FORMAL OPINION NO 2005-5

Fraudulent or Dishonest Conduct:
Unwitnessed and Telephonic Notarization

Facts:

A notary certificate provides that on a certain day an identified individual personally appeared before the notary and executed the instrument to which the notarial certificate is affixed or acknowledged execution of the same.

Question:

May Lawyer, who happens to be a notary, take notarial acknowledgments over the phone or insist that Lawyer’s secretary do so?

Conclusion:

No.

Discussion:

Oregon RPC 8.4(a)(3) makes it professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer’s fitness to practice law.” See also Oregon RPC 3.3(a)(3), which prohibits a lawyer from knowingly offering evidence that the lawyer knows to be false, and Oregon RPC 3.3(a)(5), which prohibits a lawyer from engaging in “illegal conduct.”

The above-described conduct would clearly violate Oregon RPC 8.4(a)(3) and would, if offered as evidence, violate Oregon RPC 3.3(a)(3) and (a)(5). Cf. In re Morin, 319 Or 547, 878 P2d 393 (1994); In re

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1 Notarial acts are governed by ORS chapter 194. Violation of a statute is “illegal” conduct. In re Hockett, 303 Or 150, 734 P2d 877 (1987).
Hawkins, 305 Or 319, 751 P2d 780 (1988); In re Kraus, 289 Or 661, 616 P2d 1173 (1980); In re Scott, 255 Or 77, 464 P2d 318 (1970).

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related topics, see The Ethical Oregon Lawyer § 8.4-3 (presentation of evidence), § 21.3-2(a) (prohibition against misleading conduct) (OSB Legal Pubs 2015).