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Dedicated to the enhancement of notarial professionalism in Louisiana

LEGISLATION OF INTEREST

Secretary of state resists bankers proposal to dumb-down notary exam and create second-class notary

Secretary of State Tom Schedler has taken a firm stand opposing the Louisiana Bankers Association (LBA) 's legislative package designed to solve the problems small-town banks have in getting their employees commissioned as notaries. Schedler is instead offering a more constructive solution by offering HB1192 to provide some relief to bankers and businesses in rural parishes where access to notary training is poor at best, and to give the 2011 legislative-study proposals time to develop.

The bankers' proposals (SB259 and HB928) sought to remove performance-assessment requirements from the state notary exam and to prohibit notaries from receiving notarial testaments and preparing notarial acts involving the conveyance of immovable property.

The bankers' proposal, which remains a threat if the legislature balks at the secretary's plan, would create a second-class, limited-authority notary from August 1 forward, would *require* the governor to commission all who passed the multiple-choice and research portions of the exam since 2009, and would require the secretary of state to stop using performance assessments in examining future applicants as to competence to prepare notarial instruments. The Louisiana State Bar Association board of governors, for their part,

are urging legislators to require Louisiana citizens to go to lawyers if they want a notarial testament or to convey immovable property.

The secretary has informed the bankers and legislators that he is confident in the validity of the exam developed by LSU, and that it is not in the interest of the people of Louisiana for the legislature to yield to political pressure to "dumb down" the exam. He made it clear he will oppose creating any second-class notary official with limited powers, as that would compromise the reliability of any notarial instruments made in this state.

Schedler instead has asked bankers and notary association leadership to support a temporary provisional commissioning program for the less-populated parishes as a better approach to the bankers' alleged problem while his office moves to improve the notary-education offerings available to qualified applicants. HB1192 will accomplish that objective. It has passed the house, but has to pass the senate. The bar association is working against this bill, instead endorsing SB259 (the "We don't need no notaries writin' no notarial acts" bill).

According to the HCR45 notary study committee report released in January, the motivated and educated people who are having trouble passing the exam in the northern part

of the state are unable to obtain the skills training they need to pass the exam.

The problem has hit hard in the northeast part of the state, where small-town bankers want to designate their employees as notaries so that they can provide notary services to current and prospective customers.

Under the new statewide standard, these bankers are no longer able to designate who in their employ will be notaries, send them to the courthouse for a letter from a judge, and get them commissioned. Until 2005, all you needed was a boss with connections at the courthouse. It's a new world for the banks in those parishes, and they don't like it.

During the session, the bankers have brought to bear on their legislative allies intense pressure to dumb down the notary exam and force citizens of their communities to turn to more costly law firms in lieu of using notaries for relatively straightforward notarial acts.

The bankers' self-serving proposals were quickly identified as unsatisfactory by the informed legal community (LSBA legislation committee's support of the bankers' proposals notwithstanding), prompting the secretary of state to step in and ask for time to develop solutions proposed by the legislative study that concluded its work and reported to the legislature this January.

Secretary of State Schedler opposed efforts both to change the office of notary and to change the exam to allow persons who could not meet minimum-competence standards. His survey of notaries in late 2011 indicated that the banks should not be allowed to designate and appoint their own notaries.

Schedler's office now reports that the bankers have agreed to hold their bills and go along with the secretary's plan.

Now is the time to get accurate information to the legislators

Louisiana legislators—some of whom have been convinced by Louisiana bankers that we should change the Louisiana notary to a common-law notary—probably would be disinclined to throw their constituents under the bus if they understood why the notary in Louisiana is not merely an affidavit clerk like we find in the other 49 states.

Most of the legislators who supported the bankers' bills were acting in good faith, but they had inaccurate information given to them about the exam's pass-rate. Some of the legislators, however, have fundamentally flawed concepts about the role of the notary in Louisiana, and would rather see local lawyers get fees for notary work, even when their constituent does not need legal advice.

