

Employers of Notaries
Must Train and Supervise or
Face Direct Liability for
Failure to Prevent
Harm to Third Parties

Arthur F. Silbergeld, Esq.
February 2009

Employers of Notaries Must Train and Supervise or Face Direct Liability for Failure to Prevent Harm to Third Parties

I. EXECUTIVE SUMMARY

In *Vancura v. Katris*,¹ a recent decision by the Illinois Appellate Court that might have national implications for notary employers, Kinko's was held directly liable for damages resulting from its notary employee's notarization of a forged signature on a mortgage assignment. A case of first impression, the key issue in *Vancura* was whether Kinko's was directly liable for failing to prevent the notary employee's misconduct under a common law theory of negligence. The Court recognized the notarization of a forged signature caused by an incompetent and unsupervised notary as a foreseeable harm that a notary employer has a duty to prevent.

Anyone who employs a notary would be well-served to identify the many reported missteps taken by Kinko's — the notary employer — in order to avoid potential liability for the negligent acts of its notary employees. The notary employee in *Vancura* did not understand and did not adequately perform his duties as a notary. He was unaware that his purpose as a notary was actually to confirm that the person signing the document was the person he purported to be — a duty that cannot be fulfilled simply by matching the signature on a signed document with any exemplar found on an identification document. Moreover, supervisors were not trained in how to properly notarize a document or what to look for in order to determine whether the notaries were performing their duties properly. Indeed, the manager in *Vancura* testified that he never actually observed his employees perform a notarization.

¹ *Richard P. Vancura v. Peter Katris, Gustavo Albear, Glenn S. Brown, Randall Boatwright, Old Kent Bank, as Trustee Under Trust Agreement 6927, and Kinko's, Inc.* 1-06-2750, LEXIS 1317 (Ill.App.12-26-2008). This slip opinion also is available at 2008 WL 5423357.

II. EXPANDED EMPLOYER DUTY WITH RESPECT TO NOTARY EMPLOYEES AND AGENTS

A. Common Law Duty to Prevent Harm to Third Parties Caused by Inadequately Trained and Supervised Notary Employees

“A claim for negligent training and supervision concerns the employer’s *own* negligence rather than the negligence of its employee, meaning that the employer’s liability is direct, not vicarious.”² This duty is owed to the public generally and not to the negligent employee. Thus, in order to hold any employer liable for an injury to a third person resulting from the negligent training or supervision of an employee, it must be established that “the employer *knew or should have known* its employee behaved in a dangerous or otherwise incompetent manner, and that the employer, having this knowledge, failed to supervise the employee adequately, or take other action to prevent the harm.”³

Consistent with the principles set forth in Restatement (Second) of Agency § 213 and relying on *Cutter v. Town of Farmington*,⁴ the *Vancura* Court ruled that loss from the notarization of a forged signature is a foreseeable risk resulting from an insufficiently trained or supervised notary employee, such that employers have an affirmative duty to ensure that the notary understands and follows these notarial responsibilities. The Restatement (Second) of Agency § 213, which has been widely cited by courts throughout the United States,⁵ sets forth three bases of liability that are pertinent to organizations employing notaries or using notaries as agents:

A person conducting an activity through servants or other agents is subject to liability for harm resulting from this conduct if he is negligent or reckless:

- (a) in giving improper or ambiguous orders of [sic] in failing to make proper regulations; or
- (b) in the employment of improper persons or instrumentalities in work involving risk or harm to others; or
- (c) in the supervision of the activity. . . .

In *Vancura*, the negligent training cause of action effectively encompassed paragraphs (a) and (b) of this rule. The negligent supervision cause of action is reflected in paragraph (c).

² *Id.* at 23.

³ *Id.* at 23, citing 30 C.J.S. Employer-employee § 205 at 1; *Kresin v. Sears, Robuck & Co.*, 316 Ill. App. 3d 433, 441 (2000).

⁴ 126 N.H. 836, 498 A.2d 316, 320 (1985).

⁵ See case citations to § 213 of the Restatement (Second) of Agency (the American Law Institute) (2008).

