON'S MANUAL, supra note 24, at 17. See PIOMBINO, supra note 5, at 67 (suggesting that the notary "ask the person to raise his right hand when taking the oath"). "A common practice is for the Notary and the oath-taker/affirman to face each other holding up their right hands, palms out." Administering Oaths, supra note 5, at 23. "It is not clear under the law whether the person you are swearing in must raise his or her right hand. This office strongly suggests you direct the person before you to raise his or her right hand and then administer the oath." [WYOMING] NOTARIES PUBLIC HANDBOOK, supra note 8, at 9. "The individual taking the oath or affirmation raises one's right hand while you, the notarial officer, state the words of the oath or affirmation." [NEVADA] NOTARY HANDBOOK, supra note 75, at 5. Interestingly, the English Oaths act of 1888 announced that "[i]f any person to whom an oath is administered desires to swear with uplifted hand, in the form and manner in which an oath is usually administered in Scotland, he shall be permitted to do so..." Oaths Act, 1888, 51 & 52 Vict., c. 46, para. 5 (Eng.), reprinted in CRANSTOUN, supra note 105, at 416. 309. "The Notary Public raises their right hand and asks the person whose oaths they are asking to raise their right hand, and says the words..." INDIANA NOTARY PUBLIC PAMPHLET, supra note 298, at 7. "When administering oaths, both parties should raise their right hands." [MICHIGAN] NOTARIES PUBLIC GUIDE, supra note 8, at an unnumbered page.

\textsuperscript{310} See PIOMBINO, supra note 5, at 67 (stating that in administering an oath the notary should "ask the person to place his left hand on a Bible or other religious book compatible with the religious beliefs of the person"). "When administering an oath, the Notary may ask the person to place a hand on a religious text such as the Bible." Administering Oaths, supra note 5, at 23.

\textsuperscript{311} Of course, some individuals for religious reasons should not be asked to remove their headcoverings. For example, Hasidic Jewish men "keep their heads covered at all times..." 12 FUNK & WAGNALLS NEW ENCYCLOPEDIA 410 (1986). Indeed, for such persons, compliance with their religious practices concerning their headcoverings should contribute to the solemnity of notarial ceremonies.

\textsuperscript{312} "To further impress upon the person the seriousness of taking the oath, the notary public might incorporate two... powerful symbolic gestures." PIOMBINO, supra note 5, at 67. "[A] gesture [accompanying an oath or affirmation] will strongly reinforce the conscience of the oath-taker."
helps to preserve the long tradition of notarial functioning, including the importance of the notarization of signatures on documents, the value of securing written evidence of such signatures, and the additional value of the oral oaths and affirmations taken as part of the process. Adherence to these formalities will likely make the ceremonies more memorable, if some of the notarizations are challenged and those in attendance are asked to recall what transpired.

4. Journalizing. One of the key steps in a thorough notarization is the completion by the notary of a journal entry evidencing that official act, specifically including the administration of an oath or affirmation. Indeed, the notary should journalize first, and then perform the remainder of the notarization. One authority has

Administering Oaths, supra note 5, at 23.

313. Because of the potentially serious criminal penalties that may result from oaths, affirmations and jurats, a Notary should always act with a degree of solemnity when administering them. Indeed, Standard I-C-1 of The Notary Public Code of Professional Responsibility reads, “The Notary shall conduct himself or herself with a dignity befitting a public officer and in a manner that does not bring disrepute or discredit upon the notarial office.”

Administering Oaths, supra note 5, at 23.

314. If the oath-givers accord equal dignities to the ceremonies, the importance of the oath and affirmation procedure should stand out from others. See supra note 292.

315. Unfortunately, fewer than fifteen states and territories require their notaries to maintain journals or ledgers of official acts. Nevertheless, almost all notary authorities urge notaries everywhere to keep permanently bound and chronologically sequenced record books. See generally Peter J. Van Alstyne, The Notary's Duty to Meticulously Maintain a Notary Journal, 31 J. MARSHALL L. REV. 777 (1998) (explaining the steps in journalization of notarial acts, as well as the advantages of doing so). “[T]he Notary should always be sure to complete a journal entry, including the date, time, type of oath or affirmation, and the oath-taker/affirmant's address, name and signature.” Administering Oaths, supra note 5, at 23. See also supra note 304. Even more unfortunately, Oklahoma very recently abolished its longstanding requirement that notaries maintain ledgers or journals of their notarizations. “In a surprising move by the state Legislature, Oklahoma Notaries are no longer required to keep a journal.” Journal Not Required in Oklahoma, NOTARY BULL. (Nat'l Notary Ass'n, Canoga Park, Cal.), Dec. 2001, at 5.

316. The reason to complete the journal entry first is to assure that it really gets done especially while the document signer is present to sign the journal and to provide the items of information needed for the journal entry. The document signer's signature in a bound, chronologically ordered journal is very solid evidence that the signer was really present at the time of notarization
recommended that the notary administer the oath or affirmation as the first step in the notarial process and presumably to journalize next. About eighteen states require that notaries keep journals or ledgers of their official acts, and many authorities advise all notaries to maintain such records. The reason is that more than 99% of all notarial errors and omissions would be either prevented, or immediately detected and corrected, if notaries everywhere would complete thorough journal entries for their notarizations.

Notary journal entries serve valuable functions on both the front-end and the back-end of notarizations. On the front-end, the items of information entered in the notary ledger should serve as a checklist for the complete steps in which fact is not suggested merely because the executed document bears a notarial certificate. Moreover, a journal entry requires the notary to indicate the basis upon which the document signer was identified which factor tends to suggest the signer was not an imposter. The notary journal has appropriately been called "the notary's most important notarial tool." Van Alstyne, supra note 315, at 802.

317. "The notarization should commence with the administration of an oath or affirmation." Kearney, supra note 5, at 6.

318. The exact number of jurisdictions requiring the use of journals fluctuates occasionally as states and territories are added to or subtracted from the list. "Notaries in nineteen states are required by law to keep a recordbook of their notarial acts." Workman, supra note 19, at 13. "In many of the states and other jurisdictions, the statutes require a notary public to keep a record or register of his official acts." ANDERSON'S MANUAL, supra note 24, at 15.

319. For instance, the National Notary Association suggested as follows: "The Notary shall record every notarial act in a bound journal or other secure recording device, and safeguard it as an important public record." NOTARY PUB. CODE OF PROF'L RESPONSIBILITY, supra note 70, Guiding Principle VIII, at 23. Also, to maintain "a contemporaneous and thorough journal entry for every notarization" was thought to be so important as to be among "[t]he 10 commandments of notarial practice for lawyers." See Closen & Shannon, supra note 6, at 32. Not only does attorney and notary expert Peter Van Alstyne recommend all notaries should journalize even though some of their jurisdictions do not require such practice, but also Van Alstyne argues the general common law standard of care mandates that all notaries keep journal records. "Perhaps one's state's notary laws do not require notaries to keep a notary journal. Journalizing every notarization is mandated as a standard of reasonable care. The lack thereof is arguably a form of negligence. It is wrongful to think it is discretionary." VAN ALSTYNE, supra note 3, at 187. This author agrees with him. See also supra note 300.

320. "At least ninety nine percent of all notarial errors would be prevented or detected instantly if notaries would rigorously complete a contemporaneous and thorough journal entry for every notarization." Closen & Shannon, supra note 6, at 32. "The notary journal is the notary's best friend." VAN ALSTYNE, supra note 3, at 188. See Van Alstyne's remarks, infra notes 324, 326.
a notarization and as a source of confirmatory information to verify the accuracy of the substance of the certificate of notarization as the notarial act is being completed. On the back-end of a notarization, the components of a journal entry can serve to cure defects in the certificate of notarization (if information is omitted or incorrectly recited there) and to provide a source of information to refresh the recollection of a notary about a notarization performed some time previously. The regular and thorough completion of a journal entry for each notarization would also serve as valuable evidence of the professionalism and care of the notary in the performance of official duties. It also serves to protect the notary against a claim of notarial malpractice.

The notarial oath and affirmation administration function should also benefit if notaries kept journals. If the journal entry is completed first, the journal will remind notaries to actually administer oral oaths or affirmations, because an item of information sought in current notary journals is the answer to the question of whether an oath or affirmation is administered. On the back-end of the

321. The notary journal “can also serve as a reminder for proper notarial procedure.” Workman, supra note 19, at 13. “[W]e strongly recommend that Notaries maintain a journal” because it is “very useful for avoiding problems and litigation.” Friedberg, supra note 13, at 13.

