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## GUIDING PRINCIPLE III

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The Notary shall require the presence of each signer and oath-taker in order to carefully screen each for identity and willingness, and to observe that each appears aware of the significance of the transaction requiring a notarial act.

### Standards of Professional and Ethical Practice

#### Article A: Physical Presence

##### III-A-1: Insisting That Signer Appear

The Notary shall insist that the signer and any witness identifying the signer be present before the Notary at the time of the notarization.

**Illustration:** The Notary is telephoned by a client who has just signed and mailed several documents for the Notary to notarize without personal appearance. “You know my signature, so there shouldn’t be any problem,” the client says over the telephone.

*The Ethical Imperative:* The Notary declines to perform a “telephone notarization” without the physical presence of the signer, since it would be a clear violation of the law, even though the Notary feels relatively certain about the identity, volition and awareness of the signer.

#### Article B: Screening for Identity and Willingness

##### III-B-1: Three Identification Methods

The Notary shall carefully identify each signer through either personal knowledge, at least one reliable identification document bearing a photograph, or the sworn word of a credible witness.

**Illustration:** The Notary is approached by a friend and a stranger identified by the friend as a business associate. The friend requests notarization of the associate’s signature on a document, but is not involved in the transaction. When the Notary asks the associate for identification, the friend becomes indignant that “you won’t take my word as my bond.”

*The Ethical Imperative:* The Notary continues to insist either that the associate produce a reliable form of identification bearing a photograph or that the friend be formally sworn in as a credible witness vouching for the associate’s identity.

##### III-B-2: Deterring Undue Influence

The Notary shall not notarize for any person if the Notary has a reasonable belief that can be articulated that the person is being bullied, threatened, intimidated or otherwise unduly influenced into acting against his or her will or interest.

**Illustration:** The Notary is called to the hospital room of a patient to notarize that person’s signature on several documents. The patient appears disinterested in the documents and expresses a desire to be allowed to sleep. Also present is the patient’s spouse, who insists that the patient first attend to signing the documents. The spouse places a pen in the patient’s hand and directs it to the signature space on one of the documents, but the patient makes no effort to sign.

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### COMMENTARY

#### GENERAL

Guiding Principle III prescribes appropriate conduct on a number of interrelated issues that, taken together, address the very essence of notarization. Some of the practices addressed are mandated by statute in most jurisdictions. Thus, the *Code* only serves to reinforce them. Other issues, particularly regarding the proper role, if any, the Notary should play in determining a signer’s capacity, are more problematic. Since most notarial statute is silent on these issues, the *Code* takes a more proactive position with respect to them.

Standards III-A-1 and III-B-1 principally restate the accepted practice necessary for a proper notarization. Standards III-B-2 and III-C-1 through -3 address the Notary’s obligation to assess the capacity of the person for whom the notarization is performed. Whether or not a Notary is required to be concerned about “capacity” and the ramifications of imposing such a requirement have proven to be a controversial subject. The *Code* adopts a position that forces the Notary to take a thoughtful, professional approach to notarizations, and recognizes that a Notary may exercise some discretion with respect to whether or not the notarization should be performed. Standards III-D-1 through -7 offer the Notary guidance on how to properly handle notarizations that involve the use of witnesses confirming the identity of the person who signed the document to be notarized.

#### ARTICLE A: Physical Presence

The *Code* mandates that the Notary require the physical presence of a signer or any person serving in a witness capacity. The use of “shall” makes this a mandatory charge. The use of “insist” leaves no room for discretion. Physical presence is the only reliable way a Notary can verify the identity of the signer or witness. This verification is the essence of the notarial act itself, and is routinely required by statute. (See, e.g., N.J. REV. STAT. § 46:14-2.1(b); TEX. CIV. PRAC. & REM. CODE ANN. § 121.004; and MICH. COMP. LAWS § 565.264.) Failure to meet this directive is not only unethical, but probably unlawful as well. (See, e.g., S.D. CODIFIED LAWS § 18-1-11; and N.C. GEN. STAT. § 10A-12(b).)

