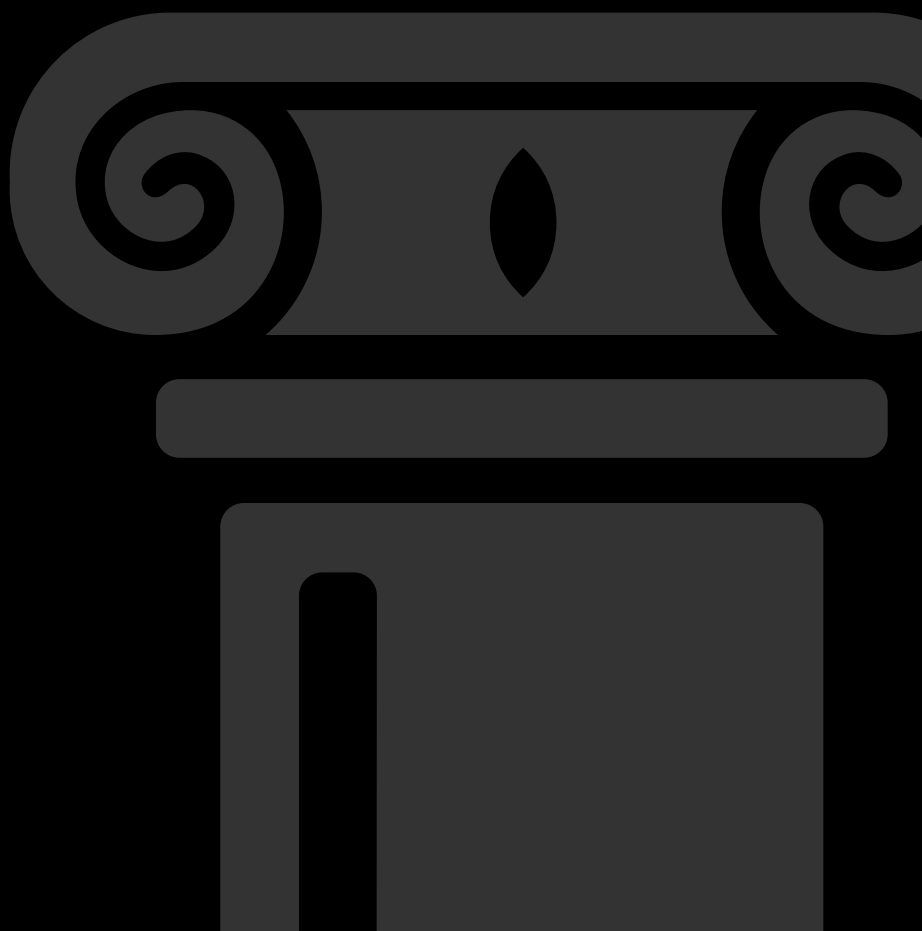




THE NOTARY PUBLIC  
**CODE OF  
PROFESSIONAL  
RESPONSIBILITY**  
OF 2020



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# Introduction

## **PURPOSE OF THE CODE**

The Notary Public's key role in lending integrity to important transactions of commerce and law necessitates sound standards for the performance of notarial acts.

Many occupations pose professional norms for their practitioners, such as the Code of Professional Conduct and Generally Accepted Accounting Principles for certified public accountants. The purpose of *The Notary Public Code of Professional Responsibility* is to promote recognized standards of professional practice for Notaries Public of the United States to follow in performing notarial acts.

The standards in this *Code* are of two types. The majority are principles, policies, and practices that have proven over the years to be effective in protecting documents and transactions from forgery and fraud. The remainder are standards which assert that as public officers Notaries must serve all persons equally, without regard to such distinctions as race, nationality, ethnicity, citizenship, religion, politics, lifestyle, advanced age, physical disability, gender, or sexual orientation.

Because the acts of Notaries affect individual rights and property under both civil and criminal law, it is imperative that professional standards for Notaries be widely acknowledged as just, fair, and well-developed. To that end, the standards in this *Code* were drafted with input from representatives of occupational fields with a large constituency of Notaries Public. Also contributing were state and local officials who regulate the activities of Notaries, as well as legal, business, and surety experts.

## **ORGANIZATION OF THE CODE**

This *Code of Professional Responsibility* is based upon 10 widely accepted "Guiding Principles" that clarify the multiple roles of the Notary Public in the United States. They are general rules for responsible conduct.

Each Guiding Principle in turn embraces particular "Standards of Professional Practice" that are arranged under several "Articles." The Articles identify the broader practice areas under which the individual Standards are organized.

The Standards of Professional Practice are exemplified by “Illustrations” posing problematic situations that are common or typical for Notaries. Details are provided to help the reader visualize each situation.

For each Illustration, the “Resolution” indicates the course of action best exemplifying the applicable Guiding Principle and Standard of Professional Practice.

The “Commentary” sections supplement the *Code* by explaining the drafters’ views, concerns, and rationales in shaping important provisions, and by discussing certain other matters not directly addressed by the *Code*.

## **BASIS OF THE CODE**

The Guiding Principles and Standards of Professional Practice reflect the relevance, evolution, and progress of the office of Notary Public in the United States over nearly 250 years.

The Principles and Standards reflect the conviction that Notaries must operate in a businesslike fashion, basing their actions on proven standards of practice, and always carefully documenting their official activities.

## **LEGAL REQUIREMENTS AND THE CODE**

In many jurisdictions, a particular Standard of Professional Practice may already be recognized in a statute or administrative rule, such as the common but not universal legal mandate to keep a record of all notarial acts performed. In rare cases, the Standards may contradict provisions in a state’s Notary statutes or administrative regulations, particularly when these rules stipulate procedures for disposition of the seal or journal upon termination of the Notary’s commission. In these instances, of course, statutes and regulations must be obeyed by the Notary.

For most Notaries, no statute or administrative rule will prevent adherence to any and every Standard of Professional Practice in the *Code*.

## **USES AND BENEFITS OF THE CODE**

This *Code* is written primarily for the benefit of practitioners of notarial services, the Notaries Public of every U.S. state and jurisdiction.

It may serve as a tool to guide and educate not only Notaries Public, but also lawmakers, Notary commissioning officials, private and public employers, and any users of notarial services.

It may assist employers in developing business rules and policies for the performance of notarial acts by employee-Notaries.

It is an imperative for progressive change, and a catalyst for improving notarial statutes and conventions in commerce and law.

Widespread implementation of the *Code* will reduce fraud and litigation.

Any Notary's adherence to the *Code's* Standards brings confidence that he or she is acting in accord with the highest professional traditions of the notarial office.

Widespread adherence to the Standards by Notaries will ensure that notarial acts are performed safely and securely for all who transact and rely upon notarized documents in the United States and abroad.

## **2020 REVISION OF THE CODE**

The Introduction to the 1998 *Code* indicated that periodic review and revision of the *Code* are intended. To commemorate its 20th anniversary in 2018, the project to revise the *Code* in areas where the law or practice standards had evolved or progressed was commenced. While a review of all changes in this Introduction is not possible, the reader may consult the Commentary for a discussion of the drafters' views on many of the important changes.

Four global changes, however, may be mentioned here. Definitions of key terms were added. The structure of the 1998 *Code* was retained, but many Standards, Articles, Illustrations, and Resolutions were shortened to make the *Code* more readable. In each situational Illustration, the simpler term "Resolution" is used instead of "Ethical Imperative" or "Professional Choice" to emphasize that Notaries should follow all *Code* Standards. Reflecting the need for the *Code* to apply equally to paper and electronic notarizations, the definition of "document" was broadened to include electronic writings. (See "Document" in the Definitions.)

The National Notary Association empaneled a Revision Commission to review proposed changes to the 2020 *Code*. A draft was sent to each participant for comment. Several changes to the final version were the result of the panel's insightful comments. The names of the Commission panelists appear at the end of the *Code*.



# Definitions

In this *Notary Public Code of Professional Responsibility of 2020*, the following terms have the meanings ascribed unless the context determines otherwise:

**“Acknowledgment”** means a notarial act in which a principal declares that the principal’s signature on a document was voluntarily affixed for the purposes stated within the document and, if applicable, that the principal had due authority to sign in a representative capacity.

**“Affirmation”** means a vow of truthfulness or fidelity on penalty of perjury without invoking a deity or using any form of the word “swear.”

**“Credential”** means a document or record evidencing an individual’s identity.

**“Document”** means a paper or electronic writing.

**“Electronic”** means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

**“Electronic journal”** means a chronological and tamper-evident electronic record of notarial acts.

**“Electronic signature”** means an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record.

**“Journal of notarial acts”** and **“journal”** mean a chronological record of notarizations.

**“Notarial act”** and **“notarization”** mean any official act that a Notary Public is authorized to perform under law of the state where the Notary is commissioned.

**“Notarial certificate”** and **“certificate”** mean the part of, or attachment to, a notarized document that is completed by a Notary Public, bears the Notary’s official signature and seal, and states the date, venue, and facts attested by the Notary in the particular notarial act.

**“Notary Public”** means an individual commissioned or appointed to perform notarial acts.

**“Oath”** means a vow of truthfulness or fidelity on penalty of perjury while invoking a deity or using any form of the word “swear.”

**“Official guideline”** means advice or guidance related to notarial conduct and practice issued or published by the commissioning or regulating official on a website, in a Notary Public handbook, or in other written or electronic form.

**“Official seal”** means: (1) a physical device, hardware, or software for affixing or attaching on a paper or electronic notarial certificate an image containing, or information consisting of, a Notary Public’s name, title, jurisdiction, commission expiration date, and other information required by law in the state where the Notary is commissioned; or (2) the physical or electronic image or information itself.

**“Principal”** means an individual whose signature is notarized or for whom a notarization is performed.

**“Signature”** means a tangible symbol or an electronic signature that evidences the signing of a document.

**“Sole control”** means at all times being in the direct physical custody of the Notary Public or safeguarded by the Notary with a password or other secure means of authentication.

**“Standards of professional practice”** and **“practice standards”** mean the minimum acceptable principles, practices, and conduct expected of a Notary Public that are widely recognized as effective in ensuring the integrity, reliability, and security of notarial acts.

**“State”** means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

**“Tamper-evident”** means that any change to a document shall provide evidence of the change.

**“Venue”** means the jurisdiction where the Notary Public is physically located while performing a notarial act.

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#### COMMENTARY

“Acknowledgment” is defined consistent with the Model Notary Act of 2010 and Revised Uniform Law on Notarial Acts of 2010 and 2018. (See MENA § 2-1; RULONA § 2(1).)

“Credential” borrows the definition from the Model Electronic Notarization Act. (See MENA § 2-2 and accompanying Comment.)

“Document” refers to both a paper and electronic writing. The drafters intended that all *Code* Guiding Principles and Standards should apply equally to paper and electronic notarizations. Typically, when used in statute, “document” refers to a tangible or paper instrument and “record” to either a paper document or information in electronic form. (See UETA § 2(13).) For the purposes of this *Code*, however, the drafters determined that since the term “document” is so ingrained in the minds of Notaries, expanding the term to encompass electronic documents would ultimately make the *Code* more understandable.

This *Code* defines “electronic” and “electronic signature” consistent with the Uniform Electronic Transactions Act. (See UETA § 2(5) and § (2)(8).) The drafters employed terms that are compatible with the UETA because that Act has been adopted by virtually all states.

“Notarial act” and “notarization” refer to the authorized powers or duties of Notaries as defined under the statutes in the Notary’s state of commissioning. Most state Notary laws contain a section that specifies the official acts of a Notary (See, e.g., CAL. GOV’T CODE § 8205.) In this *Code*, “notarial act” and “notarization” may be performed on a paper or electronic document.

“Notarial certificate” and “certificate” refer to the written statement that is completed by a Notary as evidence of a notarial act. (See RULONA § 15(a).) The notarial certificate may evidence a paper-based or electronic notarial act. The information required to be in a notarial certificate is often defined by law. (See, e.g., FLA. STAT. ANN. § 117.05(4); 57 PA. CONS. STAT. ANN. § 315(a).) Many states’ statutes provide certificate forms for the authorized acts Notaries may perform. (See, e.g., N.H. REV. STAT. ANN. § 456-B:8; WIS. STAT. ANN. § 706.07(8).) The notarial certificate is not to be confused with a Notary’s “commission certificate,” which is the official record of a Notary’s authority to perform notarial acts issued by the commissioning official.

“Notary Public” is defined specifically to denote individuals whose authority to perform notarial acts is derived from a commission, appointment, or license to perform notarial acts, and not more broadly to public officials whose office provides authority to perform notarial acts. Under state law, judges, recorders, court clerks, legislators, and others may be authorized to perform notarial acts, but they are not considered Notaries Public unless they have applied for and received a Notary Public commission, appointment, or license.

“Official guideline” is any standard other than a statute or administrative rule related to notarial conduct or practice that is published by the commissioning or regulating official of the Notary’s state. Typically, these guidelines are found in a state Notary Public handbook. In addition, practice guidelines may appear on the official’s website or be disseminated to Notaries through email or other communications. In most states, the commissioning official is also the regulating official (see WASH. REV. STAT. ANN. §§ 42.45.010(10), 42.45.210, 42.45.250), but this is not always the case (see MINN. STAT. ANN. §§ 358.70 (clarifying that the Commissioner of Commerce regulates and enforces actions against Notaries), 359.01 (stating that the Secretary of State receives applications for the commissioning of Notaries)).

“Official seal” can mean either a physical or an electronic image of information identifying the Notary, the Notary’s commission, and authority to perform notarial acts. The definition has been broadened to allow the Code Standards to apply to notarizations performed on both paper and electronic documents. (See RULONA § 2(8).) The definition also may denote the device for imparting an official seal (e.g., a physical stamp, embosser, or a combination of hardware and software).

“Principal” simplifies the definition adopted in the Model Notary Act of 2010 and the Model Electronic Notarization Act of 2017. (See MNA § 2-17 and MENA § 2-12.)

“Signature” is the definition adopted by the Uniform Law Commission in its Revised Uniform Law on Notarial Acts. (See RULONA § 2(12).)

The definition of “sole control” adopts in substance the corresponding definitions in the administrative rules of Florida and North Carolina. (See FLA. ADMIN. CODE § 1N-5.001(8); 18 N.C. ADMIN. CODE E § 07C.0102(9) and (10).) The Notary could maintain “sole control” of a paper journal by keeping the journal in a secure area such as a locked drawer, file cabinet, or safe. In the electronic world, sole control is satisfied when any device used to affix or attach the Notary’s electronic signature or seal is similarly kept under the Notary’s exclusive physical control. Sole control of an electronic seal or journal may be achieved through a secure means of authentication such as a strong password or biometric (e.g., fingerprint, retinal image, or facial scan). A Notary may keep logon credentials to an online platform used to perform electronic or remote online notarizations under the Notary’s sole control by storing them in a secure “password vault” (software application) and not sharing them with any other person.

Depending upon the context, “standards of professional practice” and “practice standards” can refer to: (1) the 91 individual Standards of Professional Practice in *The Notary Public Code of Professional Responsibility of 2020*, or (2) the body of all rules governing the conduct of Notaries Public, whether inscribed in law, a code of conduct, or in any other form. To be considered a standard of professional practice, the standard must promote reasonable care by the Notary and be publicly recognized as promoting the integrity, reliability, and security of notarial acts.

“State” is the definition commonly adopted by the Uniform Law Commission in its uniform acts, including the Revised Uniform Law on Notarial Acts. (See RULONA § 2(14).)

“Tamper-evident” has been adopted in the electronic signature and transactions industry and in law as a term of art. (For an example of the latter, see RULONA § 20(a).) It refers to any illegal attempt by an individual to make unauthorized changes to a document, but the term may also be used to refer to *any* changes to a document — authorized or not. “Tamper-evident” does not mean “tamper-proof.” A tamper-proof technology would prevent any changes from being made to the document once applied.

In keeping with customary usage in law, “venue” refers to the jurisdiction where a Notary performs a notarial act. (See FLA. STAT. ANN. § 117.05(4)(a).) It is usually indicated by the words “State of \_\_\_\_\_, County of \_\_\_\_\_” appearing at the top of a notarial certificate.





# The Guiding Principles

## I

The Notary shall serve all of the public in an honest, fair, and impartial manner.

## II

The Notary shall act as an impartial witness and not profit or gain, nor attempt to profit or gain, from a notarial act, apart from the fee for the notarial act and any charge associated with the fee, if applicable.

## III

The Notary shall require the appearance of each principal and witness identifying a principal, if any, in order to screen each for identity, willingness, and mental competence.

## IV

The Notary shall not execute a false or incomplete notarial certificate, nor perform a notarial act with respect to any document or transaction that the Notary believes is false, deceptive, or fraudulent.

## V

The Notary shall act with reasonable care and not provide unauthorized advice or services.

## VI

The Notary shall affix or attach an official seal to every notarial certificate and not allow the seal to be used by another.

## VII

The Notary shall record every notarial act in a bound paper or secure electronic journal and safeguard it as an important public record.

## VIII

The Notary shall protect the privacy of each principal and not examine, copy, divulge, or use personal or proprietary information disclosed during the execution of a notarial act unless required by law.

## IX

The Notary shall obey all laws and official guidelines that pertain to notarial acts and follow recognized practice standards when they are silent.

## X

The Notary shall seek instruction on notarization, and keep current on the laws, official guidelines, and practice standards of the notarial office.

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## INTRODUCTORY COMMENTARY

Two key factors guided the revision of *The Notary Public Code of Professional Responsibility of 2020*: the conviction that the official actions of Notaries Public are governed by professional standards and the need to update these standards in light of advancements in law and practice in the notarial field since the publication of the original 1998 Code.

The first is professional standards. The Notary is a commissioned public official who is genuinely a professional. By holding that the Notary Public is a public official, the Code makes clear that Notaries owe certain obligations to the public and must execute their official duties consistent with the demands imposed on public officers. (See, generally, Michael Clozen, *The Public Official Role of the Notary*, 31 J. MARSHALL L. REV. 651-702 (1998) and the Commentary to Guiding Principle I.)

In 2018, the District Attorney of New York County prepared a Grand Jury Report that addressed the role of Notaries in connection with real estate fraud, and observed: “The notary public [is] one of the oldest continuing professions ...” (See *Grand Jury Report*, December 2018, page 13.) Virtually every professional field establishes standards of practice for its practitioners. (See CODES OF PROFESSIONAL RESPONSIBILITY (2d ed. 1990) by Rena Gorlin, who names many professions with such norms.) As a legitimate professional field, it is only fitting that Notaries Public have their own standards of practice. The first such standards, a brief, 12-point *Responsibility Code of Ethics of the American Society of Notaries* was published in 1980 by that organization (as reprinted in 32 JOHN MARSHALL LAW REVIEW 1195 (1999)). In 1998, the National Notary Association published *The Notary Public Code of Professional Responsibility* with 85 individual Standards of Professional and Ethical Practice. This *Notary Public Code of Professional Responsibility of 2020* takes its place alongside these two codes of conduct to inform and guide Notaries Public in the fulfillment of their important and valuable official witnessing acts.

The second is change in law and practice. More than 20 years have elapsed since *The Notary Public Code of Professional Responsibility* was first published. During this time technology has advanced, electronic and remote online notarization has been adopted, the monetary value of transactions involving notarial acts has risen substantially, and new identity theft and document frauds have surfaced. At no time have Notaries Public been more needed to ensure the integrity and security of notarized instruments and transactions. To address these technological changes and societal challenges, many U.S. states and jurisdictions substantively modified or completely replaced their notarial statutes. Thus, it is imperative for the Code Standards to be informed and, in some cases, expanded by these enactments of the past 20 years.

In the area of practice, the notarial profession has also benefited from books and articles written since the publication of the original Code that have expanded the available literature on notarial issues. These publications include two expansive treatises by recognized Notary experts: VAN ALSTYNE’S NOTARY PUBLIC ENCYCLOPEDIA, by Peter Van Alstyne (2001), and PROFESSOR CLOZEN’S NOTARY BEST PRACTICES, by Michael Clozen (2018). Additionally, two separate symposiums containing some 28 separate articles on notarial practice were published in 1998 and in 1999 by the John Marshall Law Review, thereby more than tripling the total number of law review articles on Notary topics published in U.S. history. (See JOHN MARSHALL LAW REVIEW Volume 31, Number 3 (1998) and Volume 32, Number 4 (1999).) The 2020 Code has sought to reflect the wisdom and guidance of this significant corpus of notarial literature.

## COMMENTARY ABBREVIATIONS KEY

In the Commentary, several important sources will often be cited, and those often-cited authorities will be abbreviated, as follows:

ASN = American Society of Notaries

JMLR = John Marshall Law Review

MENA = Model Electronic Notarization Act of 2017

MNA = Model Notary Act of 2010

NNA = National Notary Association

RCOE = ASN Responsibility Code of Ethics of 1980

RULONA = Revised Uniform Law on Notarial Acts

USNRM = U.S. Notary Reference Manual, National Notary Association

Van Alstyne = Van Alstyne’s Notary Public Encyclopedia (2001)

# Guiding Principle I

The Notary shall serve all of the public in an honest, fair, and impartial manner.

## STANDARDS OF PROFESSIONAL PRACTICE

### Article A: Refusal to Notarize

#### I-A-1: Refusal Without Due Cause Improper

The Notary shall not refuse to perform a lawful and proper notarial act without due cause.

**Illustration:** The Notary is asked to notarize an individual's signature on a document. The Notary, however, is hesitant to notarize for any unknown individual because of a presumed increased likelihood of fraud and liability.

**Resolution:** As a public officer and servant, the Notary notarizes the person's signature after identifying the individual in compliance with Standard III-B-1, if no improprieties are requested or detected.

#### I-A-2: Refusal for After Hours Services

Notwithstanding Standard I-A-1, a Notary may refuse to perform a notarial act outside of the Notary's regular business hours.

**Illustration:** The Notary manages a retail business that provides notarial services to the public as one of its service offerings. An individual knocks on the locked front door 30 minutes after the store had closed for the day, looking for the Notary to notarize his signature on a document. The Notary is performing administrative duties to close out the day before he can leave to go home.

**Resolution:** The Notary politely informs the individual that he is unable to notarize his signature because the business is closed for the day. The Notary may choose to identify another Notary who performs after-hours notarizations to help the individual with his request.

**I-A-3: Refusal on Reasonable Grounds**

The Notary shall refuse to perform a notarial act if the Notary has knowledge, or a reasonable belief which can be articulated, that the transaction or document is unlawful or improper.

**Illustration:** The Notary is asked to notarize a person’s signature on a document. As proof of identity, the individual presents a state driver’s license. The Notary notices that the photograph on the license is raised from the surface of the ID and appears to overlay a state seal and the signature of a DMV official.

Resolution: The Notary refuses to notarize the individual’s signature, because there is strong evidence that the driver’s license has been tampered with and bears a false photograph, and that the individual is an impostor. The Notary records a journal entry in compliance with Standard VII-A-2 and reports the incident to local law enforcement in compliance with Standard IV-E-3.

**I-A-4: Discriminatory Refusal Improper**

The Notary shall not refuse to perform a lawful and proper notarial act because of the principal’s race, nationality, ethnicity, citizenship, religion, politics, lifestyle, advanced age, physical disability, gender identity, sexual orientation, or because of any disagreement with the statements or purpose of a document.

**Illustration:** The Notary is asked to notarize a principal’s signature on a document. The Notary recognizes the principal as a member of a political group with views different from the Notary. The Notary hesitates to perform the notarization.

Resolution: The Notary notarizes the individual’s signature, if no improprieties are requested or detected. To do otherwise would contradict this Standard.

**I-A-5: Discretionary Refusal**

Notwithstanding Standard I-A-1, the Notary may refuse to perform a notarial act if the refusal is not prohibited by law or this *Notary Public Code of Professional Responsibility*.

**Illustration:** The Notary is employed by a bank. The Notary’s employment agreement limits the Notary to notarizing signatures on business documents in the bank’s mortgage lending division during working hours. A member of the public enters the bank during business hours and asks the Notary to notarize the individual’s signature on a power of attorney. Law in the Notary’s state of commissioning does not require a Notary to notarize for all members of the public.

Resolution: Citing the bank’s employment agreement with the Notary, the Notary refuses to notarize the individual’s signature during regular business hours. The Notary may offer to notarize the individual’s signature after hours and off employment premises if the individual will meet the Notary at a later time.

## Article B: Fees

### I-B-1: Discriminatory Assessment of Fee Improper

The Notary shall not base the charging of a fee for performing a notarial act, or the amount of the fee, on the principal's race, nationality, ethnicity, citizenship, religion, politics, lifestyle, advanced age, physical disability, gender identity, or sexual orientation, or on agreement or disagreement with the statements or purpose of a document.

**Illustration:** The Notary is asked to notarize a person's signature on an affidavit for a ballot initiative the Notary opposes. The Notary is inclined to "punish" this proponent by charging for the notarization, even though the Notary has never before charged for notarizing.

**Resolution:** The Notary notarizes the individual's signature without charging a fee. If it has been a consistent policy not to charge for performing notarial acts, the Notary will not assess a fee as a punitive measure against a political opponent. As a general rule, a publicly commissioned Notary must strive to serve the public evenhandedly.

### I-B-2: Reducing or Waiving Fee

Notwithstanding Standard I-B-1, a Notary whose regular business practice is to charge a fee for notarial acts may, at the Notary's discretion, reduce or waive the fee, provided that doing so is not done for an unlawful or discriminatory purpose.

**Illustration:** The Notary conducts a business offering notarial services to the community and customarily charges the maximum fee allowed by law. The local senior center contacts the Notary to inquire if the Notary is available to provide notarial services at a reduced rate for those seniors whose only income is derived from Social Security.

**Resolution:** If so inclined, the Notary may decide to offer notarial services at no charge or at a reduced rate for seniors or other individuals with or without means to pay the fee for notarization, provided that reducing or waiving the fee is not done for an unlawful or discriminatory purpose.

## Article C: Dignity and Professionalism of Office

### I-C-1: Conduct of Public Officer

The Notary shall conduct himself or herself with the dignity befitting, and in a manner that does not bring disrepute or discredit upon, the solemnity and importance of the notarial office.

**Illustration:** A Notary attended a social gathering. When the Notary told a friend she just became a Notary, the individual jokingly said, "Why don't you require an oath taker to place their right hand on a magazine and swear by the Grand Poobah in the sky?!" The Notary wonders whether customers who are nervous about taking an oath or affirmation might be put at ease by making light of it as her friend suggested.

*Resolution:* The Notary determines that making light of the process of taking an oath or affirmation would discredit the solemn act of being placed under penalty of perjury for one's oral or written statements, discredit the office of Notary Public, and may jeopardize or invalidate the document.

## Article D: Advertising and Endorsement

### I-D-1: Misrepresentation Improper

The Notary shall not misrepresent the notarial office, claim or advertise powers, authority, advantages, or rights that the office does not possess or provide, or use language that is likely to mislead the public about the powers of the office.

**Illustration:** The Notary owns a shop in an area with a large concentration of Latin-American immigrants. The Notary wants to put a sign in the shop window to advertise notarial services but ponders whether it should read "Notary" or "Notario."

*Resolution:* The Notary does not translate the term Notary or Notary Public into Spanish for use in the shop sign, because the term "Notario" or "Notario Publico" is the title of an attorney-like officer in Latin nations and it may mislead immigrants into thinking that U.S. Notaries have the same powers and are entitled to the same fees.

### I-D-2: Endorsement Improper

The Notary shall not use or knowingly allow use of the Notary's name and title, seal, or a notarial certificate completed by the Notary to endorse, extol or denigrate, or corroborate or disprove claims of a product, service, program, proposal, individual, candidate, organization, or contest.

