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Briscoe Cain

District 128

CHAIR, HOUSE COMMITTEE ON ELECTIONS
MEMBER, HOUSE COMMITTEE ON BUSINESS & INDUSTRY

Office of the Attorney General
Attention Opinion Committee
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Submitted Via Email to opinion.committee@oag.texas.gov

The Honorable Ken Paxton:

As a result of difficulties conducting business as usual during Covid, many companies and industries began innovating new and better ways to conduct business. The notary business is one of those industries.

Governor Abbott understood issues that the notary industry was facing, and on April 8th, 2020 issued an executive order suspending multiple notarial requirements for specific actions.

"The State of Texas is taking any action necessary to enforce social distancing and reduce the need for in-person contact throughout the COVID-19 response," said Governor Abbott. "These temporary suspensions provide flexibility in the notarization process for certain documents and ensure Texans are able to stay home as much as possible to protect themselves and others from this virus."

The following conditions will apply whenever this suspension is invoked:

- A notary public shall verify the identity of a person signing a document at the time the signature is taken by using two-way video and audio conference technology.
- A notary public may verify identity by personal knowledge of the signing person, or by analysis based on the signing person's remote presentation of a government-issued identification credential, including a passport or driver's license, that contains the signature and a photograph of the person.
- The signing person shall transmit by fax or electronic means a legible copy of the signed document to the notary public, who may notarize the transmitted copy and then transmit the notarized copy back to the signing person by fax or electronic means, at which point the notarization is valid.

As Texas continues to move forward with Covid recovery, the Texas Legislature recognized the need for many of the restrictions and regulations that were relaxed during Covid, should be made permanent. I am requesting an opinion on whether certain actions taking by notary services are allowed under current Texas law as it now stands.



1. In addition to the electronic seal required under Tex. Gov't. Code Ann. Sec. 406.101 for online notarial services, may a notary also add additional information such as a barcode used to identify a document within the notary's storage.

Tex. Gov't. Code Ann. § 406.101(5) defines an electronic seal as “information within a notarized electronic document that confirms the online notary public’s name, jurisdiction, identifying number, and commission expiration date, and generally corresponds to information in notary seals used on paper documents.” An individual applying for an online notary commission shall include in their electronic application a copy of the applicant’s electronic seal in a format prescribed by the Secretary of State. 1 T.A.C. §87.4(b)(4).

An online notary public must attach the online notary public’s seal and digital certificate, which includes the notary’s electronic signature, to the electronic notarial certificate of an electronic document in a manner that is capable of independent verification and renders any subsequent change or modification to the electronic document evident. An online notary public must replace an electronic seal or digital certificate that is expired or no longer valid and shall provide a copy of the new seal or certificate to the secretary of state within 10 days of the replacement. Use of an expired or invalid seal or certificate and failure to provide a copy of any replacement seal or certificate may lead the secretary of state to take disciplinary action against the notary.

While Texas Government Code and subsequent Administrative Code sections are very specific as to the requirements for an electronic seal, they do not appear to prohibit adding additional verifying information to the document, as long as the additional information does not interfere with current law.

For example, if a notary applies a barcode label to the document to be used as an internal control and placed in a location that does not interfere with Secretary of State requirements for an ink stamp, may the notary use that barcode along with/in addition to the notary’s stamp and still be in compliance with Texas law.

2. Can a notary offer a \$5 optional fee to cover ID verification and tamper-proof document storage?

Sec. 406.111 authorizes fees to be charged by notaries in an amount not to exceed \$25, and Sec. 406.024 provides a laundry list of items that can be included in the fee not to exceed \$25.

Sec. 406.111 Fees for Online Notarization An online notary public or the online notary public’s employer may charge a fee in an amount not to exceed \$25 for performing an online notarization in addition to any other fees authorized under Section 406.024.



Sec 406.024. A notary public or its employer may charge the following fees: (1) for protesting a bill or note for nonacceptance or nonpayment, register and seal, a fee of \$4; (2) for each notice of protest, a fee of \$1; (3) for protesting in all other cases, a fee of \$4; (4) for certificate and seal to a protest, a fee of \$4; (5) for taking the acknowledgment or proof of a deed or other instrument in writing, for registration, including certificate and seal, a fee of \$6 for the first signature and \$1 for each additional signature. (6) for administering an oath or affirmation with certificate and seal, a fee of \$6; (7) for a certificate under seal not otherwise provided for, a fee of \$6; (8) for a copy of a record or paper in the notary public's office, a fee of 50 cents p/pg; (9) for taking the deposition of a witness, 50 cents for each 100 words; (10) for swearing a witness to a deposition, certificate, seal, and other business connected with taking the deposition, a fee of \$6; and (11) for a notarial act not provided for, a fee of \$6.

Notably, the statutes are silent as to optional fees, ID verification and tamper-proof document. Therefore, the question is, is the list mentioned in Sec. 406.024 (last updated in 1995) exhaustive or not? If the list is deemed exhaustive, can reasonable fees relating to a notarial act not provided for (Sec. 406.024(a)(11)) include things like ID verification and document storage?

Additionally, do optional fees fall under the \$25 maximum allowable fee, and if so, do they fall under the same requirements as those listed in Sec. 406.024?

3. Can a notary send a record of the transaction over secure email as long as the image of the ID used for satisfactory evidence has redacted the numbers?

It has come to our attention, that technology has advanced to the point where a record of a notary transaction can be emailed securely upon completion of the notary. That record can include a flattened image of the signed and notarized document, image of the signer, image of the ID with numbers redacted, and geolocation where the notarization took place. The document is stored in the database for only sufficient time to complete the transaction.

I am asking whether this new technology can be used in Texas and be compliant with Texas law, and if there are any changes to be made, what those changes should be.

Applicable Texas law includes Tex. Gov't Code §406.014:

The person for whom a notarization is performed is not required to sign the record book. A notary should not record any identification number that was assigned by a governmental agency or by the United States to the signer, grantor or maker on an



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identification card, driver's license, social security card or passport; or any other number that could be used to identify the signer, grantor or maker of the document.

Additionally, 1 TAC §87.40:

However, a notary is not prohibited from recording a number related to the residence or alleged residence of the signer, grantor or maker of the document or the instrument.

Thank you for your opinion on the above questions regarding notary law. If you have any questions or would like any additional information, please do not hesitate to reach out to our office.

Sincerely,

Briscoe Cain
Texas State Representative
House District 128

