

Legislative Analysis



RECORD KEEPING REQUIREMENTS FOR NOTARIES PUBLIC

Mitchell Bean, Director
Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

House Bill 4640 as introduced
Sponsor: Rep. Bert Johnson
Committee: Regulatory Reform

First Analysis (11-10-10)

BRIEF SUMMARY: The bill would require a notary public to keep and maintain a journal of all notarial acts, including, in the case of real estate records, the right thumbprint of each person whose signature is notarized.

FISCAL IMPACT: House Bill 4640 would have no fiscal impact on the State of Michigan or local units of government.

THE APPARENT PROBLEM:

The recent increase in mortgage foreclosures and identity theft across the country has highlighted the role that notaries public can play in foiling fraud and assisting in fraud investigations.

Certain types of documents are required to have a signer's identity verified by a notary public; for instance, deeds, powers of attorney, and affidavits. To have a document notarized, the signer is required to present identifying documents such as a driver's license or passport and the legal document must be signed in the presence of the Notary. In recent investigations into the mortgage foreclosure crisis, some real estate transaction documents were found to have been signed outside of the presence of a Notary. In addition, where most notaries take their position seriously, some have been implicated in fraud, such as the California notary who allowed a man to fraudulently sign over a deed to a home by accepting a Costco card as proof of identity.

However, several tools have been found to be useful to notaries in recognizing fraud as it is happening and discouraging fraud within the profession, as well as aiding law enforcement in tracking forgers. One of the tools is known as the notary journal. Among other things, a signer must sign the journal in addition to the document being notarized. This gives an astute notary an opportunity to catch a fraudulent act in process; for instance, the notary can watch if a signer is signing his or her name naturally or struggling to "get it right." The journal can also act as a deterrent, as some would-be forgers get scared off when they realize they have to sign a record that can be used to prove the dishonest act. In addition, the journal reveals whether or not the notary followed proper procedures in the transaction.

Another tool, especially in the case of real estate transactions, is to require a thumbprint impression be made in the journal. Several major crimes involving forged deeds and

even murder have been solved in jurisdictions requiring a thumbprint record. In those incidents, law enforcement agencies were able to run the thumbprint in the notary journal through national fingerprint data bases to identify suspects.

According to the National Notary Association, a 2009 report by the Mortgage Bankers Association ranked Michigan seventh in the nation for mortgage fraud incidents. Since journals and thumbprint records have helped to reduce fraud and aid in fraud investigations in other jurisdictions, it has been suggested that Michigan also require notaries public to maintain a journal of their official acts and take a thumbprint of the signer in real estate transactions.

THE CONTENT OF THE BILL:

House Bill 4640 would amend the Michigan Notary Public Act (MCL 55.285) to set requirements for record keeping.

The bill requires that a notary public keep, maintain, and protect under his or her exclusive control, a chronological paper or electronic official journal of notarial acts. The journal must contain the following entries for each notarial act:

- The date and time of the notarial act.
- The type of notarial act.
- The type, title, or description and date of every record notarized.
- The name, address, signature, and, in the case of real estate records, the right thumbprint of each person whose signature is notarized.
- A description of the satisfactory evidence relied upon to identify each person whose signature is notarized, including one or more of the following: (1) a statement that the person is "personally known" to the notary; (2) a notation of the type of identification document, its issuing agency, its serial or identification number, and its date of issuance or expiration; and (3) the name, address, and signature of any credible witness.
- A fee, if any, charged for the notarial act.

BACKGROUND INFORMATION:

Some types of legal documents (i.e., affidavits, deeds, and powers of attorney) are required to be notarized, which means the documents must be signed in the presence of a notary public. Notaries public are officers appointed by the Secretary of State to witness the signing of important documents and administer oaths. Before signing the document, a person must present certain types of identifying documents to the notary public, such as a driver's license, military ID, or passport. Having a document notarized doesn't make it legal, it just means that the signer acknowledged to the notary that he or she signed the document or vouched under oath or affirmation that the contents of the document were true. (Information derived from the website of the National Notary Association, www.nationalnotary.org.)

ARGUMENTS:

For:

Currently, notaries public are required to keep a record of their official acts, but state law does not specify what types of information must be included in the record. According to the National Notary Association, enactment of the bill would "better equip Notaries to serve as the state's front line of defense against document fraud in this era of proliferating identity theft." The Association believes, and results from other jurisdictions with similar requirements support, that requiring a notary to maintain a minimal record of all official acts "will deter fraud, prevent baseless lawsuits, and provide indispensable evidence to law enforcement in prosecuting forgeries and other identity crimes." The addition of requiring a thumbprint record in the journal for real estate transactions would protect the equity of homeowners. When fraud is alleged, a check of the fingerprint record against state and national fingerprint data bases can often reveal the perpetrator. Under current provisions of the act, a notary would have to retain the journal for at least five years. Failure to comply with the bill's requirements would be subject to the civil, criminal, and administrative penalties available under the act for violations of the act's provisions.

Against:

The bill has several weaknesses that should be addressed. For instance, some of the identifying information presented to the notary and recorded in the journal could be used to perpetrate identity theft (i.e., a social security number) or used by a stalker or a batterer to track the location of his or her victim. To protect against information in the notary journal from being used in identity theft or to further domestic violence or stalking, perhaps access to the journal should be restricted to law enforcement or by court subpoena. Also, some notaries have disposed of their journals in order to cover up their complicity in a fraudulent act. Some jurisdictions have addressed this by specifically penalizing the failure of a notary to report a missing log book. As introduced, the criminal and civil penalties prescribed by statute may not apply to disposing of a journal or failure to report a missing or stolen journal, as these acts are not specifically prohibited now.

POSITIONS:

The National Notary Association submitted a letter in support of the bill. (8-25-09)

A representative of the American Civil Liberties Union of Michigan testified in opposition to the bill. (9-9-09)

A representative of the Office of Secretary of State testified that the SOS is not in support of the bill. (9-9-09)

Legislative Analyst: Susan Stutzky
J. Hunault

Fiscal Analyst: Viola Bay Wild

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