#### ARTICLE B: Screening for Identity and Willingness

Standard III-B-1 reminds the Notary that the identity of every signer must be carefully established. Indeed, some jurisdictions impose a higher standard of care for proving identity than for performing other notarial functions. (See, e.g., IDAHO CODE § 51-111(1).) The applicable statute in every jurisdiction requires proper identification. Some statutes enumerate the different types of acceptable identification (see, e.g., CAL. CIV. CODE § 1185; and FLA. STAT. ANN. § 117.05(5)), others merely call for satisfactory evidence (see, e.g., OHIO REV. CODE ANN. § 147.53; and IOWA CODE § 9E.9.6). The Standard emphasizes that the Notary must properly follow the state-imposed rules. The key word is “properly.” The Illustration makes clear that although a signer’s identity can be proved by a credible witness, the witness must formally swear to the signer’s identity. The act of establishing the identity of and swearing in the witness becomes the notarial act. As such, the Notary must perform the act in conformity with established rules of law. A person’s identity cannot properly be established by the unsworn testimony of a witness, regardless of how highly regarded or well-known the witness is to the Notary.

The *Code* states that “reliable identification” is acceptable proof of identity. The *Code*, however, neither specifies nor attempts to define what is “reliable identification.” Notaries are presumed to know what constitutes acceptable proof of identification under the law of their respective jurisdictions. For those Notaries who do not, the Standard implicitly directs them to ascertain what is required.

*The Ethical Imperative:* The Notary respects the patient's wish to sleep, promising to return later and to notarize if the patient appears alert and willing to sign the documents.

is not coherently responsive to the Notary's greeting and questions. The friend urges the Notary to notarize.

*The Ethical Imperative:* The Notary declines to notarize because, without clear and direct two-way communication with the signer, the Notary cannot be sure of the individual's awareness. The Notary must not rely on an "interpreter" who may have a motive for misrepresenting the signer's condition or intent.

## Article C: Screening for Awareness

### III-C-1: Awareness Essential in Signer

The Notary shall not notarize for any person if the Notary has a reasonable belief that can be articulated that the person at the moment is not aware of the significance of the transaction requiring a notarial act.

**Illustration:** The Notary is called to the home of an elderly person to notarize that individual's signature on several documents. The Notary is introduced to the would-be signer by the person's relative. Acting in a childlike manner, the elderly person appears disinterested in the documents. Though the relative urges the Notary to act, the Notary is unable to get a coherent response to simple questions regarding the notarial act (e.g., "Is that your signature, and have you signed this document willingly?").

*The Ethical Imperative:* The Notary does not notarize the documents, since the person's conduct indicates a strong likelihood that the individual is not at the moment capable of responsible action.

### III-C-2: Coherent Communication Necessary

The Notary shall not notarize for any person unable to communicate coherently with the Notary at the time of notarization.

**Illustration:** The Notary is called to a nursing home to notarize documents for a bedridden patient, whose friend is also present. The patient is awake and sitting up, with both documents signed and resting on a tray table. However, the patient's speech is slurred and the individual

### III-C-3: Direct Communication Necessary

The Notary shall not notarize for any person with whom the Notary cannot directly communicate in the same language, regardless of the presence of a third-party interpreter or translator.

**Illustration:** The Notary is approached by a client and a stranger who does not speak English, but offers a foreign passport as proof of identity. The client says the stranger wants to have a signature notarized on an English-language power of attorney authorizing the client to conduct business on the stranger's behalf. With no knowledge of the stranger's language, the Notary must rely on the client to communicate.

*The Ethical Imperative:* The Notary declines to notarize for the stranger, since there can be no certainty of this individual's intent or awareness without direct communication. Further, the client has a clear interest in the transaction that compromises reliability as a truthful interpreter. The safest policy would be to direct the two to a Notary who speaks the stranger's language or to the nearest consulate of the stranger's country.

