NEW YORK CITY BAR

REPORT BY THE COMMERCIAL LAW AND UNIFORM STATE LAWS COMMITTEE AND THE REAL PROPERTY LAW COMMITTEE IN SUPPORT OF REGULATIONS PROMULGATED BY THE NEW YORK SECRETARY OF STATE ON NEW YORK NOTARY LAW (19 NYCRR 182)

Regulations promulgated by New York's Secretary of State, 19 NYCRR 182, now require, among other things, that New York notaries make a record of each notarial act they perform and retain that record for 10 years. The Regulations implement the 2022 and 2023 §§ 130 and 135-c amendments to the notarial law provisions of New York's Executive Law. These notarial amendments to the Executive Law were long overdue and were the first significant effort at improvement of notarial law by New York State since it was codified in the Executive Law. The primary purpose of the amendments was to authorize remote online notarization by New York notaries, allowing them to perform notarial acts using electronic technology for persons not physically present before the notary.

The Regulations have not been criticized or challenged except with respect to one provision, section 182.9, which now requires every notary to maintain records identifying each of their notarial acts, whether paper-based or electronic, and the method used to confirm the identity of each signatory for that notarial act. This Report addresses that criticism and urges that no change be made to this important record-keeping requirement.

I. NEW JOURNAL REQUIREMENT FOR ALL NOTARIZATIONS BY NEW YORK NOTARIES

While not specifically mentioning a "journal," the Regulations require each notary to maintain records "sufficient to document compliance with the requirements of sections 130 and 135-c of the Executive Law and the duties and responsibilities of a notary public…." The information that must be recorded by the notary is of the type regularly maintained by many notaries across the nation in a "notarial journal."

Notaries are public officers of the State in which they are commissioned. The laws of nearly half the States expressly mandate that notaries in those states keep notarial journals of their official actions. Notarial experts have determined that notarial due care requires this information. Notarial associations recommend maintenance of notarial journals as a "best practice" for the protection of their notary members. Forms of journals are easily available in both paper and electronic format. For simplicity, this Report refers to the records required by the new Regulations as a "journal."

Specifically, the Regulations, in relevant part, provide:

"(a)…all notaries public must maintain *records sufficient to document compliance with the requirements of sections 130 and 135-c of the Executive Law and the duties and responsibilities of a notary public* and/or electronic notary public as outlined in this Part. Record storage may be made through a third party if safeguarded through a password or other secure means of authentication or access. Such records shall be made contemporaneously with the performance of the notarial acts and *must include*: …

[list of five required items: date/time/type of notarial act; name/address of person for whom act is performed; notarial services provided; credential/witnesses used to identify principal; and verification procedure used for personal appearance.]

"(b) Any records maintained by a notary public pursuant to this Part must be maintained by the notary public for at least ten years.

"(c) Any records retained by a notary public pursuant to this Part must be capable of being produced to the secretary of state and others *as necessary in relation to the performance of the notary public's obligations pursuant to the Executive Law and this Part*."

NYCCR § 182.9 Recordkeeping and Reporting (*italics supplied*).

II. PURPOSE OF THE JOURNAL REQUIREMENT

With the Regulations, New York joins at least 23 States and the District of Columbia that expressly require notary journals for some or all notarial acts. There are numerous sound reasons for requiring journals. First, the journal is the notary's official record of his performance of duties as a public official.[1] Second, it provides admissible evidence of a properly performed notarial act in case the notary's certificate of the act is lost or destroyed. Third, it reinforces required procedures, thereby encouraging notaries to perform notarial acts properly and deflecting pressure on employee-notaries to take shortcuts, thereby reducing the risks of forgery and other fraud. Fourth, it provides evidence that protects notaries from false accusations and unwarranted liability by evidencing their compliance with notarial requirements.[2] Fifth, it may provide evidence that

[1] Michael Closen and Charles Faerber, *The Case that there is a Common Law Duty of Notaries Public to Create and Preserve Detailed Journal Records of Their Official Acts*, 42 J. Marshall L. Rev. 231, Winter 2009, at pp. 413-442, https://repository.law.uic.edu/lawreview/vol42/iss2/2/ ("Historically, it would be unimaginable that public officials would neglect to retain records of their official acts") (All websites last accessed on Dec. 8, 2023).

