

Unequal Protection Under the Law:

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



NATIONAL
NOTARY
ASSOCIATION

CONTENTS

Introduction	2
All Notarizations Are Equal	2
All Notarizations Carry Risk.....	5
All Notarizations Should Be Equally Protected	6
2021 Update	8
Conclusion.....	8
About the National Notary Association.....	9

INTRODUCTION

Recent enactments of electronic and remote notarization¹ 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 notarizations only and do not require it for paper notarizations as well.

This paper discusses three policy concerns with the current trend to require Notary recordkeeping for electronic and remote notarizations, but not paper notarizations. These concerns are:

- (1) A paper, electronic, or remote 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 notarizations may address the perceived risks of these notarizations, but they ignore the real perils of paper notarizations.
- (3) Until electronic and remote 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 eighteen 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.² Three additional states require recordkeeping for certain acts.³

¹ “Remote notarization” describes notarial acts performed for signers who are not in the physical presence of the Notary Public but who appear before the Notary using audiovisual communication. Remote notarization also is referred to in law as “remote online notarization,” “online notarization” and “notarial act for a remotely located individual.” It is also sometimes popularly called “webcam notarization.”

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; MD. CODE ANN. (STATE GOV’T) § 18-219; MASS. GEN. LAWS ANN. CH. 222, § 22(a); MISS. CODE ANN. § 25-34-37; MO. ANN. STAT. § 486.260; MONT. CODE ANN. § 1-5-618(f); NEV. REV. STAT. ANN. § 240.120(f); 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 121.012(a); VA. ISL. CODE ANN. TIT. 3, § 775(a) AND § 802; WASH. REV. CODE ANN. § 42.45.180(f); WYO. STAT. § 32-3-118(d). In late 2021 and 2022, new laws in Illinois, Kansas, New Jersey, and New Mexico will take effect. See ILL. PUBLIC ACT 102-0160 § (5 ILCS 312/3-107); KAN. CH. 64 OF 2021, § 20; N.J. PUB. LAW 2021-179 § 27; and N.M. CH. 21 OF 2021, § 18.

³ See ME. REV. STAT. ANN. TIT. 4, §§ 952, 953; OKLA. STAT. ANN. TIT. 26, § 14-108.1[B] and TIT. 49, § 7; OR. REV. STAT. § 194.300(f) and (f1), 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 recordkeeping⁵ and another's requires the Secretary of State to recommend that Notaries keep records.⁶

Notaries in sixteen jurisdictions must keep records of paper, electronic, and if authorized, remote notarizations.⁷

Against this legislative background, states increasingly are mandating recordkeeping for *electronic and remote notarizations*, but not for paper notarial acts.⁸ The trend began with a 2005 North Carolina statute⁹ authorizing the Secretary of State to require by administrative rule Notaries performing electronic notarizations, exclusively, to keep records.¹⁰ Soon after, Virginia¹¹ and Delaware¹² enacted their own statutes. Nebraska¹³ enacted a provision like North Carolina's. Still, "bifurcated" recordkeeping requirements were not yet mainstream until states began enacting remote 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 Irrespective of the medium, 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 paper - or technology-based 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

⁴ See TENN. CODE ANN. § 8-21-1201(b).

⁵ See UTAH CODE ANN. § 46-1-13.

⁶ See ME. REV. STAT. ANN. TIT. 4, § 955-B.

⁷ Arizona, Colorado, District of Columbia, Illinois (eff. January 1, 2022, or when the Illinois Secretary of State's office files rules, whichever is later), Kansas (eff. January 1, 2022), Maryland, Mississippi, Montana, Nevada, New Jersey (eff. October 22, 2022); New Mexico (eff. January 1, 2022), Oregon, Pennsylvania, Texas, Washington, and Wyoming.

⁸ See AK. STAT. 44.50.078; AR. CODE ANN. 21-14-310(a)(1); DEL. CODE ANN. TIT. 29, § 4314(a); FLA. STAT. 117.245(1); IND. CODE ANN. § 33-42-17-8(a); MICH. STAT. ANN. § 55.286b(7); KY. REV. STAT. 423.389(1); MINN. STAT. ANN. § 358.645 SUBD. 4; NEB. REV. STAT. § 64-316 and NEB. ADMIN. CODE TIT. 433, § 7.015; N.C. GEN. STAT. § 10B-49(e); N.D. CENT. CODE § 44-06.1-16.1(1); OHIO REV. CODE ANN. § 147.65; OKLA. STAT. TIT. 49 § 206.A; S.C. CODE § 26-2-90; TENN. CODE ANN. § 8-16-308(a); UTAH CODE ANN. 46-1-13; VA. CODE ANN. § 47.1-14C. Idaho and West Virginia permit, but do not require, Notaries to keep a journal for notarial acts involving remotely located individuals (IDAHO ADMIN. CODE 34.07.01.016.01; WV CODE OF ST. RULES § 153-45-17).

