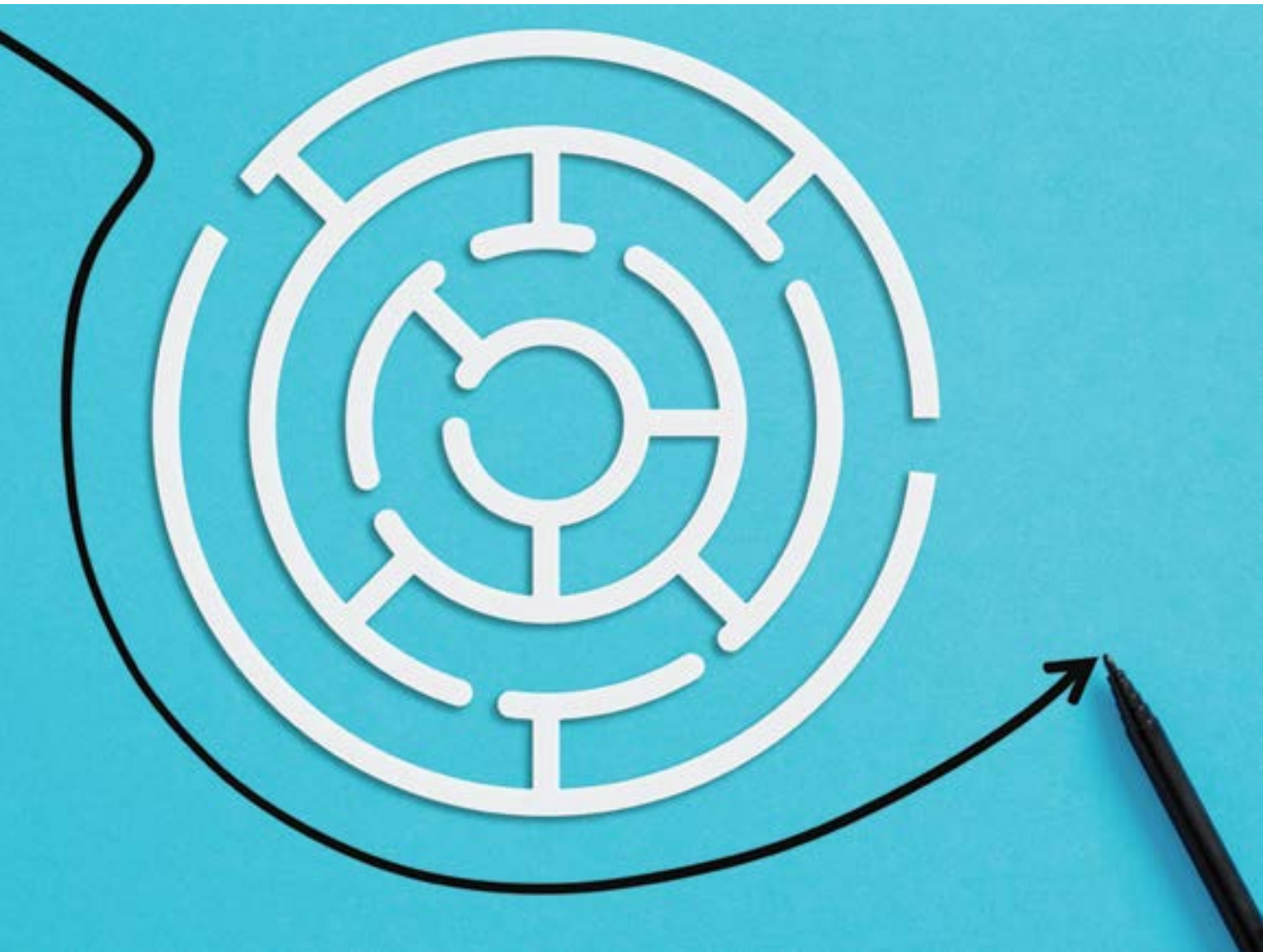


A Lesson for Notaries: Never Take Shortcuts

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by email to journal@nysba.org.**

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To the Forum:

I am a young attorney named Iam Abel. I opened Abel Law in 2020. I hired my twin sibling, Sheis Cane, as my paralegal. Sheis Cane also took the bar but failed.

