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PROMOTING THE INTERMEDIATE BENEFITS OF STRICT NOTARY REGULATION

NANCY PERKINS SPYKE*

This article begins with a factual scenario typical of those found on law school exams:

The A&B Law Firm employs Notary N on a full-time basis to perform paralegal work and provide notary services. One day Partner P, who is in a rush to meet a deadline, asks N to notarize a client's signature on a deed. The client is not present and P never saw the client sign the deed. N acquiesces to P's request and notarizes the client's signature without the client appearing before her. The client's signature was forged, and the damaged parties seek relief.

If this problem appeared in a law school essay question,¹ a query as to the liabilities of the parties would most likely follow. A proper response would detail the legal liabilities of Notary N, which are quite straightforward. Because the notary has committed notarial misconduct, a suit to recover damages could be brought against her. She also faces disciplinary action by the state's commissioning authority as well as criminal liability.² Further, if the law of the pertinent jurisdiction requires notaries to be

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1. It is unlikely that this scenario would appear on a law school exam. Law school curriculums have long neglected courses devoted to, or even touching on, notary law and practice. See generally Laura Duncan, *Notaries Take Law Schools to Task for Violations*, CHI. DAILY L. BULL., Nov. 16, 1994, at 1; NATIONAL NOTARY ASS'N., A SURVEY OF AMERICA'S LAW SCHOOLS 2 (1994). Interestingly, a notary misconduct question involving the possible liability of the notary-employer appeared for perhaps the first time ever on a recent bar examination. Minnesota State Board of Law Examiners, Bar Examination, Question 6, July 29, 1997.

2. In California, for example, a notary's commission may be revoked if the notary fails to fully and faithfully discharge the duties of office. CAL. GOV'T CODE § 8214.1 (West Supp. 1997). Notarial misconduct of the type described in the scenario is also a criminal offense in many jurisdictions. See, e.g., FLA. STAT. ch. 117.105 (1997) (stating, "A notary public who . . . falsely or fraudulently makes a certificate as a notary public . . . is guilty of a felony of the third degree . . .").

bonded, the injured parties could sue the surety on the notary's bond.³

But what about the consequences to Partner P and the A&B Law Firm? A suit against the notary and surety might prove to be unsatisfactory, since the total amount of collectable damages could be insufficient to compensate for the plaintiff's loss.⁴ It is only natural, then, that the plaintiff would seek to join Partner P and the A&B Law Firm in the suit. The text below, as well as more detailed discussions elsewhere in this issue, make clear that both A&B and Partner P could be subject to suit under the theory of vicarious liability. Additionally, Partner P could become the target of disciplinary action by state bar officials.

The civil suit that could be filed against Notary N's employer and the disciplinary action that might be pursued against Partner P should not be considered remote side effects of the Notary's misconduct. The various authorities that address employer liability and legal professional responsibility in the context of notary-employee misconduct expose the wide-spread effects of each notarial act, and demonstrate that employers, including lawyers, often become involved in notary transactions gone awry.⁵ Because notary law's impact on employers and attorneys is not as obvious as its other ramifications, however, employer liability and legal ethics issues may be given short shrift when notary legislation is being considered.

Notary services are so commonplace they gain little attention; people may even feel inconvenienced when they have to get a document notarized.⁶ At some level, however, people appreciate properly performed notary work because it fosters reliance on commercial documents and, to a broader extent, furthers the administration of justice. Moreover, these benefits are often enjoyed by individuals who are far removed from the transaction in which the notary service is rendered. When notary services are improp-

3. See, e.g., CAL. GOV'T CODE § 8214 (West 1992) (holding the surety liable for notary misconduct).

4. The personal assets of an individual notary might well be limited, and bonding amounts in the various United States jurisdictions are very low. See Michael L. Closen & Michael J. Osty, *Illinois' Million-Dollar Notary Bond Deception*, CHI. DAILY L. BULL., Mar. 2, 1995, at 6 (discussing low bond requirements for Illinois notaries).

5. The author previously conducted research in these areas. See generally Nancy P. Spyke, *Employer Accountability for Notary-Employees and Notary Services*, in NOTARY LAW & PRACTICE: CASES & MATERIALS 331-55 (1997); Nancy P. Spyke, *Ethical Concerns for Lawyers, in NOTARY LAW & PRACTICE: CASES & MATERIALS 357-87* (1997); Nancy P. Spyke, *Taking Note of Notary Employees: Employer Liability for Notary-Employee Misconduct*, 50 ME. L. REV. (forthcoming 1998).

6. See generally Michael L. Closen, *Why Notaries Get Little Respect*, NAT'L L. J., Oct. 9, 1995, at A23 (discussing the issue of the general public's lack of respect for notarial services).

erly performed, however, the parties who are privy to the transaction may suffer, as may more remote individuals who subsequently rely on the notary work. In addition to monetary loss, notarial misconduct chips away at society's confidence in commercial documents and its faith in the legal system.

The invisible "tentacles" of each notarial act have far-reaching effects, touching both private and public interests. It is fair to assume that policy makers approach notary legislation with these "tentacles" in mind, knowing that strict provisions not only improve the professionalism of notaries, but benefit the public. It is less certain, however, that lawmakers recognize that rigorous notary laws protect employers of notaries from substantial liability and may even improve legal ethics in relation to notary services. These additional benefits—although somewhat attenuated from the notarial act itself—should be borne in mind during the law-making process.

It is conceptually helpful to divide the benefits resulting from notary laws into three categories: immediate benefits, referring to the benefits that flow to the various parties tied to the particular transaction in which a notary service is performed; intermediate benefits, referring to the advantages notary laws confer upon notary employers and the legal profession; and public benefits, referring to the more general benefits that result from notary laws, such as confidence in notarized documents and facilitation of the administration of justice. It is the thesis of this Article that the intermediate benefits of notary laws are often ignored, or perhaps even rejected for self-centered motives, and this lapse in the policy-making process is one factor that allows lax notary provisions to persist. Carefully-crafted and demanding notary legislation not only enhances the immediate and public benefits described above, but assists in the creation of intermediate benefits to employers and the legal profession.

