

NOTARY LAW & ETHICS: AVOIDING LIABILITY BY EXERCISING REASONABLE CARE & AVOIDING THE UNAUTHORIZED PRACTICE OF LAW

By: Michael Closen, BS, MA, JD; Professor of Law Emeritus, John Marshall Law School; Former Illinois Notary Public; Present Florida Notary Public; Notary Consultant, Educator & Expert Witness; Author, **PROFESSOR CLOSEN'S NOTARY BEST PRACTICES (2018)**

Abbreviation key for citations to authority:

- Texas Government Code, Chapter 406 = TGC + Section[s]
- Texas Civil Practice & Remedies Code, Chapter 121 = TCPRC + Section[s]
- Texas Administrative Code, Chapter 87 = TAC + Section[s]
- PROFESSOR CLOSEN'S NOTARY BEST PRACTICES (2018) = Closen + page[s]
- VAN ALSTYNE'S NOTARY PUBLIC ENCYCLOPEDIA (2001) = Van Alstyne + page[s]
- American Society of Notaries, TEXAS NOTARY HANDBOOK (2018) = ASN + page[s]
- National Notary Association, TEXAS NOTARY PRIMER (2018) = NNA + page[s]

I. AVOIDING LIABILITY BY EXERCISING REASONABLE CARE

A. A notary will have full personal liability for

1. a faulty notarization or other fault in performing official functions
2. that causes financial injury
3. to the document signer, a party affected by the notarized document, a party who relies upon the faulty notarization, or some other party, and

4. is caused by negligent performance by the notary [and intentional misconduct such as fraud, theft, and overcharging of fees will cause the notary to be liable – but will not be the focus of this presentation].

About the general rule of notary liability for negligence, see TCPRC, Section 121.014; ASN, 29; NNA, 4, 17, 57; Van Alstyne, 205-211; Closen, 362.

B. Reasonable care is the notary's protection against liability for negligence or notary malpractice.

See NNA, 17; Van Alstyne, 340-341; Closen, 312-314.

1. Otherwise, the law would seem to require a notary to perform perfectly.
2. Reasonable care is due diligence, ordinary carefulness, or caution and prudence.

3. Therefore, even if the notary performs a faulty notarial act that causes injury to someone, the notary will not be liable if the notary has exercised reasonable care.

See ASN, 30; Closen, 313.

4. Reasonable care will protect against possible administrative, civil, and criminal liability.

See Closen, 314-318.

C. Best practice steps that demonstrate and document reasonable care.

1. Know and abide by notary statutes and regulations. Take your duties seriously.

See ASN, 30; NNA, 17; Closen, 312.

2. Obtain notary bond [\$10,000 bond is required – TGC, Section 406.010] and perhaps liability insurance.

See NNA, 4-5; ASN, 29; Closen, 301, 318-319.

3. Know and follow procedures for performing notarizations. Do it by the book.

** The notarial process is a ceremony-long process. So, if you have a concern about the signer or the document at any time before concluding the ceremony, confront the issue, and either resolve it or refuse to complete the notarization.*

See TAC, Section 87.42(e) [“A notary public should refuse a request for notarial services only after careful deliberation.”].

** Require appearance of the document signer [remote electronic notarization].*

See TGC, Section 406.009(d)(5); TAC, Sections 87.31(14) & 87.40(a); ASN, 59; NNA, 8; Closen, 125-134; Van Alstyne, 307-308.

** If you charge fees, deal with fees first and obtain payment prior to performing the notarial act. Issue an itemized receipt and journalize itemized fees.*

See TGC, Section 406.024; TAC, Section 87.31(9); Van Alstyne, 113-115; Closen, 439.

** Identify the signer. Journalize.*

See TCPRC, Section 121.005; TAC, Sections 87.31(18) & 87.40(b); ASN, 60; NNA, 9-12; Van Alstyne, 154-171; Closen, 137-154.

** Peruse the document to be notarized [without reading it in full].*

See ASN, 59; NNA, 17.

** Assess the signer's mental competence. Journalize it.*

See TAC, Section 87.42(a)(3); NNA, 8-9; Van Alstyne, 46-49; Closen, 179-192.

** Assess the signer's willingness. Journalize it.*

See TAC, Section 87.42(a)(1); NNA, 8; Van Alstyne, 458-463; Closen, 195-203.

** Notary administers oral oath or affirmation to signer [if required]. Journalize.*

See TAC, Section 87.31(8); NNA, 29-30; Van Alstyne, 288-291; Closen, 205- 217.

** Observe the signing or acknowledgment of the document to be notarized, and obtain the present signature of the signer in the notary journal.*

See Van Alstyne, 373-382; Closen, 158-165, 257-258.

** Be sure the notary journal entry is complete.*

See TAC, Sections 87.31(19) & 87.40(d).

** Complete the notarial certificate. Notary signs the certificate and affixes the seal.*

See TCPRC, Section 121.004(b); TAC, Sections 87.31(11), 87.40(c) & 87.41; NNA, 43-48; Van Alstyne, 230-238; Closen, 79-104, 110-112.

