

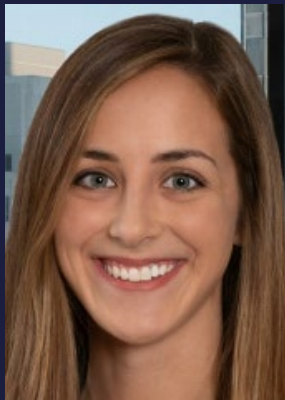
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Notarial Liability in Louisiana

December 4, 2020

- No, not my passion
- 2015 case: *Bouma Construction v. First Millennium Construction* (M. D. La.)

- *Rochereau v. Jones*, 29 La. Ann. 82, 86 (1877):
- “[The notary’s] capacity and his offense can not be asseverated. High and important functions are intrusted to notaries; they are invested with grave and extensive duties; they are charged with the solemn preparation of the authentic evidence of our transactions, of last wills, of those titles which pass from one generation to another. Their responsibility is as high as their trust, and a notary who officially certifies as true what he knows to be false violates his duty, commits a crime, forfeits his bond, binds himself, and binds his sureties.”
- Translation: notaries show up at important transactions

- Translation: notaries show up at important transactions
 - Wills
 - Donations
 - Authentic Acts
 - Transfers of Immovable Property
- La. Revised Statutes, Title 35 = entirely devoted to “Notaries Public and Commissioners”

- Resident of LA
- 18 years +
- Fluent and literate in English
- High school / GED
- Never convicted of felony (unless pardoned)

La. R.S. § 35:191

Attorneys

- Satisfy basic qualifications
- SOS determination of good moral character and “sober habits” (or judge)
- \$35 fee
- SOS application
- EXEMPTED from notarial examination

Non-Attorneys

- Satisfy basic qualifications
- SOS determination of good moral character and “sober habits” (or judge)
- \$35 fee
- SOS application
- NOTARIAL EXAMINATION

Notarial Exam Results

Exam Date	Passed	Taken	Percentage
04/06/2019	55	287	19%
12/15/2018	135	661	20%
10/06/2018	67	320	21%
06/02/2018	119	662	18%
12/02/2017	151	736	21%
06/03/2017	111	651	17%
12/03/2016	154	740	21%
06/04/2016	153	747	20%
12/05/2015	110	787	14%
06/06/2015	115	575	20%
12/06/2014	123	608	20%
06/07/2014	60	590	10%
12/07/2013	88	599	15%
06/01/2013	71	561	13%
12/01/2012	127	709	18%
06/02/2012	169	694	24%
12/03/2011	40	647	6%
06/04/2011	47	577	8%
12/04/2010	14	602	2%
07/10/2010	5	93	5%
06/05/2010	22	359	6%
01/23/2010	9	141	6%

Note: No limit on number of examination attempts

<https://www.sos.la.gov/NotaryAndCertifications/PublishedDocuments/Notary%20Exam%20Statistics%20for%2004-06-19%20exam.PDF>

Where are you a Notary?

Attorneys

- State-wide

Non-Attorneys

- Received commission *after* June 2005 (passed exam): State-wide
- Received commission *before* June 2005: parish-based
 - Residence (voter registration)
 - Maintains an office
 - BUT, regional reciprocity

La. R.S. § 35:191(P)

Can I notarize Louisiana documents in/from another state?

- Phone call: Louisiana-licensed attorney living in Texas, wants to notarize Louisiana documents
 - Statutory references to “notary in and for a parish”
 - “All notarial acts shall be made and executed at any place within the jurisdictional limits of the notary.”
- Handful of states permit in limited circumstances (KY, MT, ND, WY, VA)

Can an out-of-state notary notarize Louisiana documents in/from another state?

- Yes- provided attestation requirements of relevant physical jurisdiction are met
- La. R.S. § 35:513 ("Officers before whom proof or acknowledgement taken in other states")
- La. Stat. Ann. § 35:5, 6("Oaths, acts, and acknowledgments taken, made, or executed by or before any person purporting to be a notary public, duly appointed and duly qualified in any other state, territory of the United States, or the District of Columbia shall have the same force and effect without further proof of the signatures as if taken, made, or executed by or before a notary public in Louisiana.").
- Again—Jurisdiction is geographic

Do I have to be bonded / insured?