⁹ See N.C. GEN. STAT. § 10B-49(e).

¹⁰ In 2007, a section entitled "Records of Electronic Notarial Acts – Reserved" was created in the North Carolina Administrative Code as 18 NCAC 07C .0700 where it remains today. The Secretary has not yet published a rule requiring journals for electronic notarizations.

¹¹ Chapters 269 and 590 of the Acts of the Commonwealth of Virginia 2007.

¹² Act No. 280 of 2008.

¹³ See NEB. REV. STAT. § 64-316. Unlike North Carolina, the Nebraska Secretary of State did adopt a rule to require recordkeeping for electronic notarizations only (see 433 NAC 7.015).

¹⁴ In 2018, Indiana, Michigan, Minnesota, Ohio, and Tennessee; in 2019, Florida, Kentucky, Nebraska, North Dakota, Oklahoma, and Utah; in 2020, Alaska; and in 2021, Arkansas.

¹⁵ See e.g., COLO. REV. STAT. § 24-21-502(6); D.C. CODE ANN. § 1-1231.01(7); IOWA CODE ANN. § 9B.2.5; MONT. CODE ANN. § 1-5-602(5); MINN. STAT. ANN. § 358.52 subd. 6; N.D. CENT. CODE § 44-06.1-01.5.; OR. REV. STAT. § 194.215(8); 57 PA. CONST. STAT. ANN. § 302; R.I. GEN. LAWS § 42-30.1-2(7); WASH. REV. CODE ANN. § 42.45.010(8); W. VA. CODE § 39-4-2(5), where the definition of "notarial act" applies to acts performed with respect to a tangible or electronic record.

¹⁶ See *supra* note 15, where the notarial acts of taking an acknowledgment, administering an oath or affirmation and taking a verification upon oath or affirmation necessarily involve making a verbal declaration to the Notary Public.

¹⁷ See e.g., ARK. CODE ANN. § 16-47-101; FLA. STAT. ANN. § 695.03; IDAHO CODE § 55-805; IND. CODE ANN. § 32-21-2-3; IOWA CODE ANN. § 558.42; ME. REV. STAT. ANN. § TIT. 33, § 203; NY CLS REAL P § 291; OKLA. STAT. ANN. TIT. 16, § 16-26; S.C. CODE ANN. § 30-5-30; WIS. STAT. ANN. § 706.6.

notarized record admitted as evidence in court without further proof,¹⁸ 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.¹⁹

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

- Commissioning or registration for electronic and remote notarizations.
- Authorized electronic and 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 notarial act.
- Rules for Notary electronic signatures and seals.
- Maximum fees for electronic and remote 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 a remote notarization, appearance by communication technology satisfies this standard.²⁰ 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 notarization mirror the standards for paper notarization, it is puzzling why states would require recordkeeping for the one and not the other.

¹⁸ See USCS FED. RULES EVID. R 902(f), (8). Several states' rules of evidence are based upon the federal rules. See, e.g., ARIZ. R.E. 902; ARK R.E. 902; HAW. REV. STAT. CHAP. 626, R. 902; IND. R.E. 902; KY. R.E. 902; MD. RULES, 5-902; S.C. TEX. R.E. 902.

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; UTAH CODE ANN. § 57-2a-3 and § 57-2a-4; WYO. STAT. ANN. § 32-3-105(b) and § 32-3-109(c).

²⁰It cannot be emphasized too strongly that for Notaries to perform remote notarizations, the law of the state or jurisdiction must explicitly prescribe that a remote 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) (a); NEV. REV. STAT. ANN. § 240.1882; TEX. CIV. PRAC. & REM. CODE § 121.006(c); S.D. CODIFIED LAWS § 18-1-111; TENN. CODE ANN. § 8-16-302(f) and TEX. ADMIN. CODE TIT. 1, § 871(6); VA. ELEC. NOT. ASSURANCE STD. Definitions (b).

ALL NOTARIZATIONS CARRY RISK

Why are Notary journal provisions for electronic and remote 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 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 notarization, journals are an obvious solution.²¹

While technology-based notarial acts are too new to know whether the risk is founded, years of Notary bond and insurance claims data highlight the real risks of traditional, paper-based notarizations. 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 requiring notarization for a mortgage loan.
- A fraudster victimizes an unsuspecting buyer of an abandoned property by counterfeiting a genuine Notary seal on a bogus deed transferring title.
- 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.

Can journal records of notarial acts help mitigate the risks of these notarizations? 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.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.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

²¹The extensive laws related to journals demonstrate the underlying concern of lawmakers for the protection of the public. To cite just one example, Ohio law contains lengthy rules for the information recorded in the journal for each electronic or remote 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.

