

ETHICS FOR REAL ESTATE PARALEGALS
AND
WHAT THEY SHOULD KNOW ABOUT NOTARIES PUBLIC



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“I hope I shall always possess firmness and virtue enough to maintain what I consider the most enviable of all titles, the character of an ‘Honest Man.’”³

“Each lawyer’s own conscience is the touchstone against which to test the extent to which his actions may rise above the disciplinary standards prescribed by these rules. The desire for the respect and confidence of the members of the profession and of the society which it serves provides the lawyer the incentive to attain the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.”⁴

“... it is incumbent upon the members of the Paralegal Division to know the provisions of the attorneys’ code and avoid any action which might involve an attorney in a violation of that code or even the appearance of professional impropriety.”⁵

¹ Portions of this paper were published in “Notaries Public” authored by Gregory P. Crinion and published in 20 The Advocate 86 (State Bar of Texas, Litigation Section) (Summer 2001).

² The author wishes to thank Karen Tabor for her assistance in preparing this paper.

³ George Washington, www.famousquotesandauthors.com/topics/honesty_quotes.html.

⁴ Tex. Disc. R. Prof. Conduct, Tex. Gov’t Code, Title 2, Subtitle G, App. A, Art. X, sec. 9, Preamble, para. 9 (Vernon 2005) (the “Disciplinary Rules”).

⁵ Preamble, Code of Ethics and Professional Responsibility, State Bar of Texas Paralegal Division (adopted Mar. 27, 1982, amended June 26, 2005) (“Paralegal Code”). The

INTRODUCTION

Paralegal ethics begin with the Code of Ethics and Professional Responsibility for Texas paralegals adopted by the State Bar of Texas Paralegal Division (the “Paralegal Code”). Paralegal ethics also include, to a degree, the Texas Disciplinary Rules of Professional Conduct for Texas attorneys (the “Disciplinary Rules”).⁶

In addition to ethics rules, Texas paralegals who serve as notaries public must comply with all of the Texas laws applicable to notaries public. And, by virtue of the Paralegal Code and the Disciplinary Rules, paralegals who work with notaries public are charged with the obligation to insure that notaries public perform their services properly. Thus, Texas paralegals, including those who serve as notaries public and those who work with notaries public, have ethical rules and legal obligations pertaining to notaries public that they must read, understand and follow.

The purpose of this paper is to identify many of those ethical rules and legal obligations, inform Texas paralegals of those rules and obligations, and provide a guide for Texas paralegals to use in performing their notarial duties or interacting with notaries public in Texas.

These ethical rules are the minimum standards of conduct for avoidance of disciplinary action.⁷ These rules “do not, however, exhaust the moral and ethical considerations that should guide a lawyer [or paralegal], for no worthwhile human activity can be completely defined by legal rules.”⁸ Moreover, merely satisfying the minimal ethical requirements should not be the standard by which to pursue a career, attain the title of “Honest Man” or obtain the respect and confidence of members of our profession and of society in general.

Paralegal Code can be found at www.txpd.org, click on Ethics and then Ethics Brochure.

⁶ See Preamble, Paralegal Code.

⁷ Preamble, para. 7, Disciplinary Rules.

⁸ Preamble, para. 11, Disciplinary Rules.

THE PARALEGAL CODE AND ATTORNEY DISCIPLINARY RULES

The State Bar of Texas Paralegal Division adopted the Paralegal Code, the most recent amendment of which reads, in its entirety, as follows:

Preamble

Fundamental to the success of any professional organization are the integrity of its members and a high standard of conduct. This Code of Ethics and Professional Responsibility is promulgated by the Paralegal Division of the State Bar of Texas and accepted by its members to accomplish these ends.

The paralegal profession is by nature closely related to the legal profession. Although the Code of Professional Responsibility of the State Bar of Texas does not directly govern paralegals except through a supervising attorney, it is incumbent upon the members of the Paralegal Division to know the provisions of the attorneys' code and avoid any action which might involve an attorney in a violation of that code or even the appearance of professional impropriety.

The canons set forth hereafter are intended as a general guide, and the enumeration of these canons does not exclude others of equal importance although not specifically mentioned.

Canon 1. A paralegal shall not engage in the practice of law as defined by statutes or court decisions, including but not limited to accepting cases or clients, setting fees, giving legal advice or appearing in a representative capacity in court or before an administrative or regulatory agency (unless otherwise authorized by statute, court or agency rules); the paralegal shall assist in preventing the unauthorized practice of law.

