LOUISIANA BAR
JOURNAL
April / May 2019 Volume 66, Number 6

Think Before You Sign:

Notarial Liability in Louisiana

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Think Before You Sign:

Notarial Liability in Louisiana

By Ryan K. French

Bar associations and practitioners do a fine job of warning new lawyers about the consequences of practicing law — the stressful tediousness of billable hours, the increased likelihood of substance abuse and the ethical pitfalls, among other things. What new lawyers are left woefully unprepared for, however, is their newfound power to notarize. Not only is this notarial authority a source of significant responsibility, but, to the surprise of many lawyers, it is also a source of significant liability.

Attorney-Notary Authority

Louisiana attorneys are not automatically licensed as Louisiana notaries. But an attorney's bar admission *does* automatically exempt him or her from the notary public examination, the only substantive hurdle to a notarial commission.[1] Armed with a Louisiana bar admission, the only other things an attorney needs to do to become a licensed notary is to complete an "Application to Qualify," submit two oaths, submit a "Certificate of Good Standing" and pay $35 to the Louisiana Secretary of State's office.[2] Ironically, though excused from taking the formal notarial exam, an attorney-notary's statewide commission is far more expansive than the parish-based commission held by traditional notaries.[3]

As word of the attorney's notarial authority then spreads, friends and acquaintances — and sometimes people who are neither — suddenly begin to show themselves, papers in hand. Vehicle title certificates, professional certification applications and acts of donation appear from nowhere and in extraordinary numbers. If the attorney is feeling particularly loyal to a friend, he might even find himself sitting outside of a Bob Seger concert in another city, waiting for a certain concert patron to exit and execute a notarial act of correction.[4]

With respect to all of an attorney's professional and extracurricular notarial activities, he or she remains bound to "perform all the duties incumbent upon [him or her] as Notary Public."[5] Perhaps the most obvious notarial duty is the obligation to properly administer oaths and certify sworn statements.[6] A lesser known duty is the obligation to record any notarized act of sale, exchange, donation or mortgage of immovable property in the relevant parish records within 15 days unless excused in writing.[7] It is also notaries to whom the law exclusively entrusts the authority to pass an authentic act,[8] validate a donation[9] or substantiate certain wills.[10] In each of these contexts, the presence of a notary is meant "to ensure the validity of a signature on a document and that the person whose name appears thereon is the person who actually signed the document."[11]

Despite this most basic function of the notary public, notarization is often perceived to be a separate, stand-alone formality that can be satisfied at any time. Before or after obtaining all of the relevant signatures, a well-intentioned party will often present a document to an attorney for "independent notarization." While in the words of one court, "[s]uch a procedure would defeat the entire purpose of the [notarization] requirement,"[12] attorneys are often pressured to simply endorse the already-signed document for everyone's convenience. In the vast majority of cases, the signatures are ultimately authentic, no one is inconvenienced, and the attorney becomes a little more convinced of the meaninglessness of notarial acts. Every once in a while, however, something different happens.

Notary Liability in Louisiana

Though it imposes various registration, bonding and other requirements, the Louisiana notary statute does not itself create a general cause of action against notaries public.[13] It, nonetheless, presupposes that a notary is liable "for the failure to perform his duties" by specifying that bonding does not affect a notary's liability for such failures.[14] Elsewhere, the notary statute provides prescriptive and peremptive periods for any action for damages "occasioned by [a] notary public in the exercise of the functions of a notary public."[15]

Filling the void left by the notarial statute, the Louisiana Supreme Court has articulated a "standard of care for a notary:"

> [S]o long as [a notary] 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.[16]

In light of the existence of a distinct legal standard and the pervasiveness of notarial acts, there are surprisingly few published judicial decisions considering the liability of a notary. What makes the absence of case law even more surprising is the willingness of courts, when given the chance, to hold notaries liable for failing to perform their duties. Generally speaking, these notarial negligence cases fall into two categories — (1) "imposter cases," in which a signatory is present, although the signatory is not who he claims to be; and (2) "absent-signor cases," in which the signatory is not physically present when the document is notarized.