[2] The American Association of Notaries strongly recommends notarial journals as "the single best thing a notary can do to protect himself against allegations of misconduct." Notary Journal Best Practices (notarypublicstamps.com); Chase, Jeffrey, *The Attorney is To Blame! No, It's the Notary Public's Fault!,* 89-Aug. N.Y. St. B J. 48 (2017) (explaining New York statutes that impose civil liability on a notary public); Closen, Michael, *To Swear or Not to Swear Document Signers: The Default of Notaries Public and a Proposal to Abolish Oral Notarial Oaths*, 50 Buffalo L. Rev. 613, 676 (2002) (journal entry will protect notary against a claim of malpractice); Closen, *Notaries Public, Lost in Cyberspace, or Key Business Professionals of The Future*, 15 J. Marshall J. Computer & Info. L. 703 (1997) (noting that "if the notary's compliance with the reasonableness standard is challenged, the journal entry provides highly effective evidence to corroborate the use of reasonable care").

increases the risk of detection of notarial negligence or misconduct, thereby deterring both. Sixth, it may provide evidence that helps a victim obtain redress for forgery or other documentary fraud, when it does occur.[3] Journaling, thus, should make the relief against deed fraud provided by New York's newly enacted Theft of Real Property law (S.6577/A.6656, Chp. 630) even more effective.[4] As explained in the Model Notary Act Comment to "Article 6—Notarial Records": "[j]ournals serve the interests of principals and requesters, parties who rely upon those records, the public, government, law enforcement, the courts, and notaries themselves."[5] And notarial experts universally recognize the value of properly kept notary journals for all these purposes.[6]

Notary journals play an important role in deterring and preventing fraud, forgery, and real estate theft.[7] Properly kept journals can provide law enforcement with evidence to assist in investigating document fraud.[8] The recommendation of the December 2018 Report of the Grand Jury of the New York Supreme Court First Judicial District was that notary journals should be required in order to help combat rampant deed fraud and house theft.[9] Notary journals also have been recognized as an important tool for helping law enforcement authorities track down forgers.[10]

---

[3] "Why a Notary Journal Is Required," American Association of Notaries, July 8, 2015, https://www.notarypublicstamps.com/articles/why-a-notary-journal-is-required/#:~:text=Keeping%20a%20notary%20journal%20is%20required%20for%20the,4%29%20Protection.%20...%205%205%29%20Practical%20matters.%20.

[4] Bill text available at https://www.nysenate.gov/legislation/bills/2023/S6577.

[5] Model Notary Act of 2022, National Notary Association, Sept. 1, 2022, pp. 84-105, at 84, https://www.nationalnotary.org/file%20library/nna/reference-library/model-notary-act-of-2022.pdf.

[6] *See e.g.*, Peter J. Van Alstyne, *The Notary's Duty to Meticulously Maintain a Notary Journal*, 31 J. Marshall L. Rev. 778, at 802 (1998) ("When the purpose of notary journalization and its extensive legal protections are understood, it is reasonable to conclude that every notary should keep a notary journal, even if it is not required by state law."); *Four Keys to Keeping Your Notary Journal*, Nat'l Notary, Jan. 2007, at 45 ("The journal is one of our legal system's most important evidentiary tools."); Closen and Faerber, id. at 458-459 ("No living expert on notarial practice could be produced who would testify that notaries should not maintain journals of their official acts. Nor is any deceased notary expert known to have advocated against the wisdom of journalizing notarizations").

[7] The deterrent effect of journal keeping is confirmed by Closen and Faerber, who report that their review of hundreds of published decisions involving allegations of notarial wrongdoing did not reveal a single case in which allegations of wrongdoing were even asserted against a notary who had made and retained a detailed journal entry concerning the notarial act at issue. *See* Closen and Faerber, *id*., at 289-91. Furthermore, a notary journal can help substantiate that a document signed under unusual circumstances nevertheless was entirely proper.