One of the first cases that I signed up was Maybie Tomorrow's personal injury case in March 2020. Cane conducted the intake interview. Although I was out of the office that day, I spoke with Maybie by telephone during the interview to obtain information about her accident, injuries, and employment status.

I instructed Cane to "work up" the file – get police reports, medical reports, etc. Once we obtained the necessary information (it took years due to COVID-19 pandemic delays), I reviewed the file and drafted the summons and complaint in November 2022.

On Dec. 1, 2022, I met virtually with Maybie via Zoom to review everything, including documents I previously sent her to review. On Dec. 30, 2022, we had a second Zoom meeting, during which she signed a verification to the summons and complaint, which I notarized after she showed me her driver's license. We also discussed what Maybie thought would be a good settlement offer. Maybie stated she would accept "nothing less than \$500,000" as she was still in pain, undergoing medical treatment and out of work. My firm then served and filed the summation and complaint.

A few months later, on March 10, 2023, the defendants made an offer of \$600,000, so I gladly accepted on behalf of Maybie, reasoning that she would be happy because it was \$100,000 more than she wanted (and because I was behind on my bills). I asked Cane to call her to tell her the good news and to obtain releases, etc. However, Cane could not reach Maybie. So, unbeknownst to me, on April 1, 2023, Cane and our secretary cut and pasted Maybie's signature from another document, then used my notary stamp and signature stamp on the documents. My office sent the documents to the defense counsel, and we are awaiting the settlement proceeds.

I received a call from Maybie's daughter stating that Maybie passed away on March 1, 2023, one month before she allegedly signed the settlement documents. Needless to say, I was unaware of Maybie's death, so I confronted Cane and our secretary. They both admitted what they did. I fired them both.

HELP!! What am I professionally obligated to do? How do I handle this situation?

*Sincerely,
Iam Abel*

Dear Mr. Abel,

As a licensed lawyer and notary public, you are responsible for your conduct as well as that of your employees, so you must act ethically and professionally to ensure that your clients' legal interests are protected. Lawyers, as officers of the court, are granted the privilege to practice law, and are held to a higher standard and must comply with all laws and regulations, including the New York Rules of Professional Conduct (RPC) as well as the statutory and regulatory procedures for a notary public. It is important to understand the mistakes you made, as well as those of your employees, while handling Maybie Tomorrow's case. Although Maybie died, the personal injury case remains viable, so you must take corrective measures to ensure that Maybie's family members (now her beneficiaries¹) do not suffer harm because of your conduct, including the lack of supervision of your employees.

Notarization is often thought of as a routine or ministerial act, but it is an official task relied upon by others, so it should be treated seriously. Understanding how to properly notarize documents is vital for the lawyer/notary or, for that matter, any notary, because a court, other official agencies and the public rely on the veracity of the notarized documents as well as the fact that the person signing (the signor) the documents signed voluntarily.²

As a result, a notary/lawyer should understand New York's notary laws as well as the RPC to avoid penalties because they risk more than the loss of their notary license.

Notarization of Documents

There are two ways to be "commissioned" or licensed as a notary in New York by the Department of State. Anyone can take the examination administered by the Department of State, but a lawyer admitted to practice is exempt from the examination (they need only pay fees and complete an application). The notary signs an oath of office, sworn before a notary public that they "swear (or affirm)" to "support the Constitution of the United States, and the Constitution of the State of New York" and "faithfully discharge the duties of the office of Notary Public to the best of [their] ability."³ They are required to pay licensing fees, including a \$60 initiation fee and a \$60 fee upon renewal of the oath of office every four years. According to the Secretary of State's website, a notary must be familiar with other statutory and regulatory obligations, including:⁴

- New York's Executive Law Sections 130-142.
- Public Officers Law Sections 3, 10, 67 & 69.
- County Law Sections 534.
- Real Property Law Sections 290–333.
- Banking Law Section 335.

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- CPLR 3113.
- Domestic Relations Law Sections 11.
- Judiciary Law Sections 484-485 & 750.
- Penal Law Sections 70.00, 70.15, 170.10; 175.40 & 195.00.

