

NOTARIES PUBLIC

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(a) The Secretary of State shall appoint a convenient number of Notaries Public for the state who shall perform such duties as now are or may be prescribed by law. The qualifications of Notaries Public shall be prescribed by law.

(b) The terms of office of Notaries Public shall be not less than two years nor more than four years as provided by law.¹

I. Introduction

These words in the Texas Constitution of 1876 established the notary public as an officer of the state. The Texas Legislature has since prescribed the notary's duties, qualifications and terms of office as allowed by the Constitution.

The United States Supreme Court described the breadth and impact of the notary public's duties in Texas:

With the power to acknowledge instruments such as wills and deeds and leases and mortgages; to take out-of-court depositions; to administer oaths; and the discretion to refuse to perform any of the foregoing acts, notaries public in Texas are involved in countless matters of importance to the day-to-day functioning of state government. The Texas political community depends upon the notary public to insure that those persons executing documents are accurately identified,

to refuse to certify any identification that is false or uncertain, and to insist that oaths are properly and accurately administered. Land titles and property succession depend upon the care and integrity of the notary public, as well as the familiarity of the notary with the community, to verify the authenticity of the execution of the documents. . . .²

Despite this impact, few persons ever consider the importance of the office or the functions of a notary public or contemplate the degree to which American society relies upon the notary's honest performance of his or her responsibilities. Similarly, few consider the rules imposed upon those who hold a notary commission and the purpose for those rules and limitations. Instead, obtaining a notary's signature is often viewed as a chore with no real purpose.

Attorneys are frequent users of a notary's services and should understand the purpose for a notarial act. Yet how often is a "lowly" secretary told to get a commission, given no training or explanation from the attorney on the notary's duties, and told to "notarize" a document, perhaps even to execute a jurat or acknowledgment without actually witnessing the declarant's signature? Of course, few, if any, of these notaries understand the responsibility and potential liability they assume by accepting a commission and performing their official duties, particularly if they violate any of the laws applicable to notaries.

¹ Texas Const. Art. IV, § 26.

² *Bernal v. Fainter*, 467 U.S. 216, 224-25 (1984), quoting with approval, *Vargas v. Strake*, 710 F.2d 190, 194 (5th Cir. 1983), *reversed*, 467 U.S. 216 (1984).

The purpose of this article is fourfold - first, to explain the source of the notary commission and the applicable law in Texas; second, to educate attorneys on the duties of notaries; third, to explain the potential liabilities of notaries for failing to follow the applicable law; and fourth, to remind attorneys of their ethical obligations that relate to misconduct by notaries.

II. The Source of the Notary Commission and Applicable Law

A notary public is a constitutional officer of the state. The position is created by the Texas Constitution, and the notary obtains the commission through appointment by the Secretary of State pursuant to the Texas Government Code Chapter 406.

To be eligible for appointment as a notary public, an applicant must (1) be at least 18 years of age and a resident of Texas, and (2) not have been convicted of a felony or crime involving moral turpitude.³ The 18 years of age requirement cannot be avoided by a minor whose legal disabilities have been removed.⁴ The residency of Texas requirement does not require a notary to be a citizen of the United States.⁵ Finally, the statute does not specify which crimes involve moral turpitude, but courts have found moral turpitude to include lying to a police officer or an officer of the court, willfully attempting to evade or defeat an income tax, conspiring to defraud the United States, selling of a child, sexual assault of a child, making a false statement in a loan application, misdemeanor indecent exposure, misdemeanor assault by a man against a woman, and misdemeanor writing of NSF checks.⁶

An applicant for a notary commission must complete and sign the appropriate form issued by the Texas Secretary of State (currently Form 2301, available on the Internet at www.sos.state.tx.us/function/statforms/notary.html), pay the required filing fee (currently \$21.00), and provide the required \$10,000.00 bond. Upon qualification of the applicant, the Secretary of State will send a notice of appointment and the commission to the applicant.⁷

A notary commission is for a term of four years, and may be renewed an unlimited number of times upon submission of a new application. There is no limit to the number of notaries appointed by the Secretary of State, and notaries may be appointed at any time.⁸

The Secretary of State may reject an application for a commission, or suspend or revoke an existing notary commission, in a variety of instances, including final conviction for a crime involving moral turpitude, a false statement knowingly made in a notary application, final conviction for a violation of a law concerning the conduct of notaries public, imposition of a penalty for violation of a law prescribing the duties of a notary, and performing any notarial act when the person for whom the act is performed did not personally appear before the notary at the time.⁹ The Secretary of State has expanded this list to include, among other things, failing to administer the oath as required, collecting a fee in excess of the amount authorized, and failing to fully and faithfully discharge any duty or responsibility of a notary.¹⁰

³ Tex. Gov't Code § 406.004 (Vernon 1998).

