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BILL ANALYSIS

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House Bill 4938 (Substitute H-1 as passed by the House)
Sponsor: Representative Shelley Taub
House Committee: Local Government and Urban Policy
Senate Committee: Local, Urban and State Affairs

Date Completed: 10-30-03

CONTENT

The bill would create the "Michigan Notary Public Act" to do the following:

- Provide for the appointment and regulation of notaries.
- Provide for the collection of certain service charges and fees.
- Create the "Notary Education and Training Fund" and the "Notary Fees Fund".
- Prohibit certain actions by notaries.
- Prescribe penalties.

The bill would repeal current statutes that regulate notaries. It would take effect on January 1, 2004.

Application for Appointment

The bill would require a person to apply to the Secretary of State for appointment as a notary public, in a format prescribed by the Secretary. ("Secretary" would mean the Secretary of State, or his or her authorized duties, assistants, or employees. A "person" would be a natural person, corporation, partnership, trust, association, or other legal entity and its legal successors.) An application for appointment would have to include all of the following:

- The applicant's name, residential address, business address, date of birth, residential and business telephone numbers, and driver license or State personal identification card number.
- A copy of the bond and oath certificate of filing received from the county clerk.
- If applicable, a statement showing whether the applicant had previously applied for an appointment as a notary public in this or

any other state, the result of the application, and whether the applicant had ever held a notary public appointment that was revoked, suspended, or canceled in this or any other state.

- A statement describing the date and circumstances of any felony or other conviction of the applicant during the preceding 10 years.
- A declaration that the applicant was a citizen of the United States or proof of the applicant's legal residency in the United States.
- An affirmation by the applicant that the application was correct, and that the applicant had read the proposed Act and would perform his or her notarial acts faithfully.

An application also would have to contain the applicant's signature and other information as required by the Secretary.

Each application would have to be accompanied by an application fee of \$10. One dollar of each fee would have to be deposited into the proposed Notary Education and Training Fund, on a schedule determined by the Secretary.

Upon receiving an application that was accompanied by the prescribed service charge, the Secretary would have to inquire as to the applicant's qualifications and determine whether he or she met the prescribed qualifications. The Secretary could use the Law Enforcement Information Network as provided in the L.E.I.N. Policy Council Act to check the criminal background of the applicant. The Secretary also could request a criminal records check through the Federal

Bureau of Investigation. The applicant would have to pay for the cost of the required checks.

(Currently, under Section 107 of the Revised Statutes of 1846, an individual who wishes to be appointed a notary must submit a written application on a form distributed by the county clerk. The application must be indorsed by a member of the Legislature or a circuit or probate judge, and be presented to the Secretary of State with a \$3 fee.)

Appointment as Notary

The Secretary could appoint as a notary public a person who complied with the requirements of the bill, and met specific qualifications. An individual 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 English; and be free of any felony convictions, misdemeanor convictions, and other violations as described in the bill.

A person who did not live in Michigan would have to demonstrate that his or her principal place of business was located in the county in which he or she requested appointment, and indicate that he or she was engaged in an activity in which he or she was likely to be required to perform notarial acts.

After approving an application, the Secretary would have to mail to the applicant a certificate of appointment as a notary public. Each certificate would have to identify the person as a notary public of the State and specify the term of his or her commission. A notary public could reside in, move to, and perform notarial acts anywhere in the State from the date of appointment until the notary's birthday that occurred between six and seven years after the date of appointment, unless it was canceled, suspended, or revoked by the Secretary or by law. (Currently, a notary's appointment remains in effect until the notary's birthday that occurs between four and five years after the date of the appointment.)

The bill would prohibit the Secretary from appointing as a notary a person who was serving a term of imprisonment in a State correctional facility or jail in Michigan or another state, or in a Federal correctional facility.

The Secretary would be required automatically to cancel the commission of any person who made, drew, uttered, or delivered any check,

draft, or order for the payment of a service charge under the bill that was not honored by the bank, financial institution, or other depository expected to pay the check, draft, or order for payment upon its first presentation.

