

August 2020

## *Much Ado About Notarizing*

By Pamela A. Harbeson, Assistant Bar Counsel<sup>1</sup>

Lawyers and their support staff are often also notaries public. We all need to notarize affidavits, deeds, wills, and hosts of other types of documents. In 2016, the rules governing notaries public were substantially revised. The new law was effective January 4, 2017 and is found at Mass. Gen. L. c. 222, § 1, *et seq.*

Why, then, is the interaction of the role of attorney and the role of notary too frequently problematic? The Massachusetts Attorney Disciplinary Reports are replete with examples of attorneys sanctioned for misusing or improperly performing notarial acts. Often these offenses arise in the context of more overarching fraud resulting in suspension or disbarment. See, e.g., *Matter of Zimmerman*, 17 Mass. Att’y Disc. R. 633 (2001) (two-year suspension when attorney, with history of discipline, notarized signature, not signed in his presence, that was later discovered to be forgery); *Matter of Decenzo*, 28 Mass. Att’y Disc. R. 176 (2012) (six-month suspension for attorney who forged clients’ names on one document, added fictitious notary to another document and failed to return unearned funds in a timely manner). However, there are many cases involving lawyers who notarized or caused another to notarize a document wrongfully, but without fraudulent intent. It is this situation, so very preventable, that is the focus of this article.

Many times, the infraction arises out of a matter of convenience. The attorney notarizes or causes to be notarized (or simply witnesses) what purports to be the signature of an individual who has not personally appeared before the notary so that a transaction can be completed. Sometimes the signature is in fact genuine and the problem is that the signatory was not present when the document was notarized; sometimes the signature is forged but represents the intent of the true signatory. *E.g.*, See *Admonition 16-11*, 32 Mass. Att’y Disc. R. 697 (2016) (relying on representations of trusted client, attorney notarized signature that was found years later to be forgery; attorney received admonition as no party was harmed); *Admonition 12-06*, 28 Mass. Att’y Disc. R. 922 (2012) (attorney received an admonition for notarizing the signature of a person not present before him); *Admonition 05-19*. (attorney received an admonition for notarizing and purporting to witness the signature of a person not before him); *Admonition 03-62*, (attorney received an

---

<sup>1</sup> This Article was [originally written](#) by Constance Vecchione, Former Bar Counsel, in 1998. While the law has changed, alas the problem persists.

admonition for notarizing the signature of a person not present before her); *Admonition 02-36*, (attorney received an admonition for notarizing a signature that was not authentic and signatures of persons not before him). In each of these cases, the attorney's conduct was found to be a violation of Mass. R. Prof. C. 8.4(c), which provides that an attorney shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

In these situations, the attorney notarizing the document generally is trying to be helpful and to save time or do the client or associate a favor by taking a shortcut. The shortest way there, however, turns out to be the longest way back when the misrepresentation surfaces down the road. Litigation may ensue, documents may be invalidated, and clients may face other problems, that even if of their own making, were avoidable. A lawyer could even be criminally prosecuted under Mass. Gen. L. c. 222, § 18.

Accordingly, a notary should never perform a notarial act when:

1. The signatory is not in the notary's presence at the time of signature and notarization.
2. The signatory has not been identified by the notary through satisfactory evidence of identity.
3. In the notary's judgment, the signatory is not acting of their own free will or does not realize the consequences of the transaction or document requiring the notarial act.
4. The document to be notarized is blank or incomplete.
5. The document to be notarized contains information that the notary knows or believes to be false.
6. The notarization is done with the intent to deceive or defraud.

For all acts prohibited by statute, please review Mass. Gen. L. c. 222, § 16.

These same guidelines apply equally to the lawyer acting as witness to a document.

In the words of former Bar Counsel, Connie Vecchione, "The road to discipline or malpractice liability is often paved with good intentions. When notarizing or witnessing documents, resisting pressure to take deceptively benign shortcuts, and hewing instead to the line is in the interests of lawyers and clients alike."

## ADDENDUM

On April 23, 2020, Governor Charlie Baker signed into law “An Act Providing for Virtual Notarization to Address Challenges Related To COVID-19.” This law will remain in effect until three days after the state of emergency declaration relative to COVID-19 is lifted.

Below is a summary of the provisions of this Remote Notarization Act (“RNA”):

1. Only Massachusetts attorneys and paralegals who are under the supervision of a Massachusetts licensed attorney may notarize documents remotely or virtually under the RNA.
2. Mechanically, the RNA requires the signer and the notary to both have access to electronic devices that have video conferencing capabilities such as a computer, tablet or cell phone with both video and audio recording capabilities and features.
3. All parties must be physically located in Massachusetts during the signing.
4. All individuals in the room must be seen on the video by the notary and provide satisfactory identification by video in addition to orally disclosing their relationship to the signer so that the relationship may be noted and recorded and they must consent to the video and audio recording of the remote virtual session.
5. The signer must provide satisfactory identification by video with copies subsequently sent to the notary, together with the documents to be notarized.
6. The notary must observe the actual execution of the documents over the video conference.
7. The notary must complete an affidavit affirming the essential elements of the signing.
8. With respect to real estate transactions where the notary does not know the signer, a second form of identification including the signer’s photograph and signature issued by governmental agency is required in order to comply with the RNA.
9. The recording of the signing and the signer’s identification must be retained by the notary for 10 years from the date of the documents were executed.
10. Any documents that are to be recorded as part of a real estate transaction such as a deed, mortgage or easement, the RNA requires a second video conference for verification.

The full text of the act can be found here:  
<https://malegislature.gov/Bills/191/S2645>