[8] *See* Armando Aguirre, *America's Notaries Ready to Answer Call to Duty*, Nat'l Notary, July 2004, at 31 (Notary "[j]ournals … give us a paper trail that the authorities can work with" to investigate frauds and identity thefts). The deterrent effect of journal-keeping is confirmed by Closen and Faerber, who report that their review of hundreds of published decisions involving allegations of notarial wrongdoing did not reveal a single case in which allegations of wrongdoing were even asserted *against a notary who had made and retained a detailed journal entry concerning the notarial act in issue*. *See* Closen and Faerber, *id.*, at 289-291 (emphasis supplied). Conversely, notaries cannot be expected to remember notarizations of which they keep no record. Closen and Faerber, id. at 457-548 ("The authors know of not a single reported court decision in all of U.S. history involving a notarization in which the notary, who had not prepared and retained a journal record, could recall the specific circumstances about the notarization in question.")

[9] *See* Report of the Grand Jury of the Supreme Court State of New York First Judicial District Issued Pursuant to Criminal Procedure Law Section 190.85 subdivision (1)(c), https://www.manhattanda.org/wp-content/uploads/2018/12/Deed-Fraud-Grand-Jury-Report.pdf.

[10] Nevin Barich, *Lawsuit Protection*, Nat'l Notary, Sept. 2004, at 30.

National Notary Association Executive Director Tim Reiniger has stated: "Law enforcement...is coming to see the services of the Notary as an invaluable weapon in [the] widening war [on identity theft and document fraud]."[11]

Indeed, notary journaling is not just a good idea or best practice but has been recognized as a critical component of providing notarial services and protecting the integrity of notarized documents. "Journalizing…is mandated as a standard of reasonable care. The lack thereof is arguably a form of negligence. It is wrongful to think it is discretionary."[12] As notarial experts Closen and Faerber have stated: "No living expert on notarial practice could be produced who would testify that notaries should not maintain journals of their official acts. Nor is any deceased notary expert known to have advocated against the wisdom of journalizing notarizations."[13]

And notary journals help and protect notaries themselves by reminding them to follow step-by-step procedures for each notarization and enabling them to keep a record of each notarization for future reference. Notaries who use journals become accustomed to making a record of all relevant information concerning the notarial act.[14] The requirement to make a contemporaneous journal entry of each notarial act serves the dual purpose of reminding notaries to perform their duties properly and creating a record of their diligent compliance with notarial standards and requirements.

The requirement that the notary write down how she identified a person who appeared before her also provides the notary with ammunition to resist pressure from an employer or client to take impermissible "shortcuts," and makes it easier for the notary to explain, if challenged, why she is doing (or declining to do) various actions in the process. Notaries who are required to keep a journal are encouraged to follow recommended "best practices," which make their entries even more protective.[15]

Thus, notary journals provide a myriad of antifraud benefits described above to notaries, to people who use notarial services, to fraud victims, to law enforcement and the legal system, and to the wider public.

III. CHALLENGES TO THE JOURNAL REQUIREMENT

Despite all the benefits of notarial journals and the recommendations of experts, after 19 NYCRR 182 went into effect, objections to the Regulations – particularly with respect to the

---

[11] Aguirre, *id.*, at 31.

[12] Van Alstyne, Notary Public Encyclopedia at 187 (2001).

[13] Closen and Faerber, id. at 458-459.

[14] *See* "Why Are Notary Journal Entries Important?" American Association of Notaries, Sept. 12, 2017, https://www.notarypublicstamps.com/articles/why-are-notary-journal-entries-important.

[15] Closen and Faerber, id. at 298-307 (recommended voluntary best practices entries include recording the right thumbprint of the document signer, a photograph of the facial features of the document signer, and "any other information the notary should wish to include (such as any special circumstances that arose; any witnesses who were present; the representative capacity of the signer, if any; the reasons for declining to perform a notarization; and, a description of the procedure followed if the signer required physical assistance in signing, if the notary signed for the signer, or if the signer signed by a mark)").

journaling requirement for all notarizations (not just remote online notarizations) – were raised, particularly by lawyers who found journalling "burdensome." Such arguments include: that the requirement is overly broad and should only be applicable to notarizations of conveyances; that the journal requirement is unreasonably burdensome when applied to notaries who are lawyers or employed by lawyers; and that the journal requirement is *ultra vires* when applied to paper notarizations.[16] We address these objections below.