The bill would require the Secretary, monthly, to notify a county clerk's office of notary appointments.

Reappointment/Corrected Appointment

The Secretary could not automatically reappoint a notary, but a person who desired another appointment could apply to the Secretary for an original appointment as a notary. The person could not apply more than 60 days before his or her current notary public commission expired.

A notary public immediately would have to apply to the Secretary for a corrected notary public commission if there were a change in the person's name or residential or business address, or if a commission issued by the Secretary contained an error in the person's name, birth date, county, or other pertinent information, if the error were made on the notary public's application and used by the Secretary to appoint the person as a notary public.

A notary public also would have to notify immediately both the Secretary and the county clerk of his or her appointment, upon any change in the factual information stated in the notary public's application for appointment. The Secretary would have to notify the county clerk of the applicant's appointment upon issuing a corrected commission.

If a notary public's certificate of appointment became lost, mutilated, or illegible, the notary public would have to apply promptly to the Secretary for the issuance of a duplicate certificate. The application would have to be accompanied by a \$10 fee. One dollar of each fee would have to be deposited into the Notary Education and Training Fund.

Surety Bond/Oath/Fee

Within 90 days before applying for a notary public appointment, a person would have to file a proper surety bond with the county clerk of the county where he or she lived or expected to live, and take the prescribed oath. The bond would have to be in the sum of

\$25,000 and issued by a surety licensed to do business in the State. (Currently, a \$10,000 bond is required.) The county clerk could not accept the personal assets of an applicant as security for a surety bond. The bond would have to be conditioned upon indemnifying or reimbursing a person, financing agency, or governmental agency for monetary loss caused through the official misconduct of the notary public in the performance of a notarial act. The surety would be required to indemnify or reimburse only after a court had entered against the notary a judgment based on official misconduct. The aggregate liability of the surety could not exceed the sum of the bond. The surety on the bond could cancel it 60 days after notifying the notary, the Secretary, and the county clerk, of the cancellation. The surety would not be liable for a breach of a condition occurring after the effective date of the cancellation.

Each person who filed an oath and bond with a county clerk would have to pay a \$10 filing fee to the clerk. Upon receiving the fee, the clerk would have to give a bond and oath certificate of filing to the person. A charter county with a population over 2 million could impose by ordinance a fee for the county clerk's services different than the \$10 fee. Two dollars of each fee collected by a county clerk would have to be deposited into the Notary Education and Training Fund on a schedule determined by the Secretary.

Funds

The bill would create the Notary Education and Training Fund in the State Treasury, and require that money from certain fees be deposited in the Fund. (As noted above, this would include \$1 of the \$10 application fee, \$2 of the \$10 oath and bond filing fee, and \$1 of the \$10 fee for a duplicate certificate of appointment.) The State Treasurer could receive money or other assets from any source for deposit into the Fund; and would have to direct the investment of the Fund and credit to it interest and earnings from Fund investments. Up to \$85,000 could remain in the Fund at the close of each fiscal year and not lapse to the General Fund. Any amount in excess of \$85,000 would lapse to the General Fund.

The Secretary would have 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 notary responsibilities, election worker training, and election processes. The Secretary would have to consult with the president of the Michigan Association of County Clerks, or his or her designee, when approving grant applications.

The Secretary annually would have to file a report regarding the balance of the Fund at the time of the report and a detailed account of the expenditures in the preceding fiscal year. This report would have to be sent to the Speaker of the House of Representatives, the Majority Leader of the Senate, and the Minority Leaders of the House and Senate.

The bill also would create the Notary Fees Fund in the State Treasury. Except for money deposited in the Notary Education and Training Fund from the application fee and the fee for a duplicate certificate of appointment, an application fee, duplicate certificate of appointment fee, certification service charge, copying service charge, reimbursement costs, or administrative fine collected under the bill by the Secretary, would have to be deposited by the State Treasurer in the Notary Fees Fund. Money in this Fund would have to be appropriated to defray the costs incurred by the Secretary in administering the proposed Act. Any money remaining at the end of the fiscal year, in excess of \$85,000, would lapse to the General Fund.