But more than just being disabused of their notion that notaries in this state should no longer be allowed to do anything more than witness signatures, legislators need to understand the role of the notary in Louisiana. If the legislators can be enlightened, we can avoid these every-time-the-legislature's-membership-changes attempts to limit notarial services and change our notaries' role into one like that found in common-law states. Changing the role of the notary in Louisiana would force Louisiana citizens to pay lawyers to put their transactions into proper notarial form instead of allowing them to avail themselves of the services of notaries, whose job it is to do just that—put constituents' notarial transactions in proper form. (See page 3: *The Role of the Notary in Louisiana*.)

Legislators need better (and accurate) information

One hopes Richard's words will give legislators a start at understanding why for 330 years we have entrusted our notaries with high and important functions. Legislators could also do their constituents a favor by reading

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The Role of the Notary in Louisiana

When New Orleans attorney Richard P. Bullock (formerly a notary examiner for East Baton Rouge Parish and currently an assistant bar examiner) read the bankers' bills, he sent me the following essay. I hope you and any legislator that reads it will find informative and helpful in understanding how Louisiana citizens will lose big-time if the role of the notary in our state is marginalized as suggested by the cooks at this years attempted notary-roast at the Capitol.

When Napoleon instituted the Civil Code in France (which of course was the model for our civil code, although Louisiana law originally codified Spanish civil law, in force in Louisiana at the time), the purpose was to do away with the legal gloss and complicated bureaucratic procedures that the "average" man faced in France at the time. It was nearly impossible to understand the law because of all the non-legislative sources of authority that had been grafted onto it. The common law of our sister states adheres to the principle that "every man is charged with knowing the law," yet it is impossible to know the law in a state where crimes are defined by court decisions and statutes are set aside or limited as being in derogation of the judge-made common law.

The declared purpose of the Civil Code was for "every man" to be able to pick up the Code and know exactly what the law is without the need to know or understand all the legal gloss placed on it by the courts or the bureaucrats. The notary was integral to this fundamental principle of French law. It was a simplification of the process, a better way if you will—different from our common law brothers. In Britain, you have not one lawyer, but two: the barrister who litigates, and the attorney who facilitates transactions, both commercial and private. In the United States that distinction is lost, but in Louisiana it continues on in the form of the civil law notary.

The notary public is not intended to be a lawyer, but to be able to do the most basic things that an "attorney" is required for in common law jurisdictions. The notary in Louisiana is responsible for putting into form and meeting the requirements of the law for those transactions the "average man" will need--basic acts such as receiving a will, selling or mortgaging real estate, taking oaths and affirmations.

What the bankers' proposed bills suggest is to destroy that basic principle underlying Louisiana's civil law. Their bills, if enacted, will take

away from the citizen the ability to control his own business and to settle his own affairs, without the expense of an attorney—when he understands the law and knows what he wants to do but doesn't know how to put it into proper form. The attorney in Louisiana clearly holds a sacred role, one that is necessary only when the "average man" finds himself involved in more than just ordinary day-to-day issues.

Harkening back to our early days as a colony, it was lawyers that were few in number and notaries that were more common. The proponents of this legislation would turn this principle on its head. Notaries, they argue, should not be doing wills and real estate transfers. Such acts are "too complicated" they say. But notaries have been preparing these acts in Louisiana since the days of the first French and Spanish settlers. In fact, their acts are the foundation of modern titles, whether passing by testament or by sale. Why shouldn't notaries prepare testaments or conveyances?

The bankers come now before the legislature and say that the need for notaries in some parishes is dire, and assail the state notary exam as the problem. But is the test really the problem? Or is the problem in fact a combination of under-prepared test takers and a limited availability and accessibility of valid education programs for persons seeking to be appointed?

The bankers have encouraged the lawyers to strip away the powers of the civil law notary, to dumb them down, discount them if you will.

They say there is a need to be able to provide notary services at their branches as part of a marketing plan designed to turn local banks into Walmart super-stores of banking. However, we have seen what happens when the Walmart approach is taken to any business: quality suffers, choices are reduced, cheap imports stand instead of quality.

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the first three chapters of the notary study guide and even its later chapters on conveyance and mortgage of immovable property, and on testaments.

