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Value of a New York Notary Public

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It was not until recently when confronted with some foul play in an affidavit submitted to the court that I discovered the long history that notary publics have worldwide and their services provided since ancient Egypt. Such names dating back to that time and since have included Scribae (latin for scribes), Tabellions and Notarii (shorthand writers who preserved Christian martyr trials).

Notary publics play a vital role in our more modern societies as well. In the relatively early years of the United States notary publics provided legal services and advice due to the scarcity of lawyers, particularly in more rural areas. These practices still exist in other countries, however, the role of a notary in the United States and New York in particular has changed with time. Now, New York notaries who are not also lawyers are prohibited from giving legal advice, drafting legal documents and cannot solicit legal business for associated lawyers or share in any legal fee.

Little New York Case Law

To my surprise relatively little New York case law exists regarding notaries. Although we can be guided by some statutes and Attorney General Opinions, neither have, in my opinion, been updated in recent years to better reflect the importance of notaries - that is unless the Legislature is sending a message that the modern-day notary provides little value in New York.

The laws that cover notaries are the executive, public officers, county, state Constitution and miscellaneous laws. Historically in New York the power of a New York notary was assigned by the governor's office but that oversight was transferred to the secretary of State back in 1927.

Consequently, when applying to become a notary public it is within the discretion of the secretary of State to approve or disapprove issuing or reissuing said powers and also suspend or revoke those powers because of misconduct. Signature cards and oath of office attestations for notaries are maintained by the county clerk's office in which the notary was commissioned. As many of us know, lawyers in New York bypass taking the notary test but must pay the same fee in order to receive a four-year commission term.

One of the principle functions of a New York notary is to verify the identity of a person signing a document so that when submitted to court, for example, the power of a notary may be relied upon to authenticate the document as being from an out-of-court but under-oath declarant.

In addition to administering oaths, notaries provide other important functions which include taking depositions, certifying mortgages, powers of attorney, and promissory notes. And while notaries may charge up to $2 for their services, the county clerks office is required to have a notary available and free of charge to the public, see County Law 534. Thus, we can see to only a small degree what a vital role notaries continue to play today.

In *Sumkin v. Hammonds,* 677 NYS2d 734 (Nassau District Court, 1998), Judge Joel B. Gewanter incorporated a portion of the Notary Public Handbook, published by the secretary of State's office, into his decision in ruling a notary public is a public official and as such assumes a position of trust which demands a high degree of conscientious public service. A notary public must carry out his/her duties

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and functions only in accordance with the law. This is vital, if the public interest is to be served.

What Laws Bind a New York Notary?

To start, let's look at Executive Law 137 which states in pertinent part "In exercising his powers pursuant to this article, a notary public, in addition to the venue of his act and his signature, shall print, typewrite, or stamp beneath his signature in black ink, his name, the words Notary Public State of New York, the name of the county in which he originally qualified, and the date upon which his commission expires . . . ."

This checklist seemingly contains an indispensable set of actions which the notary must complete to properly identify him/herself in the exercise of notarial powers. I, like most, have a rubber stamp that contains those vital pieces of information and keep it nearby should the need for a notary arise. As you can see from the Executive Law, a rubber stamp is but one of three methods that can be used in the exercise of powers - thus, in black ink only a notary could write his information in longhand, or a typewriter or word processor could also be used (assuming one can even find a typewriter these days).

The rationale for 137 seems obvious enough and that is to verify the authenticity and viability of the notary public by having sufficient facts to undertake that verification process at the County Clerk in which the commission was filed. As lawyers we ask the questions so we can anticipate where problems exist and how to counsel, avoid, resolve or defend potential issues. Here, one question would be: what if the notary failed to include one or more of the indispensable pedigree items set forth in Executive Law 137?

Again, not much case law exists on the subject, but the Executive Law does provide a two-pronged analysis. Executive Law 137 itself states the mere failure to comply with inter alia the checklist just reviewed will not invalidate the acts of the notary. However, if the notary willfully fails to act in accordance with the 137 checklist, among other requirements, the act of the notary arguably remains in full force, however, he/she shall be subject to disciplinary action by the secretary of State.

The use of the word is of particular import because it requires the secretary of State to act upon such misconduct. The secretary of State covers administrative decisions spanning 1993 through 2000. While more such administrative tribunals may occur, that information is evidently not readily available to the public on their Web site nor using a legal-based search engine.

So, while the notary can be punished for willful misconduct, the acts of the notary appear at first blush to remain in full force (presumably because the person using the notary did nothing wrong).

Methodology, Damages?

What methodology does the secretary of State use when considering whether the acts were willful? Will every type of misconduct perpetrated by a notary result in the continued validation of the underlying notarial act? Executive Law 135 states, in pertinent part, that where the notary is involved in misconduct he/she shall be liable to the injured parties for all damages.

What damages could accrue if the acts of the notary stand, as suggested in 137? What about other defects such as if the notary acted after his/her term or appointment expired? While 142-a of the Executive Law answers that the acts of a notary undertaken inter alia after expiration of term or appointment will remain in full force, this creates some ambiguity or at least lack of clarity between these sections.

After all, what is the point of having these checklists or renewing your commission as a notary if all is forgiven under 142-a? Similarly under 142-a, a notary who acts outside of the state is also not a basis upon which to invalidate the otherwise impermissible act. In other words, 142-a is seemingly a quasi-catch-all forgive-and-forget type of section and one which I humbly believe could use some updating or at least some more specificity.

