

Signed, Sealed, and... Disciplined?

By Dina P. Dajani and Rhonda S. Pozehl

fast facts

The Attorney Grievance Commission receives approximately 3,500 requests for investigation each year.

Many grievances include allegations of improper notarization of documents.

Remember, haste makes waste, and notarizing a document not in the presence of the signer can lead you to having to defend a grievance, or worse, a formal complaint.

Notarizing a document might, at first blush, seem to be a mere formality and even a quaint relic from the past. Like putting a postage stamp on an envelope, it is hardly an intellectual endeavor, engaging lawyerly imagination. Yet, if a document is not notarized properly, lawyers might find themselves the subject of a malpractice action, a disciplinary proceeding, or *even a criminal action*. Devoting a few minutes to ensuring that your law office properly notarizes all documents is all that is needed to avoid notary pitfalls.

Each year, the Attorney Grievance Commission receives approximately 3,500 requests for investigation, representing grievances filed against approximately 10 percent of all lawyers. About 5 percent of all requests for investigation result in the filing of formal charges that a lawyer has engaged in professional misconduct. Increasingly, many grievances include allegations of the lawyer's improprieties in the notarization of documents used in representing a client. This article is dedicated to a discussion of the notary requirements and how a lawyer should conform his or her conduct to those requirements, thus avoiding problems in the disciplinary system regarding these issues. We will also examine

cases in which respondent lawyers have been disciplined for what amounts to a violation of the Michigan Notary Public Act.

The Michigan Notary Public Act can be found at MCL 55.261–55.315. Every notary, and every lawyer, even if not a notary, should be familiar with this act. The act itself requires that an applicant for a notary commission must attest that he or she has read the act and will conform notarial conduct to the act. The act underwent substantial changes, which became effective April 1, 2004. The revisions, however, did not change the fundamental requirement and reason for notarization: that a notary public determine from personal knowledge or satisfactory evidence that the person *in the presence of the notary* is the person whose signature is on the record being verified.¹ In witnessing or attesting to a signature, the notary shall also determine, either from personal knowledge or from satisfactory evidence, that the signature is that of the person in the presence of the notary and is the person named in the record.² It is not only good practice, *but a statutory requirement*, that the burden is on the notary to ensure that the person signing the document be in the presence of the notary.³



In a busy practice, it may be easy and tempting to shortcut this rule by directing a secretary or staff person to notarize a document even if the signer is not present and has already signed it. It may also be routine for a lawyer, who is also a notary, to notarize documents in the same fashion, without ensuring that the person signing the document is in the presence of the notary. Such practice is clearly a violation of the act.

Misconduct committed by a notary public can subject that person to civil liability⁴ and even criminal liability.⁵ The employer of a notary can also be liable civilly if the notary was acting within the actual or apparent scope of employment and the employer had knowledge of and consented to or permitted the official misconduct.⁶ Because notaries are not usually trained, it is critical for lawyers to teach and train their staff so that even unintentional violations of the notary act can be avoided.

For lawyers, while the reality of criminal or civil prosecution for acts of notarial misconduct might be remote, there is the added ethical obligation to ensure that all documents are properly notarized by the lawyer or a nonlawyer assistant. Michigan Rule of Professional Conduct 5.3 requires that, with respect to a nonlawyer employed by, retained by, or associated with a lawyer, a partner in a law firm or a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer. If the conduct would constitute a violation of the rules of professional conduct if engaged in by a lawyer and if the lawyer orders or ratifies the conduct, or the lawyer is a partner in the law firm or has direct supervisory authority over the person and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action, the lawyer may be held responsible for the conduct of the nonlawyer. Therefore, lawyers employing nonlawyer assistants in their practice must appropriately instruct and supervise the ethical aspects of the assistant's employment.

Our legal system depends in large part on an assumption that lawyers, as officers of the court, are presenting truthful documents to the court, their clients, and other lawyers. It should go without saying that a client, court officers, and other lawyers who receive pleadings or documents from a lawyer should never have to question the documents' authenticity. Regardless of whether the attorney has an intent to deceive or is merely pressed for time and takes what he or she believes is a harmless "shortcut," an attorney who creates false pleadings or documents may not only destroy the trust of his or her client but does incalculable harm to the legal system. For this reason, the Attorney Grievance Commission has filed formal charges of professional misconduct in many cases involving the issue of whether a document was properly notarized or whether the lawyer has committed misconduct arising out of the improper handling of a notarial act.

Misconduct charges involving documents in which authenticity issues have been raised have resulted in discipline orders ranging from *revocation* of the respondent's law license to findings of misconduct with orders imposing no discipline. As should be expected, revocation and lengthy suspensions have resulted in the most serious cases involving documents that are outright false.