**Illustration:** The Notary is asked to endorse a commercially available but unregulated pain cream by allowing use of the Notary's name, title, and official seal in a fact sheet for the product.

*Resolution:* The Notary does not allow the Notary's name, title, and official seal to be used to lend seeming integrity or credibility to a product. Further, the Notary should not perform a notarial act on any document (e.g., an affidavit signed by the president of the cream distributor) with knowledge that an image of the notarial seal or title will be used in promotional materials.

## Article E: Ability and Availability to Serve

### I-E-1: Physical Impairment

The Notary shall decline to perform a notarial act if the Notary has a physical impairment that prevents the Notary from performing the duties of the requested act.

**Illustration:** The Notary is asked to notarize a signature on a document. The Notary's wrist is in a cast after sustaining an injury in an accident.

**Resolution:** The Notary declines to notarize the signature, because the cast prevents the Notary from signing the Notary's signature in the manner that is on file with the commissioning official.

### **I-E-2: Lack of Knowledge**

The Notary shall decline to perform a notarial act requiring special knowledge if the Notary does not possess the special knowledge required to perform properly the requested act.

**Illustration:** The Notary is asked by an individual to note a protest. When the Notary admits to having no idea how to complete the protest, the individual says, "Don't worry, I'll walk you through it."

**Resolution:** The Notary declines to perform the protest without the knowledge to proceed competently and confidently. Only a specially trained or experienced Notary who is familiar with the applicable provisions of the Uniform Commercial Code should undertake the technically complex notarial act of noting a protest.

### **I-E-3: Change of Information**

The Notary or the Notary's personal representative shall report to the commissioning official any relevant change in personal status — including change of name or address, conviction of a misdemeanor or felony, adjudication of incompetency, or adjudicated liability in a lawsuit involving a notarial act — affecting the Notary's qualifications or eligibility to perform notarial acts, availability to the public, or the character of the Notary.

**Illustration:** The Notary will soon permanently move to live and work in another state. There are two years remaining in the Notary's commission term.

**Resolution:** The Notary reports the move to the state Notary commissioning authority and resigns the commission upon relocating. State officials must know the whereabouts of all Notaries and be kept apprised of any change in their eligibility to perform notarial acts and their availability to serve the public.

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#### **COMMENTARY**

**General.** Although the central tenet of this Guiding Principle is nearly identical to that of Guiding Principle I of the 1998 Code, substantial changes and additions to the meaning of the Principle have been incorporated in the Standards which are set out. The Principle uses the term "impartial" instead of "unbiased" (which appeared in the 1998 Code) to describe the role of the Notary. "Impartial" was selected to more accurately reflect the broad objectivity demanded of the Notary.

Guiding Principle I sets the tone for the entire Code. By emphasizing that the Notary is to serve all of the public, the Principle affirms the view that the Notary Public is a public official and servant. There are a plethora of judicial opinions that declare Notaries are "public officers." (See, e.g., *Britton v. Nicolls*, 104 U.S. 757, 765 (1881); *Werner v. Werner*, 526 P.2d 370, 376 (Wash. 1974); and *Commercial Union Ins. Co. v. Burt Thomas-Aitken Const. Co.*, 230 A.2d 498, 499 (N.J. 1967).) But public official status is different for a Notary than for many other public officials. Unlike some public officials, e.g., elected officers, appointed administrators, or policemen, a Notary is not a government employee *per se*. This distinction can have far-reaching ramifications, especially in the area of

personal liability. Usually Notaries are not afforded the sovereign immunity protection routinely available to public officials acting within the scope of their authority. (See RULONA § 21(f).) Indeed, in some states the enabling statute identifies the Notary as a quasi-public official (see, e.g., KAN. STAT. ANN. § 53-101; and MO. REV. STAT. § 486.220(3)) and in others the same result has been reached by court decision (see, e.g., *Transamerica Ins. Co. v. Valley Nat'l Bank*, 462 P.2d 814, 817 (Ariz. Ct. App. 1969); and *Ely Walker Dry Goods Co. v. Smith*, 160 P. 898, 900 (Okla. 1916)).

The Principle affirms that notarial services are rendered to the public at large under the authority of state statutory rules. Additionally, the drafters recognize that a substantial majority of state-commissioned Notaries are employees whose notarial services are only incidental to their principal job duties. For some of these Notaries, obligations to their employers, job site locations removed from public access, or both, raise important issues concerning their ability to serve members of the public at large. The Code addresses this problem consistent with the view that, absent special law to the contrary, Notaries are public and not private servants.

Furthermore, the status of a Notary as a publicly commissioned or licensed officer contributes to other themes emphasized throughout this 2020 Code, an important one being that Notaries are not mere ministerial functionaries, but rather are officers who exercise discretion and judgment, and are professionals who are therefore bound by the relevant professional responsibilities identified herein.

Contemporary Notary statutes, regulations, and best practice standards place substantial discretionary authority in Notaries in numerous respects. To name just three: to assess the understanding or mental competence of principals (see, e.g., FLA. STAT. ANN. § 117.107(5)), to determine the willingness of principals (see, e.g., OR. REV. STAT. § 194.245(1)(b)), and to act with reasonable care and prevent fraud and mistakes (see RULONA § 27(a) (5); MNA § 13-1(a)).

**Article A: Refusal to Notarize.** Although the Notary is directed by Guiding Principle I to serve all of the public with honesty, fairness, and impartiality, the Principle is not meant to suggest the Notary must always notarize upon request from a member of the public. The Notary may appropriately refuse to notarize in numerous settings.

**1-A-1: Refusal without Due Cause Improper.** The central point of the Standard focuses on making the distinction that while the Notary serves the public, there are numerous reasons why the Notary either must, or at least may, legitimately refuse to notarize for “due cause.” Due cause includes such reasons as the Notary is unavailable to perform a large number of notarizations presented by the principal (see N.M. STAT. ANN. § 14-12A-8), the employee-Notary is prohibited or bound by agreement with the employer to perform notarizations on duty for the employer or on the employer’s premises (see CAL. GOV’T CODE § 8202.8), the Notary is unfamiliar with the specialized notarization requested such as a protest (see Standard I-E-2), the Notary is not within her or his usual business location or hours (see NEV. REV. STAT. ANN. § 240.060), the Notary cannot identify the principal with reasonable certainty (see, e.g., 57 PA. CONS. STAT. ANN. § 308(a)(4)), the Notary reasonably concludes that the principal does not possess the mental competence or the willingness to execute the document (see RULONA § 8(a)), the Notary reasonably concludes the document is incomplete or unlawful (see 1 MISS. ADMIN. CODE Pt. 5, R. 050.5.3B.1), the Notary is disqualified due to an actual or apparent conflict of interest (see S.C. CODE ANN. § 26-1-90(C)(3) and (4)), and so forth. In particular, discretionary refusals are described in Standard I-A-5.

The Illustration raises the possible concerns of Notaries that if the principal is a stranger to the Notary there will be attendant increased risks of fraud and liability. The Resolution makes clear that the status of the principal as a stranger to the Notary is not a proper basis for the Notary to refuse to notarize, for there are sound notarial practices which should be employed to satisfactorily identify the principal and protect of the Notary against liability. (See, e.g., FLA. STAT. ANN. § 117.05(5); MINN. STAT. ANN. § 358.57.)

**1-A-2: Refusal for After Hours Services.** This Standard did not appear in the 1998 Code. It follows from the view of due cause described in Standard I-A-1. It corresponds to the rule of MNA § 5-6(c): “A notary may but is not required to perform a notarial act outside of the notary’s regular workplace or business hours.” Further, Notaries simply cannot be obliged to be available to serve at all times nor be saddled with the need to always carry their Notary stamps and journals with them.

The Illustration presents facts which for two reasons would permit the Notary to decline to notarize for due cause. First, the request for notarial services was made outside of the Notary’s usual business hours of operation. Second, the Notary was engaged in administrative business closing duties at the time of the request, which would permit the Notary to decline to notarize. The Resolution allows the Notary to respectfully refuse the request. There is no expectation that a Notary either be “on-call” or at the “beck and call” of the public. The operating principle is “reasonable availability” of the Notary. (See 14 *Op.Atty.Gen.* (Cal. 1949).)

**1-A-3: Refusal on Reasonable Grounds.** A paramount function of the Notary is to deter fraud. This Standard, with only minor differences, appeared in the 1998 Code as Standard I-A-2. (The 1998 caption was “Refusal



for Reasonable Suspicion.”) Also, the language of the Standard itself has been modified to require the Notary to have “knowledge, or a reasonable belief (rather than a “suspicion”) which can be articulated, that the transaction or document is unlawful or improper.” It was thought that “suspicion” was not a strong enough word (even though the suspicion had to be such as could be articulated). Thus, the 2020 Standard requires either knowledge or a “reasonable belief,” and again the belief must be such as can be articulated. Mere suspicion might also serve the purpose of one who would advance a discriminatory pretext for refusing to notarize, and this *Code* will neither enable nor condone such misconduct. Of course, the Notary should explain the belief to the principal at the time the notarization is refused and in writing in the journal entry for the refused notarization. (See Standard VII-A-2.)

The other change in language was to expand “transaction” (in the 1998 *Code*) to “transaction or document.” It was thought that the expanded phrase was more appropriate, for it avoids possible technical and narrow readings or interpretations of the Standard which would unduly limit its application. In addition, there could be confusion, real or pretext, about whether the Notary notarizes the “transaction,” or whether the Notary has authority to refuse to notarize the paper or electronic document because the underlying transaction is unlawful or improper. It should be noted that this Standard does not authorize Notaries to become document police or read the full contents of documents which they notarize. Instead, it is understood that in making the determination about possible unlawful or improper purpose of the transaction or document, the Notary should exercise the same reasonable care as other similarly situated Notaries. (See Guiding Principle V and Standard V-A-1 and accompanying Commentary.)

The Illustration presents the case of a principal presenting an ID that is apparently altered or falsified. As the Resolution rightly points out, the reasonable conclusion is that the principal is an imposter, and the only reason for an imposter to act is to accomplish an unlawful or improper purpose. Thus, the Notary must refuse to notarize.

**1-A-4: Discriminatory Refusal Improper.** The *Code* takes the position that the Notary cannot use personal bias or prejudice as the basis for refusing to notarize. This Standard appeared in almost identical language in the 1998 *Code* as Standard I-A-3 under the caption “Undue Cause for Refusal.” Only two changes in terminology have been made. “Age” in the 1998 *Code* was restated to be “advanced age” in the 2020 Standard, because Notaries may have due cause for refusing to notarize for some minors who are too young to have the mental competence or genuine willingness to obtain notarizations. “Disability” in the 1998 *Code* was modified to read “physical disability” in the 2020 Standard. A mentally competent individual has a right to execute, or have a surrogate or proxy execute, his or her signature and obtain a notarization of it (provided the other usual requirements for a notarization have been satisfied). (See Standard III-D-2 and accompanying Commentary.) Thus, a Notary will have due cause for refusing to notarize for a principal who is not mentally competent at the time of the requested notarial act. (See Standard III-C-2 and accompanying Commentary.)

The Standard is written to be as expansive as possible in identifying potential biases. Of particular note is the proscription against using statements made in, or the purposes of, an otherwise lawful document as the basis for refusing to provide notarial services. Public officials such as Notaries cannot refuse to process lawful documents simply because of disagreement with the substance or purposes of those documents.

**1-A-5: Discretionary Refusal.** This Standard is consistent with the position of the Uniform Law Commissioners: “A notarial officer may refuse to perform a notarial act unless refusal is prohibited by law other than this [act]” (RULONA § 8(b), where see accompanying Comment). The broad discretionary sweep of this 2020 *Code* Standard includes the opportunity for Notaries to decline to notarize due to considerations about the financial liability risks associated with certain types of documents or transactions, although comprehensive knowledge of notarial matters and adherence to notarial best practices should minimize such concerns.

The Illustration presents the classic example of a Notary employed by a business entity specifically to notarize the employer’s business documents and who is asked by a member of the public to perform a notarization on the employer’s premises during the Notary’s regular work hours. This very scenario is included in the official Comment to RULONA along with this explanation: “[A] notary public may be an employee whose employer has paid the expenses of obtaining and maintaining the notary public commission. Their understanding may be that the notary public will be available to perform notarial acts as needed by the employer but will not be available to perform them for general members of the public. A notary public under that arrangement may refuse to perform notarial acts for members of the public.” (RULONA § 8, Comment. See also CAL. Gov’t. CODE § 8202.8.) The 2020 *Code*’s Resolution allows the Notary to refuse to notarize. However, the employment arrangement cannot control the Notary’s conduct outside of business hours and away from business premises, which explains why the Resolution mentions the possibility that the Notary may offer “to notarize the individual’s signature after hours and off employment premises.”

**Article B: Fees.** Many states have enacted statutes that set maximum fees which may be charged for notarial services. (See, e.g., Nev. Rev. STAT. ANN. § 240.100.) Also, several states have no statutory maximum fees, so that Notaries may charge fees not to exceed reasonable amounts. (See, e.g., ARK. CODE ANN. § 21-6-309 and § 21-14-308.)

Generally, there is no requirement that a Notary charge a fee at all, nor that the Notary charge the maximum allowable fee for a notarial act. “For performing a notarial act, a Notary may charge the maximum fee specified ..., charge less than the maximum fee, or waive the fee.” (MNA § 6-1(a); see Standard I-B-2.)

Importantly, the fees just referenced are fees for official notarial acts, not associated fees for unofficial expenses and services related to official notarial services — such as reimbursement for the costs of travel (fuel, cab, and rideshare fares), copying and mailing services, and electronic systems or technology. (See Guiding Principle II and Standard II-A-1.)

**1-B-1: Discriminatory Assessment of Fee Improper.** This provision is in keeping with the broad ideals of similarly-worded Standard I-A-4. Personal bias and discrimination should never be used as a basis for a Notary to determine whether to charge a fee for a notarial service, or how much to charge. “A notary shall not discriminatorily condition the fee for a notarial act on the attributes of the principal or requester of fact ...” (MNA § 6-1(b); see also N.C. GEN. STAT. § 10B-30-B; N.M. STAT. ANN. § 14-12A-16.)

The Illustration focuses on an example in which the document to be notarized involves a ballot initiative opposed by the Notary. The Resolution correctly directs the Notary not to base the decision whether to “punish” the principal and charge a fee based on the Notary’s personal opinion about the substance of the ballot petition. This position must prevail because the Notary is not a private citizen when performing official services but is a public servant.

**1-B-2: Reducing or Waiving Fee.** This Standard is intended not only to prohibit improper or unlawful discriminatory charging or waiving of Notary fees, but also to permit and even encourage Notaries to waive or reduce fees for good faith charitable or humanitarian reasons. “[A] notary may waive or reduce fees for humanitarian or charitable reasons.” (MNA § 6-1(b).) Notaries might reduce or waive fees as noted in the Resolution to the Illustration for students, the homeless, persons with physical disabilities, low-income individuals, prisoners, hospital and hospice patients, schoolteachers, military service personnel, first responders, and many others.

Under Standard I-A-5, and unless a statute of the state in question provides otherwise, a Notary may refuse to notarize due to the non-client or non-customer status of the principal. However, once the Notary has determined to perform a notarization, the Notary may not discriminate based on the non-client or non-customer status of the principal about whether to charge a notarial fee or how much to charge.

**Article C: Dignity and Professionalism of Office.** This Article complements the fundamental professional obligation of the Notary as a public servant to act with caution, diligence, and professionalism. Indeed, the very first purpose of the MNA is “to promote, serve, and protect the public interest.” (MNA § 1-2(1); see also N.C. GEN. STAT. § 10B-2-(1).)

**1-C-1: Conduct of Public Officer.** This Standard appeared in basically the same language in the 1998 *Code*, with only the emphasis added here regarding the “solemnity and importance” of the office. This Standard is consistent with the ASN resolve of each Notary “[t]o maintain a professional manner suitable to the office I hold.” (RCOE Point 2.) Standard I-C-1 intends to regulate the Notary’s official conduct from application to become a Notary, advertising of services (see Standard I-D-1), conduct when performing notarizations, cooperation with any investigation of notarial performance, eventual retirement or resignation from office, and post-resignation disposition of the official seal and preservation and safeguarding of the Notary journal.

Notaries are obligated to comport themselves in a professional manner. Because Notaries often play an essential role in notarizing signatures on documents, it is imperative that Notaries understand the actions which tend to denigrate the office may ultimately erode public confidence in Notaries Public and impact the efficacy of a document or transaction.

The Illustration draws attention to the cavalier attitude towards taking and making oral oaths and affirmations as part of the notarial acts of jurat or verification on oath or affirmation. The Resolution rightly emphasizes the solemn nature of that essential step, and every step in the notarization process should be similarly treated.

**Article D: Advertising and Endorsement.** The *Code* does not disapprove of Notary advertisements, but frowns upon those that are not done in a professional and tasteful manner. As a public official, the Notary should not resort to “hucksterism” in an effort to generate notarial business. Appropriately, the Notary has been directed by ASN “[t]o always conduct myself and perform my duties in a manner which will bring credit to myself, my office and the [American Society of Notaries]” (RCOE, Point 12).

**1-D-1: Misrepresentation Improper.** The nearly identical Standard appeared in the 1998 *Code* as Standard I-D-2. Since Notaries are empowered to perform only specified notarial acts, misrepresenting those powers constitutes a serious breach of one's professional obligations. It may constitute criminal misconduct, the unauthorized practice of law, and grounds for administrative sanctions by the commissioning official. "A notary public may not engage in false or deceptive advertising." (RULONA § 25(b); see also MINN. STAT. ANN. § 358.72 Subd. 2.) "A notary shall not claim to have powers, qualifications, rights, or privileges that the office of notary does not provide ..." (MNA § 5-14(a); see also GA. CODE ANN. § 45-17-8.2; MASS. GEN. LAWS ANN. ch. 222, § 16(j); NEB. REV. STAT. § 64-105.03(4).)

The Illustration and Resolution focus upon the misuse of the title Notary Public in a foreign language. In some parts of the world, the Spanish notarial title suggests that the Notary is an attorney having far greater authority than the typical U.S. Notary. Thus, to avoid possible misunderstanding, the terminology "Notario" and "Notario Publico" must not be used (outside of Puerto Rico). A Notary may not use the term "Notario Publico" or any equivalent non-English term in any business card, advertisement, notice, or sign. (See, e.g., OHIO REV. CODE ANN. § 147.142(B)(5); see also N.J. STAT. ANN. § 52:7-11.b. *But* see WASH. REV. CODE ANN. § 19.154.060(3) (a) (exempting persons who hold an active license to practice law from representing themselves as a Notario Publico).)

**1-D-2: Endorsement Improper.** The nearly identical Standard appeared in the 1998 *Code* as I-D-3. The substance of the Standard has a basis in state law. (See UTAH CODE ANN. § 46-1-10; WASH. ADMIN. CODE § 308-30-230.) To the extent that an endorsement might result in financial gain to the Notary or others, ASN directs each Notary to resolve "[t]o not use the office of Notary Public as a means of financial gain, for myself or others, in any other business or profession." (RCOE Point 10.) The only change to the 2020 *Code* provision is to add the word "knowingly" to the passage disallowing the use of the Notary's seal or title for an endorsement. This important addition was in recognition of the fact that in some instances, the Notary's seal or title will be used without the expectation or knowledge of the Notary. In such circumstances, the Notary should not be accountable for the misuse of the seal or title as part of an endorsement.

The Illustration and Resolution present the case of a Notary who is approached to knowingly endorse a pain cream product. The Notary must decline to allow the Notary's name, title, and seal to be used on the fact sheet for the product. If on the other hand, the cream distributor had simply obtained a notarization of a document and used the Notary's seal on the fact sheet without informing the Notary, the Notary could not be faulted.

**Article E: Ability and Availability to Serve.** Even in recent times, the subject of possible impairment of the Notary is not known to be addressed by state statutes and regulations. Nor do the model or uniform laws consider the matter. (See, generally, MNA; RULONA; MENA.) The subject, however, has been thoughtfully considered. (See Van Alstyne 81-86; R. Jason Richards, *Disabilities and Practice*, 32 JMLR 1033-1064 (1999).) With appropriate accommodation, a Notary having some physical disability should be able to provide notarial services in many circumstances but must exercise judgment and discretion in this matter.

**1-E-1: Physical Impairment.** This Standard in the 1998 *Code* referred to the "permanent" impairment of the Notary and the resulting need to "resign from office," whereas the present Standard provides that at most the affected Notary must decline to notarize in a particular situation if the Notary is unable to perform notarial duties. Importantly, as already suggested, it should be emphasized that most physical impairments would not prevent a Notary from being able to carry out notarial duties. And, consistent with the 2020 *Code*'s status as a code of professional responsibility, the obligation is placed upon the Notary to make the assessment of any impairment and proceed accordingly.

The Illustration and Resolution represent one of the few circumstances in which an extreme physical disability may cause the Notary to decline to notarize, if the Notary's disability cannot be sufficiently accommodated under the circumstances to enable the Notary to perform notarial functions. (See, e.g., FLA. STAT. ANN. § 117.107(2) (allowing a Notary to use a facsimile signature stamp if the Notary has a physical disability and has first submitted notice to the Florida Department of State).) The Notary must be able to make the discretionary judgments required under applicable state Notary law — such as identification of the principal, assessments of the principal's mental competence and willingness to sign, and so forth.

**1-E-2: Lack of Knowledge.** This Standard, and its Illustration appeared in similar language in the 1998 *Code*. Notaries should generally be familiar with common notarial powers (taking acknowledgments, executing jurats and verifications on oath or affirmation) and be able to perform them.

There are, however, several antiquated and nearly extinct notarial acts, such as the performance of banking and marine protests, taking of depositions, and use of subscribing witnesses to appear for absent principals, which still exist in some statutes. Notaries (especially Notaries who are not also lawyers) in states which still retain those antiquated statutory Notary powers will likely never have performed them. In addition, there may be certain notarial functions allowed by state law — such as performing wedding ceremonies, inventorying

abandoned bank safe deposit boxes, certifying odometer readings, and issuing subpoenas — with which Notaries may have no experience or familiarity.

A Notary who does not understand the requisite technicalities of a specific notarial service or is uncertain about proceeding under the circumstances is directed not to act. This discretionary refusal is expressly allowed by Standard I-A-5.

**1-E-3: Change of Information.** This Standard and its Illustration and Resolution appeared in the 1998 *Code* with only a minor deviation. The earlier Standard referred to a change affecting the Notary's availability to the public or "the repute of the Notary as a person of integrity," whereas the present Standard refers to a change affecting the Notary's qualifications, availability, or "the character of the Notary."

A Notary who moves from the state in which he or she is commissioned is generally obligated to resign the commission, as shown by the Illustration and its Resolution. (See ARK. CODE ANN. § 21-14-203(b)(1); FLA. STAT. ANN. § 117.01(5)(b).) However, it should be noted that some states allow non-resident individuals to be commissioned as Notaries or if commissioned elsewhere to perform notarial services (such as between certain neighboring states). (See, *generally*, Malcolm Morris, *Nomadic Notaries*, 32 JMLR 985-1002 (1999).) Notaries Public are obliged to keep commissioning officials or agencies informed of relevant changes of status, because their commission or license affects their jurisdictional authority. (See, e.g., MNA §§ 12-1, 12-2, 12-3.)

The changes noted in the Standard are examples which trigger the need for the Notary to report a change to the commissioning agency and are not intended to be exhaustive. The Notary should err on the side of reporting more than required, rather than less, when a relevant change has occurred. Furthermore, as Notaries are public officials, they have an obligation to self-report misconduct to appropriate entities, including commissioning officials. (See Standard X-B-1 and accompanying Commentary.)

# Guiding Principle II

**The Notary shall act as an impartial witness and not profit or gain, nor attempt to profit or gain, from a notarial act, apart from the fee for the act and any charge associated with the fee, if applicable.**

## STANDARDS OF PROFESSIONAL PRACTICE

### Article A: Proper and Improper Gain

#### II-A-1: Associated Charges

The Notary may charge a fee for services associated with the performance of a notarial act that complies with a statute, regulation, or official guideline, or that is reasonable in the absence of a statute, regulation, or official guideline.

**Illustration:** The Notary is asked to certify copies of an entry in the Notary's journal and mail the certified copies to the requester and each of the requester's three siblings.

**Resolution:** The Notary charges the standard statutory fee for certifying four copies of the requested journal entry. In addition, the Notary charges an additional reasonable fee for providing the photocopies and for mailing and handling costs.

#### II-A-2: Actual or Potential Gain Improper

The Notary shall decline to perform a notarial act in any transaction that would result, directly or indirectly, in any actual or potential gain or advantage for the Notary, financial or otherwise, apart from the fee for performing the notarial act allowed by law and any charge associated with the fee.

**Illustration:** The Notary is employed by a company that sells machinery and related maintenance contracts. The Notary's receipt of a sales commission depends on the return of a signed and notarized maintenance contract. The Notary wonders whether she should notarize customers' signatures on the contracts she sells, since the notarization requirement is only a "formality."

Resolution: The Notary decides not to notarize while profiting financially from a transaction and asks an uninvolved colleague who is a Notary to perform the notarization. The roles of impartial witness and financially-interested salesperson are incompatible.

### **II-A-3: Gift, Gratuity, or Donation Improper**

The Notary shall not accept any gift, gratuity, or donation relating to the performance of a notarial act from, or on behalf of, any past, present, or potential future customers.

**Illustration:** A principal for whom the Notary performs frequent notarizations sent \$100 to the Notary with a note enclosed stating that “in appreciation for your notarial service the \$100 is for your favorite charity.” The Notary considers whether to send the donation to the local disaster relief fund.

Resolution: The Notary declines and returns the donation.

### **II-A-4: Commission or Fee Improper**

The Notary shall not perform a notarial act for a client or customer who will pay the Notary a commission or fee for the resulting transaction, apart from the fee for performing the notarial act and any charge associated with the fee.

**Illustration:** The Notary is a mortgage broker preparing mortgage refinance documents for a client who will pay a fee for the task. Several documents require signatures to be notarized. Since the Notary does not employ staff, there will be no assistant on hand to notarize the client’s signatures on the mortgage documents. The Notary ponders whether to disqualify herself from performing the notarizations.

Resolution: The Notary decides not to notarize, lest it be alleged that a financial interest in the mortgage finance transaction resulted in partiality or undue influence. Instead, the Notary arranges to have an impartial Notary present to notarize the client’s signatures on the documents.

### **II-A-5: Employee Remuneration Improper**

The Notary who is an employee shall not accept a commission, bonus, or other consideration from the Notary’s employer as a result of performing a notarial act other than the Notary’s regular salary or hourly wage, the notarial fee, and any charge associated with the fee.

**Illustration:** At the end of the year, the Notary receives an extra bonus check from the Notary’s employer that is awarded to all employees, with a notation in the memo section that reads, “in appreciation for everyone’s hard work.”

Resolution: The Notary accepts the bonus check from the employer, since the bonus was a standard company bonus awarded to all employees and was not tied specifically to official notarial services.

## Article B: Other Conflicts of Interest

### II-B-1: Notary's Signature a Conflict

The Notary shall not perform a notarial act on a document that the Notary has signed as an interested party.

**Illustration:** The Notary is about to personally sign an insurance affidavit of loss for a fire in the Notary's house that must be sworn or affirmed before a Notary. At the end of the document is a notarial certificate with a space for a Notary's signature and seal.

