
Michael L. Closen

R. Jason Richards

Follow this and additional works at: http://repository.jmls.edu/jitpl

Part of the Computer Law Commons, Internet Law Commons, Privacy Law Commons, and the Science and Technology Law Commons

Recommended Citation

http://repository.jmls.edu/jitpl/vol15/iss4/2

This Article is brought to you for free and open access by The John Marshall Institutional Repository. It has been accepted for inclusion in The John Marshall Journal of Information Technology & Privacy Law by an authorized administrator of The John Marshall Institutional Repository.
NOTARIES PUBLIC—LOST IN CYBERSPACE, OR KEY BUSINESS PROFESSIONALS OF THE FUTURE?

by MICHAEL L. CLOSEN† & R. JASON RICHARDS‡

I. INTRODUCTION

[T]he time has come for a revival of soul and practice. The notary must be restored to the position of respect which his office merits.

—John H. Wigmore (1928)¹

Almost seventy years after Professor Wigmore’s call for reform, the office of notary public continues to suffer from the stigma of insignificance. However, the image of the seemingly inconsequential notary may be on the verge of change. This prospect presents itself because of the frequency with which governmental and private entities are engaging in commerce via the computer,² in what is commonly referred to as “cyberspace.”³ These computer-based transactions have given rise to the corresponding need to ensure the integrity of such communications.⁴ Traditionally, such independent corroboration has most commonly been provided by notaries public, often taking the simple form of a notary seal.

† Professor of Law, John Marshall Law School. Notary Public, State of Illinois. B.S., M.A., Bradley University; J.D., University of Illinois.
² Emilio Jaksetic, How to Ensure the Integrity of Digitally Transmitted Documents, 6 CORP. L. TIMES 21 (1996).
and signature affixed to a document. However, notaries now have the opportunity to play a central role verifying documents on-line, taking the more sophisticated form of “cybernotarizations.” Such an opportunity may soon provide the means by which notaries can recapture the respect that Professor Wigmore demanded—a respect reminiscent of the notaries of ancient Rome or the civil law notary, the Japanese notary, and the notario publico of some Hispanic countries in modern times.


6. Throughout this article “cybernotaries” shall be used to describe persons who perform the tasks of “cybernotarizations.” The phrase “cybernotary” was coined by the American Bar Association to describe persons engaged in providing professional services related to the certification and authentication of international computer-based transactions. John C. Yates, Recent Legal Issues in Electronic Commerce and Electronic Date Interchange, 430 PRAC. L. INST. 271, 300 (1996); David Sommer, New Legal Code: Sign It by Modem—Florida’s Electronic Signature Act Has Become Law, But How It Will Be Implemented Isn’t Clear Yet, TAMPA TRIB., June 3, 1996, at 1; see also DIGITAL SIGNATURE GUIDELINES § 1.6.3 (1996) (stating that cybernotaries’ functions mirror those of the common law notary, and practice primarily in international, computer-based transactions). Utah was recently the first state to pass legislation concerning cybernotarizations. See generally UTAH CODE ANN. §§ 46-3-101 to -504 (Supp. 1996).

7. See Howland, supra note 5, at 6 (stating that “The role of the Notaire echoes much earlier history when Egyptian scribes were employed to record and memorialize significant events, both public and legal”). It is sometimes said that the Roman scribe Marcus Tullius Tiro was the first notary, as he became secretary to Marcus Tullius Cicero and invented a form of shorthand notes, called notae, from which the term notarius was derived. John R. Gregg, Julius Caesar’s Stenographer, J. COURT REPORTING, Jan. 1992, at 32. See also, Kirksey v. Bates, 31 Am. Dec. 722, 723 (Ala. 1838). “A notary public is an officer long known to the civil law, and designated as ‘registrarius,’ ‘actuarious,’ or ‘scrivarius.’ Anciently, he was a scribe, who only took notes or minutes, and made short drafts of writings and instruments, both public and private.” Id.

8. Michael L. Closen, Why Notaries Get Little Respect, NAT’L L.J., Oct. 9, 1995, at A23. For example, one commentator has explained the distinction between civil law and common law notaries this way:

Any similarity between the civil-law notary and the notary public in common-law countries is only superficial. . . . Our notary public is a person of very slight importance. The civil-law notary is a person of considerable importance. The notary in the typical civil-law country serves three principal functions. First, he drafts important legal instruments. . . . Second, the notary authenticates instruments. An authenticated instrument . . . has special evidentiary effects: it conclusively establishes that the instrument itself is genuine, and that what it recites accurately represents what the parties said and what the notary saw and heard. . . . One who wishes to attack the authenticity of a public act must institute a special action for the purpose, and such an action is rarely brought. Third, the notary acts as a kind of public record office. He is required to retain a copy [generally the original] of every . . . [public document] he prepares and furnish authenticated copies [to interested parties—as defined by law—I on request. An authenticated copy usually has the same evidentiary value as an original. Unlike advocates, who are free to refuse to serve a client, the notary must serve all comers. This, added to his functions as record office and his monopoly position, tends to make him a public as
Who are notaries? What purpose do they serve? And, do we really need them? Based upon the public image of notaries, such questions seem quite appropriate. If these questions were posed to notaries, they would probably argue that their role is necessary because they perform functions essential to a vast array of everyday business transactions as well as private functionary. Access to the profession of notary is difficult because the number of notarial offices is quite limited. Candidates for notarial positions must ordinarily be graduates of university law schools, and must serve an apprenticeship in a notary's office. Typically, aspirants for such positions will take a national examination, and if successful, will be appointed to a vacancy when it occurs.

JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 113-15 (1969). For further analysis on the distinctions between American notaries and international notaries, see generally Pedro A. Malavet, Counsel for the Situation: The Latin Notary, A Historical and Comparative Model, 19 HASTINGS INT'L & COMP. L. REV. 389, 432-33 (1996); Stewart Baker & Theodore Barassi, The International Notarial Practitioner, 24 INT'L NEWS 1 (Fall 1995); Shinichi Tsuchiya, A Comparative Study of the System and Function of the Notary Public in Japan and the United States (May 30-June 1, 1996) in NAT'L NOTARY Ass'N, Jan. 1997 (available from the National Notary Association) (indicating that Japanese notaries are held in considerable esteem, since there are so few of them, since one may not become a notary until 50 or 60 years of age, since most notaries are former judges or prosecutors or otherwise have extensive legal experience, and since notaries are authorized to perform several important functions which are judicial in nature). In Japan, the individuals who are appointed “are of such high(202,595),(308,694) integrity, diligence and legal knowledge that they are extremely qualified to be Notaries.” Tsuchiya, supra at 2. See also Howland, supra note 5, at 1 (stating that “In the French Civil System, a Notarie continues to be a legal professional who draws legal documents, supervises commercial transactions from a legal perspective, and is regarded in high esteem”).

9. A notary public is defined as:

A public officer whose function is to administer oaths; to attest and certify; by his hand and official seal, certain classes of documents, in order to give them credit and authenticity in foreign jurisdictions; to take acknowledgments of deeds and other conveyances, and certify the same; and to perform certain official acts, chiefly in commercial matters, such as the protesting of notes, bills, [and] the noting of foreign drafts.

BLACK'S LAW DICTIONARY 1060 (6th ed. 1990). For the sake of convenience, the term “notary public” and “notary” shall be used interchangeably throughout this paper. Although convenient, some believe that there are far too many notaries public for the job. Closen, supra note 8, at A23. Indeed, it can be argued that even the U.S. government believes that some notarization requirements are unjustified. See Margaret A. Jacobs, Will Notaries Still Reign Over Red Tape When Documents Move Electronically?, WALL ST. J., Mar. 12, 1996, at B1 (stating that Congress has recently dropped notarization requirements for some documents filed with the federal government, instead giving signers the option to declare under penalty of perjury that the information provided is accurate).

10. See generally Jacobs, supra note 9, at B1 (addressing some of the questions that currently surround the office of notaries public); see also supra note 9 (outlining many of the responsibilities of notaries public).

11. The notary’s usefulness has been questioned by at least one federal judge, who said: “It may be questioned whether notarization is actually an improvement upon the mere signature....” Home Sav. of Am. v. Einhorn, No. 87C-7390, 1990 WL 114643, at *6 n.14 (N.D. Ill. 1990).
tions, such as swearing signers to oaths about the truth of their documents and attesting to the authenticity of signatures on documents. Notaries might also argue that, without them, there would be a major crisis in the business community because "courts would be flooded with challenges that signatures were coerced or forged." Not only are these arguments persuasive, they are undoubtedly correct, as many documents are notarized to help prevent just such claims. Yet, if notaries may fairly be characterized as "indispensable for... business," why do they receive such little respect? Is it because of the minimal require-

12. See 58 Am. Jur. 2d Notaries Public § 27 (1989); Howland, supra note 5, at 7; In re Estate of Martinez, 664 P.2d 1007 (N.M. Ct. App. 1983), cert. denied sub nom. Martinez v. Martinez, 663 P.2d 1197 (N.M. 1983), cert. denied, In re Estate of Martinez, 663 P.2d 1197 (N.M. 1983). Notarizing signatures requires that the notary perform both an observatory and signatory function. Estate of McGurin v. Scoggins, 743 P.2d 994 (Idaho Ct. App. 1987). When executing a will, for example, "[t]he former consists of 'direct and purposeful observation' of the testator's signature to, or acknowledgment of, the will." Id. at 996 (quoting Estate of Peters, 526 A.2d 1005, 1010 (N.J. 1987)). "The latter consists of the witnesses' signing of the will, a task 'complementary' to the observatory function." Id.

If a document is executed in the absence of a notary's presence, the notary "must determine, from either personal knowledge or from satisfactory evidence, that the signature is that of the person appearing before the officer and named therein." 58 Am. Jur. 2d, supra, § 31. The Uniform Law on Notarial Acts provides that satisfactory evidence is established if the signer is the following: (1) personally known to the notary officer; (2) identified upon the oath of a credible witness personally known to the notarial officer; and (3) identified through some form of identification documents. Id. § 32.


14. Unfortunately, fraud is inherent in the business and legal community. 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, 874 n.6 (1992). It is the notary's job to help minimize that fraud. Id. As Humphrey states:

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


16. See JOHN, supra note 15, at 1-2; Closen, supra note 8, at A23. Some attribute the notaries' lack of respect, in part, to their sheer number. See Closen, supra note 8, at A23. Many of these notaries are underinformed about their notarial responsibilities because they become commissioned merely as a convenience to their employers. Id. Therefore, many notaries lack any personal initiative to become better informed about their notarial
ments for one to become a notary, or because of the small fee that notaries can charge for their services? Is the problem that notarial acts are considered ministerial or clerical? While these factors may in fact diminish the notary's business reputation, the problem runs much deeper. The 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.

The notaries' lack of knowledge of their official duties may be attributed to several reasons. First, only a few states mandate notarial training or testing of notary applicants before they receive their commissions or licenses. The private, formal education of those business and legal professionals, many of whom will become notaries—such as bank personnel, mortgage company employees, real estate agents, court reporters, paralegals, and lawyers—does not include any coverage of consequence duties. This kind of attitude only contributes to the notion that notary services are “no longer justifiable.” Id. See also supra note 11 (federal judge doubting the usefulness of notarizations).

17. See Closen, supra note 8, at A23 (stating that “The qualifications [for notaries] are minimal . . .”).


of notary ethics, practice and law. The testing currently in place in a few jurisdictions is nominal at best. Moreover, of those states that require some training or testing, none require that notaries be retrained or retested prior to renewing their commissions. There are relatively few continuing education programs for notaries, and none are mandatory. Second, assuming a commission is granted, the information received with the commission often fails to describe the powers and duties of the office. Instead, newly commissioned notaries frequently are simply encouraged to read the applicable state statutes. There is no assurance that notaries will comply, and indeed there is substantial evidence that many notaries do not come to appreciate the extent of their statutory responsibilities.

Further, there are at least two serious problems with most notary statutes in fully informing even those notaries who exert the effort to read them. First, the statutes do not tend to describe sound notarial practices to be employed to accomplish statutory requirements. There is often more than one way to do a thing, and the notary laws are not

21. For example, there are no law school courses on notary law and practice in the U.S. law schools, except for the law schools of Puerto Rico. See NATIONAL NOTARY ASS'N, A SURVEY OF AMERICA'S LAW SCHOOLS 2 (1994). However, this situation is about to change, because the first law school casebook on the subject will soon be published. See MICHAEL L. CLOSEN ET AL., NOTARY LAW AND PRACTICE: CASES AND MATERIALS (Nat'l Notary Ass'n, forthcoming 1997).

22. See generally supra note 20.

23. See generally supra note 20.

24. See Closen, supra note 8, at A23.

25. In the State of Illinois, the entire application process may be completed by mail. Laura Duncan, Notaries Take Law Schools to Task for Violations, CHI. DAILY L. BULL., Nov. 16, 1994, at 1. Similarly, in Illinois and some other states, notary seals are available through the mail, "without any required proof—or notarization, for that matter—that the recipient is authorized to use it." Jacobs, supra note 9, at B1.

26. For example, in the State of Kentucky, "[t]he Secretary of State, in his certificate of appointment to the applicant, shall designate the limits within which the notary is to act." KY. REV. STAT. ANN. § 423.010 (Michie 1992).

27. See generally The Crisis of Responsibility, NAT'L NOTARY MAG., May 1995, at 11 (identifying the problem of many notaries not acting with diligence).

28. Many provisions of the notary laws set out in clinical legalese the objective requirements of the statutes without any hint of procedural steps to employ to satisfy those requirements. For instance, under the Illinois Notary Public Act, as with numerous other state notary laws, notaries are required to have "satisfactory evidence that a person is the person whose true signature is on a document," and one form such evidence can take is "identification documents." 5 ILL COMP. STAT ANN. 312/6-102(d)(3) (West 1993). However, the notary is given no further guidance about the number or contents of the preferred documents of identification. The notary is not advised to keep a journal of notarial acts that would include a sample signature of the signer for comparison purposes and that would include a listing of the documents of identification presented by the signer.
instructive on the practices best suited to statutory compliance.\textsuperscript{29} Second, most notary laws are woefully incomplete in treating the range of matters confronting notaries and in prescribing measures to assist notaries in ensuring the integrity of public and private documents.\textsuperscript{30} Indicative of this problem is the fact that so many notary laws have not been recently reconsidered and have not kept pace with technology.\textsuperscript{31} Other laws have actually further eroded the role and status of notaries by lessening notarial procedures, such as the abolition in some states of the use of a notary seal\textsuperscript{32} and the abolition in one state of the use of a certificate of notarization.\textsuperscript{33} As additional examples, most states do not require notaries to maintain a journal or log of their notarizations,\textsuperscript{34} and only one state requires document signers to provide a thumbprint to assist in protecting against forged signatures (and then only in the notary journal in connection with certain real estate documents).\textsuperscript{35}

The final legislative blow to the standing of notaries is the almost complete lack of concern about protecting notaries against financial calamity if good faith mistakes are made. It is a travesty of justice, and stands symbolic in the path of real progress for notaries. Some twenty states have abolished altogether the requirement that notaries be bonded,\textsuperscript{36} and the highest notary bond in this country is the $15,000 bond required in California.\textsuperscript{37} In the other states, the bond amount ranges between $500 and $10,000.\textsuperscript{38} Importantly, bonds do not actually protect notaries because, if the bond company has to pay a claim resulting from a particular notary's mistake or misconduct, the bond company will seek reimbursement from that notary.\textsuperscript{39} No state requires notaries

\textsuperscript{29} See Notary Public Code of Ethics (Nat'l Notary Ass'n, Preliminary Draft 1997). More specifically, the need for a Model Notary Code of Ethics "is heightened by the frequent vagueness or absence of statutory guidance on notarial duties." Id. at 1.

\textsuperscript{30} Id.

\textsuperscript{31} National Notary Ass'n, 6 Notary Home Study Course, Vol. VI, at 56 (1989).

\textsuperscript{32} See Comparison of State Notary Provisions, supra note 18, at 32.