Although lawyer/notaries may obtain a notary license without taking the examination, they should read the notary public rules prior to doing so, and again upon their license renewal when they again swear an oath. Among the business transactions that a notary may conduct are:

- administering oaths and affirmations;
- taking affidavits and depositions;
- receiving and certifying acknowledgments or proof of such written instruments as deeds, mortgages and powers of attorney; and
- demanding acceptance or payment of foreign and inland bills of exchange, promissory notes and obligations in writing, and protesting the same for non-payment.

As to the notarization process itself, even if it only takes a mere few minutes to notarize a document, it is a multi-step and solemn process. We recommend the implementation of a custom and best practice for a notary to ensure that the signor personally appears before the notary with a photo identification card; swears the oath (if necessary), and signs the document they want notarized. In turn, the notary signs their own name in black ink, dates and affixes their notary stamp and gives the document to the signor.

Notably, effective Jan. 25, 2023,⁵ Executive Law Section 135-c(3) was amended to include extra steps for in-person notarization and also permitted virtual notarization. Executive Law Section 135-c(3), requires a notary to keep a logbook or journal with a list and copies of all documents they notarized and to record the information about the document and the signor. And, the new law requires, *inter alia*, that the notary follow the best practices outlined above and additional requirements such as:

- the notary must be physically located within the New York State at the time of the notarization;
- the notary must identify the remote signor (also known as the principal) of the document through any of three methods:
- the notary's personal knowledge of the signor,
- by communication technology that facilitates remote presentation by the signor of an official, acceptable form of identification, credential analysis, and identity proofing, or

- through oath or affirmation of a credible witness who personally knows the signor, and who is either personally known to the notary or identified by the previously referenced means of communication technology;
- the notarization must take place via real time audio visual interaction; and
- the notary must make and maintain a record of the notarization for 10 years, and the jurat needs to include the following language: "This remote notarial act involved the use of communication technology."

Thus, Abel, if you seek to virtually notarize documents due to the flexibility it affords to your practice, you must comply with the additional requirements to ensure the validity of the signor's notarized document(s).

Maybie's Case

Although New York has provided an additional process to accommodate today's virtual world, there are pitfalls that come with this responsibility. A failure to adhere to these regulations can subject a lawyer/notary to serious penalties that include civil and criminal sanctions, fines and the potential revocation of the notary and law licenses. However, there are ways to avoid these mistakes, some of which we address as we examine your query.

You state that you had three meetings with Maybie, in March 2020, Dec. 1, 2022 and Dec. 30, 2022, respectively, and that between March 2020 and Dec. 1, 2022, your firm worked on the file obtaining the necessary documents to allow you to draft the summons and complaint. In turn, you sent and discussed the draft during your Dec. 1 virtual meeting. On Dec. 30, 2022, you and Maybie again met virtually to discuss and notarize her verified affidavit to the summons and complaint. Notably, at the time you notarized Maybie's verified affidavit, the former governor's Executive Order 135-c(3) had expired and the current Executive Law Section 135-c(3) had yet to take effect, so you are in an odd situation. However, in your letter, you state that Maybie showed you her driver's license. Hopefully, a review of your file notes will determine whether you followed any of the best practices as set forth above. Thus, it is questionable as to whether the notarization was valid, but we cannot advise you as to this issue.

Although you do not state whether you communicated with Maybie between March 2020 and December 2021, presumably you communicated with her during that time period. It appears that up to this point, you followed most of your ethical obligations to diligently work on her file; to provide her with informed consent as you provided her information adequate for her to make an

informed decision about the lawsuit as well as potential settlement offers; and that she understood what she was signing as well as the issues relating to material aspects of the case.⁶

Thus, the major issues to be examined arise from your April 1, 2023 acceptance of the settlement offer and delegation to Cane and your secretary regarding the settlement documents to Maybie to finalize the agreed-upon settlement.