Resolution: The Notary finds another Notary to notarize the signature. There is no greater breach of the Notary's role as impartial witness than notarizing one's own signature and administering one's own oath or affirmation.

### II-B-2: Notary's Co-signature a Conflict

The Notary shall not perform a notarial act on a document that the Notary has co-signed.

**Illustration:** The Notary and the Notary's business partner need to have their signatures notarized on a document. Aware that notarizing one's own signature is improper, the Notary ponders whether to notarize the partner's signature.

Resolution: The Notary does not notarize the partner's signature because, as a cosigner, the Notary has a personal interest in the document that presents a conflict of interest. The two partners arrange to have an uninvolved Notary notarize the two signatures.

### II-B-3: Document Naming Notary a Conflict

The Notary shall not perform a notarial act on a document naming the Notary as an interested party.

**Illustration:** The Notary is asked by a friend to be the named agent on a medical directive giving the Notary authority to make health care decisions for the friend. The friend then asks the Notary to notarize the friend's signature on the directive.

Resolution: The Notary declines to notarize because being named in the document as the individual who is thereby given certain life-and-death decision-making powers creates a conflict of interest.

### II-B-4: Personal Document a Conflict

The Notary shall not perform a notarial act on a document that will affect or involve the Notary's personal affairs.

**Illustration:** The Notary is informed by the Notary's roommate that the roommate will receive the gift of a condominium from a grandmother. Promising that the Notary may

live in one of the bedrooms rent-free, the roommate asks the Notary to notarize the grandmother's signature on the gift-deed.

*Resolution:* The Notary declines to notarize because the Notary will personally benefit from the transaction. Such a beneficial financial impact is a conflict of interest. The roommate should arrange to have an uninvolved Notary perform the notarization.

## **II-B-5: Document of Relative a Conflict**

The Notary shall not perform a notarial act on a document in which a known family member related by blood, marriage, or adoption in any degree of lineage is an interested party.

**Illustration:** The Notary is asked to notarize her cousin's signature on a document that specifies desired medical treatment in the event the cousin becomes unable to make such decisions. The Notary is not named in the document.

*Resolution:* The Notary declines to notarize and suggests that the cousin arrange to have a Notary who is unrelated and disinterested notarize his signature on the document.

## **Article C: Appearance of Partiality**

### **II-C-1: Compromise of Impartiality**

The Notary shall decline to perform a notarial act in any transaction that would impugn or compromise, or create the appearance of impugning or compromising, the Notary's impartiality.

**Illustration:** The Notary is asked to perform a notarization on a document that will create a trust fund to benefit the Notary's children. The guardian of the Notary's children, whose signature must be notarized, will endow the trust with her own funds. The Notary is not named in the document.

*Resolution:* The Notary declines to notarize in a transaction that will benefit the Notary's own children. The Notary may suggest that the guardian arrange to have an unrelated and disinterested Notary perform the notarization.

### **II-C-2: Exertion of Influence Improper**

The Notary shall not attempt to influence a person to sign or not sign, or to act or not act, in any transaction requiring a notarial act that is to be performed by the Notary.

**Illustration:** The Notary is a signing agent who oversees signings for home purchase and refinance transactions. At a loan signing appointment, the Notary is asked by a borrower if the interest rate on the loan is competitive. Aware of a loan signing appointment earlier in the day in which the interest rate was lower than the borrower's interest rate, the Notary considers whether to urge the borrower to reconsider the decision to sign the mortgage.



**Resolution:** The Notary does not offer an opinion, and instead advises the borrower to have the question answered by his loan officer or mortgage broker. It is not the role of the impartial Notary to argue for or against or to provide advice concerning participation in a lawful transaction.

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## COMMENTARY

**General.** This Guiding Principle is fundamentally about the Notary's obligation to avoid actual and apparent conflicts of interest. "A notary is disqualified from performing a notarial act if the notary: ... will receive as a direct or indirect result any commission, fee, advantage, right, title, interest, cash, property, or other consideration exceeding in value the (notarial) fees ..." (1 MISS. ADMIN. CODE Pt. 5 R. 050.5.2. See also ALASKA STAT. § 44.50.062(6); MASS. GEN. LAWS ANN. ch. 222, § 16(a)(v) and (vi); NEV. REV. STAT. ANN. § 240.065.1; N.C. GEN. STAT. § 10B-20(c)(5) and (6); S.C. CODE ANN. § 26-1-90(C)(4).)

The reason is the concern that an actual or apparent conflict of interest may corrupt or tempt the Notary away from the impartial role demanded of a public official and diligent adherence to proper notarial procedures. To assure compliance and to guide the Notary along the high road of professional practice, the various Standards when taken together broadly disqualify the Notary from acting where either an actual or apparent conflict exists.

The ASN set out an ethical responsibility comparable to this Principle, namely, that a Notary should "not use the office of Notary Public as a means of financial gain, for myself or others, in any other business or profession." (RCOE Point 10.)

The drafters added the language, "apart from the fee for the act *and any charge associated with the fee, if applicable*" to Guiding Principle II in this 2020 Code for the reason that some state statutes allow the Notary to charge a fee for travel (see MONT. CODE ANN. § 1-5-626(2); UTAH CODE ANN. § 46-1-12(2)) or for incidental services such as making photocopies (see CAL. GOV'T CODE § 8206(c)). The charging of incidental fees does not constitute a conflict of interest.

**Article A: Proper and Improper Gain.** The message is clear. The only way to ensure impartiality is to make sure the Notary would have no reason whatsoever to provide services, other than to fulfill the obligations as a public officer. By failing to follow this practice, a Notary will unnecessarily create actual or perceived conflicts of interest and breaches of professional conduct. "A notary has an absolute duty by law to act impartially when performing notarial duties." (Van Alstyne 55. See also RCOE Point 10.)

**II-A-1: Associated Charges.** This Standard is new to the 2020 Code. Its inclusion clarifies the phrase "and any charge associated with the fee, if applicable" in the language of Guiding Principle II. (See Commentary above under "General.")

The Illustration and Resolution presents a situation in which the Notary is requested to make certified copies and mail them to several individuals. The Illustration mentions the statutory fee for certifying a copy of a journal entry and the "associated fees" for the costs of making and mailing the photocopies to the recipients. (See CODE OF MD. REG. § 01.02.08.03, which authorizes a Notary to charge \$2.00 for certifying a copy of an entry in the Notary's register and \$1.00 for a photocopy. Under Maryland law, the allowed fee for making a photocopy of an entry in the register qualifies under the Standard as an associated fee that is set by law; the mailing costs, however, are not directly provided in the rule.) Thus, under the Standard, in the absence of law the Notary is to charge a reasonable fee for the associated service.

**II-A-2: Actual or Potential Gain Improper.** This Standard appeared in the 1998 Code in nearly identical language, except for the addition in the 2020 Standard of "any charge associated with the notarial fee" (as already discussed above). Certainly, there may be settings where "the issue becomes more complex when the notary's interest or benefit is indirect and not immediate." (Van Alstyne 81.) Regardless of any countervailing view, the Code adopts the position that professional concerns dictate a Notary take all reasonable steps to avoid a conflict of interest, even if the action at issue may otherwise be legal. (See ARIZ. REV. STAT. ANN. § 41-328.C; NEV. REV. STAT. ANN. § 240.065.1(b); S.C. CODE ANN. § 26-1-90(C)(4).)

The Illustration presents squarely the conflicted position occupied by a Notary who would receive a commission for a transaction for which the Notary had notarized the sole document.

**II-A-3: Gift, Gratuity, or Donation Improper.** This broad Standard is new and is not directly addressed in any state Notary statutes. This Standard is implicit in the various announcements of prohibitions against financial or other gain or benefit for Notaries. (See statutes listed in the Commentary under "General" above.)

It may be thought unreasonable for the Standard's prohibition to apply to potential future customers of notarial services, because it may not be possible for a Notary to know if an individual will one day be a customer. The drafters intended for the restriction to apply only to "potential" future customers. That is, there must be some indication or evidence to suggest that an individual will become a customer of notarial services for the Standard to apply. On the other hand, were a Notary to accept a gift from an individual who later requested a notarization, there could be the expectation of a *quid pro quo* that could result in a conflict of interest to the Notary. As is the case with every Standard in this *Code*, the Notary should exercise reasonable care and discretion in accepting a gift, gratuity, or donation.

The Illustration was intentionally selected to emphasize the indirect benefit to the Notary of a donation to the Notary's favorite charity. The Resolution directs the Notary to refuse the gift. This action is especially appropriate in contrast to the situation in which a check or property is tendered to the Notary for the Notary's direct personal use and benefit. Even when the Notary could not directly and personally use the money or property gifted, the Notary would benefit from the goodwill resulting from such a charitable donation to a worthy cause. And, therein lies the actual or apparent conflict that is created.

**II-A-4: Commission or Fee Improper.** This Standard is similar to Standard II-A-2 but is intended to apply to Notaries who are also professionals in fields in which they draft, prepare, or review documents for clients, and who therefore may be entitled to charge a fee or commission for the service. Examples of professionals in such fields may include accountants, bankers, financial planners, lawyers, mortgage brokers, realtors, and others. In particular, this Standard would apply to Notaries who are named in documents as the drafters, preparers, or reviewers of the documents.

According to ASN RCOE Point 7, a Notary should resolve to "never perform any notarial act ... from which I stand to benefit." One who, for a commission or fee, drafts, prepares, or reviews documents for a client acts as the agent of a client and advocates for the client's interests. It is impossible for this agent to act impartially as the Notary at the same time. The gravamen of the problem is that there is a great likelihood the Notary will be more interested in the transaction being completed than in following proper notarial procedure. This is so because the commission or fee will almost always be significantly greater than the notarial fee, and would be more likely to tempt the drafter, preparer, or reviewer away from impartiality.

This Standard makes no exception for Notaries who as attorneys will receive legal fees for the drafting, preparation, or review of documents that are then notarized. This is perhaps the most controversial conflict of interest scenario. Although some statutes expressly authorize attorneys to notarize documents they have drafted, prepared, or reviewed for their own clients (see RULONA § 4(b) and accompanying Comment; NEV. REV. STAT. ANN. § 240.065.2; S.C. CODE ANN. § 26-1-180), this Standard is to the contrary and follows the lead of MNA § 5-5(a)(4): "A notary is disqualified from performing a notarial act if the notary: ... is an attorney who has prepared, explained, or recommended to the principal the document that is to be notarized."

The Illustration presents a mortgage broker who will receive a fee for the preparation of documents, including documents that require notarization. It is, therefore, different than the Illustration to Standard II-A-2, in which the Notary who is a salesperson will receive a commission for the transaction (rather than specifically for the preparation of documents).

**II-A-5: Employee Remuneration Improper.** The substance of this Standard appeared in the 1998 *Code* as Standard II-E-1. The sensible and reasonable point of this Standard is that the mere existence of a relationship — in this case an employer-employee relationship — between a Notary and another person arising in connection with the Notary's employment does not create a conflicted situation unless the Notary will gain "a commission, bonus, or other consideration as a result of the notarial act" (other than the Notary fee and any associated charge). (See, *generally*, MNA § 5-5.)

This Standard does not trump the other Standards under this Guiding Principle. For instance, if a Notary is employed by a company and is named in a company document, the Notary cannot notarize that document. (See Standard II-B-3.)

The Illustration is intended to emphasize the need for Notaries to remain vigilant to the risk of conflicts of interest in employment settings which may arise from time to time. In this example, the Notary-employee's bonus was not tied directly to the performance of notarial services; had it been, the Notary would have a clear conflict of interest in accepting it. Because the bonus was awarded to all employees, there is no conflict.

**Article B: Other Conflicts of Interest.** Article A specifically considered conflicts of interest that resulted in financial gain. Article B considers other conflict of interest situations that may or may not result in financial gain. Take, for example, the situation in which a Notary notarizes a document naming the Notary as the named agent (see Standard II-B-3). While the conflict is not necessarily financial, it is no less real. The Standards set out within this Article identify some of these conflicted situations which Notaries often confront.

**II-B-1: Notary's Signature a Conflict.** The most fundamental of all professional notarial obligations is to refrain from notarizing for oneself. It is universally endorsed. (See ARIZ. REV. STAT. ANN. § 41-328.B; CAL. GOV'T CODE § 8224.1; FLA. STAT. ANN. § 117.05(1); IDAHO CODE § 51-104(2); 1 MISS. ADMIN. CODE Pt. 5, R. 050.5.2; NEV. REV. STAT. ANN. § 240.065.1(a); S.C. CODE ANN. § 26-1-90(C)(3).) The ASN directs the Notary to resolve "[t]o never perform any notarial act in which I am a party in interest ..." (RCOE Point 7).

The Illustration and its Resolution make the point of the Standard with a case involving an affidavit, which requires not only the principal to sign the document in front of the Notary, but also the Notary to administer an oral oath or affirmation to the principal. Of course, a Notary can neither notarize his or her own signature nor administer an oral oath or affirmation to himself or herself.

**II-B-2: Notary's Co-signature a Conflict.** This Standard is intended to supplement the prohibition of Standard II-B-1 by extending the restriction to documents cosigned by the Notary — even where the Notary actually notarizes only someone else's signature. Moreover, this restriction would result anyway from the application of Standard II-B-3, which prohibits a Notary from performing a notarial act on "a document naming the Notary as an interested party," and the application of Standard II-B-4, because cosigning a document creates a personal interest in the subject matter of the document which results in the kind of conflict that Notaries must avoid.

The Resolution to the Illustration points out that a cosigner "has a personal interest in the document" that is cosigned or, in the language of Standard II-B-4, the Notary must not notarize "on a document that will affect or involve the Notary's personal affairs."

**II-B-3: Document Naming Notary a Conflict.** The application of the disqualification to notarize due to the Notary's name being in the document is without controversy, although it has been stated in a different way. "A notary is disqualified from performing a notarial act if the notary ... is a party to or named in the document that is to be notarized ..." (1 MISS. ADMIN. CODE Pt. 5, R. 050.5.2; see *also* RULONA § 4(b)). The restriction against notarizing on a document bearing the name of a relative of the Notary is not as generally announced. (See W. VA. CODE § 39-4-4(b); see *also* Standard II-B-5.) This Standard is justified on the theory that its restrictions avoid circumstances which may compromise the Notary's ability to act impartially. (See ARIZ. REV. STAT. ANN. § 41-328.C; 5 ILL. COMP. STAT. § 312/6-104(b); NEV. REV. STAT. ANN. § 240.065.1(a); S.C. CODE ANN. § 26-1-90(C)(3).)

The Illustration presents a hypothetical case which would result in a conflicted situation for the Notary, who would be granted a health care power of attorney due to the operation of the document to be notarized. And, the Resolution correctly directs the Notary to refrain from notarizing when the document would give the Notary a personal interest.

**II-B-4: Personal Document a Conflict.** This broadly worded Standard is intended to apply to circumstances in which the Notary is not a principal of, is not a party to, or is not named in, the document to be notarized, but where the "document ... will affect or involve the Notary's personal affairs." Such a situation is possible, as demonstrated by the Illustration. The unequivocal directive of the Resolution is to decline to notarize due to the direct financial benefit that would accrue to the Notary from the document. (See *also* Standard II-C-1.)

**II-B-5: Document of Relative a Conflict.** This Standard replaces the much narrower 1998 Code provision. In some states, there are no statutory disqualifications of Notaries to perform notarial acts for relatives. In some states, statute designates the close family members for whom Notaries must not notarize. (See FLA. STAT. ANN. § 117.107(11); ME. REV. STAT. ANN. tit. 4, § 954-A; MASS. GEN. LAWS ANN. ch. 222, § 16(a)(vii); WASH. REV. CODE ANN. § 42.45.020(2).) (For the argument against restrictions being placed upon Notaries notarizing for relatives, see Van Alstyne 252-253.)

It was thought that, because family relationships can bond people so closely, and may create conflicts of interest, Notaries should not perform official services for any of their known family members. (See MICH. STAT. ANN. § 55.291(8); NEB. REV. STAT. § 64-105.01(1); NEV. REV. STAT. ANN. § 240.065.1(c) and (d).) Under this Standard, if a Notary happens to notarize for a principal without realizing the principal is a family member, the Standard will not have been violated. (See, *generally*, Closen & Orsinger, *Family Ties that Bind and Disqualify: Toward the Elimination of Family-Based Conflicts of Interest in the Provision of Notarial Services*, 36 VALPARAISO LAW REV. 505-627 (2002).) To emphasize the breadth of this Standard, the Illustration presents the hypothetical example of a Notary's cousin who requests the Notary to notarize the cousin's document. The Notary declines due to the known family relationship with the cousin.

**Article C: Appearance of Partiality.** The subject of conflicts of interest is not science, but rather is a continuum of gradations of interests and influences. The line between actual and apparent conflicts is unclear. This Code directs Notaries always to take the high road of caution, prudence, and integrity. Notaries, like doctors, should always strive to do no harm to principals and their documents — such as may result if even an appearance of partiality is raised.

**II-C-1: Compromise of Impartiality.** This Standard is a catch-all provision that goes beyond the restriction imposed by Standard II-B-2, which applies to settings wherein the Notary's name appears in the document to be notarized. This Standard more broadly prohibits a Notary from notarizing when the Notary knows or should know of the potential interest in the transaction that may impact impartiality.

The Illustration effectively makes the argument for this Standard. Though the Notary is not named in the document, the Resolution points out that the transaction will financially benefit the Notary's children. Hence, the Notary's impartiality cannot be assured, and the Notary must decline to notarize. This Standard would also apply if a request for notarization came from a very close friend of the Notary — a close enough friend to cause the Notary to question whether she or he should serve as Notary for the friend.

**II-C-2: Exertion of Influence Improper.** The Notary should not become an advisor to the principal nor urge the principal to sign or not sign a document. (See ALASKA STAT. § 44.50.062(2); N.M. STAT. ANN. § 14-12A-10.A); NEV. REV. STAT. ANN. § 240.075.1.) The Notary should either perform a lawful notarization requested by a principal or refuse to perform a notarization which has been requested but is incomplete, false, deceptive, fraudulent, or unlawful. (See IOWA CODE ANN. § 9B.8(2); MICH. STAT. ANN. § 55.285(8); see *also* Guiding Principle IV.)

If the Notary were permitted to attempt to influence a principal to execute or not to execute a document, the Notary would become an advocate and would no longer be impartial. Moreover, such advocacy would sometimes involve advice or counsel that would constitute the unauthorized practice of law. (See Guiding Principle V; N.D. CENT. CODE § 44-06.1-23; N.M. STAT. ANN. § 14-12A-15.B.)

The Illustration presents the situation in which a Notary may be drawn into a discussion of the merits of the document to be notarized. The Notary is best served by politely declining to answer and suggesting the principal may wish to consult another source, in this case the borrower's loan officer or mortgage broker. The Notary must not answer subjective questions or become an advisor or advocate.

# Guiding Principle III

**The Notary shall require the appearance of each principal and witness identifying a principal, if any, in order to screen each for identity, willingness, and mental competence.**

## STANDARDS OF PROFESSIONAL PRACTICE

### Article A: Personal Appearance

#### III-A-1: Physical Appearance

The Notary shall require each principal and witness identifying a principal, if any, to be present physically before the Notary at the time of the notarization, unless law in the Notary's state of commissioning expressly authorizes otherwise.

**Illustration:** A client has just signed and mailed several documents for the Notary to notarize. On a phone call the client says, "You know my signature, so there shouldn't be any problem with you notarizing my documents without me being there."

**Resolution:** The Notary declines to perform a notarization over the phone without the principal appearing before the Notary, since it would be a clear violation of the law and this *Notary Public Code of Professional Responsibility*.

#### III-A-2: Remote Online Notarizations

The Notary shall only perform notarizations in which the principal, witness identifying the principal, if any, and Notary appear before each other using audio-visual technology if law in the Notary's state of commissioning expressly authorizes Notaries to do so.

**Illustration:** A friend who lives in another state asks the Notary to notarize online the friend's signature on a power of attorney allowing an agent to convey the friend's property. The state where the Notary is commissioned has not yet enacted a statute authorizing Notaries to perform remote online notarizations.

**Resolution:** The Notary refuses to notarize the signature.

## Article B: Identification

### III-B-1: High Degree of Care

The Notary shall exercise a high degree of care in identifying each principal and witness identifying a principal, if any, using means allowed or prescribed by law in the state where the Notary is commissioned.

**Illustration:** The Notary is approached by a friend and an individual identified by the friend as a business associate. The friend requests notarization of the associate's signature on a document. When the Notary asks the associate for government-issued identification in compliance with state law, the friend objects.

*Resolution:* The Notary continues to insist either that the associate produce a government-issued credential or that the friend be formally sworn in as a witness vouching for the associate's identity, which are means of identification authorized by law in the state where the Notary is commissioned.

### III-B-2: Personal Knowledge

The Notary may use personal knowledge to identify a principal or witness identifying a principal, if any, only if the Notary has had substantial and meaningful interactions with the individual over an extended period of time sufficient to dispel any reasonable doubt that the individual has the identity claimed and law in the state where the Notary is commissioned permits the use of personal knowledge.

**Illustration:** Two months after starting a new job, the Notary has been asked to notarize the signature of the company president on a patent application. The Notary, who has only been introduced to the president, worries about asking her to produce an identification credential for the notarization.

*Resolution:* The Notary informs the president in advance that it will be necessary to provide a valid government-issued identification credential for the notarizations, because the Notary cannot honestly claim to personally know her.

## Article C: Willingness and Mental Competence

### III-C-1: Free and Voluntary Act Essential

The Notary shall not perform a notarial act if the Notary has a reasonable belief which can be articulated that the principal or witness identifying the principal, if any, is being coerced, threatened, intimidated, or otherwise unduly influenced into acting against his or her will or interest.

**Illustration:** The Notary is called to a hospital room to notarize a patient's signature on several documents. The patient appears disinterested in the documents and expresses a desire to be allowed to sign the documents later. Also present is the patient's spouse, who insists that the patient immediately sign the documents. The spouse places a pen in

the patient's hand and moves it to the signature space on one of the documents, but the patient makes no effort to sign.

*Resolution:* The Notary respects the patient's wish to defer the notarizations to a later time because the Notary has and can articulate a reasonable belief that the patient was unwilling at the moment to sign the documents.

### **III-C-2: Mental Competence Essential**

The Notary shall not perform a notarial act if the Notary has a reasonable belief which can be articulated that the principal or witness identifying the principal, if any, does not have the mental capacity to execute the notarial act.

**Illustration:** The Notary is requested to notarize an elderly individual's signatures on several documents. The Notary is introduced to the would-be principal by the person's relative. During conversation between the Notary and the elderly principal, the elderly person appears to be confused. The relative urges the Notary to act.

*Resolution:* The Notary refuses the request to notarize, because the Notary has and can articulate a reasonable belief that the elderly person's conduct indicates a strong likelihood that the individual is not at the moment mentally competent.

### **III-C-3: Coherent Communication Essential**

The Notary shall not perform a notarial act if the principal or witness identifying the principal, if any, is unable to communicate coherently with the Notary at any time during the notarization.

**Illustration:** The Notary is called to a nursing home to take the acknowledgment of a bedridden patient, whose friend also is present. The patient is awake and sitting up, with the documents signed and resting on a tray table. The patient's speech is slurred, however, and the individual is not coherently responsive to the Notary's greeting and questions. The friend urges the Notary to notarize.

*Resolution:* The Notary declines to notarize. Without clear and coherent two-way communication with the principal, the Notary cannot be sure of the individual's willingness and mental competence.

### **III-C-4: Direct Communication Essential**

The Notary shall not perform a notarial act if the principal or witness identifying the principal, if any, cannot directly communicate with the Notary in the same language, regardless of the presence of a third-party interpreter or translator, unless authorized by law.

**Illustration:** The Notary is approached by an acquaintance and a principal who does not speak English. The acquaintance says the principal wants to have her signature

notarized on an English-language power of attorney. With no knowledge of the individual's language, the Notary must rely on the acquaintance to communicate. Law in the state where the Notary is commissioned does not authorize the use of third-party translators.

*Resolution:* The Notary declines to notarize the principal's signature, because there can be no certainty of the individual's willingness and mental competence without direct communication. If asked, the Notary may suggest the two seek assistance from a Notary who speaks the individual's language.

## Article D: Individuals with Physical Disabilities

### III-D-1: Reasonable Accommodations

The Notary shall make reasonable accommodations to perform a notarial act for or otherwise interact with a principal or witness identifying a principal, if any, whose physical disability prevents the individual from communicating with the Notary.

**Illustration:** The Notary is asked to take the acknowledgment of a principal. The principal will be identified by a witness who meets all legal requirements but is hearing-impaired.

*Resolution:* The Notary agrees to perform the requested notarization. With the principal and witness present, the Notary writes out instructions for the hearing-impaired witness so that the witness may comply with each requirement of the notarial act.

### III-D-2: Signature by Mark or Proxy

The Notary shall follow all laws in the Notary's state that apply to a principal who signs by mark or third-party whom the principal directs to sign on the principal's behalf.

**Illustration:** The Notary is called to the bedside of a patient to notarize the patient's signature on a power of attorney. Physically ill and weak, the patient is unable to sign the power of attorney. A friend of the principal, who is also present, asks if he may sign the power of attorney for the principal. Law in the state where the Notary is commissioned authorizes a third party to sign on behalf of a principal who is physically unable to sign.

*Resolution:* The Notary allows the friend to sign the patient's signature on the power of attorney after the patient consciously directs the friend to sign. The Notary adds the prescribed statement indicating the signature was made by the third party to the notarial certificate in compliance with state law.

### III-D-3: Applicability of Certain Standards

The Notary shall ensure that any witness to a principal's signature by mark or third party who signs on the principal's behalf complies with Article C of this Guiding Principle.



**Illustration:** The Notary, who is commissioned in a state where the law allows third parties to sign documents on behalf of physically disabled principals, travels to the residence of a principal who is paralyzed and cannot write. Also present is the principal's minor child. The principal intends to direct the child to sign the principal's name on the document, but the child is confused, distracted, and expresses a desire to play.

**Resolution:** The Notary refuses to allow the child to sign the document for the principal due to the child's immaturity and youthful behavior.

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## COMMENTARY

**General.** The basic language of this Guiding Principle appeared in the 1998 *Code*. Two important changes have been made to the 2020 version. First, while the 1998 Principle spoke in terms of “the presence of each signer and oath-taker,” the 2020 Principle requires the “appearance of each principal and witness identifying a principal.” Second, the 1998 Principle directed the Notary to screen principals and oath-takers to “observe that each appears aware of the significance of the transaction requiring a notarial act,” but the 2020 Principle adopts a somewhat different requirement for the Notary to screen principals for “mental competence.” This change reflects the continuing discussion within the Notary community of how to describe the awareness, capacity, understanding, or competence element. (See the Commentary on Standard III-C-2 below.)

Significant additions and modifications have been made in the Articles and Standards which are included within Guiding Principle III. This Principle prescribes appropriate conduct on several interrelated issues that, taken together, address the very essence of notarization.

**Article A: Personal Appearance.** The 1998 *Code* captioned Article A “Physical Presence” since all notarizations performed then were traditional, paper-based notarizations that required the principal and any identifying witness to be physically present before the Notary. The caption of the 2020 *Code* reflects the increasing emergence of remote online notarizations and the expansion of the term “appearance” to include both physical appearances and appearances by means of communication technology. (See RULONA § [14A(b)]; MENA § 2-1.)

