

Legislative Analysis



CREATE NEW NOTARY PUBLIC ACT

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House Bill 4938 as enrolled
Public Act 238 of 2003

Sponsor: Rep. Shelley Taub
House Committee: Local Government and Urban Policy
Senate Committee: Local, Urban and State Affairs
Second Analysis (8-26-04)

BRIEF SUMMARY: The bill would create a new act entitled the Michigan Notary Public Act, set fees, and establish the Notary Education and Training Fund. The new act would replace several provisions of current law concerning notary publics, which would be repealed by the bill. The bill would take effect April 1, 2004.

FISCAL IMPACT: The bill would have no fiscal impact on state or local units of government. The intent is that the bill be revenue neutral. All charges and fines collected, with the exception for the portions earmarked for the Notary Education and Training Fund, would be deposited into the General Fund and used first to support costs that the Office of the Secretary of State incurs while administering the act. There is the potential that a number of local units of government will experience an increase in revenue as a result of the ability to charge a fee for services. This would offset their costs for administration, which currently are not being offset.

THE APPARENT PROBLEM:

According to the Office of the Secretary of State, there are about 150,000 notaries public in Michigan, and each year 34,000 new applicants file to receive a notary's commission. Commissioned notaries have the power to attest to the authenticity of a person's signature, to administer oaths, and to take affidavits. Generally, the powers of notaries public are limited to acts of verification, and in the United States they have no authority to practice law.

The state statute that authorizes the duties of notaries public has not been thoroughly updated for more than 50 years. During that time, the number of notaries has proliferated, and their verification duties have changed in the digital age, as well as taken on new importance in an era that seeks greater homeland security. In contrast, their fees have remained unchanged.

During committee testimony, there were reports of charlatans who pretend to be notaries public, and who work in immigrant neighborhoods to defraud those with no knowledge of the U.S. legal system and little English language skill. In these instances, unsuspecting victims assume a notary public has as much legal authority in this country as he or she would in many Spanish-speaking countries, where *notario publico* (the literally

translation of 'notary public') is a licensed attorney who is granted extraordinary authority to develop complex documents.

In order to update the act that authorizes notaries public, increase their application fees, and set penalties for those who violate their commissions, legislation has been introduced.

THE CONTENT OF THE BILL:

The bill would create a new act entitled the Michigan Notary Public Act, set fees, and establish the Notary Education and Training Fund. The new act would replace several provisions of current law concerning notary publics, which would be repealed by the bill. The bill would take effect April 1, 2004.

Many of the provisions of the bill are similar or identical to current provisions that would be repealed. The following is a summary of the bill, with substantive changes from current law specifically noted.

Appointment of notaries public. Under the bill the secretary of state could appoint as a notary public a person who complies with the requirements of the bill. A notary public could reside in, move to, and perform notarial acts anywhere in the state. An initial appointment would be for six to seven years (rather than for four to five years, as under current law) expiring on the applicant's birthday.

To be appointed as a notary, a person would have to be at least 18 years old, be a resident of the state or maintain a principal place of business in the state, read and write in the English language, and be free of any felony convictions, misdemeanor convictions, and violations described in section 41, which concerns felony convictions and the automatic revocation of notary licenses. [Under the bill, an application would not have to be indorsed by a legislator or a judge, as required under current law.] A person who is not a state resident would have to demonstrate that his or her principal place of business is located in Michigan and that he or she is engaged in an activity in which one is likely to be required to perform notarial acts. Finally, an applicant would be required to file with the county clerk of his or her county of residence (or expected appointment), a proper surety bond, and have taken the oath as prescribed in the constitution.

Under the bill, the secretary of state would be required to notify, on a monthly basis, the county clerk's office of the appointment of any notaries.

Surety bond and application filing fee. The bill specifies that within 90 days before filing an application, a person must file a surety bond in the sum of \$10,000, with good and sufficient surety through a surety licensed to do business in the state. The bond would have to be conditioned upon indemnifying or reimbursing a person, financing agency, or governmental agency for monetary loss caused by official misconduct on the part of the notary. However, the surety would be required to indemnify or reimburse only after a judgment has been entered by a court. The aggregate liability of the surety would not

exceed the sum of the bond. A surety could cancel a bond upon 60 days notice to the notary, the county clerk, and the secretary of state. A county clerk could not accept the personal assets of an applicant as security for the required surety bond.