** Proofread both the notarial certificate and journal entry.*

See Closen, 96, 262-263.

** Preserve and protect the notary seal and journal from unauthorized use.*

See TAC, Sections 87.31(22) & 87.54(a); NNA, 41, 48; Van Alstyne, 362-366; Closen, 115, 265-268.

4. Be savvy and be aware of high-risk notarial settings.

See Closen, 305-312.

- * Principal is not personally known to notary.*
- * Principal is in a hurry and wants to hurry the notarial process and/or asks the notary to take shortcuts in the notarial procedure.*
- * Principal presents multiple documents for notarization.*

- * Document[s] to be notarized is of high financial value.*
- * Principal is elderly, ill, or in a nursing home, hospital, or hospice.*
- * Principal is accompanied by someone who will benefit from the notarized document.*

5. Journalize. Journalize. Journalize all official acts.

See NNA, 38-42; Van Alstyne, 185-194; Closen, 233-274.

** Texas notaries are required to prepare records or journals of the notarization of instruments, but are not prohibited from journaling all official acts.*

See TGC, Sections 121.012 & 406.014;

** Record all details. Fill all spaces in the journal. Use additional lines/fields if necessary. Record something about signer to help remember this specific notarization. The journal is the notary's best friend.*

** Record refusal to notarize.*

See Closen, 261-262.

** The journal is the notary's opportunity to build a written record to document reasonable care.*

See ASN, 30; Van Alstyne, 261-266.

** If there is a lawsuit or disciplinary inquiry, ALL journal entries will be seen [not simply the one entry for the suit or complaint involved].*

** Proofread journal entry before concluding the notarial ceremony and make necessary additions and changes.*

See Closen, 96.

II. AVOIDING THE UNAUTHORIZED PRACTICE OF LAW [UPL]

A. UPL violates sound public policy and is unlawful and criminal.

1. Non-lawyers are not fully qualified by education and experience to practice law.

See Closen, 408-409.

2. Non-lawyers not bound by official code of ethics in their representation of clients.

3. Non-lawyers not bound by official court rules to protect legal clients.

4. Non-lawyers not covered by legal malpractice insurance to protect clients.

See Closen, 409.

5. TGC, Section 406.016(d). “A notary public not licensed to practice law in this state may not give legal advice or accept fees for legal advice.”

See also TGC, Section 406.017. See ASN, 50; NNA, 53; Closen, 411-413; Van Alstyne, 440-443.

6. UPL by a non-attorney notary or misrepresentation that the non-attorney notary is a lawyer is a Class A misdemeanor and a second conviction for such an offense is a felony of the third degree.

TGC, Section 406.017(d) & (e).

7. In addition, the unauthorized practice of law or implying or misrepresenting that the non-attorney notary is a lawyer constitutes a ground for revocation of the notary commission and a deceptive trade practice.

TGC, Sections 406.009(d)(2) & 406.017(f); TAC, Section 87.31(3) & (6).

B. What constitutes UPL.

1. Representation of another person, such as in a court, agency, or arbitration [with or without fee or compensation].

“A person commits an offense if the person is a notary public and the person solicits or accepts compensation to prepare documents for or otherwise represent the interest of another in a judicial or administrative proceeding, including a proceeding relating to immigration to the United States, United States citizenship, or related matters ... [or] solicits or accepts compensation to obtain relief of any kind on behalf of another from any officer, agency, or employee of this state or the United States ...”

TGC, Section 406.017(a)(2),(3). See also, TAC, Section 87.31(12).

2. Claiming to be a licensed attorney, or creating such an appearance.

“A person commits an offense if the person is a notary public and the person states or implies that the person is an attorney licensed to practice law in this state ...”

TGC, Section 406.017(a)(1).

“The use of false or misleading advertising of either an oral or written nature, whereby the notary public has represented or indicated that he or she has duties, rights, powers, or privileges that are not possessed by law” is a ground for revocation of the notary’s commission.

TAC, Section 87.31(13). See Closen, 409-410.

3. Providing legal advice, consultation, opinion, or preparation of legal documents [with or without fee or compensation].

See TGC, Sections 406.016(d) & 406.017(a)(2); TAC, Section 87.31(6); Closen, 413-415.

C. Concern about the terms “notario” and “notario publico” and about immigration matters.

“A person commits an offense if the person is a notary public and the person uses the phrase ‘notario’ or ‘notario publico’ to advertise the services of a notary public, whether by signs, pamphlets, stationery, or other written communication or by radio or television ...” TGC, Section 406.017(a)(4).

“Use of the phrase ‘notario’ or ‘notario publico’ in connection with advertising or offering the services of a notary public” is a ground to revoke the notary’s commission. TAC, Section 87.31(3).

“The advertising or holding out in any manner that the notary public is an immigration specialist, immigration consultant, or any other title or description reflecting an expertise in immigration matters” is a ground to revoke the notary’s commission. TAC, Section 87.31(12).

See NNA, 53-54; Closen, 411.

