Issues Surrounding Mental Capacity for Document Signers

Michael Closen, Professor Emeritus at The John Marshall School of Law in Chicago, Illinois
Mike Phillips, Director and Supervising Attorney for Patient Advocacy

National Notary Association

For many years, there has been an ongoing debate about whether notaries public have the responsibility to judge the capacity or awareness of a document signer as a prerequisite to the performance of a notarization for the signer.

Trust and Character

- Reputation is important

- Vetting process can include education, testing, and background checks

- Bonding is utilized to provide trust and peace of mind for the public

Independence

- Notaries are expected to push back when statutory requirements are not met
- Notaries can have unlimited liability, indicating the importance of their role, and the level of responsibility they assume in transactions
- Misdemeanor liability for signers when they attempt to lead notaries astray

Historic Uncertainty About Legal Standards For Notarial Acts

- “Capacity”, “Competence”, “Awareness”, and “Understanding”
- “Perhaps the thorniest issue confronting Notaries [is] signer awareness.” National Notary Association, Official Commentary, Notary Public Code Of Professional Responsibility of 1998 [NPCPR], Guiding Principle III.

The responsibility of the notary is made doubly difficult [1] by the lack of clear law announcing whether the notary is to judge the signer's or oath-taker's ability to have his/her signature notarized or oath administered, and [2] by the fact that the terms "capacity", "competence", "comprehension", "awareness" and "understanding" are used interchangeably, are used to define one another, and are defined rather broadly.

“At most, the notary should have the responsibility to judge whether an individual has the capacity to sign/acknowledge a signature that the notary may notarize. The notary is NOT to attempt to judge whether the individual has the capacity to enter into the transaction described in the instrument that is signed or to be signed.”

- Peter Van Alstyne

“It is common to find notarizations on signed documents performed in the belief that the notarization legalizes or validates the document, or makes it ‘legal.’ … These assumptions are groundless …” Peter Van Alstyne, NOTARY LAW, PROCEDURES & ETHICS (1998), page 22.

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

- California Civil Code section 1189

“Signer competence is a legal issue and not one for the notary to decide. … Competence pertains to the signer’s comprehension of document contents and their ramifications. … Mental competence is complex and even difficult for professionals to diagnose in many cases.” Peter Van Alstyne, NOTARY PUBLIC ENCYCLOPEDIA (2001), page 406.

"The willful, free making of a signature, on the other hand, merely addresses the signer's ***awareness*** of what the document is and his intent to bind himself to it, content notwithstanding." Peter Van Alstyne, NOTARY PUBLIC ENCYCLOPEDIA (2001), page 406.

Thus, the law establishes two separate standards [1] for the ability of an individual to obtain a notarization of her/his signature, and [2] for the ability of an individual to enter into the transaction described by the document that is signed and notarized. The first of these might be called ***NOTARIZATION CAPACITY***.

Hence, there are FOUR possible outcome variations.

a) USUALLY … The individual has the capacity to sign/acknowledge a signature that can be notarized and has the capacity to enter into a legally valid transaction as described by the signed document.

b) SOMETIMES … The individual does not have the capacity to sign/acknowledge a signature to be notarized and does not have the capacity to enter into the transaction that is described by the document that was to be signed.

c) RARELY … The individual has the capacity to sign/acknowledge a signature that is to be notarized, but the individual does NOT have the capacity to legally enter into the transaction described in the document that is signed.

*This outcome is possible because the standard for executing/acknowledging a lawful signature that can be notarized is a lower standard than the higher standard for entering into a transaction like a deed, will, power of attorney, contract and so forth.

“The standard of reasonable care in determining a signer’s capacity to willingly and freely sign an instrument [for notarization purposes] is not well defined. Moreover, it is not the same legal standard conventionally applied to issues of mental competence. The standard [for signing for notarization purposes] is much lower.” Peter Van Alstyne, NOTARY LAW, PROCEDURES & ETHICS (1998), page 20.

d) EXTREMELY RARELY … The individual does not have the capacity at the time to acknowledge a signature that can be notarized, but the individual had possessed the legal capacity to enter into the transaction described in the document that was signed previously.

