

## NOTARY WORLD



### ETHICS AND ETHICAL DILEMMAS FOR NOTARIES

#### CONDUCT OF NOTARIAL PRACTICE by

**Michael Bula, President Society of Notaries of Victoria 19 August 2021**

#### FUNCTIONS

(Chapter 3 *Zablud*)<sup>1</sup> Appointment, Powers and Discipline provides clear guidance:

“The functions of a notary are numerous and entail greater responsibility and skill than any short description could seek to convey”<sup>2</sup>

“In Australia, a notary is a practising lawyer who holds a unique public office of trust and fidelity ... has the internationally recognised power and authority to prepare certificates of Australian law and ... instruments ... authenticated by ... signature and official seal ... acceptable to the ... authorities in the countries in which they are produced.”<sup>3</sup>

The responsibility which accompanies such functions, well above that for a barrister or solicitor, with the already high duty of care - raises the bar on ethics and stringent ethical standards expected of notaries. The oath of office supports the ethical framework:

“I, [name of Notary] do solemnly sincerely and truly declare and affirm that I will faithfully exercise the Office of a Public Notary I will faithfully make Contracts of Instruments for or between any Party or Parties requiring the same and I will not add or diminish any thing without the knowledge of such Party or Parties that may alter the substance of the Fact I will not make or attest any Act Contract or Instrument in which I shall know there is Violence or Fraud and in all things I will act uprightly and justly in the Business of a Public Notary to the best of my Skill and Ability.”

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<sup>1</sup> Peter Zablud, *Principles of Notarial Practice* 2<sup>nd</sup> edition (The Notary Press, Melbourne, Australia, 2016) p 37

<sup>2</sup> N R Ready Brooke’s *Notary* (Sweet and Maxwell, 13<sup>th</sup> edition 2009) p 21

<sup>3</sup> Zablud p 46

## DUTIES

### 1. What is the obligation of a notary to provide a public service?

The first primary duty and responsibility of the notary is to the transaction. This carries with it the obligation to maintain the highest standards of conduct for clients and appearers.

It can be said that the responsibility/liability of the notary is governed by three (3) areas of law and conduct:

- In tort - to carry out the notarial task with skill and care expected from a lawyer of the highest qualification and the duty of care extends beyond those parties appearing before the notary.
- In contract with those from whom the notary receives instructions and directions
- By the tradition of the office and profession and the rules to demonstrate a high standard of professional conduct.

A notary must be available to the public as far as practicable in ordinary working hours to offer services – which offers an explanation for the word “public” in the title notary public.

“... A notary public after his appointment cannot refuse to make an instrument or do other notarial acts when he is requested to do so. ... The only legitimate grounds for refusal are physical or legal hindrance, incapacity of the parties, impossibility of identifying the parties or illegality of the act.”

### 2. In what circumstances may or should a notary decline to act for a client?

A notary is obliged to act, unless the act contravenes his authority or his/her notarial faculty/appointment.

A notary must be satisfied that the act does not relate to/concern/effect:

- Violence
- Fraud
- Misrepresentation
- Duress
- Dishonesty
- Money Laundering
- Terrorism
- Breaches Civil and/or Criminal Law
- Bogus or for a bogus, deranged or fantastical purpose or claim and/or
- Contravenes public policy.

If so, the notary may or should refuse to notarise the deed.

The other ethical consideration is to avoid a conflict of interest between the notary and the client, where the notary should not act.

If a notary is not satisfied that he has a proper translation of a document he must personally understand, he can refuse to act.

If a party refuses to pay a fee for his services, he may also refuse to act. The fee must be reasonable and within the range recommended by the relevant society.

3. May a notary act on both “sides” of a transaction?

A notary may act for both sides of a transaction, as long as there is no apparent conflict.

4. What equipment and organisation does a notary need?

Minimum requirements are:

- Seal, ribbon and wafers
- Electronic Register or protocol book
- Complete electronic records of all acts and relevant supporting documents
- Best practice electronic forms
- Comprehensive Notarial accounting records.

