

TRUSTS AND ESTATES



CALAWYERS.ORG/TRUSTS

April 13, 2020

The Honorable Alex Padilla
Secretary of State
1500 11th Street
Sacramento, CA 95814

Re: COVID-19 – Remote Online Notarization by California Notaries

Dear Secretary Padilla:

We write on behalf of the Executive Committee of the Trusts and Estates Section (TEXCOM) of the California Lawyers Association to recommend that California Notaries be temporarily authorized to provide services remotely through videoconference during the current state of emergency. We urge expedited action on this issue.

The Trusts and Estates Section of the California Lawyers Association has over 6,000 attorneys in California who practice trusts and estates law. During this state of emergency, many Californians are thinking about potential health issues and their mortality, and have been prompted to put in place or revise their estate planning documents including trusts, durable powers of attorney and advance health care directives. For many, the difficulty in completion of appropriate estate planning documents causes increased anxiety. Notaries are a necessary part of this process, as powers of attorneys and advance health care directives must be notarized or witnessed,¹ trust instruments are often notarized to limit fraud, and deeds transferring real property into a trust must be notarized because they must be recorded.²

¹ Witnessing is sometimes a viable alternative, but because two physically present witnesses are required in all cases, and depending on the document, one or both of the witnesses will need to have a degree of independence, fulfilling witness requirements is difficult at best given various stay at home orders and the risk of spreading COVID-19 through contact. Moreover, a power of attorney is ineffective for transactions involving real property unless the power of attorney is recorded, so witnessing (without notarization) of powers of attorney for property management is usually inadequate to meet the goals of the maker of the power of attorney.

² Although our letter is focused on trusts and estates issues, we note that these same issues apply in a wide variety of commercial and non-commercial contexts. In the non-commercial context, we highlight the following examples, all of which contain some form of notary requirement: signatures on an assisted reproduction agreement for gestational carriers (Family Code § 7962); consents to stepparent adoption (Family Code § 9003); signature of the spouse who has defaulted on any marital settlement agreement or on any stipulated judgment where judgment of dissolution or nullity of marriage or legal separation is

Under current circumstances, requiring in-person contact with a Notary to execute estate planning documents may present a substantial health risk to the individual executing documents as well as the Notary. Some Californians intending to sign estate planning documents are not willing to risk their personal safety to invite a Notary into their home or go to a Notary's office, and either of these may violate applicable stay at home orders in any event. In other cases, Notaries have suspended operations, or are charging substantially higher travel fees to make personal visits. While some other states have allowed remote notarizations, as we describe below, the use of other states' remote Notaries is not a viable solution.

Below, we lay out our specific concerns and our recommendation to address them.

Remote Notarizations Via Videoconference Are Urgently Needed

TEXCOM recommends temporary suspension of the requirement that a document signer appear physically before a Notary and authorization of remote notarizations via videoconferencing. TEXCOM believes remote notarization will meet the pressing need of Californians who must sign powers of attorney, health care directives, and other crucial estate planning documents.

Remote Notarizations Performed by Notaries in Other States Do Not Adequately Address Need

We recognize that the Secretary of State's office has issued a recent statement noting that California citizens who wish to have their documents notarized remotely can obtain notarial services in another state that currently provides remote online notarization and that Civil Code section 1189(b) provides that any certificate of acknowledgment taken in another place shall be sufficient in California if it is taken in accordance with the law of the place where the acknowledgment is made.

We believe that the need for notarizations in California cannot be adequately addressed by use of Notaries located in other states because (1) county Recorders' Offices currently do not possess adequate authority to record such documents, (2) access to remote notarization platforms in other states is limited, and (3) remote notarizations in other states use electronic signatures which are not valid for certain estate planning documents under Civil Code section 1633.3(b)(1).

Documents Notarized by Remote Notaries in Other States May Not Be Recordable

Civil Code section 1189(b) provides that "any certificate of acknowledgment taken in another place shall be sufficient in this state if it is taken in accordance with the law of the place where the acknowledgment is made." Although the certificate of

entered upon the default (Family Code § 2338.5); requests for a certified copy of a birth, death, or marriage record, as specified (Health and Safety Code § 103526).

acknowledgement itself may be valid, applicable law generally requires original signatures on documents submitted for recording. (Gov't Code § 27201, subd. (b).) Documents notarized remotely by out-of-state notaries will not contain original signatures. Thus, except under limited circumstances outside of the trusts and estates context, county Recorders' Offices do not currently possess the authority to record documents notarized by remote Notaries in other states. Therefore, Californians who utilize the services of remote Notaries in other states to obtain notarization of estate planning documents (such as trust instruments, powers of attorney and advance health care directives) will find that they are largely unable to record the notarized documents.

Access to Remote Notarization in Other States is Limited

The use of Notaries located in other states is very limited. Although remote notarization is allowed in many states, for the vast majority of those states the laws are very new. Not all of the states that have enacted remote notarization laws have fully implemented the law. We are finding that California citizens' notarial needs cannot be fully met by remote Notaries operating in about a dozen other states at a time when the notarial services are in high demand.

Access to remote notarizations in other states is further limited because many large remote notarization platforms prioritize their services for signers and businesses requiring notarization of multiple documents. Signers of single documents, such as durable powers of attorney and advance health care directives, may not easily be able to obtain services of a remote Notary.

Furthermore, in order to use an out of state remote Notary, the signer must be able to connect to a sophisticated remote notarization platform. Accessing such platforms may prove a challenge for some Californians. In contrast, TEXCOM's recommended procedure incorporates the use of any device (including a smart phone) with simple video conference capability.

Use of Electronic Signatures in Certain Estate Planning Documents

The remote notarizations in other states are performed using electronic signatures. TEXCOM and many other trusts and estates attorneys consider that notarization of revocable trust instruments is the best practice, given the use of revocable trusts as substitutes for wills. It is unclear whether trust instruments may be validly executed using electronic signatures given the Civil Code section 1633.3(b)(1) prohibition against using electronic signatures to sign "testamentary trusts." Therefore, many practitioners advise Californians not to sign revocable trusts with electronic signatures, and accordingly not to use a remote notarization platform in another state that can be performed only with an electronic signature.

Recommendation

We recommend that California Notaries be authorized to perform notarial acts using audio-video technology during the current state of emergency subject to the following:

- The individual seeking the Notary's services must present valid photo ID to the Notary during the video conference;
- The video conference must allow for direct live interaction between the individual and the Notary;
- The individual must affirmatively represent that he or she is physically situated in the State of California;
- The individual must transmit by fax or electronic means a legible copy of the signed document directly to the Notary on the same date it was signed;
- The Notary must notarize the transmitted copy of the document and return the document with the Notary's original signature and stamp to the person;
- The Notary must write or print next to their seal "notarization preformed during California's COVID-19 State of Emergency." The requirement of fingerprinting and signatures in the Notary's journal is waived and the Notary must note in their journal "notarization performed during California's COVID-19 State of Emergency";
- Any document notarized pursuant to this procedure shall be deemed to meet the original signature requirement of Government Code section 27201(b) notwithstanding that the individual's signature on the document is not original, so long as the Notary's signature is an original signature;
- A third party who receives a document notarized under this procedure may rely upon it in good faith and is not bound to inquire further as to its authenticity.

We appreciate the opportunity to share our views and recommendations for your consideration, and we are available for any further discussion at your convenience.

Sincerely,



Mark S. Poochigian, Chair
Executive Committee of the Trusts and Estates Section
California Lawyers Association