

THE RISE OF ONLINE NOTARIZATION AND REMOTE WITNESSING AS LEGAL SERVICES: IMPLICATIONS FOR THE REAL PROPERTY AND PROBATE BARS

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Authors' Synopsis: Virginia's Electronic Notaries Act of 2011 has provided the legal framework for the growing national adoption of "online notarization"—electronic notarization by means of webcam or audio-video teleconference technology—wherein a signer who is located anywhere in the world can lawfully "appear" online before a notary public who is physically located in the state of commissioning. Using this legal service, a signer may remotely invoke the personal jurisdiction of a notary. And, in response to the COVID-19 pandemic, many states have also provided a parallel authorization for signers to remotely invoke the ability of individuals to serve as document witnesses.

The global move toward reliance on electronic signatures and records has driven the need for strategic information governance to establish reliable approaches for proving attribution of electronic signatures and legal identities. And, for those legal use cases, such as probate documents, that do not permit electronic signatures and records, the online notary's subject matter jurisdiction still encompasses ink-signed and sealed paper documents. Nevertheless, online notarization, as a legal service, gives notaries an enhanced ability to prove the authenticity of electronic signatures and identification credentials.

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I. INTRODUCTION

A result of the COVID-19 pandemic has been a heightened global interest in the online delivery of legal services. The online notarial act, as a legal service, is legally both portable and durable. It can be performed for any signer across virtually any type of document and transaction; and once completed, it is valid anywhere and remains valid across time, no matter where the signer moves, where the document is taken, or whether the notarization is performed by audio-visual means.

In 2011, the Commonwealth of Virginia became the first jurisdiction in the United States to authorize online notarization:¹ a modern form of electronic notarization in which the signer appears before the notary by means of real-time, two-way audio-visual communication.² Building off

¹ See VA. CODE ANN. § 47.1-2, -6.1, -7 (2011). All state statutory citations in this Article refer to the current statute unless otherwise indicated. The same applies to state regulations and ordinances.

² See ANDREW MACDOUGALL, THE COMPLETE GUIDE TO REMOTE ONLINE NOTARIZATION 8-9 (Michael Chodos ed. 2019), <http://notarize.com/guide-to-remote-online-notarization>. Material used by permission. For purposes of consistency in this Article, the term “online notarization” is used. Other descriptors with the same meaning include “remote notarization,” “remote electronic notarization,” “remote online notarization,” “webcam

of longstanding and successful use of audio-visual court appearances, Virginia provides that a signer may “appear before” a notary so long as certain heightened forms of identity verification and security are observed.³ The result of Virginia’s innovation is that a signer physically located anywhere in the world can appear before a Virginia notary public.⁴ As of this writing, thirty states have enacted online notarization authorization laws.⁵ And, in response to the COVID-19 pandemic, additional states have authorized remote witnessing and notarization on a temporary basis.⁶

The tools, technologies, and other methods used to perform notarial acts have evolved over time and will continue to improve. The benefits of online notarization are available across the vast array of personal and business transactions that can be consummated electronically. These range from simple transactions using business, motor vehicle, and government forms to complex transactions involving real property, mortgages, and financial services. Online notarization can also now be used with a host of basic estate planning documents, such as advanced directives and powers of attorney. With the nascent expansion of e-Will laws, online notarization increasingly is becoming available for use in executing wills and trusts.

II. WHAT IS ONLINE NOTARIZATION AND IS IT ENTITLED TO INTERSTATE RECOGNITION?

Virginia’s Electronic Notaries Act of 2011 establishes the legal framework for the implementation of “online notarization.” The legal framework consists of six principles: (1) the definition of “personal appearance” of a signer before a notary expanded to include use of audio and visual communications technology, as well as traditional physical presence before the notary; (2) the notary must use a means that renders

notarization,” “cybernotarization,” “electronic notarial acts by means of audio-visual communication,” and “notarial act performed by remotely located individual.”

³ See VA. CODE ANN. § 47.1-2.

⁴ See MACDOUGALL, *supra* note 2, at 9.

⁵ See *infra* note 8; [Updated] *States Take Emergency Action on Remote Notarization and Signers’ Identity*, NAT’L NOTARY ASS’N: NOTARY BULL. (Dec. 16, 2020), <https://www.nationalnotary.org/notary-bulletin/blog/2020/03/states-emergency-action-remote-notarization> [hereinafter Notary Bulletin].

