

A close-up photograph of a wooden gavel with a black handle resting on a white surface. In the foreground, a red ink pad is open, and a circular notary seal with a wooden handle is placed on it. The seal features the text "NOTARY PUBLIC" around a central emblem. The background is softly blurred, showing more papers and the gavel's head.

BY DAVID M. MADDEN

Having a document acknowledged by a notary when it's executed can overcome a challenge to its authenticity at trial and ensure it will be admissible into evidence.

Acknowledged Estate Planning Documents Are Self-Authenticating Evidence

YOU REALLY SHOULD CONSIDER HAVING YOUR ESTATE PLANNING DOCUMENTS acknowledged by a notary when they're signed. Not *witnessed*, not *notarized*¹ – *acknowledged*.

Acknowledged documents are self-authenticating, which means they can be admitted into evidence at trial without the testimony of a witness with personal knowledge to verify that the document is what it claims to be. Acknowledgement of documents can help overcome obstacles to admitting them into evidence where the original parties and witnesses are deceased or otherwise unable or unwilling to testify.

What's an "acknowledgement"?

Acknowledgement and other "notarial acts" are governed by the Illinois Notary Public Act.² An

1. Although, technically, the term "notarized" encompasses all notarial acts, one of which is acknowledgement. 5 ILCS 312/1-104(b); *id.* at § 312/6-101(a).

2. *Id.* at § 312/1-101, *et seq.*



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“acknowledgement” is

a declaration by a person that the person has executed an instrument for the purposes stated therein and, if the instrument is executed in a representative capacity, that the person signed the instrument with proper authority and executed it as the act of the person or entity represented and identified therein.³

Only lawfully appointed notaries public may take acknowledgements and perform other notarial acts.⁴ A notary public’s taking of an acknowledgement must be evidenced by a certificate signed and dated by the notary.⁵

The simplest forms of certificate of acknowledgement are the statutory short forms. One short form is for acknowledgement by a person in a representative capacity, including a trustee.⁶

Language other than the statutory short form may be acceptable, if it is otherwise prescribed by Illinois law or sets forth the actions of the notary public (assuming the notary’s actions meet the requirements).⁷ You should make sure the form of acknowledgement adequately describes the individual whose signature is being acknowledged, the capacity in which that person signed the document, and the party on whose behalf the document was executed.

The notary’s duty in taking an acknowledgement is to determine, either from personal knowledge or “satisfactory evidence,” that the person in question is actually the person who signed the instrument.⁸ A notary has “satisfactory evidence” if that person is known to the notary, is identified by a credible witness known to the notary, or the person presents a valid governmental document containing his or her photo and signature⁹ (e.g., a driver’s license or passport).

A person must appear before a notary to make an acknowledgement.¹⁰ The statute does not explicitly require the person to sign the document in the notary’s presence.¹¹ Nonetheless, notaries must exercise caution, because they may be liable for damages or even criminal penalties for failing to properly verify an acknowledgement.¹² The Illinois Supreme Court has stated that “the notary public gives his or her personal seal and signature when completing a notarial act, and in so doing he or she assumes personal liability for the accuracy of his or her notarization.”¹³

Additionally, notaries are prohibited from 1) acknowledging instruments they are party to, 2) signing a form of acknowledgement in blank, or taking the acknowledgement of 3) a person who they know to have been adjudged mentally ill, 4) someone who is blind until they read the instrument to him or her, or 5) someone who does not understand English unless the document has been translated.¹⁴

The Uniform Recognition of Acknowledgments Act sets out conditions under which acknowledgements made in other states or foreign countries may be accepted in Illinois.¹⁵

Self-authenticating documents in general

At trial, acknowledged documents are self-authenticating and do not require the testimony of a witness to lay a foundation for admitting them into evidence. Understanding why that is so important requires a basic grasp of documentary evidence.

Generally, a document is admissible if it is (a) authentic, (b) relevant, (c) the original document or an acceptable substitute, and (d) not subject to exclusion as prejudicial, privileged, hearsay, or so on.¹⁶ Authentication is the essence of laying the foundation for admitting a document into evidence. Proving authenticity requires providing “evidence demonstrating that the document is what the party offering it claims it to be.”¹⁷

Documentary evidence is usually authenticated by the testimony of a witness with sufficient personal knowledge to verify that the document is what it appears to be.¹⁸

3. *Id.* at § 312/6-101(b).

4. *Id.* at § 312/6-103(a).

5. *Id.*

6. *Id.* at § 312/6-105(b).

7. *Id.* at § 312/6-103(b).

8. *Id.* at § 312/6-102(a).

9. *Id.* at § 312/6-102(d).

10. *Id.* at § 312/6-102(a).