Each person who filed an oath and bond would be required to pay a \$10 filing fee to the county clerk. Upon receipt of the filing fee, the clerk would give a bond and oath certificate of filing to the applicant. However, the bill specifies that a charter county with a population of more than two million could impose, by ordinance, a fee for the county clerk's services that was different than the amount prescribed in this subsection. Under the bill, two dollars of each fee collected would be deposited into the Notary Education and Training Fund, on a schedule determined by the secretary.

Application and fee. A person would apply to the secretary of state for appointment as a notary public, in a format prescribed by that office. An application for appointment would have to contain the signature of the applicant. In addition to other information that could be required by the secretary, the application would have to include the applicant's driver license or state personal identification card number and a copy of the bond and oath certificate of filing received from the county clerk.

In addition to identifying information, an application would have to indicate whether an applicant was a citizen of the United States (or offer proof of the applicant's legal residency), had been previously appointed as a notary and whether the applicant's notary appointment had been revoked or suspended, include a statement describing the date and circumstances of any felony conviction during the preceding ten years, and contain an affirmation that the applicant will perform his or her notarial acts faithfully.

An application would be accompanied by a fee of \$10. One dollar of each fee collected would be deposited into the Notary Education and Training Fund, on a schedule determined by the secretary.

The bill specifies that the secretary of state could inquire about an applicant's qualifications, and would be required to determine whether the applicant met the requirements prescribed in the bill. Under the bill, the secretary of state would be authorized to use the Law Enforcement Information Network to check the criminal background of an applicant (this provision is not included in current law).

After approval of the application, the secretary would mail directly to the applicant, the certificate of appointment as a notary public. Each certificate of appointment would identify the person as a notary public of this state, and would specify the term of the person's commission.

Notary education and training fund. Under the bill, the Notary Education and Training Fund would be created within the state treasury. Money from fees collected under the bill (the \$10 application fee, the \$10 surety bond fee, and the \$10 duplicate certificate fee) would be deposited into the fund. The state treasurer could receive money or other assets from any source for deposit into the fund, direct investment of the fund, and credit

to the fund interest and earnings from fund investments. Up to \$85,000 would remain in the fund at the close of each fiscal year and would not lapse to the general fund. However, any amount in excess of \$85,000 would lapse to the general fund. Under the bill, the secretary of state would be required to spend money from the fund in the form of grants, upon appropriation, for the purposes of providing education and training programs for county clerks and their staffs, including but not limited to notary responsibilities, election worker training, and election processes. The secretary of state would be required to consult with the president of the Michigan Association of County Clerks (or his or her designee) when approving grant applications.

Annual report filed with legislature. The bill also specifies that the secretary annually file a report concerning the balance of the fund at the time of the report, and a detailed account of the expenditures in the preceding fiscal year. The report would be sent to the Speaker of the House of Representatives, the Minority Leader of the House of Representatives, and the Majority and Minority Leaders of the Senate.

Reappointment. The bill specifies that the secretary of state could not automatically reappoint a notary public. Rather, a person desiring reappointment would have to reapply in the same manner as for an original appointment, making application within the last 60 days of his or her commission.

Immediate cancellation of commission. The bill specifies that the secretary of state must automatically cancel the notary public commission of any person who made, drew, uttered, or delivered any check, draft, or order for the payment of a service fee, if that check was not honored by the bank or financial institution expected to pay it.

Notification of changes and corrections. A notary public would be required to immediately apply to the secretary of state for a corrected notary public commission upon a change in his or her name or address, or when the commission contains an error. A notary would also be required to notify the secretary of state and the county clerk upon any change in the factual information stated in the person's application for appointment. The secretary would then notify the applicant's county clerk when a corrected commission was issued.