\textsuperscript{33} A recent Maryland law "allows Notaries to 'date, sign, and seal or stamp' a document that does not bear a notarial certificate." Legislative Review, Notary Bull., Aug. 1996, at 6. The National Notary Association strongly opposed this law, believing that it would be "misinterpreted and create confusion." Id.


\textsuperscript{36} See Comparison of State Notary Provisions, supra note 18, at 33.


\textsuperscript{38} See Comparison of State Notary Provisions, supra note 18, at 33.

to carry insurance, such as errors and omissions insurance. Of course, since most insurance is purely private, notaries and their employers who believe they have some kind of coverage must examine insurance policies closely. Some insurance policies exclude intentional misconduct. Some legal malpractice policies for lawyers and law firms exclude notarial practice altogether. Thus, the lowly notary, who serves as a public or quasi-public official, for little or no compensation to perform valued commercial and governmental services, is left out in the cold by the state legislatures. Notaries are left to fend for themselves—their personal wealth at risk in the line of duty.

Furthermore, there is no thorough and recognized code of ethics to govern notarial practice. While the American Society of Notaries adopted a short, ten-point Code of Ethics in 1980, that one-page code is addressed only to the notaries themselves. The National Notary Association is presently in the process of formulating a code of ethics for notarial practice, a fifty-two page preliminary draft of which was released on March 1, 1997. Yet, other governmental and business professionals have established codes of ethics of significance—such as judges, arbitrators, lawyers, accountants, realtors, architects, and others. There is

40. See generally Closen, supra note 8, at A23; Comparison of State Notary Provisions, supra note 18, at 31.
42. Hanen & Hanna, supra note 41, at 110. (noting that attorneys and their staff may not be covered if the law firm's malpractice insurance "policy has a clause excluding notary public activities"). But see Melguin v. Zurich Can., 57 Cal. Rptr. 2d 781 (Cal. Ct. App. 1996) (finding that a "state statute barring coverage for insured's intentional acts did not relieve insurer of duty to defend against sex discrimination claims"). Insurance, L. Rep., Mar. 1997, at 58.
44. See The First-Ever Comprehensive Ethics Code for U.S. Notaries, The Nat'l Notary, Mar. 1997, at 2 (stating that "The glaring absence of such a [comprehensive] code has been a big reason why American Notaries have little or no written support when facing challenges by employers, attorneys, and the general public over use of their commissions").
45. See Code of Ethics of the American Society of Notaries (adopted May 1980); Notary Home Study Course, supra note 31, at 1, 2.
46. See generally Notary Public Code of Ethics, supra note 29. The standards of conduct set forth in the preliminary draft "serve the dual function of maximizing the public utility of the notarial office, while minimizing the notary's exposure to liability." Id. at 2. More importantly, however, the Model Code "comprises a moral imperative for change, and a catalyst for effecting progressive and private policy." Id. at 3.
even a Model Code of Ethics for Law Reviews, and it focuses on all of the constituents who participate in the law review process (the law review candidates, the review members and editors, the sponsoring law schools and faculty advisors, and outside authors).\(^\text{48}\) A comprehensive code of ethics for notarial practice should address not only notaries themselves but also the employers of notaries and the consumers of notary services, because employers and consumers regularly contribute to ethical challenges for notaries and to ethical lapses by notaries.\(^\text{49}\) The code of ethics developed for notaries will either apply also to cybernotaries or can be adapted to do so.

All of these deficiencies combine to reflect poorly upon an office at one time so vital that Charlemagne is said to have ordered each bishop, abbot, and count to have a notary.\(^\text{50}\) The notary’s problems are not limited to the circumstances already described, however. Notaries are also criticized because of their poor job performance.\(^\text{51}\) Such instances of notarial inadequacies are the result of negligence,\(^\text{52}\) misunderstanding,\(^\text{53}\)


\(^\text{49}.\) The preliminary draft of the Notary Public Code of Ethics does not currently address these concerns. See generally Notary Public Code of Ethics, supra note 29.


\(^\text{51}.\) In a recent survey of 217 randomly selected notaries, only one properly executed a simple affidavit. Jacobs, supra note 9, at B1. Of those surveyed, over 97% were unfamiliar with the authentication procedure that guides the notary's certification responsibilities; over 88% failed to administer the oath to the affiant; and more than 82% failed to check the affiant's identification. Id.; Home Sav. Inv. Co. v. Einhorn, No. 87C-7390, 1990 WL 114643, at *6 n.14 (N.D. Ill. 1990). Unfortunately, it was recognized some twenty years ago that such negligence was becoming an ever increasing trend among notaries public. See Securities Inv. Co. v. Williams, 193 So. 2d 719 (Miss. 1967). In this case, the grantor of real estate was not present when the notary public notarized the acknowledgment, resulting in a fraudulently obtained deed of trust. Id. at 721. In its opinion, the court noted that “[t]he sordid facts of this case fall within a category and pattern that is becoming increasingly familiar.” Id. at 721-22. See also infra notes 52-54 (discussing other examples of notarial wrongdoing).

\(^\text{52}.\) Early in our history, courts had occasion to hold a notary liable for "gross and culpable negligence" for not "faithfully" performing his official duties. Bernd v. Fong Eu, 161 Cal. Rptr. 58, 61-63 (Cal. App. Ct. 1979). For example, in 1858, a civil action was brought against a notary for failing to complete a certificate before singing it. Id. There, the court stated emphatically:

If the notary read the certificate before signing it, this omission must have been known to him; if he did not, he is equally guilty of negligence; for an officer who affixes his official signature and seal to a document (thereby giving to it the character of evidence,) without examining it to find whether the facts certified are true, can scarcely be said to faithfully perform his duty according to law.

Fogarty v. Finlay, 10 Cal. 239, 245 (1858). Similarly, a notary's negligence is little tolerated today, as evidenced by the court in Summers Bros. Inc. v. Brewer, 420 So. 2d 197 (La. Ct. App. 1982), where it tersely held:
Even if [the notary] did not know that the signatures on the contract were forgeries, he knew that by authenticating the document, as notary, he was telling the world that the parties had appeared before him and affixed their signatures in his presence. Thus, he committed fraud in that he purposely let third parties rely on a document purporting to be genuine but actually without validity as an authentic act. The "proof" of validity he supplied was misleading to all who relied on the contract.

*Id.* at 204. *See also* City Consumer Serv. Inc. v. Metcalf, 775 P.2d 1065 (Ariz. 1989) (finding that notary negligently notarized deed of woman based solely upon representation); Biakanja v. Irving, 320 P.2d 16 (Cal. 1958) (invalidating a will where the notary failed to properly attest to its signing); Succession of Killingsworth v. Schlater, 292 So. 2d 536 (La. 1973) (holding an attorney-notary liable to legatees for failing to use proper care in confecting a will); Howcott v. Talen, 63 So. 376, 379 (La. 1913) (finding a notary "gross[ly] negligent in accepting, conveying, and placing on record titles to property which belonged to others, merely upon the faith of . . . representations"); Willow Highlands Co. v. United States Fidelity & Guar. Co., 73 A.2d 422 (Pa. 1950) (holding notary liable for negligently certifying that property owners had personally appeared before him and acknowledged a mortgage where the property owners had in fact neither appeared before the notary nor knowledge of the transaction); Galloway v. Cinello, 423 S.E.2d 875, 881 (W. Va. 1992) (finding that "notary's negligent act proximately caused [defendant] to lose her status as a secured creditor"); Common Wealth Ins. Sys., Inc. v. Kersten, 115 Cal. Rptr. 653 (Cal. Ct. App. 1974) (holding a notary liable for negligently notarizing an affidavit); Transamerica Title Ins. Co. v. Green, 89 Cal. Rptr. 915 (Cal. Ct. App. 1970) (stating that a notary was negligent in acknowledging two impostors' signatures based solely upon the introduction of an attorney who was personally known to the notary); Lewis v. Agric. Ins. Co., 82 Cal. Rptr. 509, 509 (Cal. Ct. App. 1969) (finding that notary's act of "falsely certifying purported signatures of an individual who had never appeared before her to subscribe or acknowledge subscription to any of the instruments in question constituted 'official misconduct or neglect' of the notary"); Webb v. Pioneer Bank & Trust Co., 530 So. 2d 115 (La. Ct. App. 1988) (holding a notary negligent for failing to properly ascertain the genuineness of a signature allegedly affixed in his presence); Levy v. W. Cas. & Sur. Co., 43 So. 2d 291 (La. Ct. App. 1949) (concluding that a notary was negligent in failing to get proof of identification from the person signing the document in the notary's presence); Immerman v. Ostertag, 199 A.2d 869, 874 (N.J. Super. Ct. Law Div. 1964) (concluding that a notary displayed a "high degree of negligence" in certifying an acknowledgment without determining whether the individuals purporting to have made the statements even knew of the nature or the contents of what they were signing).

53. *See, e.g.*, McKenzie v. Renberg's Inc., 94 F.3d 1478 (10th Cir. 1996) (concluding that notary had mistakenly notarized a contract for sexual services); Whitman v. Whitman, 18 So. 2d 633 (La. 1944) (finding notary mistakenly wrote wrong description in deed); Guatreaux v. Harang, 183 So. 349, 371 (La. 1938) (finding that inexperienced notary "inserted by mistake the words 'to secure a debt' instead of 'to pay a debt'"); Baxter v. Bank of Belle, 104 S.W.2d 265, 265 (Mo. 1937) (stating that notary mistakenly signed his name "where the testatrix should have signed and testatrix signed under the attestation clause"); *In re Donohoe's Estate*, 115 A. 878, 879 (Pa. 1922) (finding that the notary "mistakenly wrote her name in the wrong place"); Thompson v. Stack, 150 P.2d 387 (Wash. 1944) (stating that notary had mistakenly notarized a deed by inserting a description of nonexistent property); Orrell v. Cochran, 685 S.W.2d 461, 462 (Tex. Ct. App. 1985), *rev'd on other grounds*, 695 S.W.2d 552 (Tex. 1985) (finding that notary mistakenly signed her name in the place designated for the seal, rather than above the words "Notary public").
and even illegal conduct. A significant amount of errors and omissions occurs in the daily routine of notarial practice in this country. Some notaries engage in the unauthorized practice of law. Some notaries contribute indirectly to the deceptive business activities of charlatans as practiced upon consumers. Notaries are imprecise and incomplete in executing notarizations. Employers of notaries encourage or direct them to take shortcuts. Some notaries conspire directly with scoundrels to defraud others. Of special concern is that attorneys who are notaries and attorneys who employ notaries are guilty of most of these same failures in notarial practice. No matter whether the notarial violations are due to instances of unintentional neglect or unlawful motive,

54. "The American Colonies' first Notary was Thomas Fugill. Appointed in 1639 in the New Haven Colony, he miserably failed to live up to his duties and was thrown out of office for falsifying documents." Notaries Public in American History, NOTARY BULL., Apr. 1997, at 3. See, e.g., Florida Bar v. Farinas, 608 So. 2d 22 (Fla. 1992) (holding illegal conduct of attorney-notary in failing to personally acknowledge signature before notarizing document warranted public reprimand); Iowa State Bar Assoc. v. Bauerle, 460 N.W.2d 452 (Iowa 1990) (imposing indefinite suspension of attorney-notary's license for falsely certifying documents); Iowa State Bar Assoc. v. O'Donohoe, 426 N.W.2d 166, 166 (Iowa 1988) (reprimanding attorney-notary for "knowingly making a false statement of fact on a document filed for public record"); State Life Ins. Co. v. Faucett, 163 S.W.2d 592 (Mo. 1942) (finding that notary signed a false certificate of acknowledgment, and did nothing to conceal her fraud).

Professor Wigmore pointed out some time ago a principle that is as applicable today as it was then:

The scandal of the reckless notary has been allowed to go too far. ... 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 upon the notary's certificate of acknowledgment. And these pillars of property become a treacherous support when they are permitted with forgery. A practice which permits forgery is as dangerous in policy as it is unsound in principle.

Wigmore, supra note 1, at 749.

55. See Crisis of Responsibility, supra note 27.

56. See, e.g., Biakanja v. Irving, 320 P.2d 16 (Cal. 1958); Florida Bar v. Fuentes, 190 So. 2d 748 (Fla. 1966); In re Skobinsky, 167 B.R. 45 (E.D. Pa. 1994).

57. See Unknowingly Swept Up In Sweepstakes, Notary Relates Her Recent Nightmare, NOTARY BULL., Aug. 1996, at 3 (suggesting a testimonial endorsement of a fraudulent sweepstakes contest). See also Notary Home Study Course, supra note 31, at 23 (noting that "Notaries have been known to use their seals and titles to endorse commercial products, services and contests in ads and mail solicitations").


60. See, e.g., State Life Ins. Co. v. Faucett, 163 S.W.2d 592 (Mo. 1942).

61. See e.g., City Consumer Serv. v. Metcalf, 775 P.2d 1065 (Ariz. 1989) (attorney-notary did not know document signer, did not see her sign the document or obtain her acknowledgment that she signed it, and did not seek documents of identification from her; the
the practical effect of each of these erroneous acts (which sometimes become known and publicized) is that the office of notary public is diminished, in terms of both public perception and public trust.\textsuperscript{62} The institutional inattention to notaries in the United States, the lack of professionalism of notaries in this country, and the extent of abuses of practice by notaries here have led to international suspicion about our notarizations.\textsuperscript{63} Consequently, in many foreign countries, our notarizations are not taken seriously, and our documents are too often refused recognition.\textsuperscript{64} Notarial indifference and misconduct must be curbed.

Fortunately, computer technology has provided the platform from which some specialized notaries may re-establish both their public image and their prominence within the governmental and business communities. While this new technology revolutionizes the way that special notaries perform some of their duties, it does not affect the fundamental authority of the notary public. In fact, those powers have changed little over the years.\textsuperscript{65} Instead, this technology simply changes the way in which cybernotaries verify certain documents. Rather than relying upon documents of identification to screen document signers and using a manual seal to attest to document authenticity,\textsuperscript{66} cybernotaries may now use a computer to screen and record the necessary verification.\textsuperscript{67}

Attendant to this new opportunity for notaries, there is great cause for concern because of the many problems that currently exist within the office of notary public. Such concern is more than justified, due to the

---

\textsuperscript{62} See Crisis of Responsibility, supra note 27.

\textsuperscript{63} See Closen, supra note 8, at A23.

\textsuperscript{64} See Closen, supra note 8, at A23.

\textsuperscript{65} John, supra note 15, at 2.

\textsuperscript{66} The seal has its origins in ancient Rome. Kumpe v. Gee, 187 S.W.2d 932, 934 (Tex. Ct. App. 1945); Raymond C. Rothman, Notary Public Practices and Glossary 1 (1978). Often contracting parties were unable to write. Rothman, supra, at 1. In such cases, the parties would use a metal or clay disk, called a "private seal," which was engraved with a special design or family coat of arms as their signature to the agreement. Id. Then, a sticky substance was melted onto the paper at the end of the document, upon which the private seal was impressed. Id. In the centuries to follow, people learned to write, and the art of making paper became more mechanized, thus increasing its supply. Id. As contracts lengthened to more than one page, it was customary to make two holes in the paper's margin and tie the pages together with a ribbon. Id. at 2. To make sure that the ribbon was secure, the notary would melt wax over the knot and impress it with his official seal. Id. From this act comes today's definition of the word "seal," which means to "make secure," or "enclose" an object. Id. For excellent discussions of promises under seal, see generally Eric Mills Holmes, Stature and Status of a Promise Under Seal as a Legal Formality, 29 Williamette L. Rev. 617 (1993); 7 John Henry Wigmore, Evidence § 2161 (Chadbourn Rev. 1978).

