March 31, 2020

Re: Executive Order Allowing Remote Notarization and Witnessing of Documents During the Coronavirus (COVID-19) Pandemic

The undersigned Chairs of two Sections within the American Bar Association (ABA) write to urge you to promptly issue an executive order, emergency proclamation, or similar order appropriate for your state allowing remote notarization and witnessing by simple means that can be offered to most clients by all attorneys in your state, regardless of the size of their firm. With so many attorneys and their clients working from home and socially isolating, the simple act of face-to-face execution of documents needing acknowledgment by a notary public has become an obstacle to attorneys’ ability to provide many essential legal services to their clients. The state of emergency created by the coronavirus (COVID-19) pandemic mandates that a simple remote notarization be allowed so that neither notary publics nor signatories have to congregate unsafely just to execute a document.

The views expressed in this letter are presented on behalf of the ABA sections listed below and are supported by the ABA Commission on Law on Aging which serves as an interdisciplinary, expert body within the ABA to strengthen and secure the legal rights, dignity, autonomy, quality of life and quality of care of aging persons.¹ These views have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and should not be construed as representing the position of the Association.²

- The Section of Real Property, Trust and Estate Law. Representing real property and trust and estate attorneys, the Section has as one of its missions to address the needs of the profession and the public within the areas of practice served by the Section. Notarized documents are vital to attorneys practicing in both areas of law. Only properly acknowledged documents may be accepted for recording by an applicable recorder’s office. If documents, such as deeds and

¹ Other groups, including WealthCounsel which is a membership based group of estate planning and business law attorneys from across the United States, have expressed similar views to those urged by this letter.
² The ABA recognized the importance of the topic of notarial attestation of signatures with its adoption of Resolution 114A declaring the importance of study of updates to the law around issues of the attestation of signatures, whether by notaries public in the United States, abroad pursuant to the laws of sovereign jurisdictions, or specifically in cross-border contexts pursuant to the Vienna Bielawski, Adamks Convention on Consular Relations or to the Hague Apostille Convention. (ABA Resolution 114A, adopted in August 2014, is available at https://www.americanbar.org/content/dam/aba/directories/policy/2014_hod_annual_114a.docx) The Uniform Law Commission further recognized the importance of the topic with its 2018 promulgation of THE REVISED UNIFORM LAW ON NOTARIAL ACTS, available at https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=aec212eb-4e8-183a-13dd-387c760466e6&forceDialog=0.
mortgages, cannot be recorded, real estate transactions and the related financings may be substantially impaired. Wills, health care proxies and other estate planning documents must also be executed in a form that meets all statutory requirements. Requirements vary by state but generally include an acknowledgment by a notary public and two witnesses.

- **The Section of Family Law.** Representing family law attorneys including assisted reproductive technologies attorneys includes in its missions addressing the needs of the profession and the public within the areas of practice served by the Section. These areas used notary services for a variety of purposes including, but not limited to, execution of pre and post nuptial agreements; transfers of property incident to agreements and incident to orders and judgments where the transfer changes financial responsibility for the property in question; estate planning documents to change estate plans incident to and even during legal proceedings; and documents for adoption and other assisted reproductive technologies proceedings.

Even if your state authorizes remote notarization, that process generally requires using an outside vendor platform as a part of the actual execution. Some attorneys are reluctant to use the tech companies providing remote notarization services due to concerns about data mining and disclosure of documents outside of the attorney client privilege before the transaction is part of the public record. Proof of identity and record retention required under other remote notarization statutes cause third party tech companies to have personal information and the contents of the legal documents themselves. The ethical implications of attorneys using third party notarization platforms are not yet well-understood, which further causes attorneys to be leery of using such platforms.

There are several examples of simple remote notarization executive orders that have been issued or are proposed for remote notarization. Which option is selected is not critical, just that a simple method is selected.

Governor Andrew Cuomo of New York in his executive order authorized documents to be notarized by a notary public via readily available video technology. A full copy is attached hereto, but the requirements include the following:

- If not known to the notary, the person seeking notary services must present a valid photo ID during the video conference.
- The video conference must allow for direct interaction.
- Pre-recorded videos of signatures are not permitted.
- People seeking notary services must affirmatively represent they are physically situated in the State of New York.
- The person seeking notary services must transmit by electronic means a legible copy of the signed document, which the notary may notarize and transmit back to the person.
• The notary may repeat the notarization of the original signed document as of the date of execution within thirty days.

Another approach being proposed in Massachusetts (a full copy attached hereto) provides in part that:

• The attorney or paralegal notary (working directly for an attorney or law firm) witnesses the execution of the document via electronic video conferencing in real time. Such attorney or paralegal notary may then affix the notary stamp and signature to any such document delivered to them; provided that an affidavit is executed by such attorney or paralegal notary which confirms under the pains and penalties of perjury that (i) he/she/they have reviewed a copy of a valid unexpired government issued identification (as acceptable to the Department of Homeland Security for domestic air travel); and (ii) they have personal knowledge of the person(s) executing such document(s).

• Such document accompanied with such affidavit shall be deemed a properly executed, acknowledged and notarized document for any and all legal purposes in the Commonwealth; including without limitation for recordation with the Registry of Deeds of any county and any other state, local or federal agency, department or office.

Another requirement that you may consider, and which would be helpful to address issues of competence and duress, is to require a disclosure of and video viewing of all persons present in the room with the signatory. In addition, the attorney affidavit shall note those present in the room and a statement of the relationship of the individuals in the room to the signatory.

The approach taken by Iowa Governor Kimberly Reynolds in an emergency proclamation (a full copy is attached hereto) allows witnesses to the execution of wills and other testamentary instruments to be remote to the “testator, settlor, principal, witness or other person, if the person is present in a manner in which the witness or other person can see and hear the acts by electronic means, such as video conference, Skype, Facetime, Zoom, or other means, whether or not recorded.”

We believe that the foregoing list is a useful list of available video methods that should be allowed under the requested temporary remote notarization and witnessing procedures.

Also, instead of having a fixed expiration date for this simple method, one could provide that the simple alternative notary provision shall expire x days after the COVID-19 state of emergency expires in your state.

For the reasons set forth above, we urge you to issue an executive order authorizing remote notarization and witnessing by a simple method while the COVID-19 pandemic restricts the ability of the public to meet in person with their counsel.
Sincerely,

Jo-Ann M. Marzullo  
Chair, ABA Section of Real Property, Trust and Estate Law

Jonathan W. Wolfe  
Chair, ABA Section of Family Law

Attachments