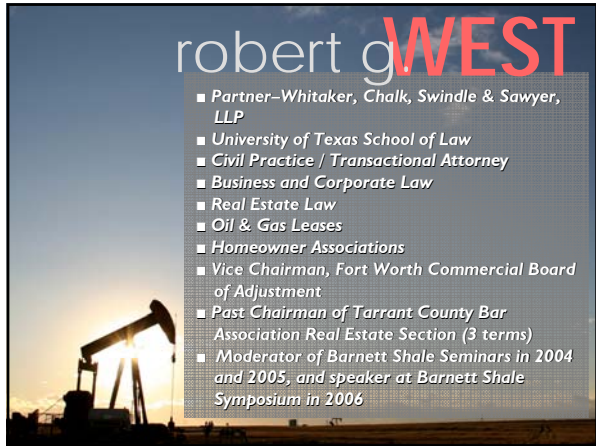


**NOTARY LAW:  
ETHICAL ISSUES IN  
DRAFTING, SIGNING  
AND NOTARIZING  
DOCUMENTS**

*by Bob West*



**robert g WEST**

- Partner—Whitaker, Chalk, Swindle & Sawyer, LLP
- University of Texas School of Law
- Civil Practice / Transactional Attorney
- Business and Corporate Law
- Real Estate Law
- Oil & Gas Leases
- Homeowner Associations
- Vice Chairman, Fort Worth Commercial Board of Adjustment
- Past Chairman of Tarrant County Bar Association Real Estate Section (3 terms)
- Moderator of Barnett Shale Seminars in 2004 and 2005, and speaker at Barnett Shale Symposium in 2006

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**whitaker CHALK**

- Originated in 1978
- 31 Attorneys, including 4 of counsel
- 21 staff, of which 5 are paralegals
- Commercial Litigation, including insurance defense
- Intellectual Property (trademarks, copyrights, patents)
- Arbitration / Mediation
- Oil & Gas
- Real Estate
- Wills, Probate, Trusts, Tax
- Employment Law
- Family Law
- Franchise Law

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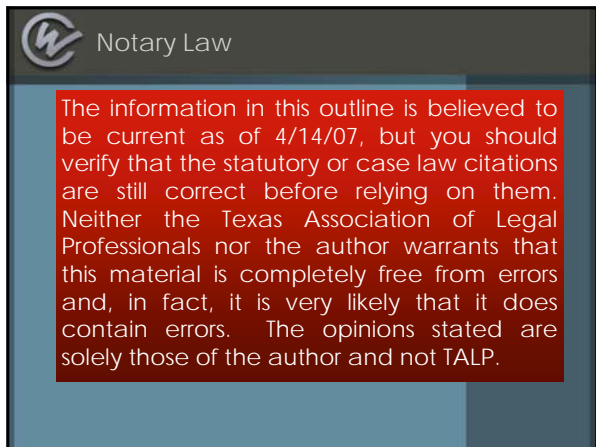
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**Notary Law**

The information in this outline is believed to be current as of 4/14/07, but you should verify that the statutory or case law citations are still correct before relying on them. Neither the Texas Association of Legal Professionals nor the author warrants that this material is completely free from errors and, in fact, it is very likely that it does contain errors. The opinions stated are solely those of the author and not TALP.

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# Drafting Documents

## KEY ETHICAL ISSUES

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### Notary Law – Key Ethical Issues

#### *Texas Disciplinary Rules of Professional Conduct*

- o Rules have been in effect since January 1, 1990.
- o Rules are found in the paperback edition of Texas Rules of Court -- State, starting at page 477 of the 2005 edition.

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### Notary Law – Key Ethical Issues

#### *Confidential Information*

- o Rule 1.05 generally prohibits a lawyer from revealing information relating to representation of a client unless the client consents after consultation
- o Exceptions:
  - when the lawyer reasonably believes it necessary to prevent the client from a criminal act
  - when it is necessary to establish a claim or defense involving the lawyer in a criminal or civil or disciplinary proceeding

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Notary Law – Key Ethical Issues

**“Confidential Information” includes:**

- o “Privileged information” (within the scope of the lawyer-client privilege)
- o “Unprivileged client information” (all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client)
- o Rule 1.05(a)

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Notary Law – Key Ethical Issues

**Conflict Of Interest: General Rules**

- o A lawyer shall not represent a person if the representation of that person will be directly adverse to the interests of another client. (Rule 1.06)
- o A lawyer may represent a client in circumstances otherwise prohibited by the general rule if: (1) the lawyer reasonably believes the representation of each client will not be materially affected; and (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any. (Rule 1.06(c)) This is called the “standard of informed consent.”