## Article D: Qualification of Witnesses

### III-D-1: Honesty, Capacity and Disinterest Essential

The Notary shall require any witness identifying a principal signer to be honest, mentally capable and

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In those jurisdictions where a jurat does not require the Notary to verify the signer's identity, the Notary may legally proceed without doing so. (See, e.g., CAL. CIV. CODE § 1185, which stipulates identification requirements for acknowledgers but not for affiants.) However, good practice dictates that the Notary nonetheless screen *all* signers for identity. This deters fraud and provides important information for the Notary who maintains a notarial journal. (See, Standard VIII-A-2 and accompanying Commentary.)

Standard III-B-2 tackles a more difficult and, perhaps, controversial issue: deterring undue influence. Although recognized as a laudable goal, there are those who suggest that this activity is not within the purview of performing a notarial act. Today, notarial authority is exclusively a product of statute. Statutes usually do not specifically direct a Notary to ascertain whether or not a party to a notarization is subject to undue influence, but there are exceptions. (See, e.g., GA. CODE ANN. § 45-17-8(b)(2) (providing a Notary is not "obligated" to act if he "feels" the person seeking the notarization "is being coerced").) Consequently, there is little direct authority for a Notary to refrain from acting if undue influence is suspected.

The *Code* adopts the position that the Notary, as a public official who performs a function relied upon by innocent third parties not privy to the notarization, should be proactive in executing his or her obligations. Consistent with the view that notarizations in general are designed to deter fraud, it logically follows that Notaries should strive to strengthen lawful documents so that they will not fall victim to challenge. While a Notary does not and cannot guarantee the efficacy of a document, users of that document ought to be able to rely on the fact the signature is what it purports to be. The *Code* favors the view that a signature not voluntarily provided is suspect.

The *Code* does not obligate the Notary to investigate all of the facts surrounding every transaction. Instead, it assumes the Notary will rely on personal observation to determine whether or not the signer is acting under his or her own free will. The Standard uses the terms "bullied, threatened and intimidated" for illustrative purposes only. The drafters recognize that from a legal perspective these terms imply acting under duress, and not undue influence. Although the two concepts are related, they are distinct. In not drawing the legal distinction, the *Code* sends the general message that the Notary should not participate in a transaction that on its face involves an unwilling signer, regardless of how that fact is manifested. The *Code* recognizes that there is no "bright line" test as to when a person has been deprived of his or her own free will. Each situation is special unto itself, and the Notary is left to use his or her best judgment as to whether or not to proceed with the requested notarization. The Standard serves to alert Notaries to the "undue influence" issue and admonishes them to avoid becoming involved in these situations.

#### ARTICLE C: Screening for Awareness

Standards III-C-1 and -2 wrestle with perhaps the thorniest issue confronting Notaries: signer awareness. This problem is distinguishable from the "willingness" issue of Standard III-B-2, although both standards address "capacity." The "willingness" problem arises when a person with full control of his or her mental faculties is being improperly persuaded or forced to act. The "awareness" problem involves only the signer, and focuses on whether or not the signer understands what he or she is doing.

Both in earlier drafts of the *Code* and in other texts, the "awareness" issue has been referred to as "signer competence." Although the same matter is being addressed, *i.e.*, the signer's ability to understand his or her acts, the *Code* adopts the view that testing for "awareness" is a more meaningful and reasonable function.

Proponents of a strict test for competence rest their position on the fact that the law allows no less. Although it is true that by definition an "acknowledgment" implicitly requires the Notary to determine the signer's competence (see ARIZ. REV. STAT. ANN. § 33-505; IND. CODE § 26-3-60; and *Poole v. Hyatt*, 689 A.2d 82 (Md. 1997)), not all notarizations are "acknowledgments." Indeed, many are not. (See, e.g., WASH. REV. CODE § 42.44.090.100.) Nonetheless, this camp suggests that the very nature of every notarial act implies the

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unaffected by the transaction requiring a notarial act.