Attorneys

- No bond required
- *See also* 46 La. Admin. Code Pt XLVI, 113 (“An attorney is exempt from taking the notary exam and from the surety bond or personal surety bond requirements.”)

Non-Attorneys

- Yes - \$10,000 “faithful performance” bond OR \$10,000 E&O insurance
 - Must be filed with SOS
- Failure = automatic suspension of commission and loss of authority

Can I lose my notarial license?

Attorneys

- If disbarred or license suspended
- NOT otherwise subject to forfeiture
- Louisiana Supreme Court regulates

Non-Attorneys

- Authority can be revoked for numerous reasons, including dishonesty, “gross conduct or malfeasance in the exercise of his notarial powers,” etc.
- Court proceeding to be handled by DA or AG
- Court can also order restitution
- SOS fines and other punishments

Other notable provisions

- “A notary's signature is his seal. If he elects to have a seal to use when notarizing documents, he is not required to have a particular style of seal to give authenticity to his copies.”
- The name of the notary and the witnesses must be typed or printed out.
- Attorney-notaries must write out their La. bar roll # (clerk of court can reject instruments without this)
- Commission is for life

You should probably know:

- A Louisiana notary is required to “record all acts of sale, exchange, donation, and mortgage of immovable property passed before them”
 - Within 15 days
 - Orleans Parish = 48 hours
 - (unless otherwise expressly directed in writing by all parties to instrument)
- “All notaries who contravene the provisions of this Section shall be subject to a fine of two hundred dollars for each infraction of the same, to be recovered before any court of competent jurisdiction, one-half for the benefit of the informer, as well as all such damages as the parties may suffer thereby.”

You should probably know:

- Any act passed before a notary must state “the marital status of all parties to the act”, including whether single, married, or widowed.
 - BUT, “If this descriptive information is omitted from the instrument its validity to no extent is affected thereby.” *Taylor v. Turner*, 45 So. 2d 107, 109 (La. Ct. App. 2d 1950)
 - “R.S. 35:11 and 35:12, which provide that notaries shall insert the full names, marital statuses and addresses of all parties to their acts, are directory only. The failure of the notary to do so may subject him to penalty, but does not affect the validity of the mortgage.” *Am. Bank & Tr. Co. v. Michael*, 244 So. 2d 882, 884 (La. Ct. App. 1st 1971)
- Notarial acts must contain parties’ full names and permanent mailing addresses

You should probably know:

- Clerical error in a notarial act can be fixed with an affidavit of correction, but only by:
 - a. Original attesting notary
 - b. Notary who prepared the act
 - c. If original attesting or preparing notary is deceased or cannot be found, a Louisiana notary who has missing person's records containing sufficient information
- Be careful who you pick // Be careful what you notarize

- No express statement of notarial liability that is applicable to attorneys.
- However, the notarial bond statute suggests that bond is to secure the “faithful performance of all duties required by law toward all persons who may employ him in his official capacity as notary public.” La. R.S. § 35:71.
- Another statute assumes liability:
 - “Nothing contained in [bond provisions] shall in any way affect the liability of a notary for the failure to perform his duties, nor the liability of his surety for any neglect thereof.” La. R.S. § 35:198
- General preemptive statute also assumes liability

- La. R.S. § 35:200
 - 1 year from act/omission/neglect, or discovery of act; In all cases, within 3 years of act (except for fraud)
 - Peremptive
- Does not apply to attorneys, who remain governed by La. R.S. § 9:5605
 - But-- Peremptive statutes are basically identical

So why might you get sued?