⁴ Op. Tex. Att'y Gen. No. O-2918 (1940) and see Tex. Fam. Code § 31.006 (Vernon 1996).

⁵ In 1984, the U.S. Supreme Court held unconstitutional the Texas statute requiring a notary public be a resident citizen of the United States and of Texas. See *Bernal v. Fainter*, 467 U.S. 216. In response, the Texas Legislature amended the statute so that an applicant must be a resident of Texas but need not be a citizen of the United States.

⁶ *Lape v. State*, 893 S.W.2d 949 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd); *In the Matter of Humphreys*, 880 S.W.2d 402 (Tex.), cert. denied, 513 U.S. 964 (1994); *In the Matter of Birdwell*, 20 S.W.3d 685 (Tex. 2000); *In the Matter of Thacker*, 881 S.W.2d 307 (Tex. 1994); *In the Matter of G.M.P.*, 909

S.W.2d 198 (Tex. App.—Houston [14th Dist.] 1995, no writ); *Searcy v. State Bar of Texas*, 604 S.W.2d 256 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.); *Polk v. State*, 865 S.W.2d 627 (Tex. App.—Fort Worth 1993, pet. ref'd); *Hardeman v. State*, 868 S.W.2d 404 (Tex. App.—Austin 1993), pet. dismissed, 891 S.W.2d 960 (Tex. Crim. App. 1995); *Borden, Inc. v. Rios*, 850 S.W.2d 821 (Tex. App.—Corpus Christi 1993), set aside on settlement, 859 S.W.2d 70 (Tex. 1993). *C.f.*, *Duncan v. Board of Disciplinary Appeals*, 898 S.W.2d 759 (Tex. 1995) and *In the Matter of Lock*, No. 99-0976, slip op. (Tex., June 21, 2001) (misprison of felony and possession of a controlled substance are not crimes of moral turpitude).

⁷ Tex. Gov't Code §§ 406.005 - 406.008 and 406.010 (Vernon 1998).

⁸ Tex. Gov't Code §§ 406.001 - 406.002 and 406.011 (Vernon 1998).

⁹ Tex. Gov't Code § 406.009 (Vernon 1998).

¹⁰ 1 Tex. Admin. Code §§ 87.41 and 87.43.

II. Duties of Notaries

Upon receiving a commission, a notary has authority to:

- (1) take acknowledgments and proofs of written instruments;
- (2) protest instruments permitted by law to be protested;
- (3) administer oaths;
- (4) take depositions; and
- (5) certify copies of documents not recordable in the public records.¹¹

The notary's jurisdiction is statewide, as the former county jurisdictional limitation has been repealed.¹² However, a Texas notary does not have jurisdiction outside the state of Texas, and so may not undertake any official act outside the state. A purported official act of a Texas notary outside the notary's jurisdiction is void.¹³

A notary may take a deposition on written questions.¹⁴ As to oral depositions, the Texas Supreme Court has adopted Texas Rules of Civil Procedure 199.1(c) and 199.2(b)(3) providing that a party may cause an oral deposition to be recorded by other than stenographic means, including videotape. In that situation, a notary public would administer the oath to the witness. However, the Texas Government Code provides that "[e]xcept as

provided by Section 52.031 and by Section 20.001, Civil Practice and Remedies Code, all depositions conducted in this state must be recorded by a certified shorthand reporter, and based upon this statute, the Texas Attorney General has opined that notaries public may not take oral depositions."¹⁵ A potentially large exception to this prohibition is the Government Code's exemption of parties to the litigation at issue, the attorney of the party, or a full-time employee of a party or the party's attorney.¹⁶