⁶ Notary Bulletin, *supra* note 5. The two states that have not enacted online notarization laws or adopted temporary authorizations are California and South Carolina; see also Lauren Wolven & Erin Mayer, *Emergency Remote Notarization and Remote Witnessing Orders*, AM. C. OF TR. & EST. COUNS. (Dec. 23, 2020), <https://www.actec.org/resources/emergency-remote-notarization-and-witnessing-orders/> (updated periodically).

the electronic document tamper-evident; (3) the notary must be physically present in the commissioning state when performing online notarizations; (4) the signer may be physically located outside of the notary's commissioning jurisdiction; (5) in the absence of personal knowledge, the signer's identity must be confirmed by heightened means, including use of multi-factor authentication; and (6) the notary must make and retain a recording of the audio-video online notarization session.⁷

Since the Virginia enactment, states passing online notarization legislation include Montana (2015), Nevada (2017), Texas (2017), Indiana (2018), Michigan (2018), Minnesota (2018), Ohio (2018), Tennessee (2018), Vermont (2018), , Arizona (2019), Florida (2019), Idaho (2019), Iowa (2019), Kentucky (2019), Maryland (2019), Nebraska (2019), North Dakota (2019), Oklahoma (2019), South Dakota (2019), Utah (2019), Washington (2019), Alaska (2020), Colorado (2020), Hawaii (2020), Louisiana (2020), Missouri (2020), Oregon (2020), Wisconsin (2020), and Pennsylvania (2020).⁸ In addition, the following three legislative proposals all incorporate the six key principles of the Virginia legal framework: (1) new amendments to the Revised Uniform Law on Notarial Acts of 2018 (RULONA), approved by the Uniform Law Commission on July 25, 2018;⁹ (2) the National Notary Association's Model Electronic Notary Act of 2017

⁷ For a detailed discussion, see Timothy Reiniger, *Developments in Information Governance: The Emergence of Online Notarization*, 9 INFO. L. J. Autumn 2018, at 10, 11–15.

⁸ See MONT. CODE ANN. §§ 1-5-601 to -632; NEV. REV. STAT. ANN. §§ 240.181–206; TEX. GOV'T CODE ANN. § 406(C); IND. CODE § 33-42-16-2; MICH. COMP. LAWS ANN. §§ 55.286–287; MINN. STAT. § 358.645; OHIO REV. CODE ANN. §§ 147.60–66; TENN. CODE ANN. § 8-16-301; VT. STAT. ANN. tit. 26 § 5323; ARIZ. REV. STAT. ANN. §§ 41-371 to -380; FLA. STAT. § 117.209; IDAHO CODE § 51-114A; IOWA CODE § 9B.14A; KY. REV. STAT. ANN. § 423.455; MD. CODE ANN., State Government § 18-214; NEB. REV. STAT. §§ 64-401 to -418; N.D. CENT. CODE. §§ 44-06.1-13.1; OKLA. STAT. tit. 49, §§ 201-214; S.D. CODIFIED LAWS § 18-1-11.1; UTAH CODE ANN. § 46-1-3.6; WASH. REV. CODE § 42.45.190; ALASKA STAT. § 44.50.075; COLO. REV. STAT. §§ 24-21-500 to -540; HAW. REV. STAT. §§ 456-1 to -21; H.B. 274, 2020 Reg. Sess. (La. 2020); MO. REV. STAT. § 486.1100; OR. REV. STAT. §§ 194.205–.990; WIS. STAT. §§ 140.01–.34; PA. C. S. §§ 301-331.

⁹ See REVISED UNIF. L. ON NOTARIAL ACTS (UNIF. L. COMM'N 2018) [hereinafter RULONA].

(MENA);¹⁰ and (3) model legislation issued jointly by the Mortgage Bankers Association and the American Land Title Association.¹¹

A notary is a public officer whose power emanates from the commission the notary receives from the State.¹² As a public officer, the “choice of law” governing a notary’s acts is necessarily the law of the state whose commission the notary holds.¹³ The statutes of every state include express interstate recognition language for out-of-state notarial acts that are validly performed under the laws of the notary’s commissioning state.¹⁴ And beyond this longstanding statutory regime, over a century ago the United States Supreme Court, in a related context, held that a duly-performed notarial act from outside the United States was entitled to full faith and credit in U.S. state courts.¹⁵

To ensure a uniform application of “interstate recognition” principles to electronic notarizations, in 2010, the United States Congress

¹⁰ See MODEL ELEC. NOTARIZATION ACT (NAT’L NOTARY ASS’N 2017). The MENA’s influence is particularly evidenced by a requirement for the notarial certificates to indicate the fact that an online notarization was performed.

¹¹ See the recommended legislative package offered by the Mortgage Banker Association and the American Land Title Association, Mortgage Bankers Ass’n, *Remote Online Notarization*, MBA, <https://www.mba.org/audience/state-legislative-and-regulatory-resource-center/remote-online-notarization>.

¹² See Timothy Reiniger, *Evidentiary Requirements for Electronic Notarization and the Legalization of Certified Electronic Documents*, Appendix C, in GEORGE L. PAUL, FOUNDATIONS OF DIGITAL EVIDENCE 209, 214–15 (ABA 2008); see also Michael L. Closen, *The Public Official Role of the Notary*, 31 J. MARSHALL L. REV. 651, 681–82, 681 nn.158–59 (1998) (exploring the longstanding presumption of validity attached to tasks performed by notaries).

¹³ See, e.g., *Era v. Morton Cmty. Bank*, 8 F. Supp. 3d 66, 71 (D.R.I. 2014); *State v. Davis*, 700 S.E.2d 85, 89 (N.C. Ct. App. 2010); *Otani v. Dist. Ct. in and for Twenty-First Jud. Dist.*, 662 P.2d 1088, 1091 (Colo. 1983).