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Notary Law – Key Ethical Issues

**Conflict Of Interest: Prohibited Transactions**

“A lawyer shall not enter into a business transaction with a client unless: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed in a manner which can be reasonably understood by the client; (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and (3) the client consents in writing thereto.” (Rule 1.08(a))

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Notary Law – Key Ethical Issues

**Conflict Of Interest: Prohibited Transactions**

- o Rule 1.08 does not apply to "standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others." (Rule 1.08(j))
- o This Conflict of Interest Rule is different from prior rules in that the new rule adds the test that the transaction must be "fair and reasonable to the client" and the requirement that the client's consent be in writing.

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Notary Law – Key Ethical Issues

**Dealing With Non-Clients**

Truthfulness in Statements to Others

- o "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail 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." (Rule 4.01).
- o Comment 1 to Rule 4.1 recognizes that "Whether a particular statement should be regarded as one of material fact can depend on the circumstances."

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Notary Law – Key Ethical Issues

**Dealing With Non-Clients**

Communication with One Represented by Counsel

- o "In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." (Rule 4.02(a))
- o Comment to Rule 4.02 explains that this prohibition is directed at efforts to circumvent the lawyer-client relationship

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## Notary Law – Key Ethical Issues

### Dealing With Unrepresented Persons

- o "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding." (Rule 4.03).

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## Signing & Notarizing Documents

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## Notary Law – Document Procedures

### Basic Procedures

#### Notary Book and Seal

Q: Must a notary keep a record book?

A: Yes. Section 406.014, Texas Government Code.

However, a notary's failure to keep the required record book or failure to enter information in the book does not affect the validity of the instrument notarized.

*Martin v. Bane*, 450 S.W.2d 142 (Tex.Civ.App. 1969).

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## Notary Law – Document Procedures

### Basic Procedures

#### Notary Book and Seal

*Q: Must the record book be signed by the person who is being notarized?*

A: No. The current law (since 9/1/89) does not require the person's signature in the record book. Even though not required, it is still good practice to get the signature.

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## Notary Law – Document Procedures

### Basic Procedures

#### Notary Book and Seal

*Q: What happens to the notary's record book when... ?*

A: If a notary resigns, is removed or dies, then the record books and public papers are to be obtained by the county clerk and retained as official public records. Tex.Gov't Code § 406.022.

A notary who moves from the address shown on the notary commission is required to notify the Secretary of State within 10 days after the change of address. Tex.Gov't Code § 406.019.

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## Notary Law – Document Procedures

### Basic Procedures

#### Notary Book and Seal

*Q: Must you always use a seal, or can the information on the seal be written or typed?*

A: Always use a proper seal. A "proper" seal must satisfy the requirements of Section 406.013 of the Texas Government Code. The seal must clearly show, when embossed, stamped or printed on a document, the words "Notary Public, State of Texas" around a star of five points, the notary's name, and the date the notary's commission expires.

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## Notary Law – Document Procedures

### Basic Procedures

#### Required Identification

There are three alternatives for identifying the person:

- (1) notary's personal knowledge of the person;
- (2) identification of the person by an identification card issued by a government agency (driver's license, passport, etc.); or
- (3) introduction of the person to the notary by the declaration, under oath, of a credible witness; if this is used then the record book must show the name and residence of the person introducing the signer. See Tex. Gov't Code § 406.014(a)(5); Tex. Civ. Prac. & Rem. Code § 121.001; Tex. Att'y Gen. Letter Opinion 92-62 (1992).

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## Notary Law – Document Procedures

### PRACTICE POINTER:

Many notaries (including title company escrow officers) make a photocopy of the signer's driver's license or other identification for their file.

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## Notary Law – Document Procedures

### Basic Procedures

#### Required Identification

- o If an identification card is relied upon, it must be "a current identification card or other document issued by the federal government or any state government that contains the photograph and signature of the acknowledging person."
- o If the acknowledging person is introduced to the notary by a credible witness, the credible witness must be personally known to the notary. Tex.Civ.Prac. & Rem. Code § 121.005.

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### “Long” Form

The State of \_\_\_\_\_,  
County of \_\_\_\_\_,

Before me \_\_\_\_\_ (here insert the name and character of the officer) on this day personally appeared \_\_\_\_\_, known to me (or proved to me on the oath of \_\_\_\_\_ or through \_\_\_\_\_ (description of identity card or other document)) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this \_\_\_ day of \_\_\_\_\_, A.D., 200\_\_.

[SEAL]

\_\_\_\_\_  
Notary Public, State of \_\_\_\_\_

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### PRACTICE POINTER:

How do you decide whether to use the “long form” or the “short form” acknowledgment certificate? They are interchangeable so use whichever you prefer.

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### Steps Required for Deeds and Similar Documents

- o Deeds are not required to be notarized -- a deed is valid and enforceable as between the parties to that deed even if it is not notarized or filed of record. A deed may not be filed of record, however, unless it is notarized or otherwise “proved” according to law (Tex. Property Code §12.001).