\textsuperscript{67} Cybernotaries will combine both legal and computer expertise to verify the authenticity of electronic documents produced in cyberspace. Jacobs, supra note 9, at B1.
lengthy historical process of erosion of the notarial office. If today's notaries are incapable of performing the most basic functions of the office (such as understanding notary laws, identifying document signers, recording certificates of notarization, and even affixing notary seals), how can they be expected to perform the more complex functions that will accompany cybernotarizations? The realistic answer is that some notaries will adapt and some will not. For those willing to adapt, the time for change is right now because, to this point, only a small number of states have actually enacted legislation governing cybernotarizations. Almost no cybernotaries have yet been appointed or have yet begun to function. Legislation will rapidly be forthcoming, however, as states are forced to adopt such legislation to remain competitive in the national and global markets. Cybernotaries will therefore be commonplace within a few years.

68. See, e.g., Howcott v. Talen, 63 So. 376 (La. 1913); Willow Highlands Co. v. United States Fidelity & Guar. Co., 73 A.2d 422 (Pa. 1950); City Consumer Serv., Inc. v. Metcalf, 775 F.2d 1065 (Ariz. 1989).

69. As of this writing, the following jurisdictions have enacted or introduced some legislation concerning either digital or electronic signatures:

   S.B. 458, 138th Leg., 2d Sess. (Del. 1996);
   Conn. Gen. Stat. § 19a-25a (West 1994);
   S.B. 103, 144th Leg., Reg. Sess. (Ga. 1997) (pending);
   S.B. 2401, 18th Leg. (Haw. 1996);
   S.B. 516, 90th Leg., Reg. Sess. (Ill. 1997) (pending);
   Iowa Code § 48A.13 (1995);
   S.B. 939, 88th Leg., Reg. Sess. (Mich. 1996) (pending);
   S.F. 173, 80th Leg., Reg. Sess. (Minn. 1997) (pending);
   S.B. 7420, 219th Leg., 2d Reg. Sess. (N.Y. 1996) (pending);
   H.B. 3046, 69th Leg. (Or. 1997) (pending);
   H.B. 8125, Reg. Sess. (R.I. 1996) (pending);
   S.B. 923, Reg. Sess. (Va. 1997) (pending);
   S.B. 12, 53d Leg., Budget Sess. (Wyo. 1996)

See Digital Signature Guidelines 13 (1996). Massachusetts is currently studying digital signature legislation. Id. Similarly, Japan, Germany, and Chile are considering digital signature legislation. Id.; Tsuchiya, supra note 8, at 17.

70. Telephone Interview with Kenneth Allen, Administrator, Division of Corporations and Commercial Code within Utah's Department of Commerce (Feb. 14, 1997).

71. Jacobs, supra note 9, at B1.
This paper will focus on the problems inherent in current notarial legislation and practice. It will discuss what problems loom ahead for both notaries and cybernotaries as states move to implement appropriate cyberlegislation. This paper will provide a brief historical view of the relevant facets of the office of notary public, including their qualifications, statutory authority, practices, and liabilities. We will discuss cybernotarial legislation and will analyze the role of cybernotaries and identify the inadequacies of current legislation in anticipating and regulating cybernotarial acts. This paper will include our suggestions to the states as they move to enact cybernotary legislation and as they seek to avoid the pitfalls of the past, as well as the problems of the current cybernotary laws. We will conclude by considering what the future holds for both notaries public in general and cybernotaries in particular.

II. HISTORICAL BACKGROUND OF THE RISE AND FALL OF NOTARIES

I have but one lamp by which my feet are guided, and that is the lamp of experience. I know of no way of judging of the future but by the past.

—Patrick Henry (1775)

A. ORIGIN AND EARLY HISTORY

If events of the recent past are to serve as the guide by which to judge the future for notaries public and cybernotaries, their future looks dim. 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. But, things were not always that way.

The high office of notary public can be traced back to the Roman Empire, to the notarius. Because the art of writing was not widespread during Roman times, it became the duty of the notary public, as a literate and trusted public official, to draft and safeguard documentary

73. See generally Notary Home Study Course, supra note 31 (showing the fast-paced increase in the number of notaries).
74. See generally Clossen, supra note 8, at A23.
75. Bickett v. Knight, 85 S.E. 418 (N.C. 1915); HUMPHREY, supra note 14, at 7.
76. A public officer whose duties closely paralleled those of later day notaries public was called a notarius. ROTHMAN, supra note 66, at 1. See Howland, supra note 5, at 6.

The mystery to which the scribe or notary held the key was written language. Throughout European and Asian history the ability to read, write, and speak effectively granted an enormous power, reserved to the elite only, treasured by those who held these gifts and the envy of those who did not.
items (such as contracts and wills) for the public record.\textsuperscript{77} Thus, when entering into an agreement or business transaction, parties who were unable to read and write would use a metal or clay disk engraved with a distinctive design or family coat of arms as their signature to the agreement.\textsuperscript{78} The formality consisted of the ceremonial melting of hot wax at the end of the document, upon which the crest or seal was impressed.\textsuperscript{79} Having a family crest and signet ring or seal became so much a symbol of wealth and status, that even the members of the nobility and the clergy who could read and write, nevertheless utilized sealed documents. This special form of sealed writing was commonly understood by both individuals and courts alike to serve as a legally binding agreement, and it lasted well into the Twentieth Century as obviating the need for, or substituting for, consideration in commercial contracts.\textsuperscript{80} The importance of the notary's authority became realized outside the Empire itself, leading to the presence of notaries in the surrounding provinces of England, France, and Spain.\textsuperscript{81} Eventually, most countries came to appoint their own notaries public, with particularized authority from nation to nation.\textsuperscript{82} In 1883, the United States Supreme Court, in deciding a case about international recognition of a notarization by a Norwegian notary, spoke of notaries public as “officers recognized by the commercial law of the world.”\textsuperscript{83}

In the early colonial United States, there was little need for the services of a notary public.\textsuperscript{84} This was due, in large part, to the fact that most land agreements were executed in open court, with the buyer and seller appearing before a judge, to advise him of their intention to contract for the purchase and sale of real estate.\textsuperscript{85} The judge would then simply record the terms of the agreement in the court record, thus giving the agreement legal effect.\textsuperscript{86} As to lesser contracts of sale and purchase, the parties met face-to-face and knew one another, so there was no felt need to put their agreement in writing or, if they did write it down, to

\textit{Id.}

77. \textsc{Rothman}, supra note 66, at 1. Notaries public retained the power to make copies and safeguard them into the early 1900’s. Closen & Dixon, \textit{supra} note 14, at n.10.
78. \textsc{Rothman}, \textit{supra} note 66, at 1.
79. \textsc{Rothman}, \textit{supra} note 66, at 1.
80. Holmes, \textit{supra} note 66, at 622. Holmes notes that affixing the seal required time because the notary had to heat and place the wax on a writing and then impress the wax with the seal. \textit{Id.} at 627. Therefore, by its very nature, the promisor was given an opportunity to contemplate the serious consequences of his pledge. \textit{Id.}
81. \textit{See Gelmer}, \textit{supra} note 50, § 1.2.
82. \textit{See generally Tsuchiya, supra} note 8.
84. \textit{See Rothman, supra} note 66, at 2.
86. \textit{See Rothman, supra} note 66, at 2.
have the signatures on the document notarized. A real need for qualified notaries emerged, however, as trade with Europe increased. Traders conducted their business through bills of exchange. The parties did not necessarily know one another and did not contract in a face-to-face setting. Hence, the need arose for an impartial and reliable person who could draft and witness such agreements, and protest such bills when necessary. Either by appointment or election, the notary public filled this important position.

Significant to the importance of the notary in those early days was the fact that there were so few of them. Some were even appointed by the President. Many statutes limited the number of notaries who could be commissioned within a city or county, and often the number was just one. But, times changed dramatically for notaries, as more states came into the Union, as the population grew, and as the perceived need for notaries to service governmental and business interests expanded. As the population increased, notaries no longer knew all of their

87. See Rothman, supra note 66, at 3. The first notary was appointed in Virginia in 1662 because “certificates and other instruments to be sent out of this country have not that credit given them in foreign parts as duly they ought.” W. Hamilton Bryson, Book Review, 38 A. J. LEGAL HIST. 89, 90 (1994).

88. Rothman, supra note 66, at 3. International notarial acts were similarly honored very early in American history, assuming that the notarized document complied with the requirements of local law. Closen & Dixon, supra note 14, at n.21.

89. Notary Home Study Course, supra note 31, at 53.

90. Rothman, supra note 66, at 3.

91. Rothman, supra note 66, at 3. But see Humphrey, supra note 14, at 8 (stating that the office is “apparently” filled only by appointment).

92. Closen & Dixon, supra note 14, at 876. However, as more persons wanted to become notaries, state legislatures eventually took over the burden of regulating the appointment and supervision of notaries by way of state statutes. Id.

93. See Bernal v. Fainter, 467 U.S. 216, 223 (1984). “The Texas Constitution of 1845 authorized the appointment of only six notaries per county and directed that they be appointed by the Governor with the advice and consent of the State Senate.” Id. Other states acted in a similar manner.

An 1853 California law, for example, specified: that Catalina Island, in Los Angeles County, was to have its own Notary. The legislature began to require that a certain number of Notaries within a given county reside in a given commercially bustling city or town—as did the 1862 regulation stipulating that two of Santa Clara County's eight Notaries must live in Santa Clara township and one in Gilroy township.

94. See, e.g., Notary Home Study Course, supra note 31, at 51.

An 1864 [California] law, for example, provided: The governor shall have power to appoint and commission twenty notaries public for the county of San Francisco, fifteen for each of the counties of Sacramento, El Dorado, Nevada, Placer, Yuba, Sierra, Butte, Calaveras, Tuolumne, and San Joaquin, and five for each of the other counties of the state, who shall hold office for the term of two years, and until their successors are appointed and qualified.
fellow citizens, and certainly did not personally know all of the business travelers passing through the territory. 95

B. Notary Practices Today

Today, all fifty states have some form of law regulating notaries, 96 with the Secretaries of State usually delegated the responsibility of processing applications and issuing appointments in the form of licenses or commissions. 97 Today's statutes do not limit the number of notaries

95. See Notary Home Study Course, supra note 31, at 55.


who may be appointed, and since the state and local governments charge a filing fee to record notary licenses and commissions, governments have preferred to receive the revenue rather than to limit the number of notaries.

Currently, there are an estimated 4.5 million notaries public in the United States. Some states are home to an average of more than one notary for every fifty people. There are thirty states with less than 4.5 million people in each of them. Many professions and occupations have fewer than 4.5 million members, including dentists and doctors, elementary and secondary school teachers, police officers, and lawyers. That number of notaries is preposterously high. As the United States Supreme Court has commented, "[T]he significance of the position of notary public has necessarily been diluted by changes in the appointment process and by the wholesale proliferation of notaries."

1. Qualifications For Notaries

The qualifications for becoming a notary vary somewhat among the jurisdictions. In general, applicants must be about eighteen years old and must be a resident of the state in which they act. Notary

98. See Bernal v. Fainter, 467 U.S. 216, 222 (1984) (stating that "The Texas Constitution now authorizes the Secretary of the State to appoint a 'convenient' number of notaries for each county"). Hawaii seems to be the only exception, in requiring the notary applicant to provide a letter justifying the need for a new notary. See Comparison of State Notary Provisions, supra note 18, at 31.

99. Every state charges a commissioning fee ranging from $3 in Michigan to $72 in California. The fees range between $15 and $30 in half of the states. See Comparison of State Notary Provisions, supra note 18, at 32. The average commissioning fee for the 50 states and the District of Columbia is approximately $26.91. If about one-fourth of all notary commissions are issued or renewed each year, more than one million fees are collected annually or about $27 million in revenue for the states.

100. See Closen, supra note 8, at A23. In contrast, there are only about 540 notaries in Japan. See Tsuchiya, supra note 8, at 2.

101. For example, there is more than one notary on average "for every 49 citizens in Alaska and Tennessee, for every 34 citizens in Florida, and for every 24 citizens in South Carolina." Closen, supra note 8, at A23.

102. Closen, supra note 8, at A23.

103. Closen, supra note 8, at A23. For example, it has been estimated that there were 656,000 attorneys practicing law in the United States in 1994, and that there will be "839,000 working lawyers" by the year 2005. Richard Dooling, Too Many Lawyers? Wait Until 2005, N.Y. TIMES, Feb. 22, 1997, at 17.


105. See Comparison of State Notary Provisions, supra note 18, at 31-33. Interestingly, the State of Louisiana requires notary applicants to exhibit, among other things, "sober habits." LA. REV. STAT. ANN. § 35:191 (West 1985).

106. In fact, of the 50 states and the District of Columbia, only Alaska and Nebraska set the minimum age higher than 18—at age 19. See Comparison of State Notary Provisions, supra note 18, at 31; NEB. REV. STAT. § 64-102 (1990). See, e.g., ALASKA STAT. § 44.50.020
applicants may have to proclaim that they have no record of felonies,\textsuperscript{108} but most states do not verify the criminal records of these applicants.\textsuperscript{109} Additionally, notaries in some thirty states are required to obtain a surety bond to “assure the faithful performance of duties, and to compensate any person who may suffer a loss because of the notary’s misconduct.”\textsuperscript{110} Then, after paying a small fee and taking an oath of office,\textsuperscript{111}...


\textsuperscript{107} See Gilmer, supra note 50, § 2.10. About 14 states still require a period of residency of between one day and one year, and about 36 states and the District of Columbia have no residency requirement. Comparison of State Notary Provisions, supra note 18, at 31. See also Bernal v. Fainter, 467 U.S. 216, 227-28 (1984) (reversing a court of appeals decision denying a notary commission to a long time resident alien of the State of Texas on the ground that it violated the Equal Protection Clause of the Fourteenth Amendment).

\textsuperscript{108} About eight states prohibit notary applicants from having a felony conviction, and two other states prohibit applicants from having a conviction for a crime involving dishonesty or a crime involving notary duties. Comparison of State Notary Provisions, supra note 18, at 31.

\textsuperscript{109} See Closen, supra note 8, at A23.


\textsuperscript{111} Taking an oath of office is a requirement in every state. Humphrey, supra note 14, at 19. In fact, some oaths of office still require an applicant to acknowledge a belief in God.

Closen & Dixon, supra note 14, at 880.
qualified applicants are commissioned for a term of about four years in duration.\textsuperscript{112}

Although a few notary laws mandate that notaries must be literate in English or some other language, and a few states require notary applicants to submit to a nominal written examination, which would seem to demand at least minimal competency in English or some written language,\textsuperscript{113} no notary statute of which we are aware requires that applicants must have attained a specified minimum level of general education (such as graduation from college, or even from high school).\textsuperscript{114} Thus, a grade school drop-out barely proficient in the relevant language can become a notary, and can notarize documents involving hundreds of thousands or millions of dollars of transactions. If the notary is to become a business professional deserving respect, then the position cannot remain available on demand to virtually anyone who is willing to pay the small application fee.

2. Authority of Notaries

Once commissioned, the notary is vested with the full authority conferred by the respective state notary law, regardless of whether the notary has bothered to become familiar with the law, and regardless of whether the notary is diligent in obeying the law. The statutory author-

---

You do solemnly swear (or affirm, as the case may be) that you will support the constitution of the United States, and the constitution of the state of Connecticut; and that you will faithfully discharge, according to law, the duties of the office of notary public to the best of your abilities; so help you God.


\textsuperscript{112} \textit{See GILMER, \textit{supra} note 50, § 2.7. Some 31 states set their term of office for notaries public at four years. \textit{See Comparison of State Notary Provisions, supra} note 18, at 32. For example, \textit{see ALA. CODE § 36-20-30 (1991) (4 years); ARK. CODE ANN. § 21-14-101 (Michie Supp. 1996) (10 years); CAL. GOV'T CODE § 8204 (West 1992) (4 years); CONN. GEN. STAT. ANN. § 3-94(a) (West Supp. 1996) (5 years); DEL. CODE ANN. tit. 29, § 4306 (1991) (2 years); GA. CODE ANN. § 45-17-5(a) (Harrison 1990) (4 years); IDAHO CODE § 51-103(2) (1994) (6 years); ILL. COMP. STAT. ANN. 312/2-101 (West 1993) (4 years); IND. CODE ANN. § 33-16-2-1(b) (Michie 1992) (6 years); IOWA CODE ANN. § 77A.4 (West 1992) (3 years); ME. REV. STAT. ANN. tit. 5, § 82 (West 1989) (7 years); MO. ANN. STAT. § 486.215 (West 1995) (4 years); NEV. REV. STAT. ANN. § 240.020 (Michie 1996) (4 years); N.Y. EXEC. LAW § 130 (McKinney 1993) (2 years); S.C. CODE ANN. § 26-1-10 (Law Co-op. 1991) (10 years); TENN. CODE ANN. § 8-16-103 (1994) (4 years); W. VA. CODE § 29C-2-102 (1992) (10 years).}

\textsuperscript{113} About 11 states require notaries to be able to read and write English, and about six states require a notary exam of some kind. The only state to require both is Wyoming. \textit{Comparison of State Notary Provisions, supra} note 18, at 31.

