

# New York Law Journal



Web address: <http://www.nylj.com>

©2008 ALM Properties, Inc. An *incisivemedia* publication

VOLUME 240—NO. 13

FRIDAY, JULY 18, 2008

## OUTSIDE COUNSEL

BY JOEL COHEN AND DANIELLE ALFONZO WALSMAN

### 'Can You Notarize This?' Taking the Notary Job Seriously

I—Joel Cohen—can remember visiting my father's law office as a young boy, sitting in the corner pecking at a broken-down Remington typewriter while my father met with a client and two witnesses to the client's will signing.

My father made a big flair of it all, a parchment will and envelope, with a red ribbon around it. Just before the execution, though, the intercom rang and his secretary alerted him to a phone call. Shockingly and immediately, my father unleashed an all-out verbal assault on the secretary, in a tone that made me quiver: "Damn it! I told you never to interrupt me during a will execution. This isn't a playground!" My father was a tall and intimidating man, yet perfectly proper and conservative by nature, so I was astonished and distraught at his sudden intemperance to his secretary, particularly in front of others. Who was this seeming tyrant?

I sulked on the train home, saying nothing and going straight to my room without dinner. My father later came to me and said quietly, "Son, I meant and did no harm, but you won't understand what I did, and why, until you grow up." I took no solace.

As always, he was right. In or around law school, I would realize that it had been his protocol for all will executions, and his secretary was in on the psychological ploy—Pavlovian, as it were. My father would, by plan, explode with rage so that the witnesses would remember the moment with precision, even years later, if ever called upon to testify as to the testator's mental condition on that day. (It was long before videotaped will executions, and how he could best train a memory.)

#### The Notary Function

People frequently sign formal legal documents that are of grave importance to them with a nonchalance and inattention that

---

**Joel Cohen** practices white-collar criminal law at *Stroock & Stroock & Lavan* and teaches professional responsibility as an adjunct professor at *Fordham Law School*. **Danielle Alfonzo Walsman** is an associate in *Stroock's* litigation department.



Joel Cohen

Danielle Alfonzo  
Walsman

is contrary to the significance of the act. One way that the law has traditionally tried to bring gravitas to the moment of execution is, not by a tirade to demand the concentration of the person signing, but by the "formality" of a notarization. That is, requiring the affiant to raise his or her right hand, in the physical presence of a notary, and actually swear to an oath or affirm its contents. Or, in the poetry of CPLR §2309(b), in a manner "calculated to awaken the conscience and impress the mind of the person taking [the oath] in accordance with his religious or ethical beliefs."

A notary public is no mere administrative minion, but rather, a state-commissioned public official who acts as a trusted third-party record-keeper, verifying the identities of document signers and providing audit evidence in the event of a dispute.<sup>1</sup> The integrity of legal deeds, mortgages, contracts, judgments and the entire judicial system itself relies on a notary's faithful and competent discharge of his or her duties.

Unfortunately, the formality of notarization is often treated with laxity and rotteness, and in some instances, sheer indifference to the rules at stake. A report by the New York State Association of Notaries Public found widespread instances of notary misconduct throughout the state, including the failure to administer the required oath, the failure to require the affiant to sign in the presence of the notary, and improperly completed affidavits.<sup>2</sup> That laxity, depending on how extreme (and even when unwitting), can have real legal consequences for the person signing and those who will rely on that sworn document, but more important here, potentially dire ones for the notary that

"rubber stamps" the signature, particularly if he or she is a lawyer.

#### The Rules for Notaries Public

In order to become a notary public in New York state, an applicant must pass a general, multiple-choice examination on the Notary Public License Law.

I, Danielle Alfonzo Walsman, took the exam as a law student, as I needed to notarize materials for a pro bono project, and remember it as being fairly elementary. However, admitted attorneys need not even take the exam in order to become a notary.<sup>3</sup> All notaries, attorneys or not, can then continue to renew the license every four years without examination.<sup>4</sup> Thus, years after the commission of notary public is received, one's awareness of the required procedures can often fade, if ever they were known, or simply be overlooked, and formality can suffer.