Canon 2. A paralegal shall not perform any of the duties that attorneys only may perform or do things which attorneys themselves may not do.

Canon 3. A paralegal shall exercise care in using independent professional judgment and in determining the extent to which a client may be assisted without the presence of any attorney, and shall not act in matters involving professional legal judgment.

Canon 4. A paralegal shall preserve and protect the confidences and secrets of a client.

Canon 5. A paralegal shall not solicit legal business on behalf of an attorney.

Canon 6. A paralegal shall not engage in performing paralegal functions other than under the direct supervision of an attorney, and shall not advertise or contract with members of the general public for the performance of paralegal functions.

Canon 7. A paralegal shall avoid, if at all possible, any interest or association which constitutes a conflict of interest pertaining to a client matter and shall inform the supervising attorney of the existence of any possible conflict.

Canon 8. A paralegal shall maintain a high standard of ethical conduct and shall contribute to the integrity of the paralegal profession.

Canon 9. A paralegal shall maintain a high degree of competency to better assist the legal profession in fulfilling its duty to provide quality legal services to the public.

Canon 10. A paralegal shall do all other things incidental, necessary or expedient to enhance professional responsibility and the participation of paralegals in the administration of justice and public service in cooperation with the legal profession.⁹

As stated in the Preamble to the Paralegal Code, Texas paralegals are also subject to the Disciplinary Rules applicable to Texas-licensed attorneys, at least indirectly through their supervising attorneys.¹⁰ The Disciplinary Rules are too lengthy to be included in whole, but some relevant excerpts - at least that may be applicable to Texas attorneys and paralegals who supervise or work with notaries public - are as follows:

Preamble para. 1. A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their

⁹ Paralegal Code.

¹⁰ Preamble, Paralegal Code.

relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.

Preamble para. 4. A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. ...

Rule 1.02 ... (c) A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent. ...

(d) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in substantial injury to the financial interests or property of another, the lawyer shall promptly make reasonable efforts under the circumstances to dissuade the client from committing the crime or fraud.

(e) When a lawyer has confidential information clearly establishing that the lawyer's client has committed a criminal or fraudulent act in the commission of which the lawyer's services have been used, the lawyer shall make reasonable efforts under the circumstances to persuade the client to take corrective action.

(f) A lawyer shall reveal confidential information when required to do so by Rule 3.03(a)(2), 3.03(b) or by Rule 4.01(b).

Rule 3.03 (a) A lawyer shall not knowingly:

- (1) make a false statement of material fact or law to a tribunal;
- (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act;
- (3) in an ex parte proceeding, fail to disclose to the tribunal an unprivileged fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision;

.... or

(5) offer or use evidence that the lawyer knows to be false.

(b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.

Rule 4.01 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 5.01 A lawyer shall be subject to discipline because of another lawyer's violation of these rules of professional conduct if:

- (a) The lawyer is a partner or supervising lawyer and orders, encourages, or knowingly permits the conduct involved; or
- (b) the lawyer is a partner in the law firm in which the other lawyer practices, is the general counsel of a government agency's legal department in which the other lawyer is employed, or has direct supervisory authority over the other lawyer, and with knowledge of the other lawyer's violation of these rules knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of the other lawyer's violation.

Rule 5.03 With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (b) A lawyer shall be subject to discipline for the conduct of such a person that would be a violation of these rules if engaged in by a lawyer if:
 - (1) the lawyer orders, encourages, or permits the conduct involved; or
 - (2) the lawyer:
 - (i) is a partner in the law firm in which the person is employed, retained by, or associated with; or

is the general counsel of a government agency's legal department in which the person is employed, retained by or associated with; or has direct supervisory authority over such person; and

(ii) with knowledge of such misconduct by the nonlawyer knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of that person's misconduct.

Rule 8.04 A lawyer shall not:

(1) violate these rules, knowingly assist or induce another to do so, or do so through the acts of another, whether or not such violation occurred in the course of a client-lawyer relationship;

(2) commit a serious crime or commit any other criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;¹¹

These are some of the ethical rules applicable to Texas attorneys and their supervised paralegals.

Texas paralegals who are also commissioned as Texas notaries public must also comply with the Texas laws on notaries public. Additionally, Texas paralegals who work with notaries public are charged with the obligation to insure that the notaries public perform their services properly. Thus, Texas paralegals must also know the laws applicable to Texas notaries public.