322. “A journal helps [notaries] remember the circumstances of the notarization, said Brenda Coffman, public services division director [in the Oklahoma secretary of state’s office].” Journal Not Required in Oklahoma, supra note 315, at 5. “If a Notary is asked to recall a notarial act from months or years earlier, a journal entry can refresh the Notary’s recollection of a particular notarization.” Closen, supra note 12, at 27. “The notarization is effective, valid and binding as long as the document it appears upon remains effective and valid . . . often for decades.” [WYOMING] NOTARIES PUBLIC HANDBOOK, supra note 8, at 5.

323. “Completing a journal entry establishes that a Notary acted with reasonable care to avoid negligence.” Closen, supra note 12, at 27. “[T]he journal will prove invaluable as protective evidence of the Notary’s use of reasonable care in the event of a lawsuit.” NOTARY PUB. CODE OF PROF’L RESPONSIBILITY, supra note 70, Guiding Principle VIII, art. A-1.

324. The legal commentary to Guiding Principle VIII of the Notary Public Code of Professional Responsibility explains that the keeping of a journal “helps deter fraud by requiring the Notary to obtain important information incident to the notarization that imposters may not be able to produce.” NOTARY PUB. CODE OF PROF’L RESPONSIBILITY, supra note 70, at 23. The notary journal “directs the notary into notarizing properly and error-free in each notarization . . .” VAN ALSTYNE, supra note 3, at 186. “The journal will steer the notary in the right direction every time.” Id. at 188. “The notary journal should compel the notary
notarization, if an oral oath or affirmation has been administered and has been noted in a journal entry, that journal entry can serve an important evidentiary purpose as a written record.\footnote{325} Of course, the written notarial certificate for a jurat states that it has been "sworn to." That certificate remains with the document which is signed, whereas the notary journal remains with the notary.\footnote{326} Since a notary journal entry constitutes part of the public record of an official act, it is entitled to the legal presumption of regularity and correctness.\footnote{327} To prove that no oath or affirmation had in fact been given in contravention of the information contained in the notarial certificate and the journal entry (and in rebuttal of the powerful legal presumption) would require substantial credible evidence.\footnote{328}

\footnote{325}According to the legal commentary to the Notary Public Code of Professional Responsibility, Guiding Principle VIII, the notary journal "provides a reliable record of notarized documents that can be referred to when questions arise in the future." NOTARY PUB. CODE OF PROF'L RESPONSIBILITY, supra note 70, at 23. "The actual taking of an oath . . . may be shown by extrinsic evidence where it does not appear by a jurat that the oath was administered." 58 AM. JUR. 2D Oath and Affirmation § 25 (1989). "A notary journal is a complete, accurate record of every notarization the notary performs. It constitutes a valuable form of legal evidence proving how the notary performed the service noted in the record." VAN ALSTYNE, supra note 3, at 186.

\footnote{326}"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." Closen et al., supra note 2, at 192. Indeed there is no guarantee that either the executed document or the notarial certificate will be extant and available at some subsequent time. Months or years later, if a notary has no record of a notarization, how can the notary possibly be expected to recall and perhaps testify about a particular notarization? "The journal refreshes the notary's memory when asked to explain a past notarization, even if it occurred many years earlier . . ." VAN ALSTYNE, supra note 3, at 186.

\footnote{327}"Under federal and state rules of evidence, the contents of a notary's journal are automatically deemed factual . . . . Under these rules of evidence, a notary's journal is valuable evidence as a 'business record [exception] to the hearsay rule.'" VAN ALSTYNE, supra note 3, at 186.

\footnote{328}"When an oath is administered by a public officer, it will be presumed, in the absence of direct evidence to the contrary, that the oath was taken properly . . ." (emphasis added). 58 AM. JUR. 2D Oath and Affirmation § 25. "In other words, what's written [in the notary journal] is fact. If it's in the journal,
5. **Conflicts of Interest.** Concerns about the validity of notarial oaths and affirmations are caused by the existence of possible conflicts of interest that burden notaries under the particular circumstances. To illustrate, may notaries administer oaths or affirmations to themselves? May notaries administer oaths or affirmations to their own parents, children, siblings, spouses or domestic partners? May notaries who have financial or beneficial interests in the instruments or transactions related to the oaths or affirmations to be administered perform the oath and affirmation ceremonies? May notaries employed by various business entities administer oaths and affirmations to their supervisors and other superiors, and may such it happened." VAN ALSTYNE, supra note 3, at 186. See Witt v. Panek, 97 N.E.2d 283, 285 (Ill. 1951) (declaring that "the certificate of acknowledgment can be overcome only by proof which is clear, convincing and satisfactory, and by disinterested witnesses"); JOHN, supra note 10, at 33 (stating that "clear, convincing and satisfactory proof of the falsity or fraud is required" to impeach a notarization).

329. "The Notary shall not notarize his or her own signature." NOTARY PUB. CODE OF PROF'L RESPONSIBILITY, supra note 70, Guiding Principle II, art. B-1. "The Notary shall not notarize a document that bears the name of the Notary ..." Id. Guiding Principle II, art. B-3. "Among the states that statutorily address notarial conflicts of interest, the guidelines ... typically prohibit notaries from notarizing on documents in which the notary's name or signature appears as a party to the transaction." VAN ALSTYNE, supra note 3, at 56.

330. "The Notary shall decline to notarize the signature of a close relative or family member, particularly a spouse, parent, grandparent, sibling, son, daughter or grandchild of the Notary, or a stepchild, stepsibling, stepparent, stepgrandparent or stepgrandchild of the Notary." NOTARY PUB. CODE OF PROF'L RESPONSIBILITY, supra note 70, Guiding Principle II, art. B-5. "The Notary shall not notarize a document that bears the name of the Notary or of a close relative ..." Id. Guiding Principle II, art. B-3. "[A] number of states also prohibit notaries from notarizing for their family members." VAN ALSTYNE, supra note 3, at 56. In a notorious historical incident the Presidential oath of office was administered by notary public John Coolidge to his son Calvin Coolidge in 1923. That oath ceremony should not have occurred, for a father simply cannot be an impartial witness to a notarial service for his own son.

331. Disappointingly little has been written about this rather obvious concern that notaries should not perform official services in connection with instruments and transactions in which they have financial or beneficial interests, including that only a few statutes expressly forbid such conflicted practices. On the other hand, the Notary Public Code of Professional Responsibility provides: "The Notary ... shall not profit or gain from any document or transaction requiring a notarial act, apart from the fee allowed by statute." NOTARY PUB. CODE OF PROF'L RESPONSIBILITY, supra note 70, Guiding Principle II. "Many of [the states that statutorily address notarial conflicts of interest] prohibit a notary's service if the notary will receive directly from the transaction any financial or beneficial gain." VAN ALSTYNE, supra note 3, at 56.
notaries perform the oath and affirmation ceremonies relating to company business in which the notaries have interests?\textsuperscript{332} Too little attention has been directed to these important questions.

Conflicts of interest in the provision of notarial services occur all too frequently in this country, including conflicted practices in the administration of oaths and affirmations.\textsuperscript{333} Such conflicts can arise out of the conduct of notaries in performing official services for themselves, (directly\textsuperscript{334} or in cases in which they have financial interests\textsuperscript{335}) and for family members.\textsuperscript{336} As notary authority Alfred Piombino has recognized, a notary "is without authority to administer an oath to himself. Under no condition is a notary public authorized to act as his own notary public."\textsuperscript{337} Similarly, attorney and notary expert Peter Van Alstyne has

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  \item 332. The Notary who is an employee shall be permitted to notarize for any officer, executive, supervisor, coworker, subordinate, client or customer of the employing organization, as long as the Notary will not gain a commission, bonus or other consideration as a result of the notarial act, other than the regular salary or hourly wage and the statutory notarial fee.

  \textsc{Notary pub. Code of Prof'l Responsibility, supra} note 70, Guiding Principle II, art. E-1.