The pages that follow briefly touch on employer liability and legal ethics and examine the A&B Law Firm problem in light of the notary laws of four jurisdictions. The analysis ultimately suggests that legislators should open their eyes to the intermediate benefits that rigorous notary laws can bestow.⁷

7. It should be observed that virtually all of the concerns raised here will have application as well to the regulation of certification authorities or "cybernotaries," who will be charged with the responsibility of authenticating electronic documents and digital signatures. See generally Michael L. Closen & R. Jason Richards, *Notaries Public—Lost In Cyberspace, Or Key Business Professionals Of The Future?* 15 J. MARSHALL J. OF COMPUTER AND INFORM. L. 703 (1997) (discussing electronic documents and signatures).

I. EMPLOYER LIABILITY AND ETHICS

A. *Vicarious Liability and Negligence*

Although it is far from settled, there is both common law and statutory authority supporting the imposition of vicarious liability on an employer if a notary-employee engages in notarial misconduct while on the job.⁸ This type of liability is to be distinguished from employer negligence, a legal theory that requires an employer to be at fault before liability will be imposed. Vicarious liability arises even though an employer is completely fault-free; instead, the fact that an employee is subject to an employer's control helps to establish an agency relationship that becomes the basis of the employer's liability.⁹ Once this relationship exists, the employer is liable for the employee's torts committed in the scope of employment.¹⁰

The common law has struggled for decades with the question of vicarious liability as it relates to notary-employee misconduct. Very early cases exposed a clear split between jurisdictions that readily applied vicarious liability¹¹ and those that rejected the theory.¹² The courts that eschewed employer liability without a showing of fault generally premised their holdings on the public officer status of notaries.¹³ To those early courts, a notary's performance of a notarial act was the act of a public official, even if the act occurred in connection with private employment.¹⁴ As such, the notary was beyond the employer's control, making it impossible for vicarious liability to attach.¹⁵

More recent rulings do anything but clarify the issue. One

8. *Transamerica Ins. Co. v. Valley Nat'l Bank*, 462 P.2d 814, 818 (Ariz. Ct. App. 1969) (holding an employer vicariously liable for notary misconduct); FLA. STAT. ch. 117.05(7) (1997) (imposing liability on employers for notary misconduct). Vicarious liability in this context is also referred to as respondeat superior. *University Health Serv. Found. v. Bush*, 638 So. 2d 794, 799 (Ala. 1994).

9. See RESTATEMENT (SECOND) OF AGENCY §§ 2, 220(1) (1958) [hereinafter RESTATEMENT].

10. *Id.* § 219(1). Under the *Restatement*, a three part test must be met for an act to be performed in the scope of employment: 1) the conduct must be the type of conduct the employee is hired to perform; 2) the conduct must occur substantially within authorized time and space limits; and 3) the conduct must be actuated, in part, by a purpose to serve the employer. *Id.* § 228(1)(a)-(c).

11. See *Simon v. Peoples Bank & Trust Co.*, 180 A. 682, 684 (N.J. 1935) (stating that it is well-settled that employers are vicariously liable for notarial misconduct), *rev'd on other grounds*, 184 A. 793 (N.J. 1936).

12. See *May v. Jones*, 14 S.E. 552, 553 (Ga. 1891) (finding no employer liability for notarial misconduct).

13. *Id.*

14. *Id.*

15. *Id.*

court has held that vicarious liability for notary-employee misconduct is not viable because notaries undertake tasks that cannot be performed by their employers.¹⁶ This is especially so if the facts show that the plaintiff in no way relied on the notary's employer, but instead sought the services of any notary.¹⁷ Even though traditional vicarious liability is ultimately rejected under this rationale, employer liability might nevertheless be imposed if an employer encourages notary misconduct or if there is proof that a plaintiff relied on the notary's employer in some way.¹⁸

Another current approach applies agency principles to cases involving notary-employee misconduct.¹⁹ Crucial to this view is the belief that notaries are not public officers in the true sense, but rather "quasi-public" officers.²⁰ Re-casting the notary position in a way that de-emphasizes its official nature makes the application of agency law less controversial, and the issue ultimately becomes whether the notary acted in the scope of employment when the misconduct occurred.²¹

A survey to common law thus reveals four approaches to vicarious liability. One view presents a liberal approach to vicarious liability, while another offers a more restrictive view that would impose liability only if the injured party was somehow led to rely on the notary's employer. Yet another common law approach limits recovery to situations where an employer coerces or encourages notary misconduct, and a final view rejects vicarious liability outright. Employer liability that is based on the employer's coercion of notary misconduct differs from vicarious liability, however, because it implies fault on the part of the employer. An employer's encouragement of notary misconduct or inaction in the face of known misconduct may well reflect a failure to follow the standard of care that a reasonable employer would follow under the circumstances and would thus amount to negligence, a legal theory that is distinct from vicarious liability.²²

16. *Commercial Union Ins. Co. v. Burt Thomas-Aitken Constr. Co.*, 230 A.2d 498, 499 (N.J. 1967).

17. *Id.* This ruling alludes to the doctrine of apparent authority, under which an agency relationship arises if an individual is held out by an entity as its agent and if justifiable reliance on the apparent relationship leads to injury. See *Keefe v. Carpet & Upholstery Cleaning by Houndstooth, Inc.*, 444 S.E.2d 857, 859 (Ga. Ct. App. 1994) (discussing apparent authority).

18. *Commercial Union*, 230 A.2d at 501.

19. See *Transamerica Ins. Co. v. Valley Nat'l Bank*, 462 P.2d 814, 816-18 (Ariz. Ct. App. 1969) (applying agency relationship in a notary misconduct case).

20. *Id.* at 817.

21. *Id.* at 818. The court applied the test from § 228 of the *Restatement*. See *supra* note 10 delineating the *Restatement's* three-part test.