THE TEXAS NOTARY LAWS

(a) The Secretary of State shall appoint a convenient number of Notaries Public for the state who shall perform such duties as now are or may be prescribed by law. The qualifications of Notaries Public shall be prescribed by law.

(b) The terms of office of Notaries Public shall be not less than two years nor more than four years as provided by law.¹²

¹¹ Disciplinary Rules.

¹² Tex. Const. Art. IV, sec. 26 (Vernon 2007).

These words in the Texas Constitution of 1876 established the notary public as a constitutional officer of the state.

The United States Supreme Court described the breath and impact of the notary public's duties in Texas:

With the power to acknowledge instruments such as wills and deeds and leases and mortgages; to take out-of-court depositions; to administer oaths; and the discretion to refuse to perform any of the foregoing acts, notaries public in Texas are involved in countless matters of importance to the day-to-day functioning of state government. The Texas political community depends upon the notary public to insure that those persons executing documents are accurately identified, to refuse to certify any identification that is false or uncertain, and to insist that oaths are properly and accurately administered. Land titles and property succession depend upon the care and integrity of the notary public, as well as the familiarity of the notary with the community, to verify the authenticity of the execution of the documents.¹³

The Secretary of State may appoint a notary public at any time.¹⁴ To be eligible for appointment as a notary public, an applicant must be at least 18 years of age, a resident of Texas and not have been convicted of a felony or crime involving moral turpitude.¹⁵ The 18 years of age requirement cannot be avoided by a minor whose legal disabilities have been removed.¹⁶ The residency of Texas requirement does not require a notary to be a citizen of the United States.¹⁷ Finally, the statute does not specify which crimes involve moral turpitude, but courts have found moral turpitude to include lying to a police officer or an officer of the court, willfully attempting to evade or defeat an income tax, conspiring to defraud the United States, selling of a child, sexual assault of a child, making a false statement in a loan application, misdemeanor indecent exposure,

¹³ Bernal v. Fainter, 467 U.S. 216, 224-25 (1984), quoting with approval, Vargas v. Strake, 710 F.2d 190, 194 (5th Cir. 1983), rev'd, 467 U.S. 216 (1984).

¹⁴ Tex. Gov't Code sec. 406.001 (Vernon 2005).

¹⁵ Tex. Gov't Code sec. 406.004 (Vernon 2005).

¹⁶ Op. Tex. Att'y Gen. No. O-2918 (1940) and see Tex. Fam. Code sec. 31.006 (Vernon 2008).

¹⁷ In 1984, the U.S. Supreme Court held unconstitutional the Texas statute requiring that a notary public be a resident citizen of the United States and of Texas. See Bernal v. Fainter, 467 U.S. 216 (1984). In response, the Texas Legislature amended the statute so that an applicant must be a resident of Texas but need not be a citizen of the United States. Tex. Gov't Code sec. 406.004 (Vernon 2005).

misdemeanor assault by a man against a woman, and misdemeanor writing of checks on accounts with insufficient funds.¹⁸

The Secretary of State may reject an application for a commission, or suspend or revoke an existing notary commission, in a variety of instances. These include final conviction of a crime involving moral turpitude, a false statement knowingly made in a notary application, final conviction for a violation of law concerning the conduct of notaries public, imposition of a penalty for violation of a law prescribing the duties of a notary, and performing any notarial act when the person for whom the act is performed did not personally appear before the notary at the time the notarization is executed.¹⁹ Also included in this list are, among other things, failing to administer an oath as required, collecting a fee in excess of the amount authorized, failing to fully and faithfully discharge any duty or responsibility of a notary, and execution of a certificate as a notary public containing a statement known to the notary public to be false.²⁰

Upon receiving a commission, a notary has authority to:

- (1) take acknowledgments and proofs of written instruments;
- (2) protest instruments permitted by law to be protested;
- (3) administer oaths;
- (4) take depositions; and
- (5) certify copies of documents not recordable in the public records.²¹