  \item 333. An obvious consequence of the dramatic, predominantly unregulated increase in the number of notaries is that their caliber including their awareness of and concern about ethical issues will decline. "The explosion of the notary population has been likened to an uncontrolled cancer." Closen et al., \textsc{supra} note 2, at 251. "We face a crisis of integrity and responsibility within the notarial community as well as within society as a whole." \textit{Id.} at 233. \textit{See, e.g.,} Dementas v. Estate of Tallas, 764 P.2d 628 (Utah 1988) (noting that a notary had purported to notarize his own signature on a document). In just one recent issue of the National Notary Association's bimonthly newsletter the Notary Bulletin, no less than seven articles detailed the intentional and negligent misconduct of notaries and notary imposters from around the country, as follows: (1) \textit{Missouri Notaries Lose Commissions} (p. 12); (2) \textit{Crooks Who Defraud Immigrants Targeted} (p. 10); (3) \textit{Notary Unwillingly Involved In Scam That Falsified Will} (p. 8); (4) \textit{Notary Gets Prison For ID Fraud} (p. 7); (5) '\textit{John Doe' Forges Notary's Signature, Uses His Stamp} (p. 7); (6) \textit{Notary Admits To Fraud, Notarizing For Hijackers} (p. 5); and (7) \textit{Prosecutor Admits To Impersonating Notary, Goes To Jail} (p. 5). \textsc{Notary Bull.} (Nat'l Notary Ass'n, Canoga Park, Cal.), Feb. 2002.

  \item 334. \textit{See supra} note 314 and accompanying text.

  \item 335. \textit{See supra} notes 316-17 and accompanying text.

  \item 336. "It is conventional wisdom that when a notary notarizes for a family member, the notary has a conflict of interest." \textsc{Van Alstyne, supra} note 3, at 59. \textit{See supra} note 239 and accompanying text.

  \item 337. \textsc{Piombino, supra} note 5, at 71.
\end{itemize}
commented: "One who is a party to a transaction or document, no matter how small or nominal his interest therein, should not act as the notary with reference thereto." A particularly common fault is found when attorney-notaries prepare instruments, then notarize them for their clients. Often, such notarizations require the administration of oaths or affirmations.

6. Physical Presence. Another common question about contemporary oral notarial oath and affirmation administration practice is whether they can be performed at a distance. That is, can the oath-taker or affirmation-taker be outside the immediate physical presence of the notary? For instance, could the notary and the oath or affirmation taker accomplish a sworn statement solely by a telephonic hookup? Or, could an oath-taker or affirmation-taker participate in a video conference arrangement with the notary, thereby allowing the notary to see as well as hear the oath or affirmation taker at the time the oath is administered? Would that procedure result in a lawful swearing?

Under current technology and law, a notarial act must be performed in the immediate physical presence of the notary. Thus, a number of notary authorities and legal

338. "A notary has an absolute duty by law to act impartially when performing notarial duties." VAN ALSTYNE, supra note 3, at 55.
339.

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

Closen & Dixon, supra note 26, at 891. See generally Closen, supra note 7, at A24; Michael L. Closen & Thomas W. Mulcahy, Conflicts of Interest in Document Authentication by Attorney-Notaries in Illinois, 87 ILL. B.J. 320 (1999). But, there is a prevailing view permitting such practices. "However improper and unprofessional it may be for attorneys in a case pending, or about to begin, to administer an oath to an affidavit, sworn to by his client in such suit, there is nothing in the law that forbids it." JOHN, supra note 10, at 51. "The fact that an attorney-[notary] has prepared a document should not automatically preclude that attorney-[notary] from certifying an acknowledgment or jurat on the document." Friedberg, supra note 13, at 13. See also supra notes 210-11 and accompanying text.

cases have declared telephonic oaths to be invalid.341 In keeping with the fundamental importance of the physical presence doctrine to reliable notarizations, the Notary Public Code of Professional Responsibility of 1998 mandates that the notarization, including the oath-taking or affirmation-taking, must occur with the document signer-oath-taker in the physical presence of the notary. Guiding Principle III of that Code announces, “[t]he Notary shall require the presence of each signer and oath-taker in order to carefully screen each for identity and willingness, and to observe that each appears aware of the significance of the transaction requiring a notarial act.”342 “A notary can no more perform by telephone those notarial acts which require a personal appearance than a dentist can pull a tooth by telephone.”343

Historically, the requirement that a document signer (oath-taker) must be in the physical presence of the notary at the time of the notarization has provided reasonable assurances about at least four features of the signing and

341. “Notaries may not administer oaths and affirmations over the phone, from another room, or through the mail.” Administering Oaths, supra note 5, at 22. See also NOTARY PUB. CODE OF PROF’L RESPONSIBILITY, supra note 70, at 10 (noting that a notary must decline “to perform a ‘telephone notarization’ without the physical presence of the signer, since it would be a clear violation of the law . . . ”). “A majority of American jurisdictions hold that telephone acknowledgments are invalid.” Charlton v. Richard Gill Co., 285 S.W.2d 801, 803 (Tex. Civ. App. 1955). Although this proposition suggests some states or territories would approve of telephonic notarizations, the author has not found any such examples. “A telephone confirmation with the signer and for his oath or acknowledgment is utterly and completely impossible and illegal. There is never an exception to this rule.” VAN ALSTYNE, supra note 3, at 434 (emphasis added).


343. Charlton, 285 S.W.2d at 803. The court went on to comment: “If a famous actor or artist should advertise that he would personally appear at a concert on a given date, and then should in fact perform for the audience by telephone, that audience would have no difficulty in concluding that the performer had not ‘personally appeared.’” Id.
First, it has permitted the notary to confidently determine the true identity of the document signer (oath-taker). The notary could personally observe the signer (oath-taker) who may well have been personally acquainted with the notary. Or, if the notary had not known the signer (oath-taker), the notary could personally examine one or more of the signer's documents of identification (such as drivers licenses or passports).

344. Notaries are not held to be guarantors of the identities of document signers for whom they perform notarizations. Instead, so long as notaries act with reasonable care, they will not be liable if skillful imposters defeat their efforts to correctly identify document signers. "[A] notary public is not a guarantor of the absolute correctness of his certificate of acknowledgment . . . ." Barnard v. Schuler, 110 N.W. 966, 968 (Minn. 1907). Moreover, since notaries do not police the contents of documents, notaries are not legally responsible if falsehoods are contained in documents. "The only thing a notary is legally authorized to notarize is a document signer's signature. A notary . . . shall not notarize a signature without a document to which it pertains." Van Alstyne, supra note 3, at 89. "A notary's function is simply to certify the validity of the signature; the notary does not attest to the validity of the statements made in the document itself." Butler v. Encyclopedia Britannica, Inc., 41 F.3d 285, 293 (7th Cir. 1994). See infra notes 345-56 and accompanying text.

345. The most important responsibility of the notary is to take reasonable steps to properly identify document signers, and thereby deter document fraud by imposters. For example, the first duty of a notary listed in Rothman's authoritative book is to "determin[e] positively and beyond the shadow of a doubt that the party or parties to a written agreement are the party or parties they claim to be." Rothman, supra note 203, at 7. "Notarizations of signatures to documents have always been important to the security of legal and commercial transactions." Van Alstyne, supra note 3, at Introduction. See supra note 266 and accompanying text.

346. Case law and statutory law have established that a notary may rely upon his/her personal knowledge of a document signer in the performance of official services. In the older cases, notaries were more likely to be sufficiently personally acquainted with their instrument signers to permit notarizations to be carried out, because times were simpler, people tended not to move around quite like they do today, and most individuals knew one another. See also The ID Puzzle, supra note 266, at 9 (noting that "[t]he safest and most reliable identification method is personal knowledge, strong familiarity with an individual resulting from numerous interactions in association with other people over a period of time sufficiently long to eliminate every reasonable doubt that the person has the identity claimed"). "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. "Identifying document signers . . . was rarely a problem for Notaries prior to the 20th century. Before the invention of cars, trains, telephones or airplanes, Notaries typically notarized only for hometown residents—most of whom the Notary had personally known for years." Ross, supra note 148, at 11.

347. The preferred method by which notaries are to exercise reasonable care
Second, the personal appearance requirement for document signers (oath-takers) allows notaries to witness the making of the signatures or to witness the acknowledgments by signers that they had signed the documents previously. Those signatures could be compared against one or more signatures executed by each signer on his or her ID documents. Moreover, the notary also should have required the document signers to presently sign a notary journal entry for each notarization. Hence, in a fully performed notarization of a

in the identification of document signers is to examine one (or more) ID documents, particularly government-issued ID documents that contain the signature of the bearer, the physical description of the bearer, and the photograph of the bearer.

All authorities agree that the best IDs contain at least three elements: a photograph, a physical description and a signature. In addition, the best IDs are issued by an official authority known to exercise a high standard of care in screening applicants for the particular identification document. State and federal agencies have proven to be the most careful screeners.

The ID Puzzle, supra note 266, at 9. But see Anderson & Closen, supra note 15, at 846 (stating "[n]otaries are now regularly confronted face-to-face by total strangers bearing a variety of documents of identification, all of which are subject to alteration and forgery. .")

