Unequal Protection Under the Law:

All, Not Just Some, Notarial Acts Require the Protections of Notary Journals.
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INTRODUCTION

Recent enactments of electronic and remote online notarization laws across the United States feature Notary journals as a means of protecting and increasing public confidence in these notarizations. This resurgence of interest in Notary journals is most welcome, but ultimately wanting, because most enactments limit recordkeeping to electronic or remote online notarizations instead of requiring it for paper notarizations as well.

This position paper discusses three policy concerns with the current trend to require Notary recordkeeping for some, but not all, notarizations. These concerns are:

(1) A paper, electronic or remote online notarial act is fundamentally the same and should be performed under functionally-equivalent standards of practice that include recordkeeping.

(2) Laws limiting recordkeeping to electronic and remote online notarizations may address the perceived risks of these notarizations, but they ignore the real perils of paper notarizations.

(3) Until electronic and remote online notarizations are performed as frequently as paper notarizations today, the public will not benefit from the protections of Notary journals for the vast number of notarizations performed daily in the United States.

ALL NOTARIZATIONS ARE EQUAL

Currently thirteen states, the District of Columbia and four territorial jurisdictions of the United States require Notaries to keep an official record of notarial acts for most, if not all, paper notarizations. Six additional states limit recordkeeping to certain acts.

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1 “Remote online notarization” is the term widely used in the Notary community to describe notarial acts performed for signers who are not in the physical presence of the Notary Public. Remote online notarization also is referred to in law as “remote notarization,” “online notarization” and “notarial act for a remotely located individual.” It is also sometimes called “webcam notarization” outside of the law.

2 See AM. SAM. CODE ANN. § 31-0334(b); ARIZ. REV. STAT. ANN. § 41-313E; CAL. GOV’T CODE § 8206; COLO. REV. STAT. § 24-21-519(f); D.C. CODE ANN. § 12A-1-1231(a); GUAM CODE ANN. tit. 5, § 33401; HAW. REV. STAT. § 456-15 and HAW. ADMIN. CODE § 5-11-9(a); MD. CODE ANN. (STATE GOV’T) § 18-107; MASS. GEN. LAWS ANN. ch. 222, § 22(a); MISS. CODE ANN. § 25-33-5 and CODE OF MISS. ST. RULES §§ 01-000-050-5.11A; MO. ANN. STAT. § 486.260; MONT. CODE ANN. § 1-5-618(1); NEV. REV. STAT. ANN. § 240.120(1); NOR. MAR. CODE ANN. tit. 3, § 3323; 57 PA. CONST. STAT. ANN. § 319(a); TEX. GOV’T CODE § 406.014(a) and CIV. PRAC. & REM. CODE 121012(a); VA. ISL. CODE ANN. tit. 3, § 775(a) and § 802; WASH. REV. CODE ANN. § 42.45.180(f).

3 See KY. REV. STAT. ANN. § 423.030 (until January 1, 2020 when the statute is repealed); ME. REV. STAT. ANN. tit. 4, §§ 952, 953; N.J. STAT. ANN. § 2A:82-5 and § 7:5-3; OHIO REV. CODE ANN. § 14704 (until September 20, 2019 when the statute is repealed); OKLA. STAT. ANN. tit. 26, § 14-108(38) and tit. 49, § 7; OR. REV. STAT. § 194.300(f) and (ft), where note four specific acts and two types of documents are exempted from the recordkeeping requirement.
One state conditions recordkeeping to acts for which the Notary or Notary’s employer charges a fee.\(^4\) One state’s law permits but does not require recordkeeping\(^5\) and another’s requires the Secretary of State to recommend that Notaries keep records.\(^6\) Notaries in ten jurisdictions must keep records of all types of notarial acts, whether paper, electronic or online.\(^7\)

Against this legislative background, states increasingly are mandating recordkeeping for electronic and online notarizations, but not for paper notarial acts.\(^8\) Currently nine states’ laws reflect this policy. The trend began with a 2005 North Carolina statute\(^9\) authorizing the Secretary of State to require by administrative rule that Notaries performing electronic notarizations, exclusively, must keep records.\(^10\) Soon after, Virginia\(^11\) and Delaware\(^12\) enacted their own statutes. Nebraska\(^13\) enacted a provision like North Carolina’s. Still, bifurcated recordkeeping requirements were not yet mainstream until states began enacting remote online notarization laws.\(^14\)