¹⁸ Lape v. State, 893 S.W.2d 949 (Tex. App.–Houston [14th Dist.] 1994, pet. ref'd); In the Matter of Humphreys, 880 S.W.2d 402 (Tex.), cert. denied, 513 U.S. 964 (1994); In the Matter of Birdwell, 20 S.W.3d 685 (Tex. 2000); In the Matter of Thacker, 881 S.W.2d 307 (Tex. 1994); In the Matter of G.M.P., 909 S.W.2d 198 (Tex. App.–Houston [14th Dist.] 1995, no writ); Searcy v. State Bar of Texas, 604 S.W.2d 256 (Tex. Civ. App.–San Antonio 1980, writ ref'd n.r.e.); Polk v. State, 865 S.W.2d 627 (Tex. App.–Fort Worth 1993, pet ref'd); Hardeman v. State, 868 S.W.2d 404 (Tex. App.–Austin 1993), pet. dismissed, 891 S.W.2d 960 (Tex. Crim. App. 1995); Borden, Inc. v. Rios, 850 S.W.2d 821 (Tex. App.–Corpus Christi 1993), set aside on settlement, 859 S.W.2d 70 (Tex. 1993). C.f., Duncan v. Board of Disciplinary Appeals, 898 S.W.2d 759 (Tex. 1995) (misprision of felony is not a crime involving moral turpitude per se) and In re Lock, 54 S.W.3d 305 (Tex. 2001) (court declined to rule whether possession of a controlled substance was crime of moral turpitude per se).

¹⁹ Tex. Gov't Code sec. 406.009 (Vernon 2005).

²⁰ 1 Tex. Admin. Code sec. 87.41 and 87.43.

²¹ Tex. Gov't Code sec. 406.016(a) (Vernon 2005).

The notary's jurisdiction is statewide.²² However a Texas notary does not have jurisdiction outside the state of Texas, and so may not undertake any official act outside the state. A purported official act of a Texas notary outside the notary's jurisdiction is void.²³

A notary may only execute acknowledgments if the witness personally appears before the notary.²⁴ A witness' later admission of execution of the instrument does not allow a notary to certify that the notary acknowledged the witness' signature.²⁵ A notary must also authenticate all official acts with his or her seal of office which must satisfy the statutory requirements, including requirements as to size, shape and content.²⁶

A notary cannot, of course, give legal advice, and for that reason cannot prepare any documents, including preparing or even selecting the appropriate notarial certificate to be attached

²² Tex. Gov't Code sec. 406.003 (Vernon 2005).

²³ Garza v. Serrato, 699 S.W.2d 275, 278-80 (Tex. App.–San Antonio 1985, writ ref'd n.r.e.); Kumpe v. Gee, 187 S.W.2d 932, 934, 935 (Tex. Civ. App.–Amarillo 1945, no writ); Ward v. Valand, 135 S.W.2d 770, 771 (Tex. Civ. App.–El Paso 1940, writ dism'd, jdgmt. correct); see Loden v. Carothers, 85 S.W.2d 291, 293 (Tex. Civ. App. –Texarkana 1935, no writ) (Notary is not authorized to perform his duties in any county other than that for which he was appointed, and fact that notary believed he was in county for which he was appointed did not add to his jurisdiction). C.F., Garza v. Serrato, 699 S.W.2d at 282-83 (Tijerina, J., dissenting) suggesting that a Texas notary may act outside the state or even outside the country. Such an interpretation is unsound, however, given that a notary is a public official and may act as a public official only upon compliance with the laws of the state or country in which the act is taken.

²⁴ Tex. Gov't Code sec. 406.009(a) and (d)(6) (Vernon 2005); 1 Tex. Admin. Code sec. 87.41 and 87.43(a)(14); United Serv. Auto. Ass'n v. Ratterree, 512 S.W.2d 30, 32-33 (Tex. Civ. App.–San Antonio 1974, writ ref'd n.r.e.); Charlton v. The Richard Gill Co., 285 S.W.2d 801, 803 (Tex. Civ. App.–San Antonio 1955, no writ); Wise v. Cain, 212 S.W.2d 880, 882 (Tex. Civ. App.–Austin 1948, writ ref'd n.r.e.).

²⁵ Chester v. Breitling, 32 S.W. 527, 528 (Tex. 1895) (“a casual admission, in the presence of a notary ... by a person who has signed a conveyance, that he had executed the deed, does not empower the officer to certify that he has acknowledged it. In order to call into exercise the authority of the officer to take the certificate, the grantor must appear before him for the purpose of acknowledging the instrument ...”); Charlton v. The Richard Gill Co., 285 S.W.2d at 803; Daugherty v. McCalmont, 41 S.W.2d 139, 143 (Tex. Civ. App.–Fort Worth 1931, no writ).

