

An Act Providing for Virtual Notarization to Address Challenges Related to COVID-19

**FAQs for the Probate Bar
4/29/2020**

1. What are the Effective Dates of the Act?

The Act is effective immediately through the date which is three days after the termination of the Governor's March 10, 2020 Declaration of a State of Emergency.

2. Can all Notaries Public act under this legislation?

Yes. All notaries public may act with limitations as to two specific categories of documents.

The only notaries eligible to act under this emergency legislation with respect to (a) any document executed in the course of closing a transaction involving a mortgage or other conveyance of title to real estate (referred to in this FAQ as a "Real Estate Document" or "RED") or (b) with respect to any will, nomination of guardian or conservator, caregiver authorization affidavit, trust, durable power of attorney, health care proxy or authorization under the federal Health Insurance Portability and Accountability Act of 1996 (referred to in this FAQ as an "Estate Planning Document" or "EPD") are licensed attorneys and paralegals working under the direct supervision of such an attorney. The term paralegal is not defined in this Act, so that leaves flexibility for attorneys to designate employees "paralegals."

See Act: Sections 2, 6(a)

3. What Supplies and Technology are required to use this emergency authorization?

- a. The notary, the Principal, and the witnesses will each need:
 - i. The page or pages that the person will be signing. Any person executing the document or documents should also have a complete paper counterpart of the document being signed;
 - ii. Pen; and
 - iii. Computer/tablet/smartphone/other device with technology to support live-streamed conferencing; agreement on which videoconferencing app to use and instructions for use.
- b. For the Principal and witnesses only: (i) government-issued ID if s/he is not personally known to the notary; and (ii) instructions (and return envelopes to facilitate the process) to return the signed pages to the notary.
- c. For the Notary: technology to record the conference (audio and video) and to store it, along with the affidavit and copies of identification relied upon for notification, for ten years.

4. Must a Notary Public record and retain the recording of the notarization?

Yes, the Notary must create and retain for 10 years an audio and visual recording of the “performance of the notarial act.” If the Notary is a paralegal, this recording shall be retained by the supervising attorney.

See Act: Sections 3(f) and 6(a)(ii)

5. Can a Notary Public notarize based on personal knowledge of the signer?

Yes.

Section 3(a)(iii) requires that “each principal provides the notary with satisfactory evidence of identity” pursuant to either of the methods allowed in as defined in Section 1.

"Satisfactory evidence of identity," identification of an individual based on: (i) at least 1 current document issued by a federal or state government agency bearing the photographic image of the individual's face and signature; or (ii) identification of an individual based on the notary public's personal knowledge of the identity of the principal.

Section 3(a)(iii) further provides that for a person who is not a United States citizen, “satisfactory evidence of identity” shall mean identification of an individual based on a valid passport or other government-issued document evidencing the individual's nationality or residence and which bears a photographic image of the individual's face and signature.

For purposes of this emergency legislation, it is not permitted to rely on the third method of identification permitted under Ch. 222, Section, which is “the oath or affirmation of a credible witness unaffected by the document or transaction, who is personally know to the notary public and who personally knows the individual.”

See Act: Sections 1, 3(a)(iii)

6. What does the word “principal” in the Act mean?

The word “principal” includes anyone signing a document in the videoconference procedure: whether as a principal or a witnesses. See #13 below for an explanation of how this would work in practice.

See Act: Section 1

7. What are the requirements of proving identification?

- 1) The notary's personal knowledge (referring to the preexisting statute governing notarial acts)
- 2) (a) The principal's government-issued ID. When relying upon this, you must have the principal (or another acting for him/her) show the front and the back of the ID to the camera **and** have the principal deliver a copy of the front and back of that evidence (or, if a passport, a copy of the front cover and page with the principal's photo, name and signature) to the notary, who must store it in a secure and confidential manner for 10 years.

(b) In the case of the notarization of any RED, if the notary is relying upon government issued ID and not upon personal knowledge, the principal must display a second form of identification containing the principal's name. Forms of identification suggested in the Act include a credit or debit card, a social security card, either of a municipal tax bill or utility bill dated within 60 days of the notarization. NB: Consider whether you would want a signer to display the suggested forms of secondary identification on a recorded videoconference.