¹⁴ See NAT’L ASS’N OF SEC’YS OF STATE, ISSUES AND TRENDS IN STATE NOTARY REGULATION: NASS REPORT ON STATE NOTARIZATION POLICIES AND PRACTICES 11 (2011). Note that with respect to online notarization, Indiana does not recognize notarial acts performed by out-of-state, online notaries who are physically located in Indiana at the time of the act and operating without an Indiana notary commission. See OFF. OF THE IND. SEC’Y OF STATE, INDIANA NOTARY PUBLIC GUIDE 30-31 (2020). Louisiana does not recognize out-of-state online notarial acts as being legally equivalent to “authentic” acts as performed by Louisiana notaries. See H.B. 274, 2020 Leg., Reg. Sess. (La. 2020).

¹⁵ See *Pierce v. Indseth*, 106 U.S. 546, 550 (1882) (“[I]f the bill be dishonored, the protest by the notary must be made according to the laws of the place. It sometimes happens that the several parties to a bill, as drawers or indorsers, reside in different countries, and much embarrassment might arise in such cases if the protest was required to conform to the laws of each of the countries.”).

unanimously passed an interstate recognition bill that, however, was vetoed by President Obama.¹⁶ In view of the rise of online notarization and electronic recording, the U.S. Treasury Department has asked Congress to revisit this previous effort.¹⁷ In response to this and the COVID-19 situation, Congress has revived the original IRON Act and recast it as the SECURE Notarization Act, which incorporates minimum criteria for online notarizations that reflect the six core legal principles developed by the thirty enacting states.¹⁸

III. ONLINE NOTARIZATION: HOW IS IT PERFORMED?

With online notarization, the basic requirements of the notarial act and the underlying role of the notary are unchanged. As in a traditional

¹⁶ With the Interstate Recognition of Notarizations Act of 2010 (the IRON Act), shepherded by Representative Robert Aderholt of Alabama, the United States Congress sought to establish a uniform national evidence-based approach for ensuring the enforceability of both paper and electronic out-of-state notarial acts. *See* H.R. 3808, 111th Cong., 2d Sess., 111 Cong. Rec. S7558 (2010) (“Each court that operates under the jurisdiction of a State shall recognize any lawful notarization made by a notary public licensed or commissioned under the laws of a State other than the State where the court is located if . . . in the case of an electronic record, the seal information is securely attached to, or logically associated with, the electronic record so as to render the record tamper-resistant.”); *To Require Any Federal or State Court to Recognize any Notarization Made by a Notary Licensed by a State Other than the State Where the Court is Located When Such Notarization Occurs in or Affects Interstate Commerce: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. (2006), <https://www.gpo.gov/fdsys/pkg/CHRG-109hhrg26412/html/CHRG-109hhrg26412.htm> (containing the bill hearing); *see also* Ryan Kline & Timothy Reiniger, *Iron Act Veto Impacts ‘National Strategy,’* SECUREIDNEWS (Jan. 5, 2011), <https://www.secureidnews.com/news-item/iron-act-veto-impacts-national-strategy/> (discussing the veto of the IRON Act).

¹⁷ *See* U.S. DEP’T OF THE TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: NONBANK FINANCIALS, FINTECH, AND INNOVATION 109 (2018) (“Treasury recommends that states yet to authorize electronic and remote online notarization pursue legislation to explicitly permit the application of this technology and the interstate recognition of remotely notarized documents. Treasury recommends that states align laws and regulations to further standardize notarization practices. Treasury further recommends that Congress consider legislation to provide a minimum uniform national standard for electronic and remote online notarizations. Such legislation would facilitate, but not require, this component of a fully digital mortgage process and would provide a greater degree of legal certainty across the country. Federal legislation is not mutually exclusive with continued efforts at the state level to enact a framework governing the use of electronic methods for financial documents requiring notarization.”).

¹⁸ *See* Securing and Enabling Commerce Using Remote and Electronic Notarization Act of 2020, S. 3533, 116th Cong. (2020). Although not reached for formal consideration in the 116th Congress, the SECURE Act is being reintroduced in the 117th Congress.

notarization, the notary still performs the core features of the notarial act: confirming satisfactory evidence of the signer's identity, checking that the signer understands what he or she is signing, and confirming that the signer is doing so willingly. However, the added online notarization technologies ensure that all important action steps (including document upload and any markups as well as all signature acts) are logged, and an audio-video recording is made of each signing session. The key document-specific actions are then included in an audit-trail attachment to the completed electronic document itself (and are subject to the tamper-evident technology applied to the PDF at the conclusion of the notarial act).

