WHEN & HOW TO REFUSE TO NOTARIZE; and
AVOIDING THE UNAUTHORIZED PRACTICE OF LAW

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[Citations are to the Notary Public provisions of the Texas Government Code, Chapter 406, or the Texas Administrative Code, Chapter 87, unless indicated otherwise]

I. WHEN & HOW TO REFUSE TO NOTARIZE

A. Preliminary steps

1. Know notary law and best practices thoroughly

Both the Texas Government Code, Chapter 406 on Notary Public and
Texas Administrative Code, Chapter 87 on Notary Public, as well as the Notary Public Educational Information on the Texas Secretary of State’s website

2. Take control of the situation, while showing respect for clients

3. Establish a serious and professional tone for every notarization

4. Explain the notarization procedure, pointing out that all legal requirements must be satisfied in order to perform the notarization

   Point out any notary fee to be charged, and get the signer’s agreement to pay
Point out that proper identification will be requested ["an identification card issued by a governmental agency or a passport issued by the United States” – Government Code, section 406.014(a)(5), and the ID must include a photograph and signature of an acknowledgment signer under Texas Civil Practice Code, Section 121.005(a)(2)]. This author recommends reviewing ID for all signers.

Point out that an oral oath or affirmation will be required for an affidavit or verification upon oath or affirmation.

5. Condition performance of the notarization on completion of your journal entry first, including requesting a present signature of the document signer therein.

Note: Although Texas law does not require the notary to obtain a present signature of the document signer in the notary journal entry, Texas law does not prohibit this procedure. This author recommends obtaining a present signature from all document signers in the notary journal entry.

B. When the notary should not notarize due to the notary's own issues

1. Should not notarize prior to the notary being fully authorized (including having the necessary notary seal and journal record), or after the notary commission has expired or has been suspended or revoked for any reason.

State law requires notaries to have and use seals, and to have and use notary record books. Texas Government Code, Chapter 406 Notary Public, Sections 406.013, 406.014.

Notaries should be familiar with their commission expiration dates, which are required to appear in the text of their seals. Government Code, Section 406.013(a). Proofread the certificate before the notarial ceremony is completed.

2. Should not notarize the notary's own signature, or a document in which the notary is named as a party in interest.
“A notary public may not: ... 6. Notarize the notary’s own signature. ...” Texas Secretary of State, Notary Public Educational Information, Prohibited Acts http://www.sos.state.tx.us/statdoc/edinfo.shtml#List (last visited 7-24-17)

A notary cannot execute/administer the notary’s own official oath of office. Government Code, Section 406.010(d).

3. Should not notarize when the notarial certificate is not complete or contains any false statement of fact – as the certificate certifies what transpired at the notarization, so the notary should complete/correct the certificate in order to proceed

“The execution of any certificate as a notary public containing a statement known to the notary public to be false” is a ground to revoke the notary’s commission. Administrative Code, Rule/Section 87.11(10). Proofread the certificate.

C. When to refuse to notarize due to concerns about document signers and/or their documents

1. When it is known that the notarized document with the notarial seal and/or notarial certificate will be used in an advertisement, promotion, endorsement, or campaign for or against a product, service, candidate, or cause

“A notary is authorized to refuse to perform a notarial act if the notary has reasonable grounds to believe that the document in connection with which the notarial act is requested may be used for an unlawful or improper purpose ...” Administrative Code, Rule/Section 87.30(a)(2).

2. The type of notarization requested is not permitted under Texas law

“A notary is authorized to refuse to perform a notarial act if the notary is not familiar with the type of notarization requested.” Administrative Code, Rule/Section 87.30(a)(4).
“A notary public may not: ... 9. certify copies of documents recordable in the public records...” Texas Secretary of State, Notary Public Educational Information, Prohibited Acts [cited above in section B.2. of this outline]

3. A conflict of interest of the notary exists due to a family relationship with the document signer

Note: Texas law does not prohibit a notary from notarizing for family members, but this author advises notaries not to do so – as a notary public best practice.