Many a lawyer has witnessed a frantic colleague dashing about to find a notary on short notice or after business hours, and has likely heard an improper plea for a notary to "just notarize this for so-and-so, who is busy down the hall and signed in front of me earlier." Or worse, and hopefully never uttered, "Don't worry! The client has authorized me to sign for her." To be absolutely clear about it, this complacent attitude regarding notarization formality is not only on the part of lawyers in, for example, a two-person law office with "too many files and too many things to do," but likewise in the halls of New York's white-shoe law firms or even, surprisingly, government offices, and everywhere in between. Even anecdotally, just interview lawyers you personally know (especially after a goblet or two of "veritas") about this seemingly "pain in the derriere" procedure, and you'll quickly realize how omnipresent the laxity, and how many lawyers will "fess up" to at least minor violations—perhaps a reader (or writer) or two included.

So, as a refresher, these are rules. A New York Notary must:

- (i) Require that the signer be physically present before the Notary for signature (which aids in a Notary's ability to

detect forgery if it appears that the affiant is taking an inordinate amount of time or care in signing);<sup>5</sup>

(ii) Verify, through photo identification or personal knowledge, that the signer is who he or she claims to be;<sup>6</sup>

(iii) Obtain the oath or acknowledgment of the signer that he or she has signed the document willingly and is aware of its contents (e.g., Do you solemnly swear that the contents of this affidavit subscribed by you is correct and true?);<sup>7</sup> and

(iv) Sign the document and print, typewrite or stamp, in black ink, the words "Notary Public State of New York," the name of the county in which the Notary is qualified, and the date upon which his commission expires.<sup>8</sup> Notaries commissioned in Bronx, Kings, New York, Queens, or Richmond County must also indicate the Notary's commission number.<sup>9</sup>

Best practices would also suggest that the notary maintain a journal record of each notarial act, including the date, affiant's name and signature, title or type of document notarized, method of identification used, and a physical description of the affiant.

While such efforts may seem incredibly onerous in light of the already document-saturated, fast-paced environment in which most of us practice, consider for a moment how useful such information will be if the notary is then ever called to testify as to the notarial act years later.

### Consequences

Make no mistake; failure to follow the proper procedures of notarization can carry real consequences. Not only may a notary be stripped of his commission under the New York Executive Law for fraud or taking a statement known to be false, but a notary who is guilty of malfeasance or fraudulent practice is also guilty of a misdemeanor and liable in damages to the person injured.<sup>10</sup> This issue of a notary's potential criminal liability arose in the March 28, 2008 report by the Office of the Albany County District Attorney in their investigation of the Spitzer administration regarding "Troopergate."<sup>11</sup> However, it was determined in that instance that no viable prosecution was possible.

Even in the absence of willful intent, notaries public may also be liable for negligence where damages are shown—a problem far worse if the notary is a lawyer who is typically viewed as a "deep pocket."<sup>12</sup> Of course, as attorneys, the risks of a false notarization are even greater, as it may also constitute professional misconduct and threaten one's license to practice law.<sup>13</sup>

Owing to the many serious consequences that a lawyer may face

as a result of sloppy notary procedure, many attorneys will choose, or have chosen, to simply discontinue their commissions as notaries ("Who needs it?!"). And furthermore, since CPLR §2106 allows affirmations by lawyers (as well as doctors and dentists) who are licensed in New York state, rather than requiring notarized affidavits, it is even perhaps even more tempting for lawyers to abandon the office of notary public and assume that there will always be someone around to notarize for us. However, whether or not it makes personal sense for you to maintain or gain a commission as a notary public, or just simply opt out and relegate the task to an office secretary or paralegal (whose acts you are nonetheless responsible to supervise),<sup>14</sup> one thing is clear:

Part of our role as attorneys will always be to explain to our clients, or nonclient affiants, the seriousness of an oath or other sworn statement. Perhaps nobody did this better than the late and revered U.S. District Judge Eugene H. Nickerson of the Eastern District of New York. Many of us can remember that in Judge Nickerson's courtroom, he employed an almost schoolmarm approach and demanded that no one be out of his or her seat—or even move—while a witness was called to the stand and sworn in, in order to call attention to and "sanctify" the moment of the oath.