22. See *Murphy v. Army Distaff Found., Inc.*, 458 A.2d 61, 62-63 (D.C. App. 1983) (setting forth the distinction between respondeat superior and negligent supervision); *McDonnell v. Chicago*, 430 N.E.2d 169, 175 (Ill. App. Ct. 1981)

State statutes are as divergent in the area of employer liability as is the common law. A number of jurisdictions have statutes that initially appear to impose liability under agency principles, requiring that the notary act in the scope of employment before employer liability attaches. But most of those provisions additionally require the employer to either know of or consent to the notary misconduct before liability arises.²³ To the extent these statutes require employer consent or knowledge of the misconduct, they imply a fault-based liability despite their use of the "scope of employment" phraseology.²⁴ In contrast, Florida's statute reflects traditional vicarious liability, rendering an employer liable if a notary-employee acts within the scope of employment at the time the misconduct occurs and if the plaintiff's harm is proximately caused by the misconduct.²⁵ The common law and existing statutes thus offer a range of liability theories for employers, including a complete rejection of vicarious liability, an odd pairing of agency principles with a fault-based standard, and traditional as well as restricted agency approaches.

These vicarious liability and negligence principles can aptly be applied to the A&B Law Firm problem. Under a traditional vicarious liability analysis, A&B would be liable for Notary N's tort, assuming an agency relationship can be established and the scope of employment test is met. The result would be the same under Florida's statute. If the injured party relied on the fact that the improperly notarized deed was the product of the A&B law firm, liability would also result under the restrictive approach to vicari-

(ruling that negligent supervision was improper where the sole theory advanced by plaintiff was respondeat superior). The theories of negligent hiring and supervision might also be available under appropriate facts. For example, employers who carelessly hire unprofessional notaries and who then ignore sloppy notary practices by those employees could be sued under such theories. *Cf. Mardis v. Robbins Tire & Rubber Co.*, 669 So. 2d 885, 889 (Ala. 1995) (finding that negligent supervision arises when an employer knows of an employee's incompetence); *Moses v. Diocese of Colo.*, 863 P.2d 310, 324 (Colo. 1993) (citing *DeStephano v. Granbrian*, 763 P.2d 275, 288 (Colo. 1988) for the proposition that an employer's knowledge that an employee's conduct will subject others to an unreasonable risk of harm is what gives rise to negligent supervision).

23. Under Idaho's and Virginia's statutes, the notary employee must not only act in the scope of employment, but the employer must know of the notary's misconduct. IDAHO CODE ANN. § 51-118 (Michie 1995); VA. CODE ANN. § 47.1-27 (Michie 1996). Other statutes differ by requiring employer consent to the misconduct in addition to the fulfillment of the scope of employment requirement. *See, e.g.*, 5 ILCS 312/7-102 (West 1997); MO. ANN. STAT. § 486.360 (West 1997).

24. *See* CONN. GEN. STAT. ANN. § 3-94(1) (West Supp. 1997) (omitting the scope of employment test altogether). Connecticut's statute, instead, imposes employer liability only if the notary's misconduct is related to the employer's business and if the employer directs or encourages the misconduct. *Id.*

25. FLA. STAT. ch. 117.05(7) (1997).

ous liability. Further, because the facts of the hypothetical make clear that Partner P encouraged the misconduct, employer liability arguably would arise under a fault-based common law or statutory approach.

B. Professional Responsibility

The concerns of Partner P and the A&B Law Firm do not end with employer liability. The encouragement of notary-employee misconduct also constitutes an ethical breach under multiple provisions of the *Model Code of Professional Responsibility* and the *Model Rules of Professional Conduct*.²⁶

The most obvious violations arise under the general misconduct provisions of the *Model Code* and *Model Rules*. Pursuant to DR 1-102 of the *Model Code*, lawyers are prohibited from engaging "in conduct involving dishonesty, fraud, deceit, or misrepresentation" or conduct that is "prejudicial to the administration of justice."²⁷ The *Model Rules* contain identical language.²⁸ In addition, the misconduct provisions of the *Model Rules* and the *Model Code* target conduct that reflects adversely on a lawyer's integrity. Specifically, the *Model Code* prohibits lawyers from engaging "in illegal conduct involving moral turpitude," while the *Model Rules* target criminal acts "that [reflect] adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."²⁹

Under these provisions, Partner P faces disciplinary action. He knowingly coerced Notary N to commit notarial misconduct, and because the deed's notary certificate was fraudulent, the act was clearly dishonest. Assuming Partner P later presents the deed as valid, knowing of its fraudulent notary certificate and intending others to rely on it, P would engage in fraudulent misrepresentation.³⁰ An argument could also be made that such conduct is

26. With limited exceptions, the various jurisdictions in the United States have adopted either the *Model Code of Professional Responsibility* or the *Model Rules of Professional Conduct*. Introduction to STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS, STATUTES & STANDARDS xv-xvi (1995).

27. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(4)-(5) (1980) [hereinafter MODEL CODE].

28. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(c)-(d) (1983) [hereinafter MODEL RULES]. Rule 8.4 provides that lawyers commit professional misconduct when they "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation," or when they engage "in conduct that is prejudicial to the administration of justice." *Id.*

29. MODEL CODE at DR 1-102(A)(3); MODEL RULES at Rule 8.4(b).

30. Fraud is comprised of four elements: "1) misrepresentation of a material fact; 2) made willfully to deceive, or recklessly without knowledge; 3) which was justifiably relied upon by the plaintiff under the circumstances; and 4) which caused damage as a proximate consequence." *Ramsay Health Care, Inc. v. Follmer*, 560 So. 2d 746, 749 (Ala. 1990).

prejudicial to the administration of justice.³¹

Further, in a jurisdiction where the procurement of notary misconduct is a crime,³² Partner P would be subject to disciplinary action under *Model Code* and *Model Rule* provisions that target criminal conduct. Partner P's encouragement of the invalid certificate reflects adversely on his honesty, bringing his conduct within the *Model Rule* language. Although moral turpitude embraces conduct of an extreme nature,³³ an argument can be made that Partner P violated the *Model Code* provision as well.³⁴

Still other ethical rules are implicated by the A&B Law Firm problem, especially if Partner P argues that it was Notary N rather than Partner P who committed the misconduct.³⁵ Because Partner P encouraged Notary N to commit an act that would be unethical if committed by an attorney, Partner P violated *Model Rule* provisions through the acts of another, constituting a violation of Rule 8.4(a).³⁶ Similarly, under *Model Code* DR 1-102(A)(2), Partner P has attempted to avoid ethical rules through another's actions.³⁷

There is a fair amount of notary-related case law arising under these rules, all of it indicating that Partner P would be sanctioned for his behavior regarding the deed's notarization.³⁸ Importantly, in cases where attorneys involve notaries in misconduct, courts have reasoned that the expertise of attorneys and the

31. See *In re West*, 805 P.2d 351, 354 (Alaska 1991) (holding that an attorney's coercion of a fraudulent notarization is prejudicial to the administration of justice).