A. Secure Online Identification of the Signer

To ensure that online notarization is more reliable and resistant to fraud and manipulation than traditional notarization, the notary must have satisfactory evidence to confirm the identity of the signer by using one of three methods: (1) personal knowledge of the signer; (2) a credible witness who is personally known by both the notary and the signer; and (3) multi-factor authentication by means of online access to third-party data sources.¹⁹ In most situations, the notary will obtain satisfactory evidence of a party's identity via a multistep identity verification process.²⁰ The identity verification process is completed as part of a continuous logged session. First, the signer must successfully complete the knowledge-based authentication (KBA) process by answering within two minutes four out

¹⁹ See RULONA § 14A(c)(1). Of the thirty enacting states, South Dakota is the only state that limits the identification procedure to the notary's personal knowledge of the signer. And, in Vermont, identification procedures have yet to be specified by the secretary of state.

²⁰ The online identity management practices are shaped by United States federal guidelines as set forth by the U.S. Department of Commerce's National Institute of Standards and Technology (NIST). See PAUL A. GRASSI ET AL., NIST SPECIAL PUBLICATION 800-63-3: DIGITAL IDENTITY GUIDELINES app. A.1 (U.S. DEP'T OF COM. 2017) (defining "identity" as "[a]n attribute or set of attributes that uniquely describe a subject within a given context" and "identity proofing" as "[t]he process by which a CSP [Credential Service Provider] collects, validates, and verifies information about a person"). "Identity proofing" encompasses a wide variety of methods, including but not limited to antecedent proofing (previously issued government identity credentials based on an in-person vetting), credential analysis, biometrics, and dynamic knowledge-based assessment (KBA). See *id.* RULONA has expressly incorporated the identity proofing concept and the requirement for multi-factor authentication. See RULONA § 14A(c)(1)(C). Note that Virginia's multi-factor signer identity confirmation is achieved pursuant to the federal antecedent process that requires (1) a review of a credential that has been issued on the basis of a prior in-person proofing and (2) a successful KBA process. See VA. CODE ANN. § 47.1-2.

of five challenge questions.²¹ If the signer fails the KBA process, he or she is given additional tries, in accordance with any limitations set forth in a state's regulations, to successfully complete the process.²² Second, the signer must present a government issued photo ID.²³ The image of the ID is captured by a secure device camera controlled by the online notarization platform.²⁴ The captured image is then subjected to credential analysis in accordance with a state's requirements.²⁵ Third, after the signer successfully completes credential analysis, the notary compares the signer's photo ID to the KBA-validated identity and to the signer appearing before the notary in the real-time audio-visual session.²⁶ The notary also reviews the output of the successful credential analysis.²⁷ If the notary concludes that satisfactory evidence of the signer's identity has been established, the notary proceeds with the notarial act.²⁸

B. Protecting the Signer Against Coercion/Duress

The entire notarial transaction itself is conducted in a real-time audio-visual session in which the signer and notary can simultaneously see and hear each other throughout and also can watch each other mark-up and sign the subject document.²⁹ The audio-visual session is recorded.³⁰ Also, on a remote notarization platform, just as when across a table from a signer, the notary engages the signer in conversation and evaluates if the signer is behaving normally.³¹ The notary asks on the record whether the signer understands the nature of the document that is being signed.³² The notary also asks, explicitly, whether the signer is proceeding of his or her

²¹ See, e.g., UTAH ADMIN. CODE § 623-100-5.

²² See, e.g., *id.*

²³ See RULONA § 14A, cmt.

²⁴ See MACDOUGALL, *supra* note 2, at 12.

²⁵ See *id.*

²⁶ See *id.* at 15; see, e.g., DAVID WEISBAUM, E-NOTARY TASK FORCE, NOTARIZATION TASK FORCE ON BEST PRACTICES & VERIFICATION STANDARDS TO IMPLEMENT ELECTRONIC NOTARIZATION app. G. (2019), <https://www.ilga.gov/reports/ReportsSubmitted/709RSGAEmail1514RSGAAttachENotary%20Report%20Approved.pdf>; OFF. OF THE IND. SEC'Y OF STATE, *supra* note 14, at 32.

²⁷ See MACDOUGALL, *supra* note 2, at 15–16.

²⁸ See RULONA, Prefatory Note at 2.

²⁹ See *id.* § 14A(a)(1), (c)(2).

³⁰ See *id.* § 14A(c)(3).

³¹ See *id.* § 14A(c)(3), cmt.

³² See *id.* § 8(a), cmt.

own free will.³³ The notary can ask the signer who is in the room, or even to pan the camera around the room, if the notary is concerned about actions of those nearby.³⁴

While many states and courts take it as a “given” that a notary always determines that a signer is accepting the specified obligation freely and without coercion, only a small number of states explicitly require the notary to make this determination.³⁵ The rest of the states either do not mention such a duty or make such a determination permissive.³⁶ No state provides any specific criteria or guidance by which a notary is to make such a determination, so it can be assumed that notaries’ approaches to this issue vary widely. The key feature of remote online notarization, with respect to this issue, is that the signer’s demeanor and communication with the notary, and the notary’s determination that it is appropriate to proceed, are captured on the recorded audio-video.