5. Foreign languages and foreign language texts require specific care and prudence. Even if the notary is merely certifying identity and signature of a text in a foreign language, his/her certificate should clearly indicate lack of knowledge of that foreign language and non-acceptance of liability as to content of the private deed.

6. If the notary doubts that the client or appearer fully understands the content of the foreign language act, he should not notarise the instrument, without the presence of a NAATI accredited interpreter, to ensure the client fully consents and understands the import and consequence of the act.

7. A notary must act in faith and testimony of the act or transaction in the client’s interest and not as a mere certifier or witness of signature – that is for non-notary legal practitioners or other official witnesses under the various Evidence Acts [see below in ETHICAL DILEMMAS].

8. Fees should not be a consideration in terms of limiting the notary’s intervention, role and advice in terms of deeds. The highest ethical standard must always be the aim, irrespective of all other time, fee and other considerations.

## RECORDS

1. How does a notary avoid confusion between the notarial practice and general legal and any other business?

A notary should keep totally separate and distinct records of notarial practice and never confuse them or place them in files with legal or other businesses.

In the United Kingdom, the applicable Rules & Regulations are:

*Notaries Practice Rules 2019* – matters relating to the practice of a Notary (such as Instructions, Undertakings, Conflicts of Interest, Duty to act impartially, Publicity, Fees, Record-keeping) –

<http://www.facultyoffice.org.uk/wp-content/uploads/2020/02/Notaries-Practice-Rules-2019.pdf>.

*Notaries Inspections Regulations 2014* – the inspection of the records and practices of Notaries, on behalf of the Master of the Faculties - <http://www.facultyoffice.org.uk/wp-content/uploads/2014/04/Notaries-Inspections-Regulations-2014.pdf>

These can serve as an appropriate guide.

2. What are the requirements for the making and keeping of records?

The requirements are to maintain:

- (i) a protocol or register book with sufficient information, such as the date, full name and address of the person appearing before the notary,
- (ii) the statement of the means by which the person is identified,
- (iii) a description of the act
- (iv) a description of any document produced to the notary and
- (v) sufficient information on the nature and purpose of public and private documents, as well as a copy of the account for the fee charged.

Electronic copies of all documents should be retained including identity and supporting documents as well as the notarial deeds themselves. Records must be kept in such a way as to be presentable, searchable and accessible to a court of law and be legible and distinctive.

Best practise is to retain copies of both public and private acts and even further – to retain as civil law notaries do the original or one of the originals of public acts and issue a copy. Whilst this is not required for private acts, I would argue that a similar standard be maintained as for public acts – as lawyers do for any deeds or files.

The notary is an archivist. Master modern technology and programs – scan in .pdf format all acts supported by an electronic or Microsoft Excel-based register of all notarial deeds – public or private.

Notaries are public or ministerial officers and their records must be of the highest ethical standard and transparency, to allow ease of reference, location and reproduction.

3. For how long should the notary retain the record of a notarial act?

Records must be kept permanently and cannot be destroyed. On the death, retirement or striking off of a notary, his/her records should be placed in the custody of another notary.

4. To whom are notaries' records made available for inspection?

In Victoria, the *Public Notaries Act* 2001 is silent on this point. It is presumed that the appointment authority, the Supreme Court, would have a power to inspect the notary's records.

It is not certain that the Legal Services Commission or other institution has such power and this matter needs to be resolved by legislation.

5. Are there any other special requirements as to the content of the records?  
If so what are they?

Records must be exhaustive and capable of providing complete evidence as to the transaction. Any lesser standard is unacceptable.

6. Are the records of a notary confidential or privileged?

The notary is a public officer. Even though there is a potential conflict between the position as a notary and that as a legal practitioner, the primary duty is to the transaction itself and to ensure that it is legally binding and effective and capable of providing full evidence and probative value.

The court, government, regulatory or tax authorities may inspect the records.

Privilege and confidentiality standards are less stringent for this reason than they are in applying legal professional privilege laws to solicitors.