Applying this Restatement section to allegations of negligence in the hiring, training, and supervision of public officers, the New Hampshire Supreme Court in *Cutter v. Town of Farmington* stated: “It seems clear to us that the rule is applicable in situations where the untutored agent unwittingly caused injury which was a risk of harm attendant to the employment which the principal had reason to foresee.”⁶ Citing Comment (d) to this Restatement section, the *Cutter* court also noted that a “dangerous quality” of an employee that causes harm may encompass the agent’s “incompetence or unskillfulness ... with reference to the act to be performed.”⁷

1. Negligent Training

Although Illinois has no mandatory education requirement for notaries as part of the commissioning process, the Court nevertheless held Kinko’s liable for negligence after noting that Kinko’s “chose to train [its employees] and it showed no concern for whether its instruction did actually ‘imbue its employees with their [notary] duties under Illinois law.’”⁸ “Thus the weight of evidence indicates Kinko’s had no regard for whether [the notary employee] understood his responsibilities and adhered to them. This is negligence.”⁹

A notary employer faces liability for both incorrect instruction and failure to instruct. “The principal or master may be negligent in that he fails to use due care to give or in giving directions to the agent or servant as to the act to be done. See § 509 and the Restatement of Torts § 311. Such directions may be negligently given either because they contain misstatements or because, in view of what the employer should know concerning the capacities of the one employed, they are incomplete. Likewise, the directions may be negligent because the principal does not anticipate circumstances which he should realize are likely to arise.”¹⁰

In *Vancura*, the Court affirmed the trial court’s determination that the notary did not understand his statutory and common law responsibilities and, therefore, had been inadequately trained by the employer.¹¹ Specifically, the notary did not understand the responsibilities to positively identify document signers and secure the seal.¹² Moreover, the employer affirmatively gave incorrect instructions concerning

⁶ *Cutter v. Town of Farmington*, 126 N.H. at 841.

⁷ *Id.*

⁸ *Vancura* at 29.

⁹ *Id.* at 37.

¹⁰ Restatement (Second) Agency § 213, Comment c.

¹¹ *Id.* at 27 and 38.

¹² *Id.* at 26 and 38. Interestingly, while the trial court referenced the failure to keep proper journal records of each notarial act as a breach of the notary’s standard of conduct, the appellate court did not cite this as a basis for affirming the common law cause of action. *Id.* at 26. However, based on the uncontroverted expert testimony of Professor Closen, the appellate court did note as fact that the employer had insufficiently instructed the notary to keep the journal records in a bound book and to make complete entries, including signature samples, name, and address of each document signer. *Id.* at 17.

the proper standard of conduct in identifying a signer.¹³ “Kinko’s knew or should have known that [the notary’s] failure to positively identify persons requesting notarizations through pictorial identification and signature documents such as local driver’s licenses would, sooner or later, permit fraud or forgery to occur. When the purpose of notarization is to prevent fraud and forgery, adequate identification involves more than accepting a customer’s personal statement and signature exemplar.”¹⁴

2. Negligent Supervision

The court in *Vancura* concluded that Kinko’s failed to satisfy the duty to adequately supervise its notary employees. Employers should be aware of the additional obligations such a duty may impose. *Vancura* noted with disapproval that Kinko’s “made no attempt to supervise [the notary’s] practices and it helped [the notary] store his notary seal improperly.”¹⁵ The Court further noted “Kinko’s did not instruct [the notary’s] supervisors about sound notarial practices or how to supervise an employee to ensure he or she was adhering to the basic rules of proper notarization.”¹⁶

The Court’s reference to Kinko’s deficient acts is notable in several respects. First, if an employer offers notary services to third parties, it assumes an ongoing duty to ensure that the notary employees are competent and perform their notary services properly. Second, an employer is obligated to instruct its managers and supervisors on sound notarial practices and/or on how to properly supervise a notary employee to ensure that the notary is adhering to basic rules of proper notarization.

The Court concluded that Kinko’s failed to satisfy that duty after noting that its managers did not monitor the conduct of its notary employees on a routine basis or even through random auditing of their journals. Moreover, the Court noted, even if a manager had been aware of the notary employee’s practices, the manager still had no way of knowing what was or was not an acceptable practice because the managers had never received any instruction on those practices.

B. Employer Liability Extends to Notaries Acting As Independent Contractors

Although *Vancura* does not address the circumstance of independent contractor notaries, the case suggests that an employer has a duty to protect third persons from the potential harm attendant to the job of notarization regardless of whether the notary is an employee or an independent contractor. While general agency law does not confer an affirmative duty on employers to train independent contractors, an employer may be liable under Restatement

¹³ *Id.* at 34-35.