Duplicate certificate and fee. If a notary public's certificate of appointment became lost, mutilated, or illegible, he or she would be required to promptly apply to the secretary for the issuance of a duplicate certificate. The application would be made on a form prescribed by the secretary, and be accompanied by a fee of \$10. One dollar of each fee collected would be deposited into the Notary Education and Training Fund.

Duties of notaries public. A notary public would have to obtain and read a copy of all the current state statutes regulating notarial acts before performing any such act. (This would be a new requirement.)

Permitted notarial acts. A notary would be authorized to take acknowledgments, administer oaths and affirmations, and witness or attest to a signature. In taking an

acknowledgment, a notary would be required to determine that the person making the acknowledgment is the person whose signature is on the record. In taking a verification upon oath or affirmation, the notary public would have to determine that the person making the verification is the person whose signature is being verified. In witnessing or attesting to a signature, the notary public would have to determine that the signature is that of the person in the presence of the notary and is the person named in the record.

In all of these cases, the notary public would have to require that the person sign the record being verified, witnessed, or attested to in the notary public's presence.

As evidence that a person is the person whose signature is on a record, the bill states that a notary public could rely on personally knowing the person or on the identification upon the oath or affirmation of a credible witness who personally knows the person and whom the notary public personally knows. In addition, a notary public could rely on a current license, identification card, or record issued by a federal or state government that contains the person's photograph and signature.

A notary public could refuse to perform a notarial act.

Fees. A notary public could charge no more than \$10 for performing any individual transaction or notarial act. (Current law limits the fee to not more than \$2 per acknowledgment or jurat.) A notary would have to expressly advise a person as to the amount to be charged before performing the act. A separate travel fee could be agreed upon.

County clerk fees. Under the bill, a county clerk could collect a service charge fee of \$10 for certifying a notarial act of a notary public.

Format of notary forms. The secretary of state would prescribe the form that a notary public would use for a jurat (a certification by a notary public that a person has voluntarily signed a document in the notary's presence), the taking of an acknowledgment, the administering of an oath or affirmation, the taking of a verification upon an oath or affirmation, the witnessing or attesting to a signature, or any other notarial act. (In a change from current law, the bill would define "signature" to include an electronic signature as that term is defined in the Uniform Electronic Transactions Act.)

Notary public's signature and forms. A notary public would be required to place his or her signature on every record, in exactly the form it appears on his or her certificate of appointment, whenever he or she performs a notarial act. In addition, on each form, the notary public would have to print, type, or stamp, or otherwise imprint, information that includes the notary's name, county of appointment, date of expiration of commission, and the county the notary is acting in. The method of printing would have to result in a legible, reproducible record. However, the bill specifies that the illegibility of any of the required statements would not affect the validity of the transaction or record. The bill also prohibits the use of an embosser alone or any other method that cannot be reproduced.

The bill contains examples of plain English notary forms and specifies that a notary public could use such a form, and that it would be considered sufficient to accomplish its stated purpose under the laws of the state.

Prohibited acts. A notary public could not do any of the following:

--Certify or notarize that a record is either an original or a true copy of another record.

--Perform a notarial act upon any record executed by himself or herself, notarize his or her own signature, or take his or her own deposition or affidavit.

--Claim to have powers, qualifications, rights, or privileges that the office of notary does not provide, including the power to counsel on immigration matters.

--In any document, advertisement, stationery, letterhead, business card, or other comparable written material describing the role of the notary public, literally translate from English into another language terms or titles, including but not limited to, notary public, notary, licensed, attorney, lawyer, or any other term that implies the person is an attorney.

[When advertising notarial services in a language other than English, a notary would have to include the following, prominently displayed in the same language: a) I am not an attorney and have no authority to give advice on immigration or other legal matters; and b) the fees for notarial acts as specified by statute.]

--Use the term “notario publico” or any equivalent non-English term in any business card, advertisement, notice, or sign.

--Perform any notarial act in connection with a transaction if the notary has a conflict of interest (including a direct financial or beneficial interest, or when the notary is named individually as a grantor, grantee, mortgagor, mortgagee, trustor, trustee, beneficiary, vendor, vendee, lessor, or lessee, or as another party to the transaction).

--Perform a notarial act for a spouse, domestic partner, descendant, or sibling including in-laws, steps, or half-relatives.