32. See, e.g., CAL. GOV'T CODE § 8225 (West 1992) (stating that the procurement of notarial misconduct is a misdemeanor).

33. Footnote 13 to *Model Code* DR 1-102 defines moral turpitude to include acts "of baseness, vileness or depravity in the duties which one person owes to another or to society in general, which is contrary to the usual, accepted and customary rule of right and duty which a person should follow." MODEL CODE at DR 1-102 n.13. See also *Commission on Legal Ethics v. Scheer*, 143 S.E.2d 141, 145 (W. Va. 1965) (discussing the standard of conduct involved in moral turpitude).

34. For example, in *Vaughn v. State Bar*, it was held that an attorney committed acts of gross negligence, tantamount to moral turpitude, when he inadvertently included false information in a writ of execution which was subsequently notarized by his notary-employee. 494 P.2d 1257, 1264 (Cal. 1972).

35. Attorneys have made precisely this argument. In *Florida Bar v. Farnas*, an attorney had a notary-assistant complete a false notary certificate and later argued to bar officials that it was the notary, not he, who committed the misconduct. 608 So. 2d 22 (Fla. 1992). The Florida Supreme Court rejected the argument, specifically holding that the attorney had violated Florida's equivalent of *Model Rule* 8.4(a). *Id.* at 24.

36. MODEL RULES at Rule 8.4(a).

37. MODEL CODE at DR 1-102(A)(2).

38. In all of the disciplinary cases cited in this article, the attorneys were sanctioned. See *infra* notes 39-41 and accompanying text for a discussion of attorney misconduct.

position of trust they hold require them to be held to a higher standard of conduct as far as notary services are concerned.³⁹ At least one court has suggested that an attorney's conduct may be considered even more egregious if the attorney involves a notary assistant in an ethical violation.⁴⁰ There is little question that attorneys who engage in the type of notary misconduct described in the A&B Law Firm problem face a period of suspension from the practice of law.⁴¹

Another *Model Rule* provision bears mentioning. *Model Rule* 5.3, which has no counterpart in the *Model Code*, requires partners in law firms to take reasonable steps to ensure that non-lawyer assistants act in a manner that is "compatible with the professional obligations of the lawyer."⁴² In non-notary contexts, courts have stated that this rule "indirectly provide[s] standards for non-lawyer assistants."⁴³ Seemingly then, this provision in effect imposes an attorney's ethical obligations on law firm notaries. Certainly in the A&B Law Firm problem, Partner P failed to ensure that Notary N acted in a way that was compatible with P's own ethical duties; P's knowing encouragement of notary misconduct led Notary N to commit acts that were at odds with Partner P's ethical obligations, resulting in a violation of Rule 5.3.

C. *The Varying Levels of Notary Regulation*

The brief discussion above describes some of the notary-related pitfalls that await employers in general and attorneys in particular. The probability of falling into the pit, however, is not the same in all American jurisdictions. Where notary laws are lax,

39. See *In re Finley*, 261 N.W.2d 841, 845 (Minn. 1978).

40. *In re Boyd*, 430 N.W.2d 663, 666 (Minn. 1988).

41. A sampling of attorney-notary disciplinary cases reveals that sanctions vary greatly, and are largely fact-dependent. Many reviewing courts will refer to the ABA Model Standards for Imposing Lawyer Sanctions. See, e.g., *In re West*, 805 P.2d 351, 355 (Alaska 1991) (stating that Alaska courts use the ABA standard). In general, courts tend to suspend attorneys for the type of misconduct described in the A&B Law Firm hypothetical but will approve a public reprimand in more innocent situations. Compare *In re West*, 805 P.2d 351, 360 (Alaska 1991) (suspending an attorney for 90 days for directing a staff notary to notarize a release forged by a client) with *Florida Bar v. Farinas*, 608 So. 2d 22, 24 (Fla. 1992) (reprimanding an attorney publicly for having a notary complete an interrogatory certificate outside the presence of clients in the belief that such procedure was legal). In particularly egregious cases, attorneys have been disbarred for notary-related misconduct. See e.g., *In re Morin*, 878 P.2d 393, 403 (Or. 1994) (requiring that the attorney be disbarred for involving staff notaries in approximately 300 instances of witnessing and notarizing estate planning documents outside the presence of the signers).

42. MODEL RULES at Rule 5.3(b).

43. *Upjohn Co. v. Aetna Cas. & Sur. Co.*, 768 F. Supp. 1186, 1214 (W.D. Mich. 1990).

employers and attorneys are far more likely to become involved in civil suits and disciplinary proceedings than where regulations are more demanding. To help illustrate this point, the laws of four states are examined.

In some jurisdictions, notary provisions are few in number, leaving notaries with specific guidance as to only the bare essentials of their professional office.⁴⁴ The notarial practices of notaries who adhere to the lowest common denominator of notary practice may be legal but may also invite trouble. Some aspects of the notary office are universal. For example, all notaries are given the power to take acknowledgments and administer oaths and are required to identify acknowledgers and those persons taking oaths if unknown to them.⁴⁵ Other aspects of the office, however, vary greatly among American jurisdictions.