Clearly, a notary may only execute acknowledgments if the witness personally appears before the notary.¹⁷ A witness' later admission of execution of the instrument does not allow a notary to certify that the notary acknowledged the witness' signature.¹⁸ A notary must also authenticate all official acts with his or her seal of office which must satisfy the statutory requirements, including requirements as to size, shape and content.¹⁹

A notary cannot, of course, give legal advice, and for that reason cannot prepare any documents, including preparing or even selecting the appropriate notarial certificate to be attached to any document.²⁰ A notary cannot issue identification cards, and cannot certify copies of documents that are

¹¹ Tex. Gov't Code § 406.016(a) (Vernon 1998).

¹² Tex. Gov't Code § 406.003 (Vernon 1998).

¹³ *Garza v. Serrato*, 699 S.W.2d 275, 278-80 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.); *Kumpe v. Gee*, 187 S.W.2d 932, 934, 935 (Tex. Civ. App.—Amarillo 1945, no writ); *Ward v. Valand*, 135 S.W.2d 770, 771 (Tex. Civ. App.—El Paso 1940, writ dismissed, judgment correct); see *Loden v. Carothers*, 85 S.W.2d 291, 293 (Tex. Civ. App.—Texarkana 1935, no writ) (notary is not authorized to perform his duties in any county other than that for which he was appointed, and fact that notary believed he was in county for which he was appointed did not add to his jurisdiction). *C.f.*, *Garza v. Serrato*, 699 S.W.2d at 282-83 (Tijerina, J., dissenting) suggesting that a Texas notary may act outside the state or even outside the country. Such an interpretation is unsound, however, given that a notary is a public official, and may act as a public official only upon compliance with the laws of the state or country in which the act is taken.

¹⁴ Tex. Civ. Prac. & Rem. Code § 20.001(a)(3) (Vernon 1997); Op. Tex. Att'y Gen. No. JM-110 (1983); Op. Tex. Att'y Gen. No. 93-110 at n.1 (1993).

¹⁵ Tex. Gov't Code § 52.021(f) (Vernon 1998). Section 52.031 allows someone other than a certified shorthand court reporter to report an oral deposition if a certified shorthand reporter is not available. Tex. Gov't Code § 52.031(b) (Vernon 1998). Section 20.001 applies only to depositions on written questions. Tex. Civ. Prac. & Rem. Code § 20.001(a). See Op. Tex. Att'y Gen. No. 93-110; Op. Tex. Att'y Gen. No. DM-308 (1994); Op. Att'y Gen. No. DM-339 (1995) (other than for statutory exceptions, only certified court reporter may take oral depositions).

¹⁶ Tex. Gov't Code § 52.033 (Vernon 1998); *Burr v. Shannon*, 593 S.W.2d 677, 678 (Tex. 1980).

¹⁷ Tex. Gov't Code § 406.009(a) and (d)(6); 1 Tex. Admin. Code § 87.41 and 87.43(a)(14); *United Services Automobile Association v. Ratterree*, 512 S.W.2d 30, 32-33 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.); *Charlton v. The Richard Gill Company*, 285 S.W.2d 801, 803 (Tex. Civ. App.—San Antonio 1955, no writ); *Wise v. Cain*, 212 S.W.2d 880, 882 (Tex. Civ. App.—Austin 1948, writ ref'd n.r.e.).

¹⁸ *Chester v. Breitling*, 32 S.W. 527, 528 (Tex. 1895) ("a casual admission, in the presence of a notary ... by a person who has signed a conveyance, that he had executed the deed, does not empower the officer to certify that he has acknowledged it. In order to call into exercise the authority of the officer to make the certificate, the grantor must appear before him for the purpose of acknowledging the instrument"); *Charlton v. The Richard Gill Company*, 285 S.W.2d at 803; *Daugherty v. McCalmont*, 41 S.W.2d 139, 143 (Tex. Civ. App.—Fort Worth 1931, no writ).

¹⁹ Tex. Gov't Code § 406.013 (Vernon 1998).