The most fundamental of all requirements for a principal who seeks to obtain a notarization is that she or he must personally appear or be present at the time the notarization takes place. This allows the Notary to determine with reasonable certainty the identity, willingness, and mental competence of the principal, complete all other steps for the notarial act that require the principal's presence (for example, completing the journal entry), and ensure the overall security of the notarization. For paper-based notarizations the presence or appearance requirement has traditionally meant the principal must be in close, arm's length proximity, and view of the Notary. (See Charles N. Faerber, *Being There: The Importance of Physical Presence to the Notary*, 31 JMLR 749-776 (1998).)

State laws generally do not explicitly state that identifying witnesses must appear with the principal at the time of notarization. Because, however, an identifying witness must swear or affirm the identity of the principal, the Notary is performing a notarial act when swearing or affirming in a witness. Administration of an oath requires the presence of the oath-taker or affirmant. (See N.M. STAT. ANN. § 14-12A-2.B and J; N.C. GEN. STAT. § 10B-3(2) and (14).)

In a remote online notarization, although the principal and Notary are not together at arm's length in the same location, they are together face-to-face in real time using communication technology. Importantly, all the assessments and steps for the notarial act that require the principal's presence, as well as the security of the notarization, can be accomplished remotely through adherence to prescribed procedures and use of appropriate technology. (See *Challenge of 'Remote Electronic Notarization'*, in Foreword, MENA. See also RULONA § [14A(c)]; MENA §§ 5A-1-5A-7; MONT. CODE ANN. §§ 1-5-603(9), 1-5-615; VA. CODE ANN. §§ 47.1-47.1-30.)

**III-A-1: Physical Appearance.** The caption for this Standard is new. It is the law everywhere that principals must appear physically before the Notary for traditional paper-based and in-person electronic notarizations. (See 5 ILL. COMP. STAT. § 312/6-102(a)-(c); MASS. GEN. LAWS ANN. ch. 222 § 16(a)(1); S.C. CODE ANN. § 26-1-90(C)(1); WYO. STAT. ANN. § 34-26-201(b)(i).)

This Standard appeared in the 1998 *Code*. It is retained in the 2020 *Code* with three important differences. First, the term “present” is modified to “present physically.” Second, the 1998 *Code*'s reference to the requirement for appearance of “any witness identifying the signer” included the procedure known as “proof of execution by subscribing witness.” Because the subscribing witness procedure today has been eliminated from

many Notary statutes across the country, the drafters of this 2020 *Code* intended the language of the 1998 *Code* to apply narrowly to a “credible witness” (the term used for this type of “witness” in the laws of some states).

Third, Standard III-A-1 reaffirms the traditional requirement that principals and identifying witnesses appear physically before the Notary but qualifies this mandate by recognizing that certain states authorize the principal transacting a paper or electronic document to appear before a Notary by means of communication technology. (See RULONA § [14A(c)(2)] where the “record” (a defined term under the RULONA) notarized for a remotely located individual using communication technology may be paper or electronic, and MONT. CODE ANN. § 1-5-602(25) and (26) which define “remote notarization” as a notarial act performed by means of communication on a *tangible* record and “remote online notarization” as a notarial act performed by means of communication technology on an *electronic* record.)

The Illustration offers the somewhat frequent suggestion by established clients of Notaries proposing that they should not have to appear for notarizations because they are personally known to the Notaries. But, as the Resolution states, the Notary may not perform a notarization over the phone.

**III-A-2: Remote Online Notarizations.** This Standard did not appear in the 1998 *Code*. The Standard was included to recognize the fact that many states have enacted laws authorizing remote online notarization. It must be remembered, however, that a state by statute or regulation must expressly approve such notarizations for its Notaries to perform them. (See TEX. ADMIN. CODE, tit. 1, pt. 4, § 871(6); VA. CODE ANN. § 471-2, “satisfactory evidence of identity.”) Some states have enacted provisions expressly prohibiting remote online notarizations. “An individual making the statement or executing the signature does not appear personally if the appearance is by video or audio technology, even if the video is synchronous.” (W.VA. CODE ANN. § 39-4-6; see also ARK. CODE ANN. §§ 21-14-302(1), 21-14-307(a); 18 N.C. ADMIN. CODE § 07C.0403.)

The Illustration and its Resolution are clear. A Notary may not perform an online notarization unless and until the state of commissioning has expressly authorized it by adopting such a law. Until that time, all principals must physically appear before the Notary to have their signatures notarized.

**Article B: Identification.** This Article is all about the Notary’s identification of the principal and identifying witness, whereas the 1998 *Code*’s Article B also treated the willingness of the principal to sign and obtain a notarization. The subject of willingness is now covered in Article C. Fundamentally, the burden of proof of the identity of the principal and identifying witness rests with the principal and witness. (See, e.g., ARK. CODE ANN. § 18-12-206(d)(1) (stating the identity of an unknown principal “shall be proved” to the notarial officer).) That is, “the notary public must always require the signer[s] to present the required identification document in person.” (California Secretary of State, NOTARY NEWS 7 (2018).) The Notary may even require a principal “to provide additional information or identification credentials necessary to assure the officer of the identity of the individual.” (RULONA § 7(c); COLO. REV. STAT. ANN. § 24-21-507(3).)

The principal and identifying witness must establish with reasonable certainty that he or she has the claimed identity. Thus, if identity is to be established by the Notary’s personal knowledge, the individual must present himself or herself before a Notary who is sufficiently acquainted with the individual, or else the individual will have failed to satisfactorily prove identity. If identity is to be established by ID credentials or other evidence allowed by law, the individual must present reliable ID or other specified evidence which satisfies the required burden of proof. If identity is to be established by a credible witness, the principal must produce a witness who qualifies under the law as an identifying witness and pledges under oath or affirmation to information which supports with reasonable certainty the principal’s identity. (See, generally, Van Alstyne, *The Notary’s Duty of Care for Identifying Document Signers*, 32 JMLR 1003-1031 (1999).)

**III-B-1: High Degree of Care.** The caption of this Standard is new and the Standard itself was simplified in this 2020 *Code*. The 1998 *Code* Standard specified three methods for verifying identity: personal knowledge, reliable identification documents, and the oath or affirmation of a credible witness. Standard III-B-1 no longer enumerates these methods but instead requires the Notary to identify each principal “using means allowed or prescribed by law in the Notary’s state of commissioning.” The Notary must use a “high degree of care” in contrast to “reasonable care.” (See VA. CODE ANN. § 471-14A. For a discussion of “reasonable care,” see Guiding Principle V.)

In general, there are four possible methods for identifying a principal. The first method is “personal knowledge” of the principal by the Notary. This identification method is the subject of Standard III-B-2 and will be addressed there.

The second possible method for identifying a principal is through examination of identification credentials. The states treat this matter in a variety of different ways; some specify the types of IDs that are to be considered (see, e.g., CAL. CIV. CODE § 1185(b)(2), (3); DEL CODE ANN. tit. 29 § 4321(21)(a)); some specify the elements

necessary for a reliable credential (see, e.g., ALASKA STAT. § 44.50.062(5)(c)); some require only that the IDs provide satisfactory or reliable evidence of identity (see *Ala. Op.Att’y. Gen.* 98-00116 (1998)); and some incorporate two or more of the requirements identified above (see COLO. REV. STAT. ANN. § 24-21-507(2)(a); HAW. ADMIN. RULES § 5-11-7).

The position has been taken that all principals and identifying witnesses should be identified using reliable ID credentials, meaning that personal knowledge and credible witness identifications alone should not be permitted. (See CAL. CIV. CODE § 1185(b) (requiring identification of principals and credible witnesses by ID documents).) And, of course, any requirement that IDs bear photographs and signatures is implicitly to have Notaries compare them to the appearances of principals and to their signatures on documents and in Notary journal entries. “A notary must ... be satisfied of the person’s identity by comparing the signature of the principal with the signature and photograph of a current ID card or document ...” (Hawaii Attorney General, NOTARY PUBLIC MANUAL 10-11 (2010).)

The third possible method to identify a principal is “the sworn word of a credible witness” (see 29 DEL. CODE ANN. tit. 29 § 4321(4)). In at least one state, the “sworn written statement” of one or two credible witnesses is required (see FLA. STAT. ANN. § 117.05(5)(b)). This procedure should be used reservedly. “The credible witness affidavit must only be used for signers who have no identification. It must not be used as a convenience for someone who has no identification simply because the person left it somewhere else. That person will have to retrieve the one he has.” (ASN in Coop. with the GA Superior Court Clerks’ Cooperative Authority, GEORGIA NOTARY HANDBOOK 56, 57 (2019).)

The fourth possible method for identifying a principal is any other means of satisfactory evidence allowed by law. In these days of remote online notarizations, this catch-all provision could include biometric and third-party identification systems. (See MENA § 5A-5; OHIO REV. CODE ANN. § 147.64(E)(2); OHIO ADMIN. CODE 111:6-1-05[B][3]-[5].)

If state law specifies how an identifying witness shall be identified by the Notary, that law must be followed. Many states require the credible witness to be personally known by the Notary (see N.H. REV. STAT. ANN. § 456-B:2VI; 57 PA. CONS. STAT. ANN. § 312(b)(2)), but many allow the Notary to identify a credible witness based on other forms of satisfactory evidence (see ARIZ. REV. STAT. ANN. § 311.11(a)(viii); OR. REV. STAT. § 194.240(b)).

**III-B-2: Personal Knowledge.** This Standard is new. Because “personal knowledge” is by its nature personal, somewhat unique to each relationship, and imprecise, this Standard narrows the circumstances which may qualify as constituting “personal knowledge.” Model and uniform laws have adopted similar definitions. (See MNA § 2-16; MENA § 2-11; RULONA § 7(a).) Some states have defined personal knowledge in comparable fashion. (See ARIZ. REV. STAT. ANN. § 41-311.10; MASS. GEN. LAWS ANN. ch. 222 § 1; NEB. REV. STAT. § 64-105(2)(b); N.M. STAT. ANN. § 14-12A-2.M; N.C. GEN. STAT. § 10B-3(16).)

The Illustration presents the realistic example of a principal known to the Notary only through a single introduction two months earlier, although the principal is the president of the company where the Notary is employed. The Resolution appropriately announces that the Notary under such circumstances does not have personal knowledge of the identity of the principal.

**Article C: Willingness and Mental Competence.** This Article expands upon the same Article in the 1998 *Code* by addressing not only awareness or mental competence, but also willingness (which had been the subject of the 1998 *Code*’s Article B). In recent decades as concerns about document security (including identity theft and document fraud) have risen dramatically, the Notary’s frontline role in protecting document security has grown and more states have approved of the Notary assessing both the willingness and mental competence of principals.

**III-C-1: Free and Voluntary Act Essential.** Historically, many Notary statutes defining acknowledgment notarizations required that acknowledgments had to be undertaken voluntarily. (See MNA § 2-1(3) and accompanying Comment.) Clearly, for a notarial act to be genuine, the document must be willingly executed by the principal. When the willingness assessment is soundly performed, the Notary may both deter and detect duress and undue influence. Accordingly, model and uniform Notary laws have adopted comparable versions of the position taken by this Standard. (See MNA § 5-2(4); RULONA § 8(a)(2) (authorizing the Notary to refuse to perform the notarial act if the Notary is not satisfied the individual’s signature is knowingly and voluntarily made). Many state laws are in accord. (See, e.g., MASS. GEN. LAWS ANN. ch. 222 § 16(a)(iii); R.I. GEN. LAWS § 42-30-1-7(a)(2); S.C. CODE ANN. § 26-1-120(B)(2).)

The *Code* does not obligate the Notary to investigate all the facts surrounding every document. Instead, the Notary should rely on personal inquiry and observation to determine whether the principal appears to be acting willingly. There is no bright-line test to identify when a principal is deprived of free will due to the actions

of another person. The Notary should take diligent and reasonable steps to inquire and observe. In order to refuse to notarize on the basis of duress, coercion, or undue influence, the Notary must have objective reasons to do so, which reasons can be articulated.

The Illustration presents the example of a very reluctant principal. The Resolution appropriately directs the Notary to decline to proceed with the signing and notarization of the documents. Incidentally, the presence of the principal's spouse or any other observer who may have an interest in the document to be notarized could raise concerns about potential duress, coercion, or undue influence.

**III-C-2: Mental Competence Essential.** The exact meaning of this Standard is elusive due to the difficulty of determining the focus and terminology to be used. Hence, the terms "awareness," "mental capacity," "mental competence," and "understanding" have been utilized synonymously by various entities. (See 1998 Code, Standard III-C-1 (using "awareness"); MNA § 5-2(3) (using "understand"); RULONA § 8(a)(1) (using both "competent" and "capacity.") Even this 2020 Standard speaks in terms of both "mental competence" (caption) and "mental capacity" (Standard).

Historically, there has been considerable disagreement about whether the Notary should assess the mental competence of the principal, but increasingly Notary laws are directing or permitting Notaries to do so. (See FLA. STAT. ANN. § 117.107(5); GA. CODE ANN. § 45-17-8(b); 1 MISS. ADMIN. CODE Pt. 5, R. 050.5.1.B.3; R.I. GEN. LAWS § 42-30.1-7(a)(1); S.C. CODE ANN. § 26-1-120(B)(2).)

Similar to what was said in connection with Standard III-C-1, a notarization must be undertaken for a principal and identifying witness who possesses the mental competence to understand the general nature and consequences of what she or he is doing at the time of the notarial act in order for it to be genuine. An individual who is not competent is not acting voluntarily and is more likely to be subject to coercion and threats.

The Illustration presents the example of an elderly, but confused, principal and a relative of the principal is urging the Notary to perform the notarization. The confused condition of the principal can be objectively articulated as the ground to refuse the notarization, as the Resolution points out. Additionally, the presence of the relative urging the Notary to notarize should cause concern and confirm the decision to decline the notarization.

**III-C-3: Coherent Communication Essential.** This Standard appeared as Standard III-C-2 of the 1998 Code. It addresses a concern that may be different than the matters of willingness and mental competence addressed in Standards III-C-1 and III-C-2. This subject has not been addressed by state Notary statutes. (*But see* MNA § 5-2(6).) Coherent communication is fundamental to each step throughout the notarization procedure, including the assessments of willingness and mental competence. Lack of coherent communication may result for any number of reasons. If the problem is one which can be reasonably accommodated by the Notary, then the Notary must do so. For example, if the principal or identifying witness cannot speak coherently or cannot hear, the Notary and the individual might communicate by written statements and questions and answers. (See Article D: Individuals with Physical Disabilities.)

The Illustration and its Resolution presents the case of a nursing home patient with slurred speech. Importantly, slurred speech may be merely a physical disability which can readily be accommodated, as suggested just above. If not, as the Resolution suggests, the Notary must refuse to notarize.

**III-C-4: Direct Communication Essential.** This Standard differs from Standard III-C-3 by emphasizing that a Notary may not rely upon a third-party interpreter or translator to communicate with a principal or identifying witness. Thus, the principal's and witness's communication with the Notary must be both direct and coherent. Notary statutes and regulations have seldom addressed the issue of the use of translators or interpreters. Standard III-C-4 permits the use of translators only if state law allows. (See ARIZ. REV. STAT. ANN. § 41-313.B.3; *but see* MNA § 5-2(6), Comment ("Moreover, a notary must not rely on an interpreter to communicate with the principal. Doing so would establish a dangerous policy. For any variety of reasons, an intermediary may not be capable or motivated to accurately represent the words of the principal or the notary."))

The Illustration presents the very type of problematic situation that could arise if Notaries were allowed to use the services of interpreters and translators. Here, the interpreter might have had an interest in the transaction involved, and such interests might be very difficult to identify or discover in instances where the Notary and principal cannot communicate directly.

**Article D: Individuals with Physical Disabilities.** This Article is new and replaces the former Article which dealt narrowly with the subject of witnesses identifying the principal. The relevant provisions of the former Article were rearranged under Articles A, B, and C. New Article D reflects the appropriate contemporary societal attitude and legal responsibility to accommodate individuals with physical disabilities who need or request notarial services.

**III-D-1: Reasonable Accommodations.** Some states have addressed the issue of Notaries making reasonable accommodations to individuals with physical disabilities. (See COLO. REV. STAT. ANN. § 24-21-509(1); FLA. STAT. ANN.

§ 117.05(14); see also N.M. STAT. ANN. § 14-12A-8.A; MASS. GEN. LAWS ANN. ch. 222 § 16(b), where a Notary is prohibited from refusing notarial service to a principal with a disability.) In keeping with this view, the ASN directed each Notary “[t]o treat each individual fairly and equally, with kindness and respect.” (RCOE Point 3.)

The Illustration and Resolution involves a hearing-impaired witness. The reasonable accommodation is the passing of written notes between the Notary and principal. Since the communication is both coherent (Standard III-C-3) and direct (Standard III-C-4), the Notary may perform the notarial act.

**III-D-2: Signature by Mark or Proxy.** The main way current statutes address the need to accommodate principals with physical disabilities is through a signature by mark and signature by third-party proxy who signs the principal’s name. The signature by mark procedure allows a principal who cannot sign a full name to write an “X” or other mark as a signature. Many states have adopted specific statutes with witness requirements for a principal who signs by mark. (See MASS. GEN. LAWS ANN. ch. 222 § 15(f); S.C. CODE ANN. § 26-1-90(F); WYO. STAT. ANN. § 34-26-201(c).) Many states have enacted specific laws authorizing signings in which a principal with a physical disability who cannot sign with a mark directs a third party to sign the principal’s name. (See IOWA CODE ANN. § 9B.9; N.C. GEN. STAT. § 10B-20(e); S.C. CODE ANN. § 26-1-90(G); W.VA. CODE ANN. § 39-4-9.) This Standard has been included to provide a professional guideline if state law authorizes these signing procedures.

**III-D-3: Applicability of Certain Standards.** Standard III-D-3 applies the best notarial practices of Article C to a witness observing a signature by mark and third-party proxy signer. This is not addressed in state Notary statutes but is assumed. It is also uncontroversial, because any individual participating in a notarial act — in this case the principal, witnesses to a signature by mark, or third-party proxy signer — first must always be acting of his or her own free will. Second, the participants must be mentally competent, for they must understand the vital roles they play in the notarization. Finally, the Notary Public providing notarial services in these situations must be able to communicate with these individuals. The Notary must be able to properly qualify the witness to a signature by mark and third-party proxy signer who serve in their respective roles and convey any instructions for them to follow.

The Illustration presents a hypothetical scenario in which a minor child is directed to sign a document for a parent who is paralyzed and is unable to sign. The actions of the minor suggest strongly that the child is unable to understand the role of third-party proxy signer. While the question of whether a more mature child could conceivably act responsibly in the situation is left open, the Resolution, rightly, calls on the Notary in this particular circumstance to disqualify the child from executing the parent’s signature.



# Guiding Principle IV

**The Notary shall not execute a false or incomplete notarial certificate, nor perform a notarial act with respect to any document or transaction that the Notary believes is false, deceptive, or fraudulent.**

## STANDARDS OF PROFESSIONAL PRACTICE

### Article A: Certificate Completion

#### IV-A-1: Notarial Wording Required

The Notary shall not perform a notarial act on any document if it does not contain notarial certificate wording to evidence the facts of the act, unless law or official guideline in the state where the Notary is commissioned explicitly provides otherwise.

**Illustration:** The Notary is asked by an individual to notarize an engineering drawing to protect an invention. The drawing does not contain a notarial certificate. When the Notary appears perplexed by the request, the individual says, “Just stamp, date, and sign it — that’s all I need.”

**Resolution:** The Notary declines the request. Merely “stamping, dating, and signing” is meaningless without a notarial certificate to evidence the facts of the notarial act as the Notary witnessed them.

#### IV-A-2: Completion by Notary

The Notary shall personally prepare or verify all information and insertions on a notarial certificate and affix or attach the Notary’s official signature or seal to the certificate.

**Illustration:** The Notary is asked to notarize an individual’s signature on a document. The Notary notices, however, that the document’s notarial certificate wording has been filled in beforehand with an incorrect, out-of-state venue.

Resolution: Before completing the certificate, the Notary corrects the venue by lining through the incorrect information, then right above printing the state and county where the notarization is being performed. After initialing the changes, the Notary completes the rest of the certificate.

#### **IV-A-3: Completion Contemporaneous with Act**

The Notary shall complete a notarial certificate only at the time of the notarial ceremony.

**Illustration:** The Notary provides signing and notarial services for mortgage purchase and refinance transactions. Wanting to reduce the time spent with borrowers at loan signing appointments and take additional appointments during the day, the Notary considers whether to complete the notarial certificates on the notarized documents in each loan package after the appointments for the day are finished.

Resolution: The Notary decides it is essential to complete the notarial certificates on documents in each loan package in front of the borrowers at the time of notarization and not later in the day. The Notary realizes that borrowers, lenders, closing agents, and investors rely on the Notary ensuring that each certificate accurately records the facts of the notarial act at the time the Notary performed it.

### **Article B: Fraudulent Certificate**

#### **IV-B-1: False Statement Improper**

The Notary shall not knowingly issue a notarial certificate containing information that is false, deceptive, fraudulent, inaccurate, or incomplete.

**Illustration:** The Notary is asked by a friend to notarize a deed bearing the signatures of the friend and an absent spouse, who is out of town on business for several days. The acknowledgment form has been prepared beforehand and states that both friend and spouse “personally appeared” before the Notary. The friend explains that the document must be quickly notarized and recorded before the spouse returns because of an escrow deadline.

Resolution: The Notary declines to notarize using the prepared notarial certificate, since it falsely states that the spouse was in the Notary’s presence. The Notary, however, may offer to notarize the signature of the friend alone if permitted to cross out the spouse’s name and modify the notarial certificate to reflect that only the friend appeared.

#### **IV-B-2: False Date Improper**

The Notary shall not knowingly issue a notarial certificate that indicates a date other than the actual date on which the notarial act was performed.

**Illustration:** The Notary is asked to notarize a friend’s signature on several documents related to charitable contributions. All of the notarial certificates have been prepared



for the Notary, but one of the certificates bears a date in the previous year. When the Notary points this out, the friend explains that a significant financial loss will be suffered unless a contribution is backdated to fall on or before the previous December 31. The friend asks the Notary to “just do a small favor and overlook the minor discrepancy regarding the date.”

Resolution: The Notary declines to use a certificate with a false date because it untruthfully states that the notarization was performed on the wrong day.

## Article C: Security of Certificate

### IV-C-1: Fraud-Deterrent Precautions

The Notary shall take reasonable steps to secure a notarial certificate form to a paper document in such a way that will deter its fraudulent or unintended removal or reattachment to another document.

**Illustration:** The Notary is asked to notarize a principal’s signature on a document containing a notarial certificate that does not meet the requirements of the law in the state where the Notary is commissioned. The Notary explains that a certificate form with acceptable wording will have to be attached.

Resolution: The Notary lines through the original, unacceptable certificate and replaces it with the proper form. After completing, signing, and affixing a seal to the proper form, the Notary then staples it to the left margin of the document’s signature page. To make fraudulent reattachment of the certificate difficult, the Notary may use a form that provides an optional section at the bottom for noting the title or type and number of pages of the document to which the certificate is attached, and the names of the principals present before the Notary or add this information to a certificate the Notary uses.

### IV-C-2: Attachment by Another Improper

The Notary shall not deliver a signed notarial certificate to another person and authorize that person to attach the certificate to a document outside of the Notary’s presence.

**Illustration:** The Notary receives a phone call from a person for whom eight days earlier the Notary had notarized a deed. Calling from out of state, the individual informs the Notary that he neglected to affix a seal imprint on the deed’s acknowledgment certificate and that the missing seal has prevented the document from being duly recorded. The caller claims that the Notary’s mistake has delayed and possibly endangered a land transaction involving multiple parties and hundreds of thousands of dollars. The caller asks the Notary to complete and overnight-mail another notarial certificate to replace the defective one.

Resolution: The Notary declines to complete and mail a new acknowledgment certificate form. The Notary, however, may offer to correct the original certificate by adding the missing seal imprint, if allowed by state law and the deed is returned.

### IV-C-3: Tamper-Evident Technology

In performing a notarial act on an electronic document, the Notary shall utilize a technology that provides evidence of any changes to the document or notarial certificate after it is signed.

**Illustration:** The Notary is commissioned in a state that does not require Notaries to use a technology for notarizing electronic signatures that is “tamper-evident.” Having identified five solution providers whose systems incorporate a workflow for notarizing electronic signatures, the Notary ponders which system to use.

Resolution: The Notary reaches out to colleagues who belong to the Notary’s professional association to learn more about tamper-evident technology. Of the five solution providers, the Notary identifies and selects one that utilizes this technology.

## Article D: Potentially Fraudulent Documents

### IV-D-1: Incomplete Document

The Notary shall refuse to notarize a signature on any document that is blank or incomplete.

**Illustration:** The Notary is asked to notarize a principal’s signature on a document containing blank spaces. “That information isn’t available right now, and I want to get the notarization out of the way,” the principal says. “It shouldn’t make any difference, since you’re just certifying my signature, not the terms in the document.”

Resolution: The Notary refuses to notarize the principal’s signature. The principal may complete the blank space with an “X,” line through the blank space, or complete the blank with the words “not applicable” or words to that effect, and then the Notary may notarize the signature.

### IV-D-2: Signature Subject to Notarization

The Notary shall refuse to notarize any signature on a paper or electronic document that is not executed or adopted by the principal.

**Illustration:** The Notary works in an office and notarizes the signature of an executive on several dozen documents every day. One day, the executive requests to acknowledge his signature on a document that has been stamped with his facsimile signature.

Resolution: The Notary notarizes the signature if the executive acknowledges the facsimile signature as his own in the presence of the Notary, unless law in the Notary’s state of commissioning provides otherwise.

## Article E: Fraudulent Notarizations or Transactions

### IV-E-1: Improper Notarization

The Notary shall refuse to perform any notarial act that is illegal, dishonest, deceptive, false, improper, fraudulent, or in violation of law in the state where the Notary is commissioned and this *Notary Public Code of Professional Responsibility*.

**Illustration:** The Notary is asked to notarize the signatures of a client and the client's spouse on a document. The spouse does not have an identification credential, claiming to have left it in a car several blocks away. The client grows indignant when the Notary expresses concern about the spouse's lack of identification and suggests that the spouse return to the car to retrieve it.

Resolution: The Notary refuses to notarize unless the spouse returns with proper identification. It would be illegal and deceptive for the Notary to complete a notarial certificate stating the spouse as personally known or positively identified when this is not actually the case.

### IV-E-2: Improper Document or Transaction

The Notary shall refuse to perform any notarial act in connection with a document or transaction that the Notary knows, or has a reasonable belief that can be articulated, is illegal, dishonest, deceptive, false, fraudulent, or improper.

**Illustration:** The Notary is asked to notarize a friend's signature on an "affidavit of residence" to qualify for in-state college tuition for his daughter. The Notary knows from her prior relationship with the friend that the friend lives out of state. The Notary asks the friend if the affidavit claims that the friend lives in the state where the daughter will be enrolling in school, and the friend responds that it does.

Resolution: The Notary refuses to notarize, explaining to the friend that, having knowledge that a statement in the affidavit is false, the Notary has an obligation as a public official to refuse to notarize.

### IV-E-3: Reporting Illegality

The Notary shall report to appropriate law enforcement and, in compliance with Standard X-B-1, to the regulatory authority any known criminal act involving a notarization requested or proposed of the Notary or performed by any other Notary.

**Illustration:** The Notary is asked to notarize a person's signature on a property deed. The principal presents a Social Security card and a birth certificate as identification. When the Notary explains that these are inadequate identification credentials, the principal says, "I've lost my driver's license. Will five hundred dollars be enough to expedite this notarization?"