348. An absolute requirement of notary law and practice is that document signers must be personally and physically present at the time of the notarial ceremonies, either to presently sign the instruments, or to presently acknowledge that they had previously signed the instruments. "The Notary shall require the presence of each signer and oath-taker. ." NOTARY PUB. CODE OF PROF'L RESPONSIBILITY, supra note 70, Guiding Principle III, at 10. "[E]very notary public statute requires the presence of document signers at notarization ceremonies." Closen & Shannon, supra note 6, at 32.

349. One feature of an ID document or documents that will stand as satisfactory evidence of a signer's identity is the requirement that the document be signed, such as occurs on a drivers license or passport. However, a birth certificate does not contain a signature of the child identified, and some people neglect to actually sign some documents that might otherwise be used to corroborate identity such as credit cards, library cards, and medical insurance cards. In order to constitute effective and satisfactory evidence of one's identity, an ID document must bear (among other features) the signature [on] its individual bearer. See supra note 332 and accompanying text. The document signer's signature in the notary journal "should match the signature [on] the document to be notarized. It should match the signature of the customer on the ID card [the notary] relied on to verify his identity." VAN ALSTYNE, supra note 3, at 189.

350. The careful notary will probably seek to have the document signer sign the notary journal at the beginning of the notarization process, so that the signer does not leave the scene without having done so. It must be remembered that the document leaves the control of the notary and goes with the document signer, whereas the notarial journal remains with the notary. "If a proper
signature, at least three original signatures will be present and available for comparison by the notary.

Third, the personal appearance requirement for a signer oath-taker provided assurance that the real oath-taker was the person taking the oath or affirmation in the presence of the notary, as opposed to an anonymous voice on the end of a telephone or intercom line reciting a pledge to truthfulness. When standard telephonic communication is employed, the notary cannot observe the speaker on the other end of the telephone line, and therefore cannot be assured of the identity of the speaker and cannot be assured of who actually submits to the oral oath or affirmation. Since the focus of this Article is upon oaths and affirmations administered to document signers, there is a further complication of any attempt to perform a telephonic notarization of a document signer’s signature. That is, notary law has always demanded that, for a jurat form of notarization (the form which includes an oath or affirmation as an integral feature), the document involved must be signed in the physical presence of the notary. There has been no reliable way for a notary to be assured that the unseen party on the other end of a telephone line is the one who signed and who is seeking to submit to an oath or affirmation as to the truth of the substance of the document. Nor would there be the heightened assurance of

notary journal entry is maintained contemporaneously with each notarization, the presence of a document signer is essential so that the journal entry itself can be signed, as well as the document to which the certificate of notarization is attached.” Closen & Shannon, supra note 6, at 32. Among the “essential components” of a notary journal entry is the “signature of each person whose signature was notarized.” NOTARY PUBLIC CODE OF PROF’L RESPONSIBILITY, Guiding Principle VIII, art. A-2 (Nat’l Notary Ass’n 1998). See Van Alstyne, supra note 330, at 783 (discussing the three signatures to be compared—the signature on an ID document, the signature on the document to be notarized and the signature in the notary journal). “The singular most important bit of information to record in the journal is the signature of the person for whom a notarization is made. This signature should be made while the notary watches and before she notarizes. It will prove the signer personally appeared before her.” VAN ALSTYNE, supra note 3, at 189.

351. A telephone notarization is specifically prohibited, for instance, in Texas, as follows: “May I take an acknowledgment over the telephone? No. A Notary Public may not perform by telephone those notarial acts, which require a personal appearance.” STATE OF TEXAS, NOTARY PUBLIC EDUCATIONAL INFORMATION (2001), at http://www.sos.state.tx.us/statdoc/edinfo.shtml. “Oaths cannot be taken or administered over the telephone.” 58 AM. JUR. 2d Oath and Affirmation § 20, at 1037.
TO SWEAR... OR NOT TO SWEAR

a document's authenticity that comes with its being in the possession of its signer (who would personally tender it to the notary). With the advent of video communication by telephone and conferencing, a notary can see an oath-taker, can hear the oral pledge, and can be reasonably assured the individual pictured is the one reciting the language of the oath or affirmation. Still, as will be discussed below, there is the serious complication of the inability in such a setting to obtain a contemporaneous original signature on a document worthy of notarization. If a fax machine were to be in view in a video conference; if a document signer were to presently execute an instrument and place it into the pictured fax machine; if the notary were to simultaneously receive a fax transmission of that signed document on the notary's fax machine; and if the notary's jurisdiction were to permit the notarization of a facsimile form of signature, then a notarization by video conference would appear to be sound and lawful, even though the notarized signature would not constitute an original one in the traditional sense. Utah has recently become the first state to approve of traditional notarization by video conference.352

Fourth, the physical presence requirement lent certainty to the jurisdictional authority of notaries to perform their official acts. Because notaries are state and territorial appointees, their authority has traditionally been limited to prescribed geographic boundaries. Originally, many states allowed notaries to act only within their home counties or parishes.353 Today, almost all notaries in the

352. In what was described as a “trailblazer” step, Utah in 2001 adopted administrative regulations permitting “first-of-its-kind” procedures for “notarization via video-conference,” to allow a notary at one location to service a document signer at another location. Notarization Via Video-Conference Allowed in Utah, NOTARY BULL. (Nat'l Notary Ass'n, Canoga Park, Cal.), Oct. 2001, at 15.

353. “The statutes of many states... permit a notary to act anywhere throughout the state. He has no jurisdiction outside the state of his appointment.” ANDERSON'S MANUAL, supra note 23, at 13. Matters of “territorial jurisdiction” of notaries “are strictly controlled by the concrete provisions of the specific state, district or other jurisdiction statutes...” Id. “In some jurisdictions a notary public can act only within the county or judicial district for which he has been appointed, or within the locality named in his commission.” Id. For example, “Louisiana is unique in that rather than having statewide jurisdiction, the authority of a Notary is restricted to a particular parish.” Armando Aguirre, Navigating Jurisdiction Laws, NAT'L NOTARY (Nat'l Notary Ass'n, Canoga Park, Cal.), Nov. 2001, at 23. An oath must be administered by one authorized to do so and “administered within such person’s...
United States have state-wide or territory-wide authority, and a few states have even approved reciprocity arrangements with neighboring states that would permit a notary from one state to exercise notarial authority in another state(s). When notaries act outside the boundaries of the prescribed jurisdictions of their commissions, the resulting “notarizations” are invalid. Requiring the notary and the document signer (oath-taker) to be in one another’s physical presence at the time of the notarial act more readily assures that the notary is aware of the site of the notarization. If a telephonic oath were to be conducted, the notary could not be assured of the location of the oath-taker within the geographical jurisdiction of the notary. No case has resolved the issue of whether a notarization occurs at the site where the oath-taker is present, or at the site where the notary is present.

Incidentally, it appears that the principal reason for the view that extraterritorial acts by notaries public are prohibited is based simply upon tradition. Each state, interested in preserving and fostering its sovereignty, has restricted its own notaries from acting outside of the home state, and, of course, each state has declared that in order

\[\text{ territorial jurisdiction.}^{354}\] \(58\, \text{AM. JUR. 2d Oath and Affirmation} \ § 21, \text{ at } 1058.\)

\[354. \text{ “In most cases, Notary jurisdiction covers the entire state, district or territory in which [notaries are] commissioned and where [the notaries] reside or work.” Aguirre, } \supra \text{ note } 353, \text{ at } 22.\]

According to Wyoming statute, a Wyoming notary public may administer oaths or proofs of acknowledgment in a contiguous state if that state recognizes the Wyoming notary public’s authority within that state to perform those acts. At the present time Montana is the only contiguous state that recognizes the Wyoming notary public’s authority to perform notarial acts.

[\text{WYOMING}] \text{ NOTARIES PUBLIC HANDBOOK (1999), at } 5.

\[355. \text{ See, e.g., State v. Haase, } 530 \, \text{N.W.2d} \text{ 617 (Neb. 1995) (holding the notarization by an Iowa notary invalid when performed in Nebraska).} \]

\[356. \text{ “There is no such thing as a notarization by telephone.” VAN ALSTYNE, } \supra \text{ note } 3, \text{ at } 434. \text{ It is “utterly and completely impossible and illegal.” Id.} \]

\[357. \text{ See United Services Auto. Assn. v. Ratterree, } 512 \, \text{S.W.2d} \text{ 30 (Tex. Civ. App. 1974) (involving a purported oath administered by a Texas notary by telephone to an oath-taker who was in Kentucky, and holding such notarial act to be invalid).} \]

\[358. \text{ However, there is also a tradition in Virginia that dates to colonial times, for “Virginia Notaries can perform their duties anywhere in the world.” Aguirre, } \supra \text{ note } 353, \text{ at } 22.\]

\[359. \text{ A notary “has no jurisdiction outside the state of his appointment.” ANDERSON’S MANUAL, } \supra \text{ note } 24, \text{ at } 13. \text{ See also Aguirre, } \supra \text{ note } 353, \text{ at } 22 \text{ (pointing out that notaries “may perform notarial acts anywhere within the} \]
to exercise notarial authority within the state individuals must obtain notarial commissions from the state. But, what would prohibit a state from empowering notaries to possess nationwide authority? After all, most states and territories have abandoned residency requirements for their notaries. Under domestic and transnational conflict of laws principles (specifically under the constitution's full faith and credit doctrine and the international comity doctrine) the official acts of a notary in one state or nation are almost always entitled to recognition and acceptance in other jurisdictions. Hence, the courts have often

[state, district or territorial] jurisdiction's borders, but not beyond”).