²⁰ Tex. Gov't Code § 406.016(d).

recordable, such as deeds, marriage licenses and birth certificates.²¹

Additionally, a notary must maintain a record book concerning all instruments authenticated. Entries in the record book are public information, and the notary must provide to any person upon request and upon payment of all fees, a certified copy of any record in the notary's office. Upon termination of his or her commission, including upon ending his or her residency in Texas, a notary must deliver the record book to the Clerk of the County in which the notary was commissioned.²²

A notary or his or her employer may charge a fee for all official acts performed, and all of those fees are set by statute. A notary may not charge any other or greater fees.²³ A notary must post a complete list of fees the notary may charge by law, as well as keep a fee book and enter in the book all fees charged for notarial services rendered.²⁴

As a public official, a notary cannot refuse to perform a duty imposed by law. Thus, a notary cannot refuse to perform an official act for persons who are not patrons of his or her employer so long, of course, as performance of the act would be proper. A notary may, however, perform his or her official duties at a time that is convenient to the notary and that is consistent with the other duties imposed upon the notary by his or her employer.²⁵

A person "who is a party to an instrument, no matter how small or nominal is his interest therein, cannot act as a Notary Public, with reference thereto."²⁶ Moreover, a person who has a financial interest in an instrument or the underlying transaction may not serve as a notary public in connection with the instrument. The financial interest required is a

direct pecuniary interest in the consideration of the instrument certified or in upholding the instrument - receipt of notary fees from a party to an instrument does not alone disqualify the notary public.²⁷

The specific situations where an interest would disqualify a notary are nowhere stated in detail. However, the Texas Legislature has specified two common situations where there is no such disqualification:

An employee of a corporation taking an acknowledgment or proof of a written instrument in which the corporation has an interest;

An officer of a corporation who is a shareholder in a corporation taking an acknowledgment or proof of an instrument in which the corporation has an interest unless the corporation has 1,000 or fewer shareholders and the officer owns more than one-tenth of one percent of the issued and outstanding stock.²⁸

IV. Liability of A Notary for Violation of His or Her Duties

As noted above, the Secretary of State has the authority to suspend or revoke a notary commission for a variety of reasons.²⁹

A notary may also be subject to civil liability for failing to comply with Texas law for acknowledgments. Texas law provides for a statutory cause of action as well as a common law cause of action based upon a negligence per se argument. Liability under these causes of action rests upon whether the notary followed the statute; proof of negligence is not required. Thus, a notary serves as a guarantor or insurer that his or her

²¹ Tex. Gov't Code § 406.016(a).

²² Tex. Civ. Prac. & Rem. Code § 121.012 (Vernon 1997); Tex. Gov't Code § 406.014 (Vernon Supp. 2000); Tex. Gov't Code §§ 406.020 and 406.022 (Vernon 1998).

²³ Tex. Gov't Code § 406.024 (Vernon 1998).

²⁴ Tex. Gov't Code §§ 603.006 and 603.008 (Vernon 1994).

²⁵ Op. Tex. Att'y Gen. No. O-471 (1939).

²⁶ *Morris v. Dunn*, 164 S.W.2d 562, 563 (Tex. Civ. App.—Fort Worth 1942, no writ); *Terrell v. Chambers*, 630 S.W.2d 800, 802 (Tex. App.—Tyler), writ ref'd n.r.e., 639 S.W.2d 451, 452 (Tex. 1982); *Creosoted Wood Block Paving Co. v. McKay*, 211 S.W. 822, 824 (Tex. Civ. App.—Dallas 1919, no writ).

²⁷ *Terrell v. Chambers*, 630 S.W.2d at 802; *Creosoted Wood Block Paving Co. v. McKay*, 211 S.W. at 824-25.

²⁸ Tex. Civ. Prac. & Rem. Code § 121.002 (Vernon 1997).

²⁹ See *supra* at nn. 9 and 10.

certificate is true.³⁰ An injured party may also bring a claim against the sureties on the notary's bond.³¹

A notary who charges an unauthorized fee, including a fee greater than that allowed by statute, is liable for four times the amount unlawfully demanded and received.³²

Finally, a notary who falsely signs an acknowledgment or certification may be subject to criminal prosecution.³³

V. An Attorney's Ethical Responsibility for a Notary's Misconduct

There are several provisions of the Texas Disciplinary Rules of Professional Conduct that give rise to the ethical responsibility of an attorney for actions of a notary public.