11. See *Harris v. Vitale*, 2014 IL App (1st) 123514, ¶ 22 (considering that notary could properly notarize signature based upon identification documents, without actually witnessing the signing).

12. 5 ILCS 312/7-101; *id.* at § 312/7-102; *id.* at § 312/7-105.

13. *Vancura v. Katris*, 238 Ill. 2d 352, 380 (2010).

14. 5 ILCS 312/6-104(b)–(f).

15. 765 ILCS 30/1, *et seq.*

16. See Ill. Rs. Evid. 402, 403, 501, 801, 901, 1001.

17. *JPMorgan Chase Bank, N.A. v. E.-W. Logistics, L.L.C.*, 2014 IL App (1st) 121111, ¶ 92; Ill. R. Evid. 901.

18. *JPMorgan Chase Bank*, 2014 IL App (1st) 121111, ¶ 92.

TAKEAWAYS >>

- Because acknowledgement of documents can help overcome obstacles to admitting them into evidence where the original parties and witnesses to the documents are deceased or otherwise unable or unwilling to testify, practitioners should consider having their estate planning documents acknowledged by a notary when they are signed.

- Only lawfully appointed notaries public may take acknowledgements and perform other notarial acts. Language other than the statutory short form may be acceptable, if it is in a form otherwise prescribed by Illinois law, or sets forth the actions of the notary public and those actions are sufficient to meet the requirements of taking a proper acknowledgement.

- Only documents that have been “executed” (i.e., signed) can be acknowledged. Additionally, only “instruments” can be acknowledged. An instrument is “[a] written legal document that defines rights, duties, entitlements, or liabilities, such as a statute, contract, will, promissory note, or share certificate.”

YOU REALLY SHOULD CONSIDER HAVING YOUR ESTATE PLANNING DOCUMENTS ACKNOWLEDGED BY A NOTARY WHEN THEY'RE SIGNED. NOT WITNESSED, NOT NOTARIZED – ACKNOWLEDGED.

But suppose all the witnesses are dead? Some documents may be authenticated by other means, including self-authentication under Rule of Evidence 902.

Rule 902 of both the Illinois and Federal Rules of Evidence recognizes self-authenticating documents. The Illinois rule mirrors the federal rule in many respects.

Several types of documents are self-authenticating under both the Illinois and federal rules, including domestic public documents under seal, certified copies of public records, newspapers, and several others. Documents declared by statute to be presumptively or prima facie genuine are also self-authenticating,¹⁹ and many statutes outside of the rules of evidence contain standards for admitting certain types of documents, such as self-proving affidavits for wills.²⁰

Importantly for our purposes, both rules contemplate self-authentication of acknowledged documents. Illinois Rule 902(8) states:

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: ... (8) Acknowledged Documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.²¹

In other words, a document accompanied by a notarized certificate of acknowledgment satisfies the authentication requirement for admissibility into evidence.²² A witness' testimony is not required.

Importantly, *only* acknowledged documents – not documents that a notary verified upon oath or affirmation, or for which he or she witnessed or attested a signature – are deemed self-authenticated under Rule 902(8). Other types of notarized documents may be authenticated in specific circumstances under other statutes, but Rule 902(8) applies only and specifically to *acknowledged* documents.

The steps for admitting a self-authenticating document into evidence are:

1. Mark the document for identification.
2. Show the document to opposing counsel.
3. Provide a copy of the document to the judge.
4. Lay a foundation by identifying the

document and stating its relevance and the basis for the self-authentication (Ill. R. Evid. 902(8), notarized certificate of acknowledgement attached).

5. Offer the document into evidence.
6. Mark the document as an exhibit in evidence.
7. Request permission to show the exhibit to the jury.
8. Publish the exhibit to the jury.

While this is a mechanical process, the proponent of admitting the acknowledged document into evidence must be prepared to meet objections. First, authentication is not the only requirement for admitting a document into evidence. Even if authentic, a document can be excluded based on relevance, prejudice, hearsay, best evidence, privilege, or other reasons.²³

Additionally, the document may be attacked as being the result of “fraud or imposition,” such as forgery or duress. However, a notary's certificate of acknowledgment carries a strong presumption of validity, and the burden is on the party seeking to impeach the document to prove fraud or imposition by clear and convincing evidence.²⁴ Courts are reluctant to invalidate an acknowledgement, even where the notary himself repudiates it.²⁵ The trial court's ruling will not be disturbed unless it is against the manifest weight of evidence.²⁶

What's so special about acknowledgements?