359. “To become a notary, one must first apply to the appropriate government body.” Closen & Dixon, supra note 26, at 878. “The legislatures of the states [had] eventually [taken] control by passing statutes regulating the appointment and supervision of notaries.” Id. at 876.

360. Wisconsin has recently adopted legislation allowing “any resident of the United States to apply for a Wisconsin Notary commission.” Residency Law Revised To Revitalize Economy, NOTARY BULL. (Nat'l Notary Ass'n, Canoga Park, Cal.), Dec. 2001, at 7. According to Wisconsin Secretary of State Doug LaFollette, “Opening the commission process to any U.S. resident facilitates interstate business transactions that originate anywhere in the country but are finalized here in Wisconsin.” Id.

361. “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.” U.S. CONST. art. IV, § 1. “Within the bounds of the public acts and records referenced are notarial acts and any official public records that are created, such as notary journals.” Closen, supra note 14, at 694-95.

362. “A notary public is an officer known to the law of nations, hence his official acts receive credence, not only in his own country, but in all others in which they are used as instruments of evidence.” JOHN, supra note 10, at 6. One report comparing the U.S. and Japanese notarial systems suggests: “As socioeconomic activities and transportation beyond national boundaries have progressed and as international transactions by digital signatures through the Internet develop, it is urgently required that Notaries in different countries cooperate with each other to make secure certain international activities through notarial acts.” Tsuchiya, supra note 132, at 21. In the notarial arena, “we should especially facilitate practices that will encourage international commerce with this country, including business conducted in whole or in part in languages other than English.” Closen, supra note 134, at 5. Interestingly, the work of today’s English notaries involves principally duties dependent upon international recognition of their functions. “The main function of the English notary today remains the preparation and authentication of legal documents intended to take effect outside the United Kingdom.” Brooks et al., supra note 164, at 136.

363. “The general notaries’ acts [of seventeenth century English notaries] were afforded full faith and credit in all nations.” Seth, supra note 55, at 868. “A notary public is an officer known to the law of nations, hence his official acts receive credence, not only in his own country, but in all others in which they are
characterized the notary as a kind of international officer whose official acts are recognized and honored worldwide.\textsuperscript{364} Moreover, in our federal system, we sometimes allow states to empower persons to act with legal authority beyond the borders of their home states. For example, state and local police in hot pursuit of criminals are permitted to cross state lines and to affect extraterritorial arrests. Licensed automobile drivers are permitted to drive outside their home states. Licensed motor vehicles are recognized as licensed outside their home states as well, so that their owners may secure licenses solely in their home states and move the vehicles from state to state. Curiously, some states authorize the notary-like commissioner of deeds to perform official notarial acts outside the home state, provided that the documents authenticated are to be recorded in the home state.\textsuperscript{365} As noted earlier, a few states now grant reciprocity to notaries from other states.\textsuperscript{366}

\textsuperscript{364} Used as instruments of evidence." \textit{JOHN, supra} note 9, at 6. "Since a Japanese Notary conducts [certain] judicial functions . . . , the notarial acts performed by foreign Notaries do not have the same effect as those by Japanese Notaries. The court as well as the general public, however, tends to respect notarial acts performed by foreign Notaries." \textit{TSUCHIYA, supra} note 132, at 7. The interstate recognition of notarial acts even extends to the approval in the recognizing state of an imperfect or defective notarization performed in the rendering state where the notarization was at least in substantial compliance with the notarial law of the rendering state. See, e.g., \textit{Roussain}, 55 N.W. at 747 (illustrating a Minnesota decision to approve a Wisconsin notarization containing a technical fault in its venue provision); \textit{Security Products}, 55 P.2d at 716 (involving a clerical error in a Utah notarization which was recognized and upheld by the Idaho courts). \textit{See also supra} notes 262-63.

\textsuperscript{365} In fact, the earliest colonial notaries were appointed in large measure to provide a procedure to obtain international approval and legal recognition of commercial documents. \textit{See Seth, supra} note 55, at 879-80 (noting that reason for the first appointment of colonial notaries in Virginia in 1662 and Maryland in 1663). The need for reliable documents for use in international trade was a key reason for the colonists' need for notaries in the new World. \textit{See Closen & Dixon, supra} note 26, at 876 (pointing out that the earliest international colonial trade was, of course, with England).

\textsuperscript{366} Most of the states of this country have a statute authorizing the governor of its State to appoint a number of residents of other States and countries [as commissioners of deeds] to act in the taking of acknowledgments or proofs of written instruments, taking depositions of witnesses, taking affidavits and the oaths of persons resident in that State or country for use in the state making the appointment. \textit{JOHN, supra} note 10, at 264.

\textsuperscript{366} Out West, Wyoming, Montana and North Dakota Notaries may
states — Idaho, Kentucky and Virginia — allow Notaries to perform notarial acts outside state boundaries provided the notarized documents will be recorded in the Notary's home state" [the state of commissioning].\(^{367}\) In fact, Virginia authorizes its notaries to act worldwide to notarize on deeds to be recorded in Virginia.\(^{368}\) United States military officers, who possess notarial powers are granted extraterritorial authority to perform those functions anywhere in the world.\(^{369}\) And, United States embassy officers assigned to foreign countries may administer oaths to our citizens there.\(^{370}\)

Much has been written in keeping with the passage that began this section of the article and described the advanced state of decline of the post of notary public in this country.\(^{371}\) Beginning with the disappointing removal from

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administer oaths or proofs of acknowledgments in a contiguous state if the other state recognizes the Notary's authority to perform those acts. Wyoming's permission to let an out-of-state Notary operate in Wyoming depends on whether or not the given state gives Wyoming Notaries a reciprocal privilege.

Aguirre, supra note 353, at 23.

367. Id. at 22.

368. The National Notary Association has recently commented upon the authority which Virginia grants to its notaries to perform notarizations worldwide on deeds to be recorded in Virginia. "It is possible that another sovereign state or nation may object to a Virginia Notary's exercise of authority in their jurisdiction as a breach of their sovereignty." Adviser, Nat'l Notary (Nat'l Notary Ass'n, Canoga Park, Cal.), Nov. 2001, at 35.

369. "In nearly all states, the notarizations performed by federal officials, by notaries of foreign nations, and the notarizations performed by commissioned United States military officers are recognized and enjoy the same probative value that is accorded notarizations of their own states." Van Alstyne, supra note 3, at 230.

Oaths, affidavits, and acknowledgments required or authorized by the laws of this state may be taken or administered within or without the United States by or before any commissioned officer in active service of the Armed Forces of the United States with the rank of second lieutenant or higher or ensign or higher for certain described document signers and oath and affirmation takers (emphasis added).

1 Fla. Jur. 2d (1997) Acknowledgments § 35 at 177. See, e.g., Ariz. Rev. Stat., §§ 26-160 (1952) (providing that "[o]aths or affirmations required in the military service [of the National Guard] shall be administered by any commissioned officer, or other officer authorized to administer oaths"—without any territorial restriction indicated).

370. "Examples of oath-givers outside the country include U.S. embassy officials (such as the ambassador, chargé d'affaires, secretary of legation, consul-general, consul, envoys, etc.)." Tobin, supra note 9, at 930.

371. See Piombino, supra note 5, at xxi-xxii
office of the first American colonial notary due to his misconduct, the story of the United States notary has described a predominantly underinformed and underachieving petty officer who frequently and unfortunately cannot be expected to carry out relatively simple responsibilities. This reality is especially troublesome when it is remembered that the notary post was originally created to provide a competent and honorable functionary to heighten the trustworthiness of documents, the very traits lacking in many of today's notaries.