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## Notary Law – Document Procedures

### Steps Required for Deeds and Similar Documents

The procedure for acknowledging a deed or other written instrument is set forth in Section 121.004 of the Texas Civil Practice & Remedies Code:

- (1) The grantor or person who executed the instrument must appear before a notary or other authorized officer (like a court clerk or justice of the peace) and must state that he executed the instrument for the purposes and consideration expressed in it.
- (2) The notary or officer then shall:
  - Make a certificate of the acknowledgment;
  - Sign the certificate; and
  - Seal the certificate with the seal of office.

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## Notary Law – Document Procedures

- A defective acknowledgment does not invalidate an instrument since it is still effective between the parties. *Haile v. Holtzclaw*, 414 S.W.2d 916 (Tex. 1967).
- Courts tend to be lenient in reviewing questionable acknowledgments. See *Sheldon v. Farinacci*, 535 S.W.2d 938 (Tex.Civ.App.--San Antonio 1976, no writ).
- However, an instrument without a valid acknowledgment does not constitute constructive notice even though it is recorded. *Reserve Petroleum Company v. Hutcheson*, 254 S.W.2d 802 (Tex.Civ.App.--Amarillo 1953, writ ref'd n.r.e.); but see *In Re Casbeer*, 793 F.2d 1436 (5th Cir. 1986).

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## Notary Law – Document Procedures

### What Steps Are Required For Notarizing Wills?

The procedure for signing, witnessing, and notarizing a will should comply not only with the notary and acknowledgment statutes, but also with the requirements of the Texas Probate Code. Wills prepared in a law office should always be prepared with a "self-proving affidavit" for the notary to sign under Section 59 of the Texas Probate Code.

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## Notary Law – Document Procedures

### What Steps Are Required For Notarizing Wills?

The language of the self-proving affidavit describes the actions that are required, and should be followed in the execution of the will:

1. The testator and at least two witnesses should all appear together in the same room as the notary.
2. The testator then signs the Will and the self-proving affidavit, with the witnesses watching.
3. The witnesses then sign the Will and the self-proving affidavit, and fill in their address, with the testator watching, and with the witnesses watching each other.
4. The notary takes the testimony of the testator and the witnesses.

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## Notary Law – Document Procedures

### What Fees May Be Charged For Notary Service?

The maximum fees are set by statute in Section 406.024 of the Texas Government Code:

- o The maximum fee for taking an acknowledgment of a deed or other written instrument is \$6 for the first signature and \$1 for each additional signature.
- o The maximum fee for administering an oath or affirmation with certificate and seal is \$6 for one signature.
- o If fees are charged, the amount of the fee must be shown in a fee book.

Tex. Gov't Code § 603.006.

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## Frequent Questions

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## Notary Law – Frequent Questions

*Q: May you notarize a signature that you did not personally see placed on the document?*

A: Maybe; it depends on the certificate form being signed by the notary.

- Yes, on an **acknowledgment** ("This instrument was acknowledged before me on \_\_\_ by \_\_\_")
- No, on a **jurat** ("Sworn to and subscribed before me on \_\_\_\_\_") or a **verification** ("\_\_\_ personally appeared before me, and being first duly sworn declared that he/she signed this application ....")

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## Notary Law – Frequent Questions

### **PRACTICE POINTER:**

The notary's job is only to use the certificate form submitted to the notary. The notary should **not** decide which certificate form to use; that is the job of the person preparing the document or an attorney. Such a decision by the notary may constitute the unauthorized practice of law.

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## Notary Law – Frequent Questions

*Q: May you take an acknowledgment over the telephone?*

A: No. Section 121.004(a) of the Texas Civil Practice & Remedies Code states, "The grantor or person who executed the instrument must appear before an officer..."

"A notary can no more perform by telephone those notarial acts which require a personal appearance than a dentist can pull teeth by telephone."

*Charlton v. Richard Gill Co., 285 S.W.2d 801, 803 (Tex. Civ. App. - San Antonio 1955, no writ)*

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## Notary Law – Frequent Questions

**Q: May you notarize the signature of your spouse?**

A: There is no statute that answers these questions. The courts have given general guidelines:

- "The act of taking and certifying acknowledgments cannot be performed by a notary public financially or beneficially interested in the transaction," *Creosoted Wood Block Paving Co. v. McKay*, 211 S.W. 822 (Tex.Civ.App.--Dallas 1919).
- "One 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." *Morris v. Dunn*, 164 S.W.2d 562 (Tex.Civ.App.--Fort Worth 1942).