Bifurcated Notary recordkeeping, unfortunately, undermines the fundamental equality of notarial acts. A notarial act at its core is the same regardless of the medium — paper document or electronic record — on which it is performed.\(^15\) Every notarial act follows the same formalities, be it a verbal acknowledgment of a signature on a deed or an oath ceremony in connection with a signed affidavit.\(^16\) And every notarial act produces the same legal effect, whether to entitle a real property record to be registered in the local land records,\(^17\) receive a notarized record admitted as evidence in court without further...
proof, or create a *prima facie* presumption that the signature and title of a Notary are genuine for the purpose of recognizing the notarial act in another U.S. jurisdiction or from another country.

To this point, an analysis of electronic and remote online notarization laws reveals that the standards for performance of electronic and remote online notarizations consistently mirror the standards for paper notarizations. Several areas of correspondence include but are not limited to:

- Commissioning or registration for electronic and online notarizations.
- Authorized electronic and remote online notarial acts Notaries may perform.
- The requirement that principals personally appear before the Notary.
- Rules for how principals must be identified.
- Requirements for completing a certificate of an electronic or remote online notarial act.
- Rules for Notary electronic signatures and seals.
- Maximum fees for electronic and remote online notarizations.
- Prohibited acts and penalties, and the administrative adjudication process.
- Standards for assessing a principal’s competence and willingness to sign.
- Rules governing Notary conflicts of interest.

While the standards are comparable, they are “functionally-equivalent” to accommodate the different environments in which notarial acts are executed. For example, the standard of personal appearance is satisfied in a paper notarization by the principal appearing physically before the Notary, but in an online notarization for a remotely-located principal, appearance by communication technology satisfies this standard. Similarly, the standard requiring a certificate of notarial act to be signed is satisfied in a paper notarization by the Notary using an ink pen, but in an electronic notarization it is satisfied by the Notary using an electronic signature.

Given how intentionally the standards for electronic and remote online notarization mirror the standards for paper notarization, it is puzzling why Notary recordkeeping is required for these acts in some states when their law does not require it for paper acts.

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19 See, e.g., ARIZ. REV. STAT. ANN. § 33-501 and § 33-502; CONN. GEN. STAT. ANN. § 1-57 and § 1-58; DEL. CODE ANN. tit. 29 § 4324 and § 4326; N.H. REV. STAT. ANN. § 456-B:4 and § 456-B:6; KAN. STAT. ANN. § 53-505 and § 53-507; UTAH CODE ANN. § 57-2a-3 and § 57-2a-4; WYO. STAT. ANN. § 34-26-104 and § 34-26-106.
20 It cannot be emphasized too strongly that for Notaries to perform remote online notarizations law of the state or jurisdiction must explicitly prescribe that a remote online notarization performed using communication technology satisfies the personal appearance standard. See MODEL ELECT. NOT. ACT § 2-1 and § 5-3(b) and REV. UNIF. LAW ON NOT. ACTS § 14A(b). Of the states where remote online notarization is operative currently, see MINN. STAT. ANN. § 358.56 and § 358.645 subd. (b); MONT. CODE ANN. § 1-5-603(7)(b); NEV. REV. STAT. ANN. § 240.1882; TEX. CIV. PRAC. & REM. CODE § 121.006(c); S.D. CODIFIED LAWS § 18-1-111; TENN. CODE ANN. § B-16-302(1) and TEX. ADMIN. CODE tit. 1, § 87(6); VA. ELEC. NOT. ASSURANCE STD. Definitions (b).
ALL NOTARIZATIONS CARRY RISK

Why are Notary journal provisions for electronic and remote online notarization so prevalent among states whose laws do not also require recordkeeping for paper notarizations? It is due to the perception that electronic and remote online notarizations pose a greater risk to the public than paper notarizations. In a time of data breaches, identity theft, ransomware, phishing attacks, social engineering and other online exploits, policymakers strive to make any electronic process as secure as possible. For electronic and remote online notarization, journals are an obvious solution.\textsuperscript{21}