\textsuperscript{114} Wisconsin requires notaries to have at least an eighth-grade education. \textit{Comparison of State Notary Provisions, supra} note 18, at 31.
ity of notaries varies slightly from state to state. All notaries possess at least two types of authority: (1) they can administer oaths (such as given to witnesses, and to public officials when they are sworn into office), and (2) notaries can attest to the authenticity of signatures on documents. Beyond those types of authority, notaries in some states can perform weddings, can protest commercial paper, can open and inventory abandoned bank deposit boxes, can certify copies of some kinds of documents, and can do other prescribed acts. The power to undertake these special activities is premised upon the status of a notary as a public or quasi-public official. As such, a notary occupies the po-

115. See Comparison of State Notary Provisions, supra note 18, at 31-33.
116. See GILMER, supra note 50, at 127; 58 AM. JUR. 2D Notaries Public § 27 (1989). Notaries public are likewise empowered by statute to take depositions and affidavits in matters relating to the duties of the office. Jii v. Rhodes, 577 F. Supp. 1128 (S.D. Ohio 1983). The difference between a deposition and affidavit has been described as follows:

A deposition, in its more technical and appropriate sense, is limited to the written testimony of a witness given in the course of a judicial proceeding, either at law or in equity, in response to interrogatories, oral or written, with an opportunity for cross-examination. An affidavit is a voluntary statement made ex parte, without notice to the adverse party or an opportunity to cross-examine the witness concerning the subject matter. Moreover, the giving of a deposition may be compelled, so that it is not in all instances, a voluntary statement.

117. See Tsuchiya, supra note 8, at 3.

118. See Tsuchiya, supra note 8, at 3.

119. See Tsuchiya, supra note 8, at 3.

120. See N.Y. BANKING LAW § 335 (McKinney 1990); see also Opening Safe Deposit Boxes, NAT'L NOTARY MAG., Nov. 1995, at 21 (discussing notary publics and safe deposit boxes).

121. See Tsuchiya, supra note 8, at 3.

122. See S.C. CODE ANN. § 26-1-90 (Law Co-op 1991) (stating that “A notary public may ... [take] renunciations of dower ... ”).

sition of a fiduciary of the public. In theory, noble notaries are supposed to perform their official duties with competence, diligence and integrity, as the occupants of positions of public trust. It is from this obligation to honor the public trust, in conjunction with the public official status of notaries, which permits them to undertake functions ordinarily reserved to judges. Unfortunately, many notaries are not competent, diligent, or honest.

Incidentally, the geographic authority of judges and notaries constitutes another similarity between the two posts. That is, while most judges and notaries have statewide authority, other judges (especially justices of the peace) and notaries have authority only in their counties, parishes, or towns of residence. Thus, while notaries may be aware

126. Closen & Dixon, supra note 14, at 876. See United States v. Morehead, 243 U.S. 607 (1917) (notaries authorized to administer oath); Vargas v. Strake, 710 F.2d 190 (1983) (notary public has authority to administer oaths and take affidavits); Carter v. Carter, 191 S.W.2d 451 (Tenn. 1944) (notary public of another state may administer oath to divorce bill); Eggert v. Ford, 150 P.2d 719 (Wash. 1944) (granting notaries the power to administer oaths to military officers for the purpose of fulfilling military justice); Wheeler v. Burckhardt, 56 P. 644, 645 (Or. 1899) (“notary public is a person who is authorized to administer oaths”); Walker v. People, 45 P. 388 (Colo. 1896) (notaries have the “fullest powers” to administer all oaths provided by law, including swearing to an affidavit); Compton v. Alabama, 214 U.S. 1 (1908) (holding that a notary public may be considered a magistrate for the purposes of administering oaths); First Nat'l Bank v. Merrill, 139 P. 1066 (1914) (stating that notaries do not exercise judicial functions); Coleman v. Roberts, 21 So. 449 (1896) (confering justice of the peace authority upon notaries public); see also Tsuchiya, supra note 8, at 7 (stating that “a Japanese Notary conducts [certain] judicial functions”).
127. See Crisis of Responsibility, supra note 27. Recall the dreadful beginning of the tradition of notaries in the American Colonies, when the first notary was removed from office due to misconduct. See supra note 54.
129. See, e.g., CAL. GOV'T CODE §§ 8200-8230 (West 1992); COLO. REV. STAT. §§ 12-55-101 to -123 and 12-55-201 to -211 (West 1996); IDAHO CODE §§ 51-101 to -123 (1994); N.M. STAT. ANN. §§ 14-12-1 to -20 (Michie 1995); N.Y. EXEC. LAW §§ 6-130 to -133 (McKinney 1993); 57 PA. CONS. STAT. ANN. §§ 1 to -169 (West 1996); VT. STAT. ANN. tit. 24, §§ 441-446 (1992); WYO. STAT. §§ 32-1-101 to -113 (Michie 1996). All states have some form of require-
that certain documents they notarize are bound for other states or countries, notaries cannot execute notarizations while physically outside the boundaries of the states where they are commissioned.\footnote{130}

3. Liability of Notaries

While the notary’s authority may vary somewhat from place to place, the standard of care for notaries does not. The standard of liability for the notary public is almost uniformly one of objective reasonable prudence, meaning that under the law a notary must act as a reasonable notary would act under similar circumstances.\footnote{131} A subjective standard of whether the notary acted in a manner such that s/he possesses a clear conscience about the incident(s) in question has seldom been asserted, and rarely adopted.\footnote{132} In other words, a notary public will nearly always be liable for negligent, reckless, or willful conduct.\footnote{133} Of course, the burden of proving such notarial misconduct rests with the plaintiff.\footnote{134} If this burden is met, and if there has been an injury to another party (either a customer of the notary, or one who has reasonably relied upon the notarial act),\footnote{135} the notary may be liable for all proximately

\footnote{130. See, e.g., State v. Haas 530 N.W.2d 617 (Neb. 1995) (holding that an Iowa notary was unauthorized to notarize in Nebraska).


132. Sometimes, the courts apply a standard of care other than a notarial standard. Thus, the standard may be a “reasonable person” standard, Johnson v. State, 238 N.E.2d 651 (Ind. 1968), or a reasonably prudent “business man” standard. Levy v. W. Cas. & Sur. Co., 43 So. 2d 291 (La. Ct. App. 1949)

133. See Closen & Dixon, supra note 14, at 888-89.


135. See, e.g., Aladdin Oil Co. v. Marque, 157 So. 368, 374 (La. Ct. App. 1963) (limit on liability is reliance damages); Stemmons v. Akins, 283 P.2d 797, 798 (Okla. 1955) (auto
caused injuries. As noted above, the highest notary bond almost everywhere in the United States is a mere $10,000 or less. Notaries could, however, be liable for amounts far in excess of $10,000, and they have been held accountable for more substantial sums. This liability may also extend to the employer of a notary under either common law vicarious liability principles or under the employer responsibility provisions of state notary statutes.

Most notarial problems arise from notarizations of signatures on documents. It is important to understand that notaries are not guarantors of the identities of the signers of the documents they notarize.

136. See Clossen & Dixon, supra note 14, at 891. See, e.g., Beneficial Mortgage Co. v. Powers, 550 N.E.2d 793 (Ind. Ct. App. 1980) (despite negligent notarization, no cause of action when loss is not proximately caused by negligence); Kirk Corp. v. First Am. Title Co., 270 Cal. Rptr. 24 (Ct. App. 1990) (liability of notary predicated on proximately caused injury by negligent act); Tutelman v. Agric. Ins. Co., 102 Cal. Rptr. 296 (Ct. App. 1972) (the fact that execution of false trust deed was a proximate cause was enough to establish notary liability, even though not sole proximate cause); Biakanja v. Irving, 320 P.2d 16 (Cal. 1958) (notary held liable for damages because of improperly attested will). See also Commonwealth Ins. Sys. Inc. v. Kersten, 115 Cal. Rptr. 653 (Ct. App. 1974) (notary public was held liable for all proximately caused injuries); Garton v. Title Ins. & Trust Co., 165 Cal. Rptr. 449 (Ct. App. 1980) (notary public can be held liable for all proximately caused injuries from negligently acknowledged deed).

137. See Comparison of State Notary Provisions, supra note 18, at 32 (indicating that at the time the highest notary bond in any state was $10,000).

138. 58 AM. Jur. 2d Notaries Public § 63 (1989); UTAH CODE ANN. § 46-1-15 (1996). See, e.g., Beneficial Mortgage Co. v. Powers, 550 N.E.2d 793 (Ind. Ct. App. 1980) (finding no cause of action when loss is not proximately caused by notary's negligence); Kirk Corp. v. First Am. Title Co., 270 Cal. Rptr. 24 (Ct. App. 1990) (stating that liability of notary is predicated upon proximately caused injury by negligent act); Biakanja v. Irving, 320 P.2d 16 (Cal. 1958) (holding notary liable for damages because of improperly attested will); Stork v. Amer. Sur. Co., 33 So. 742 (La. 1903) (finding notary proximately caused injury for failing to cancel mortgage); Garton v. Title Ins. & Trust Co., 165 Cal. Rptr. 449 (Ct. App. 1980) (stating that notary public can be held liable for all proximately caused injuries from negligently acknowledged deed); City Consumer Serv. v. Metcalf, 775 P.2d 1065 (Ariz. 1989) (situation where the notary was held liable for a $60,000 sum).


Thus, notaries are not liable for acknowledging a forged signature on a document where they have acted in good faith, and with reasonable efforts to discover the identity of the individual whose signature is being notarized. Absent this degree of precaution, the notary is engaging in negligent conduct for which s/he may be held liable if the signature is a fraud and someone is injured. Similarly, if a notary commits a willful violation, such as executing a knowingly false attestation, s/he may be liable for all proximately caused injuries, possibly including punitive damages. A notary’s commission could be suspended or revoked for violations of the state notary statute. Moreover, any conduct rising to the level of criminal activity may result in criminal prosecution, for official misconduct or for violation of the state notary statute’s criminal provisions. If the notary were also an attorney, the attorney’s law license could be placed in jeopardy.

4. Lack of Notarial Change

There has been very little change in the notary’s authority and practice over the years. Probably the most significant technological advance for the backward notary has been the slow change in the kind of notarial seal used to notarize signatures on documents. The waxen seal of olde gave way to the metal embosser that impressed raised edge letters and symbols into paper. The embosser, which with the advent of copy machines did not photocopy well, gave way to the ink stamp seal (with separate ink pad). And then, the self-inking stamp was invented. The resistance to change in notary practice can be witnessed in statutes dealing with the official notary emblem. In fact, as already noted, several states have passed statutes to abolish the requirement of a seal as part

---

144. Id.
145. Id. § 63.
148. See In re Boyd, 430 N.W.2d 663 (Minn. 1988). In Boyd, an attorney instructed a client to forge her deceased father's signature on a deed in order to avoid probate. Id. at 663-64. The court held that it was immaterial that no harm resulted from the forgery, concluding that the attorney's conduct was criminal and warranted a six month suspension. Id. at 667.
150. See Fischer, supra note 5, at 10.
151. See Fischer, supra note 5, at 10.
of the notarial ceremony, rather than to contend with calls for change in practice. Other states, meanwhile, have slowly adopted minor modifications of the seal requirement, such as recognition of computer generated notarial seals. It has been said that "sound practice still calls for transactions to be formalized in a manner which assures the parties of their validity and enforceability." The authors agree. That statement is especially important in light of developments surrounding the use of electronic communications and transactions. It is evident that digital communication is the technology of today, and tomorrow. Yet, as suggested by the cited remark of Patrick Henry—that the past is predictive of the future—it remains to be seen whether cybertaries will rise above the doubtful practices and lack of prestige of ordinary notaries.

III. EXAMINING DIGITAL SIGNATURE TECHNOLOGY

A person may be bound by any mark or designation he thinks proper to adopt, provided it be used as a substitute for his name.

—New York Court of Appeals (1844)

152. See Holmes, supra note 66, at 639. Twenty-five states and the U.S. Virgin Islands have passed such legislation. Id. See also Comparison of State Notary Provisions, supra note 18, at 32 (indicating that 12 states have no notary seal requirement—Connecticut, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, New Jersey, New York, Rhode Island, Vermont, and Virginia).

153. Holmes, supra note 66, at 655.


The Japanese notarial system, for example, still requires the use of a seal, and the Japanese also have a system of personal identification of its citizens based upon individuals having registered seals "to prevent forgeries." Tsuchiya, supra note 8, at 10, 13.

155. See Jaksetic, supra note 2, at 21.

156. See BARTLETT, supra note 72, at 339.

157. Brown v. Butchers and Drovers' Bank, 6 Hill 443, 444 (N.Y. 1844). See Joseph Denunzio Fruit Co. v. Crane, 79 F. Supp. 117, 128 n.16 (S.D. Cal. 1948), aff'd, 188 F.2d 569 (9th Cir.), cert. denied, 342 U.S. 820 (1951) (stating that a signature is whatever symbol, mark, or device one chooses to use as a representative of himself); Hessenthaler v. Farzin, 664 A.2d 990, 993 (Pa. Super. Ct. 1990) (holding that a signature need not be in any particular form); U.C.C. § 1-201(39) (1992) (stating that "[s]igned includes any symbol executed or adopted by a party with the present intention to authenticate a writing"). See also Ellis Canning Co. v. Bernstein, 348 F. Supp. 1212 (D. Colo. 1972) (holding that a tape recording satisfied the Statute of Frauds signature requirement where both parties knew that their discussions were being taped). But see Swink & Co. v. Carroll McEntee & Mccinley, Inc., 584 S.W.2d 393 (Ark. 1979) (finding that a tape recording was a writing, but refused to enforce it because it did not comply with the statute of frauds in that it was not signed by the party against whom enforcement was sought).

Similarly, a pen or ink dash, or a series of dashes (or hyphens) following the signature, may serve as a valid notarial seal. Holmes, supra note 66, at 634-35 n.60; see, e.g., Hacker's...
A. ELECTRONIC TRANSACTIONS

A great advantage of replacement of the traditional notarial practice with cybernotarization is the cost-effectiveness of such a fully computerized system to the parties to electronic transactions.\textsuperscript{158} There can be enormous savings of time and cost for the parties to the transactions, because under present notarial standards paper document signers must personally appear before notaries and either sign or acknowledge their signatures in the physical presence of those notaries.\textsuperscript{169} Instead, electronic transmissions and cybernotarizations can be accomplished in moments without the need for signers and notaries to meet in person.\textsuperscript{160} In addition, many experts believe this process will become even more convenient as central databases are established to track encrypted signatures for governments, businesses, and individuals twenty-four hours a day through on-line services such as the Internet.\textsuperscript{161} Such access will enable anyone connected to such a service to verify the authenticity of a digital signature at any time, assuming that a cybernotary is available.\textsuperscript{162}

There may, however, be a risk of significantly higher costs to cybernotaries than presently exists for ordinary notaries. Presumably, ordinary notaries function within the confines of their states of domicile\textsuperscript{163} and seldom could be required to defend civil actions against them in other states. But, when cybernotaries function on-line in inter-territorial transactions, have the cybernotaries engaged in sufficient contacts with other states or countries to establish a jurisdictional basis for suits against the cybernotaries to be brought in the courts of those states and

\begin{footnotesize}
\begin{enumerate}
\item[158.] Victoria Slind-Flor, Moving Into Cyberspace as Notaries, The Need to Authenticate Electronic Documents Is a New Frontier for Attorneys, 18 NAT'L L.J. 16 (1995).
\item[160.] Florida Recognizes Electronic Signatures as Legal and Binding, SUN-SENTINEL, June 4, 1996, at 3D.
\item[161.] See Sommer, supra note 6, at 1.
\item[162.] See Sommer, supra note 6, at 1.
\item[163.] State notary statutes do not permit any notaries to act beyond their states of licensing or commissioning. See Comparison of State Notary Provisions, supra note 18, at 32.
\end{enumerate}
\end{footnotesize}
Especially where certification authorities know that particular transactions are intended for transmission to and use in other states or countries, the certification authorities may have to at least enter limited appearances to contest jurisdiction in suits outside their places of domicile. Defending suits in distant courts, and even objecting to suits on the ground of lack of proper personal jurisdiction, can be expensive battles.