IV. PROPOSED ABOLITION OF ORAL NOTARIAL OATHS AND AFFIRMATIONS

Clearly enough if we did not have the office of notary public, we'd have to create it or something like it to take its place.

The author would enthusiastically welcome the improvement of the training and credentialing of notaries public in this country. The responsibilities of our notaries could be expanded and elevated if we were to mandate notarial education, testing, bonding, and insurance. Moreover, if we were to reduce the number of notaries, the office of notary public in the United States could be reconfigured to resemble the functioning of the civil law notaries. Notaries in this nation could be entrusted to administer oral oaths and affirmations to document signers. We could then expect that notaries would responsibly

372. See supra note 177-78 and accompanying text.
373. HUMPHREY, supra note 4, at 9.
374. The author has advocated far and wide for the expanded training and testing of notaries, and for the retraining and retesting of notaries upon their recommissioning. Without becoming too elitist on the topic, the author has also suggested heightened minimum credentials for notaries such as college degrees. After all, here we are in the 21st century, and grade school dropouts in every state and territory, except Wisconsin and Puerto Rico can become notaries. And even in Wisconsin, a mere grade school education is all that is required.
375. The author is not the only observer of notarial performance who has proposed a substantial overhaul of United States notarial practice. In 1928, Professor Wigmore suggested "that the time has come for a revival of soul and practice. The notary must be restored to the position of respect which his office merits." Wigmore, supra note 40, at 749. Perhaps some 75 years later, we can actually move in the direction Wigmore proposed. See infra pp. 186-87, 194-95 and notes 382-85, 413-19.
administer the oath and affirmation process, especially oral oaths and affirmations.

Sadly, significant enhancement of the post of notary public is not likely to happen in the foreseeable future. There is too much apathy and inertia about the matter. The states and territories have a stake in $28 million annually in notary commissioning fees. In other words, the states and territories possess vested financial interests in the continued mediocrity of notaries.

Therefore, if the calibre and performance of notaries is not likely to improve markedly, we should take measured steps to limit our exposure to unlawful and counterproductive practices. Every prudent businessperson recognizes when they must cut their losses. It makes good sense to put an end to sloppy and potentially injurious notarial practices. “The matter of notarial oaths is simply too important to continue to be left to the chance that notaries will take their duties as seriously as they should and perform those oral oaths.”

Many authorities have touted the need for the signature and document authentication services of the notary public, and even for increasing needs for such services. According to the Wall Street Journal, notaries “witness the signatures on all that paper that keeps the nation ticking.” To illustrate, Associate Editor Jill Roberts of the National Notary Association has suggested: “With the incidence of fraud on the rise, the Notary’s job as a third-party, impartial witness is sure to be heightened, not lessened.” Yet, the commercial and governmental systems should not tolerate and perpetuate the inadequacies of

376. “[T]he notary public operates in a laizzez-faire system.” Closen et al., supra note 2, at 234. “The notarial ‘system’ is based largely upon the hope and chance that notaries will be responsible in learning and performing their duties.” Id. at 232.

377. See supra note 170 and accompanying text.

378. Closen, supra note 4, at 7.


380. Roberts, supra note 141, at 15.

381. When large numbers of incompetent notaries are turned loose with official authority to affect commercial and governmental documents, a vast array of problems will begin to corrupt notarial practices to a greater extent than should have otherwise existed. See, e.g., Michael L. Closen, The Dangers of On-Line Sales of Notarial Seals, The Notary, Mar./Apr. 2001, at 5 (describing the problem of notaries negligently allowing the sale of their notary seals online, thereby contributing to the potential for document fraud); Michael L. Closen, The DeFacto Notary Doctrine, The Notary, May/June 2001, at 4
those notaries who are unqualified and indifferent regarding their official responsibilities.

The duties of notaries public in the United States are far less substantial than those of the civil law and English notaries. For understandable reasons, "the modern Latin Notary... commands more prestige than does the ministerial Notary of the United States." Today's English notaries are almost always solicitors; they have been required "to pass rigorous written examinations" on a variety of notarial topics. Moreover, they are authorized to "draw up the very document" at issue, and they specialize largely in "the verification of documents and information that will be used in other countries around the world for clients who have business or property overseas or who are involved in litigation in foreign courts." English notaries must also serve lengthy apprenticeships of five to seven years in duration. None of those features is descriptive of United States notaries.

The proposed abolition of the United States notary's role in orally administering oaths and affirmations represents the next step in an evolution that has continued

(pointing out that some notaries negligently allow their commissions to expire but continue to notarize instruments anyway); Klint L. Bruno & Michael L. Closen, *To Judge, Or Not To Judge, Competence And Willingness, AM. NOTARY* (Am. Soc'y of Notaries, Tallahassee, Fla.), 1st Quarter 1998, at 4 (discussing the unauthorized practice of some notaries in attempting to judge the mental competence of document signers); Michael L. Closen & Trevor Orsinger, *Potential Identity Crisis, CHI. DAILY L. BULL.*, Sept. 19, 2000, at 6 (warning that uninformed notaries may jeopardize the privacy rights of document signers about whom confidential information is obtained for notary journals).

382. Certainly, the functions of the notaries of antiquity were much different than those of modern notaries. "[Their duties differ very largely now." JOHN, supra note 10, at 1. "Over the course of history, notaries' powers have changed substantially... [T]he powers of the notary were gradually limited. Eventually, notarial functions became primarily ministerial rather than judicial." Closen & Dixon, supra note 26, at 877.

383. Roberts, supra note 141, at 14. See also supra note 146. "Please, understand that the office of Notary in the United States is completely different from the office of Notario Publico in Spanish-speaking nations." NAT'L NOTARY ASS'N, *SORRY, NO CAN DO! 2 MORE ANSWERS TO YOUR CUSTOMERS' EVERYDAY REQUESTS FOR IMPROPER NOTARIZATIONS*, at 6 (1996).

384. Silverman, supra note 139, at 10-11. "English notaries are... highly trained legal professionals who have passed strict examinations and have served a period of apprenticeship." Seth, supra note 55, at 885.

385. "In England" notaries "are obliged to serve an apprenticeship of five years... In London seven years' apprenticeship is required." JOHN, supra note 10, at 3-4.
at a gradual but unrelenting pace since the colonial period. Over the years, the U.S. Notary’s duties have been whittled away by technological advances and legislative action, including the statutory creation of various public officers such as county recorders who have been delegated some functions previously belonging to notaries. The other factors behind this lengthy trend have been the growth of the numbers of lawyers and judges and the increase in the number of notaries.

The paltry fees notaries are permitted by statute to charge for the administration of oaths and affirmations may represent the best evidence that this function could be abolished with no disadvantage to notaries or the notarial system. In Kentucky, for instance, the maximum fee

386. “[T]he bulk of notarial duties has been lost either to other officers (such as justices of the peace, attorneys, and county recorders) or to disuse (such as the old practices of drafting and serving marine and bank protests and of taking evidentiary depositions).” Closen, supra note 134, at 4.

387. “[S]ome of the Notary’s functions have been relinquished to other officials over the centuries.” Roberts, supra note 141, at 14.

388. Lawyers and judges (and their staffs) have taken over a number of the duties of notaries, especially judicial record-keeping and the conduct of depositions. Moreover, since the functions of justices of the peace paralleled and overlapped the activities of notaries public, with the elimination of the office of justice of the peace in most jurisdictions, the responsibilities of that office were taken over by judges. “During the nineteenth century, states began to authorize notaries to perform many [ministerial] functions that had hitherto been done by Justices of the Peace.” Seth, supra note 55, at 884. “The authority of a notary frequently corresponds with the authority of a justice of the peace.” ANDERSON’S MANUAL, supra note 24, at 9. “In Alabama [the notary] acts as a justice of the peace . . .” JOHN, supra note 10, at 5-6. See also Campbell v. Brady, 11 S.W.2d 687, 687 (Tenn. 1928) (noting the existing statute to the effect that “[n]otaries public shall have the same power as justices of the peace of this state to administer oaths, to take depositions, to qualify parties to bills in chancery, and to take affidavits, in all cases . . .”).

389. There are so very many notaries, and their duties have been at least frozen in time, if not diminished. It seems as though legislatures realize the office represents a great cash cow on the one hand, but that on the other hand the occupants of the office should not really be entrusted with expanded responsibilities. Even the United States Supreme Court has recognized that “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.” Bernal v. Fainter, 467 U.S. 216, 223 n.12 (1984).

