

April 19, 2006
OPINION NUMBER 05-0066

73 NOTARIES – Appointments & Qualifications

Ms. Shirley D. Bowler
State Representative
District 78
1939 Hickory Avenue, Suite 203
Harahan, LA 70123

All notaries public in this state shall record, with the appropriate repository, all mortgage documents passed before them. These documents shall now also contain the notary identification or attorney bar roll number and the typed, printed, or stamped name of the notary and the witnesses before the documents will be accepted.

Dear Representative Bowler:

You are requesting an Opinion from this Office inquiring whether one, several, or all of the parties to an act of mortgage or conveyance can waive the statutory duty of the notary to record the mortgage, and if so, how must the waiver be documented so as to proscribe action by the parties of future holders of any note secured by such mortgage against the notary for not recording the instruments as provided in R.S. 9:2791, 9:2745, 9:2749, 35:281, 35:284; 35:285; 35:286, 35:323(2), and 35:335?

Also you are requesting an opinion on whether R.S. 35:334 applies only to notaries in Orleans or whether it is applicable to notaries in other parishes.

Regarding your first question, this Office previously addressed this issue in Attorney General Opinion No. 93-407 where the Assessor of Orleans Parish was experiencing problems receiving copies of acts transferring title to real property. The opinion concluded that the notaries in Orleans were ignoring, or were unaware of, the provisions of R.S. 35:281, which places **a mandatory duty upon a notary to file a copy of an act evidencing the transfer of real property in Orleans Parish with the Board of Assessors for the Parish of Orleans within fifteen (15) days from the date of sale or transfer.** The opinion stated that “[F]urthermore, a violation of LA-R.S. 35:281 is punishable by a fine of not more than \$50.00 or imprisonment in the parish jail for not more than sixty (60) days, or both. LA-R.S. 35:284.”(Emphasis added).

This does not appear to allow for any provision to “waive the statutory duty of the notary to record the mortgage” as to affect third parties.

However, R.S. 9: 2756 (Effectiveness of unrecorded acts affecting immovables; effect of subsequent recordation) states:

All sales, contracts and judgments affecting immovable property, which shall not be so recorded, shall be utterly null and void, **except between the parties thereto**. The recording may be made at any time, but shall only affect third persons from the time of the recording.

The recording shall have effect from the time when the act is deposited in the proper office, and indorsed by the proper officer.

It appears this would allow the parties to the transaction to agree to a sale or mortgage between themselves and not desire to have the conveyance recorded with the Clerk of Court.

Our Supreme Court made clear in Martin v. Fuller, 214 La. 404, 37 So. 2d 851 (La. 1948) that it is the public policy of this state to have all transactions touching upon or affecting title to real or immovable property recorded in order to affect third parties. The Court stated:

As stated in the case of Baker v. Atkins, 107 La. 490, 32 So. 2d 69,70, 'there can be no actual owner of immovable property, so far as third persons are concerned, other than the owner of record'. See, also, McDuffie v. Walker, 125 La. 152, 51 So. 100; Soniat v. Whitmer, 141 La. 235, 74 So. 916; Loranger v. Citizens' Nat. Bank of Hammond, 162 La. 1054, 111 So. 418; Dalbey v. Continental Supply Co., 165 La. 636, 115 So. 807; State ex. rel. Hebert v. Recorder of Mortgages, 175 La. 94, 143 So. 15. Referring to the decision in the case of McDuffie v. Walker, this court, in the Soniat case, [141 La. 235, 74 So. 917] observed that since that time, 'the once vexatious question of whether the purchaser of real estate can be affected by unrecorded claims against the property, even though at the time of the purchase he had actual knowledge of them, has been settled in the negative--let us hope forever.'

Additionally, the statutes cited in your opinion request all contain the mandatory "**shall**" which would prevent any ability to "waive the statutory duty."

Also, all notaries public must be mindful that Act 1142 of 2003 amends R.S. 35:12 to mandate that the office of notarial records, register of conveyances, or recorder of mortgages and every clerk of court "shall not accept, file or record any notarized document which fails to contain the notary identification or bar roll number."

R.S. 35:12(D), as amended, now reads:

D. (1) Any document notarized in this state on or after January 1, 2005, submitted for filing or recording in the office of notarial records, register of conveyances, or recorder of mortgages in and for the parish of Orleans, or in the office of any clerk of court or recorder of mortgages or conveyances may be refused by the clerk or his employee if the document fails to contain the notary identification or attorney bar roll number and the typed, printed, or stamped name of the notary and the witnesses. However, documents filed in the civil or criminal suit records of any court shall not be subject to the provisions of this Subsection.

(2) Except as otherwise provided in this Section, no state office, agency, department, or political subdivision shall accept, file, or record any document notarized in this state on or after January 1, 2005, unless the document contains the notary identification or attorney bar roll number and the typed, printed, or stamped name of the notary and the witnesses.

(3) No office, agency, department, or political subdivision, or any officer or employee thereof, refusing to accept, file, or record any notarized document pursuant to the provisions of this Section shall be liable for any damages resulting from the refusal to accept, file, or record a notarized document for its failure to comply with the provisions of this Section.