See Act: Section 1, 3(a)(iii), 6(b)

8. Are two video conferences necessary under the Act?

It depends.

If the document is an RED, two video conferences are necessary under Section 3(a)(vi). Notarization will occur at the time of the second videoconference REBA will issue further guidance on this procedure.

In the case of all other documents, including EPDs, there need only be one videoconference and the notarial act is complete once the notary receives and compiles the originally signed documents.

See Act: Section 3(a), (b), generally for all documents, and Section 3(e) for EPDs and Section 3(a)(a)(vi) for RED

9. Can the Principal and Witnesses be in separate locations during the videotaping?

Yes, as long as all parties, including the notary, are located within the Commonwealth at the time of the videoconference; the notary public obtains the affirmation of each party of his/her location within the Commonwealth; and the videoconference shows each party as being present for the videoconference at the same time.

See Act: Section 5

10. When does the Notary Public notarize?

If the document requiring notarization is anything but an RED, the Notary notarizes the signatures in the sole videoconference, provided that the notarial act is not complete and the stamp and seal cannot be applied until the signed document is delivered to the notary. This would include an EPD once compiled, if in multiple counterparts.

If the document requiring notarization is an RED, the Notary notarizes in the second videoconference.

See Act: Sections 3(a), (b) and (e)

11. Why are there differences in the treatment of REDs and other documents?

The real estate bar developed the procedure which requires two video sessions to provide certainty with respect to conveyancing documents.

Other notaries may serve clientele which include numerous persons who are isolated during the COVID-19 outbreak in nursing homes, medical facilities, or at home, for whom risk of social contact may carry extreme risk, and persons who may not be as technologically adept. Many of the persons who desire to execute other documents during the COVID-19 outbreak, or the witnesses to such documents, may be frail, ill, or hospitalized at the time of execution and may suffer incapacitation or death between the time of a first video-conference and a second video-conference. The probate bar believes that the notarization requirements set out for EPDs in this emergency procedure provide robust protections regarding the principal's identity and capacity and allow the greatest possible access to document execution by video conference for this population.

Despite the difference between procedures for REDs and EPDs, REBA has agreed that EPDs, including trusts and Powers of Attorney executed for conveyancing purposes, may be recorded with the Registry of Deeds. Section 4 of the Act states this outright.

12. When is an EPD Valid? What if the Principal dies before the Will is compiled?

The document is complete when all of the original counterparts and the notary's affidavit are compiled. The administrative delay between signature and compilation may or may not affect validity. It was the intent of the drafters that administrative delay would not affect validity for EPDs and other documents requiring only one video conference.

See Act: Section 3(e)

13. Can EPDs which require witnesses be executed in counterparts? How is this document made complete?

Yes. For the execution of a Will, the notary will use that notary's standard procedures to ascertain the Testator's legal competence. The notary will use the methods set out in the Act to determine each Principal's identity. The notary must visually verify each Principal's identification document (if identification is not by personal knowledge) and the signatures of each Principal prior to notarizing the document. If identification of a Principal is by government document, the notary must capture and keep images of front and back of the document either by (a) the notary's own use of electronic capability during the conference, or (b) having the Principal mail hard copies or email the images with the signed document after the conference.

After each Principal has signed, each must transmit (by mail, courier, or private delivery service) that person's original counterpart to the notary. The notary must also prepare and sign an Affidavit regarding the signing conference.

The EPD may be valid when signed by all necessary parties, but under the Act, the notarial act is not completed until the various signature pages, notarization clause, and Affidavit are compiled.

See Act: Sections 3

14. Can I use this videoconference procedure for the execution of an EPD that does not currently require a Notary Public's attestation? Are the signatures of Witnesses now required to be notarized?

In most documents, including Health Care Proxies, we may not normally notarize a witness's signature. That will change during this emergency period.