390. Nominal fees suggest trivial worth of the service. It is estimated that less than 25% of all notaries charge a fee for their notarizations . . . Another reason many notaries do not charge a fee is because the fee amount authorized by their state’s notary laws are nominally low. In fact, many view the authorized amount to be so low that the fee is trivial and embarrassing to charge.
allowed for a notary to administer a stand-alone oath with its accompanying certificate is just 20¢, and to execute a jurat is only 50¢.\textsuperscript{391} In Oklahoma until 2001, the maximum notarial fee for a jurat was 25¢,\textsuperscript{392} while in Wisconsin the fee is still 50¢.\textsuperscript{393} In Nevada, a notary may charge no more than $1 for an oath or affirmation without a signature, and $2 for a jurat.\textsuperscript{394} Nine states set the maximum fee for a jurat notarization (or administration of an oath or affirmation) at $1.50 or less, and another thirteen jurisdictions set it at $2.\textsuperscript{395}

Abolition of oral notarial oaths and affirmations does not mean the end of notarial oaths and affirmations. Rather, we must “create . . . something to take [the] place\textsuperscript{396} of oral oaths and affirmations. Those notarial vows can be readily executed in writing, and they can effectively marshall the truthfulness of document signers. A self-authenticating paper document is superior to the oral version of a vow that requires two parties to accomplish.\textsuperscript{397} Fourteen states and the federal government have recognized this and have enacted statutory provisions authorizing the written self-authentication of documents

\textsuperscript{391} See KY. REV. STAT. ANN. § 64.300 (1) (Michie 2001).
\textsuperscript{392} While this paper has been in preparation in 2001, Oklahoma raised its notary fees from 25¢ to $5. \textit{Journal Not Required in Oklahoma}, NOTARY BULL. (Nat'l Notary Ass'n, Canoga Park, Cal.), Dec. 2001, at 5.
\textsuperscript{393} See WIS. STAT. § 137.01 (9)(d), (e) (2000).
\textsuperscript{394} See NEV. REV. STAT. § 240.100 (1) (2001).
\textsuperscript{395} “In many states the amount notaries can charge is often less than $1 per notarial act.” \textit{Free or Fee: Charges for Notary Services}, AM. NOTARY (Am. Soc'y of Notaries, Tallahassee, Fla.), 4th Quarter 2001, at 6. The maximum fee allowable depending upon the notarial act performed is $1 in Illinois, Minnesota, South Carolina, and Wisconsin. \textit{Id.} at 7. It is $1.50 in Alabama, Rhode Island, and Tennessee. \textit{Id.} In Kentucky and Oklahoma, the maximum fee is 50¢ (and depends upon the notarial act performed). \textit{Id.} Proposed legislation pending in the Massachusetts Senate would set the notary fee for administering an oath or affirmation at one dollar, under Senate Bill 962. John Jones, \textit{Legislative Updates}, AM. NOTARY (Am. Soc'y of Notaries, Tallahassee, Fla.), 4th Quarter 2001, at 19. The notary fee for administering an oath in New Jersey is 50¢, but state Assembly Bill 1994 proposes to raise that fee to $2.50. \textit{Id.} at 21. \textit{Guide to Notary Fees}, NAT'L NOTARY (Nat'l Notary Ass'n, Canoga Park, Cal.), May 2002, at 25.
\textsuperscript{396} See supra note 373 and accompanying text.
\textsuperscript{397} When “men learned to write, it was found that cold letters remain after the fragile structures of memory have failed.” HUMPHREY, supra note 4, at 11. See also Closen, supra note 4, at 6.
where signers become subject to the laws of perjury and false swearing. 398

The federal version of the self-authentication procedure was enacted in 1976 and is found in Section 1746 entitled “Unsworn Declarations Under Penalty of Perjury.” 399 That section sets out two versions of suggested language, one for documents executed in the United States and another for documents executed outside the United States. 400 As the latter version is slightly more inclusive and clear, it is the form proposed here to be used for all self-authentications of signatures.

In addition, the author proposes three other procedures designed to draw the document signer’s attention to the legal significance of signing. First, a block format should be used with a square or rectangle drawn around the self-authentication language. Second, a caption reading “Signed Under Penalty of Perjury” should begin the block of language, thereby making the purpose conspicuous for the signer. Third, because many hand-signed signatures are difficult to decipher, 401 and because it would be helpful to
have some contact information about a signer, the signer should be required to print or type her or his name and address. Here is how the self-authentication provision should appear:

Signed Under Penalty of Perjury

I declare (or certify, verify or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on ____________________ (date)

Signed ________________________

Printed or typed name and address ________________________

Written oaths or affirmations could be obtained in one of two ways under the author’s proposal. First, the application of the current state and federal statutes on self-authentication could simply be expanded. For the vast number of instruments where the true identity of the signers is not an issue of doubt, there is no reason to involve notaries public at all. Any sort of public or private

of the document signer. See, for example, the following statutory short forms of certificates for jurats, all of which include the names of the signers: ILL. COMP. STAT. ANN. § 312/6-105 (c) (West 1993).

402. This contact information is important enough that the standard practice is to include such information in notary journal entries. “The notary journal should compel the notary to record the following information for every notarization performed: 6. The signer’s address (residential or business).” VAN ALSTYNE, supra note 3, at 189-90. See, e.g., HAW. REV. STAT., § 456-15 (3) (Supp. 2000) (requiring the notary journal to include “[t]he signature, printed name, and address of each person whose signature is notarized.”).

403. See supra notes 20-21 and accompanying text.

404. Very often, the parties to written instruments are known to one another, and there would be no concern that imposters would have falsely executed the instruments. Rather, notaries are sought out to witness signatures on documents due to the mistaken impression that a notarization legalizes or validates the instruments, but notarizations serve only to witness or verify the signatures.

Unless a statute, ordinance, or governmental regulation requires a notarization, there is no good reason in most cases to add a notarial certificate to a document. Indeed, there may be a good reason not to add a notary certificate, for a faulty notarization can subject a document to an attack on its validity.

Closen & Shannon, supra note 6, at 33. Moreover, needless notarizations,
document could be drafted to include the specified statutory form and verbage. Thus, a box could be added to the end of an instrument reciting the words as set out in the federal procedure illustrated previously.\textsuperscript{405} This method has the advantage of avoiding the inconvenience, time, and expense of the participation of a notary public. The proposal also avoids some of the occasional jurisdictional blunders made by notaries who attempt to perform their official functions outside the states or territories that have commissioned them.\textsuperscript{406} The self-authentication procedure could be utilized anywhere. Adopting the federal model should contribute to a uniformity of practice throughout the states and territories.\textsuperscript{407} Moreover, this procedure virtually guarantees that instrument signers will recognize the significance of their signature: they legally vow to the truthfulness of the substance of their documents and thereby subject themselves to the law of perjury or false swearing should they falsify information.\textsuperscript{408}

Secondly, in those cases when one or more of the parties involved desires an independent identification of a

including needless oaths and affirmations do not advance the cause of truthfulness in documents. "There was also some feeling that any encouragement of indiscriminate use of oaths should be avoided lest it impair the respect for oath-taking in serious official matters." \textsc{model penal code} § 241.1 cmt. at 148 (1980).

\textsuperscript{405} See supra notes 399-400 and accompanying text.

\textsuperscript{406} See, \textit{e.g.}, \textsc{state v. haase}, 530 N.W.2d 617, 618-19 (Neb. 1995) (noting that an iowa notary had preformed a notarization in nebraska, and holding that notarization to be invalid). The jurisdictional authority of notaries is a subject essential to proper notarial functioning, and therefore attracts considerable attention in the literature. \textsc{see generally} malcolm l. morris, \textit{nomadic notaries}, 32 j. marshall l. rev. 985 (1999) (addressing jurisdictional issues relating to notarial practice).

\textsuperscript{407} Equally important would be the contribution to expanded application of the practice. There are simply too many needless notarizations in this country. Such empty gestures contribute to misunderstanding by the public about the role of notaries and contribute to the perceived need for more than four million notaries.

\textsuperscript{408} Recall that one of the key reasons those who sign documents to which jurats are attached but who do not actually take oral oaths should not be held to the law of perjury or false swearing is that there is no assurance such signers were aware they were submitting to the law of perjury or false swearing. \textit{see supra} notes 266-81 and accompanying text. Fundamental fairness demands that document signers be made aware of the consequences of their actions in signing. "\textit{the notary shall} . . . \textit{observe that each document signer and oath-taker} appears aware of the significance of the transaction requiring a notarial act." \textsc{notary public code of prof'l responsibility}, guiding principle iii (1998).
document signer at the time of an instrument's execution, a notarial certificate could simply be added after the self-authentication form. Notaries public would serve the impartial role of properly identifying the document signers.\footnote{409. Of course, the document signer identification function is already the principal responsibility of notaries. "The Notary shall require the presence of each signer and oath-taker in order to carefully screen each for identity." \textit{Id.} The legal commentary to this provision calls the duties described in Guiding Principle III "the very essence of notarization." \textit{Id.} at 10.} To the extent that the identity of document signers is reasonably assured by the heightened security that notaries bring to the process, parties can place greater trust in signed documents.