D. Concern about use of non-English advertising

“A person commits an offense if the person is a notary public and the person advertises the services of a notary public in a language other than English, whether by signs, pamphlets, stationery or other written communication or by radio or television, if the person does not post or otherwise include with the advertisement a notice that complies with subsection (b).” TGC, Section 406.017(a)(5).

“The notice required by Subsection (a)(5) must state that the notary public is not an attorney and must be in English and in the language of the advertisement and in letters of a conspicuous size. If the advertisement is by radio or television, the statement may be modified, but must include substantially the same message. The notice must include the fees that a notary public may charge and the following statement: ‘I AM NOT AN ATTORNEY LICENSED TO PRACTICE LAW IN TEXAS AND MAY NOT GIVE LEGAL ADVICE OR ACCEPT FEES FOR LEGAL ADVICE.’” TGC, Section 406.017(b).

See NNA, 53; Closen, 411.

E. Concern about selection of the form of notarization/notarial certificate.

In some other parts of the country, there is some disagreement about this issue.

See NNA, 45-46; Closen, 417-418; Van Alstyne, 367-370, 442.

A notary public may not perform acts which constitute the practice of law or prepare, draft, select, or give advice concerning legal documents. Thus, in Texas, notaries should neither designate the type of notarial act to be performed, nor select the notarial certificate to be used.

This prohibition is one of the reasons why the Texas notary statute provides: “When the commission is issued, the secretary of state shall supply the notary public with: ... (3) sample forms for an acknowledgment, jurat, and verification and for the administering of an oath, protest, and deposition ... “ TGC, Section 406.008(b)

When a principal presents a document for notarization that does not contain a notarial certificate and the principal does not know what type of notarial act should be performed, a notary can then show the sample forms to a principal and allow the principal to either select the form to be used, consult with an attorney of some other party about the selection of the form to be used, or delay the notarization until such time as the principal provides a certificate form or is able to select from among the samples.

See Closen, 418.

If the situation arises in which the notary is presented with a document that does not have a notarial certificate attached, and if the notary shows sample forms to the principal from which a type of certificate is chosen by the principal, the notary should note this procedure in the journal entry.

See Closen, 245-246.

F. Special risks for notary-professionals in law-related fields.

Notaries who are accountants, bankers, financial planners, health care professionals, notary signing agents, paralegals, real estate and mortgage brokers, stock brokers, tax form preparers, and the like are qualified to provide advice about and to prepare documents in their fields. However, they especially run the risk of crossing the gray line between appropriate activities in their professions and UPL, or at least of being accused of doing so.

See Closen, 416-417.

Note: Such notary-professionals [and lawyers as well] should avoid conflicts of interest and not notarize documents they have prepared for, or about which they have advised, their own clients. This is a somewhat controversial point. Notaries must be and must remain impartial governmental officers.

See NNA, Notary Public Code of Professional Responsibility (1998), Standard II-A-2; NNA, Model Notary Act (2010), Section 5-5(a)(2), (4); Van Alstyne, 22-23; Closen, 293-294, 295-296, 298-299, 417.

“[A] failure to fully and faithfully discharge any of the duties or responsibilities required of a notary public” is a basis upon which the Secretary of State may revoke a notary’s commission or take other disciplinary action against a notary.

TAC, Sections 87.30 & 87.31(5).

G. Steps to take to avoid UPL.

1. Avoid deceptive advertising, especially non-English advertising.
2. Advise clients that you are not an attorney [post a sign, or publish such a disclaimer in conjunction with the posting of the notary fee schedule].
3. Post/publish a notarial fee schedule, if fees will be charged [modest fees, less than a lawyer would charge].

See Closen, 438-439.

4. Agree upon the fee, if any, for each notarization in advance of the notarial ceremony. Provide an itemized receipt to the principal and itemize the fee in the notary journal entry.

See Closen, 439, 441-443.

5. Do not fully read documents to be notarized.

See Closen, 311, 415-416.

6. Do not provide advice/opinions about format/content of documents [do not volunteer comments about the document to be notarized or the underlying transaction, and do not answer questions about either of those matters].

7. If principals do not provide notarial certificate forms with their documents to be notarized, notaries may provide sample certificate forms from which principals may select the type of notarization to be performed.

See Closen, 418.

8. Do not make any changes or additions to the document to be notarized [the notary should write only in the notarial certificate and in the notary journal].

9. Do not review/draft/consult about documents in the notary's field of law-related expertise and notarize those same documents.

10. Refer clients to attorneys for legal advice.

11. Keep and preserve a notary journal, and record start/end time for notarial ceremonies in notary journal entries [a brief time, less than the length of time needed to provide legal advice and consultation].

See Closen, 245-246, 252-253.

III. Further Reading

A. NNA, Notary Public Code of Professional Responsibility (1998)
[2019 revision forthcoming].

B. NNA, Model Notary Act (2010).

C. Commissioners on Uniform Laws, Revised Uniform Law on Notarial Acts (2010).

D. NNA, Model Electronic Notarization Act (2017).