Another goal of electronic transactions and communications is to reduce or eliminate the use of paper. It is not surprising, then, that many proponents of legislation which promotes electronic communication consider digital signatures superior to paper documents and signatures. Reducing the quantity of paper used is just one of several practical goals achieved by employing digital signature technology. For example, electronic documents and digital signatures reduce the amount of storage space required (in contrast to the area needed to house paper documents), reduce the weight of stored documents (which personnel and facilities must carry and support), and reduce the collateral materials and equipment necessary for the effective use of paper documents (including everything from notebooks and staplers to photocopy and fax machines). Almost every one of the processes takes less time as computers handle functions formerly done by hand. All of this, in turn, reduces the administrative overhead required to complete paper documents, and achieves significant savings.

It is fascinating to speculate about the prospect of having a “paperless” society. While in-depth consideration of that subject is beyond the scope of this article, the authors cannot resist predicting that it will not happen. Paper will always be in use to some extent for commercial and


165. A certification authority is someone who is authorized to issue a certificate verifying the sender’s identity and the integrity of the message. Utah Code Ann. § 46-3-103(4) (Supp. 1996).


168. Florida Recognizes Electronic Signatures, supra note 160, at 3D.

169. See Slind-Flor, supra note 158, at 16.

170. See generally Faerber, supra note 159; Paul Bernstein, The Paperless Desktop—A Virtual Reality?, TRIAL MAG., Mar. 1997, at 54, 57 (noting that “While [one] may never achieve the ultimate goal of a paperless office, . . . the paperless desktop may be close at hand”).
governmental transactions, for a variety of reasons. Some people will
not learn the technology. Some will not be able to afford the technol-
gy. Some will not trust in the technology or those who control it. Governmental transactions will, understandably, be reluctant to convert exclusively to on-line procedures if some of their citizens will be adversely affected by such decisions. Finally, the important issue of long-term storage of documents also suggests a field where paper has a record of superiority.

[Another] reason I do not think you will ever see the traditional role of the Notary eliminated is because of the nature of paper. In contrast to modern electronic mechanisms, paper appears to be a flimsy, crude instrument for storing and transmitting information, but it has many advantages. Many of you know, for example, that there has been much talk of replacing court reporters with audio taping machines. This would certainly save a lot of money, but at what price? Have you ever tried to find a pertinent piece of spoken testimony on a lengthy tape? It is much easier to flip through the pages of a document. Did you know that in time that tape will turn into the equivalent of peanut butter—but we will still have the paper transcript? Paper is much underrated. In a plane crash or an earthquake, for example, every electronic device, every computer disk drive may be obliterated. But what usually survives undamaged? Paper.

Certainly, a substantially paperless society will not be achieved anytime soon, and definitely not within the next few generations.

Advancing technology and its accompanying efficiency for the parties to the transactions are not the only reasons prompting the focus on electronic transactions and digital signatures. Of course, concern about document security constitutes one of the most important factors contributing to the interest in computerized commerce in the first place. After all, the execution of paper documents can be corrupted in numerous ways. Confusion and uncertainty can result from the manner and form of handwritten signatures and from the difficulties associated with multiple page documents, such as the loss, omission, addition, or

171. See Faerber, supra note 159, at 4.
172. See Faerber, supra note 159, at 4.
173. See Faerber, supra note 159, at 4.
174. See Faerber, supra note 159, at 4, 5. See also Bernstein, supra note 170, at 56 (stating that “Some documents, like original, recorded deeds and wills, should not be destroyed even if digital backup files exist”).
175. Wright, supra note 4, at 189 (stating that “Electronic commerce unveils questions about how to sign or legally prove electronic documents”). See generally Stewart I. Edelstein, Litigating in Cyberspace: Contracts on the Internet, TRIAL MAG., Oct. 1996, at 16 (noting that “Merchants throughout history have shared common concerns: minimizing opportunities for fraud and safekeeping against perjury in the event of a dispute”).
176. See Wright, supra note 4, at 190.
177. See Wright, supra note 4, at 191.
disordering of pages. 178

However, fraudulent conduct represents perhaps the greatest concern about traditional paper transactions. 179

One risk that afflicts the traditional signing of paper documents is forgery. Forensic science cannot guarantee that any given ink signature can be verified. Scientists can only offer an educated opinion as to whether the signature is authentic, and they can do so only under the right circumstances. This includes, for example, the availability of several good specimen signatures. 180

The hope and expectation is that computer technology will improve and even assure the security of on-line transactions. 181

Nevertheless, apart from issues about cybernotaries, advances in computer technology have given rise to an alarming increase in computer-generated fraud. 182 And because computer crime knows almost no boundaries, no on-line computer-generated transaction seems immune from such danger. In an effort to combat this worrisome trend, a number of states, led by Utah, have passed “digital” or “electronic” signature legislation. 183 Such digital or electronic signatures are considered by many

178. See Wright, supra note 4, at 190.
179. See Wright, supra note 4, at 190.
180. See Wright, supra note 4, at 190.
181. See generally Wright, supra note 4, at 189; Edelstein, supra note 175.
183. See, e.g., Fla. Stat. Ann. §§ 117.01 to .10 (West 1996). The terms “electronic signature” and “digital signature” are sometimes used interchangeably. Theodore S. Barassi, Electronic Signature Differs from Digital, 214 N.Y. L.J. 102 (1995). However, this comparison is incorrect. Id. As Barassi explains:

"Electronic signature" is a very broad term, commonly accepted by those who have looked at electronic forms of authentication to mean any electronic symbol adopted by a party with the present intention to authenticate a writing. . . . "Digital signature," on the other hand, has come to refer to the specific technology . . . , in which an electronic message is transformed using an asymmetric crypto-system. This is not a merely semantic point; digital signatures provide proof of message integrity
to be the technology that will “further revolutionize electronic commerce” by providing a more secure means of on-line identification procedures.

and non-repudiation by the signer which give them legal advantages over other types of electronic and traditional signatures.

Id. See also infra notes 191-220 (discussing digital signature technology).

Digital and electronic signature legislation is not the only means used in the effort to curb forgeries. California has recently required that notaries take signers' thumbprints before notarizing real estate deeds. Jacobs, supra note 9, at B1; see also Timothy J. Moroney, Review of Selected 1995 California Legislation Business Associations and Professions, 27 PAC. L.J. 451, 452 (1996) (discussing and real estate problems in Los Angeles County, leading to the necessity for thumbprint identification). California is the only state thus far to require thumbprint identification. State Notaries get Ready for Unique Print Statute, NOTARY BULL., Dec. 1995, at 1; Lasting Impressions, NAT'L NOTARY MAG., Mar. 1995, at 16. The need for such drastic measures came in the wake of a recent increase in forged deeds. See Bill Wallace, Elderly Cheated Out of Homes by Scam Artists/Home-Equity Fraud Hits Area Residents, S.F. CHRON., Feb. 10, 1992, at A13 (giving examples of real estate fraud schemes and showing that there is a real need to establish some protective measures for the public); see also A Journal Thumbprint: The Ultimate ID, NAT'L NOTARY MAG., May 1996, at 9 (discussing the advantages of thumbprint identification in real estate transactions); Journal Thumbprint Is “The Notary Public's Strongest Weapon Against Fraud,” NOTARY BULL., Aug. 1995, at 3 (same). See generally S.W. Farrell, Front-Porch Scams Creative Con Artists Have Tricks That Can Cost You Your Home, L.A. TIMES, Feb. 7, 1993, at K1 (describing various real estate scams such as recordation of forged deeds, which would likely decrease if the forger was required to leave a thumbprint in the notary public's journal).

Thumbprint identification accomplishes several goals. First, thumbprinting deters impostors from scamming notaries into notarizing forged deeds because it is unlikely that the forger would want to leave his thumbprint. A Journal Thumbprint: The Ultimate ID, supra, at 10; see also Ted Appel, Thumbprint L. Targets Fraud, Scams Tracking Down Impostors Will be Easier, PRESS DEMOCRAT, (Santa Rosa, Cal.), Mar. 16, 1996, at R1 (discussing new types of fingerprinting techniques). Second, thumbprinting deters signers from falsely attesting to a con-artist's forged signature for fear of individual culpability. Id. Finally, thumbprinting puts all signers, especially the vulnerable, like the elderly, on notice of the serious legal consequences of what they are about to sign. Id.; see also Moroney, supra, at 451 (noting that California law requires that notaries keep journals of all acts performed in their official capacity as notaries public). So far, it appears that thumbprinting identification has been a success. See generally Bank's Benefit from Fingerprints, NOTARY BULL., Dec. 1996, at 1, 12 (stating that fingerprinting is "widely recognized as the Notary's strongest deterrent to document fraud"); Corrie M. Anders, With Home Fraud Down, L.A. Project Getting Thumbs Up, SAN DIEGO UNION-TRIB., June 4, 1995, at H14 (finding that the three year pilot program has deterred real estate fraud with overwhelming success). 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. (forthcoming 1997) (discussing thumbprint identification).


Effective measures are desperately needed because many of the security problems associated with computer-generated business transactions are the result of inadequate identification procedures. Indeed, the concern over proper identification has spurred a significant amount of discussion, development of practices and procedures, and, ultimately, legislation regarding the establishment of individual electronic identities.186 Most, if not all, states implementing such legislation to date have placed their trust in a technique called asymmetric cryptography, a method of encryption technology.187 Encryption is a process by which documents traveling through an electronic medium are scrambled and unscrambled through a series of mathematical formulas, or algorithms.188 The electronic document is sent by using encryption/decryption software, which allows the electronic transmission to be scrambled by the sender and unscrambled by the recipient.189 Encryption technology can function for many facets of communication, including “digital

186. Cox, supra note 185, at 40.
187. Michael D. Wims, Law and the Electronic Highway, Are Computer Signatures Legal?, 10 CRIM. JUST. 31 (1995). "Encryption" is a technique used to convert a message into a secret form. Edward J. Radlo, Legal Issues in Cryptography, 13 COMPUTER LAW. 1, 1 (1996). Although beyond the scope of this comment, it is useful to develop the concept of encryption to more fully understand the foundation upon which digital signature technology is based. Encryption is a broad term encompassing many related fields, including decryption, authentication, digital signatures, key management, and key certification. Id. Cryptography was first used by Egyptians and Phoenicians around 2000 B.C. Id. However, it was not until World War I that this country used cryptography, largely as a means of cracking enemy codes. Id. This use continued until the end of World War II. Id. Up until the mid-1970’s, private key encryption was the only type of cryptography available. Id. In private key cryptography, a secret, private key both encrypted and decrypted messages. Id. Public key cryptography was then invented around the mid-1970’s. Id. Public key cryptography solved many of the problems associated with private key cryptography, namely by using two keys instead of one. Id. Although new cryptographic encryption systems are now available, public key cryptography is still used in digital signature technology because of its reliability in establishing the authenticity of a document. Id. The authentication feature of cryptography has three major aspects: (1) proving that a person who claims to have signed the document actually did so (paternity); (2) proving that the document was not altered since signature (integrity); and (3) preventing a digital signer from later asserting that he didn’t sign (non-repudiation). Id. The benefit of each of these cryptographic systems is that they are seen as one of the more secure means for ensuring privacy among digital communications. Id.

The U.S. military remains concerned with encryption technology today. See Bernstein v. United States, 945 F. Supp. 1279 (N.D. Cal. 1996). In Bernstein, a federal judge ruled that United States restrictions on the export of encryption programs was unconstitutional. Donald C. Dilworth, Restraints on Encryption Products Ruled Unconstitutional, TRIAL MAG., Mar. 1997, at 83. The military’s main concern in Bernstein was the potential of “enemies abroad obtaining technology for creating undecipherable codes.” Id.

188. See Wims, supra note 187, at 3. See generally Tsuchiya, supra note 8, at 16-18 (describing the digital signature process).
189. See Wims, supra note 187, at 3.
B. **Digital Signatures**

A digital signature is simply the functional equivalent or computer-generated manifestation of a manual signature. We should recall the statement of the New York Court of Appeals, which introduced this section of the article, to the effect that an individual has a right to adopt almost any mark as his/her identification symbol. That is the law nation-wide and has been the law for a very long time. Using cryptography, a digital signature is affixed to an electronic document using electronic "keys." First, there is the "private key." Private keys are unique, in that they are created by, and should be known only to, the document's signer. This "secret" key is used to place the signer's "signature" onto a document. The signature itself is actually a "hash"—a string of digits (letters, numbers, and/or symbols) representing a combination of the document and the unique computer-generated code produced by the document's signer. To process the signature, the

---

190. See Wims, supra note 187, at 3. Utah defines a digital signature as: a transformation of a message using an asymmetric cryposystem such that a person having the initial message and the signer's public key can accurately determine whether: (1) the transformation was created using the private key that corresponds to the signer's public key; and (2) the message has been altered since the transformation was made. UTAH CODE ANN. § 46-3-103(10) (Supp. 1996).


192. See also Marks Aren't X-traordinary, Nat'l Notary Mag., Mar. 1997, at 22 (stating that "By custom and law, a witnessed mark is the same as a regular signature and may be notarized").

193. See Joseph Denunzio Fruit Co. v. Crane, 79 F. Supp. 117, 128 n.16 (S.D. Cal. 1948), aff'd, 188 F.2d 569 (9th Cir.), cert. denied, 342 U.S. 820 (1951) (stating that a signature is whatever symbol, mark, or device one chooses to use as a representative of himself); Hessenthaler v. Farzin, 564 A.2d 990, 993 (Pa. Super. Ct. 1989) (holding that a signature need not be in any particular form); U.C.C. § 1-201(39) (1992) (stating that "signed includes any symbol executed or adopted by a party with the present intention to authenticate a writing"); see generally Edelstein, supra note 175, at 16.


196. Cox, supra note 185, at 40.

197. Cox, supra note 185, at 40.

198. See Cox, supra note 185, at 40. When using a secure hash function, it is "computationally infeasible" to learn the original message solely from knowledge of its hash value. DIGITAL SIGNATURE GUIDELINES 9 (1996). In the context of digital signature verification, a "hash" function is defined as:

An algorithm mapping or translating one sequence of bits into another, generally smaller, set (the hash result) such that (1) a message yields the same hash result every time the algorithm is executed using the same message as input, (2) it is computationally infeasible that a message can be derived or reconstituted from the
document's signer types "in a pass[-]phrase (much like a PIN number for a bank teller machine), and then [the] private key generates a long string of numbers and letters which represents the 'signature.'" Because the computer-generated signature is unique to each document, each private key will produce a different sequence of numbers, and, thus, a new "signature" for each document.

On the other end of the electronic transmission is the document's recipient. The recipient holds the "public key" by which s/he can decrypt the sender's document and signature through the use of a computer program. The program is used to match the private key with the public key to ensure that neither the document nor the signature has been altered prior to or during transmission. Collectively, this process is referred to as "public key cryptography." "Put simply, if a private key other than one identified with the subscriber . . . [is] used to encrypt the document, or if the document [is] changed in any way between execution and verification, the hashes [will] differ from each other and the signature [will] fail verification."