If our legislators (and bankers) would educate themselves on this issue and factor in the fact that the performance-evaluation component of the state notary exam is an *open-book exam*, they would understand why the pass-rate is lower than they'd like.

By the way, the actual exam pass rate is *17 percent*. One of every six persons who have taken the exam has passed it. Not 2%, 5%, or 8%, as has been represented to the legislators. Giving legislators this kind of misleading information is shameful, and the people of this state are all victimized when legislators buy into it. *Pass rate* is a function of how many people take the exam. Under the current system, *anybody* with a pulse and a Louisiana voter registration card can pay \$75 and take the notary exam. There are no academic qualifications whatsoever. Success on the exam, however, requires mature critical thinking skills, and an ability to read and write at least at the level of a college junior. The problem is that people with those qualifications cannot depend on current education programs to teach them what they need to know.

Legislators might consider what the pass rate would be for any professional exam if two-thirds of those taking the test had little or no education in preparation for the exam, nor the ability to read and write at college level.

I invite legislators to ask themselves two questions: 1. If any residents of this state age 18 or over could sit for the Louisiana state bar exam as often as they could pay the fee for the exam, what would that exam's pass-rate be? 2. As long as an exam identifies the applicants with the necessary competencies and passes them, what are the valid generalizations that can be made when looking at a pass rate?

To be sure, thoughtful legislators will not want to diminish the capacity of the notary exam to ensure effective notarial transactions any more than they would want to license lawyers, accountants, doctors, or pharmacists without an examination process that determines their readiness to serve safely and effectively.

Let's not lose sight of the goal: competent Louisiana notaries to serve Louisiana citizens.

The wrong approach: A second-class notary commission for any entry-level employee to act as a signature witness.

In 2004, the legislature decided to protect the citizens of all Louisiana parishes and require notaries in all parishes to meet a statewide competency standard before being appointed as a Louisiana notary.

The extremely low exam standard once common in the more rural parishes has given rise to a notion that the state exam must be flawed. But it is not the exam that is flawed. It is the education system.

Primarily in low-population parishes, notary applicants have been unsuccessful in getting the training they need to have a chance at passing the state notary exam.

The 2011 legislative study committee rejected the bankers harping that the exam should be dumbed down, but rather made a convincing case that the prospective notaries get better education.

The bankers were not satisfied with that idea; instead they pressured legislators to introduce bills that would undo the reforms of 2004 and undermine a centuries-old system.

The information furnished to legislators was incorrect, but it induced them to author the bills for the bankers. The misinformation was furnished knowingly and demonstrates bad-faith in the attempt to enable banks to get their

employees commissioned as notaries without having demonstrated the minimum acceptable competencies required of a Louisiana notary.

The proponents of the banker bills secured the support of legislators who, with limited knowledge of the traditional role of the Louisiana notary, have made clear their contempt for the regularly commissioned notary, saying that notaries have no business doing what they are currently authorized to do—things notaries have done since before lawyers even existed in this state. This has even stirred up uninformed lawyers, who have been led to believe that notaries who prepare notarial instruments are engaging in the unauthorized practice of law.

In the House committee hearings for HB929 (that's the secretary of state's bill to improve the education programs), some legislators on the House Committee on Civil Law and Procedure made it clear they had bought the bankers' line. Their words indicate that they neither understand nor respect the role of notaries in this state, along with the view that the office should be conformed to the common-law status of the other 49 states and that notaries should be prohibited from preparing certain notarial instruments! You can view the March 19th hearing online at http://house.louisiana.gov/H_Video/WM/2012/Mar_2012/0319_12_CL.aspx

Listening to some of those fellows one can almost hear the same logic that in the not too distant past held that African Americans had no business knowing how to read and write or that women had no business voting.

The sad part is that the bankers really didn't need to do this. Instead, they simply need to qualify and educate their employees, or hire qualified competent notaries to serve their customers. LSU offered to help them develop a first-class education program five years ago. The bankers balked. Wanting to "webinar" train their employees, the LBA finally found

an online course designed to prepare individuals for common-law notary duties in Texas and used it as their pre-exam offering to their member-bank employees. Here they are, five years later with nothing to show for it but a lot of people who still haven't passed the state notary exam.