²²*Report of the Grand Jury of the Supreme Court State of New York First Judicial District Issued Pursuant to Criminal Procedure Law Section 190.85 Subdivision (1)(c).*

²³*Id.*, at 10-11.

transfer involved a faulty notarization.²⁴ Tellingly, the report recommends requiring New York Notaries 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 law required the attorney to leave his thumbprints in the Notary’s journal records for the notarizations, which directly linked him to the crimes and helped produce a successful prosecution of the parties.

ALL NOTARIZATIONS SHOULD BE EQUALLY PROTECTED

This paper applauds state laws requiring journals for electronic and remote notarizations but questions why those 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 record²⁷ 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 could 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 of wrongdoing by demonstrating that the Notary exercised reasonable care in identifying the principal and performing the notarial act.

²⁴*Id.*, at 13.

²⁵*Id.*, at 19.

²⁶*Murder, 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).

²⁸See Peter J. Van Alstyne, *The Notary’s Duty to Meticulously Maintain a Notary Journal*, 31 J. MARSHALL L. REV., at 779; Michael L. Closen, PROFESSOR CLOSEN’S NOTARY BEST PRACTICES: EXPERT’S GUIDE TO NOTARIZATION OF DOCUMENTS, 238-247 (National Notary Association) (2018).

- Helps a Notary recall the details of a notarization long after it is performed²⁹ in the event the Notary is called to testify when a record involving a notarial act is contested in court.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 notarizations. But these notarizations do not begin to account for the lion's share of notarial acts performed today.³¹

As for remote notarization, over two-thirds of states now authorize it. It still will take years for the remainder of the country to put in place the necessary legal frameworks to permit remote notarization, and several additional years for these notarizations to be implemented widely. Remote 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 notarizations are being performed every day, the available data of actual numbers is sparse.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 despite the many conveniences inherent in electronic and remote notarizations. However well-intentioned, state laws exclusively requiring Notary records for electronic and remote notarizations will not fully benefit nor protect the public until electronic and remote notarizations are as common as paper notarizations. In the meantime, it is sound public policy³³ as well as good common sense to require the same recordkeeping requirement for paper notarizations.

²⁹Claims 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.

³⁰See Michael L. Closen and Charles N. Faerber, *The Case That There Is a Common Law Duty of Notaries Public to Create and Preserve Detailed Journal Records of Their Notarial Acts*, 42 J. MARSHALL L. REV., at 457-458.

³¹Notarize, a remote notarization provider, claims there are 1.25 billion notarizations performed in the U.S. each year. See <https://www.notarize.com/blog/what-about-the-28> (last viewed on August 4, 2021). Attom Data Solutions reported there were 3.77 million loans secured by residential real property originated in the first quarter, 2021. See <https://www.attomdata.com/news/market-trends/mortgage-origination/attom-data-solutions-q1-2021-u-s-residential-property-mortgage-origination-report> (last viewed on August 4, 2019). Based on this data, currently there are roughly 15 million residential loan transactions originated each year. Assuming each loan carried through to closing and that a typical closing involves 1-5 notarized documents, totaling 15 to 75 million notarizations per year in just the residential mortgage finance industry for these transactions.

³²NotaryCam, a remote notarization provider, reported having transacted 100,000 remote online notarizations on June 7, 2018. See <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 <https://www.notarize.com/blog/four-years-of-notarize-accelerating-growth-and-building-the-next-chapter> (last viewed on July 11, 2019). In February 2021, the National Notary Association published "How COVID-19 gave RON a shot in the arm and Notaries new opportunities" See <https://www.nationalnotary.org/notary-bulletin/blog/2021/02/covid-19-ron-notaries-new-opportunities-part-2> (last viewed on February 11, 2021), reporting that Notarize.com saw growth of 263% in 2020 for their retail line of business (direct remote notarization transactions between consumers and Notaries) and 826% growth in its real estate business. These percentages did not cite actual numbers of remote notarizations performed.

³³Closen and Faerber, *supra* note 24, at 402-412.

2021 UPDATE

Since the publication of this paper in 2019, the National Notary Association can report that several jurisdictions that did not previously have a journal requirement enacted legislation to require journal records for both paper-based and technology-related notarizations. These include 2021 enactments in Illinois, Kansas, New Jersey, New Mexico, and Wyoming. This is gratifying news. Despite these successes, bifurcated journal enactments in Alaska, Arkansas, Florida, Kentucky, North Dakota, Oklahoma, South Carolina, and Utah since initial publication demonstrate that the issue addressed by this paper persists.

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 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.

Government Inquiries

Bill Anderson, Vice President, Government Affairs
(818) 739-4064 banderson@nationalnotary.org

Media Inquiries

Phillip Browne, Vice President, Communications
(818) 739-4039 pbrowne@nationalnotary.org

Kat Garcia, Content Strategy Manager
(818) 739-4009 kgarcia@nationalnotary.org

Main

(800) US NOTARY (1-800-876-6827)