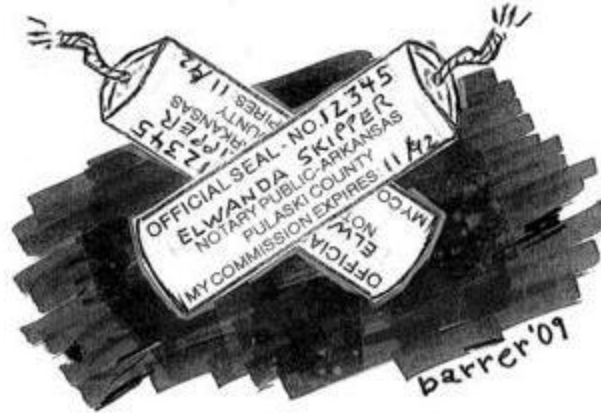
Dirt Law at Ground Level



EVERYBODY DOES IT, DON'T THEY?
By W. Christopher Barrier
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Sometimes professionals dealing with real estate (including lawyers) go through certain motions as a matter of course, without giving much thought to the underlying purposes or elements behind them. Notarization seems especially susceptible to that sort of unthinking habit, as demonstrated this past fall by the case of Jones v. Owen, decided by our Supreme Court.

In that case, at issue was a deed executed pursuant to a power of attorney. As you know, in such instances, the power of attorney has to be recorded as well as the deed. And a defective acknowledgment as to the power of attorney is fatal to the conveyance, even if the acknowledgment on the deed is proper. (More on defective acknowledgments in a later column.)

Wide and deep…

The power of attorney was granted by Sondra Jones's father to his brother-in-law Larrie Owen. The power was broad and unlimited and Owen proceeded to sell property of the father with the intention of distributing the proceeds to the father's siblings (which, of course, included Owen's wife). The result would be to supersede the father's will, which left his entire estate to Sondra's mother, remainder to Sondra.

There was only one small problem: when the notary completed and signed the acknowledgment on the power of attorney, the father **had not yet signed it!** In an astounding admission, the lawyer who drafted the power said that he had that sort of thing done routinely when the logistics of execution dictated it---for example, when a client was coming in after hours or on a Saturday, when the office notary was not available.

Mean what you say..

But, the recitations in an acknowledgment mean what they say---that is, the notary is saying in that block that the person signing the document had appeared before the notary and verified that he was who he said he was, and had indeed signed it, and for the purposes set out in the document. That could involve a picture ID (as title companies request), but, as a matter of practice, the notary will typically either know the client or accept the attorney's identifying introduction.

Perhaps (being charitable) the lawyer was confused by the fact that, with regard to execution and acknowledgment, those two acts do NOT have to happen at the same time. A signer might well sign and, three days later, identify himself and ask the notary to complete the acknowledgment. The signer may sign a stack of documents at his lawyer's office, before the notary arrives, and then affirm his execution of that stack and request the acknowledgment.

Essential elements…

That *identification* and *request* are of the essence for that portion of the transaction, although they can be implied---a notary may be completely familiar with a certain client's signature, enough to identify it, without contact with the signer, especially if the lawyer says he saw the documents signed. But, most lawyers try to avoid that situation, as they should. After all, what if the notary is not absolutely sure of the signature and the client has left for Tunica?

Alone by the telephone…

On the other hand, if the notary calls the signer on the telephone, at a familiar number, and recognizes the signer's voice, the signer identifying himself and confirming the execution, as he would face to face, that is also proper. But, again, it is clearly better to avoid that situation, if at all possible, in favor of a face to face execution.

Even with a real time acknowledgment, there is room for error, sometimes prompted by bankers' forms. If, for example, the document in question is a mortgage to be executed by a limited liability company, the body of the acknowledgment should identify the signer and recite the **capacity** in which she is signing (managing member, etc.) relative to the mortgagor. Which may require a little tinkering with the form, but that is much safer.

What if the notary, the client and the lawyer have a sit down closing, but the notary needs to leave---so she completes the acknowledgments, the client thanks her, she leaves and the client finishes signing above the completed acknowledgment? Same result as acknowledging the night before---a notary simply ***cannot*** acknowledge an act **that has not happened yet---**even if she is absolutely certain it is going to happen, and shortly.

I swear, you swear…

Finally, I occasionally run across confusion between a little two-line **jurat** and a full-fledged acknowledgment. The first merely reflects that signer's assertion on oath that the statements above are true. The latter confirms the execution in a particular capacity and the purposes for execution. The essential difference, of course, is that a jurat is **not** sufficient to support recordation (even though acknowledgments in some states aren't much longer).

Again, we all need to remember why we do certain things and lawyers especially should know better than to put their employees in jeopardy, simply for the lawyer's convenience.

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