A. Argument 1: The Secretary of State Should Limit the Scope of the Notarial Regulation to Conveyances

One objection to the journal requirement is that it is overbroad and that the Secretary of State should have limited the requirement to the notarization of conveyances, which present the greatest risk of fraud, forgery and house theft. Nothing in the Executive Law, however, evidences a legislative intent to limit the application of the Secretary of State's rule making authority to the notarization of conveyances. Notarization protects against all forms of documentary fraud, and is not limited to protecting against deed fraud. Furthermore, notaries have no way to determine the significance of the notarization of a particular document, and do not have discretion to apply different standards of care in the notarization of documents based on their assessment of the fraud-risk or potential injury. All persons seeking or relying on the protections of notarization are entitled to notarial due care and the protections of proper notarial record-keeping.

Importantly, as a practical matter the recent amendment of CPLR 2106 has significantly alleviated the concerns of those who wish to limit the journal requirement to conveyances. Amended CPLR 2106 now allows all persons to use unsworn affirmations instead of sworn and notarized affidavits in State court litigation. This change of law substantially reduces the need for notarizations under New York law and effectively limits the notarization requirement to transactional documents and a few other instances. Clients and their lawyers will no longer have to obtain notarizations of affidavits for legal proceedings. Not only does this moot the alleged overbreadth of the Regulation, but it also alleviates alleged concerns about the cost or "burden" on lawyers, or their staffs, of having to make a journal entry for every affidavit that is notarized, concerns which are addressed in the next section.

B. Argument 2: Lawyers Performing as Notaries Should Be Treated Differently

The basic argument against applying the journaling requirement to lawyer-notaries is as follows: "Attorneys, as officers of the court, should be exempt from these record-keeping requirements. The application of these regulations to attorneys and their employees is superfluous, encroaches on attorney-client privilege, and imposes unduly burdensome record retention requirements."[17] Because lawyers are "officers of the court," the idea is that potential discipline for an ethical violation is adequate assurance that lawyer-notaries will comply with the

[16] These arguments are the basis of a report from the New York State Bar Association's recently formed Task Force on Notarization. *See* "Report on Notary Regulations," New York State Bar Association Resolution to Approve Reports and Recommendations of Task Force on Notarization Approved by the Executive Committee, March 2, 2023, https://nysba.org/app/uploads/2022/03/approved-resolution-and-reports-Task-Force-on-Notarization-March-2-2023.pdf ("State Bar Report").

[17] Id. at 3.

requirements for proper notarizations, and, therefore, it is unreasonable to impose on a lawyer the obligations imposed on all other notaries to maintain records of their compliance with notarial duties.

However, this effort to exclude lawyers from the journal requirement disregards the difference between the roles of a lawyer (as an advocate or fiduciary for a client) and a notary public (as a neutral public officer). Lawyers who appear in court are said to be "officers of the court,"[18] meaning that, while they are zealous advocates for their clients, they are also subject to court rules. Notaries, in contrast, are not advocates whose duties are owed to their clients. Notaries are public officers under the Executive Law, who owe duties to the general public. They are neutral witnesses performing official acts evidenced by certificates, and they are liable to *any person* injured by their misconduct or malfeasance. A transactional lawyer who acts as a notary at a closing to notarize signatures of non-clients or clients is neither acting as an advocate for a client nor as an "officer of the court," but as a public officer of New York State, like any non-lawyer notary. In that capacity, a notary improperly notarizing a document (whether or not a lawyer) could be charged with a criminal violation of the Penal Law and sued for civil remedies by any injured party under the Executive Law, even if the plaintiff was not their client in the transaction.[19]

The argument that keeping a notarial journal may violate attorney-client privilege is another example of this role confusion.[20] The information required for a journal entry is not privileged and, if it were, disclosure to the notary would waive any potential privilege. Notaries are liable to any person injured by notarial malfeasance,[21] whereas the attorney-client privilege runs only to the attorney's client. If a lawyer-notary cannot perform a notarial duty because of a conflicting duty to a client, then that lawyer must exercise the discretion provided by Executive Law § 135 and decline to serve as a notary. A lawyer who cannot perform notarial duties because of an actual conflict is not disinterested and therefore must decline to serve as a notary – not demand an exemption from the duties that are applicable to all notaries for the protection of the public.[22]

---

[18] *See* How Courts Work (americanbar.org) ("The lawyers for both sides are also officers of the court. Their job is to represent their clients zealously, within the formal rules of the Code of Professional Conduct. The belief is that justice can best be achieved if each side's case is vigorously presented by competent legal counsel"). *But see* Gaetke, 42 Vanderbilt L. Rev. 39 (Iss 1 1989) https://scholarship.law.vanderbilt.edu/vlr/vol42/iss1/2/ ("Careful analysis of the role of the lawyer within the adversarial legal system reveals the characterization [of lawyers as officers of the court] to be vacuous…and misleads the public.")