**Resolution:** The Notary refuses to notarize because he could not verify the individual's identity and was offered a bribe. Having a strong suspicion that the principal is an impostor, the Notary reports the encounter to the local police department.

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## COMMENTARY

**General.** This Guiding Principle rests upon the fundamental and solid proposition that the Notary, as both a public official and a fraud-deterrent officer, must not engage in any improprieties. The public is entitled to depend upon the Notary's integrity. Despite its simplicity, the Principle addresses some situations that do not lend themselves to easy description and resolution.

**Article A: Certificate Completion.** The notarial certificate lies at the heart of a notarization and is mandated for every notarial act in virtually every state. The first three Articles will focus upon the notarial certificate, whereas the last two Articles will also deal with the document or transaction to be notarized.

**IV-A-1: Notarial Wording Required.** This Standard appeared in the 1998 *Code* in comparable language. "A notarial act must be evidenced by a certificate." (RULONA § 15(a); see MNA §§ 5-9(a)(2), 9-1(a); MENA § 6-1; see also DEL. CODE ANN. tit. 29 § 4327(a); N.H. REV. STAT. ANN. § 456-B:71; N.M. STAT. ANN. § 14-14-7A; VA. CODE ANN. § 47.1-2; W.VA. CODE ANN. § 39-4-15(a).) It should be noted, however, that currently two states do not require a certificate of notarial act for all notarizations. (See MD CODE ANN. STATE GOV'T § 18-113 (effective until October 1, 2020); MICH. STAT. ANN. § 55.287(2).) Thus, the language of the Standard has been qualified to account for these exceptions. In the infrequent event when no document is involved in a notarial act (perhaps as an example when an oath of office is administered by a Notary to a newly appointed or elected public official), a certificate would not be required.

The same Illustration appeared in the 1998 *Code*. The Resolution correctly directs the Notary not to notarize under the circumstances. In this example, the Notary must certify to the facts and procedures in compliance with one of the standard notarial certificate forms — usually an acknowledgment, a jurat or verification on oath or affirmation, or in some states, a signature witnessing.

**IV-A-2: Completion by Notary.** This Standard is the standard operating procedure to which Notaries must adhere. (See MNA §§ 8-1, 9-1(a)(1).) The Notary should always inspect the notarial certificate to ensure it properly states the type of notarization being performed and is free from errors and omissions. Of course, the Notary must personally sign each certificate and affix or attach the official seal during the notarial ceremony. The Notary may never surrender or delegate these official responsibilities. (See Standard VI-A-2.)

This same Illustration appeared in connection with Standard IV-C-1 of the 1998 *Code* and presents the case in which someone other than the Notary has filled in the factual information in the venue of a notarial act incorrectly. The "venue" of a notarial certificate is the state and county where the Notary performed the notarization. (See Definitions, above; see also MENA § 2-20; MONT. CODE ANN. § 1-5-629(2).) The Resolution describes the obligation of the Notary to correct the venue statement, as well as the best practice for doing so.

**IV-A-3: Completion Contemporaneous with Act.** This Standard is new. It takes the uncontroversial position that the notarial certificate cannot be completed before or after the notarial ceremony, but only during and as part of that ceremony. (See COLO. REV. STAT. ANN. § 24-21(a); N.D. CENT. CODE § 44-06.1-14.1.a.; VT. STAT. ANN. tit. 26 § 5367(a)(1).)

The Illustration presents the case of a busy Notary considering whether to wait to the end of the business day to complete notarial certificates for notarizations performed earlier in the day. The only proper course is the one taken by the Resolution, which requires the Notary to complete the notarial certificate contemporaneously as part of each notarial ceremony. Indeed, without the completion of the certificate, there is no notarization.

**Article B: Fraudulent Certificate.** Article B bearing the same caption appeared in the 1998 *Code*. The intention here is to emphasize the absolute necessity to obtain a complete and accurate certification by the Notary of what transpired during the notarization. There can be no fraud or misrepresentation by either commission or omission.

**IV-B-1: False Statement Improper.** As suggested by the Article's caption, "Fraudulent Certificate," attention here is fixed upon prohibition of intentional wrongdoing and for falsification and fraud in the notarial certificate, both which involve knowing misconduct. (See MNA §§ 5-6(b)(1), 5-8(a), (b); IND. CODE ANN. § 33-42-2-2(a); UTAH CODE ANN. § 46-1-9(1), (2); VA. CODE ANN. § 47.1-15; WYO. STAT. ANN. § 34-26-205.) Unquestionably, the statutes

specifying the required elements of notarial certificates contemplate that their substance will be complete and truthful. (See ALASKA STAT. § 44.50.062(3).)

The Illustration and its Resolution demonstrate application of this Standard. There is no more important feature of the notarial certificate than the certification of the appearance of the principal of an instrument, so the fact that one of the principals did not appear would have been a material misrepresentation in the certificate and could not have been allowed.

**IV-B-2: False Date Improper.** This Standard addresses a specific kind of misrepresentation that can and does occur, namely, the incorrect dating of the notarial certificate. Notaries sometimes insert dates other than the actual dates of the notarial ceremonies in notarial certificates. This may happen for a couple of reasons. Principals may have pre-signed documents on dates before the dates they appear to acknowledge their signatures to the Notary. Certificates may have been prepared by someone other than the Notary. Dating a notarial certificate with a false date is incorrect and improper. (See IND. CODE ANN. § 33-42-2-2(a); VA. CODE ANN. § 47-1-16(2); WASH. REV. CODE ANN. § 42.45.130(1)(a). See *also* New Hampshire Secretary of State, NEW HAMPSHIRE NOTARY PUBLIC AND JUSTICE OF THE PEACE MANUAL 5, stating “notarial officers should be warned that alteration of ... items on the certificate, like pre- or post-dating, could in certain circumstances constitute a crime ... entitled ‘Tampering with Public Records or Information’.”)

The 1998 Code included the same Illustration and Resolution as included here, relating a hypothetical in which the principal asks the Notary to falsely back-date a notarization. The Resolution applies Standard IV-A-2 (the Notary verifying all information in a notarial certificate). The keeping of a chronological journal in which notarizations are recorded sequentially by date (see Standard VII-A-1) will make it less likely that a Notary will enter a false or incorrect date in a notarial certificate.

**Article C: Security of Certificate.** A similar Article entitled “Certificate Completion and Attachment” appeared in the 1998 Code, whereas the present Article covers the broader subject of “Security of Certificate.” This topic is a significant one and is an example of a matter that has not always been thoroughly addressed by statutes. In certain scenarios, a document without a notarial certificate may be presented to the Notary. The Notary would be required to add a certificate form to the document to comply with Standard IV-A-1. In other scenarios, the notarial certificate may appear as a separate page distinct from the rest of the document. Most Notary statutes are silent about the proper steps for securing notarial certificates to documents. For instance, “[i]f a notarial act is performed regarding a tangible record, a certificate must be part of, or securely attached to, the record.” (W.VA. CODE § 39-4-15(f).) Without more comprehensive guidance on *how* to attach a certificate to a document, fraudulent notarizations could be performed, or the genuineness of notarizations could be questioned, challenged, or invalidated. Yet, the sound practice steps for attachment of notarial certificates have been readily explained and should be enacted. (See MNA § 9-2.)

**IV-C-1: Fraud-Deterrent Precautions.** This Standard appeared in a more limited form as Standard IV-C-2 of the 1998 Code. The 1998 Code Standard dealt narrowly with *attaching* a “loose” notarial certificate, whereas the 2020 Code Standard more broadly covers *securing* a “notarial certificate form.” The 2020 Code Standard chooses to refer to a “loose” certificate — a notarial certificate printed on a separate piece of paper — as a “notarial certificate form” to emphasize that a notarial certificate must always be secured to the document in some manner. If a certificate is separated from the document it was intended to serve, the notarization could be nullified, another falsified certificate could be substituted, or the original certificate could be fraudulently attached to a different document.

There are several techniques which can be employed by Notaries to deter and help prevent the fraudulent removal or substitution of completed notarial certificate forms. First, the form could include spaces to record the name, date, and number of pages of the document to which it is attached. Second, the form could be identified in some way as belonging to the document. The Notary, for example, might write in the margin: “This certificate is attached to a \_\_\_\_\_ (name of document) dated \_\_\_\_\_, and signed by \_\_\_\_\_.” (See Alaska Office of Lieutenant Governor’s *Frequently Asked Questions* at <https://ltgov.alaska.gov/notaries-public/frequently-asked-questions/#faqs> (last viewed on December 4, 2019).) This kind of procedure has even been mandated by statute and regulation. (See ARIZ. REV. STAT. ANN. § 41-313.C; HAW. ADMIN. RULES § 5-11-18.) Third, the Notary could securely staple the form to the document to make detachment or reattachment to another document tamper-evident. “Taping or paper-clipping the certificate ... to the document is not permitted. ... [The certificate] must be attached permanently to the instrument.” (California Secretary of State, NOTARY NEWS 8 (2018).) Finally, the Notary could use the Notary’s official seal or stamping device to secure the form. “You can use the notary stamping device to guard against fraudulent certificate use. Affix the impression so that it rests partly on the certificate and partly on the signer’s page, but make sure that the stamp does not obscure any writing or signatures on either paper. Make

sure a whole impression is also on the certificate ... All of the components of the notarial certificate must be on the same page.” (Oregon Secretary of State, OREGON NOTARY PUBLIC GUIDE 39 (2018).)

The Illustration makes the implicit point that a notarization’s validity is governed by the law of the place of its performance, regardless of where the pre-printed notarial certificate language is created. In this case, the legal requirements for the notarial certificate in the state where the Notary is commissioned required a compliant certificate to be completed, and the new certificate was attached to the document in a manner suggested by the best practice methods discussed above.

**IV-C-2: Attachment by Another Improper.** Violation of this Standard is among the worst possible misconduct a Notary might commit. It would mean that a certificate would be completed or at least signed by a Notary without a legitimate notarial ceremony and would involve an unlawful conspiracy with at least one other person. The Standard has statutory support. (See FLA. STAT. ANN. § 117.107(3); 5 ILL. COMP. STAT. § 312/6-104(c); IND. CODE ANN. § 33-42-4-2(1).) It should be noted that at least one state makes a questionable exception for delivery of an unattached completed notarial certificate to an attorney for later attachment to a document. (See MASS. GEN. LAWS ANN. ch. 222 § 16(f).)

The Illustration presents the example of an allegedly faulty notarial certificate (missing an official Notary seal) discovered by the principal who has taken the notarized document to another state. The Notary cannot simply prepare another certificate and send it to the principal, for the whole story might be a hoax and, even if the principal’s story is true, the substitute certificate might be misused by the principal. A Notary may never prepare a signed and sealed certificate unless it is done during the notarial ceremony. According to the Resolution, the Notary would be allowed to correct the certificate by affixing the official seal to it, if state law allows and the deed is returned to the Notary. (See MNA § 9-3.) A Notary confronted with this situation should review the statute in the state where the Notary is commissioned to determine whether there is a specific provision allowing correction of a notarial certificate and should strictly comply with such a provision. (See MONT. CODE ANN. § 1-5-609(5) (providing that Montana Notaries may correct a notarial certificate). *But see* FLA. STAT. ANN. § 117.107(8) (prohibiting Florida Notaries from amending a notarial certificate after it has been signed).)

**IV-C-3: Tamper-Evident Technology.** As this Standard applies specifically to electronic notarizations, it is a new provision which did not appear in the 1998 *Code*. “‘Tamper-evident’ means that any change to a record shall provide evidence of the change.” (MENA § 2-19; see *also* Definitions, above.) Tamper-evident refers both to any illegal attempt to make unauthorized changes to a record as well as any changes to a completed record — authorized or not. This Standard is consistent with numerous state statutes. (See MICH. STAT. ANN. § 55.286(1); MONT. CODE ANN. § 1-5-602(8) and (35); TEX. GOV’T CODE ANN. § 406.109(d); VA. CODE ANN. § 47.1-16D; WASH. REV. CODE ANN. § 42.45.190(2).)

The Illustration and its Resolution together reinforce the important point of this Standard that the security of the notarization is essential. Further, as suggested by the Resolution, tamper-evident technology is readily available and should always be the choice of Notaries.

**Article D: Potentially Fraudulent Documents.** While the previous Articles focused upon the notarial certificate, Article D deals with concerns about the document that is to be notarized. It directs Notaries not to notarize incomplete documents or documents which do not bear lawful signatures.

**IV-D-1: Incomplete Document.** Some Notary statutes and regulations direct the Notary not to notarize if a document contains blanks or is incomplete. (See ARIZ. REV. STAT. ANN. §§ 41-311.4, 41-328.A; FLA. STAT. ANN. § 117.107(10); IND. CODE ANN. § 33-42-2-2(a); NEB. ADMIN. CODE § 6.002.01B.) The Standard directs the Notary not to notarize if a document is incomplete in any respect. It does not require the Notary to have read the document in its entirety. “A Notary is not required to read the document ...” (Nebraska Secretary of State, *Frequently Asked Questions* at <http://www.sos.ne.gov/business/notary/faq.html> (last viewed on September 30, 2019).) Rather, the Notary should “[s]can the document for any blanks that may exist.” (Maine Secretary of State, MAINE NOTARY PUBLIC HANDBOOK 7 (2017).)

The concern expressed in this Standard about the completeness of a document implicitly requires that the Notary must be presented with the entire document. There may be no missing pages. (See ASN in Coop. with the GA. Superior Court Clerks Cooperative Authority, GEORGIA NOTARY HANDBOOK 15 (2019).)

The same Illustration appeared in the 1998 *Code*. Its Resolution has been revised to be more helpful by pointing out that, upon the Notary explaining the presence of blank or incomplete text to the principal, the principal could fill such blanks with an “X,” line through them, or write the words “not applicable,” or other similar language.

**IV-D-2: Signature Subject to Notarization.** This Standard represents a major revision of the 1998 Standard, in part due to advancements in technology allowing for electronic notarizations. The central requirement of this Standard is that, at the time of the notarization, the principal must either execute a signature or adopt a signature

already appearing on the document. (See MNA §§ 2-1(3), 2-7(3), 5-2(1), (5); RULONA §§ 2(11), 6; MENA § 2-9.) For a jurat and signature witnessing notarization, the principal must sign the document in front of the Notary. For an acknowledgment, the principal must either sign the document during the notarial ceremony or expressly acknowledge the signature which has already been executed upon the document. (See MNA §§ 2-1, 2-7, 2-21; MENA § 5-3(b).)

In some quarters, the thinking prevails that for paper notarizations only an “original” signature may be notarized. “A photocopy or fax may be notarized, but only if it bears an original signature.” (Minnesota Secretary of State, *Notary FAQs* at <https://www.sos.state.mn.us/notary-apostille/notary-help/notary-faq/> (last viewed on December 4, 2019).) However, such a view is not entirely warranted. For an acknowledgment, the principal may adopt or acknowledge a previously-executed signature, which may have been stamped, typed, faxed, or photocopied. (See the discussion of the Illustration immediately below.)

This same Illustration appeared in the 1998 Code, but its Resolution has been corrected to reflect the law’s position that a signature is any mark or symbol intended by a principal to be her or his identifier for purposes of authenticating the document on which it appears. (See RULONA § 2(11), (12); UNIF. ELEC. TRANS. ACT § 2(8).) Hence, because the notarization in question is an acknowledgment, the principal may acknowledge or adopt the pre-stamped name appearing on the document as the principal’s signature.

**Article E: Fraudulent Notarizations or Transactions.** This Article is intended as a sweeping fraud-deterrent catch-all set of provisions — as honesty, integrity, diligence, prudence, and reasonable care are the hallmarks of the ethical Notary. Notaries, as has been observed, are on the front line of crime fighting in the war against identity theft and document fraud.

**IV-E-1: Improper Notarization.** This Standard’s broad language is widely accepted. (See MASS. GEN. LAWS ANN. ch. 222 § 19(j); 1 MISS. ADMIN. CODE Pt. 5, R. 050.5.3.B.1; N.M. STAT. ANN. § 14-12A-8.B(1).) The Standard’s Resolution is without doubt the appropriate position, and it serves equally as a catch-all expansion on Standard IV-B-1. (See *also* Standard IV-E-2.)

An almost identical version of this Illustration appeared in the 1998 Code, along with the same Resolution. Verification of the identity of principals is among the most fundamental duties of the Notary. One of the most frequent frauds occurs in the case of a spouse using an imposter to impersonate his or her husband or wife. When the purported spouse does not have reliable ID, the Notary should proceed with great caution and strictly follow the law — which in this example would mean refusing to notarize unless the spouse presents reliable identification.

**IV-E-2: Improper Document or Transaction.** This Standard expands upon Standard IV-E-1. The Standard could have permitted a Notary to refuse to notarize only in circumstances in which “an instrument contain[s] a statement known by the notary public to be false.” (NEV. REV. STAT. ANN. § 240.075.2.) The 1998 Code Standard also allowed a Notary to refuse if the Notary had a “reasonable suspicion.” However, the drafters elected to revise the 1998 Standard to require Notaries to know, or to have more than a mere “reasonable suspicion,” that the document or transaction is somehow improper. Under this revised 2020 Standard, the Notary must know or have “a reasonable belief that can be articulated” of some impropriety of the document or transaction. Not all statutes impose this heightened burden upon the Notary. (See GA CODE ANN. § 45-17-8(b): “No notary shall be obligated to perform a notarial act if he feels such act is ... [f]or a transaction which the notary knows or suspects is illegal, false, or deceptive.”) There are several objective grounds on which a notarization should be refused: illegality, dishonesty, deceptiveness, falsity, fraud, or impropriety.

This Standard does not direct or expect the Notary to engage in a detailed investigation for every document or transaction. Instead, the reasonable and prudent Notary should employ a commonsense approach whereby irregularities apparent on the face of the document or circumstances attendant to the document or transaction raise a “red flag” suggesting that some impropriety may be afoot.

The Illustration presents a scenario of a Notary who has knowledge that an affidavit is false. Under this circumstance, the Notary must refuse to notarize.

**IV-E-3: Reporting Illegality.** Professionals bear responsibilities that other persons do not possess. This Standard is one such professional duty. The duty to report applies to criminal misconduct performed by anyone, including the Notary. Any such criminal conduct should be reported to law enforcement authorities. (See Standard X-B-1 and accompanying Commentary.) The greater good of the public and the parties affected by the actual or attempted notarial illegality may be served by the Notary’s self-reporting or reporting the attempts of others bent upon illegal activity.

The same Illustration appeared in the 1998 Code. An attempted bribe of a public official is clearly a criminal violation, and it should be reported to law enforcement.





# Guiding Principle V

**The Notary shall act with reasonable care and not provide unauthorized advice or services.**

## STANDARDS OF PROFESSIONAL PRACTICE

### Article A: Due Care and Diligence

#### V-A-1: Reasonable Care

The Notary shall perform every notarial act with the degree of care and diligence of an ordinarily prudent Notary in similar situations.

**Illustration:** The Notary is asked to notarize the signatures of Joe and Jennifer Knighton on a benefit election form waiving spousal rights to a pension. Both present a driver's license as identification. While signing the journal and prior to the Notary completing the notarial certificate, the Notary observes that Ms. Knighton signs her name "Jennifer Kinghton."

**Resolution:** The Notary catches the discrepancy between the true spelling of Ms. Knighton's name and the transposed letters appearing in the signature. The Notary should ask the principal to provide further evidence that will prove her identity to the Notary's satisfaction. If she cannot, the Notary must not proceed with the notarization because the true principal would not make such a fundamental mistake as misspelling her last name.

### Article B: Unauthorized Advice

#### V-B-1: Legal Counseling Improper

The Notary who is not an attorney, or a professional duly trained or certified in a pertinent field, shall not provide legal advice that may or may not involve a notarial act.

**Illustration:** The Notary is asked by a friend, "Do you know anything about wills?" The friend then expresses a desire to make sure that a relative will receive the friend's

personal property in the event of death. The friend asks, “Can I just write out what I want and then have you notarize it?”

*Resolution:* Not being an attorney, the Notary declines to offer legal advice about the preparation of a last will and testament. The Notary may suggest to the friend that he seek the advice of an attorney or contact the local bar association.

### **V-B-2: Selecting Notarial Act or Certificate Improper**

The Notary who is not an attorney, or a professional duly trained or certified in a pertinent field, shall not determine or prescribe the type of notarial act or certificate required for a given document.

**Illustration:** The Notary is asked by a principal to notarize a letter giving a friend permission to authorize medical treatment for a child. When the Notary asks the type of notarization needed the individual says, “You decide. I have no idea.”

*Resolution:* The Notary shows the language of both a standard jurat (or verification on oath or affirmation in certain states) and acknowledgment certificate, and then asks the principal to decide which to use. If the principal cannot decide, the Notary may suggest that the individual contact the person or agency requiring the letter to be notarized, the medical facility where the letter would be presented, or an attorney for further instructions.

### **V-B-3: Selecting Document Improper**

The Notary who is not an attorney, or a professional duly trained or certified in a pertinent field, shall not determine or prescribe the particular type of document required in a given circumstance.

**Illustration:** The Notary, who is not an attorney, is asked by a principal to provide a “parental consent for minor to travel” form that will allow the principal’s son to travel with a relative to a neighboring country. An airline had informed the individual that any Notary may provide such a document.

*Resolution:* The Notary refuses to provide the consent to travel form and may inform the principal that a Notary who is not an attorney is not authorized to provide documents for use by other persons.

### **V-B-4: Preparing Document Improper**

The Notary who is not an attorney, or a professional duly trained or certified in a pertinent field, shall not draft or prepare a document for another person.

**Illustration:** The Notary, who is not an attorney, is asked by a principal for assistance in completing a “claim of benefits designation” form with several spaces requesting information that he does not know how to complete.

*Resolution:* The Notary refuses to assist in completing form and may inform the principal that the Notary is not authorized to prepare documents for other persons.

## Article C: Unauthorized Services

### V-C-1: Improper Copy Certification

The Notary shall not certify the accuracy and completeness of a copy if the original is a vital record or a document that is eligible to be filed with a county clerk, register of deeds, a court, or any other government records custodian.

**Illustration:** The Notary is asked by an individual to certify a copy of her birth certificate. The individual needs a birth certificate for foreign travel but does not want to risk losing the “original.”

*Resolution:* The Notary declines to certify a copy of a birth certificate. It is a vital record that only a custodian of vital statistics may authoritatively certify. A Notary’s “certification” of a birth, death, or other vital record may lend credence to a counterfeit or tampered record. Very likely, the “original” presented by the individual is itself a certified copy and, for a modest fee, the individual may obtain another copy of the same from the bureau of vital statistics in the locality of birth.

### V-C-2: Certifying Photograph Improper

The Notary shall not certify the accuracy or authenticity of a photograph, unless authorized by law.

**Illustration:** The Notary is asked to notarize an individual’s signature on a document containing a notarial certificate and photograph of the principal. The document text states that the attached photograph is the photograph of the principal. The principal directs the Notary to affix the seal partially over the photograph.

*Resolution:* The Notary complies with the principal’s instruction. In notarizing a document with text, a signature, and a notarial certificate, the Notary may affix the seal partially over an attached photograph in addition to affixing a full impression of the seal near the Notary’s signature. The text of the document may declare the accuracy or authenticity of the photograph, but the notarial certificate may not.

### V-C-3: Certifying Translation Improper

The Notary shall not certify the accuracy or completeness of a translation.

**Illustration:** The Notary is asked by an individual to “certify” a translation of that person’s foreign birth certificate for an immigration petition.

*Resolution:* The Notary declines to perform such a certification. Notaries in the United States are not authorized to certify the accuracy of translations, though they may notarize the signature of a translator on a translator’s declaration.

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## COMMENTARY

**General.** Some reorganization and renumbering of the 1998 Guiding Principles occurred for the 2020 *Code* and this Guiding Principle is one such example. The 1998 *Code* included this Guiding Principle prohibiting Notaries from providing unauthorized advice or services as its Guiding Principle VI (in only slightly different language). The first part of this 2020 Principle directing Notaries to act with reasonable care has been added as a modification and is new to the *Code*.

This Guiding Principle and indeed the entire *Code* has been adopted by the state of Hawaii in its Notary Public administrative rules, which expressly require Hawaii Notaries to “perform notary public duties in accordance with ... the notary public code of professional responsibility as adopted by the National Notary Association, and as ... may be amended.” (HAW. ADMIN. RULES § 5-11-3.) Additionally, American Samoa has required Notary applicants to study and retain a copy of the *Code* as part of its mandatory Notary education program. (See USNRM 2-12-14 update.) These two government endorsements of the *Code* are particularly noteworthy in prefacing any discussion of a Notary’s acting with reasonable care, one of the emphases of Guiding Principle V.

**Article A: Due Care and Diligence.** Generally, under the law, professionals are obliged to act with reasonable care in the performance of their professional roles to avoid legal liability for injuries they cause. Otherwise, it might be incorrectly thought that professionals bear the impossible obligation to perform perfectly. If a Notary is careful and reasonable and, nevertheless, performs a faulty notarization that causes financial injury to someone, the Notary will not be liable for the damage. In other words, reasonable care exonerates the Notary, and it serves as “an essential protection for the notary against legal liability.” (Van Alstyne 340.) Of course, the reasonable care standard does not mean that Notaries may be less than absolutely honest and truthful; they must act with integrity in their official functions all of the time. The Alabama Supreme Court drew this distinction when it concluded: “A notary public is ... under a duty to his clients to act honestly, skillfully, and with reasonable diligence.” (*Butler v Olshan*, 191 So.2d 7, 16 (1966).)

This notarial obligation of reasonable care is unquestionably the law (see Van Alstyne 340-341), although Notary statutes and regulations rarely announce this rule. (*But see* VA. CODE ANN. § 47.1-14A.) Neither RULONA, MNA, nor MENA expressly declare that the Notary shall act with reasonable care. Instead the rule is found in a long line of court decisions. (See, e.g., *Meyers v Myers*, 81 Wash.2d 533 (1972); *Independence Leasing Corp. v Aquino*, 506 N.Y.S.2d 564 (Erie County 1986); *First Bank of Childersburg v Florey*, 676 So.2d 324 (Ala. Civ. App. 1996); *Vancura v Katris*, 238 Ill.2d 352 (2010). See, generally, Haberkorn & Wulf, *The Legal Standard of Care for Notaries and Their Employers*, 31 JMLR 735-748 (1998).)

Beyond the relevance of the reasonable care standard to legal liability is the broader concern of this *Code* about the professional responsibilities of Notaries. Generally, the obligation to act with reasonable care and diligence should apply to all features of the official acts of Notaries (*but see* Standard III-B-1 and Commentary (requiring a high degree of care in verifying the identities of principals and identifying witnesses)), except as already noted that Notaries must always be completely honest and truthful. Reasonable care is a higher standard than mere minimally acceptable performance. Indeed, although the frequent synonym for reasonable care is ordinary care, Notary professionals must strive to rise above ordinary performance. The intent of placing this matter in the *Code* is to underscore its significance and encourage conduct comprehensive enough to assure satisfaction always — thereby achieving better performance than basic compliance.

**V-A-1: Reasonable Care.** As previously noted, this Standard is new to the *Code*, although it is quite old in its origin. The Standard in any case is tested on the basis of how other informed and thoughtful Notaries would act, and that is the usual legal responsibility demanded across the spectrum of conduct by other professionals and parties. Especially as technology advances, as the financial values of documents steadily rise, as fraudsters engage in ever-increasing efforts at identity thefts and document frauds, and as the roles of Notaries become more expansive and complex, Notaries would be well advised to exercise care, diligence, and prudence beyond the lowest common denominator of reasonableness.