Another component of this proposal would be the suggestion that law enforcement agencies place increased emphasis upon investigating, charging, and prosecuting perjury and false swearing. Increased enforcement of perjury and false swearing will focus attention on a topic otherwise seldom noteworthy in the media and elsewhere.\footnote{410. Under the Model Penal Code, perjury is declared to be a felony in the third degree. \textit{MODEL PENAL CODE} § 241.1(1), introductory cmt. (1980). \textit{See supra} notes 119-23 and accompanying text.} This should also deter and reduce the amount of perjurious material in documents to which written self-authentication oaths and affirmations are attached. Finally, jurisdictions that currently designate perjury and false swearing as misdemeanors should elevate the offenses to felony status.\footnote{411. \textit{See supra} notes 114-18 and accompanying text.} This communicates that states and territories will no longer tolerate the harm done by the perjured contents of governmental and commercial instruments.

\textbf{CONCLUSION}

"[V]ery few notaries understand what is meant by... administering an oath."\footnote{412. Kearney, \textit{supra} note 5, at 6. Comments like the one quoted are all too frequently made by those familiar with notarial practice, because these remarks are absolutely accurate. "[M]any notaries are unaware of the notary rules and laws." Workman, \textit{supra} note 19, at 13. "There are a lot of Notaries who don't know what they need to know...," according to Tom Wrosch, Oregon supervisor of notaries and president of the Notary Public Administrators section of the National Association of Secretaries of State. \textit{Officials: Education Should Be Required, NOTARY BULL.} (Nat'l Notary Ass'n, Canoga Park, Cal.),
Before abandoning the prospect of saving mediocre notaries from themselves, it should be pointed out that we could do otherwise. There are many ways to reform the present notarial system (which currently represents the lowest common denominator of practices). First, notaries in both Louisiana and Puerto Rico generally serve with distinction in their heightened notarial roles. There is a total of about 57,000 notaries in these two jurisdictions. And, much like the civil law notaries of the civil law systems after which Louisiana and Puerto Rico were fashioned, the notaries of those two jurisdictions exercise far more significant duties than other United States notaries. Secondly, both Florida and Alabama have recognized the transnational and domestic need for an official position comparable to that of the civil law notary and have adopted legislation creating the post of international notarial practitioner. The Revised Model

Dec. 2001, at 12. See also supra note 182. Dishonesty is also a problem among notaries. "[T]here exists a substantial basis for the opinion that many notaries are ill-equipped slackards and that many will resort to unscrupulous actions for the most nominal of reasons." Closen, supra note 14, at 682. It is little wonder that non-notaries know even less about notarial law, practice, and ethics. "The public is only vaguely familiar with the office of notary and its occupants." Id.

413. "[American] notaries are not authorized to prepare legal documents of any kind except in the state of Louisiana, where notaries follow civil law practice, and in Puerto Rico, where notaries must be attorneys." Seth, supra note 55, at 885.


415. "Louisiana is the only state whose Notaries operate under the complex civil law notarial system and are required to have extensive legal training so that they are able to draft such documents as wills and deeds." Legislative Watch, NOTARY BULL. (Nat'l Notary Ass'n, Canoga Park, Cal.), Dec. 2001, at 14. "In our States, perhaps the laws of Louisiana delegate to the Notary Public duties and powers of wider scope and greater importance than those of any other State or Territory." HUMPHREY, supra note 4, at 7-8. "Our . . . notaries are regarded to be ministerial officers and possess much less authority than civil law and English notaries (except in Louisiana and Puerto Rico)." Closen, supra note 134, at 4. See also D. Barlow Burke, Jr., & Jefferson K. Fox, The Notaire in North America: A Short Study of the Adaptation of a Civil Law Institution, 50 TUL. L. REV. 318, 328-31 (1976) (discussing the civil law notarial practices in place in Louisiana).

416. Florida was the first state to create such a post, followed next by Alabama. Florida was a likely first-mover state in this regard since it is the most southern state and has many connections to (including many people from or with families from) Central and South America, where the civil law notario
Notary Act also contains an article endorsing the office of civil law notarial practitioner, who would possess heightened credentials and heightened responsibilities.\textsuperscript{417} Finally, there are two comprehensive, groundbreaking documents in place in this country that could serve as the blueprints for an effective reformation of our entire notarial system. They are the Revised Model Notary Act\textsuperscript{418} and the Notary Public Code of Professional Responsibility.\textsuperscript{419} If the directives of those two seminal documents were adopted and enforced nationwide, United States notaries would become true business professionals to whom we could confidently entrust the most important of notarial responsibilities, including the continued responsibility of administering oral oaths and affirmations.

Disappointingly, state and territorial governments have shown no interest in a largescale overhaul of the notarial system that would include uniformity in basic credentialing and functioning. There has been no meaningful progress in that system over the last 150 years, and thus no reason to believe there will be any noticeable momentum behind reform at the present time. Regrettably, the notarial system has continued to deteriorate rather than to improve. “The utmost responsibility of notaries is to perform their services thoroughly and competently so as not to subject documents to challenges - just as doctors under the Hippocratic oath are to do no harm to their patients.”\textsuperscript{420} The modest level of

\textit{publico} practices. See, e.g., Ala. Code, (creating civil law notary); FLA. STAT. ANN. § 118.10 (West Supp. 2002) (same).

\textsuperscript{417} See Revised Model Notary Act, art. IV (June 1, 2001 draft) (describing a procedure for the qualification and appointment of a civil law notarial practitioner). One of the credentials must be that he is a licensed attorney. § 25-1(b)(1).

\textsuperscript{418} See National Notary Association, Revised Model Notary Act, June 1, 2001 draft). It should be noted that the author has served on the drafting committee for this model law and speaks from first-hand knowledge of the extensive, thoughtful efforts that have contributed to its formulation.


\textsuperscript{420} Closen, supra note 4, at 7. “Historically, the physician’s primary obligation has been, above all, to do no harm.” Hoopes v. Hammargren, 725 P.2d 238, 242 (Nev. 1986). According to one version of the Hippocratic Oath, a physician pledges to prescribe only beneficial treatments and to refrain from causing harm or hurt. See 11 The New Encyclopedia Britannica 827 (15th ed. 1979) “The document signer has every right to expect that the notarization is being performed correctly and that it will withstand challenges to its validity.” Van Alstyne, supra note 3, at 779.
interest and qualifications needed for notaries to fulfill that minimal but fundamental obligation cannot be guaranteed in the present laissez-faire notarial system.

It has been observed that "the office of Notary has been adapted to the particular needs of each age and society" and that "[h]istory reveals the Notary Public has adapted and changed in response to the needs of each era." "Over the course of history, the powers of the notaries have changed substantially." Such comments represent polite and understated descriptions of what has really transpired. The gradual but uninterrupted reduction of the functions allocated to notaries constitutes the commercial and governmental reaction to the rapid rise in the number of notaries, many of whom remain untrained and indifferent about their part-time positions. Business and government cannot afford to be without notaries, but their irregular involvement in the administration of oral oaths or affirmations is simply not necessary given that few notaries understand their oath-administration role. The author's proposal would be relatively easy to implement, because it is predominantly a call to officially discontinue a practice that does not actually take place in the vast majority of instances as the author's survey seems especially to confirm. The substitution of a simple self-authenticating form written in plain English in the place of the old-fashioned jurat could be efficiently and effectively accomplished as well.

421. Roberts, supra note 141, at 14. See also supra note 382 and accompanying text.
422. Id. at 15. See also notes 410-11 and accompanying text.
423. ANDERSON'S MANUAL, supra note 24, at 8. See also supra notes 163-73 and accompanying text.
424. Throughout most of recorded history, the functions of the notary public have been touted as significant and essential. For instance, "[t]he office [of notary public] is one indispensable to the law merchant." HUMPHREY, supra note 4, at 7. It has been said to be "indispensable to the carrying on of modern business." Id. at 9. "The early settlers could not get along without [notaries], and neither can we." Ross, supra note 148, at 12 (quoting Connecticut Secretary of State Julia H. Tashjian). "The proper performance of a Notary Public is essential to the operation of business, the court system and many other areas." Id. at 10 (quoting Illinois Secretary of State Jim Edgar).
425. Supra note 412.