C. Audio-Video Recording and Electronic Journal Required to be Kept

Records of the signer’s identity credentials, transaction information, audit trail, and audio-video recording of the signing session are maintained in secure, encrypted, and backed-up data records.³⁷ Records required to be maintained by law (such as the notary’s electronic journal and the recording of the audio-visual session) are maintained for no less than the state-mandated retention period—usually between five and ten years under most current laws.³⁸ The notary’s location at the time of signing is also confirmed, ensuring that the notary is physically located in the notary’s state of commission when completing the notarization.³⁹

With respect to the electronic journal, the notary must capture and retain at least the following information: (1) the date and time of day of the notarial act; (2) the type of notarial act; (3) a description of the

³³ See *id.*

³⁴ See *id.*

³⁵ See, e.g., 1–5 MISS. CODE R. § 5.1(B)(4) (LexisNexis 1972).

³⁶ See Michael Closen, *To Notarize or Not To Notarize . . . Is Not A Question of Judging Competence or Willingness of Document Signers*, 31 J. MARSHALL L. REV. 1013, 1030 (1998); see also RULONA § 8 (stating that this determination is permissive). Professional guidance for notaries on this topic essentially reiterates the “basic assumption” that a notary should not complete a notarial act if the notary is concerned that the signer is not acting of her own free will, without coercion. *Id.*

³⁷ See RULONA § 14A, cmt.

³⁸ See *id.* § 14A.

³⁹ See *id.*

document or proceeding; (4) the printed name and address of each signer; (5) the evidence of identity each signer presented to the notary; and (6) the fee, if any, charged for the notarial act.⁴⁰

The notary's capability of controlling access to and use of the notarial electronic journal and the audio-video recording is a main privacy concern. And, the notary may exercise this responsibility through a third party repository.⁴¹ At all times, it is necessary for the notary to know who has access to the electronic journal and the audio-video recording and for what purpose. With respect to consumer privacy protections, the online notary must adhere to a duty of care in three respects.⁴² First, the notary must maintain exclusive control of the electronic journal and recording.⁴³ Second, the notary must provide for lawful access to the electronic journal and recording, whether for inspection by law enforcement, a commissioning official, or in connection with a civil lawsuit investigation.⁴⁴ Third, the notary must have a means of providing certified copies of entries, be able to identify the requesting individual, and complete an entry in the electronic journal for each such access and certified copy request.⁴⁵

IV. WHAT IS REMOTE WITNESSING AND REMOTE INK-SIGNED NOTARIZATION AND HOW ARE THEY PERFORMED?

Due to the pandemic, many of the states, whether through the Governor's office, a Secretary of State, or the Judicial branch, have issued Emergency Orders to temporarily change the requirements for the execution of real property and estate planning documents. Some states have enacted statutes to codify what were originally executive orders.⁴⁶ Not surprisingly, there is a great deal of variation among the states—some have laws or orders pertaining only to remote witnessing (and not remote notarization) or only to remote notarization, some have overlapping laws

⁴⁰ See *id.* § 19(c). Except for South Dakota and Vermont, a journal is required to be kept by the notary in all states that have enacted an online notarization.

⁴¹ Upon the notary's death, this legal responsibility is assumed by the notary's legal representative. For an example, see RULONA § 14A(f).

⁴² See, e.g., VA. CODE ANN. § 47.1-14; VIRGINIA ELEC. NOTARIZATION ASSURANCE STANDARD §§ 1.3, 1.4 (2013).

⁴³ See, e.g., VIRGINIA ELEC. NOTARIZATION ASSURANCE STANDARD § A.

⁴⁴ See, e.g., *id.* at § 1.4.

⁴⁵ See, e.g., *id.*

⁴⁶ See, e.g., S.B. 241, 31st Leg., 2nd Reg. Sess. (Alaska 2020) (extending what was originally a declaration by the Governor).

or orders, and some have laws or orders that attempt to address remote witnessing and remote notarization separately.⁴⁷

A specialized use of audio-visual communication during the COVID-19 period has been remote ink-signed notarization (also labeled as RIN).⁴⁸ As with online notarization, the signer may invoke the jurisdiction of the notary remotely by means of audio-visual communication.⁴⁹ Similarly, a testator may invoke the authority of a remote deed witness by audio-visual means. But, unlike with online notarization, the remote ink-signed paper process does not leverage the added fraud protection afforded by access to online authentication and digital tamper-evidence for documents.⁵⁰

The Emergency Orders for remote ink-signed notarizations typically require the following basic steps:

1. The signer executes the documents during a live audio-visual connection with the notary;
2. The signer is physically located in the same state as that of the commissioned notary;
3. The notary instructs that the camera view pan the entire room to view all individuals who are present;
4. The required attesting witnesses either can be physically present with the signer or can be viewing the signing procedure remotely;
5. The signer mails the executed paper document to the notary, who then applies a holographic signature and official seal;

⁴⁷ The American College of Trust and Estate Counsel (ACTEC) has compiled a convenient list of states that allow remote witnessing or remote notarization on an emergency basis. *See* Wolven & Mayer, *supra* note 6.

⁴⁸ States that have enacted online notarization based on the RULONA model authorize the use of audio-visual communication technology for notarial acts performed on both tangible and electronic records. *See* RULONA. Currently, these states include Colorado, Hawaii, Idaho, Iowa, Minnesota, Montana, North Dakota, Oregon, Pennsylvania, Vermont (pending the issuance of rules), Washington, and Wisconsin.