The biggest problem with undertrained, under-educated notarial candidates being granted commissions is the questionable validity of their acts. We do not need to look too far for an example of the problems that this situation would cause. Around the nation, in the common law states, banks have been called to task for flawed mortgages in which proper signatures were not required or obtained. Some homes were foreclosed upon that should not have been; others cannot be foreclosed upon that should be. Why? Because of errors in documenting these loans and mortgages. Christopher Whalen, managing director of Institutional Risk Analytics told Minnesota Public Radio that "it's going to be trench warfare with years of lawyering." Major banks have set aside \$10 billion dollars to cover losses from these shoddy loans. The bills proposed by the bankers in Louisiana set up Louisiana homeowners and businesses for a similar result. The properly educated notary provides protection for our citizens and businesses, especially including the banks.

As of this writing, the bankers' bills (SB259 and HB928) have not been withdrawn, but the bankers have agreed to let the secretary of state's plan go forward. Nevertheless, readers should be mindful that the bankers' bills continue being held at the ready, held over the head of the secretary as a means of saying, "Make us happy, or we will do anything we can destroy the office of notary as it currently exists in this state in order to serve our purposes."

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The right solution: Improved access to effective notary training

The secretary of state has listened to the recommendations of the 2011 notary study committee and proposes to improve the education available to properly qualified applicants. His bills, HB929 and HB1192, offer what promises to be the best option for the people of Louisiana, including the people who would appear before notaries in banks. His offerings, along with HB361, have secured agreement from the bankers to stop advancing their bills and let the education plan come about. The plan calls for a four-year period to allow certain provisional notaries to be commissioned for a short time in underserved parishes until the education programs can properly staff the needs in those parishes.

Secretary of State Tom Schedler stands by the state notary exam, and offers HB929, HB1192 and HB361 as the means to improve the pool of qualified applicants. He has obtained the bankers' word that they will not move SB259 or HB928, both of which propose to fundamentally change the office of notary in this state by legislating away a valid notary exam and creating a second-class notary to replace the notary we have today.

Making your opinion known

Now is the time to let our senators know what you think, and what you want them to do. Corresponding directly with your own senator is essential.

Make sure senators know where you stand. Don't attack the banker-bills' authors. The authors are just looking to help the bankers and are obviously uninformed about the consequences to their constituents if they allow the bankers, or any commercial interest, to control the office of notary public.

To be effective, plainly state your position, make your case with supporting arguments, and urge senators to vote in favor of the secretary of state's bills (HB1192 and HB361, which hold the bankers at bay, and HB929 which will improve education for qualified notary hopefuls). And let them know in no uncertain terms you want them to vote against the bankers' bills (HB928 and SB259) if the bankers decide to advance either.

Your emails, faxes, and letters to senators are important reminders that not all of their constituents are bankers, but that all of their constituents benefit from access to competent notaries.

Notary Associations in Louisiana

Louisiana Notary Association

www.lna.org

Professional Civil Law Notary Association

www.pclna.org

Membership in either of these associations affords you the opportunity to protect your commission and the office of notary public in Louisiana. If you care about your commission, you should join one or both of these organizations. I belong to both.

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In these dark economic times, do we really want to tell the "average man" that he now stands alone? Do you want to tell him "We will sign your affidavits for free!" but require him to pay as much as ten times more for a basic will?

Is this what we want for our state—to create a greater need for lawyers?

I think what the citizens want are strong well-educated well-qualified civil law notaries capable of fulfilling their historical role in serving the people—not a cheap knock off.

Richard Bullock was first commissioned in East Baton Rouge Parish before becoming a licensed attorney. He served as parish notary examiner there from 1999 to 2002.

RECENT CASES OF INTEREST

If Louisiana bankers are having a hard time qualifying employees as notaries, they should contact Judge G. Michael Canaday at the 14th Judicial District Court in Lake Charles and ask him for a list of felons in his area and have him certify them as having the character and fitness to serve as a notary. All they have to do is find some of these character-laden first-offenders who need jobs and their problems finding notaries will be over.