[Note that this scenario would have to involve an “acknowledgment” type of notarization, in which the signature may be executed earlier and acknowledged by the signer at the later time of the notarization.]

Definitions Of Capacity/Competence Are Ordinarily Well Established

- Many statutes, many court opinions, and many authoritative writings over hundreds of years have addressed legal capacity/competence in various legal contexts, such as for contracts, wills, powers of attorney, etc.

Example - Capacity To Contract

- Generally, a person can avoid contract duties “if by reason of mental illness or defect,“ s/he “is unable to understand in a reasonable manner the nature and consequences of the transaction …”
- RESTATEMENT 2d, CONTRACTS, Section 15

Uncertainty Of Application Of Standards To Factual Settings

- Although the legal standards for capacity/competence are well known, their application to particular circumstances can be very difficult and seemingly inconsistent.

Retroactive Procedure Generally Followed For Judging Legal Capacity

- Effectively, there is a practical difference in the timing of the application of a capacity/competence standard in notarial settings and in many other legal settings. In other settings, such as in regard to contracts, wills and powers of attorney, individuals simply prepare their contracts, wills and powers of attorney [or have them prepared] and go forward with those documents with no one really questioning their capacity/competence. Hence, challenges to their capacity/competence occur after-the-fact, and are decided by courts.

Retroactive Procedure Generally Followed For Judging Legal Capacity

- With notarial acts, a notary is supposed to actually consider the capacity/competence of a document signer BEFORE the notarization is performed – not after-the-fact. Although, a challenge could be filed to a notarization, and such a challenge would be decided after-the-fact by a court.

Most Parties & Witnesses Are Not Disinterested

- The family, friends, business associates and lawyers around a document signer tend not to be disinterested, and often they are quite directly interested in the subject-matter of the document in question. However, the attending notary public is an impartial public official whose independent judgment about the capacity/competence of a signer should be regarded as significant and persuasive.

Parties & Witnesses Are Not Advised Of Duty To Judge Capacity

- Even when other parties are present at or about the time of the signing of a document, they are not often informed of their roles as witnesses, and even if they are advised that they are to serve as witnesses, they are not given any guidance about what to look for and/or how to perform their functions as witnesses. The notary public is well aware of her/his duty to serve as an impartial witness, and the notary public should know what to do to judge the capacity/competence of the signer.

Parties & Witnesses Are Not Trained To Judge Capacity

- Few parties or witnesses to the signing of a document have ever been informed of the standard for the capacity/competence of a document signer or have been instructed about how to properly carry out their roles as witnesses. Notaries public should now become knowledgeable about both of those matters.

Absence Of Separate Written Record Of Transactions [No Notary Journal]

- Often, when a transactional document is prepared, there is no other written record of it [other than duplicate originals or copies], and there would almost never be a separate written record addressing the capacity/competence of the document signer. However, a well-done, detailed notary journal entry could, and now should, reference the capacity/competence of the document signer – to show that the signer appeared to be competent and to show that the notary had exercised reasonable care in performing the notarization.

Absence Of Accepted Standard Of Capacity Or Awareness For Notarial Acts

- Only a few state statutes direct notaries to consider signer capacity or awareness. They are Florida and Georgia. See Illinois also.

Florida Example

- "A notary public may not notarize a signature on a document if it appears that the person [signer] is mentally incapable of ***understanding*** the nature and effect of the document at the time of notarization."

- FLORIDA STATUTES, Section 117.107(5)

Georgia Example

- The notary is given the opportunity to decline to act if s/he has "compelling doubts" about whether the signer "***knows the consequences*** of the transaction requiring the notarial act."