⁴⁹ *See* Bill Anderson, *10 Standards Of Practice For Remote Ink-Signed Notarizations*, NAT'L NOTARY ASS'N: NOTARY BULL. (Apr. 16, 2020), <https://www.nationalnotary.org/notary-bulletin/blog/2020/04/10-standards-video-conference-notarizations>.

⁵⁰ *See id.*

6. Witnesses sign affidavits during the audio-visual session and then mail the paper documents to the notary, who applies a holographic signature and official seal;
7. The notary compiles all completed paper documents; and
8. An audio-video recording of the session is retained for a set time period.⁵¹

For remotely notarized or witnessed wills and powers of attorney, some states, such as Maine and Massachusetts, require that either the notary or at least one witness be an attorney licensed in the state.⁵²

The following are examples of when use of remote witnessing or execution of estate planning documents might be helpful in the case of an existing client who is well known to the attorney:

- the client cannot travel to the law office to make a minor change to existing documents or has physical limitations that make travel difficult; and
- the attorney has high level of confidence that the client is making changes willingly and free of undue influence or duress.

Conversely, remote witnessing or execution might be harmful in the following representative contexts:

- the client is not well known to the attorney;
- the client has vulnerabilities that might make him or her susceptible to undue influence; or

⁵¹ See, e.g., Me. Exec. Order No. 37 FY 19/20 (Apr. 8, 2020), <https://www.maine.gov/governor/mills/sites/maine.gov/governor.mills/files/inline-files/EO37.pdf>; N.Y. Exec. Order No. 202.7 (Mar. 7, 2020), <https://www.governor.ny.gov/news/no-2027-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>. For examples of a temporary emergency authorization by means of statute but without permitting an online multi-factor means of confirming signer identification, see S.B. 2645, 2020 Leg., 191st Gen. Ct. (Mass. 2020) (authorizing only a paper notarization process); S.B. 704, 2019-2020 Gen. Assemb., Reg. Sess. (N.C. 2019), <https://www.ncleg.gov/Sessions/2019/Bills/Senate/PDF/S704v5.pdf> (authorizing the notary to create either a paper or electronically notarized document and requiring the notary to maintain a journal, but making a recording of the signing session optional).

⁵² See, e.g., Me. Exec. Order No. 37 FY 19/20 (Apr. 8, 2020); S.B. 2642, 2020 Leg., 191st Gen. Ct. (Mass. 2020).

- the attorney is unable to effectively control the execution process in order to ask questions and engage in discussions necessary to assess mental capacity and the voluntary nature of the act of signing the instrument.

Prevailing uses for remote ink-signed notarization include documents for which the notary currently has no subject matter jurisdiction in electronic form, such as with wills in most states. However, because of its time-consuming nature, the procedure is not well-suited for high-volume and time-sensitive document processing, which is prevalent in the mortgage industry.

V. APPLICATIONS OF ONLINE NOTARIZATION TO REAL PROPERTY AND PROBATE/ESTATE PLANNING DOCUMENTS

The federal Electronic Signatures in Global and National Commerce Act (E-SIGN)⁵³ and the parallel state-level Uniform Electronic Transactions Act (UETA)⁵⁴ authorize the use of e-signatures, including e-notarization, for records affecting transactions between two or more parties. UETA has been adopted in the District of Columbia and all states except Illinois and New York (each of which have non-uniform, custom laws with similar provisions).⁵⁵ As discussed below, E-SIGN and UETA do not address authorization for use of e-signatures with respect to court pleadings, testamentary trusts, and wills.⁵⁶ For these instruments, separate laws are necessary to authorize electronic signatures and electronic notarization.

A. Electronic Real Property Transfer/e-Closings

On July 28, 2017, the first online e-Closing of a home mortgage refinance occurred when a husband and wife who were physically located in Illinois electronically signed documents, which were remotely notarized by a notary public in Virginia, to complete a transaction in Chicago,

⁵³ See 15 U.S.C. §§ 7001–7031.

⁵⁴ See UNIF. ELEC. TRANSACTIONS ACT (NAT'L CONF. OF COMM'RS ON UNIF. STATE LS. 1999).

⁵⁵ See 5 ILL. COMP. STAT. ANN. 175/5-105 through 175/5-145; N.Y. STATE TECH LAW §§ 304–309.

⁵⁶ See *infra* Parts V.A–D.