In the state of Rhode Island, for example, notaries are not required to use a seal of office, and bonding is not mandatory.⁴⁶ Nor is there a requirement that notaries record their official acts in a notary journal. Further, the state's statutes are silent on the issue of employer liability for notary-employee misconduct, and no cases in the jurisdiction address the issue. A notary who engages in fraud or deceit in the exercise of notarial powers is, however, subject to criminal liability.⁴⁷

Virginia offers somewhat stricter laws. Its notaries do not have to use seals or journals, nor do they have to be bonded.⁴⁸ Employer liability, on the other hand, is addressed in Virginia's Code, which provides that an employer is civilly liable for damages proximately caused by the notarial misconduct of an employee if "[t]he notary . . . was acting within the scope of . . . employment at the time such damages were caused . . . and [t]he employer had actual knowledge of, or reasonably should have known of, such notary's misconduct."⁴⁹ As for criminal liability, any notary who willfully commits misconduct in office is guilty of a misdemeanor,⁵⁰

44. Where this is the case, a jurisdiction may publish an advisory guide for its notaries. See, e.g., NOTARY PUBLIC SECTION, STATE OF CAL., NOTARY PUBLIC HANDBOOK (Bill Jones, Secretary of State, Notary Public Section 1997) (depicting an example of a notary guide). See generally CHARLES N. FAERBER, NOTARY SEAL & CERTIFICATE VERIFICATION MANUAL (1996) (giving an example of a notary manual).

45. See, e.g., FLA. STAT. ch. 117.05 (1997) (explaining notary powers and requirements of office).

46. R.I. GEN. LAWS §§ 42-30-1 *et seq.* (Michie 1993 & Supp. 1996). See generally FAERBER, *supra* note 44, at 1, 6.

47. R.I. GEN. LAWS § 42-30-16 (Michie Supp. 1996). If the elements of this provision are met, the notary has committed a misdemeanor and can be fined up to \$1,000 and/or imprisoned up to one year. *Id.*

48. VA. CODE ANN. §§ 47.1-12 *et seq.* (Michie 1996). See generally FAERBER, *supra* note 44, at 1, 7.

49. VA. CODE ANN. § 47.1-27 (Michie 1996).

50. *Id.* § 47.1-28(A).

and a person who impersonates a notary while not commissioned is guilty of a felony.⁵¹ Additionally, an employer who willfully coerces a notary to engage in notarial misconduct commits a misdemeanor.⁵²

Florida's statutes mandate the use of notary seals and require notaries to be bonded, but do not require the use of notary journals.⁵³ Notary-employers are subject to liability pursuant to a liberal statutory provision:

The employer of a notary public shall be liable to the persons involved for all damages proximately caused by the notary's official misconduct, if the notary public was acting within the scope of his or her employment at the time the notary engaged in the official misconduct.⁵⁴

Florida also imposes criminal liability for various types of unlawful conduct pertaining to notary practice. It is a misdemeanor to unlawfully possess a notary seal or any papers related to notarial acts.⁵⁵ Further, a notary who, with the intent to defraud, notarizes a signature outside of the signer's presence is guilty of a third degree felony.⁵⁶ It is also a misdemeanor to impersonate a notary.⁵⁷

A comparison of the notary requirements of Rhode Island, Virginia, and Florida shows that Florida, largely because of its vicarious liability provision and its basic notary requirements, offers the most demanding regulations. But even more comprehensive provisions are found in California, where the notary laws are perhaps the most rigorous in the nation. Notary seals are mandatory, and notaries must be bonded.⁵⁸ Sequential notary journals are required as well, and specific information must be logged in a journal for each notarial act performed.⁵⁹ Mandatory entries include the date, time, and type of each notarial act; the signature of the per-

51. *Id.* § 47.1-29.

52. *Id.* § 47.1-28(B).

53. FLA. STAT. ch. 117.05(3)(a), 117.01(7)(a) (1997). The bonding amount is \$5,000. *Id.* § 117.01(7)(a). See generally FAERBER, *supra* note 44, at 8 (discussing bonding amount for the State of Florida).

54. FLA. STAT. ch. 117.05(7) (1997). In a recent case involving a law firm's liability for staff notary misconduct, the defendant law firm lost a summary judgment motion after arguing that the notary misconduct was not the proximate cause of the plaintiff's harm. *Ameriseal v. Leiffer*, 673 So. 2d 68, 70 (Fla. Dist. Ct. App. 1996).

55. FLA. STAT. ch. 117.05(9) (1997).

56. FLA. STAT. ch. 117.05 (1997). If a notary notarizes a signature without the signer being present at the time of the notarization, and if this is done without the intent to defraud, the notary has committed a civil infraction and can be penalized up to \$5,000. FLA. STAT. ch. 117.05(6)(a) (1997).

57. FLA. STAT. ch. 117.05(8) (1997).

58. CAL. GOV'T CODE §§ 8207, 8212 (West 1992). The bonding amount is \$15,000. *Id.* § 8212.

59. *Id.* § 8206.

son whose signature is notarized; an indication as to how the signer's identity was established; and the fee charged.⁶⁰ A recent amendment to this provision requires that a signer's thumbprint be included in a journal if the notarized document is a deed, quit-claim deed or deed of trust.⁶¹

The employer-notary relationship is also addressed in California's statutes, which allow private employers to enter into agreements with notary-employees. Such an agreement may provide that the employer will assume the cost of the notary-employee's supplies and bond premiums⁶² and may also require the employee to remit all job-related notary fees to the employer.⁶³ Further, the employer "may limit, during the employee's ordinary course of employment, the providing of notarial services by the employee solely to transactions directly associated with the business purposes of the employer."⁶⁴ This statutory scheme allows employers to restrict the type of notarial services rendered by employees during business hours. Such a practice might help an employer facing suit for a notary-employee's misconduct if the employer can show that the employee's negligence occurred in a transaction that was unrelated to the employer's business.⁶⁵

Although California has no vicarious liability statute, its common law raises little question that notary employers are subject to vicarious liability for the notarial misconduct of their notary employees. The cases, however, furnish little explanation. In one case, a notary-employer was held liable for the notary's misconduct after stipulating that the misconduct occurred in the scope of employment.⁶⁶ In a later case the court simply held that a notary's employer "may . . . be held liable for the improper taking of [an] acknowledgment."⁶⁷ Although the case law is less than satisfying in terms of discussion, it leads to the conclusion that California accepts the doctrine of vicarious liability in the notary-employee con-

60. *Id.*

61. *Id.*

62. CAL. GOV'T CODE § 8202.7 (West 1992).

63. *Id.*

64. *Id.* § 8202.8.