--Perform a notarial act in connection with a transaction if the record contains a blank space.

--Take the acknowledgment of a record by or to a bank or other corporation of which he or she is a stockholder, director, officer, or employee (or administer an oath to another stockholder, director, officer, employee, or agent), if the notary is named as a party to the record, either individually or as a representative of the corporation, and the notary is individually a party to the record.

Sign for another. A notary public could sign the name of a person whose physical characteristics limit his or her capacity to sign or make a mark on a record presented for notarization, if the person directs the notary public to sign (whether orally, verbally, physically, or through electronic or mechanical means), if the person is in the physical presence of the notary, and if the notary indicates on the record that he or she is signing for the person according to the bill's provisions.

Responsibility to secretary of state. A notary public would be required to furnish records to the secretary of state upon request, respond to such requests within 15 days, and permit the secretary of state to inspect his or her records. The secretary of state could suspend a notary public's commission until the notary provided a satisfactory response.

Liability. A notary public and the surety listed on his or her surety bond would be liable in a civil action for damages resulting from the notary's official misconduct. The employer of a notary would also be liable if the notary was acting within the actual or apparent scope of his or her employment, and the employer had knowledge of and consented to or permitted the official misconduct. A notary public and his or her surety would not be liable for the truth, form, or correctness of the contents of a record that is notarized.

Violations and investigations. Under the bill, the secretary of state may investigate, or cause to be investigated by local authorities, the administration of the notary public laws and must report violations of the notary public laws and rules to the attorney general or prosecuting attorney, or both, for prosecution. The secretary may, on his or her own initiative or in response to a complaint, make a reasonable and necessary investigation within or outside the state, and gather evidence concerning a person who violated or is about to violate the act or its rules, or an order issued under the act.

Complaint process. A person may file a complaint against a notary public with the secretary, and that complaint must be made in a format prescribed by the secretary of state. The complaint would include the complainant's name, address, and telephone number; the complainant's signature and the date signed; a complete statement describing the basis for the complaint; and the actual record that was the basis for the complaint, or a copy, photocopy, or other replica of the record.

Penalties. An applicant or a commissioned notary public who had engaged in conduct prohibited by the act or its rules, would be subject to one or more of the following penalties, in addition to any criminal penalties otherwise imposed: a) suspension or revocation of his or her certificate of appointment; b) denial of an application for appointment; c) a civil fine paid to the department in an amount not to exceed \$1,000; d) a requirement to take the affirmative action determined necessary by the secretary of state, including payment of restitution to an injured person; e) a letter of censure; and f) a requirement to reimburse the secretary of state for the costs of the investigation.

The bill specifies that the secretary of state may impose one or more of the penalties listed above, upon presentation of satisfactory evidence that the applicant had done one or

more of the following: a) violated the act or its rules; b) committed an act of official misconduct, dishonesty, fraud, deceit, or of any cause substantially relating to the duties or responsibilities of a notary public or the character or public trust necessary to be a notary public; c) failed to perform his or her duties; d) failed to fully and faithfully discharge a duty or responsibility; e) been found liable in a court of competent jurisdiction for damages in an action grounded in fraud, misrepresentation, or violation of the act; f) represented, implied, or used false or misleading advertising that he or she had duties, rights, or privileges that he or she did not possess by law; g) charged a fee for a notarial act that was more than was allowed under the act; h) failed to complete the notary public's acknowledgement at the time the notary public signed or affixed his or her signature, or seal, to a record; i) failed to administer an oath or affirmation; j) engaged in the unauthorized practice of law, as determined by a court of competent jurisdiction; k) ceased to maintain his or her residence or principal place of business in the state; l) lacked adequate ability to read and write English; m) hindered or refused a request by the secretary for notary public records or papers; n) engaged in a method, act, or practice that was unfair or deceptive, including the making of an untrue statement of a material fact relating to a duty or responsibility of a notary public; o) violated a condition of probation; p) permitted an unlawful use of a notary public's seal; or q) failed to maintain good moral character.

Notice of violations. Before the secretary took any action with regard to violations and penalties, the person affected would be given notice, and an opportunity for a hearing.