Particularly interesting were the following administrative decision from the secretary of State: Citing case law from inter alia 1877, 1905 and 1922, Mr. Dougherty's notarial powers were revoked after he acted as a notary to a will in which he had a pecuniary interest and in which he failed to indicate the venue in which he exercised his powers, *Doherty v. DOS*, 07 DOS APP 03; *In the Matter of Norman F. Russakoff*, 60 DOS 95, a disbarred attorney was not permitted to renew his commission as a notary because the tribunal agreed with the Second Department who disbarred him and Mr. Russakoff failed to establish the good moral character to be commissioned . . . ; *In the Matter of Sidney Baumgarten*, 131 DOS 95, the administrative tribunal similarly refused to renew the notary's application for renewal, but in a situation where the attorney had been suspended from practice and not disbarred. None of these tribunals addressed or ruled on the validity of the underlying notarial act and limited their decision to the notary public.

The 'Sumkin' Decision

A more detailed look at some case law, albeit limited, may provide further insight into judicial analysis of this area. Judge Gewanter's decision in *Sumkin*, supra, involved a pro se landlord who concomitantly exercised his notary powers in the affidavits of service for the notice of petition and petition involved in his dispute. Citing an appellate decision from 1897, which itself cited sister-state decisions, the court ruled that a notary is disqualified from exercising his powers in a situation where he also has a pecuniary interest. This was cited by the Court as prohibiting the use of a notary who also has such a financial interest - not unlike the administrative language in *Doherty*, supra.

That ruling is not unlike our own ethical obligations where we must avoid an appearance of impropriety. Specifically as it applies to lawyers, the appearance of a conflict exists if we represent a client while at the same time have an independent pecuniary interest in the outcome, see DR 5-105, 22 New York CRR 1200.24, and also *Green v. Green,* 47 NY2d 447.

Ultimately Judge Gewanter deemed the affidavits of service a nullity and as a consequence dismissed the petition for failing to obtain jurisdiction over the respondent.

Notwithstanding 142-a, therefore, instances do exist where misconduct will result in the vacatur or nullity of the underlying notarial acts. The quasi-catch-all 142-a(5) forgive-and-forget statute also suggests a notary public can nevertheless still be held criminally liable for certain undeliniated acts. Executive Law 135-a(2), also generally drafted, imposes a misdemeanor penalty where a notary is found guilty of fraud or deceit. That, in addition to the administrative disciplinary action by the secretary of State identified in 137 would seemingly keep notaries on the straight and narrow.

But is that the case? A search of New York case law failed to reveal even one criminal conviction under either 135-a or reference to the disciplinary actions of the secretary of State, ever! Does that mean New York notaries have never perpetrated a fraud or deceit nor willfully failed to comply with any provision governing their acts? Certainly not, but with the quasi-catch-all and broad language contained in the present laws it is problematic to pursue such action.

This is supported by the lack of any case law preserving any criminal versus administrative guilt in New York. As Judge Gewanter noted that public interest must be served by upholding these principles, one wonders how that has been accomplished without enforcement that has consequences beyond losing a notary commission.

On the civil judicial side, however, some actions have proceeded against notaries regarding civil damages, see *Parks v. Leahey & Johnson, P.C.,* 81 NY2d 161 (1993), *Plemmenou v. Anninos*, 12 AD3d 657, and subsequent history 2007 New York Slip Op 3113 (April 10, 2007). No statute of limitations is set forth in 135 for commencing an action against a notary and under application of CPLR 213; the First Department previously ruled that six years was the correct limitation. See *Bank of New York v. Mitchell,* 222 AD2d 217 (1995).

Analysis

So, what value does a New York notary public have? On the one hand I can not imagine how our courts or the county clerks would operate without honorable notaries administering oaths at depositions, or of witnesses in court, or upon written instruments, affidavits, mortgages and the like. Outside of courthouses notaries are even more stringent in demanding acceptance or payment of promissory notes, and other written obligations.

Conversely, the criteria upon which the secretary of State is to judge a nonlawyer applicant is limited to one who hasn't been convicted of certain enumerated criminal acts and is of good moral character, has the equivalent of a common school education and is familiar with the duties and responsibilities of a notary public, see Executive Law 130.

The smooth administration of our system is very much dependent upon notary publics and yet the apparent lack of updating, and statutory specificity, and moreover better policing fraud, deceit and even misconduct is troubling.

Why does the secretary of State choose to not have the tribunal of these public officers more open, apparent and easily accessible? What resources exist to monitor these vital public officers? Are notaries in such demand that our system turns a blind eye and fails to commit resources to police, if at all, their acts particularly before they result in harm?

Personally, I prefer to think the secretary of State is under fiscal restraints and that, with the sweeping changes Governor Eliot Spitzer has generally proposed to the court system, that he and the Legislature [should] not overlook the importance of notary publics in New York and commit the necessary funds to better monitor and prevent fraud and misconduct.

The scarcity of case law preserving criminal convictions is somewhat of a mystery. After all, even the

few reported administrative decisions that found willful misconduct warranting revocation made no reference to referral for criminal investigation. Having the administrative right hand speak to the judicial/policing left hand, or undertaking criminal investigation in the first instance, would act as further deterrent to notaries and also instill in the minds of citizens of New York that notaries are valuable and at the same time not beyond the reach of law.

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