The Illustration was inspired by an actual incident and makes the point that Notaries must be alert and attentive throughout every step of the notarial process, including to something as basic as the spelling of the principal’s name. (See *Knighton v. Hayes*, No. W2003-00837-COA-R3-CV, 2004 WL 250903 (Tenn. Ct. App. 2004).) Most often, the answer in each set of circumstances to the question of what is ordinarily required of a Notary to comply with the standard of reasonable care involves reference to the Notary’s common sense. “The notary law is premised on the expectation that notaries will exercise common sense in serving the public and solving notarial problems. ... Common sense is one of the key elements of the standard of reasonable care.” (Van Alstyne 46.) Common sense dictates attention to details, such as to the spelling of a principal’s name.

**Article B: Unauthorized Advice.** This Article appeared in the 1998 *Code* in Guiding Principle VI, Articles A, B, and C. The 2020 Article B addresses the full range of possible settings in which a Notary may be tempted to engage in offering or providing unauthorized advice or counsel — or what is termed the “unauthorized practice of law” (UPL). (See MNA § 5-12(a).) UPL is unlawful in every state. UPL is a serious matter, which is not only improper and unhealthy to the law, but also punishable by sanctions against the offending Notary.

Persons who are not licensed attorneys or duly qualified in pertinent fields do not possess the requisite education and experience to provide sound legal advice and therefore may provide incorrect and harmful counsel to others. The key purpose of this Article is to protect the public, especially those who mistakenly believe that Notaries may perform some of the functions of lawyers. (See *Florida Bar v Fuentes*, 190 So.2d 748 (Fla. 1966) (finding that a Notary who was not licensed as an attorney, but who advised clients and prepared a wide variety of legal documents for them, “can offer only a limited, misleading and dangerous pseudo-legal service”).)

Because so much of the work of Notaries is related to the notarization of *legal* documents, it is sometimes thought by Notaries and members of the public that Notaries are knowledgeable and qualified in the law. Most Notaries serving in the rest of the world are also lawyers (as is the case with both English and civil law Notaries), and some members of the public may be familiar with this foreign practice. “In other countries, notaries can be ‘civil notaries’ which means they can go above and beyond what a notary in Utah can do. They can also attest to information outside of what is lawfully allowable for a non-attorney notary in Utah.” (Utah Lieutenant Governor’s website, *FAQs* (USNRM 11-1-19 update).) Further, many Notaries also serve as professionals in law-related fields (such as accounting, banking, bankruptcy and tax form preparation, real estate and mortgage services, paralegal work, and the like), and they may be tempted to stray beyond their limited authority into UPL. In a number of court decisions, Notaries have been found to have engaged in the unlawful activity of UPL. (See, e.g., *Biakanja v Irving*, 320 P.2d 16 (Cal. 1958) (tax preparer-Notary; also noting UPL is a misdemeanor); *In Re Skobinsky*, 167 B.R. 45 (E.D.Pa. 1994) (bankruptcy petition preparer-Notary); *Florida Bar v Fuentes*, 190 So.2d 748 (Fla. 1966) (accountant-Notary); *Florida Bar v Rodriguez*, 509 So.2d 1111 (Fla. 1987) (Notary advertised as a “notario publico” and advised clients and prepared legal documents for them).)

**V-B-1: Legal Counseling Improper.** This Standard is intended as a broad proscription against the Notary providing legal advice or counsel in general as well as in connection with a notarial act, unless the Notary is a licensed attorney or a duly qualified professional in a pertinent law-related field. Notaries have been statutorily prohibited from engaging in UPL. (See MASS. GEN. LAWS ANN. ch. 222 § 17(d); OR. REV. STAT. § 194.350(5); TEX. GOV’T CODE ANN. §§ 406.016(d), 406.017(a)(1); VA. CODE ANN. § 471-15.)

As a corollary concern, it must be pointed out that there will be an ethical bar against notarization if the Notary is a licensed attorney or qualified professional in a law-related field and has drafted, prepared, or consulted for the principal about the document to be notarized. Such a dual role undermines the impartiality of the Notary and creates an actual or apparent conflict of interest. (See the discussion of Standards II-A-2 through II-A-5.)

The Illustration presents a case in which the Notary was asked for legal advice not in connection with the performance of a notarization, and the Notary who is not a licensed attorney or otherwise duly qualified must not provide such advice. The same restraint would be required of anyone else who is not a licensed attorney or qualified in the pertinent field.

**V-B-2: Selecting Notarial Act or Certificate Improper.** This Standard appeared in the 1998 *Code* as Standard VI-A-1, and it treats a common concern in the notarial field. With regularity, principals present themselves for notarizations, but without notarial certificate forms attached to the documents. Yet, the notarial certificate is of vital importance to the proper conduct, recording, and evidencing of a notarization. (See Standard IV-A-1.) When certificate wording is missing, Notaries are often asked by principals to identify the type of certificate form that should be used — in other words, the type of notarial act that should be performed. Should there be an acknowledgment or a jurat (also called a verification on oath or affirmation), or in many states a signature witnessing?

The view is widely held that the Notary who is not an attorney or qualified professional in a relevant law-related field may not advise the principal about, or select the type of, notarization to be performed, as such advice or selection would constitute UPL. (See MNA § 5-12(b); ALASKA STAT. § 44.50.061(a); NEB. REV. STAT. § 64-105.03(2); N.M. STAT. ANN. § 14-12A-15.A.) “A notary should not decide which type of notarial act a document requires.” (Michigan Secretary of State, *Jurat vs. Acknowledgments – Which One?* at [https://www.michigan.gov/sos/0,4670,7-127-1640\\_1633\\_95527-95663-85785--,00.html](https://www.michigan.gov/sos/0,4670,7-127-1640_1633_95527-95663-85785--,00.html) (last viewed on December 5, 2019). See also Kansas Secretary of State, NOTARY PUBLIC HANDBOOK 41; Montana Secretary of State, NOTARY PUBLIC HANDBOOK 14 (2018-2019); Oregon Secretary of State, OREGON NOTARY PUBLIC GUIDE 10 (2018); Wisconsin Department of Financial Institutions, NOTARY PUBLIC INFORMATION 10 (2018).) Furthermore, the act of selecting the type of notarial act or notarial certificate is not expressly granted by statute to Notaries. (See Colorado Secretary of State, NOTARY HANDBOOK 16 (2019).) There is, however, some difference of opinion about the Notary’s authority and competence to select notarial acts and certificates. (See Van Alstyne 367-370.)

The Illustration and its Resolution resolve this common problem for Notaries by suggesting the Notary may keep sample certificate forms available for the various kinds of notarial acts and ask principals to choose from the sample forms. This sound solution has been suggested elsewhere. (See N.C. GEN. STAT. § 10B-20(m); Texas Secretary of State, *Information Materials That Accompany Notary Commissions* at <https://www.sos.state.tx.us/statdoc/edinfo.shtml> (last viewed on December 5, 2019): “(A) notary public is provided copies of sample notarial certificates with his or her notary commission. A person for whom a notarization is performed may choose the notarial certificate, and the notary may add such certificate to the document.” If a principal is uncertain or unwilling to make such a selection, the Notary may suggest the principal contact an attorney, the party who will receive the notarized document, or someone else for assistance with the choice of notarial form language.

**V-B-3: Selecting Document Improper.** Just as the Notary who is not a licensed attorney or duly qualified professional in a law-related field must not advise or counsel the principal about selection of the kind of notarization or notarial certificate to be employed (Standard V-B-2), the Notary must refrain from advising about, or selecting, the kind of document to be used by the principal. (See NEB. REV. STAT. § 64-105-03(3); N.M. STAT. ANN. § 14-12A-15.B, C; N.C. GEN. STAT. § 10B-20(k).)

The Illustration and Resolution is one in which the principal asks the Notary to provide the kind of document needed to allow the principal's son to travel abroad with a relative. The Notary must decline to provide the document, for two reasons, the Notary is not statutorily authorized to perform the requested service and doing so would constitute UPL.

**V-B-4: Preparing Document Improper.** Just as the Notary who is not a licensed attorney or a duly qualified professional in a law-related field must not advise about, or determine, the kind of document to be employed by the principal (Standard V-B-3), the Notary must refrain from drafting or preparing the document for the principal. (See 5 ILL. COMP. STAT. § 312/6-104(b); NEB. REV. STAT. § 64-105-03(3); N.C. GEN. STAT. § 10B-20(k).) The Missouri Secretary of State declared: “A notary does not have the authority to prepare legal documents.” (Missouri Secretary of State, MISSOURI NOTARY HANDBOOK 45.)

The Illustration and its Resolution present the example of a request from a principal for the Notary to complete a “claim of benefits designation” form. The request must be denied by the Notary. Moreover, if a Notary were to complete a document, the Notary's impartiality would be lost because the Notary would have an interest in seeing that the document is successfully notarized. (See Standards II-A-2 through II-A-5, and II-C-1.)

**Article C: Unauthorized Services.** This Article appeared in the 1998 *Code* as Article D of its Guiding Principle VI. This Article was included to highlight three types of services which Notaries are prohibited from performing.

**V-C-1: Improper Copy Certification.** Some states do not authorize Notaries to perform copy certifications. “A notary cannot certify copies of documents or signatures.” (Illinois Secretary of State, *Certifying Official Documents for Foreign Use*.) Numerous states, however, authorize Notaries to perform copy certifications with specified restrictions on the kinds of documents that qualify. “In many instances, ... the custodian of the official archive or collection may also be empowered to issue an officially certified copy. When a copy officially certified by the custodian of the archive is available, it is official evidence of the state of the public archive or collection, and it may be better evidence of the original record than a copy certified by a notarial officer.” (RULONA § 5(d), Comment.) “Copy certifications by notaries of recordable instruments are considered nationally to be unauthorized. ... A number of states specifically prohibit notaries from copy certifying anything that is held in custody by a government entity.” (Van Alstyne 63, 65. See NEV. REV. STAT. ANN. §§ 240.075.5, 440.175.2 (prohibiting certificates of birth, death, and marriage; divorce and annulment decrees); N.H. REV. STAT. ANN. § 5-C:98.II (prohibiting vital records, recordable records, etc.)

This Standard instructs the Notary not to certify the accuracy or completeness of certain documents, and is justified on the grounds that in many instances the Notary is either unauthorized to perform the act (e.g., where only the official public custodian of vital records can certify those records) or performing the act would result in unreliable reproductions (e.g., where the copy could be handwritten, or a photocopy would provide poor resolution quality). (See MNA § 2-4.)

**V-C-2: Certifying Photograph Improper.** The certification of photographs is requested of Notaries with some frequency. The basic reason for this Standard's prohibition of Notaries to certify photographs is that except for the state of Montana (see MONT. CODE ANN. § 1-5-603(11)(c)), this procedure is simply not a power expressly granted to Notaries. “Notaries are not authorized to certify the authenticity of photographs.” (ASN in Coop. with GA Superior Court Clerk's Cooperative Authority, GEORGIA NOTARY HANDBOOK 45 (2019).) Indeed, the notarization of a photograph itself has been statutorily prohibited in some states. (See N.M. STAT. ANN. § 14-12A-12.B; N.C. GEN. STAT. § 10B-23(b).)

The Illustration does not involve a request for the Notary to certify the accuracy of a photograph, but instead posits the example of a request to notarize a signature on a document that bears a photograph of the principal along with the principal's request "to affix the seal partially over the photograph." The Notary may perform this notarization because it is the principal who is swearing to or affirming the authenticity of the photograph. The Massachusetts Secretary of the Commonwealth has stated: "For individuals needing a photograph notarized, a Notary Public may not certify nor authenticate a photograph. However, a Notary Public may notarize a statement by the principal regarding the photograph." (Secretary of the Commonwealth of Massachusetts, *Apostilles and Certificates of Appointment*.)

Additionally, because the photograph will appear outside the notarial certificate block, as a best notarial practice the Notary should affix a seal impression that overlaps both the edge of the photo and the document to which it is attached (to help protect against possible tampering or substitution of the photo). The Oregon Secretary of State has recommended for the Notary to use the seal "such that it overlaps the photograph and the paper it is attached to. ... This action makes it clear to the receiving agency that the photograph is the one attached to the document when it was notarized." (Oregon Secretary of State, *Oregon Notary Public FAQs* at <https://sos.oregon.gov/business/Pages/oregon-notary-public-faq.aspx> (last viewed on December 5, 2019).) The Notary should, of course, also affix the usual seal impression near the Notary's signature within the boundaries of the notarial certificate.

**V-C-3: Certifying Translation Improper.** The authority for Notaries to certify translations of documents is not expressly granted in statutes. (See MNA § 5-1; RULONA, §§ 4, 5.) "(A) notary public has no authority to certify translations." (Connecticut Secretary of the State, *NOTARY PUBLIC MANUAL 17* (2013).)

The Illustration presents the example of a request by a principal to obtain a Notary's certification of the translation of a foreign language birth certificate. The Resolution rightly directs the Notary not to certify the translation, because the Notary is not statutorily empowered to do so. On the other hand, as the Resolution notes, the Notary may notarize the signature of a translator who certifies the accuracy of the translation. This reasoning is similar to the explanation for allowing the Notary to perform the notarization in the Illustration for Standard V-C-2.





# Guiding Principle VI

**The Notary shall affix or attach an official seal to every notarial certificate and not allow the seal to be used by another.**

## STANDARDS OF PROFESSIONAL PRACTICE

### Article A: Official Seal

#### VI-A-1: Use of Official Seal

The Notary shall affix or attach a legible impression or image of an official seal to every notarial certificate completed by the Notary at the time of notarization.

**Illustration:** The Notary resides in a state that does not have a statute requiring Notaries to affix or attach official seals to notarial certificates; however, using a seal is not prohibited and many Notaries choose to use one. The Notary ponders whether use of a seal justifies the expense of its purchase.

**Resolution:** Even though state law does not require a seal, the Notary elects to obtain and use an official seal, believing it imparts a sense of ceremony and officiality to the act of notarizing that most principals seem to expect and appreciate. The Notary also concludes that a well-placed official seal can deter forgers, identify the Notary and the Notary's authority, and eliminate potential recording problems. Although not required, the Notary decides that the minor expense of purchasing a seal is far outweighed by its advantages.

#### VI-A-2: Delegation of Official Seal Improper

The Notary shall not allow the official seal to be affixed or attached to a notarial certificate by another person.

**Illustration:** The Notary is asked by a supervisor for an impression of the Notary's official seal so that it may be reprinted on multiple copies of certain standard office forms. "That way, we don't have to worry about smeared or illegible seal impressions," the

supervisor says. The Notary is told that the resulting copies will be under the Notary's strict control.

*Resolution:* The Notary refuses to allow the official seal to be preprinted on the office forms. It would effectively mean surrendering control of the seal and allowing it to be imprinted on the forms prior to the act of notarization.

## Article B: Control and Disposition of Official Seal

### VI-B-1: Safeguarding Official Seal

The Notary shall safeguard and maintain sole control of the official seal to prevent its misuse by others when it is not in use.

**Illustration:** The Notary maintains a desk in a large and busy office with other desks nearby. The Notary finds it convenient to keep the official seal on the top of this desk.

*Resolution:* The Notary determines to keep the official seal in a locked drawer of the desk or other secure location under the Notary's sole control when not in use. The only key is safeguarded on the Notary's person.

### VI-B-2: Surrendering Official Seal to Employer Improper

The Notary shall not surrender the official seal to an employer or supervisor upon termination of employment, even if the employer paid for the seal.

**Illustration:** The Notary gives an employer two weeks' notice before leaving for a new job. The employer responds that the Notary must surrender the official seal before departing, since the employer paid for it.

*Resolution:* The Notary informs the employer that the Notary will not surrender the official seal. The seal must be retained by the Notary until it is destroyed in compliance with Standard VI-B-3. Use of the seal by anyone but the Notary would be unlawful.

### VI-B-3: Destruction or Disablement of Official Seal

To prevent its misuse by others, the Notary shall destroy, deface, disable, delete, or erase the official seal when the term of office it denotes expires or is terminated by revocation or resignation, provided the law does not prescribe another disposition.

**Illustration:** After moving to another state for a new job, the Notary resigns her commission. The Notary ponders what to do with her official seal. The state where the Notary is commissioned does not prescribe a rule for disposing of the seal.

*Resolution:* The Notary defaces the official seal so that it may not be misused.

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## COMMENTARY

**General.** Guiding Principle VI is an updated version of prior Guiding Principle VII from the original *Code*. It continues to maintain that the seal is an important symbol of office, and the Standards foster that position. The Standards provide guidance on both the proper use and improper misuse of the seal, as well as best practices for the control, surrender, and when appropriate, destruction of the seal. Following these directives will help prevent unauthorized use of the notarial seal and deter fraud.

**Article A: Official Seal.** Article A provides rules regarding the proper use of notarial seals. The concepts are straight-forward. The first Standard requires that all notarial certificates have a seal and specifies when it must be affixed or attached. (“Attached” is used in the Guiding Principle and Standards with specific reference to electronic seals, since they are typically “attached” and not “affixed” to electronic documents.) The second makes clear that the Notary is not authorized to allow anyone else (including another Notary) to use the Notary’s seal.

**VI-A-1: Use of Official Seal.** Standard VI-A-1 sets out important specifics regarding how and when to use the notarial seal properly. Although some states do not require a Notary to use a seal (see, e.g., N.J. STAT. ANN. § 52:7-19; ME. REV. STAT. ANN. tit. 4, § 951), most do (see, e.g., ARK. CODE ANN. § 21-14-107(b); HAW. REV. STAT. § 456-3; MONT. CODE ANN. § 1-5-609(2)(a)). The *Code* takes the position that best practice dictates using a notarial seal. Thus, the Standard requires that every notarial certificate have a seal affixed or attached to it. The seal not only imparts a significant formality to a notarization, but also helps deter fraud when properly affixed. The seal should be affixed manually to paper documents being notarized. (*Accord* TEX. GOV’T CODE ANN. § 406.013(c); 5 ILL. COMP. STAT. § 312/3-101.) Additionally, the Standard requires the seal to be applied to the certificate at the time of the notarization. (*Accord* N.M. STAT. ANN. § 14-12A-18.D: (“[an] impression or image of the seal or stamp shall be affixed only at the time the notarial act is performed.”); Standard IV-A-3.) If a Notary affixes the seal to an unsigned document, there are no safeguards to protect against a subsequent forgery or other fraud. The dictate against issuing incomplete certificates (see Standard IV-B-1) applies equally to affixing one’s seal to an unsigned document.

**VI-A-2: Delegation of Official Seal Improper.** Standard VI-A-2 addresses another crucially important matter — prohibiting the Notary from delegating the use of the Notary’s seal to others. The seal is personal to the Notary and for the Notary’s exclusive use. (See MO. ANN. STAT. § 486.285.4; WASH. REV. CODE ANN. § 42.45.160(1).) The authority of a notarial commission resides only in the Notary who received it. Consequently, a Notary should never allow another person to use the Notary’s seal. To do so is an invitation to false notarizations as well as the fraudulent transactions and unwanted consequences that can flow therefrom. A Notary must not relinquish exclusive control of the seal. Moreover, a Notary only is authorized to use their own seal. Thus, allowing a fellow Notary to use one’s seal is prohibited, as well.

The Illustration offers another aspect of the “exclusive use” rule, *i.e.*, prohibiting an impression or image of the seal to be copied and placed on pre-printed forms or used in other ways. A form with a printed image of the seal affixed to it paves an easy path for an unscrupulous individual to commit fraud.

**Article B: Control and Disposition of Official Seal.** Article B addresses the need for a Notary to maintain control over the Notary’s seal, as well as its ultimate disposition. The Article provides guidance on how to avoid fraudulent use of the seal during the term of the notarial commission period as well as thereafter.

**VI-B-1: Safeguarding Official Seal.** Standard VI-B-1 requires a Notary to exercise exclusive control over the seal to ensure it is not used by others. This requirement is a complement to Standard VI-A-2. Whereas the Standard VI-A-2 prohibits authorizing another to use the seal, Standard VI-B-1 seeks to prevent the misuse from a Notary’s carelessness. Failure to do so can result in fraudulent notarizations. As a corollary to the exclusivity rule, it would be improper for two or more duly commissioned Notaries either to have a joint or share one seal. (*But see* OHIO REV. CODE ANN. § 147.04, which does not require the Notary’s name or commission expiration date to appear in the seal.)

The Standard imposes an affirmative duty on the Notary to prevent misuse of the notarial seal. The seal carries with it the ability to add authenticity to a fraudulent document. Therefore, every effort should be made to protect the public against misuse of the seal by others. A Notary could be held liable for damages caused by a fraudulent notarization arising from the Notary’s negligence in failing to properly safeguard the seal. To prevent misuse of the seal by others, a Notary should report lost or stolen seals to the appropriate authority immediately upon discovery. (*Accord* GA. CODE ANN. § 45-17-14; W.VA. CODE § 39-4-18(b).) Properly safeguarding the seal is essential to preventing unauthorized use of it. (See, *generally*, N.C. GEN. STAT. § 10B-36(a).) Possession or use of a Notary seal by an unauthorized person can constitute a criminal act. (See FLA. STAT. ANN. § 117.05(3)(c) and (d); MO. ANN. STAT. § 486.380; 57 PA. CONS. STAT. ANN. § 323(f)(3).)

**VI-B-2: Surrendering Official Seal to Employer Improper.** Standard VI-B-2 extends the “exclusive use” rule to possession of the seal in employment settings. (See FLA. STAT. ANN. § 117.05(3)(b); WASH. ADMIN. CODE § 308-30-080(3).) The Standard establishes the rule that a notarial seal must always remain in possession of the Notary. This is true even if an employer paid for the commission, seal, and other materials used by the Notary for making notarizations exclusively for the employer. Thus, the Notary retains the seal after the employment relationship terminates. This position is supported by the fact the Notary, and not the employer, is empowered by the state to perform notarizations which require use of the seal. Without this rule the door would be left wide open to fraudulent notarizations. It would be too easy for an unscrupulous employer to hand over the seal to an employee and order the employee to use it for unauthorized notarizations. A Notary cannot surrender the seal to an employer or supervisor upon termination of employment even when the employer paid for the Notary’s commission, seal, and supplies.

**VI-B-3: Destruction or Disablement of Official Seal.** Standard VI-B-3 directs the Notary to destroy or disable the notarial seal when, for whatever reason, the Notary stops being a Notary. This would include expiration of the notarial term without renewal, resigning of one’s commission, or revocation of the commission. Doing so will eliminate the possibility the seal is misused by others. In each instance the Notary must take sufficient action so that the seal cannot be used for future notarizations. If a state has established the method for dealing with the matter, the Standard directs that the Notary follow it. Some states require the Notary, or the Notary’s personal representative, to tender the seal to the appropriate authority after the Notary’s commission expires without renewal, is resigned, is revoked, or ends with the Notary’s death. (See, e.g., GA. CODE ANN. §§ 45-17-16 through 47-16-18; HAW. REV. STAT. § 456-3.) If the state does not prescribe a process to use, the Standard offers several ways a seal may be destroyed or disabled. (See COLO. REV. STAT. ANN. § 24-21-518(1).)

# Guiding Principle VII

**The Notary shall record every notarial act in a bound paper or secure electronic journal and safeguard it as an important public record.**

## STANDARDS OF PROFESSIONAL PRACTICE

### Article A: Record of Notarial Acts

#### VII-A-1: Official Act

The Notary shall maintain a detailed, chronological record of every notarial act performed by the Notary in a journal of notarial acts.

**Illustration:** The Notary resides in a state where keeping a record of notarial acts is not required by law. The Notary ponders whether to document each notarization in a journal.

**Resolution:** Even though not mandated, the Notary elects to maintain a journal in the belief that all responsible and businesslike public officials should keep a record of their official activities. In addition, the journal will prove invaluable for several other reasons, including as protective evidence of the Notary's use of reasonable care and proper procedure.

#### VII-A-2: Refused Act

The Notary shall create a journal record of any request for a notarial act refused by the Notary.

**Illustration:** The Notary is asked to notarize a principal's signature on a deed containing a space for the legal description of the property being conveyed with the notation, "See Exhibit A." The accompanying exhibit is not present. The principal explains to the Notary that it will be provided after his signature is notarized and before the deed is filed in the local land records.

*Resolution:* The Notary refuses to notarize the signature on a deed referencing an exhibit with the legal description that is not present in compliance with Standard IV-D-1. The Notary completes an entry in the Notary's journal documenting the reasons for refusing to perform the notarial act.

### **VII-A-3: Format of Journal**

The Notary shall use a permanently-bound paper journal with pre-printed, sequentially numbered pages and entry spaces or a tamper-evident electronic journal designed to record notarial acts.

**Illustration:** The Notary's employer has recently paid the costs for the employee-Notary's commission. Since the employee-Notary will be notarizing hundreds of debt affidavits to submit to court each week, the employer wishes to cut costs by using either loose-leaf notebooks or a spreadsheet to record the notarizations.

*Resolution:* Whereas the employer's suggestion may comply with state law, the Notary insists on using bound paper or tamper-evident electronic journals that are specifically designed to record notarial acts. The Notary may explain that using secure journals to record the affidavits is necessary because the business will be relying on the independent evidence in the journals to support the affidavits filed with the court and that secure journals establish the integrity of the recordkeeping process.

### **VII-A-4: Essential Journal Entries**

For every notarial act performed, the corresponding entry in the Notary's journal shall contain, at least: the date, time, and type of the notarial act; the date, if provided, and description of the document or proceeding; the name, address, and signature of each principal and witness identifying a principal; a description of the evidence used to identify any principal and witness identifying a principal; and the itemized fees, if any, paid by the principal to the Notary.

**Illustration:** A principal asks the Notary to notarize her signatures on some sensitive personal papers that pertain to a complicated and painful divorce. The principal presents only the signature pages of the documents. The principal tells the Notary, "there is no need for anyone but myself, my ex-spouse, and our lawyers to know the details." The principal keeps the other pages of the documents hidden from the Notary, not wanting the Notary to record any information from the documents in the Notary's journal.

*Resolution:* The Notary refuses to notarize the principal's signatures unless handed all pages of each document so that the Notary may complete an entry for each in the journal. The Notary may explain that the act of notarization which will protect the principal's rights in the divorce necessarily requires surrendering to the journal certain minimally descriptive information about the documents. Failure to follow this

procedure could facilitate fraud by allowing changes or additions to be made to the documents after the notarizations that could be difficult to detect or verify.

#### **VII-A-5: Additional Journal Entries**

In addition to the minimum entries required by Standard VII-A-4, a Notary may enter in the journal other information about a notarial act the Notary deems important, unless prohibited by law, official guideline, or Standard VIII-B-1.

**Illustration:** The Notary is commissioned in a state where the law allows a principal with a physical disability who cannot sign or make a mark to direct the Notary to sign the principal's name on a document and to notarize that signature. The Notary ponders whether to explicitly document the signing procedure for the notarization in the journal entry.

Resolution: The Notary includes a notation in the journal that the principal directed the Notary to sign the principal's name and that the Notary added the prescribed wording required by statute to evidence the signing by proxy beneath the signature.

#### **VII-A-6: Entry Contemporaneous with Act**

The Notary shall complete a journal entry of any notarial act performed by the Notary only at the actual time of the notarial act.

**Illustration:** A principal urges the Notary to proceed with a notarization without completing the journal to save time and promises to stop by the Notary's office later to sign the journal.

Resolution: The Notary declines to notarize without first completing the journal entry. A completed journal entry is required to satisfy proper notarial practice.