That's because Judge Canaday recently certified that Christopher Dale Lane, who was convicted in 2008 of simple robbery, was of sufficient good character and fitness to qualify as a notary public.

According to the secretary of state notary division, Lane recently applied to qualify as a Louisiana notary. He disclosed on his application that he had a dubious past. But he did not go so far as to inform that it involved a felony conviction for simple robbery. Simple as the robbery might have been, it was still a felony.

Applicants to qualify for a notary commission in Louisiana must answer a battery of questions related to their character and fitness to hold the office. When anything on an application calls into question the applicant's good character and fitness to serve as a notary, the secretary of state refers the application to the district court in the applicant's parish for a judicial determination of character and fitness. Lane's disclosure of past trou-

bles with the law was sufficient for his application to be sent on to the courthouse in Lake Charles.

There, Chief Judge Lilynn Cutrer tasked Judge Canaday with handling the request. Canaday wrote to the secretary of state with the particulars of the sentence. Lane had plead guilty to his crime and had been sentenced in

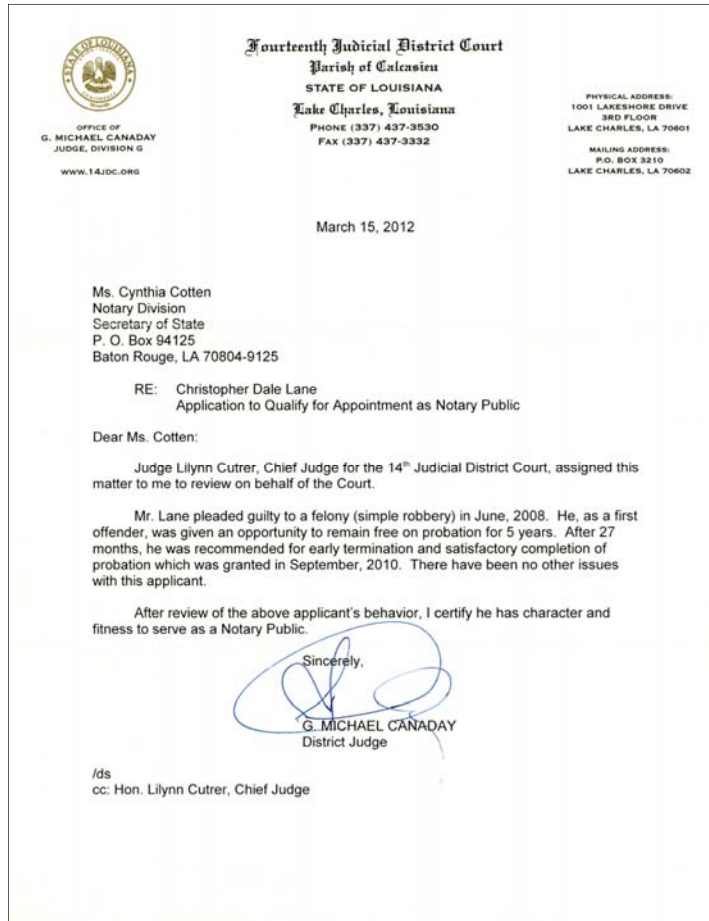
June 2008 to five years probation. After 27 months, his probation was terminated early and Lane was given a satisfactory-completion status.

One stroke of a pen by Judge Canaday and Lane is on his way to qualifying as a Louisiana notary with statewide jurisdiction. That's because Judge Canaday has deemed that conviction of simple robbery isn't such a bad thing, at least in Mr. Lane's case, and that it won't keep Lane from being entrusted with the office of notary public in the

state of Louisiana.

Now that Judge Canaday has given his blessing, Mr. Lane can sit for the statewide notary exam. If he passes (and if the governor signs his commission), Mr. Lane will be a Louisiana notary with statewide jurisdiction, and any problems he might have getting a job due to his past could vanish, because the bankers in the northeastern part of the state need notaries in the worst way.

This is their big opportunity to get them in the very worst way.





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