  - GEORGIA CODE, Section 45-17-8(b)(3)

Illinois Example

- “A notary public shall not take the acknowledgement of or administer an oath to any person whom the notary actually knows to have been adjudged mentally ill by a court of competent jurisdiction and who has not been restored to mental health as a matter of record.”
- Illinois Notary Public Act (1993), Section 6-104(d)

Maryland Example

- "We hold that … when a signatory (1) appears personally before a notary for the purpose of having the notary witness and attest to his signature, (2) the signatory appears to be alert and is under no apparent duress or undue emotional influence, (3) it is clear from the overall circumstances that the signatory ***understands*** the nature of the instrument he or she is about to sign, and (4) he or she signs the instrument in the presence of the notary with the apparent intent of making the instrument effective, the signatory is effectively acknowledging to the notary that the instrument is being signed voluntarily and for the purpose contained therein." Maryland Court of Appeals, in Poole v Hyatt, 689 A2d 82, 90 (1997).

Oklahoma Example

- The notary had the “duty to see that the grantors [signers] ***understood*** the nature and contents of the mortgage.”

- Oklahoma Supreme Court, in Ely Walker Dry Goods v Smith, 160 P 900 (1916).

Some official state notary handbooks address signer/oath-taker awareness [although no local statute, court opinion, or administrative regulation does so].

Notary Public Handbooks

- "Make certain the signers of the document have an ***understanding*** of what they are signing." MAINE NOTARY PUBLIC HANDBOOK, May 2002, page 11.
- "***Comprehension*** [means] the ability to understand something. A notary is responsible for determining that all parties ***understand*** what they are signing or affirming." MONTANA NOTARY PUBLIC HANDBOOK, Winter 2011-2012, page 21.

Texts and Treatises

- The notary "is required in all cases to see that the parties to an instrument thoroughly ***understand*** the contents thereof …" C.P. Smith, TEXAS NOTARIAL MANUAL AND FORM BOOK (1902), page 20

Texts and Treatises

- “A conscientious and careful Notary will be certain not only of the signer’s identity and willingness to sign, but will also make a layperson’s judgment about the signer’s ability to ***understand*** the document. This ability to understand is called competence.” National Notary Association, NOTARY LAW PRIMER [California, 1996, page 14; New York, 2005, page 14]

NNA Notary Public Code Of Professional Responsibility of 1998

- "The Notary shall require the presence of each signer and oath-taker in order to carefully screen each for identity and willingness, and to observe that each appears ***aware*** of the significance of the transaction requiring a notarial act." NOTARY PUBLIC CODE OF PROFESSIONAL RESPONSIBILITY of 1998 [NPCPR], Guiding Principle III

NNA Notary Public Code Of Professional Responsibility of 1998

- "Guiding Principle III prescribes appropriate conduct on a number of interrelated issues that, taken together, address the very essence of notarization." Official Commentary, NPCPR, Guiding Principle III

NNA Notary Public Code Of Professional Responsibility of 1998

- "The Code adopts a position that forces the Notary to take a thoughtful, professional approach to notarizations, and recognizes that a Notary may exercise some discretion with respect to whether or not the notarization should be performed." Official Commentary, NPCPR, Guiding Principle III

NNA Notary Public Code Of Professional Responsibility of 1998

- "The Notary shall not notarize for any person if the Notary has a reasonable belief that can be articulated that the person at the moment is not ***aware*** of the ***significance of the transaction*** requiring a notarial act." NPCPR, Guiding Principle III, Art. III-C-1

NNA Notary Public Code Of Professional Responsibility of 1998

- "Determining 'awareness' is not an exact science." Official Commentary, NPCPR, Guiding Principle III.

NNA Notary Public Code Of Professional Responsibility of 1998

- "The Standard does not require the signer to understand detailed legal ramifications of the act [transaction], or to be able to recite from memory any part of the document. ***The key to the 'awareness' standard is the signer's self-recognition that he or she is engaged in a transaction sufficiently significant to require proof of the signer's participation in it***." Official Commentary, NPCPR, Guiding Principle III

Standard In The NNA Model Notary Acts of 2002 & 2010

- "A notary shall perform a notarial act only if the principal [signer, and oath or affirmation taker] … appears to ***understand*** the nature of the transaction requiring a notarial act …" MODEL NOTARY ACT of 2010, Section 5-2(3)