First, we note that your reason for accepting the offer is an issue here. You attest to accepting the settlement offer from the defense counsel because you were “behind on your bills.” Even if you had discussed the parameters of the settlement amounts with Maybie, you may have engaged in a conflict of interest because you did not exercise your duty of loyalty and judgment to protect Maybie’s interests by considering your own financial

underlying pending Supreme Court civil action. Pursuant to RPC Rule 3.3, you are obligated to ensure that you do not use “false evidence” or engage in “fraudulent conduct” before “a tribunal.” Specifically, RPC Rule 3.3(b) provides that a “lawyer shall take reasonable remedial measures, including if necessary disclosure to the Court” so that the court, counsel and other interested third parties do not rely on the fraudulent conduct by a “person” (in this case two persons: Cane and your secretary). Thus, as you know that the settlement documents are improper, you must remediate the matter by notifying the court, Maybie’s daughter and the defense counsel, as they have an interest in the case and continue to rely on false documents. We recommend that you review NYSBA Ethics Opinions 1123 (May 15, 2017) and 837 (Feb. 5, 2010) as well as NYCLA Ethics Opinion 741 (March 10, 2010) as to the steps to take to remediate the false notarization issue.

“Simply stated, the cover-up often results in more dire consequences because it will result in your having to defend against allegations that you may have engaged in intentionally dishonest conduct and/or that you may have engaged in criminal conduct.”

interests ahead of those of your client, and thereby you may have violated RPC Rules 1.0(f) and 1.7(a)(2). And doing so may also have violated the RPC Rules cited above concerning informed consent, settlement offers and communication of material aspects of the case at Rules 1.0 (j), 1.2(a) and 1.4, respectively. In fact, if Maybie was alive at the time of the offer (she died one month before), any additional conversations relating to this issue during the negotiation process may have resulted in you learning that she had different views toward settlement. Needless to say, accepting an offer based on your own financial situation is never right. You should always check with your client, as you are obligated to make these decisions based on your client’s best directives and interests.

Second, the fraudulent notarization by your staff is also problematic, even if you were unaware your employee’s acts included cutting and pasting Maybie’s signature from another document; inserting your signature and notary stamps on the documents; and sending the fraudulent documents to defense counsel. As the licensed lawyer/notary who took the oath, you alone are allowed to notarize any document, but the signor must be present and actually sign it, and you must supervise your staff.

While it is true that you fired Cane, you must also understand the steps you must now take regarding the

While providing notice may implicate your failure to supervise the conduct of your non-lawyer employees as required by RPC Rule 5.3, the worst thing to do is to wait to see whether others realize the documents are not valid and report you to the court. We recommend that you promptly take corrective measures by volunteering the information and that you did not participate in the fraudulent conduct. Doing so will likely avoid the severe wrath of the court, should it learn about what happened from others. Simply stated, “the cover-up” often results in more dire consequences because it will result in your having to defend against allegations that you may have engaged in intentionally dishonest conduct and/or that you may have engaged in criminal conduct.⁷

Even so, confessing to your employees’ false notarization of Maybie’s signature on the settlement documents will likely result in some action by the court. Pursuant to the New York Rules of Judicial Conduct at 22 N.Y.C.R.R. 100, Rule 100.3(D)(2), a judge who “receives information indicating a substantial violation of the Rules of Professional Conduct (22 N.Y.C.R.R. Part 1200) *shall take appropriate action*” (emphasis added). The New York State Judicial Advisory Committee⁸ has repeatedly advised that “appropriate action” may be some lesser action than reporting the lawyer to a disciplinary authority.⁹ Thus, the judge has full discretion when handling

any issue relating to the false notarization. The judge can choose to either simply let you fix the mistake, sanction you or may refer you to the disciplinary authorities.¹⁰

If you find yourself subject to a disciplinary complaint, depending on the number of falsely notarized documents and the harm caused, the sanction ranges from a private unpublished admonition issued by the committee to public discipline via hearing with formal charges that results in sanctions ranging from censure to lengthy suspension and, in some cases, disbarment due to the lawyer's additional unrelated egregious conduct.¹¹

One case that you should review, *In re Roosa*,¹² is particularly instructive because the facts are strikingly similar. In *Roosa*, the lawyer/notary was censured due to the mitigation offered despite misconduct that arose in an uncontested divorce where he falsely notarized the signatures of his client on documents he submitted six days after the client died but did not advise the court (or others) that his client died. The court held:

Although we find the submission of falsely notarized documents to the courts serious professional misconduct, we conclude that, in view of the circumstances presented, especially respondent's apparent lack of venal motive and his relative inexperience as an attorney, censure is the appropriate discipline. We also direct respondent, within one year from the date of this decision, to complete six credit hours of accredited continuing legal education in ethics and professionalism in addition to the accredited continuing legal education required of all attorneys.^{13,14} (emphasis added)

There is no sure way to predict what the judge may do, but it is important that you move quickly to take corrective action on Maybie's case. You must advise and assure the court that this was an isolated incident; that you did not act with venal intent; that you want to resolve the issue; and that you fired Cane to prevent any recurrence of this issue. Until the court has determined the right path for handling the falsely notarized document, the best approach is transparency because it will be among the mitigating factors considered.