Notarial Acts

The bill specifies that a notary public could perform notarial acts, including taking acknowledgments, administering oaths and affirmations, and witnessing or attesting to a signature.

In taking an acknowledgment or a verification upon oath or affirmation, a notary would have to determine, either from personal knowledge or from satisfactory evidence, that the person in the presence of the notary and making the acknowledgment or verification was the person whose signature was on the record. ("Acknowledgment" would mean the confirmation by a person in the presence of a notary that he or she was placing or had placed his or her signature on a record for the purpose stated in the record and, if the record were signed in a representative capacity, that he or she was placing or had placed his or her signature on the record with the proper authority and in the capacity of the person represented and identified in the record.

"Verification upon oath or affirmation" would mean the declaration by oath or affirmation that a statement was true.)

In witnessing or attesting to a signature, a notary would have to determine, either from personal knowledge or from satisfactory evidence, that the signature was that of the person in the presence of the notary and was the person named in the record. In all matters where a notary took a verification upon oath or affirmation, or witnessed or attested to a signature, the notary would have to require that the person sign the record being verified, witnessed, or attested in the presence of the notary. ("Signature" would mean a person's written or printed name or electronic signature, or the person's mark attached to or logically associated with a record and executed or adopted by the person with the intent to sign the record.)

A notary would have satisfactory evidence that a person was the person whose signature was on a record if he or she were personally known to the notary public; identified upon the oath or affirmation of a credible witness who was personally known by the notary and who personally knew the person; or identified on the basis of a current license, identification card, or record issued by a Federal or state government that contained the person's photograph and signature.

The fee charged by a notary for performing a notarial act could not be more than \$10 for any individual transaction or notarial act. (Currently, for notarizing an acknowledgment or jurat a notary may charge not more than \$2. A notary also is entitled to various fees, which do not exceed 50 cents, for copying and serving.) The bill would require a notary either to display a sign conspicuously or expressly to advise a person concerning the fee amount to be charged for a notarial act before the notary performed the act. Before the notary traveled in order to perform a notarial act, he or she and the client could agree concerning a separate travel fee to be charged by the notary.

The Secretary would have to prescribe the form that a notary public would use for a jurat, the taking of an acknowledgment, the administration of an oath or affirmation, the taking of a verification upon an oath or affirmation, the witnessing of or attesting to a signature, or any other act that a notary public was authorized to perform in the State.

A county clerk could collect a service charge fee of \$10 for certifying a notarial act of a notary.

On every record upon which he or she performed a notarial act, a notary would have to place his or her signature exactly as the name appeared on his or her certificate of appointment, and print, type, stamp, or otherwise imprint mechanically or electronically clearly and legibly and in a manner capable of photographic reproduction, the notary public's name and statements prescribed by the bill. Illegibility of the required statements would not affect the validity of the transaction or record that was notarized.

A notary could use a "plain English notary form" set forth in the bill. If properly executed, the notary form would be considered sufficient to accomplish its stated purpose under the law.

The bill would require a notary, before performing any notarial act, to obtain and read a copy of all the current State statutes regulating notarial acts.

A notary could refuse to perform a notarial act.

Prohibited Acts

The bill would prohibit a notary from certifying or notarizing that a record was an original or a true copy of another record; performing a notarial act upon any record he or she executed; notarizing his or her own signature; or taking his or her own deposition or affidavit. A notary could not perform any notarial act on a record that contained a blank space.

A notary could not claim to have powers, qualifications, rights, or privileges that the office of notary did not provide, including the power to counsel on immigration matters.