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For instance, the respondents' law licenses were revoked in the following matters:

- Attorney Discipline Board (ADB) Case No. 03-125-GA (2004): Respondent created two false mortgages with forged notarizations and, in one instance, a false Wayne County Register of Deeds stamp, including fictitious liber and page numbers, with the expectation and hope that they would be relied on as genuine documents.
- ADB Case No. 03-14-GA (2003): Respondent admitted that in a possible medical malpractice action, he had a notary notarize the signatures of two doctors on affidavits of merit when he knew the notary did not witness the signatures as they were made.

Cases involving the submission of improperly notarized (and therefore false) documents to a court have also resulted in lengthy suspensions:

- ADB Case No. 95-118-GA (1995): Respondent's law license was suspended for four years for misconduct that included affixing or causing to be affixed the signatures of two proposed expert witnesses on two affidavits without the witnesses' knowledge or consent. Respondent was also found to have improperly affixed his signature as a notary on one affidavit, and affixed, or caused to be affixed, a fictitious name as notary on another affidavit.
- ADB Case No. 95-56-GA (1995): Respondent signed as a notary a statement that he knew to be false at the time it was made. In notarizing the false statement, respondent assisted in fraudulently obtaining the return of seized funds. Respondent's law license was suspended for two years.

In other matters, lawyers have been suspended for false notarizations when the misconduct was less egregious than creating an outright false document:

- ADB Case No. 05-53-GA (2007): Respondent admitted to, among other allegations, notarizing an affidavit submitted to the court allegedly signed by his client and which the client claimed did not contain his signature. Respondent was suspended for 90 days.
- ADB Case No. 04-67-GA (2004): Respondent pleaded no contest to misconduct allegations concerning two separate

personal injury matters. Regarding one matter, respondent pleaded no contest to having caused the settlement documents to be notarized without his notary/secretary witnessing the signature. The parties agreed that respondent should be suspended for 90 days.

- ADB Case No. 99-178-GA (2001): Respondent's license to practice law was suspended for 60 days on a finding by the hearing panel that, among other things, respondent signed her clients' names to an affidavit without their knowledge or consent and caused the affidavit to be notarized by someone who was not a registered notary.
- ADB Case No. 95-167-GA (1996): Respondent notarized several documents in blank when he was not a licensed notary public. Respondent's license to practice law was suspended for 90 days.

In situations in which a document is properly signed but not properly notarized, such as notarizing the document when the person who signed it is not in the presence of the notary, lawyers have been reprimanded or have been found to have engaged in misconduct with no discipline being imposed:

- ADB Case No. 05-67-GA (2005): Respondent was reprimanded for signing a notary's signature to a proof of service without the notary's knowledge or consent.
- ADB Case No. 03-21-GA (2003): Respondent was reprimanded after pleading no contest that, in a bankruptcy matter, he filed an "Affirmation of Amendments to Chapter 7 Petition" with the bankruptcy court, knowing that his clients had no knowledge of the document and had not authorized its filing even though the document was purportedly signed by the clients.
- ADB Case No. 99-124-GA (2001): Respondent assisted in the improper notarization of a document submitted to the court, but an order of no discipline was entered.
- ADB Case No. 97-290-GA (2001): Respondent was reprimanded for directing a secretary to notarize the "signature" of an absent party and then submitting the document to the court.

- ADB Case No. 99-124-GA (2001): Respondent caused an affidavit to be notarized without the notary witnessing the signature. An order of no discipline was entered on a finding of significant mitigation.
- ADB Case No. 99-123-GA (2000): Respondent was reprimanded for signing two clients' names to an affidavit with their permission, but then having a notary swear they appeared before the notary and submitting the affidavit to the court.
- ADB Case No. 97-283-GA (1998): Respondent was reprimanded for allowing his secretary to notarize a pre-dated power of attorney although he knew the notarization to be improper because the document was not signed or witnessed in his secretary's presence.
- ADB Case No. 97-136-GA (1998): Respondent admitted that he prepared a quit claim deed and an assignment of seller's interest in a land contract for a client. Respondent signed the deed and the assignment as a witness to the parties' signatures. Respondent admitted that he signed the documents and did not, in fact, witness the signing of the document. The panel ordered that respondent be suspended for 60 days. On appeal, the Attorney Discipline Board reduced the discipline to a reprimand.
- ADB Case No. 172/84 (1985): Respondent, without authorization, affixed a "simulated signature" on five probate documents. On appeal, the Attorney Discipline Board reduced the hearing panel's suspension of 90 days to a reprimand.

It should be evident that false notarizations constitute ethical misconduct and have been taken seriously in the attorney discipline system. To avoid the filing of a grievance or the initiation of formal disciplinary proceedings by the Attorney Grievance Commission, lawyers should take care and time to ensure that any notarized document is done so in a proper manner. ■

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FOOTNOTES

1. MCL 55.285(3).
2. MCL 55.285(4).
3. MCL 55.285(5).
4. MCL 55.297.
5. MCL 55.299.
6. MCL 55.297(1).

Authorized Signature