---

Id. § 1.12. For a more technical background on hash functions, see generally id. at 36 cmt. 1.12.1 (citations omitted).

199. Wims, supra note 187, at 31.

200. Wims, supra note 187, at 31. For example, a digitally signed contract may look like this:

```
<Signed SigID=1>
Promissory Note
I, Mary Smith, promise to pay to the order of First Western Bank five thousand dollars and no cents ($5,000) on or before June 10, 1998, with interest at the rate of fifteen per cent (15%) per annum.

Mary Smith, Maker
</Signed>
<Sigature SigID=1 PsnID=smith082>
2AB3764578cc18946A29870F40198B240CD23
02B2349802DE002342B212900BA5330249C1D
20774C1622D39</Signature>
```

---

201. Wims, supra note 187, at 31.


203. Digital Signature Guidelines 8. In contrast with public key cryptography, "conventional," "single key," or "symmetric cryptography" uses the same key to both encrypt and decrypt digital signatures. Id. at n.19.

C. Digital Signature Verification

Deciding whether or not the signature is authentic is the responsibility of an independent third party called a certification authority or cybernotary. For example, in a typical electronic transmission, the sender encodes a signature on the computer using the private key, and clicks on the “sign document” button. This act guides the digital signature to a central “repository” that stores the coded signature. The repository is the central storage station that warehouses electronic documents such as certificates of cybernotaries, lists of subscribers, notices of various kinds, and other information. The certification authority then contacts the computer’s repository to see if the private key as sent matches the public key of the intended recipient on file in the repository. If it does, the cybernotary digitally signs the document and issues a computer-based certificate of authenticity, similar to the way that a notary would sign and seal a document to signify the validity of an original execution to a signature on paper. Thus, the cryptography method significantly reduces the likelihood of fraud. The only way that a digital signature’s integrity should be subject to compromise is if the private key holder is negligent in safeguarding the key, or intentionally gives others access to the signature software and provides them with the pass-phrase. In whatever manner it is obtained, knowledge of the private key holder’s identification number could compromise the integrity of

205. See id. It is important to keep in mind that while most of the functions performed by certification authorities resemble those of notaries public, a certification authority does not need to be a commissioned notary public to verify the authenticity of digital signatures. In Utah, a certification authority may be:

(i) an attorney admitted to practice before the courts of this state, . . . the attorney’s partnership . . . , or a professional corporation in which the attorney named in the license is a shareholder;
(ii) a financial institution, a corporation authorized to conduct a trust business, or an insurance company . . . ;
(iii) any title insurance or abstract company . . . ; or
(iv) the governor, a department or division of state government, other than the Digital Signature Agency, the attorney general, the Utah Judicial Council, a state court, a city, a county, or the Legislature.

S.R. 188, 52d Leg. (Utah 1996).

206. See David P. Vandagriff, Who’s Been Reading Your E-mail? Two Easy-to-Use Tools Can Protect Privacy, Integrity of Documents, 81 A.B.A. J. 98 (1995) [hereinafter Vandagriff, Reading E-Mail].


208. See DIGITAL SIGNATURE GUIDELINES 49 (1996).


the digital signature because it would allow a forger to execute the document as if s/he were the proper private key holder. Absent such conduct, however, a digital signature transmission that uses the cryptographic methodology is considered "some of the most secure communication possible." It is imperative that those using digital signatures in their business or personal affairs insist upon cybernotary verification because "the increase in computer technology has not eliminated the need to ensure the completeness, accuracy and authenticity of legally significant documents."

D. DRAWBACKS OF DIGITAL SIGNATURES

Notwithstanding the many benefits, digital signature technology does have drawbacks. Although digital signatures are considered extremely secure forms for authenticating communications, no computer system is perfectly secure. The encryption system method of digital transmission is no different. In other words, digital signatures may also be corrupted. Therefore, while the asymmetric cryptosystem of digitalized verification is still considered more secure than paper signatures, it is not absolutely safe. Moreover, digital signature technology is still in its infancy, as is the process of digital encryption. While the key method of cryptography is considerably faster than the labor intensive process of signing and verifying manual signatures on paper, it is still slower than the process available through more advanced computer software packages. Although this time delay may not become a problem for every cybernotary, it could become one for those cybernotaries who offer their services on a national or international scale and then find themselves in high demand. Additionally, institutional overhead may be a concern as the cost of establishing and purchasing encryption hardware and software, the cost of paying for training of personnel to master the technology and for cybernotary fees, and the cost of obtaining other important services, may require a significant monetary commitment. Therefore, many small businesses may find that digital signature technology is not cost-effective, especially in the near future and especially if it is to be used only occasionally. These practical drawbacks, how-

212. Vandagriff, Reading E-Mail, supra note 206, at 98.
218. See Radio, supra note 187, at 3; Jaksetic, supra note 2, at 21.
220. See Jaksetic, supra note 2, at 21.
ever, are commonly associated with the use of any technological innovation.

E. CYBERNOTARIES

Cybernotaries will play an essential role in the digital communications process. This is because the cryptographic system relies upon an impartial third party to verify the authenticity of electronic transactions.\(^\text{221}\) Cybernotaries, like notaries before them, will be created, authorized, and regulated by statute.\(^\text{222}\) They will be licensed or commissioned by the state, as notaries now are.\(^\text{223}\) Hence, cybernotaries will serve as public officers, subject to the obligation to uphold the public trust that is reposed in them. Cybernotaries will not have to be notaries, although some notaries may also become cybernotaries.\(^\text{224}\) In fact, although notaries must be human beings, certification authorities or cybernotaries can be entities such as accounting firms, banks, real estate enterprises, and the like.\(^\text{225}\)

---

\(^{221}\) See Wendy R. Leibowitz, Technology and the Law Meet Online Commerce: “Digital Signature” Guidelines and an Upgraded U.C.C. Will Ease Internet Transactions, An L.A. Court Tries It Out, 18 NAT’L L.J. 49 (1996); DIGITAL SIGNATURE GUIDELINES 14. A comparison to notaries is fitting. “Notaries have survived because they have adapted to change. In the future, their professional duties, responsibilities, and liabilities will no doubt change, but notaries will certainly remain a vital part of the legal and business communities.” Closen & Dixon, supra note 14, at 896.

\(^{222}\) See generally UTAH CODE ANN. §§ 46-3-101 to -502 (Supp. 1996).

\(^{223}\) See id. § 46-3-302.

\(^{224}\) See S.R. 188, 52d Leg. (Utah 1996). The Utah Act provides in part:

(1) To obtain or retain a license a certification authority must:

(a) be either:

   (i) an attorney admitted to practice before the courts of this state, that attorney's partnership which engages principally in the practice of law if the attorney is a partner, or a professional corporation in which the attorney named in the license is a shareholder;

   (ii) a financial institution, a corporation authorized to conduct a trust business, or an insurance company, if authorized to do business in this state;

   (iii) any title insurance or abstract company authorized to do business in this state; or

   (iv) the governor, a department or division of state government, other than the Digital Signature Agency, the attorney general, the Utah Judicial Council, a state court, a city, a county, or the Legislature provided that:

   (A) each of the governmental entities acts through designated officials authorized by ordinance, rule, or statute to perform certification authority functions; and

   (c) qualify and hold an appointment as a notary public or employ at least one notary public;

   Id. § 46-3-201.

\(^{225}\) Interview with Kenneth Allen, supra note 70.
Cybernotaries will confirm credentials in electronic commerce.\textsuperscript{226}

Each party to a contract should naturally want to verify the other's signature.\textsuperscript{227} The cybernotary's role would be to bind the private key of the particular sender with the public key of the intended recipient. If the verification is successful, the cybernotary certifies the digital signature and "allow[s] the deal to proceed under an umbrella of trust."\textsuperscript{226} Essentially, cybernotaries will guarantee transactions.\textsuperscript{229} Obviously, this function will be critical to the success of the electronic marketplace at home and abroad.\textsuperscript{230}

In a high stakes deal, the parties may prefer to know not only that the signature is authentic but also that the contract itself is valid.\textsuperscript{231} That is, it would be helpful for those concerned to understand that the parties to the contract are financially responsible and that the contract is legally enforceable, much like the international process of the legalization and protocolization of documents by the civil law notary or the \textit{notario publico}.\textsuperscript{232} It follows that many experts have recommended the role of certification authorities be undertaken exclusively by attorneys.\textsuperscript{233} As one commentator has noted, cybernotaries will inhabit "a high-level legal position . . . requiring a good understanding of contract law, international law, technology in general, and [such lawyers will] very likely need to have a substantial legal infrastructure around

\begin{footnotes}

\footnote{\textit{See Appleby, supra} note 226, at 38.}

\footnote{\textit{See Wasserman, supra} note 167, at A1.}

\footnote{\textit{See Wasserman, supra} note 167, at A1.}

\footnote{\textit{See Slind-Flor, supra} note 158, at A1.}

\footnote{\textit{See Slind-Flor, supra} note 158, at A1. \textit{See} Stewart Baker & Theodore Barassi, \textit{The International Notarial Practitioner—Heightened International Enforceability of U.S. Legal Documents and Elimination of Civil Law Procedural Formalities}, Istr\'l. L. News 1, 4-5 (Fall 1995) (describing legalization and protocolization). \textit{See also Tsuchiya, supra} note 8 at 4-5, 20 (describing the character and duties of the Japanese notary, which includes the giving of legal advice).}

\footnote{\textit{See Slind-Flor, supra} note 158, at A1; \textit{see, e.g.,} \textit{Digital Signature Guidelines} 31 (1996) (recommending that cybernotaries be "attorneys at law admitted to practice in the United States and qualified to act as a Cybernotary pursuant to specialization rules currently under development"); Tsuchiya, \textit{supra} note 8, at 18. "It is necessary to have Notaries or CyberNotaries who have acquainted themselves not only with computer technologies, but also with electronic transactions and related laws. For this reason, CyberNotaries should be lawyers." \textit{Id.} It must be remembered, however, that lawyer-notaries are certainly guilty of regularly violating the standard of care relating to ordinary notarizations. \textit{See supra} notes 52-54.}
\end{footnotes}
The larger law firms with sophisticated international practices will probably be the first to embrace this new technology because they “will be the first ones to see a need arising from their client base.” However, it is likely that small firms will eventually use this technology as they realize that they, too, can automate their business transactions for the benefit of clients. The practical effect of this new technology will be that “every lawyer—not just cybernotaries operating in the international arena—will have to learn how that technology works so that they may explain the trustworthiness of the transaction to their clients.” There is no time for procrastination, because digital signature legislation is already the law in some states and many others are in the process of adopting new laws on the subject.

IV. DIGITAL SIGNATURE STATUTES IN UTAH AND OTHER STATES

Good laws lead to the making of better ones; bad ones bring about worse.

—Jean Jacques Rousseau (1762)

A. Utah Legislation

In 1995, Utah became the first state in the United States to enact legislation recognizing a digital signature. Substantial amendments to the Utah law were approved in 1996. Because it was the first, the Utah law has naturally served as the model for other states’ digital signature statutes. More than twenty states have already enacted some form of digital signature law or have such legislation under active consideration. Unfortunately, however, the statutes of Utah and the other states are deficient in a number of significant respects. To fully
understand these deficiencies, a brief overview of the Utah Digital Signature Act and others is in order.

Utah’s statute designates three primary players in the digital signature certification process: the subscriber, the recipient, and the certification authority. The subscribers are those who send electronic documents by way of their private keys. The recipients are the receivers of the documents who access those documents through their public keys. Certification authorities issue the certificates that verify the digital signatures. A signature is verified when a certification authority issues a digital certificate of authenticity, just as a notary public would sign and perhaps affix a seal on a document to signify the identity of a paper document signer and the validity of an original signature. The statute also absolves the certification authority from responsibility for false or forged signatures, so long as s/he “compl[ies] with all material requirements . . .”

B. Digital Signature Statutes in General

The various acts require that digital signature verification be accomplished by the process of encryption. More specifically, the statutes

243. "'Subscriber' means a person who: (a) is the subject listed in a certificate; (b) accepts the certificate; and (c) holds a private key which corresponds to a public key listed in that certificate." Utah Code Ann. § 46-3-103(33) (Supp. 1996).

244. "'Recipient' means a person who receives or has a digital signature and is in a position to rely on it." Id. § 46-3-103(26).

245. See Kennedy & Davids, supra note 204, at S4. "Certification Authority" means a party or person who issues a certificate. Utah Code Ann. § 46-3-103(4).

246. Utah Code Ann. § 46-3-103(33).

247. Id. § 46-3-103(26).

248. Id. § 46-3-103(3); Kennedy & Davids, supra note 204, at S4. A certificate is a "computer based record which: (a) identifies the certification authority issuing it; (b) names or identifies its subscriber; (c) contains the subscriber’s public key; and (d) is digitally signed by the certification authority using it." Utah Code Ann. § 46-3-103(3).

249. Kennedy & Davids, supra note 204, at S4. The statute provides that:

By issuing a certificate, a licensed certification authority certifies to all who reasonably rely on the information contained in the certificate that:
(a) the information in the certificate and listed as confirmed by the certificate authority is accurate;
(b) all foreseeable information material to the reliability of the certificate is stated or incorporated by reference within the certificate;
(c) the subscriber has accepted the certificate; and
(d) the licensed certification authority has complied with all applicable laws of this state governing issuance of the certificate.


require use of an "asymmetric cryptosystem." 252 This type of verification process employs the public/private key pair system of security. 253 Use of this type of verification system demonstrates that a digitally signed document is "as valid, enforceable, and effective as if it had been written on paper." 254 Furthermore, the private key remains "the personal property of the subscriber who rightfully holds it." 255 Therefore, as private property, the wrongful taking or unauthorized use of a private key may result in either criminal liability for theft or civil liability for conversion. 256

The statutes further provide for an on-line, publicly accessible database called a "repository." 257 The repository identifies registered users and certification authorities. 258 The statutes require the certification of their authorities. 259 The repository, therefore, consists in part of a listing of certificates of various certification authorities, and the identification of those certification authorities currently in good standing, along with those whose certificates have been suspended or revoked. 260 Publication in a repository is similar to listing a business in the yellow pages, except that the information about a certification authority is online. 261 Publication is important for persons using digital signature technology because it allows them to ensure that a certification authority's certificate is valid before requesting verification. 262 If the certification authority is both published in the repository and registered with a user, the certification authority may then establish the identity of a key holder and obtain a copy of the key holder's public key for the repository. 263 If the public and private keys match, the digital transaction is successful, thus allowing the certification authority to issue a digitally executed certificate of verification. 264


253. "'Key pair' means a private key and its corresponding public key in an asymmetric cryptosystem, keys which have the property that the public key can verify a digital signature that the private key creates." Utah Code Ann. § 46-3-103(16).

254. Id. § 46-3-403(1).

255. Id. § 46-3-305(2).

256. Humphreys, supra note 250, at 5; Kennedy & Davids, supra note 204, at S4.

257. See supra note 207 (defining repository).


259. See id. § 46-3-201.

260. See Humphreys, supra note 250, at 5.


262. Id.

263. See Wims, supra note 187, at 31.

264. See Wims, supra note 187, at 31.
C. PROBLEMS WITH CURRENT DIGITAL SIGNATURE LEGISLATION

As already opined, these new laws are deficient in several ways. First, the laws announce that only the "asymmetric cryptosystem" can be used to verify digital signatures. This restriction may serve to hamper rather than promote the systematic use of advanced and more secure signature technologies in the future. Other security methods are now available for use. Yet, the states' endorsement of a single verification system will undoubtedly hinder competition because entrepreneurs will have to unseat the established state-approved security procedure in order to succeed with any alternative system. That process will represent a costly uphill battle. Furthermore, other security methods are sure to develop that will equal or exceed the asymmetric cryptosystem. After all, electronic communication is only in its infancy. Indeed, there are already claims that one other system is at least as secure as the asymmetric cryptosystem. The Utah law did not have to endorse a particular system and the other states did not have to jump on this bandwagon, but could have allowed the utilization of more than one approved security method. The statutes could delegate to the appropriate govern-

265. UTAH CODE ANN. § 46-3-103(2) (Supp. 1996). The statute requires that a certification authority use a "trustworthy system" when fulfilling the general requirements of his position. Id. § 46-3-301(1). The statute defines "trustworthy system" as "computer hardware and software which: (a) are reasonably secure from intrusion and misuse; (b) provide a reasonable level of availability, reliability, and correct operation; and (c) are reasonably suited to performing their intended functions." Id. § 46-3-103(38). By virtue of this definition of "digital signature" and "key pair," the statute limits the use of other "trustworthy systems" of encryption. See supra notes 190 (defining digital signature) and 253 (defining key pair), respectively.