---

*A notary public is no mere administrative minion, but a state-commissioned public official who acts as a trusted third-party record-keeper, verifying the identities of signers and providing audit evidence in case of a dispute.*

---

### Afterthought

As we all know, when something is important, you do it in person. For those readers who are married, we can pretty much guarantee that none—not one—of you proposed, or were proposed to, by telephone or through an agent. Sworn statements, just like marriage proposals, should never be done by telephone or other remote means, and never with a cavalier attitude. So, each and every lawyer among us should take the time to brush up on his or her familiarity with the required notarization procedures and, in the meantime, we can only hope that any of you who did propose to your spouse by telephone (and not because you were in the armed forces at the time)

you will consider doing it again—looking into her eyes.



1. The Role of Notaries in Deterring and Detecting Fraud and Identity Crimes (National Notary Association 2004).

2. Special Investigation Report: Status of the Office of Notary Public in New York State (New York State Notaries Public Inc. 1989).

3. N.Y. Executive Law §130.

4. Id.

5. N.Y. Real Property Law §303.

6. Id.

7. *Bookman v. City of New York*, 200 NY 53, 56 (1910). Or, for persons who conscientiously decline taking an oath, "Do you solemnly, sincerely and truly declare and affirm that the statements made by you are true and correct?" *People ex rel. Kenyon v. Sutherland*, 81 NY 1 (1880).

8. N.Y. Executive Law §137. An attorney may substitute "Attorney and Counselor at Law" for the words "Notary Public." Note also that a notary may charge a fee of no more than \$2 for administering an oath or affirmation. Id. at §136.

9. Id. at §137.

10. N.Y. Executive Law §135-a; N.Y. Real Property Law §330. See *Maloney v. Stone*, 601 NYS2d 731 (4th Dept. 1993) (notary of forged signatures found liable in damages to trust beneficiaries whose signatures were forged).

11. Investigation "D," Office of the Albany County District Attorney, March 28, 2008, p. 4-5, available at [http://www.albanycountynyda.com/press\\_releases/March\\_2008/press.htm](http://www.albanycountynyda.com/press_releases/March_2008/press.htm).

12. See *Marine Midland Bank, N.A. v. Stanton*, 556 NYS2d 815, 817 (N.Y. Sup., Monroe Cty. 1990) ("Notarial misconduct can be for the willful, fraudulent or negligent activity of a notary.").

13. See *In re Lazroe*, 811 NYS2d 825 (4th Dept 2005) (attorney suspended for, inter alia, notarization of client's signature without requiring client to appear before him); *In re Bunting*, 781 NYS2d 153 (2d Dept 2004) (attorney disbarred for, inter alia, signing and notarizing for his client without her knowledge or consent); *In re Land*, 749 NYS2d 23 (1st Dept 2002) (attorney censured for, inter alia, signing and notarizing for clients after telephonic authorizations). These are cases where there are additional egregious facts indicated beyond the notary violations. In addition to the reported matters, however, there may be scores of others that are handled via private disciplinary warnings or admonitions. See 22 NYCRR 605.5, 691.6.

14. Under the New York Code of Professional Responsibility, attorneys are responsible for adequately supervising the work of non-lawyer employees. DR 1-104(d); 22 NYCRR 1200.5. Knowingly allowing or encouraging a subordinate employee to perform a false notarization will not allow an attorney to escape liability. *Heritage East-West v. Chung & Choi*, 785 NYS2d 317, 324 (N.Y. Civ. Ct. 2007) ("[A] lawyer is responsible for the conduct of a non-lawyer employed by the lawyer if the lawyer orders or directs the conduct or, with knowledge of the conduct, ratifies it, or...should have known of the conduct so that reasonable remedial action could have been taken.").