¹⁴ *Id.* at 35.

¹⁵ *Id.* at 29.

¹⁶ *Id.* at 36.

Agency (Second) § 213 if the employer entrusts a notarial service to an incompetent independent contractor.

Cutter demonstrates that an employer may be liable for failure to train under an agency theory. If fraud results from an improperly trained notary independent contractor, the victim of the fraud will likely file a claim against the employer. Even if the employer ultimately prevails in defending against such claims, it would spend considerable time and energy, as well as financial resources, in order to have the case dismissed. Thus, notary employers should adopt policies to ensure that their notary independent contractors are adequately trained and properly performing their notary services at all times.

C. The Standard of Conduct for Notaries Is Based on Statutory and Common Law Sources, Including the Model Notary Act

What is perhaps most significant about the *Vancura* decision is the extent to which the holding relies on an application of the standards set forth in the National Notary Association's Model Notary Act of 2002 (the "Model Act"). The Court relied on the standards set forth in the Model Act with respect to what constitutes satisfactory evidence of identification, proper maintenance of a notary's seal, and what constitutes consent of an employer to a notary employee's misconduct. The Court reasoned that because the state statutes were silent on those issues, it was reasonable to look to industry standards to determine what is considered reasonable conduct by a notary. In citing the Model Notary Act as a "persuasive authority" comparable to the American Institute of Law's Restatement (Second) of Agency and the American Bar Association's Model Business Corporations Act, the majority noted the expertise and representative breadth of the Act's drafters.¹⁷

Where the statute is incomplete or a term is left undefined, however, a court may turn to the Model Act, as it did in *Vancura*. Compliance with a statutory or administrative requirement is merely evidence of having met a minimum standard of conduct and does not preclude a finding of negligence for having failed to follow professional codes or common law requirements.¹⁸ Accordingly, employers of notaries should be familiar with the Model Notary Act, particularly if the employer provides notary services in a state that has a fairly general notary act or one that is limited in scope.

III. STEPS EMPLOYERS MAY TAKE TO REDUCE LIABILITY EXPOSURE

Employers of notaries should take care to document that each notary has been effectively trained, that supervisors understand notarial responsibilities, and that each notary is complying with all statutory and common law duties. An

¹⁷ *Id.* at 32, 33, 34, and 40.

¹⁸ *Christou v. Arlington Park-Washington Park Race Tracks Corp.*, 104 Ill.App.3d 257, 60 Ill. Dec.21, 432 N.E.2d 920 (1982).

employer need maintain objective indicators of adequate training and supervision, including such items as certifications, test results, and journal records.

A. Negligent Training

Even though the Court in *Vancura* did not specify what an adequate training program would consist of, the case provides some guidance to notary employers. First, if an employer elects to provide in-house notary training courses, it should engage a professional who is well-versed in the applicable state law statutes as well as sound notarial practices in order to prepare training materials to ensure that they adequately convey the duties and responsibilities of a notary.¹⁹

Second, the training program should include objective indicators to show an employee mastered the training material. For example, the Court opined that training courses should incorporate a testing component to ensure that employees actually understand the materials being taught. In addition to a written question and answer section, the testing component should include a live simulation of the notary process. Employees should be graded on this process and be required to repeat the process if they do not obtain a passing score.

Third, after the notary employees have been trained, the employers should follow up periodically to determine whether the employees are actually performing their notary duties properly.

In the alternative, employers should consider outsourcing the training portion to a reputable notary training service, and then requiring its notary employees to attend follow-up courses to ensure that they are up to date on the most recent developments in the industry.

B. Negligent Supervision

While *Vancura* does not clearly define the extent to which an employer has a duty to supervise its notary employees, the case provides direction for notary employers. First, an employer is obligated to instruct its managers and supervisors on sound notarial practices and/or on how to properly supervise a notary employee to ensure that the notary is adhering to basic rules of proper notarization. Such basic rules of notarization include, but are not limited to the following:

- A notary should carefully and positively identify each document signer;
- A notary should keep his or her seal and journal in a safe place;
- A notary should keep a record or journal of all notarial acts;
- A notary should not notarize a document unless the signator is

¹⁹ *Vancura* at 25 and 30-38.

present at the time of notarization; and

- A notary should not lend his or her notary seal and journal to anyone, including his or her employer.