Illinois.⁵⁷ This online e-Closing built on the first public recording of an online deed in the United States, which took place on June 6, 2013, and involved the sale of a property in Alexandria, Virginia, signers in France, and an online notary in Richmond, Virginia.⁵⁸

Electronic recording of documents relating to real property transactions is now performed throughout the United States. The Uniform Real Property Electronic Recording Act has been adopted in thirty-five states and Washington D.C., with remaining states deriving authorization from UETA or another provision in the recording laws.⁵⁹ For those counties that are not yet enabled to perform electronic recording, the laws in thirty-five states now expressly authorize recording officials to accept tangible paper printouts of electronically notarized documents.⁶⁰

B. Powers of Attorney for Finances

Authorization of electronic Powers of Attorney for finances are gaining national traction with enactment of the Uniform Power of Attorney Act in twenty-eight states.⁶¹ Except for New Hampshire, all of these enactments give evidential benefits to an electronic power of attorney in which the agent's appointment is acknowledged before a notary.⁶² In Maine, acknowledgement before a notary is required for the electronic power of attorney to be valid.⁶³

⁵⁷ See Robyn A. Freidman, *Mortgage Closings Just Took a Big Step Into the Digital Age*, WALL ST. J. (Aug. 9, 2017 9:59 AM), <https://www.wsj.com/articles/mortgage-closings-just-took-a-big-step-into-the-digital-age-1502287181>.

⁵⁸ For a description of the first online deed recordation, see Timothy S. Reiniger & Phillip M. Marston, *The Deed is Done: On-line Notarization Becomes A Reality*, 10 DIGIT. EVIDENCE & ELEC. SIGNATURE L. REV. 144 (2013), <http://journals.sas.ac.uk/deeslr/article/view/2034>.

⁵⁹ See *Real Property Electronic Recording Act*, UNIF. L. COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=643c99ad-6abf-4046-9da4-0a6367da00cc>; UNIF. REAL PROP. ELEC. RECORDING ACT (NAT'L CONF. OF COMM'RS ON UNIF. STATE LS. 2005).

⁶⁰ See UNIF. REAL PROP. ELEC. RECORDING ACT § 4.

⁶¹ See *Power of Attorney Act*, UNIF. L. COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=b1975254-8370-4a7c-947f-e5af0d6cb07e>; UNIF. POWER OF ATT'Y ACT (Nat'l CONF. OF COMM'RS ON UNIF. STATE LS. 2006). Although not an enactment of the Uniform Power of Attorney Act, Indiana also authorizes electronic powers of attorney with the use of an electronic notarization, but only with physical presence before the notary. See IND. CODE § 30-5-11-4.

⁶² See N.H. REV. STAT. ANN. § 564-E:105.

⁶³ See ME. REV. STAT. ANN. tit.18-C, § 5-905.

C. Advance Directives

Electronic advance directives are authorized in California, Nevada, and Texas.⁶⁴ Express authorization for electronic notarization of these documents is provided in California and Texas.⁶⁵ In the current legislative session, electronic advance directive authorization is being considered in Illinois.⁶⁶

D. Wills and Trusts

In 2017, Nevada enacted the first online e-Will and e-Trust laws in the United States.⁶⁷ Joined with the online notarization law, the e-Will law amends Nevada's pre-existing e-Will law to authorize the use of audio-visual conference technology by testators, witnesses, and notaries in the creation of wills.⁶⁸ The new position of a Qualified Custodian is created to function as the record-keeper of self-proving electronic wills.⁶⁹ Recognition is also given to paper printouts for admission in probate court as authoritative originals of e-Wills.⁷⁰

Since the Nevada experience, five other jurisdictions have enacted e-Will laws. Arizona (2018) and Florida (2019) e-Will laws incorporate provisions for online notarization.⁷¹ Indiana (2018) has also enacted e-Will and e-Trust authorization.⁷² but without including use of online notarization.⁷³ More recently, Utah (2020) has enacted the Uniform Electronic Wills Act and Washington, D.C. (2020) has enacted a version of the Uniform Electronic Wills Act but on a temporary emergency basis.⁷⁴

⁶⁴ See CAL. PROB. CODE § 4673; NEV. REV. STAT. § 133.088(1); TEX. HEALTH & SAFETY CODE ANN. § 166.011.

⁶⁵ See CAL. PROB. CODE § 4673(B); TEX. HEALTH & SAFETY CODE ANN. § 166.011(a)(2).

⁶⁶ See S.B. 182, 101st Gen. Assemb., Reg. Sess. (Ill. 2019).

⁶⁷ See NEV. REV. STAT. §§ 133.085 to .088, .300 to .340 (wills), 163.0095 (trusts).

⁶⁸ See *id.* §§ 133.085 to .088.

⁶⁹ See *id.* §§ 133.300 to .340.

⁷⁰ See *id.* § 136.185.

⁷¹ See ARIZ. REV. STAT. ANN. § 14-2519; FLA. STAT. §§ 732-501 to -526.

⁷² For wills, see IND. CODE ANN. § 29-1-21-1 to -18. Note that the attesting witnesses are not authorized to appear with the testator by means of audio-video communication. See *id.* For trusts, see IND. CODE ANN. § 30-4-1.5-1 to -13.

⁷³ Indiana law does not require wills to be notarized. See IND. CODE ANN. § 29-1-5-3, -3.1.

⁷⁴ See UTAH CODE ANN. § 75-2-1401 to -1411 (recognizing the use of online notaries); D.C. CODE § 18-113.