Imposter Cases: Negligence Liability

With respect to notarial liability in an imposter case, the Louisiana 5th Circuit's decision in *Collins v. Collins*[17] is illustrative. In *Collins*, the plaintiff alleged that his ex-wife had appeared at the notary's office with a man purporting to be the plaintiff; that the notary failed to confirm his identity; that the man forged the plaintiff's name on an act of sale; and that the plaintiff thereby lost property in which he had an interest.[18] Construing the "prudent notary" standard, the *Collins* court first explained, "[A] notary is liable both for deliberate misfeasance in the course of his official duties and for negligence in performing those duties."[19] Under this standard, the court then held a notary could certainly be liable for failing to confirm the identity of a signatory.[20]

In contrast to *Collins*, there are two decisions (*Howcott* and *Quealy*)[21] declining to hold a notary liable for notarizing a false signature. Like *Collins*, both of those decisions involved an "imposter"

who physically appeared before the notary.[22] In both of these decisions, however, the imposter was introduced and vouched for by someone with whom the relevant notary had a significant pre-existing relationship.[23] Where a notary is less familiar with someone, though, the notary's reliance upon an introduction has been found to be a "serious deviation from safe business practices" and, therefore, negligent.[24]

Another noteworthy decision is the Louisiana 2nd Circuit's opinion in *Webb v. Pioneer Bank & Trust Co*.[25] Indeed, the *Webb* court considered the liability of a notary in the circumstances arguably most likely to face a busy attorney — while a notarized signature was later shown to be forged, the notary simply could not remember the specific facts surrounding the transaction.[26] The notary's inability to offer an explanation (some five years after the transaction) was fatal; faced with only a forged signature, the court had to presume that the notary was negligent in certifying its authenticity.[27]

Absent-Signor Cases: Fraud Liability

While it is one thing to fail to verify the identity of a signor that is physically present, it is an entirely different thing to notarize the signature of someone who was never seen. This distinction, it turns out, is the difference between a finding of negligence and a finding of fraud.

Squarely before the Louisiana 1st Circuit in *Summers Bros., Inc. v. Brewer* (1982) was an attorney's "independent notarization," or the certification of a signature that was not physically witnessed by the attorney-notary.[28] The notarized, forged document then served as the basis for various commitments of money and equipment, ultimately costing the aggrieved party more than $10,000.[29] Emphasizing the deception inherent in the notarization of an absent party's signature, the court stated:

> Even if [the attorney-notary] 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.[30]

The 1st Circuit reaffirmed this reasoning in *McGuire v. Kelly*, which also concerned an attorney's notarization of an absent party's signature.[31] Like the *Summers* court before it, the *McGuire* court determined that to notarize an absent party's signature is tantamount to falsely representing that a party personally appeared, presented identification and inscribed a signature.[32] In other words, the *McGuire* court explained, such a notarization is the definition of *fraud*:

> Regardless of whether [the attorney-notary] was aware of Kelly's scheme and his forgery of the plaintiffs' signatures, [the attorney-notary] knew that his acknowledgment was false . . . . Furthermore, [the attorney-notary] knew that the plaintiffs did not appear before him and acknowledge their signatures on the deed, nor did he require that they do so . . . . [By] signing the acknowledgment clause, [the attorney-notary]'s actions were a deliberate misrepresentation.[33]

Put another way, an attorney who notarizes a signature he or she did not witness commits fraud, *even if the signature is authentic*.

Consequences of Notarial Malfeasance

The consequences of notarizing an illegitimate signature can be severe. The most obvious consequence, of course, is the potential liability for resulting damages. Where an aggrieved party can adequately demonstrate its reliance upon an illegitimate notarization, courts have not hesitated to attribute all resulting damages and expenses to the notary.[34]

Notarial malfeasance has the additional, unique consequence of exposing the notary to liability to anyone who might come to rely upon the tainted document. As the title notary *public* might suggest, the very function of a notary is

to "purposely let third parties rely on a document."[35] The improper discharge of notarial duties, therefore, permits the notary "to be held liable to *anyone* who may be thereby injured."[36]

For those who face fraud liability, the consequences of notarial misconduct are even more severe. In some cases, the mutual misrepresentations of the notary and the party submitting the false signature — even though the notary was not necessarily aware of the forgery — can constitute concerted action sufficient to make the notary solidarily liable for all resulting damages.[37]

Perhaps more practically damning is the effect of a fraud finding upon an attorney-notary's insurance coverage. Because many malpractice insurance policies exclude coverage for claims arising out of fraudulent or deceptive acts, an attorney sued over a notarial act could conceivably have no source of indemnity. Indeed, this is precisely what happened in *McGuire*, where the Louisiana 1st Circuit determined that the professional liability insurer owed no coverage to the attorney-notary who notarized the signature of an absent party.[38] From here, it is not difficult to argue that notarial malfeasance justifies piercing the corporate veil of the attorney-notary's law firm[39] and even creates a non-dischargeable debt.[40]

As if the legal consequences of notarial malfeasance were not enough, such conduct is also ripe for professional discipline. In fact, the notary statute expressly contemplates that attorney-notaries will at all times remain subject to "the authority of the Louisiana Supreme Court to regulate the practice of law."[41] In turn, Rule 8.4 of the Louisiana Rules of Professional Conduct makes it professional misconduct for an attorney to "engage in conduct involving dishonest, fraud, deceit or misrepresentation."