65. In such a case the employer could argue that, because the agreement restricted notary services to business-related matters, the notary's act was not in the scope of employment. See *supra* notes 9-10 and accompanying text for a discussion of employer liability and the scope of employment test. While the statute may provide employers with a defense against some vicarious liability claims, the law raises another issue. If the notary service restriction is widely utilized by employers, notaries might become less available to the public in general, threatening a fundamental characteristic of the office of notary "public."

66. *Iselin-Jefferson Fin. Co. v. United Cal. Bank*, 549 P.2d 142, 143 (Cal. 1976).

67. *Garton v. Title Ins. & Trust Co.*, 165 Cal. Rptr. 449, 456 (Cal. Ct. App. 1980).

text.

As to criminal liability, it is a misdemeanor in California to "destroy, deface, or conceal any record or papers belonging" to a notary⁶⁸ or to hold oneself out as a notary if not duly commissioned.⁶⁹ Additionally, a person who knowingly "solicits, coerces, or . . . influences a notary public to perform an improper notarial act" is guilty of a misdemeanor.⁷⁰

The notary laws of these four jurisdictions present a broad spectrum of regulation that is indicative of the disparate nature of notary law in the United States. The table that follows presents the laws in a way that better illustrates their differences. It is important to note that the choice of notary laws discussed in this essay was purposely selective. Statutory requirements pertaining to notary qualifications, powers of office, and mandatory certificate language, for example, are not detailed. The goal is to pinpoint a number of statutory provisions that have a significant impact on vicarious liability and legal ethics, not to provide an exhaustive comparison of the notary laws of these jurisdictions.⁷¹ A glance at the table reveals that statutory schemes such as Rhode Island's offer a minimal level of regulation, while Virginia, Florida and California offer increasingly demanding provisions.

68. CAL. GOVT. CODE § 8221 (West 1992).

69. *Id.* § 8227.1.

70. *Id.* § 8225.

71. It is certainly possible that an examination of other notary laws would further support the thesis of this essay.

	Rhode Island	Virginia	Florida	California
<i>Seal Required</i>	No	No	Yes	Yes
<i>Bonding Required</i>	No	No	Yes \$5,000	Yes \$15,000
<i>Journal Required</i>	No	No	No	Yes
<i>Employer Liability</i> by statute	No	Yes restrictive vicarious liability	Yes traditional vicarious liability	No
by common law	No	—	—	Yes
<i>Criminal Liability</i> Notary - fraud, de- ceit	Yes	Yes	Yes	Yes
<i>Criminal Liability</i> Others - Possession of notary seal or papers	No	No	Yes	Yes
Impersonation of notary	No	Yes	Yes	Yes
Solicitation of notary misconduct	No	Yes	No	Yes

II. THE IMPACT OF NOTARY REGULATION

A. *The Impact of Various Levels of Notary Regulation on Employer Liability*

What type of notary regulation most protects employers from vicarious liability for the notarial misconduct of their employees? This question requires the consideration of two types of laws. The first and most obvious laws to examine are those that directly deal with the issue of employer liability for notary misconduct. In this regard, a jurisdiction will generally follow one of four views of employer liability: 1) its law is silent on the issue; 2) its law imposes vicarious liability under traditional agency principles; 3) its law imposes a restricted view of vicarious liability; or 4) its law imposes liability on employers only when the employers are somehow at fault.⁷² A short answer to the question regarding protective

72. See *supra* notes 7-25 and accompanying text for a discussion of the four

legislation suggests that a law rejecting vicarious liability will be most protective of employers. Assuming, however, that the immediate and public benefits of notary regulation remain part of public policy, the most effective legislation will impose traditional vicarious liability.

The second type of laws to consider are those dealing with more fundamental matters such as seals, bonds, journals, and civil and criminal liability. Again, unless the immediate and public benefits of notary regulation are to be abandoned, the best protection for employers is afforded by notary regulations that impose strict requirements on notaries.

In Rhode Island, neither the legislature nor the courts have addressed the matter of employer liability for notary misconduct. Without any binding guidance, Rhode Island employers will be less inclined to consider the ramifications of their interaction with notary staff. They may perceive notary shortcuts to be expedient, perhaps even efficient. In trying to get his client's acknowledgment notarized, a Rhode Island lawyer in the position of Partner P might be concerned solely with his impending deadline. It follows that employer requests such as that presented in the A&B Law Firm problem will be more prevalent. If requests for notary shortcuts are more numerous, it is inevitable that some notaries will comply with those requests. Where third parties suffer harm as a result, the employers are likely to become targets of litigation.

Rhode Island's other notary laws, or lack thereof, add to this possibility. Notary seals are not required in Rhode Island.⁷³ If an official seal need not accompany a certificate, the notarial act itself may seem less official, leading an employer to overlook its importance. A request for an unlawful notarization is hardly surprising if a notarial act is perceived to be little more than an administrative detail. Similarly, because Rhode Island notaries are not required to record their notarial acts in journals, misconduct simply becomes easier to commit. Notary N, for example, could perform the unlawful notarization without having to deal with glaring omissions in her official journal. Further, she would not have to confront Partner P with the journal requirement, yet another reason Partner P would be less aware of the unlawful nature of his request and more likely to pursue it. Finally, the fact that notaries do not have to be bonded in Rhode Island makes an employer's deep pockets look more attractive to a potential plaintiff, since no amount is recoverable on a notary's bond. In a state such as Rhode Island, both the absence of laws regarding vicarious liability and the existence of skeletal laws pertaining to other aspects of notary practice make notary fraud and related lawsuits against employers

jurisdictional views of vicarious liability.