The Uniform Electronic Wills Act expressly contemplates that enacting states may choose to authorize the use of remote witnessing as well as online notarization.⁷⁵ Most wills today are self-proving, meaning that the witnesses have signed both the will and a declaration or notarized affidavit as to proper signing and execution. For self-proving e-Wills, Section 8 of the Uniform Electronic Wills Act provides that affidavits and attestations must be executed at the same time as the e-Will, so that they are part of the e-Will document itself.⁷⁶

Florida, Nevada, and Utah do not require the witnesses to be physically present with the testator or notary. Arizona, while permitting the witnesses to appear before a notary remotely, still requires the witnesses to be physically present with the testator.⁷⁷

VI. IMPLICATIONS FOR REAL PROPERTY AND PROBATE BAR PRACTITIONERS

Real property and probate attorneys would be well-advised to leverage the emerging legal service of online notarization. Experience in Virginia and other states has shown that giving notaries the capability of performing online notarial acts, and signers the ability to e-file and e-record, is highly valued by the business community, consumers, and government. An additional advantage is the substantial deterrent to attempts at notarial fraud with respect to documents notarized in this manner due to the inherent security requirements of online notarizations. In contrast, RIN notarizations, while affording signers the convenience of the audio-visual appearance, do not enjoy the security afforded by access to online authentication capabilities.

The online notarization process is built upon the most effective security tool of all: the human notary who is overseeing the signing. The best security systems rely upon the human factor, not merely technology.⁷⁸ “The most important element of any security measure . . . is people, not

⁷⁵ See UNIF. ELEC. WILLS ACT (NAT’L CONF. OF COMM’RS ON UNIF. STATE LS. 2019) <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=8529b916-8ede-67e4-68eb-e0f7b1cb6528&forceDialog=0> [hereinafter e-Wills Act]. For a broader discussion on the development of the Electronic Wills Act, see Susan N. Gary, *The Electronic Wills Act: Facing The Inevitable*, 55 REAL PROP. TR. & EST. L.J. 3 (2020).

⁷⁶ See e-Wills Act, *supra* note 75, § 8.

⁷⁷ See ARIZ. REV. STAT. ANN. § 14-2518.

⁷⁸ See Charles C. Mann, *Homeland Insecurity*, THE ATLANTIC (Sept. 2002), <https://www.theatlantic.com/magazine/archive/2002/09/homeland-insecurity/302575/>.

technology—and the people need to be at the scene. . . . [P]eople are the essential security element. You always build the system around people.”⁷⁹ By recognizing that the “scene” includes computer screens, online notarization processes accomplish this.

As real property and probate practitioners embrace online notarization as a legal service, new considerations for ethical obligations will emerge. For example, in states where attorneys are obligated to control the property closing, e-Closings raise questions as to what level of direct attorney participation is required in the audio-visual session, and whether an attorney’s availability by phone to answer questions is sufficient to meet those obligations.⁸⁰ With respect to the preparation of estate planning documents, are there ethical concerns as to the sufficiency of an audio-video recording of a will execution in view of the implications for possible will contest challenges to the testator’s mental capacity? Are probate attorneys ethically obligated to provide remote witnessing capabilities for document execution when there are health risks posed by in-person meetings?⁸¹ These are just a few of the emerging questions.

VII. CONCLUSION

Online notarization strengthens the current paper-based notarial acts in three important respects. First, the authorizing statutes modernize the notary office by requiring stronger qualification (including educational) criteria for those notaries who desire to perform remote online notarial acts.⁸² Second, online notarization gives consumers greatly increased

⁷⁹ *Id.*

⁸⁰ See Orlando Lucero, *The Future is Now: eClosings and a Lawyer’s Ethical Obligations*, PROB. & PROP. MAG., Sept.–Oct. 2020, at 5, https://www.americanbar.org/groups/real_property_trust_estate/publications/probate-property-magazine/2020/september-october/the-future-now-eclosings-and-lawyers-ethical-obligations/ (explaining the ethical implications facing practitioners in relation to conducting eClosings).

⁸¹ See Amanda Robert, *Lawyers Address Problems with Estate-Planning Document Signing During Coronavirus Crisis*, ABA J.: TRS. & ESTS. (May 4, 2020), <https://www.abajournal.com/web/article/lawyers-and-problems-with-estate-planning-signing-during-coronavirus-crisis> (discussing practice considerations posed by the COVID-19 pandemic situation).

⁸² Before performing online notarizations, notaries must fulfill course requirements (in Colorado, Florida, Indiana, Iowa, Kentucky, Missouri, Montana, Nebraska, Nevada, Ohio, and Wisconsin) and pass an exam (in Colorado, Indiana, Missouri, Montana, Nebraska, Nevada, and Ohio). See *How to Become a Remote Online Notary*, NAT’L NOTARY ASS’N, <https://www.nationalnotary.org/knowledge-center/remote-online-notary/how-to-become-a-remote-online-notary#Requirements>.

identity validation protections through a multi-factor authentication of signers. Third, online notarization laws generally mandate keeping notarial journals and retaining the audio-video recording of each signing session.

Real property and probate attorney practitioners will experience the strategic use of online notarization and remote witnessing as an emerging client benefit and business driver.