²⁶ Tex. Gov't Code sec. 406.013 (Vernon 2005).

to any document.²⁷ A notary cannot issue identification cards, and cannot certify copies of documents that are recordable, such as deeds, marriage licenses and birth certificates.²⁸

Additionally, a notary must maintain a record book concerning all instruments authenticated. Entries in the record book are public information, and the notary must provide to any person upon request and upon payment of all fees, a certified copy of any record in the notary's office. Upon termination of his or her commission, including upon ending his or her residency in Texas, a notary must deliver the record book to the Clerk of the County in which the notary was commissioned.²⁹

A notary or his or her employer may charge a fee for all official acts performed, and all of those fees are set by statute. A notary may not charge any other or greater fees.³⁰ A notary must post a complete list of fees the notary may charge by law, as well as keep a fee book and enter in the book all fees charged for notarial services rendered.³¹

As a public official, a notary cannot refuse to perform a duty imposed by law. Thus, a notary cannot refuse to perform an official act for persons who are not patrons of his or her employer so long, of course, as performance of the act would be proper. A notary may, however, perform his or her official duties at a time that is convenient to the notary and that is consistent with the other duties imposed upon the notary by his or her employer.³²

A person "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."³³ Moreover, a person who has a financial interest in an instrument or the underlying transaction may not serve as a notary public in connection with the instrument. The financial interest required is a direct pecuniary interest in the

²⁷ Tex. Gov't Code sec. 406.016(d) (Vernon 2005).

²⁸ Tex. Gov't Code sec. 406.016(a) and (c) (Vernon 2005).

²⁹ Tex. Civ. Prac. & Rem. Code sec. 121.012 (Vernon 2005); Tex. Gov't Code sec. 406.014 (Vernon Supp. 2008); Tex. Gov't Code secs. 406.020 and 406.022 (Vernon 2005).

³⁰ Tex. Gov't Code sec. 406.024 (Vernon 2005) and Tex. Gov't Code sec. 603.010 (Vernon 2004).

³¹ Tex. Gov't Code secs. 603.006 and 603.008 (Vernon 2004).

³² Op. Att'y Gen. No. O-471 (1939).

³³ Morris v. Dunn, 164 S.W.2d 562, 563 (Tex. Civ. App.—Fort Worth 1942, no writ); Terrell v. Chambers, 630 S.W.2d 800, 802 (Tex. App.—Tyler), writ ref'd n.r.e., 639 S.W.2d 451, 452 (Tex. 1982); Creosoted Wood Block Paving Co. v. McKay, 211 S.W. 822, 824 (Tex. Civ. App.—Dallas 1919, no writ).

consideration for the instrument certified or in upholding the instrument - receipt of notary fees from a party of an instrument does not alone disqualify the notary public.³⁴

The specific situations where an interest would disqualify a notary are nowhere stated in detail. However, the Texas Legislature has specified two common situations where there is no such disqualification:

An employee of a corporation taking an acknowledgment or proof of a written instrument in which the corporation has an interest; or

An officer of a corporation who is a shareholder in the corporation taking an acknowledgment or proof of an instrument in which the corporation has an interest unless 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.³⁵

In addition to having a notary commission suspended or revoked by the Secretary of State, a notary may also be subject to civil liability for failing to comply with Texas law for acknowledgments. Texas law provides for a statutory cause of action as well as a common law cause of action based upon a negligence per se argument. Liability under these causes of action rests upon whether the notary followed the statute; proof of negligence is not required. Thus, a notary serves as a guarantor or insurer that his or her certification is true.³⁶ An injured party may also bring a claim against the sureties on the notary's bond.³⁷

A notary who charges an unauthorized fee, including a fee greater than that allowed by statutes, is liable for four times the amount unlawfully demanded and received.³⁸

³⁴ Terrell v. Chambers, 630 S.W.2d at 802; Creosoted Wood Block Paving Co. v. McKay, 211 S.W. at 824-25.

³⁵ Tex. Civ. Prac. & Rem. Code sec. 121.002 (Vernon 2005).

³⁶ Tex. Civ. Prac. & Rem. Code sec. 121.014 (Vernon 2005); Standard Acc. Ins. Co. v. State, 57 S.W.2d 191, 193-94 (Tex. Civ. App.—Fort Worth 1933, writ dismissed); Brittain v. Monsur, 195 S.W. 911, 913, 916-17 (Tex. Civ. App.—Beaumont 1917, writ dismissed).