While this list is not exhaustive, it provides some guidance regarding what is expected of employers in order to satisfy their duty to supervise. A notary employer would be wise to provide some form of training (through a reputable educator or notary of indisputable credentials) on sound notarial practices to its managers. Further, employers should consider revising their review process for notary employees by including random audits to determine whether the notary's seal and journal are secure and to periodically observe the notary employees while notarizing documents or monitor proper completion of journal entries to determine whether they are performing their notary services properly.

C. Additional Non-Statutory Sources of the Notary's Standard of Conduct

Vancura demonstrates that a state's notary statute may not provide all the guidance a notary needs to thoroughly perform his or her duties. The court looked to the Model Notary Act to define what constitutes "satisfactory evidence of identity" and for the minimum characteristics an identification document should contain to identify a document signer when the Illinois Notary Public Act did not provide this direction.

Therefore, employers should include instruction in widely-held notary best practices to guide notaries in responsible conduct when statutes are unclear or fall short.

In a related and important development, The Notary Public Code of Professional Responsibility²⁰ has emerged as an additional source of the standard of conduct owed by notaries. The state of Hawaii recently adopted administrative regulations that expressly reference The Notary Public Code of Professional Responsibility in its entirety as defining the duties and standard of conduct for notaries.²¹ Similarly, the territory of American Samoa has formally adopted the ten guiding principles of The Notary Public Code of Professional Responsibility.²²

²⁰ The Notary Public Code of Professional Responsibility (Nat'l Notary Ass'n 1998).

²¹ Hawaii Administrative Rules, Title 5, Department of the Attorney General, Chapter 11, Notaries Public §5-11-3 (adopted April 17, 2008).

²² American Samoa's Notary Act of 2007 (Public Law 30-18 as amended by Public law 30-21) became effective October 29, 2008, and created a new Chapter 30 ("Notary Public") in Title 31 of the American Samoa Code Annotated. The ten guiding principles are: 1) the Notary shall, as a government officer and public servant, serve all of the public in an honest, fair and unbiased manner; 2) the Notary shall act as an impartial witness and not profit or gain from any document or transaction requiring a notarial act, apart from the fee allowed by statute; 3) 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; 4) the Notary shall not execute a false or incomplete certificate, nor be involved with any document or transaction that is false, deceptive or fraudulent; 5) the Notary shall give prece-

IV. CONCLUSION

Setting a precedent for expanded notary employer liability, the Court in *Vancura* affirmed the finding of employer direct liability for negligent training and supervision based on common law theories. Significantly, the Court determined that an inadequately trained or supervised notary employee poses the type of danger or risk of harm from which employers have a duty to protect third parties. Of additional importance to notary employers in defining the applicable standard of conduct for notaries and notary employers, the Court looked beyond statutory language to available notarial professional codes and other common law sources.

dence to the rules of law over the dictates or expectations of any person or entity; 6) the Notary shall act as a ministerial officer and not provide unauthorized advice or services; 7) the Notary shall affix a seal on every notarized document and not allow this universally recognized symbol of office to be used by another or in an endorsement or promotion; 8) the Notary shall record every notarial act in a bound journal or other secure recording device and safeguard it as an important public record; 9) the Notary shall respect the privacy of each signer and not divulge or use personal or proprietary information disclosed during execution of a notarial act for other than an official purpose; and 10) the Notary shall seek instruction on notarization, and keep current on the laws, practices and requirements of the notarial office.

PROSKAUER ROSE LLP

Proskauer Rose LLP is an international law firm of 700 attorneys providing a wide variety of legal services to clients worldwide.

The Firm has wide experience in all areas of practice important to businesses, including corporate finance, mergers and acquisitions, private equity, real estate transactions, bankruptcy and reorganizations, taxation, litigation, trusts and estates, intellectual property, and labor and employment law.

Arthur F. Silbergeld is a partner in the Labor and Employment Group, which advises and litigates on behalf of employers and management on issues of employment and labor relationships.

PROSKAUER ROSE LLP

2049 Century Park East Suite 3200
Los Angeles, California 90067-3206
Telephone 310.557.2900
Fax 310.557.2193

This publication is a service to our clients and friends. It is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice or render a legal opinion.

©2009 PROSKAUER ROSE LLP. All rights reserved.