#### **VII-A-7: Backup of Electronic Journal**

The Notary who records notarial acts in an electronic journal shall create a backup of the data after each new entry is recorded in the electronic journal.

**Illustration:** The Notary has chosen to use an electronic journal to record notarial acts that stores the records in an online storage facility. The Notary is concerned with the possibility that an outage may prevent the Notary from recording entries in the electronic journal at the time of notarization or accessing and retrieving electronic journal entries later.

Resolution: The Notary contacts the electronic journal provider and learns that the provider makes secure, redundant backups of the data in the Notary's electronic journal after each notarial act is recorded and stores the backups on separate servers located in different regions of the country.

## Article B: Control and Disposition of Journal

### VII-B-1: Safeguarding Journal

To prevent loss, theft, or tampering, the Notary shall safeguard and maintain sole control over the journal of notarial acts, and not surrender it to any person who does not present a subpoena or other lawful written authorization.

**Illustration:** The Notary is asked by an acquaintance to see an entry in the journal of notarial acts and presents a written and signed request in compliance with Standard VIII-B-2. After viewing the entry, the acquaintance asks to make a photocopy. When the Notary responds that there is no photocopier available on the premises, the acquaintance asks, “May I take the journal to the copy shop around the corner and come right back?”

**Resolution:** The Notary declines, explaining that he never surrenders control of the journal of notarial acts unless presented with a subpoena or other lawful authorization. As a courtesy, the Notary may offer to make a copy of the journal entry that evening, if the acquaintance will return the next day.

### VII-B-2: Surrendering Journal to Employer Improper

The Notary shall not surrender the journal to an employer or supervisor upon termination of employment, even if the employer paid for the journal, unless expressly authorized by law.

**Illustration:** The Notary gives notice of intent to leave for a new job in two weeks. The Notary’s supervisor says that the firm will require the official journal of notarial acts to be left behind, since it contains important information for its business records.

**Resolution:** The Notary refuses to surrender the journal to the employer. The journal is the official record of a particular Notary. It must be kept in the custody of that officer, who will be solely accountable for its accuracy and availability as evidence for the public benefit. The Notary, however, may provide the firm with copies of all entries that are directly associated with its business.

### VII-B-3: Storage of Journal

In the absence of official rules for disposition of the journal of notarial acts, including an electronic journal, the Notary shall safeguard and maintain sole control of each journal for at least 10 years from the date of the last entry in the journal.

**Illustration:** The Notary reports for work at a new job to find that there are a more than a sufficient number of Notaries on staff to handle the office’s business. With the Notary’s commission about to expire, the Notary decides not to renew the commission.

**Resolution:** On the day after commission expiration, the Notary stores the journal of notarial acts in the locked fireproof cabinet used to store all the Notary’s important personal records. The Notary attaches a note on the cover that the journal must not be



discarded or destroyed prior to a particular date that is 10 years from the last entry in the journal. Notaries in states where statutory limits on civil lawsuits extend beyond 10 years may elect to preserve the journal as potential evidence if they feel it prudent.

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## COMMENTARY

**General.** Guiding Principle VII is an enhanced version of its predecessor, Guiding Principle VIII, in the original *Code*. There are a number of new Standards with substantive changes that address journal entries and proper storage of the journal itself. Whereas uniform and model notarial laws endorse recordkeeping (see RULONA § [19]; MNA § 7-1, MENA § 9-1) and a number of states require it (see, e.g., CAL. GOV'T CODE § 8206; D.C. CODE ANN. § 1-1231.18; and 57 PA. CONS. STAT. ANN. § 319), that is not the majority rule. Notably, there is not any state that proscribes the use of a journal. As part of its update, the Principle now uses the term “electronic journal” in lieu of the former “recording device.” This change was made to reflect both the technological advancement and common practice changes since the original *Code* was published. The journal plays an important role that both serves the public’s interest, as well as helps ensure consistent, proper notarizations. The changes in this Principle are designed to reflect that fact.

**Article A: Record of Notarial Acts.** Article A offers professional guidance on how a Notary should maintain a journal to maximize its effectiveness and prevent misuse. The best practices addressed in the Article cover a wide range of subjects. These include basic matters such as requiring a journal, elements of a journal entry, and proper journal format to more innovative items such as electronic journals and recording refusals to notarize. Taken together these Standards provide the Notary a road map on how to protect the interests of clients, the public, and the Notary.

**VII-A-1: Official Act.** Standard VII-A-1 presents the basic tenet that a Notary should maintain a journal whether or not state law requires it. A journal helps ensure consistent, proper notarizations. The journal entry itself serves as a “check list” the Notary can use to determine whether every required element of a proper notarization has been performed. (See Standard VII-A-4, *infra*.) The journal entry is an excellent way of showing the Notary acted with reasonable care. (See Standard V-A-1 and accompanying Commentary.) Also, formally recording any action gives the transaction a certain gravitas. A properly executed notarization coupled with a carefully entered journal entry reminds both principals and witnesses of the significance of the notarial act. In many instances, the journal will not only provide a reliable record of notarized documents that can be referred to when questions arise in the future long after memories of the notarization have faded, but also help deter fraud by requiring the Notary to obtain important information incident to the notarization that impostors may not be able to produce. Finally, the Standard emphasizes that as public servants Notaries have a duty to carefully document their official acts. (See Guiding Principle I and accompanying Commentary.)

**VII-A-2: Refused Act.** Standard VII-A-2 recognizes that refusing to perform a notarization is an action worthy of recordation. (See MNA § 7-2(c).) The related Illustration presents a simple scenario in which the Notary should not perform the notarization. Consider the potential consequence to the Notary if the Notary had not made the journal entry and was sued one year later as the cause for a large real estate transaction to fail. The journal entry not only will refresh the Notary’s recollection of what had happened to justify the refusal to notarize, but also provide a written record of the same. Additionally, it could be useful evidence in a future lawsuit brought by the person for whom the Notary refused the notarization.

**VII-A-3: Format of Journal.** Standard VII-A-3 prescribes an appropriate format to use for a journal. (See RULONA § [19(b)]; MNA § 7-19(a); MENA § 9-2; COLO. REV. STAT. ANN. § 24-21-519(2); WASH. REV. CODE ANN. § 42.45.180(3).) The *Code* adopts the position that making reasonable efforts to prevent journal entry alterations is important. For example, a permanently-bound journal with sequential page numbers will be a significant impediment to post-dated entries and similar fraudulent activities. Although not required by the Standard, a journal also could have separate columns for each required element of a proper notarization as provided in Standard VII-A-4. The journal is a small investment of time for significant protection against challenges to notarizations. The Standard also recognizes that electronic journals must be tamper-evident if they are to have validity. The term “tamper-evident” is defined in this *Code*. (See Definitions.) Requiring that the journal be tamper-evident provides the same. Without this protection entries are susceptible to improper post-notarization changes that can facilitate fraud. (See *also* Standard VII-A-6 and Commentary, *supra*, discussing the necessity of journal entries being made at the time of notarization.)

**VII-A-4: Essential Journal Entries.** Standard VII-A-4 specifies the essential elements required of a properly performed notarization as well as the evidence used by the Notary to verify the same in the journal. The Standard calls for more detailed entries than those required in several states. (See, e.g., HAW. REV. STAT. § 486-15 (not requiring the fee for the notarial act); 57 PA. CONS. STAT. ANN. § 319 (not requiring the date of the document, if provided, or signature of principal); MO. STAT. ANN. § 486.260 (not requiring the time of notarization and the date of the document, if provided).) Although not relevant to the efficacy of the notarization, the Standard recommends that any fee received by the Notary be recorded as well.

The Illustration makes the case for having all of the “essentials” entered into the journal. The journal serves to remind the Notary of every action that must be taken for a proper notarization. This alone justifies using a journal. As long as every entry made as required by this Standard is complete, the principal and those relying on the notarization are assured it was properly executed. The Notary also benefits by recording the steps to perform the notarization. That journal entry will help the Notary rebut any challenge to the Notary’s action.

**VII-A-5: Additional Journal Entries.** Standard VII-A-5 permits the Notary to make “non-required” journal entries that the Notary believes are important. Such entries could be part of a Notary’s established journal entry regimen or made on an *ad hoc* basis as the Notary deems necessary. The Illustration provides a good example of the latter. Importantly, the Standard makes clear that there are limitations on what can be recorded in the journal. A Notary may not record any information proscribed by law or an official governing guideline. Also, principals and other persons who may be identified in the journal have privacy rights that cannot be violated. Certain private information, e.g., Social Security numbers, identification credential serial numbers, or personal markers such as fingerprints, should not be entered in the journal unless state law requires or authorizes. (See Standard VIII-B-1 and accompanying Commentary; see also MASS. GEN. LAWS ANN. ch. 222 § 22(c)(v)(1); TEX. ADMIN. CODE tit. 1, pt. 4, § 87.50. *But see* CAL. GOV’T CODE § 8206(a)(2)(G) (requiring a thumbprint for certain documents).)

The Illustration presents a variation of the signature by surrogate signing procedure presented in Standard III-D-2. There, a principal directs a third party to sign the document for the principal; here, the *Notary* is the proxy who signs on behalf of the principal. Some state laws require the Notary and not a third party to sign the principal’s signature. (See MNA § 5-4; HAW. REV. STAT. § 456-19; MICH. STAT. ANN. § 55.295; TEX. GOV’T CODE ANN. § 406.0165.) Chronicling in the journal that this specific procedure was used helps to protect all parties to the notarization.

**VII-A-6: Entry Contemporaneously with Act.** Standard VII-A-6 provides the cardinal rule that the notarization and journal entry must be executed contemporaneously or at the time of the notarial act. (See RULONA § [19(c)]; D.C. CODE ANN. § 1-1231.18(c); OR. REV. STAT. § 194.300(3); WASH. REV. CODE ANN. § 42.45.180(4).) The journal serves, *inter alia*, as a fraud-deterrent device. Any deviation from contemporaneous entry subverts that objective. There is one exception to this rule — a Notary need not make the journal entry contemporaneously if doing so would put the Notary at risk of harm. For example, if the Notary is threatened after refusing to perform a notarization, the Notary may wait to make the appropriate journal entry until after the disgruntled requestor departs. Incidentally, Standard VII-A-6 is consistent with other Standards in this Code which call for the contemporaneous completion of notarial duties during the notarial ceremony. (See Standard IV-A-3 (requiring the notarial certificate to be completed contemporaneously with the notarial act) and Standard VI-A-1 (requiring the official seal to be affixed or attached to the notarial certificate at the time of notarization).)

**VII-A-7: Backup of Electronic Journal.** Standard VII-A-7 directs a Notary who maintains an electronic journal to have a system in place to preserve the journal. A backup journal serves this purpose. (See MENA § 9-3; DEL. CODE ANN. tit. 29 § 4314(e); VA. CODE ANN. § 47.1-14.C(b); OHIO REV. CODE ANN. § 147.65(D)(4).) The wisdom of this position is self-evident. As a public record, reasonable measures should be taken to protect its contents.

**Article B: Control and Disposition of Journal.** Article B address the obligations a Notary has with respect to control and disposition of the Notary journal. The underlying tenet of Guiding Principle VII is that the journal is an important, official public record with personal information of many individuals that must be properly protected. To that end the Article addresses safeguarding, surrendering, and disposing of the journal.

**VII-B-1: Safeguarding Journal.** Standard VII-B-1 imposes a duty on the Notary to safeguard the journal. (See MNA § 7-4; COLO. REV. STAT. ANN. § 24-21-519(4); MASS. GEN. LAWS ANN. ch. 222 § 22(a) and (h).) This includes taking action to prevent others from tampering with the journal as well as its theft or loss. Although the Notary is not asked to guarantee that the journal will never be compromised, the Notary is held to a high standard of what needs to be done to prevent that from occurring. The Illustration makes this point. The Notary should never surrender sole control of the journal unless required to by subpoena or other written lawful authorization.

**VII-B-2: Surrendering Journal to Employer Improper.** Standard VII-B-2 suggests that it is improper for a Notary to surrender the journal to an employer upon terminating employment, even if the employer paid for the

Notary commission, journal, and notarial supplies. (*Accord* ME. REV. STAT. ANN. tit. 4, § 955-B; *but see* OR. REV. STAT. § 194.300(10) (allowing the employer to retain the journal of a Notary-employee upon agreement).) The Illustration elaborates on this point by noting that the Notary is the custodial officer of the journal, and as such has full responsibility for it. (*Accord* CAL. GOV'T CODE § 8206(d) (stating the journal is the exclusive property of the Notary).) The Notary should surrender the journal only to appropriate, legally recognized authorities. A Notary seeking to surrender a journal should investigate applicable state law, and then act according to its directives. This may apply when the Notary's commission is resigned, surrendered, revoked, or terminated by the Notary's adjudication of incompetency or death. (*Accord* ARIZ. REV. STAT. ANN. § 41-317.B (requiring delivery of journal to Secretary of State); D.C. CODE ANN. § 1-1231.18(f) (requiring the Notary's personal representative or guardian or any other person knowingly in possession of the journal to transmit it to the Mayor); 1 MISS. ADMIN. CODE Pt. 5, R. 050.5.17H (requiring delivery to the clerk of the circuit court of the Notary's county of residence); and see Standard VIII-B-2.)

**VII-B-3: Storage of Journal.** Standard VII-B-3 addresses storage of the journal when there are not any governing rules on point. The Standard directs the Notary to continue to safeguard and maintain sole control of the journal. This is true even if the journal was maintained as that of an employee. As indicated in the preceding paragraph, unless expressly authorized by law, the journal should not be delivered to the employer or the employer's representative. Given the confidential nature of some of the entries, it seems appropriate to require the Notary to continue to honor the privacy rights and expectations of past clients (See Guiding Principle VIII.). The Notary is directed to keep the journal for at least 10 years after the last entry in it. (*But see* MASS. GEN. LAWS ANN. ch. 222 § 24 (requiring the journal to be retained for 7 years after the date of expiration, resignation, or revocation).) The time period was selected with an eye toward the use of the journal in possible future lawsuits. It was believed most lawsuits would be stale, or past the applicable statute of limitations, after 10 years. Although some statutes of limitations reach 20 years (notably those relating to real estate adverse possession claims) a shorter time period was adopted. After the 10-year period expires, the Notary may destroy the journal. Some states allow penalties to be imposed if the required disposition of the journal is not made. (See, e.g., ARIZ. REV. STAT. ANN. § 41-317.B (imposing fine of between \$50 and \$500); CAL. GOV'T CODE § 8209(a) (charging the Notary with a misdemeanor).) After any official retention-time period has expired or, if none, when the Notary deems it advisable, the destruction of a paper-bound journal would involve shredding all pages, burning the entire journal, or otherwise reducing it to a state which would make it totally unreadable. Electronic journals, and all backup copies thereof (see Standard VII-A-7), also would need to be destroyed in a way in which they could neither be read nor recreated after destruction.



# Guiding Principle VIII

**The Notary shall protect the privacy of each principal and not examine, copy, divulge, or use personal or proprietary information disclosed during the execution of a notarial act unless required by law.**

## STANDARDS OF PROFESSIONAL PRACTICE

### Article A: Review of Documents

#### VIII-A-1: Examining Text

The Notary shall review the text of a document presented for notarization for two purposes only: to ascertain that it appears complete — including the presence of a notarial certificate — and to extract the information necessary for recording entries in the journal of notarial acts.

**Illustration:** The Notary is asked by a couple to notarize their signatures on a prenuptial agreement. After they identify themselves and give the document to the Notary to review, the couple is distracted for several minutes in making a phone call. Alone with the document, the Notary is tempted to closely read its provisions.

**Resolution:** The Notary examines the prenuptial agreement no further than to scan the document for blank spaces and missing pages, and to glean data to record in the journal, including the document's title, date, if applicable, and number of pages. The Notary realizes that reading the document would be an invasion of the couple's privacy and a breach of public trust.

#### VIII-A-2: Extracting or Copying Information Improper

The Notary shall not extract or copy information from the text of a document requiring a notarial act or from other documents possessed by the principal, unless the principal expressly directs or consents.

**Illustration:** The Notary observes that a co-worker Notary always makes and keeps a copy of each principal's notarized document and identification credential. The co-worker explains, "It's protection for me in case I'm sued."

**Resolution:** The Notary points out to the co-worker that this policy constitutes an unwarranted invasion of each principal's privacy and risks the possibility of theft or loss of the copies and unauthorized dissemination of sensitive personal information. The Notary explains a detailed journal entry for each notarial act in compliance with Standard VII-A-4 will serve the same protective purpose in the event of a lawsuit.

## Article B: Journal of Notarial Acts

### VIII-B-1: Recording Personal Information in Journal Improper

The Notary shall not record a full identification serial or Social Security number, date of birth, or other non-public, personal information in the journal of notarial acts, unless required by law in the state where the Notary is commissioned.

**Illustration:** The Notary purchases a journal of notarial acts that contains an instruction to record a passport, driver's license, or other government-issued credential serial number in the journal for every notarization performed. The Notary is commissioned in a state that requires journals but does not require identification numbers to be entered in the journal.

**Resolution:** The Notary chooses to disregard the instruction in the journal, choosing instead to record only the type of identification presented (e.g., Colorado Driver's License) and the last four digits of the credential's serial number.

### VIII-B-2: Access to Journal Entries

Unless a law or official guideline otherwise allows, the Notary shall only show or provide a copy of a journal entry to an individual who presents a written and signed request specifying the month and year, the document type, and the principal or principals for the respective notarization, or a subpoena or other lawful written authorization.

**Illustration:** The Notary is approached by an individual who claims to be an attorney representing a principal whose signature the Notary had notarized on a document several months earlier. The individual says the document is now at issue in a lawsuit and asks to inspect the journal of notarial acts.

**Resolution:** As a public official, the Notary understands that private citizens may have a legitimate need to verify facts related to a particular notarization recorded in the journal. The Notary asks the individual to present a written and signed request stating the month and year of the notarization, the name of the principal whose signature was notarized, and the type of document. The Notary may explain that in order to respect the privacy of other principals and discourage opportunistic "fishing expeditions," the individual may only inspect the entries specified in writing.

### **VIII-B-3: Record of Access**

The Notary shall record information related to a request for public access of the journal that is sufficient to evidence compliance with the request in a separate, sequential entry.

**Illustration:** The Notary is presented with a written and signed request as specified in Standard VIII-B-2 for a photocopy of a journal entry pertaining to a notarization specified in the request. The Notary ponders how to prove the photocopy was provided to the requester.

Resolution: The Notary completes a chronological entry in the Notary's journal that contains the name of the requester, the date of the request, the month and year of the notarization specified in the request, the date the photocopy was provided, the page and entry number of the journal entry for the notarization specified in the request, the location where the signed, written request is stored, and any other information related to the request the Notary deems important.

## **Article C: Exposure of Information**

### **VIII-C-1: Revealing Particulars of Notarial Act Improper**

The Notary shall not divulge information about the circumstances of a document involving a notarial act to any person who does not have lawful authority or make a lawful request for access in compliance with Standard VIII-B-2.

**Illustration:** The Notary notarized a principal's signatures on mortgage papers at the Notary's residence. At the conclusion of the appointment, a neighbor, who knows that the Notary routinely performs notarizations at home, observes the departure of the principal. After the principal has left, the neighbor asks, "That person just bought the house down the street. Did you happen to notice the selling price?"

Resolution: The Notary declines to tell the neighbor about any particulars in the documents. Such a revelation would constitute an invasion of the principal's privacy and a breach of public trust.

### **VIII-C-2: Sale or Personal Use of Information Improper**

The Notary shall not sell or use information extracted from the text of a document requiring a notarial act or from other documents possessed by the principal for personal gain or reason.

**Illustration:** A Notary who notarizes a heavy volume of documents for walk-in customers every day is approached by the agent of a company that prepares and files homestead documents for homeowners. The agent offers to pay the Notary a finder's fee for providing the names and addresses of new home purchasers whose signatures the Notary has notarized on property deeds.

**Resolution:** The Notary declines the offer, refusing to profit from information extracted from the text of documents requiring a notarial act.

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## COMMENTARY

**General.** Principle VIII is a revised version of prior Principle IX in the 1998 *Code*. Although there are wording changes throughout the Principle, the original concept of preserving privacy remains paramount. To accentuate the importance of this objective, the Principle now mandates the Notary “protect the privacy” as oppose to just “respect the privacy” of each principal. This establishes a higher standard of protection for every person for whom a notarial act is performed and underscores the important role a Notary plays in many confidential matters. The goal is accomplished by new privacy-driven restrictions on the Notary. Whereas the predecessor Principle only required a Notary not to “divulge or use” a principal’s “personal or proprietary” information, the Principle now dictates that the Notary not “examine” or “copy” such information as well. The changes to the Principle stress that a Notary must appreciate the Notary has access to personal and sensitive information and an accompanying duty to maintain individuals’ privacy rights with respect to it. (See WIS. STAT. ANN. § 137.01(5m)(a); IOWA CODE § 9B.14C (2019) (effective July 1, 2020).) The Iowa statute prohibits a Notary from sharing with others “personally identifiable information” about an individual, such as a “photograph, social security number, driver’s license number, name, address, and telephone number.” The provision provides some exceptions such as, *inter alia*, consent from the person or pursuant “... to a court order, subpoena, or other legal process compelling disclosure.” A violation of the statute is a misdemeanor. The *Code* exhorts the Notary to act professionally when dealing with clients, especially when sensitive matters are involved, and to be diligent in protecting the confidentiality of and limiting access to private information. (See RCOE, Points 6 and 8 (members of ASN resolve “[t]o not betray the confidence of any individual appearing before me” and “[t]o never divulge the contents of any document nor the fact of execution of that document without proper authority”).)

**Article A: Review of Documents.** Article A expands the scope of the Notary’s obligation to maintain privacy rights of principals. Although a Notary is obligated to determine whether or not a document is complete before performing the requested notarization with respect to it (see Standard IV-D-1 and accompanying Commentary), there must be reasonable restrictions in place to prevent unnecessary intrusions on personal information. The Article introduces some reasonable safeguards to protect principals’ privacy.

**VIII-A-1: Examining Text.** Standard VIII-A-1 makes clear that fulfilling the notarial duties imposed by this Principle must be done in a professional and ethical manner. Its language specifically states that the Notary shall limit the Notary’s review of documents to two, *and only two*, purposes: (1) determining that the document to be notarized is complete; and (2) extracting information *necessary* for completing journal entries. In a sense, the Standard establishes and seeks to enforce a “limited purpose” rule when a Notary reviews a document and records information from it. The change in language in this version of the *Code* from “scrutinize” (1998 *Code*) to “review” the text of a document is clear: The Notary’s inspection of documents presented for or supportive of a notarization is limited to the purpose of satisfying proper notarial execution requirements.

The Resolution in the Standard directs a Notary to “scan” and “glean” the document. “Scanning” a document should identify blank spaces (which may indicate incompleteness) and other blatant irregularities (e.g., notations in margins or erroneous pagination). To “glean” suggests going over a document solely for the purpose of finding certain facts, which in this instance would be limited to those necessary for proper completion of the notarization. There is not any reason for a Notary to reach beyond these limits.

The new language should deter a Notary from taking license to intrude upon the client’s privacy. Notaries are strongly admonished to follow the dictates of the Standard closely. There is no call for a Notary to examine a document beyond checking for blank spaces and obtaining necessary descriptive information necessary to the journal, unless otherwise required by law to do so. (*Accord* GA. CODE ANN. § 45-17-8(f).) Although a Notary is to record in the journal information obtained from documents (Standard VII-A-4), it is to be accomplished consistent with the mandates established in correlative Standards. (See Standards VII-A-4 and VII-A-5 and accompanying Commentary.)

**VIII-A-2: Extracting or Copying Information Improper.** Standard VIII-A-2 addresses another important restriction on Notaries. It prohibits extracting or copying information from the text of a document (whether it is the one to be notarized or other documents possessed by the principal to which the Notary has access) unless there is express consent or direction from the principal. (*Accord* IOWA CODE ANN. § 9B.14C(2) (effective July 1,



2020) (prohibiting a Notary from selling, offering for sale, using, or transferring to another person "... information collected in the course of performing a notarization..." except in certain limited circumstances such as with consent or pursuant to an enforceable legal order.)

As indicated in Standard VIII-A-1, a Notary should not read either a document to learn its contents or identification credentials for the purpose of memorizing information on them. Such acts clearly violate privacy rights. The same is true for extracting or copying such information without the principal's consent or direction. Allowing a Notary to have a copy of confidential or sensitive material runs the risk of it being lost or stolen, which can result in undue harm to the principal or others related to the transaction for which the notarization was made.

As noted above, the Standard permits "extracting or copying information" if the principal provides express direction or consent. A specific test for determining "express direction or consent," however, is not provided. "Direction" connotes "authorization" from the principal. It suggests the principal instructed the extracting or copying for some specific reason. This likely was done for the benefit or convenience of the principal. A rule of prudence requires the Notary have and maintain some evidence of the direction made. (See WIS. STAT. ANN. § 137.01(5m)(a) — requiring *written* consent of the person.) A signed statement from the principal would be best, but at a minimum a journal entry explaining the principal's reason for the direction should be made. "Consent" suggests the Notary asked permission to make the copy. The Notary likely only would make such a request for the Notary's own benefit. For example, the Notary might want a signed statement from the principal indicating permission was given for the Notary to make the copy. The Notary should make a journal entry indicating the principal's consent was given. Additionally, the Notary should retain the written and signed consent from the principal as well since that is the best evidence in the event the "copying" was ever challenged in court.

**Article B: Journal of Notarial Acts.** Article B addresses the right of the public to inspect Notary journals. This Article was moved from the Guiding Principle relating to journals (Guiding Principle VIII of the 1998 Code) to emphasize that public access to journals has privacy implications (see Commentary below and Standard VIII-A-1 on access to documents being a "limited purpose" right). The Code recognizes that the journal is a public record (see ARIZ. REV. STAT. ANN. § 41-319.F (clarifying that journals containing records that are not subject to the attorney-client privilege or are confidential pursuant to federal or state law are public records); TEX. GOV'T CODE ANN. § 406.014(b)), but also takes the position access to it cannot mirror that of public records maintained by governmental units or agencies. Usually, those records are housed in public buildings and can be accessed during stated hours. A private Notary, however, does not work for a public entity and availability to notarial records should be limited accordingly. Also, unlike some public records that are open to all, e.g., recorded deeds, Notaries have many documents that are private in nature and are seen only by parties with an interest in them. As such, the "public inspection" of a Notary journal is a limited "targeted" right — one limited to a specified entry as opposed to the entire journal. The Standards on point adopt that view.

**VIII-B-1: Recording Personal Information in Journal Improper.** Standard VIII-B-1 provides a simple rule — non-public, private information shall not be recorded in the Notary's journal. This includes recording a full Social Security number, serial identification number, or birth date in the journal. Any other private information that would easily facilitate identity theft should not be recorded in the journal either. The Illustration makes clear that the ban is not to be ignored merely because a journal has an instruction to record a driver's license or similar private identifying numbers. The Resolution instructs the Notary to ignore any "calls" for that specific type of information. Listing the credential used to identify the principal, such as a driver's license, will suffice for journal recording purposes. There is not any need to enter private information from it, such as the full driver's license number. The only exception to the rule would be if there was a legal requirement demanding the private information be entered into the journal.