Standard In The NNA Model Notary Acts of 2002 & 2010

- The above "provision does not require the notary to inquire into the principal's knowledge or understanding of the document to be notarized. Nor does it mandate that the notary actively inquire into or investigate the transaction. Instead, it demands that the notary form a judgment from the circumstances as to whether or not the principal is generally ***aware*** of what is transpiring." Official Comment, MODEL NOTARY ACT of 2010, Section 5-2(3)

Revised Uniform Law On Notarial Acts of 2010

- "A notarial officer may refuse to perform a notarial act if the officer is not satisfied that: (1) the individual executing the record is *competent* or has the *capacity* to execute the record; or (2) the individual's signature is knowingly and voluntarily made." REVISED UNIFORM LAW ON NOTARIAL ACTS of 2010 [RULONA], Section 8(a)

Revised Uniform Law On Notarial Acts of 2010

- "Thus, … if the notarial officer is not satisfied that the individual has the mental status needed to execute the record, the officer may refuse to perform the notarial act." Official Comment, RULONA , Section 8(a)

Revised Uniform Law On Notarial Acts of 2010

- "Satisfaction as to the ***competency*** or ***capacity*** of the individual making the record or with the fact that the signature is knowingly and voluntarily made are matters within the proper judgment of the notarial officer. No expertise on the part of the notarial officer as to those matters is required to perform the notarial act." Id.

Revised Uniform Law On Notarial Acts of 2010

- "This subsection does not impose a duty upon the notarial officer to make a determination as to the competency or capacity of the individual nor as to whether the signature of the individual is knowingly or voluntarily made. It does not require the officer to perform a formal evaluation of the individual on those matters. It merely permits the notarial officer to refuse to perform the notarial act if the officer should not be satisfied as to those matters." Id.

Revised Uniform Law On Notarial Acts of 2010

- In Section 6, the RULONA requires that the individual seeking a notarization of his/her signature "shall appear personally before the notarial officer." The official Comment to that section explains, in part, that: "It is … by personal appearance before the notarial officer that the notarial officer may be satisfied that (1) the individual is competent and has the capacity to execute the record, and (2) the individual's signature is knowingly and voluntarily made (see Section 8(a))."

Revised Uniform Law On Notarial Acts of 2010

- Both Iowa and North Dakota have already adopted versions of the Revised Uniform Law On Notarial Acts of 2010, including Section 8(a)

- Additionally, versions of the RULONA including Section 8(a) have been introduced in the legislatures in Oklahoma, Pennsylvania and Tennessee – though not yet enacted into law.

- Why does the uniform law declare that the notary “may” refuse to notarize?

Importance Of Presence Of Impartial Public Official [Notary Public]

- As noted above, the presence of an impartial public official at a document signing – when that public official is a notary who is aware of her/his responsibility to assess the capacity of the signer to obtain a notarization, who is aware of the legal standard for such notarization capacity, and who is aware of how to conduct the notarial ceremony in such a way as to satisfy that responsibility – will add to the degree of trustworthiness of the notarization itself and to the security of the transactional document being executed.

Possible Use Of Notary Journal To Assist *Capacity* Assessment

- Journals should begin to include a section/column regarding the capacity or awareness issue, perhaps allowing the notary to mark a box or boxes to describe what steps the notary took to consider capacity or awareness. Or, the notes/other information area that appears in virtually every commercially available notary journal could be used to identify in some abbreviated way the steps taken by the notary regarding the capacity or awareness assessment. Thus, the journal should become a reminder to notaries to perform the assessment. Certainly, the notary journal that makes specific reference to such an assessment should serve as very valuable evidence if there were ever a question about the capacity or awareness of the signer.

Possible Use Of Notary Journal To Assist *Capacity* Assessment

- Practice Tip: A journal entry should definitely be made if a notary refuses to perform a notarization on the ground that the signer lacked capacity or awareness, with such an entry setting out specific reasons for the refusal.

What Should Be The Standard For Legal Capacity For Notarial Acts?

- By analogy to other relevant standards for legal capacity, the test should be: “Whether the individual reasonably appreciates the nature and consequences of the notarial act being performed.”

What Should Be The Standard For Legal Capacity For Notarial Acts?

