

ANOTHER LOOK AT NOTARIZATION PRACTICES

by

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It's not too late to make New Year's resolutions. One resolution might be to review your firm's or office's notarization practices.

Document notarization is something we may do routinely and often, without giving it much thought. But is your firm or office really in compliance with Minnesota's notary laws? Do you have policies in place to ensure that lawyers and nonlawyer assistants are properly notarizing documents?

If not, consider doing a thorough review of notarization practices early in 2014. Violations of the notary laws can lead to enforcement action by the Minnesota Department of Commerce or disciplinary action by the Office of Lawyers Professional Responsibility, or both.

The Minnesota Supreme Court has publicly disciplined lawyers for misconduct that included improper notarization as early as 1928 in *In re Diesen*. But it was *In re Finley* in 1978 where the Court drew specific attention to the problem of improper notarization by lawyers. The lawyer in *In re Finley* notarized four signatures on sworn statements that were not made in the lawyer's presence, and it even was unclear who signed the documents in some of the cases. The Court imposed a "public censure" (now known as a public reprimand) even though the lawyer "had no intent to defraud and was unaware of the inaccuracies or forgeries," was cooperative in the disciplinary action, had no prior discipline, and no one suffered "pecuniary loss."

In re Finley was a case of first impression for the Minnesota Supreme Court, and it is notable and instructive because the lawyer used something of a "hey, everybody's doing it" defense. The Court "categorically rejected" that defense for two reasons. First, the Court denied that "everybody was doing it." Second, and more important, the Court observed that lawyers "are held to a higher standard of morality than the public generally. They take an oath to conduct themselves in an upright manner and to 'use no falsehood or deceit.'"

The Court "strongly condemned" the lawyer's conduct in *In re Finley*, but also warned all lawyers in Minnesota that "[s]imilar violations by members of the bar in future cases may well be dealt with more severely." The Court said the public censure the lawyer

received should “not necessarily be construed as a precedent in all future cases.” Indeed, in the 35 years since *In re Finley* was decided, approximately 50 lawyers have been publicly reprimanded or suspended solely or partially for improper notarizations by themselves or others acting at their direction.

What are the standards for proper notarization? The relevant statutes are Minn. Stat. secs. 358 and 359. The Minnesota Secretary of State’s Office has published on its Web site a useful “Notary Commission Guide.” The guide includes “six steps to notarizing a document” that are summarized here:

1. Verify the identity of document signers (unless you personally know them).
2. Verify the document signer’s willingness to sign the document.
3. Perform the notarial act.
4. Certify that the document was signed, sworn to, or acknowledged in front of you.
5. Affix your stamp to the document.
6. Record the notarial act in your journal (optional).

While it is not required by law, lawyers should strongly consider doing step number six—recording notarizations in a journal in order to create a record of the notarization. This might be useful in the event the notarized document is questioned, for example, in a complaint to the OLPR against the lawyer.

When time is short and there are many documents to notarize, or when a notary is not immediately at hand, lawyers might be tempted to sign documents and then bring them to a notary later for notarization, especially if the signer and the notary are well-acquainted. Resist the temptation. While the formalities of administering an oath (e.g., raising the hand, reciting certain words, etc.) are not required, signing (and taking an oath) in the presence of a notary is required.

In fact, in 2007 the Minnesota Legislature amended the relevant statute, Minn. Stat. sec. 358.42, to add “made in the presence of the officer” and “the officer must be present when the signature is made.” It might be inconvenient and a hassle to always have to sign documents in front of a notary public, or it may seem like “everybody’s doing it,” that is, taking shortcuts in notarizing documents. But proper notarization is the law and it’s required by the Minnesota Rules of Professional Conduct.

Despite a warning to lawyers by the Minnesota Supreme Court almost 35 years ago to comply with the notary laws and engage in good notarization practices, lawyers continue to be publicly disciplined for improper notarization, either based on their own

acts or on the acts of staff members acting at their direction. Lawyers might wish to consider adding "make a thorough review of notarization practices" to their list of New Year's resolutions for 2014.