Why do the Rules of Evidence allow acknowledged documents to be authenticated without the testimony of a witness? Notaries are public officers who take an oath to faithfully perform all notarial acts in accordance with the law. A notary's

ISBA RESOURCES >>

- ISBA Free CLE, *Practical Skills for Attorneys New to Estate Planning* (recorded May 20, 2016), <http://onlinecle.isba.org/store/seminar/seminar.php?seminar=60766>.
- Zachary J. Freeman, Thomas M. Staunton, and Arthur W. Friedman, *How to Avoid Estate Planning Malpractice Claims*, 103 Ill. B.J. 32 (Dec. 2015), <https://www.isba.org/ibj/2015/12/howavoidestateplanningmalpracticecl>.
- Helen W. Gunnarsson, *What Limits on Lawyer-Notaries?*, 92 Ill. B.J. 562 (Nov. 2004), <https://www.isba.org/ibj/2004/11/lawpulse/whatlimitsonlawyernotaries>.

19. Ill. R. Evid. 902(10).
20. 755 ILCS 5/6-4.
21. Ill. R. Evid. 902(8).
22. *In re Glenn*, 502 B.R. 516, 534 (Bankr. N.D. Ill. 2013) (applying Illinois law).
23. See Ill. Rs. Evid. 402, 403, 802, 1002, 501.
24. See, e.g., *Butler v. Encyclopedia Britannica, Inc.*, 41 F.3d 285, 294–95 (7th Cir. 1994) (applying Illinois law).
25. See, e.g., *Witt v. Panek*, 408 Ill. 328, 333 (1951) (notary later admitted that the person whose document he acknowledged had not actually appeared before him).
26. *Resolution Trust Corp. v. Hardisty*, 269 Ill. App. 3d 613, 616–17 (3d Dist. 1995).

function is to serve as a public witness. The notary gives his or her personal seal and signature when completing a notarial act, and in so doing assumes personal liability for the accuracy of the notarization.

In this way, the Notary Public Act codifies a long tradition of imposing burdens and liabilities on a notary. Additionally, parties act on the faith of the certificate of acknowledgement. Consequently, public policy, security of titles, and peace of society require these instruments be given full credit.

Limitations of self-authentication of acknowledged documents

Only documents that have been “executed” (i.e., signed) can be acknowledged.²⁷ Additionally, only “instruments” can be acknowledged.²⁸ An instrument is “[a] written legal document that defines rights, duties, entitlements, or liabilities, such as a statute, contract, will, promissory note, or share certificate.”²⁹

A document cannot be made self-authenticating by having it signed by a person who is not a party to it. A written instrument is presumed to be the written expression of the parties’ intentions.³⁰ The acknowledgement of a non-party’s signature is not proof that the signatures of the parties are also authentic, or that the written document embodies the intentions of the parties. The signatures of the parties must be authenticated (by acknowledgement or otherwise) to prove that the document is a genuine expression of the parties’ intentions.

Trust certifications do not solve the problem

A trust certification is a document signed by the current trustee of a trust certifying certain details of a trust instrument, such as the date of the execution of the instrument, the identities of the settlor and the currently-acting trustees, the powers of the trustees, and other information specified in the statute.³¹ The purpose of the statute is to protect persons who enter into transactions in reliance on the trust certification.

The statute does not provide that a trust certification has evidentiary value in any circumstance other than where a person’s reliance upon the trust certification itself is an issue in the case.

Conclusion

Authentication can be a major hurdle to admitting a key document into evidence, and may be insurmountable if there are no available witnesses with personal knowledge of the document.

If a document was properly acknowledged, however, admitting it into evidence may go from impossible to easy. Even if an instrument was not acknowledged, it may still be possible to authenticate a signature on it by other means such as nonexpert opinion that the signature is genuine, comparison by the judge, jury, or expert, or other means. Acknowledgement, however, can provide a straightforward path to authenticating a document when other means are costly or otherwise difficult.

The benefits of acknowledgement are

ACKNOWLEDGED DOCUMENTS ARE SELF-AUTHENTICATING, WHICH MEANS THEY CAN BE ADMITTED INTO EVIDENCE AT TRIAL WITHOUT THE TESTIMONY OF A WITNESS WITH PERSONAL KNOWLEDGE.

not limited to estate planning documents. Imagine any scenario where you might need to admit an instrument into evidence – trust agreements, commercial agreements, litigation settlement agreements, promissory notes, amendments and restatements of instruments, and so on. The attorney drafting any instrument should consider whether it should be acknowledged in anticipation of the possibility of future litigation. **EB**

27. 5 ILCS 312/6-101(b).

28. *Id.*

29. Black’s Law Dictionary (10th ed. 2014).

30. *Gillespie Community Unit School Dist. No. 7, Macoupin County v. Union Pacific R. Co.*, 2015 IL App (4th) 140877, ¶ 88 (“An agreement, when reduced to writing, must be presumed to speak the intention of the parties who signed it. It speaks for itself, and the intention with which it was executed must be determined from the language used.”).

31. 760 ILCS 5/8.5.

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