Needless to say, Abel, this incident should serve as a wake-up call: it is never a good idea to take shortcuts. In addition to the remedial measures outlined above, we recommend implementing changes to your own individual and office processes. This will help in your day-to-day practice as well as in a defense should you have to appear before the disciplinary authorities, as it will provide mitigation. Indeed, you must understand the RPCs and how to manage your own time and tasks as well as tasks you delegate to your staff.

In addition to the best practices outlined above, familiarizing yourself with the notary public laws is a must. We also recommend the following:

1. Do not leave your notary stamp, journals and/or recordings where others have access to them; rather keep them locked away or in a place where others cannot locate or use them.
2. Pay for a staff member to take a course and the notary public examination, so that once they are licensed, they too can notarize documents.
3. Train all staff members about the proper notarization practices.
4. Travel to the signor's location to notarize the documents in person.
5. Provide virtual notarization services (but be mindful and adhere to the extra requirements cited above).
6. If you do not provide virtual notarization services, and the signor is unable to come to the office, you must advise them to seek out a local notary. If they are out of country, they must go to the local American Embassy. However, in the case of an affidavit for litigation, CPLR Section R2106, was amended, effective Jan. 1, 2024, and permits an "affirmation of truth of statement" to be filed in lieu of an notarized affidavit as long as it includes the following: "I affirm this ___ day of _____, ____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law."

Conclusion

Abel, you sought help because you understood that falsifying a person's signature and then notarizing a document in a pending matter is wrong. We hope that you now understand your ethical obligations as to your own conduct, including the proper supervision of your non-lawyer employees, which is crucial to protecting your clients' interests. More than that, the use of the best practices and adherence to notary laws will not only help you to protect your client's interests but will make you a better lawyer/notary and well-rounded lawyer, allowing you avoid the consequences for not properly doing what a lawyer/notary is entrusted to do.

Sincerely,
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QUESTION FOR THE NEXT FORUM

To the Forum:

I am an attorney defending my client in a bench trial against allegations of fraud. My client is a well-known public figure, so the case has been closely monitored by the media. My client has been very vocal about his concerns that the judge and his staff are biased against him. And I have to say, I agree with him.

Given my client's status, everyone in the courtroom knew who he was before he ever stepped foot before the judiciary, including the judge's clerk. Throughout the trial, the clerk could be seen shaking his head in disapproval. During my client's testimony, the clerk glanced at the judge numerous times with the same disapproving look and furiously took notes that he passed along to the judge. The judge passed notes back to the clerk as well.

This behavior unnerved my client and made our whole defense team suspicious that the clerk may have been biased against my client. After an eventful day of trial, my client posted on his social media page to his millions of followers questioning the clerk's and judge's impartiality and that he felt he was not receiving a fair trial. One of the defense attorneys on my team reposted my client's post to his own social media page. This instantly made news headlines.

When we appeared in court the next day, my team argued to the judge that his and the clerk's conduct was improper, as the judge appeared to be consulting with the clerk during the proceedings by passing notes.

By the end of the day, the judge issued a gag order preventing my client and the rest of our team of defense attorneys from publicly commenting on the judge and his staff. The judge reasoned that the order is being issued to protect his office and staff from further threats of violence that have resulted from, in his words, "the public bashing of the judiciary" on my client's social media account.

My question is, does this impede on my client's and fellow defense attorneys' First Amendment rights? Can a judge prohibit litigants and attorneys from criticizing the judiciary outside of the courtroom?