A notary could not, in any document, advertisement, stationery, letterhead, business card, or other comparable written material describing the role of the notary, literally translate from English into another language terms or titles, including notary public, notary, licensed, attorney, lawyer, or any other term implying the person was an attorney.

A notary who was not a licensed attorney and who advertised notarial services in a language other than English would have to include in the document, advertisement, stationery, letterhead, business card, or other comparable written material, prominently displayed in the same language, the fees for notarial acts and the statement: "I am not an attorney and have no authority to give advice on immigration or other legal matters." A notary could not use the term "notario publico" or any equivalent non-English term in any business card, advertisement, notice, or sign.

A notary could not perform any notarial act in connection with a transaction if the notary had a conflict of interest. In this context, "conflict of interest" would mean either or both of the following: the notary had a direct financial or beneficial interest, other than the notary fee, in the transaction; or the notary was named individually, as a grantor, grantee, mortgagor, mortgagee, trustor, trustee, beneficiary, vendor, vendee, lessor, or lessee or as a party in some other capacity to the transaction. For this purpose, a notary would have no direct financial or beneficial interest in a transaction in which he or she acted in the capacity of an agent, employee, insurer, attorney, escrow, or lender for a person having a direct financial or beneficial interest in the transaction.

A notary could not perform a notarial act for a spouse, domestic partner, descendant, or sibling including an in-law, step, or half-relative.

A notary who was a stockholder, director, officer, or employee of a bank or other corporation could take the acknowledgment of a party to a record executed to or by the corporation, or administer an oath to any other stockholder, director, officer, employee, or agent of the corporation; however, a notary could not take the acknowledgment of a record by or to a bank or other corporation of which he or she was a stockholder, director, officer, or employee, under circumstances in which the notary was named as a party to the record, either individually or as a representative of the bank or other corporation and the notary was individually a party to the record.

Records/Misconduct/Investigations

Upon receiving a written or electronic request from the Secretary, a notary public would have to give the Secretary a copy of the

notary records that related to the request; within 15 days after receiving the request, respond to the Secretary with information that related to the official acts performed by the notary; and permit the Secretary to inspect his or her notary public records, contracts, or other information that pertained to the official acts of a notary. When the Secretary received satisfactory evidence that a notary had failed to respond within 15 days, or another time period designated under the bill, to a request of the Secretary, the Secretary could notify the notary that his or her notary public commission was suspended indefinitely until he or she provided a satisfactory response to the request.

For the official misconduct of a notary, the notary and the sureties on the notary's surety bond would be liable in a civil action for the damages sustained by the persons injured. ("Official misconduct" would mean the exercise of power or the performance of a duty that was unauthorized, unlawful, abusive, negligent, reckless, or injurious; and/or the charging of a fee that exceeded the maximum amount authorized by law.) The employer of a notary also would be liable if the notary were acting within the actual or apparent scope of his or her employment, and the employer knew of and consented to or permitted the official misconduct. A notary and the notary's sureties would not be liable for the truth, form, or correctness of the contents of a record upon which the notary performed a notarial act.

The Secretary could investigate, or cause to be investigated by local authorities, the administration of notary public laws and report violations of those laws and rules to the Attorney General and/or prosecuting attorney.

On his or her own initiative or in response to a complaint, the Secretary could make a reasonable and necessary investigation within or outside of the State and gather evidence concerning a person who violated, allegedly violated, or was about to violate the proposed Act, a rule promulgated under it, or an order issued under the Act, or concerning whether a notary was in compliance with the Act or a rule or order.

A person could file a complaint against a notary with the Secretary. A complaint would have to contain the complainant's name, address, telephone number, and signature; the date the complaint was 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.

The Secretary could investigate compliance with the proposed Act, the rules promulgated under it, or an order issued under it, by examining a notary's records, contracts, and other pertinent records or information that related to the official acts of the notary.