Because Utah was the first political entity in the world to adopt a digital signature statute, the fact that other states implement similar statutes that include such limiting language is not surprising. See, e.g., S.B. 942, Reg. Sess. (Fla. 1996) ("Electronic Signature Act of 1996"); S.B. 6423, 54th Leg., Reg. Sess. (Wash. 1996) ("Washington Digital Signature Act"). The American Bar Association's Digital Signature Guidelines also recommend use of the asymmetric cryptosystem, believing it to be a trustworthy system which reflects "the core of digital signature technology." DIGITAL SIGNATURE GUIDELINES § 1.3. But see CAL. GOV'T CODE ANN. § 16.5 (West 1995) ("Electronic Signature Act of 1996"). California refused to limit the use of a single encryption methodology in defining digital signatures in its abbreviated form of digital signature legislation. See generally id. Instead, the legislation simply defines digital signature as "an electronic identifier, created by computer, and intended by the party using it to have the same force and effect as the use of a manual signature." Id.

266. See Wasserman, supra note 167, at A1.

267. See infra note 308.

268. Kennedy & Davids, supra note 204, at S4.

269. See Wright, supra note 4, at 107 (endorsing Pen Biometrics Technology ("PENOP")).

270. UTAH CODE ANN. § 46-3-305(1) (Supp. 1996).
ment department the adoption of regulations to implement the digital signature laws, including the approval of secure verification systems.

Second, subscribers under the Utah law are required only to "exercise reasonable care" in retaining control of their private keys. This standard of care is insufficient given the highly technical nature of the field and the overriding concern for fraud and theft. It is not too much to ask that the private key be kept private. Absolute liability should attach if a private key holder relinquishes control or allows another to obtain control of that private key. If private key holders were advised by statute of their no-fault, full legal accountability for use of their private keys, a number of positive results could be expected. Private key holders would be careful about the security of their private keys, and private key holders would acquire liability insurance with sufficient policy limits to protect them (which really means their business customers, partners, and others who are injured by the unauthorized use of private keys would be protected by the insurance coverage). Electronic communication can flourish only if there is assurance of the integrity of private keys, and the starting point for such assurance is for subscribers to have absolute responsibility for the use or misuse of their private keys. It should be remembered that as soon as a subscriber would discover any abuse, or even uncertainty about the security of the private key, the private key could be canceled and changed in the repository.

Third, the statutes do not set any qualifications of consequence for cybernotaries. With respect to individuals who would actually carry out the digital signature verification process, there are no minimum age or specific experience requirements, and no education or testing requirements. The Utah law merely says that the "operative personnel...[shall] have demonstrated knowledge and proficiency in following the requirements" of the digital signatures law. This is an inadequate standard.

In addition, the statute sends mixed signals about those who obtain a license as a certification authority. To be licensed as a certification authority, the statute (as noted in part above) merely requires an employer to "employ as operative personnel only persons who have demon-

271. Id. § 46-3-305.
272. See Closen, supra note 8, at A23 (describing today's bond amount requirements as outdated). See also Transamerica Ins. Co. v. Valley Nat'l Bank, 462 P.2d 814 (Ariz. Ct. App. 1969) (finding notary negligent for notarizing forged signatures on real estate closing documents causing loss of $84,800 in Arizona (which today has a notary bond requirement of $5,000)); NCNB Nat'l Bank v. Spiwak, 89-L-13696 (Apr. 20, 1994) (Chicago Circuit Court held notary personally liable for more than $23,000 for negligence in notarizing a deed (and where Illinois has a $5,000 notary bond requirement)).
273. See generally UTAH CODE ANN. §§ 46-3-101 to -504.
274. Id. § 46-3-201(1)(c).
strated knowledge and proficiency in the requirements.” This provision ostensibly demands that the certification authority employ persons with a knowledgeable and efficient grasp of digital signature technology. But, the fox is placed in charge of the chicken coop, because employers may decide whether their own employees are qualified. The statute does not establish any general educational requirement for certification authorities, such as some amount of college or university education. The statute does not require that certification authorities undertake any specialized training with which to become “knowledgeable” in the field of digital signatures. The statute does not establish any testing requirement to objectively insure that certification authorities understand the full range of their responsibilities (such as the technological processes, the legal and ethical duties, statutory procedures, and legal liability). Although the Utah statute announces that one who seeks to operate as a certification authority cannot have a record of a felony or other criminal conviction for fraud or deception, the statute neglects that a party may have been found guilty of fraudulent conduct in administrative or civil proceedings. Additionally, the statute does not declare that the state will investigate the cybernotary applications to verify such information as the criminal records of applicants. These omissions of the Utah and other statutes should concern not only prospective cybernotaries but also all those who will expect competent and knowledgeable cybernotaries to authenticate digital signatures.

275. Id. More specifically, the statute provides:

(1) To obtain or retain a license a certification authority shall:
(a) be the subscriber of a certificate published in a recognized repository;
(b) employ as operative personnel only persons who have not been convicted of a felony or a crime involving fraud, false statement, or deception;
(c) employ as operative personnel only persons who have demonstrated knowledge and proficiency in following the requirements of this chapter;
(d) file with the division a suitable guaranty, unless the certification authority is the governor, a department or division of state government, the attorney general, state auditor, state treasurer, the judicial council, a city, a county, or the Legislature or its staff offices provided that:
(i) each of the above-named governmental entities may act through designated officials authorized by ordinance, rule, or statute to perform certification authority functions; and
(ii) one of the above-named governmental entities is the subscriber of all certificates issued by the certification authority;
(e) have the right to use a trustworthy system, including a secure means for controlling usage of its private key;
(f) present proof to the division of having working capital reasonably sufficient, according to the rules of the division, to enable the applicant to conduct business as a certification authority;
(g) maintain an office in Utah or have established a registered agent for service of process in Utah; and
(h) comply with all other licensing requirements established by division rule.

Id.

276. Id. § 46-3-201(1)(b).
Fourth, the statutes have not clearly delineated how the financial accountability of certification authorities and subscribers will be determined. The Utah law, for example, creates a “recommended reliance limit,” which “means the limitation on the monetary amount recommended for reliance on a certificate.” Apparently, the certificate in a repository will state a reliance limit beyond which the recipient and other parties should not rely and should not expect to recover in the event of injury or damage caused by reliance on the certificate. However, this brief and ambiguous provision raises more questions and concerns than it answers. Most importantly, the reliance limit is only a recommended limit. The statute does not explain how the reliance limit will be set.

The law does not make clear whether the reliance limit will have the legal effect of capping liability. If more than one party were to rely on a certificate, could each party recover the reliance limit? Will the reliance limit vary from document to document? No written regulations have yet been issued to implement the recommended reliance limit provision in Utah.

A more basic question is raised by the creation of the “recommended reliance limit.” Can a governmentally licensed or commissioned official, such as a certification authority, limit its liability for its misconduct? A subscriber might be entitled, pursuant to the principles of private contract making, to place limits upon its liability. On the other hand, the cybernotary is not a purely private party, but a public officer, akin to a notary public.

Fifth, the statutes do not set any specific dollar amounts required as either surety bond amounts or financial responsibility levels for the cybernotaries, although the statutes do establish one or both of these general standards. Furthermore, the statutes do not mandate that cybernotaries carry liability insurance, just as no notary law requires notaries public to obtain errors and omissions insurance. This omission is wholly unsatisfactory considering the magnitude of contracts commonly found in today’s business environment, especially computerized transactions. Moreover, as noted earlier, a bond is not insurance. A bond would not protect the cybernotary, because if the bond company

278. Interview with Kenneth Allen, supra note 70.
279. Id.
280. Effectively, the reliable limit is the provision concerning surety bonds in the Utah Digital Signature Act. See Utah Code Ann. §§ 46-3-309, 46-3-201(1)(f).
281. See Closen & Osty, supra note 39, at 14. See also Closen, supra note 8, at A24 (proposing that “The states should . . . mandate substantial errors and omissions insurance”).
282. See Closen & Osty, supra note 39, at 13 (stating that “a bond is not insurance”).
were called upon to pay on the bond, the company would then seek reimbursement from the cybernotary.\textsuperscript{283} However, the statutes foster a false sense of security for the public and those relying upon a certification authority's verification.\textsuperscript{284} Since the cybernotary is a state-approved public officer, and since the statutes purport to hold the cybernotary financially responsible, such as by requiring that the cybernotary be bonded, the public should be entitled to place its trust in the digital signature process.\textsuperscript{285} But, we cannot fully trust in the system at this point. It is too early. Regulations have not been promulgated to address the required surety bond and financial responsibility provisions.\textsuperscript{286} The statutes have not been tested yet. Utah, for example, has not even approved a single certification authority at this time (almost two years after first adopting its law).\textsuperscript{287}

Utah and other state officials have not learned enough from generations of experience with notaries. A fundamental reason for the diminution of status of notaries in the business and governmental communities has been the establishment of trivial bond amounts or the abolition of notary bonds altogether.\textsuperscript{288} Utah and other states, which set small bonds, no bonds, and no insurance or meaningful financial responsibility requirements, are signaling the direction for cybernotaries and dooming cybernotaries to positions of insignificance or serious trouble. If government officials treat cybernotaries as inconsequential, and if cybernotaries accept that as their fate, a vicious cycle of indifference and dereliction is likely to result. Cybernotaries will be no better than present-day notaries, and there is much room for improvement of performance by today's notaries.

Sixth, the Utah and other statutes do not insist that certification authorities independently maintain any record of the certificates they issue. Although the certificates of authenticity should be available in the repositories, the statutes include no provisions to assure that a record of the certificates will be preserved.\textsuperscript{289} Since repositories will be within the

\textsuperscript{283} See Closen & Osty, supra note 39, at 13.
\textsuperscript{284} See Closen & Osty, supra note 39, at 13.
\textsuperscript{285} See Closen & Osty, supra note 39, at 13.
\textsuperscript{286} Interview with Kenneth Allen, supra note 70.
\textsuperscript{287} Id.
\textsuperscript{288} See Comparison of State Notary Provisions, supra note 18, at 32 (indicating that 20 states have no bond requirements at all, and that the highest bond required at the time was $10,000 (now $15,000 in California)); Closen, supra note 8, at A23 (stating that "the required [notary bond] amount is so low that it is useless and misleading"). The $5,000 Illinois notary bond "represents a mere symbol, left over from legislation outdated generations ago." Closen & Osty, supra note 39, at 13-14. Moreover, "[t]he notary bonding practice now in place in Illinois constitutes a hoax." Id.
\textsuperscript{289} Similarly, relatively few state notary laws require notaries to maintain a registry or log of their notarizations. See, e.g., CAL. GOV'T CODE § 8205 (West Supp. 1996); HAW.
control of parties other than cybernotaries, the entries in repositories may be subject to tampering or obliteration with cybernotaries powerless to prevent it. The best interests of both cybernotaries and other parties will be served by a requirement that the cybernotaries establish and maintain a record of their certificates of authentication.

Seventh, while the Utah statute provides that one must maintain an office or have an agent for service of process purposes in Utah in order to qualify as a certification authority,\textsuperscript{290} the statute does not prescribe that a Utah certification authority may issue certificates only while within the confines of Utah. Absent such a provision, could the Utah cybernotary authenticate a digital document signature when the cybernotary is physically outside the boundaries of Utah? What is the statute's intent? Utah notaries cannot notarize documents outside the state of Utah.\textsuperscript{291} On the other hand, Utah licensed drivers can drive vehicles in other states. Utah lawyers cannot practice law in other states,\textsuperscript{292} except that under some attorney reciprocity arrangements attorneys from one state can be licensed to practice in another state.\textsuperscript{293} The digital signature statute needs to clarify the important question of the extent of the geographic authority of a cybernotary.

D. Model Legislation

All of these deficiencies combine to make the Utah Digital Signature Act suspect as a model for other states. It is quite troublesome that the other states have so willingly begun to follow the Utah lead, including acceptance of the several deficiencies of the Utah statute. The statutes fail to remedy some of the most fundamental reasons why the office of notaries public has received so little respect over the years.\textsuperscript{294} Minimal bond and financial responsibility requirements serve only as symbolic relics of the past.\textsuperscript{295} In fact, some states have not changed their notary

\textsuperscript{290} See Utah Code Ann. § 46-3-201(1)(g) (Supp. 1996).
\textsuperscript{291} See Comparison of State Notary Provisions, supra note 18, at 32 (showing that Utah notaries have statewide jurisdiction).
\textsuperscript{292} It is well known that there is not presently either a national bar exam or a federal licensing procedure for attorneys.
\textsuperscript{293} Utah and 24 other states do not permit admission of attorneys on motion, while the District of Columbia and 25 states do allow admission to their bars on motion. See National Notary Ass’n, Comprehensive Guide to Bar Admission Requirements 36-37 (1995-96).
\textsuperscript{294} See Closen, supra note 8, at A23.
\textsuperscript{295} See Closen & Osty, supra note 39, at 13.
bond requirements in over one hundred and twenty years.\textsuperscript{296} Consider, for example, a bond requirement of $15,000 (the very highest national notary bond amount).\textsuperscript{297} If there is notarial misconduct amounting to damage of $15,000 or less, the claim is hardly worth pursuing in most cases, particularly in expensive litigation.\textsuperscript{298} Conversely, if the notary's misconduct is substantial, the $15,000 bond is so minimal as to serve no worthwhile purpose.\textsuperscript{299}

Legislative inaction and indifference mislead the public by portraying notaries and cybernotaries as honorable and knowledgeable public officials.\textsuperscript{300} The Utah Digital Signature Act and others provide no genuine assurance that cybernotaries will be honorable, knowledgeable, or financially responsible. The Utah law should be closely examined before it is accepted by other states as "model" legislation. It bears repeating that as of February of 1997, Utah not only had not yet approved a single certification authority, but also had not yet issued written regulations to implement the statute.\textsuperscript{301} Frankly, it seems that Utah is struggling with admittedly important and difficult decisions about financial issues relating to electronic communications and digital signatures that had not been thought about well enough in advance. Will Utah require only surety bonds, or will mandatory insurance be adopted? At what minimum amounts will bonds or insurance be set? If transactions involving hundreds of thousands or millions of dollars will be involved, will the bonds or insurance fully protect against losses that may be suffered? Can affordable bond or insurance premiums be offered to cover possible losses of that magnitude? Will certification authorities have to assess fees so prohibitively high as to impede the use of digital communications? Or, will the states regulate the fee schedules for charges assessed by cybernotaries, just as the states currently regulate the fees that may be charged by ordinary notaries?\textsuperscript{302} Incidentally, the state fee regulations for notarial services constitute a major source of obstruction to progress for notaries. In many states, notaries can charge such trivial

\textsuperscript{296} Closen, \textit{supra} note 8, at A23 (stating that three states—New Mexico, Wisconsin and Wyoming—have $500 notary bond provisions that were enacted between 1849 and 1876).

\textsuperscript{297} \textit{See} \textsc{Cal. Gov't Code} \textsection 8212 (West Supp. 1996).

\textsuperscript{298} \textit{See} Closen, \textit{supra} note 8, at A23 (finding that "the required [notary bond] amount is so low that it is useless and misleading").

\textsuperscript{299} \textit{See} Closen & Osty, \textit{supra} note 39, at 13.

\textsuperscript{300} Closen & Osty, \textit{supra} note 39, at 13.