*Sincerely,
Sy Lenced*

Endnotes

1. We limit this column to the ethical issues raised herein, but note that you will need to determine if Maybie has a will and who she designated as executor, or whether she died intestate. In either case, you will have to seek relief from the Surrogate's Court so that her estate is substituted for Maybie in the personal injury case and allow the case to proceed.
2. See, e.g., *Ambulatory Surgery Center of Brooklyn v. Helpers of God's Precious Infants, Inc.*, 283 A.D.2d 528, 529-30 (2d Dep't 2001) (Court relied on but later vacated part of its prior decision when the lawyer admitted to repeated false representations that affidavits were signed in his presence before he notarized because they were improper; the lawyer was also sanctioned and fined \$10,000).
3. When a lawyer is admitted to practice, they take a similar oath.
4. See <https://dos.ny.gov/system/files/documents/2022/04/notary.pdf>.
5. Revisions to Section 135-c(3) came three years after the start of the COVID-19 pandemic during which notarization of documents was done virtually after March 19, 2020, when Governor Andrew Cuomo issued Executive Order 202.7, temporarily allowing documents to be notarized "utilizing audio-visual means" via an internet video conference. It required that the signor send the document and photo ID to the notary; affidavits be executed by the signor; and that the signor present their photo ID on the screen. In short, recognizing that business and legal matters had to proceed, Executive Order 202.7 provided a simpler process for virtual notarization. However, once the COVID pandemic restrictions were lifted, Executive Order 202.7 expired on July 5, 2021.
6. See the RPC at 22 N.Y.C.R.R. § 1200, Rules 1.0(j), 1.2(a) and 1.4, respectively.
7. See RPC 8.4 and Penal Law §§ 70.00, 70.15, 170.10, 175.40 and 195.00.
8. The Advisory Committee on Judicial Ethics provides ethics advice to judges, justices and quasi-judicial officials of the New York State Unified Court System about their own conduct.
9. See, e.g., JAC Advisory Opinion 10-85 (If the alleged misconduct is not so egregious as to implicate the lawyer's honesty, trustworthiness or fitness to practice law, the judge need not necessarily report the lawyer to the appropriate disciplinary authority) and JAC Advisory Opinion 91-36 (Vol. VII) (where no improper motivation, the judge has the discretion to take less severe, appropriate measures, including but not limited to, counseling and/or warning a lawyer, reporting a lawyer to his/her employer, and/or sanctioning a lawyer).
10. See Federal Rule 11 or 22 N.Y.C.R.R. § 130-1.
11. For the procedures see the Rules for Attorney Disciplinary Matters you should review 22 N.Y.C.R.R. Part 1240. See, e.g., *Matter of Ciaravino*, 204 A.D.3d 138 (2d Dep't 2021) (law firm associate censured via discipline by consent because she notarized 11 affidavits purportedly, but the client had never signed the affidavits. The lawyer electronically signed them outside of the client's presence and then falsely notarized the affidavits that were filed with the court); *Matter of Gitler*, 184 A.D.3d 105 (2d Dep't 2020) (lawyer reciprocally suspended for six months because he forged his assistant's name and notarized the forged signature on two letters in support of an application for an extension); *Matter of Micha*, 169 A.D.3d 15 (4th Dep't 2019) (lawyer suspended for one year for signing client's husband's name on an affidavit, notarizing it, filing it with the court and representing that it had been signed by the husband to other attorneys; failing to appear and neglect of unrelated legal matter that caused substantial harm to the client, resulting in excessively high valuation of a marital residence against client's interests); and *Matter of Toback*, 199 A.D.3d 99 (1st Dep't 2021) (lawyer disbarred in Florida reciprocally disbarred in New York because she falsely notarized an agreement, executed a certification in litigation related to the agreement that included false statements, and repeatedly gave false testimony at a deposition).
12. *In re Roosa*, 273 A.D.2d 535 (3d Dep't 2000).
13. See 22 N.Y.C.R.R. Part 1500; cf., *Matter of Davis*, 269 A.D.2d 732 (3d Dep't 2000). Respondent shall report said completion to petitioner.
14. *Roosa*, 273 A.D.2d at 537.
15. Mr. Seminara worked as a summer intern at Scalise & Hamilton, P.C. He is in his second year at the Elizabeth Haub School of Law at Pace University and a member of the law school's International Law Journal. He will graduate in May of 2025.

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