[19] *In re Hallock*, 207 AD 3rd 90 (2nd Dept. 2022), arising from *Luscier v Risinger Bros. Transfer, Inc*., 2015 WL 5638063,*1, 2015 US Dist LEXIS 129640, *3-4 [SD NY, No. 13-cv-8553 (PKC)], provides a notable recent example of how focusing on a lawyer's ethical obligations to a court obscures the fact that a lawyer's notarial misconduct is not only unethical, but, additionally, may be a violation of the Penal Law.

[20] *See* Closen and Faerber, id., at pp 422-425.

[21] *See* Executive Law § 135, Real Property Law § 330.

[22] Closen and Faerber conclude that lawyers should *never* serve as notaries for transactions in which they represent a party, reasoning that, rather than seeking to deprive the public of the benefits of notarial journals because of concerns about a speculative loss of the attorney-client privilege, a lawyer would better serve the public by declining to serve as a notary for any document he has prepared or in any transaction in which he represents a client, due to the substantial actual or apparent conflicts of interest inherent in those situations. *Id*. at 420-422, 425-436.

But even if there were a reason to exempt lawyers, there is no colorable justification for exempting notaries ***who are employed by lawyers*** from the journaling requirement. Notaries employed by lawyers have no special training, licensing or ethical duties relevant to their performance of notarial duties. On the contrary, the journaling requirement, which protects notaries from pressure to engage in notarial misconduct, is particularly important to protect notaries employed by lawyers, who are most subject to that pressure.[23]

We also find unpersuasive concerns[24] that the journaling requirement will deprive the indigent or persons in rural areas of necessary legal services because rural lawyers or lawyers who work for legal services with limited budgets may decline to provide essential notarial services to their clients. First, the objection to journaling predates the recent amendment of CPLR 2106 to permit the use of unsworn affirmations in lieu of affidavits in New York actions. That amendment dramatically limits the need for notarizations in New York practice, thereby greatly decreasing any alleged burden on lawyers. Furthermore, it limits the need primarily to the notarization of acknowledgments on contracts, which both involve the greatest risk of fraud and forgery and also usually involve a monetary transaction that can fund the *de minimis* expense of notarization. Second, the cost of a journal is insignificant.[25] Third, as discussed above, the notarial profession itself regards any burden imposed by the requirement as minimal and unquestionably justified and outweighed by the protections it provides to notaries. Fourth, if necessary, remote notarization services are available online in rural areas lacking notaries. Fifth, the "threat" that lawyers will refuse to provide or obtain a service required to close a transaction is not credible.[26] Finally, there

---

And to the extent that the effort to insulate lawyers from the journal requirement presumes that attorneys as a class are more diligent in complying with notarial requirements than non-lawyer notaries and, therefore, need not maintain records of such compliance for the protection of the general public, unfortunately this does not appear to be the case. *See* Christopher Young, *Signed, Sealed, Delivered…Disbarred? Notarial Misconduct by Attorneys,* 31 J. Marshall L. Rev. 1085 . at 1105 ("Notarial abuse is rampant in the legal profession"; attributing such abuse to overzealousness, work pressures, self-interest, control over notary employees and lack of notarial education); Closen and Faerber, id. at 436 ("The abuses of notary law by ordinary attorneys and attorney-notaries is frequent and widespread. There are hundreds of reported cases of discipline of lawyers for violating notary laws").

[23] *See* Young, id., pp. 1101-1103 (noting that it is not unusual for notaries employed by lawyers to feel pressured to engage in notarial misconduct); see also Closen and Faerber, id., fn. 207 and accompanying text ("Counselors at the NNA's Information Service telephone hotline report that 'notary employees' [are routinely] pressured, intimidated…[and] threatened into 'expediting' transactions by ignoring the formalities of proper notarizations.")

[24] *See* State Bar Report at 3.