- “Fortunately, the legal standard notaries must address concerning signer competency is reasonable and logical. Simply, the notary must find from observation and interaction with a document signer that they know what the document is as they proceed to sign it. … As a matter of public policy, the signer is presumed to possess a modicum of understanding as to the effects or consequences a document may have if the signer knows what the document is.” - Peter Van Alstyne, NOTARY PUBLIC ENCYCLOPEDIA (2001), page 47.

What Should Be The Standard For Legal Capacity For Notarial Acts?

- "*The key to the 'awareness' standard is the signer's self-recognition that he or she is engaged in a transaction sufficiently significant to require proof of the signer's participation in it.*" *Official Commentary, NPCPR, Guiding Principle III.*

What Should Notaries Do To Judge Legal Capacity For Notarial Acts?

- “Recognizing that there is not just one exclusive method for determining ‘awareness,’ the [Notary Public Code Of Professional Responsibility] does not offer any methodology on how a Notary should proceed, partially out of concern that the suggestions might become the only ones used. Such a result clearly would be contrary to the Code’s position that determining ‘awareness’ is not an exact science. Instead, the Code relies upon the Notary’s ability to judge from the facts and circumstances presented whether or not the signer satisfies the ‘awareness’ standard.” Official Commentary, NPCPR, Guiding Principle III.

Talk Briefly With The Individual To Observe His/Her General Competence

- An introductory conversation with an individual will permit the notary to observe the general demeanor of the signer and will usually permit the notary to immediately determine whether or not there may be some obvious concerns about serious impairment due to intoxication, drug/medication usage, or mental illness of the signer.

Talk Briefly With The Individual To Observe His/Her General Competence

- Practice Tip: Remember, the key to both [1] the decision whether to refuse to notarize due to the signer's incapacity and [2] the proper recording and documentation of a refusal to notarize is to identify objective facts or circumstances that can be articulated. A mere "doubt" or "gut feeling" is not sufficient. The notary who legitimately refuses to notarize must be able to explain why, by pointing out concrete reasons [more than one of them].

Explain the Procedure to be Followed for the Notarization Ceremony

- “Simply, the notary should engage the signer in simple conversation on any subject. This will easily identify those who are mentally diminished.” Peter Van Alstyne, NOTARY LAW, PROCEDURES & ETHICS (1998), page 21.

Speak Directly to the Signer or Oath/Affirmation-Taker

- "The Notary shall not notarize for any person unable to communicate coherently with the Notary at the time of notarization." NPCPR, Guiding Principle III, Section III-C-2.

Engage in Standard Preliminary Conversation

- "A document signer who cannot respond intelligibly in a simple conversation with the Notary should not be considered competent to sign that document." NNA, NOTARY LAW PRIMER [California, 1996, p. 15; New York, 2005, p. 14].

Do Not Ask “Yes” – “No” Questions. Engage the Signer.

- “The notary might pursue the conversation by asking the signer simple, open-ended questions about the document to be signed. If the signer is capable of articulating a simple response relevant to the question, one could reasonably believe the signer has at least the minimum requisite awareness of what the instrument is … sufficient to execute a signature on the instrument …” Peter Van Alstyne, NOTARY LAW, PROCEDURES & ETHICS (1998), page 21.

Ask: What Type of Document is Being Executed?

- "The primary issue for the notary to decide is whether the signer knows what the instrument is when executing a signature thereon." Peter Van Alstyne, NOTARY LAW, PROCEDURES & ETHICS (1998), page 20.
- "The Notary might ask the signer if he or she understands the document and can explain its purpose." NNA, NOTARY LAW PRIMER [California, 1996, p. 14; New York, 2005, p. 15].

Ask: What is the Significance of Having the Document/Signature Notarized?

- The document signer should be aware that the notarization process is an official procedure of legal importance, and if an oath/affirmation is administered, that the law of perjury will be implicated.