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## Notary Law – Frequent Questions

**Q: May an employee or officer of a corporation notarize a document for the corporation?**

A: Yes for employee. Maybe for officer. An employee of a corporation is not disqualified because of his employment from notarizing an instrument in which the corporation has an interest. An officer is disqualified if 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. Tex. Civ. Prac. & Rem. Code § 121.003.

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## Notary Law – Frequent Questions

**Q: May you notarize the signature of a minor or obviously incapacitated person?**

A: Yes, but...

- The notary is not required to make a determination of age or legal capacity or other subjective factors, unless expressly called for in the language of the certificate form signed by the notary. *Shelton v. Swift Motors, Inc.*, 674 S.W.2d 337, 342 (Tex.Civ.App.--San Antonio 1984, writ ref'd n.r.e).

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### Notary Law – Frequent Questions

**Q:** *May an attorney notarize a document that the attorney prepared?*

**A:** Unclear.

An argument might be made that the attorney who prepared the document is financially interested in the transaction since the attorney is (hopefully) paid for the preparation of the instrument and is also financially interested in the instrument to some extent since the attorney may be subject to a malpractice claim if the instrument is not valid.

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### Notary Law – Frequent Questions

**Q:** *May you notarize transactions out of your own county or state?*

**A:** **Yes**, for out of county, but **No** for out of state. The notary is a state public official and has no authority to act beyond the state limits—the same is true for the Governor!

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### Notary Law – Frequent Questions

**Q:** *May you make changes in an instrument that you are notarizing?*

**A:** A notary may not make a change in the substantive text of the instrument, but may correct only the notary certificate "as circumstances may require" to reflect true facts. Tex. Civ. Prac. & Rem. Code §121.006(a).

*Always use the correct current date; you should never "backdate" your notary certificate, even if the document that is notarized bears a different date.*

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## Notary Law – Frequent Questions

*Q: What if the space provided on the form is not sufficient to write all the information required?*

A: Do the best you can with what is provided.

If the maker of the form does not like the way its looks, then they can redo their form!

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## Notary Law – Frequent Questions

*Q: What liability risks does a notary face?*

A: Action for Damages. "A person injured by the failure, refusal, or neglect of an officer to comply with a provision of this chapter has a cause of action against the officer to recover the damages resulting from the failure, refusal, or neglect of the officer." Tex. Civ. Prac. & Rem. Code § 121.014.

Execution by a notary of a false certificate of acknowledgment on a deed, in direct violation of statutory duty, constitutes negligence per se. *Standard Accident Ins. Co. v. State*, 57 S.W.2d 191 (Tex.Civ.App.--Fort Worth 1993, writ dism'd).

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## Notary Law – Frequent Questions

Each notary is required to post a \$10,000 bond with the Texas Secretary of State and persons who have been damaged by the acts or omissions of a notary may file a claim against the bond. However, the notary's exposure for civil damages is not limited to the amount of the bond.

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## Notary Law – Frequent Questions

### *Q: What liability risks does a notary face?*

- Action for Deceptive Trade Practice. Tex. Gov't Code § 406.017.
- Revocation of Commission. Tex. Gov't Code § 406.009.
- Criminal Prosecution:
  - Official misconduct. Tex. Penal Code § 39.01.
  - Perjury, tampering, etc. Tex. Penal Code §§ 37.01, et seq.
  - Unauthorized practice of law. Tex. Penal Code §§ 38.01, et seq.
  - False representation that the notary is an attorney. Tex. Gov't Code § 406.017

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## Notary Law – Frequent Questions

### *It is now a criminal offense to:*

- Falsely state or imply that the notary is a licensed attorney;
- Solicit or accept compensation to prepare documents for or otherwise represent the interest of another in a judicial or administrative proceeding, including a proceeding relating to immigration or citizenship;
- Solicit or accept compensation to obtain relief of any kind on behalf of another from any officer, agency, or employee of Texas or the United States;
- Use 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.

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## Notary Law – Frequent Questions

*Q: Why do attorneys ask their staff notaries to notarize something AFTER the person has already signed the documents and is no longer present?*

A:

**GOOD QUESTION!**

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## Notary Law – Frequent Questions

*Q: Where can I get more information?*

A: Contact the Notary Public Unit of the Texas Secretary of State's office, P.O. Box 12079, Austin, TX 78711-2079; telephone (512) 463-5705. Also see information and forms at: [www.sos.state.tx.us](http://www.sos.state.tx.us)

The National Notary Association has a good website, including The Notary Public Code of Professional Responsibility and helpful tips for preventing identity theft and mortgage fraud: [www.nationalnotary.org](http://www.nationalnotary.org)

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## CONCLUSION

Don't take the short-cuts, but to "do it right" every time as a matter of basic office policy and personal integrity.

And remember:

**"THERE IS NO RIGHT WAY TO DO A WRONG THING."**

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