[25] The American Association of Notaries provides an online electronic journal to its members free of charge. See Evelin Garcia, "Free Notary E-journal for AAN Members," American Association of Notaries, July 31, 2020, https://www.notarypublicstamps.com/articles/free-notary-e-journal-for-aan-members. In addition, notarial journal smartphone applications are available online that are tailored to each State's requirements and facilitate data entry. The notarial journal app published by Jurat requires a fee of about $100 per year, but that is not an unreasonable expense to securely store unlimited journal data on the cloud, making it accessible on smartphones and computers.

[26] If a transaction could not be closed without notarization, and notarization from another source were impossible to obtain, there would be no need to engage a lawyer unwilling to provide or obtain notarial services in the first place. Thus, it is not credible that a lawyer would find the incremental "cost" of providing notarial services so large as to warrant foregoing all fee income from the transaction.

is no evidence from the large number of states that require their notaries to maintain journals that the requirement impedes the delivery of legal service or notarial services.[27]

C. Argument 3: The Secretary of State Should Exempt Lawyers from Notarial Requirements

Additional arguments for limiting the notary journal requirement have focused on the role of the Secretary of State in promulgating the regulations: Specifically, the assertion that the Secretary of State should have exempted lawyers (and their employees) from the journaling requirement.[28] We respectfully submit there is no basis for this assertion.

New York does not grant lawyers notarial powers automatically by virtue of their being licensed lawyers, nor are lawyers required to become or to serve as notaries. New York lawyers are not authorized to function as notaries *unless they have voluntarily applied to the Secretary of State for, and been granted, a notarial commission.* New York lawyers who are not commissioned as notaries have no authority to administer oaths or take acknowledgments. And lawyers who are commissioned as notaries have no duty to provide notarial services. Executive Law § 135 provides that a notary who is an "attorney…. may, ***in his discretion,*** administer an oath or…take the affidavit or acknowledgment of his client in respect of any matter, claim, action or proceeding." (emphasis supplied) This protects notary-lawyers from Penal Law § 195.00(2), which makes it a misdemeanor for a commissioned notary, absent lawful justification, to refuse to perform notarial services when requested.[29]

Notarial duties arise from the Executive Law, as supplemented by New York's Public Officers Law, Penal Law, Real Property Law, and common law. A notary is liable to any person injured by notarial malfeasance.[30] Various forms of intentional notarial malfeasance are misdemeanors or even felonies under the Penal Law. Lawyers, in contrast, are not subjected to regulation by the Secretary of State or to these notarial penal laws or civil laws by virtue of their law license.

The Executive Law does not empower the Secretary of State to exempt lawyer-notaries from notary laws or regulations. To the extent lawyer-notaries are treated differently from other notaries, it is by reason of express statutory requirements, not regulatory discretion. First,

---

[27] We are sympathetic to the feelings of individual lawyers, particularly in the legal services area, that this is an additional burden for which they are not compensated, and this may have funding implications for legal services organizations. But for all the reasons set out in this paragraph, there is no reason to believe this will materially impair the delivery of necessary legal services to the indigent. On the other hand, creating a loophole in the journaling requirement would primarily deprive other disadvantaged populations of the important protections provided by journaling against deed fraud or home theft, which depends on the negligence or complicity of notaries. These include the elderly and members of minority groups who are also significant consumers of *pro bono* legal services and are frequent victims of deed fraud.

[28] *See* State Bar Report at 4 ("For example, under Exec. Law §130(2), attorneys admitted to practice can be appointed as a notary without an examination. Additionally, a notary generally cannot act if they have a pecuniary interest in a matter. However, Exec. Law §135 allows an attorney who is a notary to act as such for their own client in respect of 'any matter, claim, action or proceeding'").

[29] *See People v. Brooks*, 1 Den. 457 (1845).

[30] *See* Executive Law §135; Real Property Law § 330.

Executive Law § 135-b (not a Secretary of State regulation) exempts lawyers from the advertising rules applicable to notaries. Furthermore, that exemption does not evidence any policy decision that lawyers do not require regulation in their notarial capacity. Rather it is logically required by the fact that the rule from which lawyers are exempt is the rule against notaries' falsely advertising that they are attorneys or practice law.

Second, the lawyer's exemption from the testing requirement for a notarial commission is statutory, in Executive Law § 130.2, not regulatory. It is based on the assumption lawyers understand notarial rules and is not an exemption from the performance of a statutorily mandated notarial duty.

