

To Notary or not to Notary, That is the Question....

(Again with apologies to William Shakespeare)

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In William Shakespeare's "Hamlet", the title character famously ponders, "To Be, or not To Be, that is the question". He reflects on the unfairness of life, yet knows that it is better than the alternative. Such is the notary's dilemma. In most instances, a person who takes on the noble mantle of 'Notary Public' chooses it for himself knowing that the best way to avoid a 'sea of troubles' is *not* to become one. Still, they choose to do so in order to provide a valuable service to society – and their customers.

But with that service, as with most things of value, comes risk. And the primary risk is the possibility of not doing the job correctly, which could ultimately lead to some error that may be of great cost.

So what is a "notary"? In ancient times a notary was simply a scribe who wrote in shorthand. Over the course of time, notaries became able to draft legal documents and other written instruments. To commemorate their work, they used wax seals and ribbons to show that the document had a semi-official status. Eventually, governments saw the need to regulate their actions and to give notaries the purpose that is bestowed upon them to this day: to act as "a person of proven integrity by the state to act as an impartial witness" (National Notary Association Home Study Course). By being in such position, the notary is most commonly called upon to acknowledge that a signature placed on a legal document was, in fact, put there by the person to whom it is ascribed, and that the person signed the document in their presence. The notary does not pass judgment on the legality of the document or guarantee its truth, only that the named signatory did so in their presence.

While being a notary public may seem relatively innocuous, an error committed while exercising ones duties can be quite significant, both monetarily and emotionally. That is why the Swiss Re Corporate Solutions Insurance Agents Professional Liability (E&O) insurance policy provides coverage for several ancillary acts that an insurance agent or agency staff may undertake, *including* that of a notary public under the "Other Related Services" section of the policy. (Coverage is also provided for teaching a formal insurance course, testimony as an expert witness, advertising, or services as a claims adjuster. Please see the policy itself for details or contact your state E&O administrator.)

For a proper notarization to occur, it must include the following:

1. The signature of the individual
2. A notarial certificate stating the document was signed before the notary
3. The signature of the notary as commissioned
4. The notary's seal or stamp

While these steps seem simple enough, the claims that occur can be complex because of the parties that may be involved.

The most common error associated with being a notary public is notarizing the signature of a person who later claims they did not appear in front of the notary and, in any event, the signature is not theirs. This will most likely occur when the document is a bond or some other financial guarantee that is later called into question. While it is not a claim that happens with great frequency, the severity can be quite sizable -- especially when a bond is at stake. In most such cases the bond involves some type of construction project in which there is some defect causing the entire amount of the bond to come due. Difficulty arises when the signature on the bond application is called into question. A claim in this situation is not unheard of to be in the value of 6 or even 7 figures. That's right, millions of dollars over something as simple as a signature.

Another common scenario involves real estate transactions. Sometimes the property in question is sold outright, while in other cases there is a partial grant of ownership, e.g., selling mineral rights. Did both husband *and* wife sign the deed? All of the siblings with an ownership interest? Every owner of the business? Gathering all of the busy parties to these transactions in one place just to scribble a quick signature can be a challenge. 'Is it *really* necessary that [the notary] watch *everyone* sign in person? I can vouch for the signature of my wife/brother/partner...'

Faced with significant pressure from all concerned to cut a small corner or two, what must one do to avoid being put in the position of having a claim made against them while acting as a notary?

Simple! Begin by following the guidelines set out by the American Society of Notaries, National Notary Association, and your state government. As a general rule notaries are commissioned by the state government (most commonly by the Secretary of State), but also by state licensing boards, or possibly even the governor. In virtually every state, in order to be a notary the person must be at least 18 years of age, be a resident or have a place of employment in the state, read and write the English language, complete a notary training course, not been convicted of a felony or a crime involving fraud, dishonesty or deceit, and pass a state exam. A background check by state law enforcement may also be conducted.

After the minimum steps are completed, each state is different as to its requirements for term of office, continuing education, having a notary bond, notary record book or journal, seal, and other requirements. Each state also prescribes what authority the notary may have including taking acknowledgements and proofs, administration of oaths and affirmations, certifying copies, and performing any other acts permitted by law. An excellent resource that provides information about each state's requirements can be found on the American Society of Notaries State Information page:

<http://www.asnnotary.org/?form=stateinfo>. The National Notary Association also introduced "The Notary Public Code of Professional Responsibility" in 1998, which provides a detailed code of ethical and professional conduct for notaries public. A copy of the code and additional information about it can be found on their website: <http://www.nationalnotary.org/knowledge-center/reference-library/notary-public-code-of-professional-responsibility>

Having gone through all the proper steps to become a notary, what else should you do to protect yourself from the 'slings and arrows' of an E&O claim? The following tips may not be required by individual state law, but they are essential to being able to defend a notary claim:

- **Journal or record book:** As with any E&O claim, proper documentation is the first line of defense. Your journal/record book should be permanently bound with numbered pages. The book should include the month, day and year of every notary activity; the type of activity, such as an acknowledgement or jurat; the type of document being notarized; the printed name and address of the person whose signature is being notarized; the identification used by the signer, such as a driver's license or passport; the signature; the notary's countersignature; a witness' printed name and signature; and any fee associated with the notary. These journals are available from local office supply stores and from the two associations mentioned previously.
- **Protect your seal:** Most states require the use of either an engraved embosser seal or an inked rubber stamp seal on every notary certificate to serve as verification of your witnessing a transaction. The seal usually must include the notary's name as given on their commission certificate, their commission number, and phrases including, but not limited to, "Notary Seal" or "Notary Public", and the state issuing the notary commission. The seal is available from the same places as the journal. Given its importance, your seal must be protected from loss, theft or 'borrowing'. There are unscrupulous people who would readily take advantage of someone who is cavalier about protecting this piece of equipment and would not hesitate using it for their own suspect purposes. Locking it in a safe or other secure location is important to protect yourself from the 'less-than-honorable-persons' who may put your seal to improper use. If your seal is lost or stolen, you should immediately contact the entity that awarded you a commission so proper steps can be taken to protect you and any others who may become a victim of an unauthorized act.
- **Stand firm on the rules.** Yes, it can be problematic to have all parties sign a document in person with proper identification. That does not make it **your** problem. The drafter of the document can often make provision to have the parties sign different copies at different times/locations. If she chose not to do so? Cut no corners. Never agree to notarize a signature unless all of the rules regarding personal presence, ID, etc., are followed *to the letter*.

Remember that the designation of 'notary public' is an official position that is appointed by the state for good reason. While it may be ministerial in nature, not regulatory or judicial, it is an important role nonetheless. The person who acts as a notary is a true professional, recognized by the state as being a person of integrity and impartiality. When that status is called into question, the challenge will become more personal because it calls into question that you value most as a professional: your integrity.

The simple steps outlined above can help ensure that you *do* maintain your integrity and *don't* become an E&O claim statistic. If you have chosen "To Be", you should "Be" the best you can.

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