- Notary fails to include marital status or to record instrument
- Notary oversees execution of instrument with defects
- Notary fails to properly confirm identity
- Notary certifies signature of absentee

Defective Instrument Cases

- *Dale v. Carriere*, 537 So. 2d 346, 346 (La. Ct. App. 4th 1988)
- The Notary (defendant) notarized a will that was brought to him. The will consisted of a pre-printed form containing standard will clauses and blanks to be filled in by the testator.
- The court in which the succession was opened refused to probate the will as it did not satisfy the requisites of Louisiana law as to proper testamentary form.
- Plaintiffs then filed suit against the notary alleging that he was negligent in his notarization of a last will and testament which was legally invalid in its form, causing plaintiffs to suffer a loss in the value of their inheritance.
- “The [Notary’s] duty was a purely clerical one, requiring only certification of the signature on the particular document. . . . There is no law in Louisiana which requires a notary to give inspection for legal flaws and guaranty validity of every document which he notarizes when he is hired only in his capacity of a notary and not as a drafter or guarantor of validity of such documents.”

Defective Instrument Cases

- *Fechtner v. Bice*, 964 So. 2d 1055 (La. Ct. App. 1st 2007)
- The Notary was called to the home of an elderly man to notarize his will. Upon arriving and being presented with the document to be notarized, the notary observed that it was handwritten and advised that a handwritten will did not need to be notarized. When a family member insisted the notary notarize the document anyway, he requested two witnesses and signed the will.
- Will was subsequently held invalid as to form.
- “In this instance, [the notary] neither asked for nor did he give an opinion as to the validity of the document he was asked to notarize. . . . [H]e was not required by law to inspect the document that he did not draft to verify or guarantee its validity. The assertion that [the notary] could have made the document a valid testament by adding an attestation clause wrongly presumes that [he] had a duty to guarantee that the document was valid in form. Hence, [the notary] cannot be held liable for the fact that the document was improperly drafted.

Rochereau v. Jones, 29 La. Ann. 82 (La. 1877)

- Notary validated mortgage and related promissory notes
- Notary then forged two identical promissory notes, certified them as associated with mortgage, and sold them to plaintiffs
- Plaintiffs sued not only notary, but also bond sureties
- Question: can plaintiffs pursue notarial bond even though notary had no “notarial relationship” with the plaintiffs (he was notary for original transaction participants only)?
- “[I]t was as a notary he forged the notes, as a notary that he forged the signature of the parties to the act, and that it was his signature as a notary that gave to those notes that form, that character, without which they could not have been converted into money.”
- Recognition of heightened standard of notarial office and broad-reaching consequences of notarial attestation.

- *Harz v. Gowland*, 52 So. 986 (La. 1910)
- Notary forged various promissory notes; notary also assured another party that notes were secured by a first-priority mortgage
- Notary did not answer, but question was whether notary's surety was liable
- "The 'paraph' of a notary is his official signature, and where he paraphs a forged note he acts as a notary, and not as an individual, and one deceived by this paraph has a cause of action against the surety on his bond. "
- "Paraphing the note is a notarial function, for the nondischarge or improper discharge of which the notary and his surety may be held liable to any one who may be thereby injured."

Collins v. Collins, 629 So.2d 1274 (La. Ct. App. 5th 1993)

- Plaintiff had purchased real estate with former wife in 1988
- Plaintiffs alleged that, in March 1989, now ex-wife appeared in notary's office "accompanied by someone purporting to be plaintiff, who forged his signature to an Act of Sale conveying the two Florida lots to purchaser."
- "Petitioner alleges that the notary violated his notarial obligations by notarizing the Act of Sale, while he knew or should have known that the person signing as Harvey Collins was not in fact Harvey Collins, and/or the notary should have requested identification from whomever signed as Harvey Collins."
- On Exception of no cause of action: "the law is clear that a notary is liable both for deliberate misfeasance in the course of his official duties, and for negligence in performing those duties"

Howcott v. Talen, 133 La. 845 (La. 1913)

- Plaintiff lost property or money as a result of scheme by several people to open fake successions and sell land belonging to others
- As part of scheme, fraudster brought person to notary with whom he had long pre-existing relationship; fraudster identified person and stated his identity, and notary requested no further proof
- “[I]t can hardly be expected that [a notary] will ordinarily require more than the reasonable identification of persons who come before him merely to acknowledge their signatures to instruments of any kind. He most assuredly is not obliged to examine the titles of the property which the instruments purport to affect or to verify the truth of the affidavits which the parties propose to sign. In fact, so long as he exercises the precaution of an ordinarily prudent business man in certifying to the identity of the persons who appear before him, it may be doubted whether he has any other function to discharge; and we are of opinion that such precaution was exercised by Dearing in the matters here complained of.”
- Still valid?