4. A financial conflict of interest of the notary exists directly or indirectly in the document to be notarized or its underlying transaction

5. A technical fault exists with the document to be notarized or the notarial certificate – such as the language in which it is written, as blank spaces in the document, as the omission of a notarial certificate

6. The absence of the document signer from the notarial ceremony

A ground for suspension or revocation of the notary commission arises if the notary performs “any notarization when the person for whom the notarization is performed did not personally appear before the notary at the time the notarization is executed.” Government Code, Section 406.009(d)(5). See also, Administrative Code, Rule/Section 87.11(14). See also, Texas Secretary of State, Notary Public Educational Information, Prohibited Acts #5 [cited above in section B.2. of this outline]

Concern about this fundamental requirement is one reason why the notary should always obtain a present signature of the document signer in the notary journal entry.

7. The inability of the notary to identify the document signer with reasonable certainty
“A failure to properly identify the individual whose signature is being notarized” is a ground to revoke the notary’s commission. Administrative Code, Rule/Section 87.11(18). However, the notary does not guarantee the identity of the signer, but rather, the notary is required to use reasonable care to properly identify the signer.

State law requires the notary to record the method of identifying the document signer in the notary journal entry. Government Code, Section 406.014(a)(5).

I recommend the notary should always examine and record in the journal entry one or more documents of identification for the signer – to best satisfy the standard of reasonable care – even when the document signer is personally known to the notary. And, I always have the signer execute a present signature in the journal entry as a further way to identify the signer [by comparing three signatures – on the transactional document to be notarized, on the ID, and on the journal entry].

8. The inability of the notary to communicate directly with the document signer

The reason is that the notary must be able to assess the understanding and willingness of the document signer. This barrier should very rarely occur.

Of course, individuals with physical disabilities and who are not mentally incapacitated are legally entitled to have their signatures affixed to documents and to have those signatures notarized. See for example, Government Code, Section 406.0165, Signing Document For Individual With Disability.

Note: Consider hearing-impaired, speech-impaired and/or visually-impaired document signers.

9. The lack of genuine willingness of the document signer to execute the document

“A notary is authorized to refuse to perform a notarial act if the notary has reasonable grounds to believe that the signer is acting under coercion or undue influence ...” Administrative Code, Rule/Section 87.30(a)(1).
10. The lack of mental competence of the document signer to execute the document

“A notary is authorized to refuse to perform a notarial act if the notary has reasonable grounds to believe the signing party does not have the capacity to understand the contents of the document.” Administrative Code, Rule/Section 87.30(a)(3).

11. The refusal of the signer to take the required oral oath/affirmation which must accompany a jurat notarization or verification on oath or affirmation [affidavit]

D. When the notary’s employer may prohibit the notary from notarizing

Under Texas law: “A private employer may limit or prohibit an employee that is a notary public from notarizing during work hours.” Administrative Code, Rule/Section 87.30(c).

However, this provision does not permit private employers to engage in unlawful discriminatory practices in the provision of notary services.

“A notary who is employed by a governmental body shall not perform notarial services that interfere with the notary's discharge of the notary's duties as a public employee.” Administrative Code. Rule/Section 87.30(b).

E. Inappropriate reasons to refuse to notarize

1. The race, gender, marital status, sexual orientation, religion, political affiliation, nationality, old age, physical disability, or physical illness of the document signer

“A notary may not refuse a request for notarial services on the basis of the sex, age, religion, race, ethnicity or national origin of the requesting party.” Administrative Code, Rule/Section 87.30(d).
2. Mere suspicion or gut feeling that the notarization should be refused [refusal should be based upon one or more objective factors that can be articulated – and that should be set out in the notary journal entry for the refusal]

“A notary should refuse a request for notarial services only after careful deliberation." Administrative Code, Rule/Section 87.30(e).