However, if a notary public is convicted of a felony or of a substantially corresponding violation of another state, the secretary would be required to automatically revoke the notary public's commission on the date that the felony conviction was entered.

If the notary public was convicted of two or more misdemeanor offenses within a 12-month period while commissioned, or of three or more misdemeanor offenses within a five-year period regardless of being commissioned, the secretary would be required to automatically revoke the commission on the date the person's most recent misdemeanor conviction was entered.

Finally, if a notary public was sentenced to a term of imprisonment or jail, the commission would be revoked automatically on the day on which the person began serving the sentence. If a person's commission was revoked because of imprisonment, and that person performed or attempted to perform a notarial act while imprisoned, then that person would not be eligible to receive a commission as a notary public for at least 10 years after he or she completed the term of imprisonment.

Under the bill, a person found guilty of performing a notarial act after his or her commission had been revoked, would be guilty of a felony punishable by a fine of not more than \$3,000, or by imprisonment for not more than 5 years, or both. A person, regardless of whether he or she had ever been commissioned as a notary public, who was convicted of a felony would be disqualified from being commissioned as a notary public

for not less than 10 years after completing his or her sentence. After such a conviction, the court would be required to notify the secretary that a notary had been convicted.

The bill states that cancellation of a commission would be without prejudice to reapplication at any time. However, a person whose commission is revoked would be ineligible for the issuance of a new commission for at least five years.

A fine imposed under the bill that remains unpaid for more than 180 days could be referred to the Department of Treasury for collection. The treasury department could collect the fine by deduction from a payroll or tax refund warrant. In addition, the secretary of state could bring an action in a court of competent jurisdiction to recover the amount of a civil fine.

If a fine imposed under the act remained unpaid for more than 180 days, then it could be referred to the Department of Treasury for collection. The department could collect the fine by deducting the amount owed from a payroll, or from a tax refund warrant. The secretary could bring a court action to recover the amount of a civil fine.

Cease and desist order. The attorney general would be authorized to petition a court for injunctive relief if it appeared that a person had engaged or was about to engage in an act or practice that would constitute a violation. A circuit court could issue a permanent or temporary injunction or restraining order to enforce the provisions of the bill. A party to such an action would have the right to appeal within 60 days from the date of the order.

The court could order a person subject to an injunction or restraining order to reimburse the secretary of state for actual expenses incurred in the investigation. The secretary of state would have to refund such reimbursement if the injunction or restraining order was overturned on appeal.

Notary certificate admissible as evidence. In the courts of the state, a certificate of a notary public of official acts performed in the capacity of a notary public, under the seal of the office, would be presumptive evidence of the facts contained in the certificate, except that a certificate would not be evidence of non-acceptance or nonpayment in any case in which a defendant attaches to his or her pleadings an affidavit denying the fact of having received that notice of non-acceptance or nonpayment.

Criminal penalties. The bill specifies that, except as otherwise provided by law, a person who violated the bill would be guilty of a misdemeanor punishable by a fine of up to \$5,000, imprisonment for up to one year, or both fine and imprisonment. Further, the penalties and remedies under the bill would be cumulative, and the bringing of an action or prosecution under the bill would not bar an action or prosecution under any other applicable law.

The bill specifies that an action concerning a fee charged for a notarial act would be filed in the district court, in the place where the notarial act occurred.

Notary fees fund; cap. Under the bill, the notary fees fund would be created in the state treasury. An application fee, duplicate notary public certificate of appointment service charge, certification service charge, copying service charge, reimbursement costs, and administrative fine collected under the act by the secretary of state would be deposited by the state treasurer in the fund. The revenue would be appropriated to defray the costs incurred by the secretary in administering the act. Any money remaining at the end of the fiscal year in excess of \$85,000 would lapse to the general fund.

Retention of records for five years. The bill specifies that a person, or the personal representative of a person who is deceased, who performed a notarial act while commissioned as a notary public, would be required to maintain all the records of those notarial acts for at least five years. (Under current law, a notary public, or the personal representative of a deceased notary public, is required to deposit his or her records and papers with the county clerk within three months after resigning or being removed from office.

