

You have presented a hypothetical situation in which Attorney A and Attorney B are husband and wife who practice law together in a professional corporation. The corporation employs no other attorneys, no secretary, nor any other staff. Both Attorney A and Attorney B are notaries for the Commonwealth of Virginia.

You have requested that the committee opine as to several issues regarding the propriety of each attorney notarizing documents prepared by the other.

The appropriate and controlling Disciplinary Rules related to your inquiry are DRs 5-101(B) which states that a lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except under certain limited circumstances; and DR:5-102(A) which provides that if, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue representation and he or a lawyer in his firm may testify in the limited circumstances enumerated in DR:5-101(B)(1) through (3).

The committee responds to your inquiries relative to the facts you have presented as follows:

1. As to whether Attorney B can notarize the client's signature on an affidavit, sworn pleading, or property settlement prepared for the client of the professional corporation by Attorney A, the committee refers you to prior LE Op. 742 and LE Op. 1006, which found that it is not unethical per se for a lawyer to notarize his client's signature so long as there is no probability that the lawyer will be a witness in regard to the notarized signature. Thus, under the facts you present, the committee opines that it likewise is not improper for the partner of an attorney to notarize that attorney's client's signature.

You also ask whether there are any other types of documents Attorney A may prepare and notarize for a client, such as deeds and powers of attorney. The committee believes that it is not the type of document which is relevant but rather whether there is a probability that the lawyer will be a witness in regard to the client's signature. Thus, the committee declines to enumerate the various types of documents which an attorney may ethically prepare and notarize for a client. The committee feels, however, that if it is not probable that the lawyer will be a witness regarding the client's signature, then it would be ethically proper for an attorney to prepare and notarize a deed and/or a power of attorney for a client.

2. Regarding whether Attorney B, spouse of Attorney A, may notarize divorce depositions prepared and read by Attorney A for a client, the committee refers you to LE Op. 499 which concluded that it is not ethically improper for the law partner of an attorney who has taken depositions to notarize the depositions. The committee does not believe that the proper notarizing of divorce depositions by one's partner is made improper by the fact that the law partners are also partners in marriage. Therefore, the committee opines that it is not improper for Attorney B, spouse of Attorney A, to notarize depositions taken by Attorney A.

3. Whether or not Attorney A may ethically prepare a will for a client, under which neither Attorney A nor Attorney B has any direct beneficial interest, and sign at the will execution as a witness along with Attorney B presents a question of law which is beyond the purview of the committee.

4. You ask whether Attorney A may ethically prepare a will and notarize the signature of the testator and witnesses who are individuals other than Attorney A and Attorney B. The committee assumes that the testator is Attorney A's client. As stated above, it is not per se improper for an attorney to notarize his client's signature so long as there is no legal probability that the lawyer will be a witness in regard to his client's signature. As to whether the attorney may notarize the signatures of witnesses to the will, LE Op. 742, which states that there is no prohibition against a lawyer notarizing a nonclient's signature, is dispositive.

5. You have inquired whether Attorney A may ethically (i) prepare a will for a client, (ii) ask Attorney B to witness the signature of the testator along with another individual, and (iii) notarize the signatures of the testator and witnesses on the self-proving affidavit. As stated in the response to question #1 above, it is not per se improper for the law partner of an attorney to notarize the attorney's client's signature. The committee believes that it similarly would not be per se improper for the law partner to notarize nonclients'/witnesses' signatures.

Finally, you ask whether a secretary under Attorney A's authority and control may notarize the above-mentioned signatures. The committee has previously opined that there is no prohibition against a lawyer's secretary notarizing the signature of the lawyer's client. LE Op. 742. Since there is no prohibition against a lawyer's secretary notarizing the client's signature, the committee similarly opines that there is no prohibition in the secretary notarizing the signatures of the witnesses, either on the will or on the self-proving affidavit.

The committee's opinion is predicated on the assumption that the notarial acts described are not prohibited under the Conflicts of Interest section of the Virginia Notary Act, Va. Code § 47.1-1 et seq. or otherwise prohibited by law.

Committee Opinion
May 28, 1993