**Illustration:** The Notary is asked by a former school classmate to swear that person in as a subscribing witness vouching for the signature of an absent “business associate” on a deed. Over the years, the Notary has developed a poor opinion of the classmate’s integrity, having knowledge of a conviction for trafficking in stolen goods.

*The Ethical Imperative:* The Notary declines to accept the former classmate as a reliable subscribing witness, urging this individual to have the absent business associate appear in person before a Notary.

### III-D-2: Oath or Affirmation Necessary for Identifying Witness

The Notary shall administer an oath or affirmation to any witness identifying a principal signer in order to compel truthfulness.

**Illustration:** The Notary is telephoned by a client who promises to stop by later in the day with a deed to be notarized. The client mentions that the deed requires one witness in addition to the Notary, and asks if a friend may witness the signature on the document before it is brought in.

*The Professional Choice:* The Notary explains that the client may sign the deed and have the signature witnessed outside of the Notary’s presence prior to appearing before the Notary to acknowledge the signature. The Notary also explains that it will not be necessary for the witness to appear and take an oath, since the Notary will positively identify the client based on personal knowledge of identity and not rely on the witness to make the identification.

### III-D-3: Personal Knowledge of Identifying Witness Essential

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requirement to screen for competence. Notwithstanding this belief, if the signer merely seeks to have a document “witnessed,” there is no authority requiring the Notary to determine the signer’s competence. (*But see* FLA. STAT ANN. § 117.107(5) (requiring a Notary to refrain from acting if it appears the signatory is “mentally incapable of understanding the nature and effect of the document”); and GA. CODE ANN. § 45-17-8(b)(3) (giving the Notary the opportunity to decline to act if he has “compelling doubts” about whether the signer “knows the consequences of the transaction requiring the notarial act”).) To self-impose a standard of determining signer competence could expose the Notary to legal liability if the Notary uses a perceived lack of competence as a basis for improperly refusing a notarization, and harm results.

The *Code* accepts the position that determining competence is problematic. Not only is it of dubious legal necessity, but it also may require abilities beyond the ken of many Notaries. Moreover, when “competency” is tested for legal matters such as a will or a contract, much more than a cursory examination is made. Attorneys have statutory and judicial guidance detailing how they should proceed on these matters. Moreover, the process can be quite time-consuming. Thus, even for those Notaries who would feel comfortable in performing such a review, the time involved for such a task is probably prohibitive.

The *Code* does not posit that the Notary should mindlessly proceed with any notarization upon request. Instead, it erects an “awareness” standard. Notaries are expected to judge for themselves whether the signer has the requisite awareness to proceed. Standard III-C-1 calls for the Notary reasonably to believe the signer to be “aware of the significance of the transaction requiring a notarial act.” The Standard does not require the signer to understand detailed legal ramifications of the act, or to be able to recite from memory any part of the document. The key to the “awareness” standard is the signer’s self-recognition that he or she is engaged in a transaction sufficiently significant to require proof of the signer’s participation in it.

In meeting the “awareness” test, the signer need not divulge particulars of the document nor provide the Notary with an overview of the transaction. Such a requirement might violate confidentiality rules established in Guiding Principle IX of the *Code*. (See Standards IX-A-1 and B-2.) Instead, it is sufficient for a signer to indicate, for example, that the document is a will or a contract, although such specificity is not required. Indeed, a Notary ethically could proceed upon hearing the signer say he needs an important document notarized, if the signer’s demeanor conveyed to the Notary that the signer understood the significance of the act. Recognizing that there is not just one exclusive method for determining “awareness,” the *Code* does not offer any methodology on how a Notary should proceed, partially out of concern that the suggestions might become the only ones used. Such a result clearly would be contrary to the *Code*’s position that determining “awareness” is not an exact science. Instead, the *Code* relies upon the Notary’s ability to judge from the facts and circumstances presented whether or not the signer satisfies the “awareness” standard.