An attorney must make reasonable efforts to ensure that non-lawyers under his or her supervision act in a manner compatible with the professional obligations of the attorney. Supervising attorneys are subject to discipline for the conduct of a non-lawyer that would be a violation of the Disciplinary Rules if the attorney ordered, encouraged or permitted the conduct involved or, if having knowledge of misconduct by the non-lawyer, fails to take reasonable remedial action to avoid or mitigate the consequences of the person's misconduct.³⁴

Similarly, an attorney is forbidden from making a false statement of material fact or law to a tribunal or third person, from failing to disclose any fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act, and from failing to disclose a material fact to a third person

when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.³⁵

An attorney is prohibited from violating any of the Disciplinary Rules, knowingly assisting or inducing another to do so, or doing so through the acts of another, committing any crime that reflects adversely on the attorney's honesty, trustworthiness or fitness as an attorney in other respects, and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.³⁶

Thus, an attorney/notary's false signing of a document is a violation of these ethical rules. An attorney who instructs an employee notary to authenticate a signature made outside the notary's presence violates these rules. An attorney who allows a notary to authenticate a signature made outside the notary's presence, or who knows the notary does so yet makes no effort to avoid or mitigate the consequences of the notary's actions, violates these ethical rules. An attorney who knowingly submits to a court an affidavit that a notary has falsely stated was signed in the notary's presence violates these rules. An attorney who knowingly submits to a county clerk for filing a document that a notary has falsely stated was signed in the notary's presence violates these rules.

VI. Conclusion

"A notary's official acts as expressed by legislation are not insignificant formalities which may be smiled out of the law."³⁷ In fact, notaries public have an important role in the functioning of American society, and society's ability to rely upon a certification of a notary is crucial to the reliability of our judicial and economic systems. Yet too often notaries fail to follow the mandates of Texas law applicable to them in performing their official duties.

³⁰ Tex. Civ. Prac. & Rem. Code § 121.014 (Vernon 1997); *Standard Acc. Ins. Co. v. State*, 57 S.W.2d 191, 193-94 (Tex. Civ. App.—Fort Worth 1933, writ dismissed); *Brittain v. Monsur*, 195 S.W. 911, 913, 916-17 (Tex. Civ. App.—Beaumont 1917, writ dismissed).

³¹ *Standard Acc. Ins. Co. v. State*, 57 S.W.2d at 193-94; *Brittain v. Monsur*, 195 S.W. at 916; *Lawyers Surety Corp. v. Gulf Coast Inv. Corp.*, 410 S.W.2d 654, 655 (Tex. Civ. App.—Tyler), writ ref'd n.r.e., 416 S.W.2d 779 (Tex. 1967).

³² Tex. Gov't Code § 603.010 (Vernon 1994).

³³ *Wise v. Cain*, 212 S.W.2d at 882; see Tex. Penal Code §§ 32.21(b), 32.32(b) and 37.10 (Vernon Supp. 2001).

³⁴ Tex. Disc. R. Prof. Conduct 5.03 (Vernon 1998).

³⁵ Tex. Disc. R. Prof. Conduct 3.03 and 4.01 (Vernon 1998).

³⁶ Tex. Disc. R. Prof. Conduct 8.04(a) (Vernon 1998).

³⁷ *Charlton v. The Richard Gill Company*, 285 S.W.2d at 803.

Similarly, attorneys - of all classes and professions in the world - are "the most sacredly bound to uphold the laws."³⁸ Yet how often have attorneys failed to follow the Disciplinary Rules of Professional Conduct when supervising employee notaries or obtaining notarial acts on behalf of clients?

The obligations of a notary public are not particularly difficult to satisfy and the procedures are not particularly complicated. For notaries, upon whom we all rely for the faithful performance of their work, and for attorneys who supervise them or utilize their services, there is no better time than now to follow diligently the rules applicable to notaries public and meet our professional obligations.

³⁸ *Ex parte Wall*, 107 U.S. 265, 274 (1883), cited in *In the Matter of Paula Ann Lock*, No. 99-0976, slip op. (Tex., June 21, 2001) (Owen, J., dissenting).