Notarial Law: Don’t Take it for Granted
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Actually being a Notary
• Louisiana attorneys can easily become notaries, however, they actually have to fill out the paperwork to register as a notary. *In Re Hollis*, (La. 3/14/14); 135 So.3d 596.

• While inactive attorneys are still notaries, suspended or disbarred attorneys are not. *Compare Op. Atty. Gen. # 16-0084, with In re Dowell*, 2014-B-2038 (La. 11/21/14); 154 So.3d 545.
The Dating of Documents
The Dating of Documents
(Backdating)

1. Backdating is bad
   a. Nixon and his tax attorney
b. Bad Recordkeeping & Backdating

i. Britton v. Williams, 40,341-CA (La. App. 2 Cir. 10/26/05); 914 So.2d 1151. No copy kept by notary of notarizations. Further, no other sufficient records to pin down date of notarization. Parole evidence used to defeat MSJ and send back to determine if authentic act.

ii. Couvillion v Couvillion, 2003-CA-2006 (La. App. 1 Cir. 6/25/04); 886 So.2d 474. Attorney by his own admission not always present for notarizations, so uncertainty arose in case of pre-marital agreement as to whether there was backdating.
2. **Effective date**
   a. Delays in the formality of execution leads to litigation.
      - In *Francois v. Tufts*, 571 So.2d 813 (La. App. 4 Cir. 1990), a witness’ signature on an acknowledgment was omitted, creating a question regarding whether an intervening marriage created a widow’s portion.
   b. “As of” vs. execution date
      i. Clauses to consider:
         1. Effective Date. This agreement is effective upon the last to occur of signature by all parties.
         2. Effective Date. This agreement is effective upon a final, non-appealable order by the United States Bankruptcy Court for the Eastern District of Louisiana, case no. 19-99999.
ii. Consider the impact of suspensive or resolutory conditions upon effective dates

1. La. Civil Code art. 1767.

A conditional obligation is one dependent on an uncertain event.

If the obligation may not be enforced until the uncertain event occurs, the condition is suspensive.

If the obligation may be immediately enforced but will come to an end when the uncertain event occurs, the condition is resolutory.

2. Common example of a suspensive condition is the “if my spouse survives me by 30 days” clauses in wills
c. Public Records Doctrine

   i. Effective between parties is not the same as effective as to the world

3. Where to date

a. Take care when the splicing forms

i. Failing to date

ii. Inconsistent dating top and bottom of document

1. In re Succession of Holbrook, 2013-C-1181 (La. 1/28/14); 144 So.3d 845, the word “day” was omitted from the attestation clause of a will, but the date was on the same page and every other page and at the precatory paragraph.

2. See La. Civil Code art. 1577, for substantially similar compliance:

The notarial testament shall be prepared in writing and dated and shall be executed in the following manner. If the testator knows how to sign his name and to read and is physically able to do both, then:

(1) In the presence of a notary and two competent witnesses, the testator shall declare or signify to them that the instrument is his testament and shall sign his name at the end of the testament and on each other separate page.

(2) In the presence of the testator and each other, the notary and the witnesses shall sign the following declaration, or one substantially similar:

“In our presence the testator has declared or signified that this instrument is his testament and has signed it at the end and on each other separate page, and in the presence of the testator and each other we have hereunto subscribed our names this ___ day of __________, ____. ”
3. In contrast to Holbrook, consider, *In the Matter of John Robert Biscamp*, 16-673, 2017 WL 435710 (La. App. 3 Cir. 2/1/17) where the “sworn to and subscribed before me” language was found insufficient as an attestation clause.

b. Next to signature to be filled in vs. pre-typing date

4. **Other improper dating**

a. Consider the problem of the date is never being filled in

b. Watch out for facially invalid dating, e.g. in agreements to purchase, the acceptance occurring after the deadline for acceptance
The Notary at the Closing Table

An authentic act is self-proving, meaning that it is presumed to be valid upon its face, and as such, it constitutes admissible evidence of its content and of the identity of the declarer or parties, without further proof.


See also, Pope vs. Khaled, 2005-CA-0027 (La. App. 4 Cir. 6/1/05); 905 So.2d 1149, explicating utility of authentic acts for summary judgment in contract litigation.
The Notary at the Closing Table

(When must item be in Authentic Act)

a. Items which must be in Authentic Form:
   i. Executory Process
   ii. Notarial Testaments, La. Civil Code arts. 1577 – 1580.1
   iv. Consent of parent to the adoption of a child, Children’s Code article 1244; *see also*, Children’s Code articles 1122, 1196 & Civil Code art. 196 & 213.
   v. For a more extensive list, *see Appendix A*, quoting the Study Guide for Notaries, at pages 273-274.
b. Authentic Act is to be contrast with act under private signature, duly acknowledged,
   i. The act under private signature, duly acknowledged is generally covered by La. Civil Code art. 1836
   ii. A failed authentic act may nonetheless constitute an act under private signature. La. Civil Code art. 1834.
   iii. Authentic Act Failure Jurisprudence