The Standard defers to a statute or administrative rule in the Notary's state that expressly requires the Notary to record personal information in the journal. (See ARIZ. REV. STAT. ANN. § 41-319.A — requiring a signature, full address, and identification credential serial number to be recorded; CA. GOV'T CODE § 8606(a)(2) — requiring an identification credential serial number, signature, and in certain transactions, a thumbprint, to be entered; and COLO. REV. STAT. ANN. § 24-21-519(3)(d) — requiring a signature to be entered.) While a law could consider a signature to constitute non-public, private information, the drafters nevertheless believed requiring the journal of notarial acts to contain the principal's signature (see Standard VII-A-4) is sound public policy for providing evidence of the appearance of a principal for a notarial act and preventing forgeries.

**VIII-B-2: Access to Journal Entries.** Standard VIII-B-2 provides the framework for the basic rule that a journal is subject to a limited "targeted" inspection right. (See MNA § 7-3(a); CAL. GOV'T CODE § 8206(c); OHIO REV. CODE ANN. § 147.65(G)(1).) Absent some law or official guideline to the contrary, the Notary must be given a signed, written request identifying specific information sufficient to enable the Notary to find the entry in the

journal. The Standard mandates that all of the required information be supplied to the Notary. The Standard does not obligate the Notary to review the entire journal or proceed with insufficient information to find the entry. To mandate such an “open-ended” search would be unreasonable. The Standard recognizes the right of law enforcement or the courts to review and subpoena the journal without providing the written and signed request required of members of the public. (See CAL. GOV'T CODE § 8206(d); 1 MISS. ADMIN. CODE Pt. 5, R. 050.5.17C.)

**VIII-B-3: Record of Access.** Standard VII-B-3 requires the Notary to make a journal entry memorializing an inspection request and the result thereof. (See MNA § 7-3(a)(2).) Although in this circumstance a notarial act is not performed, the entry should comply in substance with the requirements of Standard VII-A-4. The Notary is permitted to enter additional information deemed relevant to the request. (See Standard VII-A-5.) A Notary should also make a journal entry if the request is denied. Because it is possible a requester who is denied access to a journal entry for a legitimate reason will become unreasonable and hostile, the contemporaneous journal entry required by Standard VII-A-6 would be subject to the exception of that Standard as discussed in the Commentary to it.

**Article C: Exposure of Information.** Article C is designed to alert Notaries to their obligation not to use any information obtained from a notarization in an unauthorized manner. Failure to observe this dictate is unprofessional and constitutes a breach of public trust. The drafters contemplate that the Standard will be interpreted liberally. If a question arises concerning either disclosure or personal use of information, the Notary should err on the side of caution and refrain from compromising the client's privacy unless required to do so by order of law. Prohibiting Notaries from using private information without authorization is gaining currency. (See, *generally*, IOWA CODE ANN. § 9B.14C (effective July 1, 2020) which sets out specific bars to a Notary's use of private information along with penalties for violations thereof.)

**VIII-C-1: Revealing Particulars of Notarial Act Improper.** Standard VIII-C-1 posits the simple rule that a Notary must not disclose information concerning notarial acts performed. Although the Standard specifically proscribes disclosure regarding “circumstances” of the notarization, the Illustration points out that information obtained from the reading of the document itself cannot be disclosed either. Thus, the drafters intended the word “circumstances” to be given a broad interpretation. Consistent with this view, a Notary must not disclose the type, nature, purpose, or contents of the document, nor other information such as the client's demeanor, time of day, if anyone appeared with the client and if so who it was, or any other fact attendant to the notarization. In sum, notarizations are not subject to “fishing expeditions.”

Strict application of this Standard is imperative. Since a Notary is prohibited from reading a document for content (see Standard VIII-A-1 and accompanying Commentary), a Notary should not know about detailed facts in the document. Having this information itself could constitute a breach of professional responsibility. Disclosing it would only compound the misdeed. Sometimes, however, a Notary will inadvertently obtain confidential information while performing a notarization. The inadvertently-gained information must not be disclosed. It is private information obtained by a public official incident to performing an official act and generally not available for the public-at-large unless otherwise required by rule or law. As a practical matter, disclosure of inadvertently-gained information will not only make the Notary answerable for the improper disclosure, but also force the Notary to sufficiently explain the circumstances under which the information was obtained. This will be necessary to defend against the possible charge of violating the professional obligation not to breach the client's privacy rights or the public trust based on reading documents for improper purposes.

**VIII-C-2: Sale or Personal Use of Information Improper.** Standard VIII-C-2 makes clear that a Notary cannot sell or use information from any document needed to complete the notarization for the Notary's personal gain or reason. The rule also implicitly states that a Notary cannot sell or use for personal gain, benefit, or advantage *any information* obtained from a notarization. This would include information learned in any conversation that was necessary for the Notary to complete the notarization. For example, the Notary may have had to ask a question of the principal about some aspect of the principal's identification credential. The response would be information the Notary could not use for the Notary's own personal benefit. The Standard is designed to prevent the misuse of information obtained solely by dint of the Notary's public official status. (See the Commentary to Guiding Principle I.) The restriction, however, is limited to information directly related to the notarization. Thus, if during casual conversation during the notarization the client mentioned excellent bargains available at a new mall nearby, that would not be considered information gained incident to the notarization.

# Guiding Principle IX

**The Notary shall obey all laws and official guidelines that pertain to notarial acts and follow recognized practice standards when they are silent.**

## STANDARDS OF PROFESSIONAL PRACTICE

### Article A: Precedence of Law

#### IX-A-1: Following Statutes and Rules

The Notary shall follow all statutes, rules, and regulations that apply to the performance of notarial acts in the state where the Notary is commissioned.

**Illustration:** The Notary is asked to swear in a former school classmate as a witness identifying a grantor of a deed. As the witness identifying the grantor, state law requires the classmate to swear or affirm that he does not have an interest in the deed. The deed names the classmate as the grantee.

**Resolution:** The Notary declines the request because the classmate has a direct interest in the notarial act and is unable to take the required oath.

#### IX-A-2: Following Court Decisions

The Notary shall follow any judicial or administrative law decisions that affect the performance of notarial acts in the state where the Notary is commissioned.

**Illustration:** The Notary is asked to perform a notarial act on a power of attorney for a principal who has no identification but is willing to swear an oath that he is the individual who must sign the power of attorney. The same day the Notary learns of a state appellate court case that could affect the Notary's decision to perform the notarization.

**Resolution:** The Notary reads the court opinion that concluded a Notary must be shown actual evidence of the principal's identity, and that an oath does not constitute such evidence. On this basis, the Notary refuses to notarize the principal's signature on the power of attorney.

**IX-A-3: Waiving Legal Requirement Improper**

The Notary shall not waive any legal requirement of a notarial act because a person or entity directs or requests the Notary to do so.

**Illustration:** The Notary works for a mortgage servicer acting under the supervision of an attorney who submits motions for summary judgment pertaining to foreclosure actions in state court. The motions require the executives to sign and take an oral oath or affirmation in the presence of the Notary. The attorney directs the Notary to perform the notarizations on the motions without the executives being formally sworn or affirmed, since the motions are “only boilerplate.”

Resolution: The Notary declines to follow the attorney’s directive. The Notary may explain to the attorney that state law requires the actual administration of the oath or affirmation to the executives for each motion.

**IX-A-4: Commission of Employee**

A Notary may disregard any request or directive of an employer to surrender or resign the commission upon termination of employment, even if the employer paid for the commission.

**Illustration:** The Notary informs the Notary’s employer of the intent to leave employment in two weeks. The employer says that policy will require the Notary to hand over the commission certificate to the employer and resign the commission because the Notary was commissioned at the company’s expense.

Resolution: The Notary declines to surrender the commission certificate or resign the commission. The commission belongs solely to the Notary, not the employer. Any decision to resign rests solely with the Notary.

**Article B: Official Guidelines**

**IX-B-1: Following Official Guidelines**

The Notary shall follow all official guidelines of the commissioning and regulating official of the state where the Notary is commissioned.

**Illustration:** The Notary’s friend requests the Notary to notarize the signature of her mother on a power of attorney. The Notary has concluded that the friend’s mother is not mentally competent at the time of notarization. While law in the Notary’s state does not require Notaries to assess mental competence, the Notary’s commissioning official has published a guideline that Notaries should ensure each principal for whom a notarial act is performed is mentally competent at the time of notarization. The friend strongly urges the Notary to perform the notarization.

Resolution: The Notary refuses to notarize the signature of the friend’s mother at that time, since to do so would require the Notary to disregard the commissioning official’s clear guideline.

## Article C: Practice Standards

### IX-C-1: Following Code of Professional Responsibility

The Notary should follow this *Notary Public Code of Professional Responsibility* when laws, rules, and official guidelines of the state where the Notary is commissioned are silent.

**Illustration:** The Notary is a newly hired paralegal at a law firm. Although state law does not require the Notary to maintain a journal of notarial acts, the Notary keeps one in compliance with Standard VII-A-1. The Notary is asked by a supervisor to forgo keeping a journal of notarizations on documents related to the law firm because the firm retains copies of the originally signed documents.

**Resolution:** The Notary urges the supervisor to allow the Notary to keep a journal for all law firm notarizations. The Notary may explain to the supervisor that keeping a journal demonstrates the reasonable care of the Notary in performing the notarization and provides evidence of the notarization separate and independent from the signed document itself that can protect the law firm, principal, and Notary.

### IX-C-2: Other Practice Standards

A Notary may consider following the recommended best practices of other reputable notarial experts or organizations when this *Notary Public Code of Professional Responsibility* is silent.

**Illustration:** The Notary has followed *The Notary Public Code of Professional Responsibility* Standards of Professional Practice for completing notarial certificates in compliance with Guiding Principle IV and journal entries in compliance with Guiding Principle VII. The Notary reads a notarial expert's article on the best practice of diligently proofreading the certificate of each notarial act and journal entry and correcting any error or omission that is detected prior to the conclusion of the signing ceremony for the act. The *Code* does not promote a standard of practice on this matter. Upon learning of this best practice, the Notary considers whether to follow it.

**Resolution:** The Notary decides to follow the practice of proofreading the journal entry and notarial certificate.

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#### COMMENTARY

**General.** Guiding Principle IX addresses an essential tenet for notarial practice. By its nature, a profession has core values designed to ensure its members provide high quality, ethical service to the members of the public it serves. Notaries are professionals who play a significant role in many personal and business transactions daily. As such, they must perform their duties in compliance with the applicable laws and official guidelines. This Principle exhorts Notaries to know and obey all laws and official guidelines, as well as be knowledgeable in good notarial practices to protect the public in its personal and business affairs.

**Article A: Precedence of Law.** This Article mandates that Notaries are public officials who must adhere to legislative and, if applicable, regulatory directives while performing their duties. Additionally, it emphasizes the commission belongs to the Notary, and that professional obligations flow from the authority conferred by it. As such, the Notary alone controls the use of the commission.

**IX-A-1: Following Statutes and Rules.** Standard IX-A-1 simply states that a Notary must perform notarial obligations consistent with state statutes and, if applicable, state administrative rules and regulations. The Notary is a ministerial officer with authority only to perform notarizations allowed by the state. Any unauthorized action taken under the auspices of the commission will subject the Notary to penalty and possibly damages that result from the inappropriate action.

The Illustration presents an example of a case related to the legal qualifications of a witness identifying a principal. “Like all witnesses, the credible-witness should be honest, competent, and disinterested in the transaction.” (Conn. Secretary of State, NOTARY PUBLIC MANUAL 8 (2013). See FLA. STAT. ANN. § 117.05(5)(b); N.C. GEN. STAT. § 10B-3(5); S.C. CODE ANN. § 26-1-5(5); VA. CODE ANN. § 471-2, “credible witness”.) Therefore, as the Resolution directs, the Notary must decline to notarize.

**IX-A-2: Following Court Decisions.** Occasionally, a court will issue a ruling in a case that has a bearing on notarial duties, particularly when a statute, rule, or regulation is silent or unclear on the Notary’s responsibility. The Illustration presents such a situation in which an individual with no identification offers to take an oath to establish his identity. The question posed by the Illustration is whether an oath constitutes proper evidence of identity of an individual who is present before the Notary to acknowledge his or her signature. The Resolution references a court case (*Keck v. Keck*, 54 Ohio App. 2d 128 (Ohio Ct. App. 1977)) on this very point. In the case before the court, a woman wanted to sign the name of her husband, who she said was too ill to be available, on an automobile title transferring a vehicle to her name. The Notary, properly, told the woman her husband must be present to have his signature notarized. Later in the day, the woman returned with an impostor who forged the husband’s signature on the title. The impostor did not present evidence of his identity to the same Notary, but merely swore an oath that he was the individual named on the title. The court said that a reasonable person in the position of the Notary should have at least been suspicious of the man’s identity after being told earlier in the day by the woman that her husband was too ill to be present and have demanded actual evidence of identity from the impostor. The sworn oath of the impostor did not meet the required threshold of evidence. Occasionally, judicial decisions will define or clarify a Notary’s duty, and a Notary is bound to follow them.

**IX-A-3: Waiving Legal Requirement Improper.** Standard IX-A-3 makes clear that a Notary does not have any discretionary authority when executing a notarization. The Notary must follow all of the requirements prescribed by law in order for the notarization to be valid. Neither the Notary nor the person requesting the notarization can waive a legal requirement. The consequences of doing so would subject the Notary to potential liability for damages that flowed from the improper notarization. The fact the requestor consented to waiving a required element of the notarization would not protect the Notary, nor should it. State statutes and regulations determine the required elements of a notarial act. The Notary must follow them without exception.

Waiving a requirement to administer an oral oath or affirmation to a principal, as would be required when performing the notarial act of jurat or verification on oath or affirmation, is improper. Equally improper would be waiving an oath or affirmation that must be administering to any witness identifying the principal. (See, e.g., CAL. CIV. CODE § 1185(b)(1)(A).) Consequently, the Illustration presents the example of an employer directing the Notary to disregard administering an oral oath or affirmation on affirmations submitted to the court. (See OHIO REV. CODE ANN. § 147.14 (prohibiting a Notary from certifying an affidavit of a person without administering the appropriate oath or affirmation to the person, and providing that a failure to do so will result in the revocation of the Notary’s commission).)

**IX-A-4: Commission of Employee.** Standard IX-A-4 recasts former Standard V-B-1 of the 1998 *Code* with a slightly different emphasis. The previous Standard addressed *employers* who required a Notary to resign the commission upon termination of employment. This 2020 Standard authorizes the *Notary* to disregard an overture by an employer to resign the commission. It iterates the fact that a Notary commission is associated with and belongs exclusively to the Notary. It does not matter who paid for the Notary’s commission, training, or supplies. The only important criterion for determining the holder of the commission is who applied for, qualified for, and was conferred the commission. The name of that person is on the Notary seal and that person’s signature is needed for the notarization. The Notary is the only person who has the right to make decisions with respect to the commission.

The *Code* Resolution only recites the legal rule. It does not address private arrangements that may have existed between the parties. Thus, if the employer and employee had voluntarily agreed as part of the employment engagement that the commission would be resigned upon the Notary’s termination of employment, a cause of action may lie against the Notary who does not resign the commission. Such an employment contract can only give rise to damages for the employer, but it cannot force the Notary to resign the commission. Granting and regulating a Notary commission is a state power. It cannot be controlled by agreements between private parties. (*But see* OR. REV. STAT. § 194.300(10) (providing that the Notary and employer may

enter into an agreement under which the Notary's journal or journals are retained by the employer upon the Notary's termination of employment); compare CAL. GOV'T CODE § 8206(d) (providing that the notarial records of a Notary are the Notary's exclusive property and must not be delivered to the employer upon the Notary's termination of employment).)

**Article B: Official Guidelines.** Article B addresses another source of instructions for Notaries: official guidelines. Usually the agency or department overseeing a certain subject will be the body that generates the guidelines. Depending upon the governmental structure of the state, official Notary guidelines can be published by the Secretary of State, another state official that grants Notary commissions, or any other officer so designated by the state. Official guidelines can interpret statutes and administrative rules or provide guidance for situations that are not covered by a statute or rule. Guidelines may be disseminated to Notaries in official Notary handbooks, in periodic communications from the commissioning official, or on the commissioning official's website.

**IX-B-1: Following Official Guidelines.** Standard IX-B-1 establishes the rule that official guidelines are to be followed when not inconsistent with state law. The Illustration makes the point. Since the legislature has not addressed the situation at hand, the official guideline on the commissioning official's website is the governing rule to be followed. Administrative guidelines are commonplace in our legal system, so seeing them address notarial issues should be expected.

**Article C: Practice Standards.** Article C addresses the role practice standards play for a Notary. (See "Standards of professional practice and 'practice standards'" in the Definitions.) There may be times when a Notary encounters a situation that is not specifically addressed by law or official guideline. The Notary is not without recourse. Established standards of practice can be followed. Aside from providing the road map on how to proceed with a matter, they also offer some protection if the notarization is subsequently challenged. It is common for professionals to follow "industry standards." Practice standards serve that role. Following established practice standards will enable a Notary to demonstrate the Notary used reasonable care in performing the notarization. (See Standard V-A-1 and accompanying Commentary.)

**IX-C-1: Following Code of Professional Responsibility.** The Standard recommends that a Notary should refer to *The Notary Public Code of Professional Responsibility* for assistance on notarial matters if a statute or other official guidance on point is not available. Importantly, the *Code* is not governing law. It, however, is a product of Notary experts from government, the private sector, and academia. Consequently, it is an excellent source that provides good practice standards which can complement governing law or official guidelines, as well as provide authority if there is not any official authority on point.

**IX-C-2: Other Practice Standards.** Standard IX-C-2 alerts Notaries to the fact that an unusual situation may arise that is not addressed by a governing statute or administrative rule, official guidelines, or recognized good practice of this *Code*. In such a situation, the Notary should seek information from other sources. When doing so the Notary should be comfortable that the other source provides sound practice advice before proceeding with it. Notaries, for example, may consult two substantive volumes on notarial practice written by reputable experts: VAN ALSTYNE'S NOTARY PUBLIC ENCYCLOPEDIA, by Peter Van Alstyne (2001), and PROFESSOR CLOSEN'S NOTARY BEST PRACTICES, by Michael Closen (2018). The American Society of Notaries, whose *Responsibility Code of Ethics of 1980* has been cited at several points in this *Code*, is an organization to which Notaries also may turn when the *Code* does not contain guidance. When a source's trustworthiness is unknown, Internet searches and other research methods should be used to ascertain the reputability of the source. Importantly, before venturing into uncharted waters, a Notary can contact the commissioning official's office or the National Notary Association (publisher of *The Notary Public Code of Professional Responsibility*) for answers to Notary practice questions. Having the advice from respected sources as these will provide valuable, authoritative support if asked to explain the rationale for a notarial action called into question.

The Illustration presents an example of a notarial expert's best practice to diligently proofread a notarial certificate and journal entry for accuracy prior to the completion of a notarial act. While the *Code* does not contain an explicit Standard for this practice, it may be inferred from Standards IV-A-2 (requiring the Notary to "verify all information and insertions on a notarial certificate") and VII-A-1 (requiring the Notary to create a "detailed" journal entry for each notarial act). Since the expert's recommended practice is consistent with the *Code*, it is reasonable for the Notary to follow the recommendation.





# Guiding Principle X

**The Notary shall seek instruction on notarization, and keep current on the laws, official guidelines, and practice standards of the notarial office.**

## STANDARDS OF PROFESSIONAL PRACTICE

### Article A: Responsibility to Seek Knowledge

#### X-A-1: Studying Statutes and Regulations

The Notary shall study all statutes and regulations that apply to the performance of notarial acts in the state where the Notary is commissioned.

**Illustration:** After receiving a commission, the first-time Notary follows instructions to file an oath of office and purchase an official seal. The Notary, however, feels inadequately prepared because the state’s “Notary Handbook” offers a minimal description of notarial duties.

**Resolution:** The new Notary obtains copies of the statute sections cited in the “Notary Handbook.” The Notary carefully studies these laws and keeps them accessible to reference when needed.

#### X-A-2: Studying Official Guidelines

The Notary shall study all official guidelines that apply to the performance of notarial acts in the state where the Notary is commissioned.

**Illustration:** An employee is asked by a supervisor to become a Notary. The supervisor hands the employee an application form from his desk and tells the employee, “Being a Notary is not a ‘big deal.’ Just fill this out as best you can and follow the steps to properly submit it.”

**Resolution:** The employee realizes that she will be responsible for executing important official acts as a Notary. Consequently, she accesses the website of the state

commissioning official, thoroughly reads the information on performing notarial acts that she finds there, takes a practice examination, and downloads the state “Notary Handbook” to keep as a reference.

### **X-A-3: Seeking Supplemental Guidance**

The Notary shall seek out expert guidance and supplement any training required for a Notary commission with those provided by respected educational institutions and professional organizations.

**Illustration:** The newly commissioned Notary has studied the state’s Notary laws and “Notary Handbook,” and taken the state’s required training and examination, but desires to learn more about the practical procedures and guidelines for performing notarial acts.

*Resolution:* The new Notary may further her knowledge in several ways, including finding an experienced Notary to serve as a mentor, reading publications from a professional association for Notaries, taking a course on the procedures of notarization, and purchasing books on notarial practice.

### **X-A-4: Keeping Current on New Developments**

The Notary shall keep current on new statutes, regulations, official guidelines, and on other developments that affect the performance of notarial acts in the state where the Notary is commissioned.

**Illustration:** The Notary is asked to notarize a principal’s signature on a document. The principal presents a “consular ID” as proof of identity. When the Notary explains that such a card is not on the statutory list of acceptable IDs, the individual claims to have no other IDs. Another Notary, however, advises that a recent change to the state’s law now allows use of consular IDs to identify principals, and shows an announcement of the law change in a periodical from a professional organization for Notaries.

*Resolution:* The Notary verifies the change in the law and completes the notarization. The Notary may resolve to subscribe to the publication to keep abreast of new laws affecting notarial duties.

## **Article B: Responsibility to Maintain Standards**

### **X-B-1: Reporting Misconduct**

The Notary shall report to the commissioning or other regulating authority violations of the statutes, regulations, and official guidelines governing the conduct of Notaries.

**Illustration:** The Notary observes that another Notary, who is an attorney in the same retail business, fails to ask principals who are unknown to him to present an identification credential when performing notarizations. After the Notary warns the co-worker about the danger of this policy, the Notary ponders whether to report the violation.

**Resolution:** The Notary files a complaint with the state Notary-commissioning authority as well as the state bar, detailing the colleague's misconduct.

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## COMMENTARY

**General.** As a professional, albeit within a narrow field, a Notary is trained and trusted to execute duties imposed by law. The *Code* anticipates that the conscientious and professional Notary will abide by its Guiding Principles and Standards where they are not inconsistent with applicable law. Additionally, technological innovation has changed the way documents for many transactions are executed. Notaries must keep abreast of the rules and practices that address recent advancements. These advancements present new challenges not only to proper notarial practice, but also seek to prevent more sophisticated ways of committing fraud. To foster the status of the Notary as a professional, the *Code* enunciates aspirational educational and personal goals consistent with those set for other professionals. The *Code* recognizes that professionalism is not a status to be achieved and then neglected, but instead results from an on-going process of self-development and commitment to excellence. Each of the Standards addresses significant professional obligations in this regard.

**Article A: Responsibility to Seek Knowledge.** Standards X-A-1 through X-A-4 prescribe the educational foundation one would expect from a professional. The public has a right to expect that the Notary will be able to perform properly any lawful notarization requested and provide any needed directions related to the same.

**X-A-1: Studying Statutes and Regulations.** Standard X-A-1 addresses the need for a Notary to study all statutes and regulations of the commissioning state. Generally, when first commissioned, Notaries are required to either state or swear they have read and are familiar with the applicable notarial laws. (See, e.g., FLA. STAT. ANN. § 117.01(3); 5 ILL. COMP. STAT. § 312/2-104; W.VA. CODE § 39-4-20(c).) Some states require an applicant for a Notary commission to pass an examination prior to appointment as a Notary (see, e.g., CA. GOV'T CODE § 8201(a)(4); OR. REV. STAT. § 194.315(k)) or take a notarial training course (see MO. ANN. STAT. § 486.225; N.C. GEN. STAT. § 10A-4(b)(3)).

**X-A-2: Studying Official Guidelines.** Standard X-A-2 instructs Notaries to keep apprised of official guidelines pertaining to notarial acts. Some states have taken steps consistent with this Standard. (See ARIZ. REV. STAT. ANN. § 41-312.D.5 (requiring each applicant to keep a Notary manual or handbook approved by the Secretary of State); VA. CODE ANN. § 471-11) (publishing handbooks and making them available to Notaries); ME. REV. STAT. ANN. tit. 5, § 82-A (requiring the Secretary of State to send informational publications to Notaries seeking to have their commissions renewed); TEX. GOV'T CODE ANN. § 406.008 (requiring sample certificate forms to be sent to Notaries).)

**X-A-3: Seeking Supplemental Guidance.** Notaries are expected to obtain additional guidance as needed to ensure they fully understand the practical side of notarial work. The Illustration in Standard X-A-3 identifies a number of avenues the Notary can pursue to obtain that knowledge.

**X-A-4: Keeping Current on New Developments.** Notaries, as professionals, must keep abreast of changes and developments in Notary law and practice, respectively. Failure to do so can expose a Notary to liability. Increasingly, states are enacting continuing education requirements. (See, e.g., IND. CODE ANN. § 33-42-12-2(b); MONT. CODE ANN. § 1-5-620(3).) Many professions understand the importance of having their members keep current on changes in the field. If a state does not prescribe mandatory continuing education, Notaries as professionals should self-regulate to ensure they are protecting those members of the public who rely on their notarizations.

The Illustration presents the realistic situation of a change in state law allowing a consular ID to be presented to a Notary as satisfactory evidence of identity. (See CA. CIV. CODE § 1185(b)(4)(A); 5 ILL. COMP. STAT. § 312/6-102(d)(3); NEV. REV. STAT. ANN. § 240.1655.4(d) and § 240.1655.9.) The Resolution emphasizes that it is not enough to receive second-hand knowledge of a new law of such importance; the diligent Notary will verify the new law and resolve to be better informed about new laws affecting notarial duties in the future.

**Article B: Responsibility to Maintain Standards.** The *Code's* final Article and Standard speaks to the importance of maintaining standards within the profession. A profession cannot exist without standards and devoted individuals who self-regulate their actions consistent with them. Standards that are not enforced are meaningless. The only way for a profession to earn its deserved recognition is for its members to adhere to fair and reasonable standards designed to regulate their actions and protect the public it serves.

**X-B-1: Reporting Misconduct.** Regrettably, it is not enough for a member to learn and abide by the Standards; he or she must be willing to protect the integrity of the group by reporting violations when discovered.

(See IND. CODE ANN. § 33-42-12-3(c) (requiring a Notary to self-report the Notary's conviction of certain crimes to the Secretary of State within fourteen days); N.C. ADMIN. CODE tit. 18 § 07B.0107(b) and (c)(4)-(7) (requiring a Notary to self-report the Notary's conviction of a crime within 45 days of the date a judgment is entered and other actions that may constitute misconduct).) Only by honest self-regulation can the public be protected from a Notary's intentional misconduct or negligent errors. The Illustration and Resolution present a scenario that goes beyond self-reporting to the reporting of violations of other Notaries. The reporting by Notaries of other Notaries' misconduct is not specifically addressed in Notary Public statutes, although the Notary who witnesses the violation could legitimately file a complaint just as any member of the public who was harmed by a Notary's misdeeds. In the Illustration the offending Notary is also an attorney. Reporting the offense thus involves informing the commissioning authority, who is responsible for issuing the Notary's commission and the state bar, which is responsible for the attorney's professional conduct.

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