Administrative rules. The secretary of state would be authorized to promulgate rules under the Administrative Procedures Act to implement the bill.

BACKGROUND INFORMATION:

Comparison of application process. The legislation would streamline the process that applicants use to file for a notary public commission, reducing the currently required nine steps, to six. A comparison follows:

<u>Current process 45 to 90 days</u>	<u>New process proposed by HB 4938</u>
1. Customer completes notary application.	1. Customer completes notary application.
2. Legislator or judge endorses application.	2. Applicant files bond and \$10 county application fee with county clerk.
3. Secretary of State receives and approves application.	3. County administers oath and issues certificate of filing.
4. County clerk receives a list of approved notaries.	4. Applicant submits \$10 Secretary of State application fee.
5. Customer is notified that commission has been approved.	5. Secretary of State reviews application, may conduct background check, and makes
6. Bonding company issues a \$10,000 bond.	6. If approved, Secretary of State issues notary certification.
7. Customer takes oath, proof of bond and \$4 commission fee to county clerk.	
8. County administers oath and issues commissions.	
9. Secretary of State receives word that the commission is accepted.	

ARGUMENTS:

For:

This act has not been revised in more than 50 years, thus it needs updating. According to the Office of the Secretary of State, the legislation conforms in many ways to the ‘model notary public act’ that serves as a blueprint when state legislatures throughout the country adopt their respective enabling statutes.

For:

The bill sets new fees for notary public applicants. Currently an applicant pays \$4 for a commission, which fails to cover the cost of processing the application at the local and state level. Under the legislation, the applicant’s fees would increase to \$20. Of that amount, \$10 would go to the state treasury (to cover the administrative costs of the program at the Department of State), and \$10 would go to the county of the applicant’s origin. A portion of each state and local fee (that is to say, \$2 of the county fee, as well as \$1 of the state fee and also \$1 of any duplicate state commission fee) would be set aside to create an education and training fund. The fund, capped at \$85,000 annually, would enable the Office of the Secretary of State and the Michigan Association of County Clerks to establish an annual conference, as well as to enhance the organization’s regional education and training conferences throughout the year. That way clerks will have better knowledge and information about best practices, allowing them to meet their many duties, including their important responsibility to coordinate fair elections.

For:

The bill increases the penalties for those who violate their notary public commissions. There have been reports of criminals who pretend to be notaries public, and who work in Spanish-speaking immigrant neighborhoods to defraud newcomers to this country who have no knowledge of the U.S. legal system, and little English language skill. In these instances, unsuspecting victims have been allowed to believe that a ‘notary public’ has as much legal authority in this country as he or she would have in many Spanish-speaking countries, where a *notario publico* (the literally translation of ‘notary public’) is a licensed attorney who is granted extraordinary authority to develop complex documents, and may charge ample fees. Under this legislation, this kind of nefarious behavior is prohibited, and if it persists, the violators are investigated and punished.

Against:

There should be a U.S. citizenship requirement for all applicants who hold notary public commissions. Under this bill, legal aliens can become notary publics. Further, the bill eliminates the current practice of requiring legislators and judges to attest to an applicant’s ‘good moral character’ by signing their application. Yet according to committee testimony, the Office of the Secretary of State does not plan to conduct background checks of the 34,000 applicants whose applications it receives each year. Although citizenship cannot guarantee honesty and lawful behavior, citizens have demonstrated their loyalty and commitment to the values and norms of our democracy. U.S. citizens are more apt to know, too, that as notaries they are part of a system of laws

and rules that regulate our commerce, and govern our public discourse as we work and play in our communities.

Response:

The current law allows even illegal aliens to become notary publics, while this bill does not. Instead, the legislation contains a residency requirement. What's more, state statutes cannot require that all applicants be citizens of the United States, because that would be in violation of the U. S. Constitution's 14th Amendment which guarantees all residents the right to due process. In *Bernal v. Fainter* (467 U.S.216 (1984)), the Supreme Court ruled that imposing a citizenship requirement for a notary was unconstitutional. Consequently, any legal resident can qualify for a notary commission.

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.