By definition, mere negligence in the course of notarial work should not constitute a violation of the Rules of Professional Conduct. If the legal analysis applied in *Summers* and *McGuire* is any indication, however, the notarization of an absent party's signature is not merely negligence. Given the sole purpose of notarial attestation, such an "independent notarization" certainly seems to be misrepresentative, dishonest and deceptive. For precisely these reasons, the Louisiana Supreme Court has ordered a range of disciplinary actions in response to similar conduct.[42]

Conclusion

Like many articles, this one was inspired by real events and a very real lawsuit. Despite the shortage of litigation on the topic, the severity with which the law has punished careless notarial conduct is startling. To those attorneys who continue to serve as notaries, the Louisiana Supreme Court's 141-year-old statement in *Rochereau v. Jones* remains both remarkably relevant and the best summary of the responsibilities:

> High and important functions are entrusted to notaries; they are invested with grave and extensive duties . . . . 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.[43]

FOOTNOTES

1. *See,* La. R.S. 35:191(C)(3)(c).
2. *See generally,* La. R.S. 35:191.
3. *See,* La. R.S. 35:191(A), (F)-(O).
4. Yes, this happened.
5. *See id*.
6. La. R.S. 35:2, 35:3.
7. La. R.S. 35:199 (48 hours in Orleans Parish). The same statutory provision establishes a $200 penalty and a cause of action in favor of all parties to the instrument.
8. La. Civ.C. art. 1833.
9. La. Civ.C. art. 1541.
10. La. Civ.C. art. 1577.
11. *See,* Zamjahn v. Zamjahn, 02-871 (La. App. 5 Cir. 1/28/03), 839 So.2d 309, 315.
12. *Id*.
13. *See,* La. R.S. 35:1 *et seq*.
14. *See,* La. R.S. 35:198(A).
15. La. R.S. 35:201.
16. Howcott v. Talen, 63 So. 376, 379 (La. 1913); Quealy v. Paine, Webber, Jackson & Curtis, Inc., 475 So.2d 756, 761 (La. 1985) (quoting Howcott).
17. 629 So.2d 1274 (La. App. 5 Cir. 1993), *writ denied*, 635 So.2d 1110 (La. 1994).
18. *Id*. at 1276.
19. *Id*.
20. *Id*. at 1277.
21. Howcott v. Talen, 63 So. 376, 379 (La. 1913); Quealy v. Paine, Webber, Jackson & Curtis, Inc., 464 So.2d 930, 938 (La. App. 4 Cir. 1985), *aff'd in relevant part, revd in part on other grounds*, 475 So.2d 756 (La. 1985).
22. Quealy, 464 So.2d at 938; Howcott, 63 So. 376 at 379.
23. Quealy, 464 So.2d at 938; Howcott, 63 So. 376 at 379.
24. Levy v. W. Cas. & Sur. Co., 43 So.2d 291, 294 (La. App. 2 Cir.1949).
25. 530 So.2d 115, 118 (La. App. 2 Cir. 1988).
26. *Id*. at 117.
27. *Id*. at 118.
28. 420 So.2d 197, 201 (La. App. 1 Cir. 1982).
29. *Id*. at 203.
30. *Id*. at 204.
31. 2010-0562, 2012 WL 602366 (La. App. 1 Cir. 1/30/12).
32. *Id*. at *11-12.
33. *Id*. at *12.
34. *See, e.g.*, Summers Bros. v. Brewer, 420 So.2d 197, 204 (La. App. 1 Cir. 1982).
35. *Id*. at 204.
36. Harz v. Gowland, 52 So. 986, 987 (La. 1910) (emphasis added); *see also,* Summers, 420 So.2d at 204 ("A notary is responsible to all persons . . . .").
37. McGuire, 2010-0562, 2012 WL 602366 at *12.
38. *Id*. at *13-14.
39. *See,* Riggins v. Dixie Shoring Co., 590 So.2d 1164, 1168 (La. 1991).
40. *See,* 11 U.S.C. § 523(a)(6).
41. *See,* La. R.S. 35:604.
42. *See, e.g.*, In re Hollis, 2013-2568 (La. 3/14/14), 135 So.3d 596, 599 (ordering attorney discipline based, in part, on "notarizing [an] affidavit outside of the presence of the affiant"); In re Porter, 2005-1736 (La. 3/10/06), 930 So.2d 875, 876-77; In re Landry, 2005-1871 (La. 7/6/06), 934 So.2d 694, 699.
43. Rochereau v. Jones, 29 La. Ann. 82, 86 (La. 1877).

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