It is therefore the opinion of this office that all notaries public in this state shall record, with the appropriate repository, all mortgage documents passed before them to make the transaction valid as to third parties. The parties to the

transaction could agree between themselves not to record the transaction; however, it would not have affect on third parties. These documents shall now also contain the notary identification or attorney bar roll number and the typed, printed, or stamped name of the notary and the witnesses before the documents will be accepted by the office of notarial records, register of conveyances, or recorder of mortgages in and for the parish of Orleans, or in the office of any clerk of court or recorder of mortgages or conveyances in the parishes outside the parish of Orleans.

Regarding your second question, § 334 of Title 35 is in Chapter 5 (Notaries in Orleans Parish), specifically states that this section applies only to notaries in Orleans.

The only other law regarding a notary and an expired bond is found in R.S. 35:71(E), which states:

E. The commission of any qualified notary, other than a licensed attorney at law, who fails to renew his notarial bond timely or who fails to timely file his new or renewed bond or evidence of insurance coverage, as provided in Paragraph (D)(2) of this Section, shall be automatically suspended, and the notary shall have no authority to exercise any of the duties or functions of a notary public until the required bond or insurance is in force and effect, and the bond or evidence of insurance has been filed with the secretary of state. This penalty shall be in addition to the filing fee required for renewal of the bond.

Hopefully this opinion answers your concerns. Please contact this office should you need any further assistance.

Yours very truly,

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ATTORNEY GENERAL

By:

WILLIAM P. BRYAN, III
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APPENDIX A

R.S. 9 § 2741 (Registry by notary outside New Orleans of conveyances and encumbrances of immovables; penalty)

It **shall** be the duty of all notaries public within this State, without the limits of the city of New Orleans to deposit in the office of the parish recorder of the parish in which the property is situated within fifteen days, at farthest, after the same shall have been passed, the original of all acts of sale, exchange, donation and mortgage of immovable property passed before them, and in the order of their respective dates, first making a careful record of said acts in their record books.

The foregoing provision shall not be so construed as embracing inventories or partitions or any other act required by law to be performed by notaries or parish recorders under any order of court; but the original of all such acts, without being recorded, shall be returned to the court from which the order is issued.

All notaries without the limits of the city of New Orleans, who may contravene the provisions of this article, **shall** be liable to a fine of one hundred dollars for each infraction of the same, to be recovered before any court of competent jurisdiction, one-half for the benefit of the informer, as well as all such damages as the parties may suffer thereby.

§ 2745. Registry by New Orleans notary of conveyances of immovables; penalty

It **shall** be the duty of the notaries in New Orleans to cause every deed of sale, donation, or any other sort of conveyance of immovable property, passed before them respectively, even when the parties shall agree to dispense therewith, to be registered at the office of [the] register of conveyances for the parish of Orleans, within forty-eight hours after the passage of said acts, and this under the penalty of five hundred dollars fine, to be recovered before any court of competent jurisdiction, for the use and profit of the Charity Hospital, and also under the penalty of being liable for all damages which the parties may suffer through the neglect of said notary to register the acts.

§ 2749. Parish of Orleans, registry of act on certificate of notary

In the parish of Orleans, when the act of transfer of property **shall** have been passed before a notary public, it shall be sufficient that the registering of the act be made, on a certificate being presented from the notary, who **shall** have passed the act containing:

1. The date of the act, and the place where it was passed.
2. The names, surnames and qualities of the contracting parties.
3. A description of the immovable property which has been transferred, with all necessary details.
4. The price of the transfer, whether paid in ready money, or on time, and in the latter case what the terms and conditions are.

R.S. 35§ 281 (Act evidencing transfer of real property; filing with board of assessors)

A. Whenever an act of sale or any other act evidencing a transfer of real property situated in the parish of Orleans is passed before a notary public, it **shall** be the duty of the notary to file a copy of any such act with the board of assessors for the parish of Orleans within fifteen days from the date of sale or transfer.

§ 284. Violations

Whoever violates the provisions of R.S. 35:281 or R.S. 35:282 **shall** be fined not more than fifty dollars or imprisoned in the parish jail for not more than sixty days, or both.

§ 285. Deposit of original acts when property affected situated outside New Orleans

Notaries public within the Parish of Orleans **shall** deposit in the office of the clerk and recorder of the parish in which the property is situated, whenever the property affected is situated in this state outside of the Parish of Orleans, within fifteen days after the same shall have been passed, the original of all acts of sale, exchange, donation and mortgage of immovable property, passed before them, together with all resolutions, powers of attorney and other documents annexed to or made part of the acts, and in the order of their respective dates, first making a careful record of the acts in record books to be kept for that purpose.

§ 286. Violations

Notaries who contravene the provisions of R.S. 35:285 are liable to a fine of one hundred dollars for each infraction to be recovered before any court of competent jurisdiction, one-half for the benefit of the informer, as well as for all such damages as the parties may suffer thereby.

§ 323. Central office; preservation of notarial records; permanent volumes

C. (1) The custodian of notarial records shall charge the sum of ten dollars for each act, contract, or other instrument thus filed and deposited in his office, and twenty dollars for each sketch, blueprint, or survey, with one-half of the fee collected to be dedicated to microfilm or other imaging projects, with the remainder to be used only for the expenses and maintenance of said office

§ 335. Willful violations

The custodian or notary willfully violating the provisions of this Part **shall** be fined not less than five hundred dollars nor more than one thousand dollars, or imprisoned for not less than ten days nor more than six months.

SYLLABUS
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