

Little White Lies

By the NHBA Ethics Committee

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The Ethics Committee has been asked to comment on the application of the Rules of Professional Conduct to violations of laws by lawyers not acting in their capacities as lawyers. Particularly, we have been asked to review the implications of the practice of taking acknowledgments of signatures of persons not actually present at the time of acknowledgment. The following illustrations may be uncomfortably familiar:

- The phone rings. Your client, who is also a friend and who pays your legal bills by return mail, is in a hurry: a document must be submitted this afternoon, signed by your client's employee and notarized. The employee has already signed the document, and is out of town on a business trip. The document has nothing to do with any file you had, have or will have for the client. You are, as your client knows, a notary. May your client swing by and obtain your notarial services, right away? Your client assures you that the employee signed the document - your client saw it happen.
- You receive a document in the mail, signed by someone whose signature you recognize, but the acknowledgment line is blank; you know you can call the signer, verify the signature, and sign as a justice of the peace, allowing the deal - in which you are representing the other side, not the signer - to go through on time. If you don't, it won't.
- You are conducting a closing for a lender; the broker, whom you trust, brings in the seller's deed with a homestead waiver signed by the seller's spouse, who will be in Europe until next month, and requests that you acknowledge the spouse's signature. The broker tells you that the spouse signed in the broker's presence, and the signature is consistent with the spouse's signature on various pre-closing documents. The seller needs the closing proceeds for a closing tomorrow.

Such acknowledgment crunches happen all the time, and it is so easy to rationalize being helpful. You have satisfied yourself that the signature appearing on the document is authentic, so the purpose of notarization has been satisfied; the harm done by being a purist far outweighs the harm arising from the little technical matter of your not having actually witnessed the signature; oaths are in any case an anachronism. All arguably true, but does it get you off the hook?

NHRSA 456-A:3, a section in the Uniform Recognition of Acknowledgments Act, states that:

"The person taking an acknowledgment shall certify that:

- I. *The person acknowledging **appeared before him** and acknowledged he executed the instrument; and*
- II. *The person acknowledging was known to the person taking the acknowledgment or that the person taking the acknowledgment has satisfactory evidence that the person acknowledging was the person described in and who executed the instrument."* [emphasis added]

Note that, if you acknowledge one of the documents described above, you are not acting as an attorney. Assuming that the illustrations above constitute violations of this statute, can you get in trouble *as an attorney* for "little white lies" committed outside your legal capacity?

Rule 8.4 of the Rules of Professional Conduct states in part that:

"It is professional misconduct for a lawyer to:

- (c) *engage in conduct involving dishonesty, fraud, deceit or misrepresentation."*

The Committee finds that the conduct described above violates the Rule.

The ABA Model Code Comments on this Rule, while not formally adopted in New Hampshire, state that:

*"...a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust or serious interference with the administration of justice are in that category. A pattern of repeated offenses **even ones of minor significance when considered separately**, can indicate indifference to legal obligation."* [emphasis added]

We are not aware of any New Hampshire cases brought for technical violations of the Uniform Recognition of Acknowledgments Act, and we are not aware of any actions taken in this state against attorneys for a pattern of repeated minor offenses. We are, however, aware that the Professional Conduct Committee is concerned with this issue, and is specifically worried that, since the signer did not "personally appear" before the lawyer taking the acknowledgment, signing such an acknowledgment is a misrepresentation to anyone who may later rely on the document as having been properly acknowledged.