F. How to refuse to notarize

1. Be firm, not equivocating

2. Place responsibility for the refusal on notary law

3. Record the refusal to notarize, including one or more objective reasons, in a notary journal entry

Texas Government Code, Section 406.014 about ‘Notary Records’ does not expressly direct notaries to record refusals to notarize. Nor does the statute prohibit a notary from recording a refusal. A refusal to notarize is an official act of a notary public that should be documented. There are sound reasons for notaries to record such refusals.

The Texas statute requires that notaries have ‘reasonable grounds’ to refuse to notarize in three situations. Administrative Code, Rule/Section 87.30(a)(1),(2),(3). How would the notary recall such grounds if they are not recorded? And, as noted above, under Texas law, a notary should refuse to notarize only “after careful deliberation.”
II. AVOIDING THE UNAUTHORIZED PRACTICE OF LAW [UPL]

A. UPL violates public policy and is unlawful

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

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 malpractice insurance to protect clients.

5. Texas Government Code, Chapter 406, 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.”

6. The unauthorized practice of law 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. Government Code, 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 under the Texas Business & Commerce Code. Government Code, Sections 406.009(d)(2) & 406.017(f); Administrative Code, Rule/Section 87.11(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 ...” Government Code, Section 406.017(a)(2)(3).

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 ...” Government Code, 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. Administrative Code, Rule/Section 87.11(13).

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

“A notary public may not: 1. perform acts which constitute the practice of law; 2. prepare, draft, select, or give advice concerning legal documents ...” Texas Secretary of State, Notary Public Educational Information, Prohibited Acts http://www.sos.state.tx.us/statdoc/edinfo.shtml#List (last visited 7-24-17)

See also the above reference to preparing documents in subpart B.1 of this outline.

C. Concern about the terms “notario” and “notario publico” and about immigration matters
A notary public may not: ...3. use the phrase ‘notario’ or ‘notario publico’ to advertise notary services.” Texas Secretary of State, Notary Public Educational Information, Prohibited Acts [cited above in section B.3 of this outline]

“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 ...” Government Code, 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. Administrative Code, Rule/Section 87.11(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. Administrative Code, Rule/Section 87.11(12).

See references to immigration, citizenship, and relief in subpart 1 of this outline.

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).” Government Code, 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’.” Government Code, Section 406.017(b).
“A notary public may not: ...11. use the translation into a foreign language of a title or other word, including ‘notary’ and ‘notary public’ in reference to a person who is not an attorney in order to imply that the person is authorized to practice law in the United States.” Texas Secretary of State, Notary Public Educational Information, Prohibited Acts [cited above in section B.3 of this outline]

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

Controversy about whether notaries have the authority to select the form of document notarization to be executed, or whether doing so constitutes the UPL

“A notary public may not: 1. perform acts which constitute the practice of law; 2. prepare, draft, select, or give advice concerning legal documents ...” Texas Secretary of State, Notary Public Educational Information, Prohibited Acts [cited above in section B.3 of this outline]

“May a Notary Public Determine Which Type of Notarial Certificate Should Be Attached to a Document? No. A notary public who is not an attorney should only complete a notarial certificate which is already on the document or type a certificate of the maker’s choosing. If a notary public is brought a document without a certificate and decides which certificate to attach, that notary public would be ‘practicing law.’ However, a notary public is provided copies of sample notarial certificates with his or her notary commission. A person for whom a notarization is performed may choose the notarial certificate, and the notary may add such certificate to the document.” FAQ, Texas Secretary of State, Notary Public Educational Information [cited above in section B.3 of this outline]

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 brokers, stock brokers, tax form preparers, etc]

Note: Such notary-professionals should avoid conflicts of interest and not notarize documents they have prepared, or about which they have advised, their own clients
G. Steps to take to avoid UPL

1. Advise clients that you are not an attorney [post a sign]

2. Avoid deceptive advertising, especially non-English advertising

3. Post/publish a notarial fee schedule, if fees will be charged [modest fees less than a lawyer would charge]

4. Agree upon the fee, if any, for each notarization in advance of the notarial ceremony

5. Do not read documents to be notarized

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. 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]

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

9. Refer clients to attorneys for legal advice

10. 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]