Do Not Ask Whether the Signer Has Read the Document

- There are a number of reasons why the notary is well advised not to ask the signer whether s/he has read the document involved in a notarization. To begin, what would the notary do if the answer were ‘no’? Would the notary have to interrupt the process to allow time for the signer to read the instrument [recognizing that some documents are quite long and complex]? Would the notary refuse to notarize until the document had been read? Next, the question might be considered by some signers to be condescending or offensive? Most importantly, the question is unnecessary from a legal standpoint. The law does not require that parties to instruments must have read them – although the step of reading an instrument before signing it is certainly well-advised in all instances. Instead, the law presumes that a signer of a document has read it and understands it, and therefore the signer will generally be bound by the contents of the signed document.

Do Not Ask Whether the Signer Has Read the Document

- Practice Tip: Notaries public are not document police. Notaries should not read transactional documents on which signatures are to be notarized. Notaries should not make or keep copies of such transactional documents. Notaries should not question document signers about details of the contents of transactional documents.

Include Reference To Capacity Assessment In the Notary Journal

- If the notary determines to refuse to notarize on the ground of a lack of competence on the part of the signer, the notary should be required to formulate objective reasons for the refusal, and such reasons ought to be contemporaneously recorded in the notary journal.

Include Reference To Capacity Assessment In the Notary Journal

- "The Notary shall not notarize for any person if the Notary has a reasonable belief ***that can be articulated*** that the person at the moment is not aware of the significance of the transaction requiring a notarial act." NPCPR, Guiding Principle III, Section III-C-1.

Include Reference To Capacity Assessment In the Notary Journal

- "If the notary employs probative questioning of the signer [regarding the competency assessment], it is imperative the notary make a careful notation in the notary journal of such questioning." Peter Van Alstyne, NOTARY PUBLIC ENCYCLOPEDIA (2001), page 48.

Possible Legal Liability For Notary For Negligence, And Worse

- “To self-impose a standard of determining signer competence could expose the Notary to legal liability if the Notary uses a perceived lack of competence as a basis for improperly refusing a notarization, and harm results.” Official Commentary, NPCPR, Guiding Principle III.

Possible Legal Liability For Notary For Negligence, And Worse

- "In assessing a signer's competence to sign a document for notarization, the notary is under the duty of law to exercise reasonable care. … ***Should it be found the notary was mistaken in his assessment about the signer's competence, there should be no liability on the notary's part as long as the notary can provide documentation of having exercised reasonable care***." Peter Van Alstyne, NOTARY PUBLIC ENCYCLOPEDIA (2001), pages 48-49

Possible Legal Liability For Notary For Negligence, And Worse

- Hypothetical Case: An elderly individual is accompanied by a younger family member to a notarial ceremony for an acknowledgment. A signature in the name of the elderly party already appears upon the document. Upon conversation and questioning by the notary in the presence of the younger family member, the elderly person appears somewhat disoriented and is not sure whether s/he executed the signature. But, the younger person assures the notary that the signature is genuine and that the elderly one is simply having a “senior moment.” The notary performs the notarization, and since the state involved does not have a statute requiring the keeping of a notary journal, no journal entry is created for the notarization. It is later determined that the elderly party was incompetent, that the signature was a forgery, and that the elderly party was defrauded by the younger family member in the amount of hundreds of thousands of dollars due in part to the false document and the notarization thereon. What faults did the notary commit? What liabilities may the notary face? What should the notary have done to properly handle this situation?

Notarization Valid … But, Transaction Invalid

- “Willful, free [and aware] making of signatures is a vastly different standard from the standard of mental competence. A notarized signature made willingly and freely [and with awareness] by a person who is [later] found by a court to have been incompetent to sign will not subject the notary to legal liability. The court may hold the transaction invalid for signer incompetence, but the notarization fully valid because the signature was made willingly and freely [and with awareness]. The one does not necessarily impact the other.” Peter Van Alstyne, NOTARY PUBLIC ENCYCLOPEDIA (2001), page 407.

The Notary's Role and Worth Will Be Heightened

- If the heightened responsibility to judge signer capacity/competence to obtain a notarization is imposed upon notaries, and if notaries are properly trained to make such an assessment, then U.S. notaries will take on a more significant role in the document security process than they have occupied in the past 150-200 years. For those of us who strive to attain a more professional status for U.S. notaries, this development will move notaries in the right direction and will result in improved document security.

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