Levy v. Western Cas. & Surety, 43 So. 2d 291 (La. Ct. App. 2d 1949)

- Plaintiff loaned money in exchange for mortgage of certain property. However, actual party providing the mortgage and obtaining the loan was not owner of property, but was grandson of owner
- “Seymour introduced himself to the notary and produced cards from his billfold showing his height, weight, color of eyes and signature. He then introduced one of the ladies who accompanied him as his wife (she was in fact his wife) and the other as ‘Mrs. Genie Culpepper, his sister,’ who desired to mortgage her property and execute the note with him” – posing as Culpepper was a friend of bad grandson
- Question: was acceptance of introduction from one identified person sufficient?
 - No- “serious deviation from safe business practices.”

***Quealy v. Paine, Webber, Jackson & Curtis*, 475 So.2d 756 (La. 1985)**

- Plaintiff was owner of 1,500 shares of stock and noticed one day he was no longer receiving his dividends. Contacted corporation and learned his stock had purportedly been surrendered and transferred.
- Plaintiff then learned that stock had been sold by someone claiming to be plaintiff, through a notarized bill of sale, to a car dealer as part of the purchase of a car
- Notary knew the car dealer well, but also asked the imposter for identification, “but at trial in December of 1983 (some six years later) could not recall what type of identification was produced.”
- Court reiterates *Howcott* case as “enunciating the standard of care for a notary who acknowledges a signature.”
- “Ryan asked the imposter how he had obtained the stock and requested identification. While Ryan could not recall at trial exactly what type of identification the imposter produced, it should be noted that the trial took place six years after the bill of sale was notarized. Under the circumstances, we are **unable to say that the trial judge was clearly wrong** in finding that Ryan did not act unreasonably in this transaction. Clearly, Ryan met the standard of care for a notary as set forth in *Howcott*.”

Webb v. Pioneer Bank & Trust Co., 530 So.2d 115 (La. Ct. App. 2d 1988)

- Plaintiff began receiving loan payment notices. Upon conducting an investigation, plaintiff learned that her ex-husband had secretly obtained a \$40,000 loan in both spouses' names by forging plaintiff's signature.
- Bank had required signature of spouse for any significant loans, and a notary at the bank had attested to the signature's authenticity.
- "Parker could not recall whether Mrs. Webb's signature to the note and mortgage was affixed in his presence, although he was the notary." (1981)
- "As the notary, Parker was negligent in failing to exercise ordinary care in ascertaining the genuineness of the signature allegedly affixed in his presence."
- Suit not filed until 1985

Summers Bros. Inc. v. Brewer., 420 So.2d 197 (La. Ct. App. 1st 1982)

- Fraudster went to acquaintances with fabricated business opportunity—a lucrative industrial maintenance contract. Contract was notarized; in reliance on it, plaintiffs paid funds to fraudster to purchase corporate interest, loaned money to fraudster, purchased welding machines, and leased expensive equipment. Notary notarized signatures after the fact
- Court: Notary's certification absolutely was a "proximate cause" of plaintiffs' financial losses
- "A notary is responsible to **all persons** who have been defrauded of their money as a consequence of their reliance upon the genuineness of any document executed by the notary public while in the performance of his official duties."
- "Even if Mills did not know that the signatures on the contract were forgeries, he knew that by authenticating the document, as notary, he was telling the world that the parties had appeared before him and affixed their signatures in his presence. Thus, he committed fraud in that he purposely let third parties rely on a document purporting to be genuine but actually without validity as an authentic act. The "proof" of validity he supplied was misleading to all who relied on the contract."
- Constructive fraud