- If witnesses are physically present with the primary Principal and no notarization is needed for their signatures, then the witnesses are not considered a "principal" and the notary would not need to follow the procedures of this Act to validate a witness's signature.
- If witnesses are not physically present with the primary Principal, then this Act allows a notary to validate the witness's signature as if the witness had been physically present with the primary Principal at the time of signing. To do this, the notary will notarize the signature of each witness following the procedures of the Act. As noted above, the term "Principal" in the Act refers to each person whose signature is being notarized, whether that person is a principal to the document or a witness to the document.

Best practice guideline: Because this Act's object is to provide a method of securing notarizations during the COVID-19 outbreak, the best practice will be to now require a notary and witnesses and to use counterparts and a self-proving affidavit for these documents as you would do with a Will. The notarial certification serves as a "wrapper" allowing the videoconferenced signing to qualify under this Act.

See Act: Section 1; Section 5

15. Can we use counterparts for Videoconferenced Notarizations where witnesses are required?

Yes. That is expressly permitted under the Act.

See Act: Section 5

16. How is the Notary Certification completed?

REBA will provide guidance on this. The Act requires the notary clause to include each of the following: 1) indication that the document was notarized remotely pursuant to the Act; 2) the county where the notary was located at the time of notarization; and 3) any other information you would normally include in a notary clause.

See Act: Section 3(c)

17. What is required in the post-execution Affidavit by the Notary?

In addition to the notary clause on the document itself, the notary is required to prepare, execute and retain for 10 years an Affidavit confirming satisfactory evidence of the parties' identity; and averments of the parties' verbal assent to any recording of the videoconference; of the parties' physical presence within the Commonwealth; and that the notary was informed of the presence of other persons in the room at the time of the execution of the document (and notes the identity of those persons and states their relationship to the principal). If the notary is a paralegal, this Affidavit must be kept in the Supervising Attorney's files for 10 years. The images of the Principal's identification document should be kept with this Affidavit, as should the recording of the notarial act.

See Act: Sections 3(d) and (f)

18. How many affidavits should I sign?

This Act requires an affidavit to validate each remotely notarized document, but the affidavit is not presented as part of the original document. Therefore, the notary may decide whether to prepare one affidavit per remote signing conference, or one affidavit per document. The attached sample affidavit could be used as a single affidavit, or it could be printed multiple times and signed by the notary as duplicate originals, one for each document signed during the conference.

19. How should a Will which has been notarized by videoconference be probated?

This Act causes a will notarized remotely to be valid for probate just as it would be if all persons had been personally present at the time of signing. Unless the Probate and Family Court issues guidance otherwise, informal probate should be available for remotely executed wills.

Best practice: If the Principal owned real estate in the Principal's sole name, the Will should be offered in formal probate. (Other circumstances individual to the matter may also affect the Personal Representative's decision.)

ADDITIONAL BEST PRACTICES:

1. Each videoconference should include, to the extent possible, a scan of the physical space in which the Principal or witness is located to discern whether other parties are present. Witnesses should be in a private space and to the extent possible, Principals should also be in a private space with no other people around. It is recognized that some parties may be unfamiliar with the technology, however, and may need to have someone else with them to aid with the video conference. The Notary Public should determine and record the names of each other person present with the individual signing and that person's relationship to the individual. No person who is an heir or beneficiary/devisee of a testator should be present.
2. Consider taking screen-shots of critical elements (e.g. other parties in the room, the moment the Principal and the witnesses each sign, and (in the event the hard signed counterparts are lost in the mail, each signed signature page) and preserving those in the client file.
3. All signatories to all documents should transmit the signed document/counterpart to the notary or other designated collection person as soon as possible via any available method.
4. The notarization certificate should include the town/county where the Principal signs; the town where each witness signs; and the county where the Notary is present at the time of notarization. The Notary should include the Notary's additional capacity as an attorney (with BBO #) or as a paralegal employed by a specific attorney with that attorney's BBO#, as appropriate. The document should be prepared with numbered pages and with separate pages for each individual to sign, to facilitate consolidation. If not previously completed for them, each witness must print the other witness's name in his or her jurat as proof of the requirement of having two witnesses present in the videoconference.