Policymakers in most states, however, have not demonstrated any belief that the risks of paper notarization merit requiring recordkeeping for these acts. Yet, years of claims data on Notary bonds and insurance policies tell a compelling story. Following are some common scenarios that lead to losses, in many cases in the tens and hundreds of thousands of dollars and all involving paper notarial acts:

- An imposter appears before a Notary to forge a spouse’s signatures on closing documents for a mortgage loan.
- A fraudster counterfeits a genuine Notary seal on a deed transferring title to an abandoned property to an unsuspecting buyer.
- A disinherited family member contests a living trust or last will over a technicality with the notarial act.
- A bankruptcy trustee avoids a lender’s security interest in real property due to a mistake in the acknowledgment of a signature on a security instrument.

Two recent examples illustrate the perils of paper notarizations and the value of Notary journals in protecting the interests of the parties to these notarizations.

**Deed Fraud.** A 2018 New York County Grand Jury report details the pervasive problem of deed fraud in New York City.\textsuperscript{22} The report noted that the Sheriff of New York County handled over 2,000 deed fraud complaints from 2014 to 2018, reflecting a staggering combined fair market value of over $112 million. During roughly the same period there were but 20 convictions.\textsuperscript{23} The report noted that in every case before the Grand Jury, a Notary was a willing or unwitting facilitator in the crime and that virtually every fraudulent transfer involved a faulty notarization.\textsuperscript{24} Tellingly, the report recommends that New York

\textsuperscript{21} The extensive laws related to journals demonstrate the underlying concern of lawmakers for the protection of the public. To cite just one example, the Ohio legislation (SB 263, effective September 20, 2019) contains lengthy rules for the information recorded in the journal for each electronic or remote online notarization, exclusive use of the journal by the Notary, tamper-evidence of the records, creation of a secure backup, authentication and access to the journal, safeguarding, storage and retention of records during the Notary’s term of commission, disposition of the records to the Secretary of State or an approved repository by the Notary or the Notary’s executor or administrator in the event of the Notary’s death or adjudication of incompetence, inspection and copying of records for the public, law enforcement, a court or the Secretary of State, denial of access to records, and third-party repositories of journal records.


\textsuperscript{23} Id. at 10-11.

\textsuperscript{24} Id. at 13.
Notaries be required to keep a journal of notarial acts. The Grand Jury said, "We heard testimony that a journal voluntarily kept by a New York City notary public, enabled law enforcement to prosecute a person engaged in deed fraud. However, the absence of a journal, or any type of recordkeeping, made it difficult, and in some cases impossible, to identify the culprits and their accomplices, or to gather sufficient evidentiary facts to mount a successful prosecution."25

**Murder and Forgery.** In 2012, *The National Notary* reported the conviction of a California attorney for his role in a murder and fraud case. The attorney impersonated the deceased by forging his signature on several powers of attorney, enabling the attorney and his cohorts to drain the victim’s bank account, charge his credit cards, take his house and use his cars.26 Fortunately for the cause of justice, California's journal law required the attorney to leave his thumbprints in the Notary's journal records for the notarizations, which directly linked him to the crimes.

**ALL NOTARIZATIONS SHOULD BE EQUALLY PROTECTED**

This paper applauds laws requiring journals for electronic and remote online notarizations but questions why those state laws do not extend recordkeeping to paper notarizations. All notarial acts should be safeguarded by Notary records.

By recording facts about each notarization in a paper or electronic journal, the Notary creates a public record that protects citizens’ rights to property and due process under the law. The benefits of journals are numerous.28 A properly completed journal entry for every notarial act:

- Provides the only authoritative evidence that a contested fact about a paper or electronic record is, in fact, true when the notarized record is lost or fraudulently altered.
- Deters forgers and impostors who realize that leaving a signature and other evidence in a journal will incriminate them.
- Discourages groundless lawsuits by showing that a principal appeared before the Notary.
- Assists law enforcement authorities in prosecuting frauds.
- Protects the Notary from baseless allegations by demonstrating that the Notary exercised reasonable care in identifying the principal and performing the notarial act.