73. It is not uncommon, however, for Rhode Island notaries to use seals. See FAERBER, *supra* note 44, at 1 for a discussion of Rhode Island notary law.

a real threat.

Such actions are less likely to be brought in states such as Virginia, where civil liability is imposed on an employer if a notary-employee acts within the scope of employment at the time the damages are caused and if the employer knows or reasonably should have known of the misconduct.⁷⁴ In a jurisdiction like Virginia, employers know they cannot afford to encourage notary misconduct or look the other way when it occurs. Virginia employers are also on notice that coercion of notary misconduct is a crime.⁷⁵ These two statutes are thus likely to raise an employer's consciousness regarding the acts of its notary employees. Partner P, if practicing in Virginia, would be aware of the liability facing him for coercing Notary N to complete the unlawful notarization, making him less likely to approach her with his request.

Unfortunately, Virginia's other statutes do little more to heighten an employer's awareness of liability for notary misconduct. Like Rhode Island, Virginia requires neither seals nor journals; thus its laws miss an opportunity to heighten employer awareness of the importance of the notary. Additionally, because Virginia, like Rhode Island, has no bonding requirement, Virginia's employers will be sought out by plaintiffs looking to be compensated for harm related to notary misconduct. It might even be argued that Virginia's laws impact employers more harshly than Rhode Island's. This is so because Virginia's laws lack requirements that underscore the importance of notary services yet impose civil and criminal liability on employers for notary-employee misconduct under certain circumstances.

Florida's liberal statutory law regarding employer liability may be denounced by employers, but its vicarious liability policy actually protects employers from liability. The knowledge that liability may arise even if an employer is unaware of the misconduct should lead employers to take significant steps to ensure that their notary services are professionally performed. If Partner P was a Florida attorney, he would do more than simply avoid asking Notary N to commit notary misconduct; he would act in a reasonable way to ensure that Notary N consistently performed her notary duties in a professional manner. The precautionary steps taken by Florida's notary-employers will make notary misconduct less commonplace, diminishing employer exposure to liability.

To a certain extent, Florida's other laws also help protect employers. Because seals are required, the significance of the notarial act is clarified. Further, the fact that notaries are bonded

74. VA. CODE ANN. § 47.1-27 (Michie 1996). See *supra* note 48 and accompanying text for a discussion of Virginia's notary requirements.

75. See *supra* note 51 and accompanying text for a discussion of criminal sanctions for notary misconduct.

shields employers from at least a portion of the damages that may result from notary misconduct. The absence of a journal requirement, however, decreases the level of employer protection otherwise offered by Florida law. An employer or other potential procurer of notary misconduct would likely be discouraged by a notary who explains that all information, including the signature of the person whose signature is notarized, must be entered into a journal. The absence of this extra level of protection against notary fraud is the weak link in Florida's statutory scheme.

Of the jurisdictional law discussed, California's is the most effective in preventing suits against employers. Not only have California courts seemingly accepted the idea that employers can be vicariously liable for the notarial misconduct of their employees, but its statutes allow employers to limit the notary services rendered by employees to those required for work-related transactions.⁷⁶ Employers are, therefore, not only aware of their liability, which will encourage them to take precautions against notary misconduct, but are allowed to take steps to limit that liability through private agreements with their notary-employees.

California's seal, bonding and journal requirements also lessen the likelihood of suits against employers. The advantages of seals and bonding have already been addressed. Further, the journal requirement indirectly prevents vicarious liability by making it more difficult for notary fraud to occur. Notary N has a strong response to Partner P's request in California: she will necessarily inform him that her journal must include the client's signature as well as his thumbprint.⁷⁷ Confronted with this requirement, Partner P would have little choice but to delay the notarization until the client could appear before the notary.

The review of employer liability under the laws of these four jurisdictions suggests that clear employer liability provisions promoting vicarious liability have a preventative effect that should ultimately lead to better notary practice in the workplace. Further, notary laws that impose strict regulations regarding seals, bonding, and journals help to emphasize the importance of the notarial act and may indirectly lead to heightened employer respect for notaries and their duties. More demanding laws have the added advantage of equipping notaries with much-needed ammunition when confronted by employers or others who solicit notary fraud.

What is both predictable and ironic is that notary employers such as banks and attorneys often lobby against laws imposing vi-

76. See *supra* notes 62-67 and accompanying text for a discussion of vicarious liability under California law.

77. See *supra* notes 58-70 and accompanying text for a discussion of California notary law.

carious liability.⁷⁸ Such efforts represent a type of knee-jerk reaction, a manifestation of a natural inclination to avoid liability whenever possible. But this sense of self-preservation does little to advance the immediate or public benefits of notary regulation. Laws rejecting vicarious liability do nothing to prevent notary fraud, so the parties involved in notary transactions and the public in general remain waiting victims. Rather than sacrificing the immediate and public benefits of notary work for the benefit of influential employers, legislators need to keep those public interests in mind. Lawmakers must also realize that traditional vicarious liability laws ultimately make employers more aware of and more likely to police the notary work performed in their offices. The end result is decreased employer liability—one of the intermediate benefits of notary legislation.

B. *The Impact of Strict Notary Laws on Legal Ethics*

If we ask what type of notary laws promote strong legal ethics, we ultimately arrive at a similar answer. For many of the same reasons that strict laws help prevent employer liability, they make it less likely that attorneys will become involved in professional misconduct involving notary work. There are no ethical rules directly dealing with notary services; instead we must look to the general provisions of the *Model Code of Professional Responsibility* and the *Model Rules of Professional Conduct*. As pointed out before, the basic misconduct provisions, which prohibit dishonest, fraudulent, and deceitful conduct, are of particular interest, as are provisions calling for disciplinary action if attorneys engage in criminal conduct that reflects badly on their integrity.⁷⁹

Our sample jurisdictions have ethical rules that are either identical to, or very similar to, these provisions. Rhode Island, for example, is a *Model Rule* jurisdiction with a misconduct provision identical to *Model Rule* 8.4;⁸⁰ the same is true of Florida.⁸¹ Virginia, on the other hand, is a *Model Code* jurisdiction with a misconduct provision containing language similar to that of the *Model Code*.⁸² And although California's ethical rules appear dissimilar to the *Model Code* or *Model Rules*, they nevertheless contain

78. See *Commercial Union Ins. Co. v. Burt Thomas-Aitken Constr. Co.*, 230 A.2d 498, 500-01 (N.J. 1967) (rejecting traditional vicarious liability because the court was very much aware that attorneys are the major employers of notaries).