7. Who maintains a notary's records after the retirement of the notary?

After the retirement of a notary, another notary should assume custody of the records.

## EXAMPLES OF ETHICAL DILEMMAS AND ISSUES

### *IDENTIFICATION*

“Verifying the identities of people [appearers] who execute documents is a notary’s primary and most basic duty, the proper discharge of which is the cornerstone of the high degree of trustworthiness conferred on documents by virtue of the notarial intervention”

“In matters of identification, the most difficult issue facing a notary is the standard of proof – the level of evidence – required to identify a person appearing before the notary whether in a representative capacity or the person’s own right.”

Proof can also be provided by 2 credible identifiable witnesses for appearers lacking identity documents.

A notary intervenes to avoid or minimise identity fraud.

### *CAPACITY*

#### Individuals

“... if, for whatever reason, a notary has compelling concerns about a person’s comprehension of the substantive aspects of the document ..., the notary is justified in declining to intervene.”<sup>4</sup> provides a simple test.

#### Corporations

The notary must be satisfied as to corporate or representative capacity of the client representing a corporation, government department, semi-government authority, university faculty, educational or other institution / body. “... a notary must ... be satisfied that the signatory is properly authorised to execute the document on the company’s behalf”.<sup>5</sup>

### *CONTENTS OF THE ACT*

A notary is not a mere witness or certifier of signature to either a public form or private form deed, such as a solicitor, justice of the peace or other authorised witnesses under the various Evidence Acts of the States, Territories and Commonwealth. A far higher duty of care and conduct applies to the office.

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<sup>4</sup> Zablud p 120

<sup>5</sup> Ibid p 98

If the document is in English or indeed in a language in which the notary is fluent or familiar, where there the deed contains an element as listed under DUTIES above, the notary should not be a party to such deed and act with caution and prudence, certainly in public and even in my opinion in private form.

No amount of waiver or exclusion of liability clauses in a notarial certificate will protect the notary from liability or requisite duty.

Whether in public or private form, a notary should not notarise any act in a foreign language, without full official certified translation from a NAATI<sup>6</sup> or equivalent professional translator in any circumstance.

### ***AUTHENTIC DEEDS AND COPIES***

A notary's work to authenticate Australian or foreign source certificates [academic, government, court, diplomatic and consular, to set out a non-exhaustive list] requires due diligence and third party verification, in most cases. Liability is high when a notary attests to the AUTHENTICITY of a source document. It is the notary's certificate and personal narrative with commensurate liability.

Whether in English or a foreign language, the notary must be capable of answering questions from appearers, which may relate to foreign law. If incapable, the notary should not act and refer the appearer to qualified colleagues.

### ***FOREIGN LANGUAGE ISSUES***

In the profile of a notary as international lawyer, foreign language acts come before him/her as part of the office.

Were a notary to approach private foreign language deeds – as a mere certifier of or witness of signature – this is substandard and not best practice.

For private acts, a notary must at the minimum ascertain and record in the notarial certificate –

- The nature and type and effect of the act
- If the client or appearer fully understands its contents and acknowledges this before the notary, especially if in a foreign language the appearers claims to understand
- Specific acknowledgement or declaration clauses

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<sup>6</sup> National Accreditation Authority for Translators and Interpreters

- Of course in public act format, the notary personally signs, certifies and declares the entire contents of a foreign language deed to be true, appropriate and authentic. Obviously, an independent NAATI translation or the presence of a NAATI qualified interpreter is a minimum in best practice for public deeds, if the notary does not speak the language of the public act.

## CODE

Under my first mandate as President of the Society of Notaries of Victoria [2007 to 2009], with Professor Peter Zablud, the first Professional Conduct and Practice Rules in any Australian State jurisdiction, as an expression and codified guide of ethical provisions, were adopted, which are still in force today.

See:

<https://notaries.org.au/wp-content/uploads/2021/08/SNV-Professional-Conduct-and-Practice-Rules-05112008.pdf>