25Id., at 19.
26Murder, Fraud And Forgery Foiled, NAT’L NOTARY MAG., Nov. 2012, at 20-21
27See, e.g., CAL. GOV’T CODE § 8206(c), § 8206.5 and § 8209; OR. REV. STAT. § 194.300(9); TEX. GOV’T CODE § 406.014(b).
• Helps a Notary recall the details of a notarization long after it is performed\textsuperscript{29} in the event the Notary is called to testify when a record involving a notarial act is contested in court.\textsuperscript{30}
• Prevents or quickly resolves litigation, helping unclog our overburdened civil and criminal courts.

There is no doubt that journals will protect the parties transacting and relying on electronic and remote online notarizations. But these types of notarization do not begin to account for the lion’s share of notarial acts performed today.\textsuperscript{31}

As for remote online notarization, twenty-two states now authorize it and seven of those are operational. It will take years for the remainder of the country to put in place the necessary legal frameworks to permit remote online notarization, and several additional years for these notarizations to be implemented widely. Remote online notarization offers the promise of being more convenient than electronic notarization since a principal does not have to physically appear before a Notary, and no doubt meets a need among individuals living in areas of the United States or overseas where geographical proximity to an available Notary is limited. While remote online notarizations are being performed every day, the available data of actual numbers is sparse.\textsuperscript{32}

Paper notarizations have for centuries delivered the assurances and protections afforded by a notarial act. They will be with us for some time to come and may not completely disappear for decades despite the many conveniences inherent in electronic and remote online notarizations. However well-intentioned, state laws exclusively requiring Notary records for electronic and remote online notarizations will not fully benefit nor protect the public until electronic and remote online notarizations are as common as paper notarizations. In the meantime, it is sound public policy\textsuperscript{33} as well as good common sense to require the same recordkeeping requirements for paper notarizations.

\begin{footnotesize}
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\item \textsuperscript{29}Claims data from the NNA’s bond and insurance program indicates that on average a notarial act resulting in a financial loss is reported 24 months from the date the act is performed.
\item \textsuperscript{31}Notarize, a remote online notarization provider, claims there are 1.25 billion notarizations performed in the U.S. each year. See \url{https://www.notarize.com/blog/what-about-the-28} (last viewed on January 16, 2019). Attom Data Solutions reported there were over 2 million loans secured by residential real property closed in the second quarter, 2018. See \url{https://www.attomdata.com/news/market-trends-mortgage-origination/q2-2018-u-s-residential-property-loan-origination-report} (last viewed on January 24, 2019). Thus, there are roughly 8 million residential loan transactions closed each year. Each loan usually involves 1-5 notarized documents, totaling 8 to 40 million notarizations per year in just the residential mortgage finance industry for these transactions.
\item \textsuperscript{32}NotaryCam, a remote online notarization provider, reported having transacted 100,000 remote online notarizations on June 7, 2018. See \url{https://www.notarycam.com/wp-content/uploads/2018/08/NotaryCam-100K-at-NS3-News-Release-060718.pdf} (last viewed on January 16, 2019). On April 25, 2019, Notarize wrote it had completed over 2,000 online mortgage transactions. See \url{https://www.notarize.com/blog/four-years-of-notarize-accelerating-growth-and-building-the-next-chapter} (last viewed on July 11, 2019).
\item \textsuperscript{33}Closen and Faerber, supra note 24, at 402-412.
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CONCLUSION

Since all notarial acts are fundamentally equal, the public will continue to be unequally served until the protections of a properly completed journal record are required for every notarial act, not just for those performed on electronic records or for acts involving remotely-located signers who appear before a Notary using communication technology. Documenting a notarial act is good public policy when assessing the potential risks of performing notarial acts on electronic records or in the online environment. But it is equally good public policy to require recordkeeping for paper notarizations, considering that they, too, carry real risks and that they will constitute the overwhelming number of notarizations performed until electronic and remote online notarizations are more widely used.

ABOUT THE NATIONAL NOTARY ASSOCIATION

Established in 1957, the National Notary Association (NNA) is the leading professional authority on the American Notary office and is dedicated to educating, serving and advocating for the nation’s 4.4 million Notaries. The NNA published the Model Notary Act and the Model Electronic Notarization Act to help lawmakers enact effective legislation, and created The Notary Public Code of Professional Responsibility, a standard for best practices and professional conduct. To learn more, visit NationalNotary.org.

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