

Online Notarization: Challenges and 6 Core Principles



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Online Notary Tools

- Electronic Signature
- Electronic Seal
- Electronic Journal/Record
- *Storage/Maintenance of Session Recordings*
- *Identification of Signers*
- *Real-Time Two-Way Audio-Video Communication Capability*

Online Notarization: New Aspects

1. Identification Standards (Multifactor Authentication)
2. Audio-Video Standards (Security of Connection)
3. Recording Requirements (Quality of Testimony)
4. Certificate Language (Indication of Online Appearance)

Conceptual Points of Confusion

- Jurisdiction/Authorization
- Interstate Recognition
- Allocation of Liability with Technology Service Providers
- Privacy/Access

Notary's Authorization

- Public Office/Territorial Jurisdiction
- Subject Matter Jurisdiction
- Personal Jurisdiction

Public Office/Territorial Jurisdiction

Authorization to Perform Notarial Acts within the
Commissioning State's Boundaries: Powers and Duties

- Acknowledgment
- Oath/Affidavit/Jurat
- Copy Certification
- Signature Witnessing/Attestation
- Protests

Subject Matter Jurisdiction

- Paper Documents
- Electronic Notarization
 - Federal ESIGN
 - State UETA Enactments
 - State URPERA Enactments
 - State Uniform Power of Attorney Act Enactments

Personal Jurisdiction

- **Appearance** → Means for Signer to Invoke Notary's Authority
 - Paper Documents → Physical Presence
 - Online Environment → Virtual Presence (Real-Time Audio-Video Communication Technology)
- **Legal Capacity** → Legal Ability of Signer to Invoke Notary's Authority
 - Representative/Agency Status
 - Age and Awareness

Interstate Recognition Analysis

- 1) **Validity** – Law Where Notarial Act is Performed (Full Faith and Credit / US Constitution)
- 2) **Enforceability** (Proof) – Law of Receiving State (Federal and State Evidence Codes and Authentication Requirements)
- 3) **Effect** – Law of Receiving State (50 State Interstate Statutory Regime; Uniform Law Commission Acts)

Allocation of Liability

- Online Notaries v. Third-Party Technology Providers
 - Signing Platforms
 - Credential Analysis
 - Identity Proofing
 - Audio-Video Recordings
 - eJournal Retention
- Online Notary Service Providers v. Land Title and Banks

Privacy and Access

- Recordings and eJournals
 - Who Owns the Data?
 - Who Controls Access?
 - Rights of Signers
- Identification of Signers
 - Who Owns the Data?
 - Is the Credential Information Retained and Shared?
 - Are the KBA Questions Recorded/Retained?

Principle 1 – Appearance

- Any Requirement for Personal Appearance is Satisfied by an Online Notarization
 - Security Requirements for Communications Technology

Principle 2: Location of Notary

- **The Online Notary Must be Physically Located in the Commissioning State When Performing Online Notarizations**
 - **History of Commissioners of Deeds**

Principle 3: Document Integrity

- Documents Must be Rendered Tamper-Evident
- From Time of Execution or Issuance
- Capability of Proof over Time

Principle 4: Location of Signer

- The Signer May be Physically Located Outside of the Notary's Commissioning State
 - Considerations for Signers Located Outside of the United States

Principle 5: Capability for Strong Proof of Signer Identity

- The Online Notary Must Confirm the Signer's Identity Using One of Several Methods:
 1. Personal Knowledge
 2. Credible Witness
 3. Two-Factors of Online Authentication
- Online Authentication
 - Antecedent Proofing/Credential Analysis
 - Knowledge-Based Assessment (KBA) Questions

Principle 6: Audio-Video Recording

- Online Notary Must Make and Keep a Copy of the Audio-Video Recording of Each Signing Session
 - 10 Years
 - Third-Party Repositories

Online Notarization Legislative History

- Utah (Chapter 312 of 2000; Repealed 2006)
- Virginia (Chapter 731 of 2011; Effective 2012)
- Montana (2015)
- Texas and Nevada (2017)
- Model Electronic Notarization Act (NNA, January 2017)
- American Land Title and Mortgage Bankers Model Legislation (December 2017)
- Revised Uniform Law on Notarial Acts (ULC, July 2018)

Online Notarization: 2 Legislative Approaches

- 1) Electronic Documents Only (Virginia, Nevada, TX, Ohio, Tennessee, Michigan, Minnesota, MENA, ALTA/MBA Model)
- 2) Both Paper and Electronic Documents (Montana and Revised Uniform Law on Notarial Acts)

