

Lawyers' Responsibility for their Nonlawyer Assistants' Notarial Acts

OPINION #1-21

Question

Can a lawyer be subject to discipline for their nonlawyer assistant's/notary's failure to properly notarize a document?

Short Answer

A lawyer who ratifies a nonlawyer assistant's conduct and is in a position of managerial authority, or who directly supervises the nonlawyer assistant, can be subject to discipline for the nonlawyer assistant's/notary's failure to properly notarize a document.

Recommended Rules for Review

[Indiana Rules of Professional Conduct](#): 3.3, 5.3, 8.4(a), 8.4(c), 8.4(d), and Guideline 9.1.

Summary

Too many lawyers have learned that cutting corners and failing to properly notarize documents can lead to serious repercussions. When performing notarial acts, attorneys must ensure not only their own compliance with the Indiana Code and the Indiana Rules of Professional Conduct, but also the compliance of any nonlawyer assistant/notary they oversee. Rule 5.3 of the Indiana Rules of Professional Conduct establishes an attorney's responsibility for the conduct of their nonlawyer assistants. Lawyers must adequately oversee any nonlawyer assistant/notary in the notarization process to ensure that the assistant's conduct will not put the attorney at risk for violating the rules.

The Ethical Problems

Guideline 9.1 for the Use of Non-Lawyer Assistants provides that lawyers should take reasonable measures to ensure that a non-lawyer assistant's conduct is consistent with the lawyer's obligations under the Rules of Professional Conduct. If a nonlawyer assistant/notary fails to properly notarize a document, the supervising lawyer could be subject to multiple rule violations.

- A lawyer will be "responsible for conduct of such [a nonlawyer assistant] that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer

orders, or with the knowledge of the specific conduct, ratifies the conduct involved, or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." **Indiana Professional Conduct Rule 5.3(c)(1),(2).**

- A lawyer "shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." **Indiana Professional Conduct Rule 3.3(a)(1).**
- A lawyer participates in professional misconduct if the lawyer, "(a) violate[s] or attempt[s] to violate the Rules of Professional Conduct, knowingly assist[s] or induce[s] another to do so, or do[es] so through the acts of another." **Indiana Rule of Professional Conduct 8.4(a).**
- A lawyer participates in professional misconduct if the lawyer, "(c) engage[s] in conduct involving dishonesty, fraud, deceit or misrepresentation." **Indiana Rule of Professional Conduct 8.4(c).**
- A lawyer participates in professional misconduct if the lawyer, "(d) engage[s] in conduct that is prejudicial to the administration of justice." **Indiana Rule of Professional Conduct 8.4(d).**

Failure to Supervise Nonlawyer Assistant

Indiana Rules of Professional Conduct 5.3(c)(1)-(2) confers upon lawyers a responsibility for the conduct of their nonlawyer assistants. A supervising lawyer could violate the rules by having knowledge and failing to take remedial action when a nonlawyer assistant/notary habitually has notarized affidavits prior to the principal's signature. Although no Indiana lawyer has been disciplined yet for a nonlawyer assistant's notarial conduct, this issue could arise in the future, and lawyers would be wise to supervise assistants carefully with respect to notarial activities.

Nonlawyer Assistant's Candor Toward the Tribunal

Improper notarization could amount to a Rule 3.3 violation. Rule 3.3(a)(1) of the Indiana Rules of Professional Conduct prohibits lawyers from making false statements of fact or law to a tribunal. For example, if a nonlawyer assistant/notary forges a client's signature on a document filed with the court, the supervising lawyer could be responsible for the nonlawyer assistant's misconduct. Discipline could be imposed whether the lawyer: instructed the nonlawyer assistant in the misconduct, directly supervised the nonlawyer assistant who improperly notarized the document, or assumed responsibility for the misconduct by virtue of the lawyer's managerial authority. Improper notarization of a document filed with the court amounts to an untrue attestation of material fact, thereby constituting a Rule 3.3(1)(a) violation.

Inducing a Nonlawyer Assistant in Misconduct

Rule 8.4(a) of the Indiana Rules of Professional Conduct prohibits a lawyer from assisting or inducing another in violating the Rules of Professional Conduct. A lawyer could violate the rules by inducing a nonlawyer assistant to notarize a document without witnessing the principal's signature. It is pivotal that lawyers and their nonlawyer assistants abide by the proper notarization process and refrain from making efforts to cut corners for the sake of their time and convenience.

Nonlawyer Assistant's Dishonesty, Fraud, Deceit or Misrepresentation

Indiana Rule of Professional Conduct 8.4(c) forbids engagement in conduct involving dishonesty, fraud, deceit or misrepresentation. Improperly notarizing a document, regardless of motive, can amount to a Rule 8.4(c) violation. *See Matter of Beeson*, case no. 43S00-1305-DI-00306, Order (Oct. 31, 2013) (Court imposed public reprimand on Respondent who violated Rule 8.4 despite the absence of dishonest or selfish motive). However, if a selfish motive is present, disciplinary action can be more severe. *See Matter of Szilagyi*, 969 N.E.2d 44 (Ind. 2012) (Court imposed a 60-day suspension after determining that Respondent's actions were dishonest and selfish). Additionally, consequences could be significant if it is discovered that the signature notarized by the nonlawyer assistant/notary is not authentic. Lawyers need to be vigilant supervisors and ensure that their nonlawyer assistants are in the practice of properly notarizing documents, whether a selfish motive is present or not.

Nonlawyer Assistant's Engagement in Prejudicial Conduct

Rule 8.4(d) of the Indiana Rules of Professional Conduct prohibits engagement in conduct that is prejudicial to the administration of justice. Actions that are prejudicial to the administration of justice could include the nonlawyer assistant/notary filing pleadings containing false notarizations, false attestations, or fictitious signatures.

Conclusion

Supervising lawyers may be held accountable for their nonlawyer assistants' conduct as notaries. A lawyer should review the Indiana Rules of Professional Conduct, paying careful attention to Rules 3.3, 5.3, 8.4(a), 8.4(c), 8.4(d), in addition to the Indiana Code. Lawyers should understand that directing a nonlawyer assistant/notary to improperly notarize a document will subject the lawyer to discipline. Additionally, supervising lawyers and lawyers in a position of managerial authority should be thorough in their instruction and supervision of nonlawyer assistants so that misconduct can be avoided altogether, or so that they retain the requisite time to mitigate the consequences.

This nonbinding advisory opinion is issued by the Indiana Supreme Court Disciplinary Commission in response to a prospective or hypothetical question regarding the application of the ethics rules applicable to Indiana judges and lawyers. The Indiana Supreme Court Disciplinary Commission is solely responsible for the content of this advisory opinion, and the advice contained in this opinion is not attributable to the Indiana Supreme Court.