Penalties

An applicant for an appointment, or a commissioned notary public, who had engaged in conduct prohibited by the bill, a rule promulgated under it, or an order issued under it, would be subject to one or more of the following penalties, in addition to any criminal penalties otherwise imposed:

- Suspension or revocation of his or her certificate of appointment.
- Denial of an application for appointment.
- A civil fine paid to the Department of State in an amount up to \$1,000.
- A requirement to take the affirmative action determined necessary by the Secretary, including payment of restitution to an injured person.
- A letter of censure.
- A requirement to reimburse the Secretary for the costs of the investigation.

The Secretary could impose one or more of the penalties when he or she was presented with satisfactory evidence that the applicant for an appointment or a commissioned notary public had done one or more of the following:

- Violated the proposed Act, a rule promulgated under it, or an order issued under it or assisted others in violation of the Act, a rule, or an order.
- Committed an act of official misconduct, dishonesty, fraud, deceit, or of any cause substantially relating to the duties or responsibilities of a notary or the character or public trust necessary to be a notary.
- Failed to perform his or her duties in accordance with the Act, a rule promulgated under it, or an order issued under it, or failed to discharge fully and faithfully a duty or responsibility required of a notary.
- Been found liable in court for damages in an action grounded in fraud, misrepresentation, or violation of the Act,

or 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.

- Charged a fee for a notarial act that was more than was allowed under the bill.
- Failed to complete the notary's acknowledgment at the time the notary signed or affixed his or her signature or seal to a record, or failed to administer an oath or affirmation as required by law.
- Engaged in the unauthorized practice of law as determined by a court.
- Ceased to maintain his or her residence or principal place of business in the State.
- Lacked adequate ability to read and write English.
- Hindered or refused a request by the Secretary for notary public records or papers.
- 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.
- Violated a condition of probation.
- Permitted an unlawful use of a notary public's seal.
- Failed to maintain good moral character as defined and determined under Public Act 38 of 1974 (i.e., the propensity on the part of the person to serve the public in the licensed area in a fair, honest, and open manner).

Before the Secretary imposed a penalty, the person affected would have to be given notice and an opportunity for a hearing.

If a person holding office as a notary were sentenced to a term of imprisonment in a State correctional facility or jail in this or any other state, or in a Federal correctional facility, that person's commission as a notary public would be revoked automatically on the day on which he or she began serving the sentence. If that person performed or attempted to perform a notarial act while imprisoned, he or she would not be eligible to receive a commission as a notary public for at least 10 years after completing his or her term of imprisonment.

Cancellation of a commission would be without prejudice to reapplication at any time. A person whose commission was revoked would be ineligible for the issuance of a new commission for at least five years.

If a fine imposed under the bill remained unpaid for more than 180 days, 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 tax refund warrant. The Secretary could bring an action in court to recover the amount of a civil fine.

If a notary public of the State were convicted of a felony or of a substantially corresponding violation of another state, the Secretary automatically would have to revoke the person's notary commission on the date that the felony conviction was entered. If a notary were convicted of two or more misdemeanors involving a violation of the proposed Act within a 12-month period while commissioned, or of three or more misdemeanors involving a violation of the Act within a five-year period regardless of being commissioned, the Secretary automatically would have to revoke the person's notary public commission on the date that the person's most recent misdemeanor conviction was entered.

A person found guilty of performing a notarial act after his or her commission was revoked would be guilty of a felony punishable by a fine of up to \$3,000, by imprisonment for up to five 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 for at least 10 years after completing his or her sentence for that crime, including any term of imprisonment, parole, or probation, and paying all fines, costs, and assessments. (Under the bill, "felony" would mean a violation of a penal law of the State, another state, or the United States for which the offender, upon conviction, could be punished by death or imprisonment for more than one year, or an offense expressly designated by law to be a felony.) If a person were convicted of a felony, the court would have to determine whether the person was a notary. If the person were a notary, the court would have to inform the Secretary of the conviction.

Except as otherwise provided in the bill or by law, a person who violated the proposed Act would be guilty of a misdemeanor punishable by a fine of up to \$5,000, imprisonment up to one year, or both.