	Virginia	Montana	Texas	Nevada	Ohio
Status	eNotary Commission	Notary Commission	Online Notary Commission	Registered eNotary	Registered Online Notary
Paper or eRecord	Electronic	Both	Electronic	Electronic	Electronic
Limits on Signers	None	MT Resident Only	None	None	None
ID Methods	Multi-factor	Knowledge of Signer; Credible Witness	Multi-factor	Multi-factor	Multi-factor
Integrity of Record	Tamper Evident	Tamper Evident	Tamper Evident	Tamper Evident	Tamper Evident
Certificate Denotation of Online Method	No	No	Yes	Yes	No

	Indiana	Tennessee	Minnesota	Michigan	Vermont
Status	Registered Remote Notary	Online Notary Commission	Registered Online Notary	Notary Commission	Pending
Paper or eRecord	Electronic	Electronic	Electronic	Electronic	Pending
Limits on Signers	None	None	None	None	None
ID Methods	Multi-factor	Multi-factor	Multi-factor	Multi-factor	Pending
Integrity of Record	Tamper Evident	Tamper Evident	Tamper Evident	Tamper Evident	Tamper Evident
Certificate Denotation of Online Method	Yes	Yes	Yes	Yes	Pending

Online Notarization Market Adoption Challenges

- Relying Party Trust: Risk of Non-Acceptance?
- Business Models: How Sustain it Financially?
- Paper Printouts: Originals?
- Bankruptcy Trustee Challenge: Risk to Lienholder Status?
- Privacy Compliance/Liability Risks?

Resources

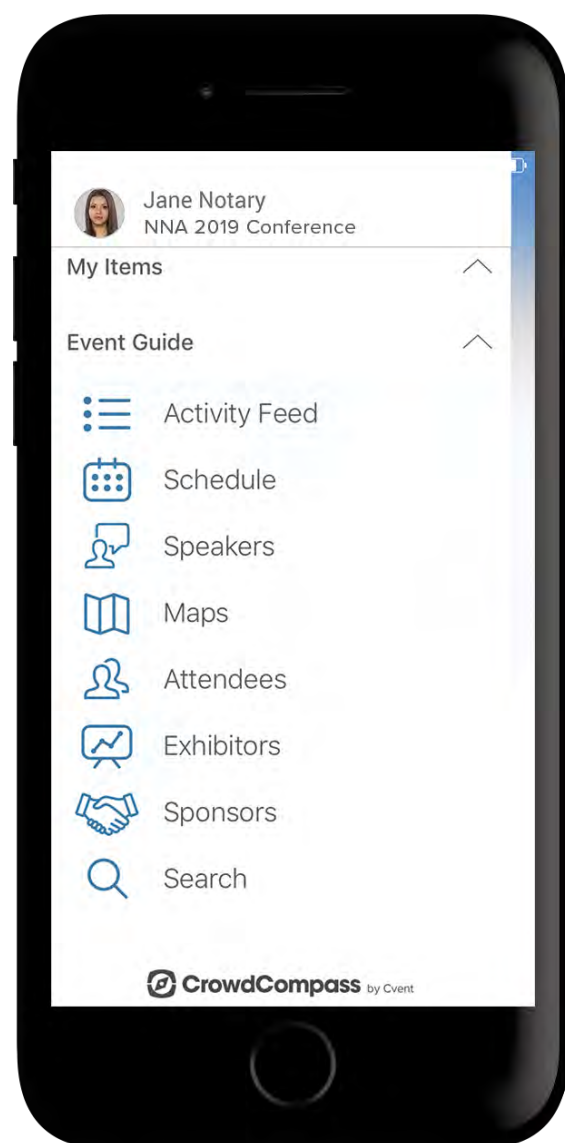
- Articles
 - “Developments in Information Governance: The Emergence of Online Notarization” (ABA Information Law Journal, Autumn 2018)
 - “The Deed is Done: Online Notarization Becomes a Reality” (Digital Evidence and Electronic Signature Law Review, Vol 10, 2013)
 - “Online Notarization and the End of Physical Appearance in the Digital Age” (ABA The SciTech Lawyer Journal, Fall 2011)
- Model Electronic Notarization Act of 2017(MENA): <https://www.nationalnotary.org/knowledge-center>
- Revised Uniform Law on Notarial Acts (ULC): www.uniformlaws.org
- ALTA/MBA Model Online Notarization Law: www.mba.org

Questions?



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