Third, the Executive Law § 135 exemption from the statutory duty to provide notarial services is not an exercise of regulatory discretion by the Secretary of State. And, it also does not exempt lawyers from a rule as to the proper performance of notarial duties. It merely reflects that lawyers do not hold themselves out as providing notarial services to the general public and serve as notaries as an accommodation to clients, and require the ability to decline to provide such services in matters in which they are interested or have a conflict.

Finally, as noted in Point B, nothing in the Executive Law would justify, let alone require, an exemption for non-lawyer employees of lawyers. Furthermore, the primary consequence of that exemption would be to enable a lawyer-employer (who may herself not even be a notary) to lawfully order a notary-employee not to use a journal against that notary's best judgment, thereby subjecting the employee to risk of undue influence in the performance of notarial duties.[31]

D. Argument 4: The Journaling Requirement Is Not *Ultra Vires*

Another argument that has been raised against the new journaling requirement for paper-based notarial acts is that the regulation exceeds the authority of the Secretary of State.[32] We respectfully disagree.

Section 91 of the Executive Law authorizes the Secretary of State to issue rules that "regulate and control the exercise of the powers of the department of state and the performance of the duties of officers, agents and other employees thereof." The journaling requirement regulates the exercise of notarial powers and performance of notarial duties of commissioned notaries as officers of the Department of State. As a result, it is squarely within the power of the Secretary of State under Executive Law section 91.[33]

---

[31] See fn 14, 21 and 22, concerning the effect of journal keeping on preventing notarial negligence or misconduct and the frequency of both employer pressure on employee-notaries and of lawyer-notary notarial misconduct.

[32] *See* State Bar Report at 2.

[33] The State Bar Report cites *Campagna v. Shaffer*, 73 N.Y.2d 237, 536 N.E.2d 368, 538 N.Y.S.2d 933 (1989), for the proposition that regulations promulgated by the Secretary of State may not exceed statutory authority. However, the case is inapposite: in *Campagna*, the regulation impeded the otherwise lawful speech and business practices of persons who, although licensed as brokers, are not public officers performing official duties. Here the regulation sets standards for the performance of official duties by commissioned public officers.

Furthermore, the regulations' requirement of record maintenance for both paper-based and electronic notarizations is fully consistent with and implements the express requirement of new Executive Law § 135-c(2)(a) that the "method of identifying a document signer for an electronic notarization shall be the same as the methods required for a paper-based notarization." Consistent with that statutory mandate, the journal regulation requires that the notary keep a record of that identification method used for each notarial act, whether paper-based or electronic.[34]

IV. CONCLUSION

The Secretary of State's Regulations, including the journal requirement, are within the Secretary of State's statutory authority to issue rules and are also directly relevant to and supported by the Executive Law amendments that required the issuance of regulations for identification of signatories of electronic records identical to those used for paper-based signatures. The journal requirement is not contrary to law or *ultra vires*.

It is also not an unreasonable abuse of discretion. Notarization is no longer necessary for affidavits in legal proceedings and, therefore, journaling is required primarily for conveyances and similar transaction documents, which have well-recognized fraud and forgery risks. There is no evidence that journal keeping imposes an unreasonable burden on notaries. The Regulations were properly drafted based on the best notarial models and practices and impose a journaling requirement similar to that imposed by half the States. It would be a serious error, and abuse of discretion, for the Secretary of State to modify the Regulations to allow lawyers the power, not provided in the Executive Law, to deprive their notarial employees of the protections provided to them by the duty to maintain a journal and to deprive their clients or persons dealing with their clients of the important protections that journaling provides against notarial negligence and misconduct.

Commercial Law and Uniform State Laws Committee
Curtis C. Mechling, Chair
Alan Kolod, Immediate Past Chair

Real Property Law Committee
Robert J. Gorzelany, Chair
Dorothy Heyl, Immediate Past Chair

December 2023

Contact
Elizabeth Kocienda, Director of Advocacy | 212.382.4788 | ekocienda@nycbar.org
Mary Margulis-Ohnuma, Policy Counsel | 212.382.6767 | mmargulis-ohnuma@nycbar.org

[34] 19 NYCRR §§182.2(a)(7) and 182.9 ("all notaries pubic must maintain records sufficient to document compliance with the requirements of sections 130 and 135-c of the Executive Law…").