1. In re Succession Harlan (La. App. 1 Cir., 2017)
   What constitutes an Authentic Act. Oral Arguments were heard by the La. Supreme Court on March 12, 2018
   2. Executory process
   3. Same room same time.
      i. In Hardin vs Williams, 478 So.2d 1214 (La. 1985), donation failed because notary did not see the execution by donor.
      ii. In Eschete vs. Eschete, 2012-CA-2059 (La. App. 1 Cir. 2/27/14); 142 So.3d 985, marital donation failed because witnesses not in room of time of execution.
2. Competence

a. Capacity and the notary
   • Signatory needs to specifically understand what is to be signed.
   • Succession of Reynaud, 619 So.2d 628 (La. App. 3 Cir., 1993) attorney reviewed will, but did not know testator had a delusion underlying the change Executors

b. Watch for indicators of diminished capacity
   i. Is the testator
      • living in an Alzheimer unit?
      • Under the influence of alcohol or drugs (the latter whether prescription or non-prescription)
      • Is the signatory able to follow instructions?
ii. Can the testator read English
   • Is there a heavy Cajun, Spanish or Vietnamese accent? *Lejeune vs Succ. of Duplechin*, 260 So.2d 37 (La. App. 3d Cir. 1972)
   • Is the person illiterate?

iii. Perhaps use questions such as
   • What year is it?
   • Who is the president?
   • Who are your children?

iv. Consider video
The Notary at the Closing Table

(Competence continued)

c. Undue Influence
   c. In re Alexander (La. App. 1 Cir., 2015) nice discussion of Capacity versus Undue Influence

d. Louisiana’s concept of intermittent lucidity

e. Capacity and the Attorney: Ethical Considerations
   There are now circumstances where an attorney’s confidentiality proscriptions are altered in the context of a client with diminished capacity. See Louisiana Rule of Professional Conduct 1.14.

f. Some resources regarding diminished capacity: See Appendix B
The Notary at the Closing Table

(Whether & how to notarize)

3. Never obligated to notarize
   a. Listen to your gut, like Gibbs in NCIS
   b. Out of country academic transcripts and other frauds

4. Notary’s signature is his seal in Louisiana. *Fleming vs. Richardson*, 13 La. Ann. 414 (1858). In other words, the “squeeze” is for the out of state.

5. “Notarized but not prepared” stamp
The Notary and Death
1. **Wills**
   a. One testator per testament. La. Civil Code art. 1571.
   c. Revocation.
      • La. Civil Code art. 1607:
        Revocation of an entire testament occurs when the testator does any of the following:
        (1) Physically destroys the testament, or has it destroyed at his direction.
        (2) So declares in one of the forms prescribed for testaments or in an authentic act.
        (3) Identifies and clearly revokes the testament by a writing that is entirely written and signed by the testator in his own handwriting.
      • Note that tacit vs express distinction no longer exists.
   d. One will vs triplicate original
      • Advantages and disadvantages to each approach
      • *Succession Of Talbot*, 530 So.2d 1132 (La. 1988). Tearing up one of the multiple originals in front of the attorney who drew up the will found sufficient to revoke
   e. Attestation clauses. See **Appendix C**.
2. Revocable living trusts
3. Successions

i. Administration or not

ii. Renunciations

iii. Donations with succession docs
   • More effective than renunciation
   • Judgment blessing the donation
The Notary and Filing
1. **Duties and Recordation**
   b. Orleans Parish considerations
      - La. R.S. 35:199(A)(2)(c) and the Office of Notarial Archives
      - La. R.S. 35:199(D): Internet loan considerations
      - Orleans Documentary Transaction Tax of $325.00, New Orleans Code Ordinances, Ch. 150, Sec. 150-366 et seq.

2. **Attachments**
   a. Riders
   b. Property descriptions
   c. Surveys
   d. Entity authority. Consider the following clause:
      o Entity Authority. Evidence of the authority of any entity signatory to enter into this agreement may be attached hereto as Exhibit “_,” in globo.

3. **Notaries subject to criminal prosecution for malfeasance in office.** La. R.S. 14:134.
The Notary in the Modern and Electronic World
1. **Electronic signatures**
   a. Generally allowed:
      - Louisiana Uniform Electronic Transactions Act, La. R.S. 9:2601 et seq.;
      - Electronic Signatures in Global and National Commerce Act, 15 U.S.C § 7001 et seq.
   b. Louisiana statute specifically proscribes electronic signatures for testaments, codicils, and testamentary trusts
   c. La. R.S. § 9:2611. Notarization and acknowledgment
      - If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.
2. **Patriot Act.**
   a. No closing for a person known to be a terrorist.
   b. Can look up terrorists on most of the software that title companies and banks use.

3. **TRID.** Acronyms within an acronym enforced by an acronym. TILA (Truth in Lending Act) RESPA (Real Estate Settlement Procedures Act) Integrated Disclosure is enforced by the CFPB (Consumer Financial Protection Bureau).
   