An action concerning a fee charged for a notarial act would have to be filed in the district court in the place where the act occurred.

Injunctive Relief

Whenever it appeared to the Secretary that a person had engaged or was about to engage in an act or practice that constituted or would constitute a violation of the proposed Act, a rule promulgated under it, or an order issued under it, the Attorney General could petition a circuit court for injunctive relief. Upon a proper showing, the court could issue a permanent or temporary injunction or restraining order to enforce the provisions of the Act. A party to the action would have the right to appeal within 60 days from the date the order or judgment of the court was issued.

The court could order a person subject to an injunction or restraining order to reimburse the Secretary for the actual expenses incurred in the investigation related to the petition. The Secretary would have to refund any amount received as reimbursement should the injunction or restraining order later be dissolved by an appellate court.

Certificate: Presumptive Evidence

The bill specifies that, in the courts of the State, the certificate of a notary of official acts performed in the capacity of a notary, under the seal of office, would be presumptive evidence of the facts contained in the certificate, except that the certificate would not be evidence of a notice of nonacceptance or nonpayment in any case in which a defendant attached to his or her pleadings an affidavit denying that he or she had received that notice of nonacceptance or nonpayment. Notwithstanding this provision, a court could invalidate any document not notarized in compliance with the bill.

Other Provisions

A person, or the personal representative of a person who was deceased, who performed a notarial act while commissioned as a notary would have to maintain all the records of that notarial act for at least five years after the date of the act.

The Secretary could promulgate rules to implement the bill.

The bill would allow a notary to sign the name of a person whose physical characteristics limited his or her capacity to sign or make a mark on a record presented for notarization. The person would have to be in the physical presence of the notary, and direct the notary through oral, verbal, physical electronic, or mechanical means to sign the person's name. The notary would have to inscribe beneath the signature the following: "Signature affixed pursuant to section 33 of the Michigan notary public act."

Repealers

The bill would repeal the following:

- Chapter 14 of the Revised Statutes of 1846, which provides for the appointment and regulation of notaries public.
- Public Act 18 of 1903, which requires notaries to affix to each instrument signed notarially their commissioned name, the county of authorization, and the date of expiration of their commission.
- Public Act 18 of 1909, which places certain restrictions on notaries who are stockholders, directors, officers, or employees of banks or other corporations.
- Section 2564 of the Revised Judicature Act, which allows notaries to charge certain fees for various services.
- Executive Reorganization Order No. 1980-2, which transferred to the Department of State all powers, duties, and functions of the Governor with respect to notaries.

Legislative Analyst: George Towne

FISCAL IMPACT

The fee increases would generate approximately \$238,000 in additional State revenue and \$250,000 for local units of government. The amount of revenue in future years would decline due to the extended term of appointment under the bill.

With the exception of funding allocated to the Notary Education and Training Fund, State fees would be deposited in the Notary Fee Fund to defray the Secretary of State's administrative costs under the bill. Any balance in the Fund at the close of the fiscal year in excess of \$85,000 would lapse to the State General Fund.

The Notary Education and Training Fund would receive approximately \$68,000 of the filing

fees paid to county clerks and \$34,000 from the State filing fee.

There are no data to indicate how many offenders would be convicted of the proposed misdemeanor and felony offenses. An offender convicted of a misdemeanor for violating the proposed Act could receive probation, up to one year's incarceration in a local jail, and/or a fine of up to \$5,000. An offender convicted of a felony for performing notarial acts after his or her commission had been revoked could be sentenced to probation, up to five years' incarceration in a local or State facility, and/or a fine of up to \$3,000. Local units of government incur the costs of misdemeanor probation and incarceration in local facilities, which vary by county. The State is responsible for the cost of felony probation at an average annual cost of \$1,750, and the cost of incarceration in a State facility at an average annual cost of \$27,000. Public libraries would benefit from any additional penal fine revenue raised due to the proposed penalties.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.