The Illustration for Standard III-C-1 presents a typical dilemma faced by many Notaries. The signer demonstrates a sufficient disorientation to raise a question in the Notary’s mind as to whether the signer is aware of what is transpiring. The Notary asks some simple, yet straightforward questions to determine the signer’s “willingness.” If a signer cannot identify or acknowledge a signature as his or her own, the Notary should not proceed. If the signer responds that he or she did not sign the document willingly, the Notary must not proceed. In the latter situation, the Notary who proceeds not only acts unethically, but also may be considered a party to a fraud.

The essence of the *Code*’s position is that while being commissioned as a Notary does not qualify one to determine legal competence, a Notary may nonetheless make a basic assessment as to whether or not the signer is willing and aware enough to proceed. The *Code* does not require the Notary to actually prove “awareness,” but asks only that the Notary formulate a reasonable belief that the signer has “awareness.” The issue will not arise in many notarizations. The *Code* seeks to provide guidance for those situations in which the signer’s actions raise doubt in the Notary’s mind as to whether the signer can proceed.

The Notary shall personally know any individual serving as the sole witness identifying a principal signer in the Notary’s presence, and the witness shall personally know the principal signer.

**Illustration:** The Notary works in an office. An elderly stranger walks in and requests notarization of a document. However, the stranger no longer drives and cannot present a driver’s license or other reliable ID card as identification. At that moment, a longtime coworker of the Notary enters and greets the stranger by name. The coworker has known the individual for years.

*The Professional Choice:* The Notary notarizes the signature of the elderly stranger, who is identified through the vouching under oath of the coworker. The critical chain of personal knowledge exists: the Notary personally knows the identifying witness and the identifying witness personally knows the signer. State law may provide assistance in usefully defining “personal knowledge of identity.”

### III-D-4: Identifying Witness Must Be Unaffected

The Notary shall disqualify any person from serving as an identifying witness if that individual is named in or affected by the document signed by the principal.

**Illustration:** The Notary is asked by a married couple to notarize their signatures on a document. The Notary personally knows one of the two as a former college classmate, but has never met the other, who does not drive nor have a driver’s license or other photo ID. The couple suggests that the Notary swear in the classmate as a witness to identify the spouse.

*The Professional Choice:* The Notary agrees to notarize the signature of the spouse who is personally known, but declines to notarize the signature of the unknown spouse, since identification would be based on the word of a

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witness who is clearly involved in and affected by the transaction. The Notary suggests that the unknown spouse visit a Notary who personally knows that spouse, or rely on a disinterested credible acquaintance who personally knows a Notary to make the identification.

### III-D-5: Personal Knowledge of Subscribing Witness Essential

The Notary shall personally know any individual offering to serve as a subscribing witness to identify a principal signer who is not in the Notary's presence.

**Illustration:** The Notary is asked by a stranger to take a proof of execution for the signature of the stranger's absent spouse. The stranger explains that the spouse was suddenly called out of town on emergency business, but that the stranger saw the spouse sign the document.

*The Professional Choice:* The Notary declines to allow the stranger to serve as a subscribing witness for a proof of execution because this individual is not personally known to the Notary. Because proofs have a high potential for fraud, Notaries must know well any individual they trust to vouch for an absent signer's identity, volition and awareness.

### III-D-6: Subscribing Witness Must Be Unaffected

The Notary shall disqualify any person from serving as a subscribing witness if that individual is named in or affected by the document signed by the absent principal.

**Illustration:** The Notary is asked by a friend to perform

a proof of execution for the signature of the friend's parent on a health care power of attorney naming the friend as attorney in fact. The parent is described as too sick to appear before the Notary.

*The Professional Choice:* The Notary declines to allow the friend to serve as a subscribing witness for a proof of execution because this individual is named in and affected by the document and the person's credibility as a reliable witness would be compromised.

### III-D-7: Two Witnesses to Mark Must Be Disinterested

The Notary shall require that two individuals in addition to the Notary witness the affixation of a mark, and neither witness shall be named in or affected by the marked document.