   - Had the effect of having title companies regulated in a fashion similar to banks, partially because the banks were made responsible for the acts of the title company (think about insufficiently protected consumer information)

4. **Best practices and safeguarding your client’s money**
   a. False cashier checks
   b. Emails changing wiring instructions
   c. Online banking and stand-alone computer

5. **Bad things Happening in Louisiana and Other States**
Appendices
The following acts **MUST** be authentic acts (La. C.C. art. 1833) in order to be valid:

- Act of surrender (adoption) (Children’s Code art. 1122)
- Release of claims by alleged father; consent to adoption (Children’s Code art. 1196)
- Consent of parent to the adoption of his child in an intrafamily adoption (Children’s Code art. 1244)
- Acknowledgment of paternity (C.C. art. 196)
- Adult adoption (C.C. art 213)
- Designation of tutor (Tutorship by will) (C.C. art 257)
- Limited emancipation by authentic act (C.C. art 368)
- Modification or termination of limited emancipation by authentic act (C.C. art. 371)
- Declaration of dispensation from collation (C.C. art 1232)
- Proof of conditions of partnership to exempt from collation (C.C. art 1247)
Appendix A (continued)

- Donations *inter vivos* of immovables and incorporeal things (and corporeal movables whenever not effected by actual delivery or when the donation must be in writing) (C.C. arts. 1541 & 1543)
- Notarial testaments (C.C. arts. 1577-1580.1)
- Act of mortgage or privilege on immovable property importing confession of judgment in order to use executory process (C.C.P. art. 2631, 2635)
- Act of immobilization of movable (R.S. 9:1149.4)
- Act to establish disability of principal in conditional procuration (R.S. 9:3890)
- Grant of real right in immoveable create for educational, charitable, or historic purposes (R.S. 9:1252)
- Act of sale titled movable sold by holder of privilege (R.S. 9:4502)
- Acknowledgement of designation of keeper of property (R.S. 9:5136)
- Affidavit of correction (R.S. 35:2.1)
- Act to cancel mortgage or privilege secured by paraphed obligation (R.S. 9:5170)
- Statement of Authority (R.S. 12:505).
Appendix B


- B. Charles P. Sabatino article Assessing Clients with Diminished Capacity, Bifocal Vo. 22 No. 4 (Summer 2001) (ABA Commission on Legal Problems for the Elderly)
  - https://www.americanbar.org/content/dam/aba/publications/bifocal/summer01.authcheckdam.pdf


- D. B.B. Brown, Assessment of Capacity, §§ 5.01.- 5.06, in Mental Capacity: Legal and Medical Aspects of Assessment and Treatment (A.C. Walsh et al., 1994).

- E. http://www.mass.gov/ (search for diminished capacity)
• **Attestation Clauses**: These clauses come from C. Alan Jennings, et al. *Fundamentals of Louisiana Notarial Law and Practice* (LSU 2017) [the “Study Guide for Notaries”], pages 396-401. They are legally derived from the Civil Code articles below. Care and review of the relevant Civil Code articles is strongly advised in connection with any attestation clause other than basic form.

- **Testator knows how to read, sign his name, and is physically able to do both** (C.C. art. 1577 (2)) (Basic)

  “In our presence, the testator has declared or signified that this instrument is his testament, and has signed it at the end on each other separate page, and in the presence of the testator and each other we have hereunto subscribed our names this _____ day of __________, ________.”

- **Testator knows how to read and sign his name, but is physically unable to sign** (C.C. art. 1578 (2))

  “In our presence the testator has declared or signified that this is his testament, and that he is able to see and read, and knows how to sign his name, but is unable to do so because of a physical infirmity; and in our presence, he has affixed or caused to be affixed, his mark or name at the end of the testament and on each other separate page, and in the presence of the testator and each other, we have subscribed our names this _______ day of __________, ______.”
• Testator does not know how to read, or is unable to read because of physical impairment, whether or not he is able to sign his name (C.C. art. 1579(2))

• “This testament has been read aloud in our presence and in the presence of the testator, such reading having been followed on copies of the testament by the witnesses [, and the notary if he is not the person who reads it aloud,] and in our presence the testator declared or signified that he heard the reading, and that the instrument is his testament and that he signed his name at the end of the testament and on each other separate page; and in the presence of the testator and each other, we have subscribed our names this ____ day of __________,_____.“
• Notarial Testament in Braille form (C.C. art 1580 (2))
  “In our presence the testator has signed this testament at the end and on each other separate page and has declared or signified that it is his testament; and in the presence of the testator and each other have hereunto subscribed our names this _____ day of __________, ______.”

• Deaf or Deaf and Blind Notarial Testament (C.C. art. 1580.1 (B) (2))
  “The testator has signed this testament at the end and on each other separate page, and has declared or signified in our presence that this instrument is his testament, and in the presence of the testator and each other we have hereunto subscribed our names this _______ day of ______________, _____."

• Deaf or deaf and blind notarial testament unable to sign his name because of physical infirmity (C.C. art. 1580.1 (C) (2))
  “The testator has declared or signified by sign or visual English that he knows how to sign his name but is unable to sign his name because of a physical infirmity and he has affixed his mark at the end and on each other separate page of this testament, and declared or signified in our presence that this instrument is his testament and in the presence of the testator and each other we have hereunto subscribed our names this __________ day of __________, 2__.”