McGuire v. Kelly, 2012 WL 602366 (La. Ct. App. 1st 2012)

- 3 individuals had jointly purchased an expensive FL beach-house as an investment. After the purchase, one of the owners forged documentation transferring the house from the others to himself. He then did a cash-out refinance by taking a \$400k-higher new mortgage on the property.
- To obtain sale document, fraudster contacted attorney-notary and asked him to meet at local restaurant and bar. Fraudster was seated with others and then presented bill of sale to notary, who notarized notwithstanding that he had not actually seen other owners sign.
- Fraudster admitted deceiving notary
- “Voss, a notary, signed the acknowledgment clause, indicating that the plaintiffs personally appeared before him and acknowledged their signatures on the quitclaim deed. . . . Regardless of whether Voss was aware of Kelly's scheme and his forgery of the plaintiffs' signatures, Voss knew that his acknowledgment was false. . . . By executing the quitclaim deed and signing the acknowledgment clause, Voss' actions were a deliberate misrepresentation and violated his duties as a notary public.”

Absentee Implications

- Solidary liability -- *Summers Bros.* case (no) vs. *McGuire* (yes)
- Loss of insurance coverage – *McGuire* case
- Non-dischargeable?
- Ethical implications / disbarment?
- Change in law? (Remote Online Notarization Act, La. R.S. 35:621)

In Re Landry, 2005-1871 (La. 7/6/06), 934 So. 2d 694:

- A title attorney opened a succession for his client Walter Wallendorf's deceased wife as part of a refinancing he was handling for Wallendorf. Wallendorf told his attorney the decedent had no children, no property other than the home, and had died intestate. The attorney prepared and notarized an affidavit of death and heirship (signed by Wallendorf) based solely on this information.
- The attorney also had two secretaries in his office (who had never met the decedent) execute affidavits swearing that they were "well acquainted" with the decedent and knew that she had died intestate. The attorney notarized those affidavits and filed into the record along with a Petition for Possession. It was later determined that the information in the affidavits was incorrect and the JOP had to be set aside.
- ODC filed charges alleging violation of Rules 3.3(a)(1), 8.4(c), and 8.4(d).
- LASC found that the attorney had knowingly and intentionally filed a false affidavit into court records, warranting a baseline sanction of suspension.
- The court imposed a 6 month suspension, with all but the first 30 days deferred.

In Re Porter, 2005-1736 (La. 3/10/06), 930 So. 2d 875:

- An attorney filed a defamation suit on behalf of his clients (Mr. and Mrs. West) and included an affidavit signed by both clients and notarized by him attesting that the factual allegations in the petition were true.
- In fact, Mrs. West had not signed the affidavit. The attorney had watched Mr. West sign his wife's signature.
- ODC filed charges alleging violation of Rules 3.3(a), 4.1(a), 8.4(a), 8.4(c), and 8.4(d). He was also charged for misconduct unrelated to the affidavit (failing to respond to discovery or otherwise pursue the case, resulting in a dismissal of the case).
- The attorney admitted that the notarial act was improper, but argued that the verification was not legally material to the suit and contained no material facts. He also said that Mr. West signed with his wife's permission.
- The court ultimately imposed a one year suspension.

In Re Hollis, 2013-2568 (La. 3/14/14), 135 So. 3d 596:

- An attorney was retained to represent clients in a personal injury matter after an accident in June 2004. He notarized an informia pauperis affidavit purportedly in February 2005, then failed to file a petition until May 2006 (after the claim had prescribed).
- While the ODC was investigating charges relating to failure to pursue the claim, the attorney admitted he actually notarized the affidavit in August or September 2005, but backdated it so that it would not appear prescribed. He also testified that he notarized the affidavit out of the presence of the affiant, and he was not a registered notary in LA.
- The ODC alleged violations of Rules 3.3 and 8.4.
- The court, relying on *Porter*, imposed a suspension of one year and one day.

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