

Ethically Speaking



By Charles Slanina, Esquire

A Brief History of False Notarizations in Delaware

Delaware law permits attorneys to act as notarial officers. 29 Del.C. Section 4323(a)(3). This statute permits and requires attorneys to attest to documents signed in their presence. What seems like a simple concept has historically been the cause of both confusion and discipline for Delaware attorneys serving in this capacity.

First, it should be emphasized that the attorney's statement that the document was signed in his presence means what it says. Many excuses for and interpretations of this statute have been tried, and all have failed. The attorney may not sign the client's name on behalf of the client. The attorney cannot notarize his own signature. The attorney cannot notarize the signature of a person known to him even if he recognizes the handwriting or if the client authorizes him to notarize a signature if it is done outside of the attorney's presence.

It does not matter if the notarization is done to benefit the client. Various exigent circumstance defenses have been raised, all unsuccessfully. Attorneys have argued that the false notarization was done to avoid the expiration of a statute of limitations or other pleading or filing requirement. Attorneys have also defended their false notarizations as being done to simply avoid the inconvenience to the client that would result if the client had to appear before the attorney to sign or re-sign a document in the attorney's presence.

Delaware attorneys who fail to follow the technical requirements of notarization are charged with violating Professional Conduct Rule 8.4(c) which prohibits conduct involving dishonesty, fraud,

deceit, or misrepresentation. They can also be charged with violating Rule 8.4(d) which prohibits conduct prejudicial to the administration of justice since the attorney's notarization of a document which was not signed in his presence constitutes a misrepresentation of fact which may be relied upon by the courts or other authorities.

Over the years, a number of attorneys were found to have falsely notarized documents, and the typical resulting sanction was a private admonition. In December 1991, an attorney who had received such a private admonition (Board Case No. 24, 1990) for notarizing signatures on three deeds outside the presence of the signer and then having the deeds recorded, authored an article in *In Re*: entitled "Aberration or Epidemic: False Notarization in Delaware." Nevertheless, false notarization cases continue to occur and the Court and Bar responded.

The Chairman on the Board on Professional Responsibility, James T. McKinstry, sent a letter dated August 28, 1992 to all members of the Delaware Bar regarding False Notarizations. That letter provided a memorandum written by Deputy Disciplinary Counsel David C. Johnson-Glebe entitled "Professional Integrity and the Delaware Lawyer." That same memorandum was published in *In Re*:

The memo described a number of Delaware false notarization cases that had resulted in private admonitions between 1984 and 1992 as well as one case in which an attorney was suspended for false notarization as well as other violations. *In re Tos*, Del. Supr., 576A.2d 607

(1990). The private admonitions typically included substantial conditions such as payment of \$5,000 in legal fees to a party opponent, 10 to 100 hours of *pro bono* legal services, and the authoring of the aforementioned article.


Since Mr. McKinstry's open letter to the Delaware Bar in 1992, there have been at least four additional false notarization cases which have resulted in private admonitions, some with conditions. There was also a public reprimand for a second offense false notarization. *Matter of Doelze*, Del. Supr. No. 22, 2002 (1/31/02).

Unfortunately, there has been recent activity on the false notarization issue which made this column timely. A Delaware attorney was suspended for three months for a second offense false notarization as well as other violations. Case No. 575, 2007. That attorney argued that the client authorized him to sign on her behalf and that the signing and false notarization was done when the client could not be located in time for required filing. The attorney's motivation for the false notarization was deemed irrelevant.

Finally, the memorandum by the Deputy Disciplinary Counsel included in Mr. McKinstry's letter contains an ominous warning. That memo points out that false notarizations of a document can expose the notarial officer to both civil and criminal liability in addition to disciplinary sanctions and suggests that false notarization may constitute a violation of 11 Del.C. Section 1221 as perjury in the third degree. Although no attorney has been criminally charged to date, the memo goes on to suggest that there is always the possibility that Disci-

plinary Counsel could refer the matter to the Office of the Attorney General for investigation and prosecution.

In light of all of this, “Ethically Speaking” departs from its usual practice of not giving legal advice by offering this advice: When it comes to serving as a notarial officer, don’t sign it unless you see it.

**“Ethically Speaking” is intended to stimulate awareness of ethical issues. It is not intended as legal advice nor does it necessarily represent the opinion of the Delaware State Bar Association. Additional information about the author is available at www.delawgroup.com.* 



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