79. See *supra* notes 26-29 and accompanying text for a discussion of the *Model Code* application to attorney notarial misconduct.

80. R.I. CT. RULES ANN., Sup. Ct. Rule 47-8.4 (a)-(d) (Michie 1991-92).

81. FLA. RULES OF PROFESSIONAL CONDUCT Rule 4-8.4(a)-(d) (1997).

82. VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102 (Michie 1997). Instead of using the *Model Code's* "moral turpitude" phraseology, Virginia's rule provides that a lawyer must not commit a criminal act that "reflects adversely on a lawyer's fitness to practice law." *Id.*

similar provisions.⁸³

Running afoul of these ethical directives is more of a problem in a state such as Rhode Island, where minimal notary laws require neither seals nor journals. The absence of strict regulation means that attorneys who have little familiarity with notary law and practice could inadvertently take improper notary shortcuts, only to be contacted by disciplinary officials. For example, since notaries do not have to be bonded in Rhode Island, attorneys who employ notaries may never be asked to pay bond premiums, making them even less aware of potential liability. Further, because Rhode Island law remains silent on the issue of vicarious liability, attorneys may remain unaware of their potential liability and of their professional obligations regarding notary services. In short, because Rhode Island's lax laws may indirectly create law firm environments that tolerate notarial misconduct, attorneys run the risk of becoming unethically involved in fraudulent notarizations. Without clear and demanding statutes that both reinforce the importance of the notarial act and establish the possibility of liability, an attorney may adopt a dangerously casual attitude regarding notary services.

Virginia fares only slightly better in this regard. Its laws, by omitting a seal, bonding, or journal requirement, also fail to emphasize the significance of the notarial function. Employers are at least on notice, however, that civil liability awaits them if they fail to abort known notary misconduct.⁸⁴ Virginia attorneys would, therefore, avoid coercing notary staff to engage in misconduct and would also avoid ignoring the occurrence of misconduct. In this type of environment, notary-related ethical breaches will be less common.

Florida's laws go even further toward creating an incentive for attorneys to treat law firm notary services in an ethical manner. Its seal and bonding requirements reinforce the importance of the notarial act, and its pure vicarious liability statute puts attorneys on notice that firm notary work must be performed professionally. Once such a professional attitude is adopted in a law

83. See CAL. RULES OF PROFESSIONAL CONDUCT (Deering 1996); CAL. BUS. & PROF. CODE §§ 6000 et seq. (West 1990 & Supp. 1998). Pertinent rules require attorneys to "employ, for the purpose of maintaining the cause confided to him or her such means only as are consistent with truth . . ." CAL. BUS. & PROF. CODE § 6068(d) (West Supp. 1997). Further, if an attorney is convicted of a felony or misdemeanor involving moral turpitude, the attorney can be disbarred or suspended. *Id.* §§ 6101(a), 6106. Attorneys are also bound to act competently, which has been determined to include the supervision of the work of non-attorney employees. CAL. RULES OF PROFESSIONAL CONDUCT Rule 3-110. Neither can a California bar member advise another to violate any law without the belief that the law is invalid. *Id.* at Rule 3-210.

84. See *supra* note 48 and accompanying text for a discussion of Virginia notary statutes.

firm, its attorneys' ethical obligations regarding notary work are likely to fall in place.

The preventative effect of strong notary laws is best exemplified by California's laws, which, because of the mandatory journal requirement, surpass those of Florida in terms of rigor. A California lawyer who needs to have a document notarized will interact with a notary having a journal and seal in hand, making sloppy and fraudulent notary work difficult to accomplish. And if notary fraud is avoided, so too are many ethical violations.⁸⁵

As is the case with civil suits against employers, the number of disciplinary actions brought against attorneys should diminish as notary laws become more rigorous. This exemplifies why legislators should endorse proposed legislation that lends respect to, and emphasizes the importance of, the notarial act rather than capitulate to complaints of inconvenience and fears of increased liability.⁸⁶

III. CONCLUSION

By deterring notary fraud, rigorous notary laws protect the parties to each notary transaction and the public in general. Demanding laws simultaneously shield employers from civil liability and lessen the likelihood that attorneys will engage in notary-related unprofessional conduct. Rather than being ignored altogether or drowned out by anti-liability rhetoric, these intermediate benefits need to be articulated in pertinent policy debates. Only in this way can legislators consider the full range of goals that can be achieved by notary legislation. If this is accomplished, notary legislation may well take on greater significance, and American jurisdictions will perhaps move closer to both uniform and higher standards of notary regulation.

85. In fact, the strict nature of California's notary laws could lead to a different problem: the theft of notary seals. Theft becomes an alternative for those who have difficulty finding a notary willing to commit misconduct. Notary seal theft played a role in a recent disciplinary case in California, where an attorney was disbarred for various activities, including his use of a stolen notary seal to fraudulently notarize a number of forged loan documents. *In re Brazil*, 2 Cal. State Bar Ct. Rptr. 679, 683 (1994). See generally *Safeguard That Seal!*, NAT'L NOTARY MAG., July 1997 at 15.

86. Time and again, legislators oppose notary legislation, claiming it will unduly burden those who frequently rely on notaries. It is no secret that attorneys often require the assistance of notaries, and because many legislators are attorneys themselves, the aversion to new notary laws is not surprising. The problem is particularly pronounced for laws that mandate journals and those that prohibit the completion of notary certificates by notaries with a disqualifying interest. Telephone Interview with Charles N. Faerber, Vice President of Legislative Affairs, National Notary Association (Sept. 3, 1997).