**Illustration:** The Notary is called to the bedside of a patient to notarize this person's signature on a power of attorney naming a spouse as attorney in fact. Ill and extremely weak, the patient is only able to affix an "X" rather than a normal signature. The spouse offers to sign as a witness to the mark.

*The Professional Choice:* The Notary explains that two persons in addition to the Notary must witness the making of the mark. The Notary disqualifies the spouse as a witness, since this individual is both named in and affected by the document. Instead, the spouse finds two neighbors, both of whom present reliable ID cards, to witness the patient's mark.

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Standard III-C-2 and -3 address a different aspect of the "awareness" issue, that of the signer being able to communicate effectively with the Notary. The Illustration for Standard III-C-2 cites a situation wherein the physical condition of the would-be signer raises doubts as to the signer's awareness of the transaction. Although the Illustration instructs the Notary not to proceed, it must not be mindlessly applied to all similar situations. Individuals with slurred speech or who cannot speak at all often may nonetheless effectively communicate their wishes in a variety of other ways. The result reached in the Illustration rests largely on the fact that the would-be signer could not respond effectively to the Notary's questions. Standard III-C-3 takes the communication problem a step further by admonishing Notaries not to perform notarizations through an interpreter, even though several states allow translators to explain the nature and effect of an English-language document to a non-English-speaking signer. (See, e.g., FLA. STAT. ANN. § 117.107(6).) Drafters of the Code considered the inherent risk of fraud to be too great when the Notary relies on the words of a third party who may have a motive for dissembling. There are other ways for persons who speak a foreign language not understood by the Notary to obtain notarizations, including taking advantage of consular services. Advising the client to take one of those options is the ethical path to pursue.

#### ARTICLE D: Qualification of Witnesses

Standards III-D-1 through -7 offer advice on the proper use of witnesses in notarization. Although not mandatory, taken together the Standards create a protocol of good practice.

Standard III-D-1 states the three minimum requirements for a witness: honesty, mental capacity and disinterest. The Notary will have to draw upon his or her personal knowledge of the witness to assess these qualifications. As to "disinterest," the Notary will have to ascertain this fact at the time of notarization. Standard III-D-4 addresses this issue more directly. Any witness with a direct interest in the document to be notarized must be disqualified. (Accord CAL. CIV. CODE § 1185(c)(1)(E).) Standard III-D-6 provides the same rule for subscribing witnesses. (For guidance as to what may constitute an improper personal interest, see Guiding Principle II, Article B.)

Standards III-D-3 and 5 set out the foundation for the Notary's knowledge of the witness' identity. The former relates to identifying witnesses in general, the latter to subscribing witnesses. In both instances the Notary must have personal knowledge of the witness' identity. Standard III-D-3 indicates that state laws may usefully define "personal knowledge of identity" (see, e.g., ARIZ. REV. STAT. ANN. § 41-311 (defining personal knowledge of identity as "familiarity with an individual resulting from interactions with that person over a sufficient time to eliminate reasonable doubt that the individual has the identity claimed")). Notaries are advised to review the relevant law in their respective jurisdictions on this matter.

Standard III-D-2 requires that an identifying witness be put under oath, an action dictated by many statutes. (See, e.g., FLA. STAT. ANN. § 117.05(5)(b).) This simple procedure is designed to provide the assurance needed to verify the unknown signer's identity. It is an essential link in the notarial process needed to deter fraud.

Standard III-D-7 addresses the use of marks as signatures. This situation can arise when the signer is physically incapable of writing his or her own signature, or does not know how to write the signature. In either event, a mark (e.g., "X") can constitute a valid signature, as long as proof is provided of the mark's authenticity. The Standard suggests that the Notary always use at least two disinterested witnesses when notarizing a document signed with a mark, a requirement imposed by many state laws. Use of two witnesses in addition to the Notary will help guarantee the validity of the document should it ever be challenged. As with any other witness, the Standard alerts the Notary of the need to make the witnesses prove their identities. Note that since the witnesses are not serving to verify the identity of the signer, they need not be personally known to the Notary nor put under oath.