³⁷ Standard Acc. Ins. Co. v. State, 57 S.W.2d at 193-94; Brittain v. Monsur, 195 S.W. at 916; Lawyers Sur. Corp. v. Gulf Coast Inv. Corp., 410 S.W.2d 654, 655 (Tex. Civ. App.—Tyler), writ ref'd n.r.e., 416 S.W.2d 779 (Tex. 1967).

³⁸ Tex. Gov't Code sec. 603.010 (Vernon 2004).

Finally, a notary who falsely signs an acknowledgment or certification may be subject to criminal prosecution.³⁹

PARALEGAL AND ATTORNEY RESPONSIBILITY FOR NOTARY ACTS

Neither a paralegal nor a notary can engage in the practice of law. Thus, under the Paralegal Code, a paralegal, even a paralegal notary, cannot (except while under the supervision of a lawyer) prepare a deed, determine what form of notary block should be used or even prepare a Release of Record of Lien on Homestead Property under Tex. Prop. Code sec. 52.0012 (Vernon Supp. 2008).⁴⁰

A paralegal must maintain a high standard of ethical conduct.⁴¹ A paralegal notary who violates any of the duties of a notary fails to maintain that high standard. A paralegal who is charged with arranging for notarial acts to be completed but who witnesses and fails to correct notary violations, fails to maintain this high standard.

A paralegal is prohibited from doing things which a lawyer may not do.⁴² As a lawyer is prohibited from utilizing a false notarial acknowledgment, a paralegal notary may not affix a false notarial acknowledgment.

A lawyer must make reasonable efforts to ensure that lawyers and non-lawyers under his or her supervision act in a manner compatible with the professional obligations of the attorney. Supervising attorneys are subject to discipline for the conduct of a lawyer or non-lawyer under his or her supervision that would be a violation of the Disciplinary Rules if the attorney ordered, encouraged or permitted the conduct involved or, if having knowledge of misconduct, fails to take reasonable remedial action to avoid or mitigate the consequences of the person's misconduct.⁴³

Similarly, a lawyer is forbidden from making a false statement of material fact or law to a tribunal or third person, from failing to disclose any fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act, and from failing 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 assisting

³⁹ Wise v. Cain, 212 S.W.2d at 882; see Tex. Penal Code secs. 32.21(b), 32.32(b) and 37.10 (Vernon Supp. 2008).

⁴⁰ Paralegal Code Canons 1 and 3; Tex. Gov't Code sec. 406.016(d) (Vernon 2005).

⁴¹ Paralegal Code Canon 8.

⁴² Paralegal Code Canon 2.

⁴³ Disciplinary Rules at 5.01 and 5.03.

in a fraudulent act perpetrated by a client.⁴⁴ As a lawyer is forbidden from these actions, so too is a paralegal forbidden from these actions or from assisting a lawyer in performing these actions.⁴⁵

A lawyer is prohibited from violating any of the Disciplinary Rules, knowingly assisting or inducing another to do so, or doing so through the acts of another, committing any crime that reflects adversely on the attorney's honesty, trustworthiness or fitness as a lawyer in other respects, and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.⁴⁶ Again, as a lawyer is forbidden from these actions, so too is a paralegal forbidden from these actions or from assisting a lawyer in performing these actions.⁴⁷

Thus, a lawyer/notary's false notarial act on a document is a violation of the Disciplinary Rules. A lawyer who instructs a paralegal notary to authenticate a signature made outside the notary's presence violates these rules. A lawyer who allows a notary, whether an employee or not, to authenticate a signature made outside the notary's presence, or who knows the notary does so yet makes no effort to avoid or mitigate the consequences of the notary's actions, violates these ethical rules. A lawyer who knowingly submits to a court an affidavit that a notary has falsely stated was signed in the notary's presence violates these rules. A lawyer who knowingly submits to a county clerk for filing a document that a notary has falsely stated was signed in the notary's presence violates these rules. A paralegal who commits any of these actions or who witnesses any of these actions and does not take action to avoid or mitigate the consequences of these actions when taken by a notary violates the Paralegal Code.