\textsuperscript{301} Interview with Kenneth Allen, \textit{supra} note 70. Even in a country as technologically advanced as Japan, no guidelines for a digital signature system have yet been published. \textit{See} Tsuchiya, \textit{supra} note 8, at 16-18.

\textsuperscript{302} \textit{See} \textit{Comparison of State Notary Provisions}, \textit{supra} note 18, at 33 (indicating that only seven states have no notary fee schedule—Alaska, Iowa, Kansas, Louisiana, Maine, Massachusetts, and Oklahoma).
amounts ($1 or $2 or $5 at the most) that notaries tend not to be taken seriously. Finally, these same questions about financial issues need to be asked regarding Utah subscribers and repositories.

Official indifference fosters notarial misconduct. The authors are concerned that Rousseau's warning may describe legislative developments relating to digital communications and certification authorities: "[B]ad [laws] bring about worse."

V. SUGGESTIONS FOR CYBERNOTARY LEGISLATION AND PRACTICE

People are the common denominator of progress. So . . . no improvement is possible with unimproved people, and advance is certain when people are liberated and educated.

—John Kenneth Galbraith (1958)

The Utah Digital Signature Act is a monumental step. It will force other states to consider and to address the subject. It will probably cause states to reconsider many notary issues as well. This effect, by itself, will be significant since notarial reform is long overdue. However, Utah may have moved too quickly, before it was fully ready. As Galbraith correctly advised, people are central to progress. The people who act as subscribers and certification authorities, and the people who oversee repositories, subscribers, and certification authorities are key to the success of electronic communications and transactions. But, have Utah and the other first-moving states provided the best possible substantive framework to assist the people to learn about and apply digital technology? No. The Utah Digital Signature Act fails at the most basic levels. To cite an old cliché, the Act fails to "see the forest for the trees."

A. UNRESTRICTED CRYPTOSYSTEMS

One of the Act's criticisms is aimed at the fact that it restricts the digital signature encryption system to one methodology, that of the "asymmetric cryptosystem." This restriction severely limits the use of
alternative encryption methods which could provide for more secure sys-
tems, some of which are currently in development.308 Indeed, it is not
uncommon for new technological advances to become quickly and expen-
sively dated.309 Consider, for example, the computer industry. Com-
puter technology has advanced so rapidly that computers purchased just
a few years ago are considered almost obsolete, with the cost of upgrad-
ing one's system a costly endeavor. It is likely that digital signature leg-
islation which mandates a single encryption system for performing
cybernotarizations will hamper rather than help the digital signature in-
dustry. Therefore, "it may be prudent, in drafting [future] digital signa-
ture legislation, also to accommodate the possibility of systems with
alternative security based on methods other than public certification au-
thorities and the public key repositories."310

B. Notarial Safeguards

Some states require that notaries maintain logs or journals of their
notarizations,311 and sound notarial procedure demands that this prac-
tice be honored whether required by law or not.312 There are two very
good reasons for a notary to do so. First of all, under current notarial

308. See Kennedy & Davids, supra note 204, at S4. See also Yates, supra note 6, at 312
(noting that because more sophisticated security systems are likely to develop, parties
should specify in their contracts the generally accepted security procedures that will be
recognized). Many upgraded standards for cryptography are under development by the
United States Government, including the EES (Escrowed Encryption Standard) system,
which incorporates an algorithm known as Skipjack. Radlo, supra note 187, at 8. The
Skipjack technology, written by the National Security Agency, "is the heart of the Clipper
Chip," a secret algorithm that the U.S. government hopes will enable it to eavesdrop on
otherwise confidential communications under certain circumstances. Id. at 3. In an at-
ttempt to make the EEG system more industry friendly, the government announced that
aspects of the Skipjack algorithm would be available despite the fact that it is classified.
Id. at 8.

Moreover, various non-governmental and foreign governments are also currently up-
grading the standards for cryptography. Id. at 10. Some of these groups include the IEEE
(Institute of Electrical and Electronic Engineers), ANSI (American National Standards In-
stitute), Internet IETF, World Wide Web Consortium (W3C), ISO (International Standards
Organization), and CCITT (Consultative Committee for International Telegraphy and Tel-
lephony). Id. While these groups do not confer the legal authority to impose industry stan-
dards, such standards are influential in shaping industry practice and determining market
acceptance. Id.


310. Kennedy & Davids, supra note 204, at S4.

311. See MODEL NOTARY ACT §§ 4-101 to -104 (1984). See generally Gnoffo, supra note
183.

312. See id. § 4-102; Fischer, supra note 5, at 12. See generally Wigmore, supra note 1,
at 749 (stating that "A [notarial] practice which permits forgery is as dangerous in policy as
it is unsound in principle").
procedure, if the notary is diligent enough to complete the journal entry, the notary will be likely to have correctly executed the notarization, as the contents of the journal entry and the certificate of notarization overlap and complement one another.  

Secondly, if the notary's compliance with the reasonableness standard is challenged, the journal entry provides highly effective evidence to corroborate the use of reasonable care.  

Like the state laws that require notaries to keep journals of notarizations, cybernotary statutes should mandate that certification authorities retain a permanent record of the certificates which they issue, as well as those documents which they refuse to authenticate.

A state undoubtedly cannot unilaterally create the position of certification authority and endow such an entity with power to act in other states. Nevertheless, in light of the heightened potential for multistate and multinational electronic transactions, and in the face of the ease of contemporary interstate and international mobility, the state and federal governments should consider a legislative scheme that would allow certification authorities to operate nationally and internationally. Perhaps, some states could, at least, establish mutual reciprocity agreements to permit cybernotaries to operate much like attorneys who can readily achieve bar admission by reciprocity. Indeed, in the international arena, consideration should be given to a treaty or compact, comparable to the Convention Abolishing the Requirement of Legalization for Foreign Public Documents (called the Hague Public Documents Convention of 1961), which will address international recognition of electronic communications and digital signatures.

313. Model Notary Act, supra note 311, § 4-102 (detailing the information to comprise each entry in the notary journal) and §§ 5-101 to 5-103 (detailing the substance of the certificate of notarization for acknowledgments and jurats). See generally Fischer, supra note 5, at 12.

314. The authors have not found a reported appellate case in which a notary who kept a journal entry was sued for negligence in identifying the document signer. But, there have been numerous successful tort suits against notaries (and/or their employers or sureties) who did not keep journal entries and who failed to detect the false identities of signers. See, e.g., City Consumer Serv. Inc. v. Metcalf, 775 P.2d 1065 (Ariz. 1989); First Bank v. Florey, 676 So. 2d 324 (Ala. Civ. App. 1996); Iselin-Jefferson Fin. v. United California Bank, 549 P.2d 142 (Cal. 1976). See also Meyers v. Meyers, 503 P.2d 59 (Wash. 1972); Independence Leasing Corp. v. Acquino, 506 N.Y.S.2d 1003 (Erie Co. 1986); Ameriseal, Inc. v Leiffer, 673 So. 2d 68 (Fla. Dist. Ct. App. 1996).

315. U.N.T.S. 189, 20 I.L.M. 1405 (1981). It was not until 1981 that the Hague Convention's requirements were enforced in the United States. Id. See Tsuchiya, supra note 8, at 21. "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." Id.
C. Absolute Liability

The Utah statute requires that a private key holder “exercise reasonable care” to prevent the unauthorized use of his/her key. This is wholly insufficient. As the sender of the digital message, the private key holder is the first line of defense to prevent fraud. As such, the private key holder should be absolutely liable for the unauthorized use of his/her key. Unlike the “duty to exercise reasonable care” requirement, an absolute duty to retain the exclusive control of the private key would greatly increase the integrity and confidence in digital signatures. It is also likely that insurance companies would insure private key holders against theft or loss of their key, thus providing more assurance to both private key holders as well as their intended recipients. Moreover, absolute liability would ideally result in more precaution being taken in light of the heightened risk of liability.

D. Insurance Requirements

Next, the Act should require cybernotaries to obtain insurance policies in amounts above those of the trivial notary bond requirements. For example, a statute requiring very substantial errors and omissions insurance for cybernotaries could best serve all involved. “Errors and omissions insurance would cover the notary, the notary’s employer, and the individual injured by the notarial misconduct up to the face amount of the insurance policy.” The same would be true for cybernotaries. Such insurance would undoubtedly be affordable because, as a mandatory policy, insurance companies would organize risk pools of

316. For example, California’s recently adopted Electronic Signature Act imposes more than a “reasonable care” standard, yet it seems to stop short of imposing absolute liability. The Act states: “By accepting a certificate issued by a certification authority, the subscriber identified in the certificate assumes a duty to retain exclusive control of the private key and keep it confidential.” CAL. GOV’T CODE § 16.5 (West 1995).

317. Compare UTAH CODE ANN. § 46-1-4 (1990) ($5,000 bond requirement) with UTAH CODE ANN. §§ 46-3-309, 46-3-201(1)(f) (Supp. 1996) (“Utah Digital Signature Act”) (none). See supra note 280. When first proposed, the Notary Public administrator for Utah’s Department of Commerce stated that certification authorities would have to meet stringent commission requirements, including testing and posting bond amounts in excess of $25,000. New “Computer Notary” Created to Certify Electronic Signatures, NOTARY BULL., Dec. 1994, at 1, 12. It is unfortunate that in Utah and in several other states that have used Utah’s Digital Signature Act as “model” legislation, such standards never materialized. These pitfalls have for years weakened the already tarnished image of the notary public as they may very well the office of cybernotary. See also supra note 110 (listing bond amounts).


319. Closen & Osty, supra note 39, at 14. Moreover, because most notaries are commissioned at the request or requirement of their employers, the premiums would likely be paid for by the notary’s employers as a cost of doing business. Id.
cybernotaries so that the cost of obtaining the insurance would be quite affordable.\textsuperscript{320} Moreover, errors and omissions insurance would provide additional peace of mind for both cybernotaries and their customers. It is surprising that the Utah Act could be as thorough as it is in setting up requirements for certification authorities and yet fail to remedy one of the fundamental reasons why the office of notaries public is held in such low regard.

E. Testing/Training Requirements

Even more troubling is the fact that the Utah Digital Signature Act does not require that certification authorities receive instruction or pass a test before obtaining a license.\textsuperscript{321} Refusing to require such instruction or testing, yet subjecting cybernotaries to civil liability and disciplinary action in the event that they perform their jobs poorly, is both naive and inconsistent.\textsuperscript{322} Absent requirements for training and testing, we are not progressing into the Twenty-First Century with digital signature legislation; we are repeating the mistakes of the past.

F. State Action Required

The authors firmly believe that notaries and cybernotaries should achieve respectability the old-fashioned way: they should earn it. But, notaries and cybernotaries cannot accomplish that feat alone. Since the offices of notary public and cybernotary are creatures of state statute, state governments have pervasive controls over those offices, and, hence, the states have expansive opportunities to improve the calibre and performance of notaries and to assure capable performance by cybernotaries. The states can adopt and enforce heightened qualifications for those who seek to be cybernotaries. The states can require both a minimum level of general educational attainment (preferably a four-year college degree), as well as a minimum number of hours of training specifically in cybernotary ethics, law, and practice (preferably at least a fifteen hour course of study). The states should establish a mandatory, comprehensive, and challenging examination on the topics of cybernotary ethics, law, and practice to be passed by applicants before they can be commissioned. The states should mandate that cybernotaries obtain liability insurance in the amount of at least $250,000 or more, to cover notary errors and omissions including both negligent and intentional

\textsuperscript{320} Closen \& Osty, \textit{supra} note 39, at 14.
\textsuperscript{322} See \textit{generally} id. § 46-3-202. Certification authorities are subject to an audit administered at least once a year by an "expert [ ] in computer security." \textit{Id}. If a certification authority is not in full compliance with the regulations, his/her name may be published and categorized into a deficiency report. \textit{Id}. 
misconduct. Next, the states should establish and maintain mandatory programs for cybernotaries who seek to renew their commissions, including segments on new developments and review of traditional standards about cybernotary ethics, law, and practice (preferably at least five hours of such study before renewal of commissions). Finally, the states should require re-examination of cybernotaries before renewal of their commissions.

A rigorous program of the kind we have described for both notaries and cybernotaries should cause at least three highly influential results in this country. First, there would be significantly fewer notaries and a limited number of cybernotaries in the first place. Second, the calibre of notaries and cybernotaries would be enhanced dramatically by the suggested program. Third, the performance of notarial functions should improve markedly, and the performance of cybernotaries from the very beginning should be exemplary.

VI. CONCLUSION

I am not an advocate for frequent changes in laws and institutions. But laws and institutions must go hand-in-hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with change of circumstances, institutions must advance also to keep pace with the times.

—Thomas Jefferson (1816)\textsuperscript{323}

Electronic transactions and digital signature technology have provided the opportunity for government agents and business professionals to transform the tarnished image of notaries into one that more accurately reflects the important position cybernotaries should occupy in the government and business communities.\textsuperscript{324} No longer should these special notaries face the criticism that their office, too, will be insignificant or unnecessary.\textsuperscript{325} Perhaps, the tail can wag the dog in this situation. Perhaps, with recognition of cybernotaries as key business professionals in the Twenty-First Century, steps can then more readily be taken to improve the lot of ordinary notaries as well. It would be just plain silly to allow the obvious problems of notaries public to continue to plague the office of notaries and cybernotaries into the future.

Since other countries already have an established tradition of treating notaries with great respect, in large measure because those foreign

\begin{footnotes}
323. Yates, supra note 6, at 277.
324. See Wigmore, supra note 1, at 749.
325. Closen, supra note 8, at A23.
\end{footnotes}
notaries have far more authority than notaries in this country, it can be expected that the cybernotaries of foreign nations will occupy positions of esteem. In the international electronic marketplace, we cannot afford to allow our cybernotaries to impede business because they lack the necessary experience, training, and authority. Our cybernotaries, essentially, will have to compete with their foreign counterparts.

There is simply no sound business or policy reason for so many individuals to hold notary commissions in this country. The explosion of notary commissions since the mid-1800s has seriously diluted the quality of services rendered by notaries and destroyed the special stature of the office. If there are some 4.5 million notaries in this country today, the authors believe there are at least 4 million too many.

Our proposal is no more elitist than the present system of selection of occupants in the other professions, such as law, accounting, medicine, dentistry, banking, engineering, and so forth. Not everyone is qualified and capable of being architects or veterinarians. Similarly, not everyone should be allowed to be notaries and to affect important financial and other transactions.

In keeping with the view expressed by Thomas Jefferson, laws, including notary and cybernotary statutes, should not be adopted and modified solely for the purpose of change, but “as new discoveries are made . . . institutions must advance . . . to keep pace with the times.” This means that the failed legislation currently governing notaries public cannot be allowed to undermine the evolving and promising guidelines for the conduct of electronic transactions and cybernotarizations. Otherwise, what was recognized by the Ohio Supreme Court in a case decided some forty years ago may describe the path awaiting cybernotaries, namely, “this . . . is a good example of the injury and loss which result from the failure of a notary public to recognize the seriousness and importance of his duties.” The authors would supplement this court’s observation by borrowing Jefferson’s point that laws should “go hand-in-hand with the progress of the human mind.”

326. See Baker & Barassi, supra note 232, at 1 (stating that “Civil law notaries play a role and have an expertise not expected of notaries in the United States”); see also Tsuchiya, supra note 8, at 2 (pointing out that Japanese notaries “are of such high integrity, diligence and legal knowledge that they are extremely qualified to be Notaries” and that there are only 540 notaries in all of Japan).

327. See Bernal v. Fainter, 467 U.S. 216, 224 n.12 (1984); see generally Closen, supra note 8, at A24.

328. See Closen, supra note 8, at A24 (stating that “Four and a half million notaries is at least 4 million too many”).

329. Yates, supra note 6, at 277.


331. Yates, supra note 6, at 277.
also "recognize the seriousness and importance of [the] duties"\textsuperscript{332} of the offices of notary and cybernotary.

\textsuperscript{332} Citizens Nat'l Bank, 133 N.E.2d at 333.