The following four disciplinary proceedings exemplify some of the ethical violations that result from improper notarial acts:

In the first instance, a lawyer signed his client's name to an affidavit that was allegedly subscribed and sworn to before a notary. The lawyer then submitted to the court an amended affidavit signed by the client in California but which bore a Texas notary's seal.⁴⁸

In this instance, the attorney violated Disciplinary Rule 1.02(c) by engaging in conduct the attorney knew was criminal or fraudulent in the form of the forgery of the client's signature, submitting a forgery to a government office, and submitting the amended affidavit to a government office despite the fact that it was not signed before a notary. The attorney also violated Disciplinary Rule 3.03(a)(1), (2) and (5) in making a false statement of material fact to a tribunal by submitting the forgery of the client's signature to the court, using evidence that the lawyer knew to be false and

⁴⁴ Disciplinary Rules at 1.02, 3.03 and 4.01.

⁴⁵ Paralegal Code Canon 2.

⁴⁶ Disciplinary Rules at 8.04.

⁴⁷ Paralegal Code at Canon 2.

⁴⁸ 72 Tex. Bar J. 501 (June 2009).

by failing to disclose those facts to the court when disclosure was necessary to avoid assisting a criminal or fraudulent act. The lawyer further violated Disciplinary Rule 8.04 that prohibits any violation of the Disciplinary Rules, prohibits commission of any criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, and prohibits engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. The attorney received a public reprimand and filed a notice of appeal.

In the second instance, a lawyer prepared an affidavit for a non-party witness in a civil suit and instructed the client to arrange for the witness to sign the affidavit in front of a notary. The client returned the affidavit to the attorney and claimed the witness had signed it but could not physically go to a notary. The attorney then notarized the affidavit without having witnessed the witness' signature. The witness contacted the opposing party and stated she had not read the affidavit completely and did not sign the affidavit in front of a notary.⁴⁹

In this instance, the attorney violated Disciplinary Rule 1.02(c) by engaging in conduct the attorney knew was criminal or fraudulent. The attorney also violated Disciplinary Rule 3.03(a)(1) and (2) in making a false statement of material fact to a tribunal by signing a notarial acknowledgment that was false and by failing to disclose that fact to the court when disclosure was necessary to avoid assisting a criminal or fraudulent act. The attorney also violated Disciplinary Rule 3.03(a)(5) in offering or using evidence the lawyer knew to be false. The lawyer further violated Disciplinary Rule 8.04 that prohibits any violation of the Disciplinary Rules, prohibits commission of any criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, and prohibits engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. The attorney received a private reprimand.

In the third instance, a lawyer caused a witness affidavit to be prepared and notarized. The witness called the lawyer later and requested that changes be made to the affidavit. The lawyer had his legal assistant type the requested changes into the word processing document that contained the affidavit and then told the witness that it would not be necessary to return and sign a new affidavit if she consented to using the signature page from the original affidavit on the modified affidavit. The witness approved the requested changes by telephone and consented to the lawyer's use of the signature page from the original affidavit on the modified affidavit.⁵⁰

In this instance, the attorney violated Disciplinary Rule 1.02(c) by engaging in conduct the attorney knew was criminal or fraudulent. The attorney also violated Disciplinary Rule 3.03(a)(1) and (2) in making a false statement of material fact to a tribunal by submitting a document that was altered after it was signed and utilizing the original signature page and notarial acknowledgment and by failing to disclose that fact to the court when disclosure was necessary to avoid assisting a criminal or fraudulent act. The attorney also violated Disciplinary Rule 3.03(a)(5) in offering or using evidence the lawyer knew to be false. The lawyer further violated Disciplinary Rule 5.03 by not ensuring that his legal assistant's conduct was compatible with the professional obligations of

⁴⁹ 82 Wis. Lawyer 35 (May 2009).

⁵⁰ 82 Wis. Lawyer 35 (May 2009).

the lawyer, by ordering or permitting the conduct by the legal assistant, and by failing to take reasonable remedial action to avoid or mitigate the consequences of his legal assistant's misconduct. The lawyer further violated Disciplinary Rule 8.04 that prohibits any violation of the Disciplinary Rules, prohibits assisting or inducing another to violate the Disciplinary Rules, prohibits violating the Disciplinary Rules through the acts of his legal assistant, prohibits commission of any criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, and prohibits engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. The attorney received a private reprimand.

Additionally, the legal assistant violated Canon 2 by preparing the changes to the original affidavit form and assisting the attorney in attaching the original signature page to the amended affidavit, both acts that the attorney was prohibited from doing. The legal assistant also violated Canon 8 in failing to maintain a high standard of ethical conduct and in failing to contribute to the integrity of the paralegal profession.

Finally, a lawyer was hired to prepare a will, health care power of attorney, durable power of attorney and a revocable trust. The client signed the documents in the lawyer's office but not in the presence of the required witnesses or the notary. A statute requires the witness to sign the documents in front of the witnesses, and a statement above each witness' signature indicates that the document was signed in front of the witnesses. A statute also required the client and witnesses to sign the documents at the same time. Instead, a legal assistant arranged for witnesses to sign as witnesses even though they did not witness the client's signatures, the legal assistant notarized the documents even though they were not signed in front of the legal assistant, and the legal assistant allowed the client to sign a previously notarized document.⁵¹

In this instance, the attorney violated Disciplinary Rule 1.02(c) by engaging in conduct the attorney knew was criminal or fraudulent. The attorney violated Disciplinary Rule 4.01 by causing his legal assistant and other staff members to make a false statement of material fact to a third person in the form of the false notarial acknowledgment and the false witness statements. The attorney violated Disciplinary Rule 5.03 by not ensuring that his legal assistant's and staff's conduct was compatible with the professional obligations of the lawyer, by ordering or permitting the conduct by the legal assistant, and by failing to take reasonable remedial action to avoid or mitigate the consequences of his legal assistant's misconduct. The lawyer further violated Disciplinary Rule 8.04 that prohibits any violation of the Disciplinary Rules, prohibits assisting or inducing another to violate the Disciplinary Rules, prohibits violating the Disciplinary Rules through the acts of his legal assistant, prohibits commission of any criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, and prohibits engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. The attorney received a private reprimand.

Once again, the legal assistant violated Canon 2 in arranging for witnesses to sign a document without witnessing the client's signature and by notarizing a document without witnessing the client's signature and the witnesses' signatures. The legal assistant also violated Canon 8 in failing to maintain a high standard of ethical conduct and in failing to contribute to the integrity of the

⁵¹ 82 Wis. Lawyer 33 (May 2009).

paralegal profession. The legal assistant also likely violated Canon 9 in failing to maintain a high degree of competency as represented by the obvious legal violations, particularly in arranging for witnesses to sign without witnessing the client's signature despite language immediately above the witnesses' signatures stating that the client signed the documents in the witnesses' presence.

CONCLUSION

A notary's official acts are not insignificant formalities which may be smiled out of the law. Notaries have an important role in the functioning of American society, and society's ability to rely upon a certification of a notary is crucial to the reliability of our judicial and economic systems. Despite this impact, few persons ever consider the importance of the office or the functions of a notary public or contemplate the degree to which American society relies upon the notary's honest performance of his or her responsibilities. Similarly, few consider the rules imposed upon those who hold a notary commission and the purpose for those rules and limitations. Instead, obtaining a notary's signature is often viewed as a chore with no real purpose.

Attorneys and paralegals are frequent users of a notary's services and should understand the purpose for a notarial act. In fact, attorneys - of all classes and professions in the world - are the "most sacredly bound to uphold the laws."⁵² Yet how often is a paralegal or secretary told to get a commission, given no training or explanation from the attorney on the notary's duties, and told to "notarize" a document, perhaps even to execute a jurat or acknowledgment without actually witnessing the declarant's signature or perhaps to execute a jurat without administering an oath to the witness? And, how often have attorneys failed to follow the Disciplinary Rules when supervising employee notaries or obtaining notarial acts on behalf of clients? The attorneys are obligated to obey the Disciplinary Rules.

Too often, notaries fail to follow the mandates of Texas law applicable to them in performing their official duties. While few, if any, of these notaries understand the responsibility and potential liability they assume by accepting a commission and performing their official duties, they were all given written instructions on their duties and responsibilities that they simply chose to ignore.

Also too often, paralegals participate in transactions involving improper notarial acknowledgments or they witness violations of the notary laws yet say nothing because the deal needs to get closed or the supervising attorneys instructs them to disregard the violation. Those paralegals agreed to follow the Paralegal Code.

The obligations of a notary public are not particularly difficult to satisfy and the procedures are not particularly complicated. For notaries, upon whom we all rely for the faithful performance of their work, for attorneys who supervise them or utilize their services, and for paralegals who may be the notaries or who actually oversee the notary performing the services, there is no better time than now to follow diligently the rules applicable to notaries public and meet our professional

⁵² Ex parte Wall, 107 U.S. 265, 274 (1883), cited in In re Lock, 54 S.W.3d at 323 (Owen, J., dissenting).

obligations. After all, it is a matter of ethics and the respect and confidence of the members of our profession and the society we serve.