

## Memo in Opposition to Proposal by the Executive to add §142-b to the Executive Law

### TRUSTS AND ESTATES LAW SECTION

T&E #1

March 9, 2021

It is the goal of this memorandum to provide comments and highlight practical concerns about the proposal contained in Governor Cuomo's Executive Budget to amend the Executive Law by adding a new section, §142-b, which sets out to codify a "Remote Notarization" process.

The ability to virtually notarize Powers of Attorneys, trusts, and other integral estate planning documents is of utmost importance to our practice, our clients, and the residents of New York State.

The powers granted by Governor Cuomo in Executive Order 202.7 allowing for virtual notarization had an immediate and positive impact on residents of the state as it allowed them to safely seek notarial services during the ongoing COVID-19 pandemic. The success of EO 202.7 highlighted the benefits of codifying some form of technologically assisted notarization; however, we assert that the proposal as presented in the Executive Budget should not be passed as written because it will restrict, rather than expand, access to notarial services for everyday New Yorkers.

There are no fewer than three pieces of legislation that have been proposed which seek to codify some form of "technology-assisted" notarial act,<sup>1</sup> and each of the proposals is structured with a different audience in mind. Generally, there are three different "categories" of technology-assisted notary methods, and the basics of each are as follows:

1. **Virtual.** Redefines "presence" to include presence via audio-visual technology - this is most useful to everyday New Yorkers and should be kept as simple as possible to promote access.
2. **Electronic.** Removes the need for pen and paper entirely - this is helpful in international business matters and other complex transactions, but has little utility outside that arena.
3. **Remote.** Allows the notary and/or the principal to be outside the state at the time of notarial act - this can be combined with either Virtual or Electronic.

The instant proposal attempts, but fails, to effectively incorporate portions of all three categories into one. Indeed, if this hybrid approach is put into practice, it would greatly impede New Yorkers' access to notarial services. Certain provisions, listed below, of this hybrid approach render the proposal completely inoperable as applied to estate planning documents, which we do not believe was intended. For example:

1. **Excessive Cost.** The costs associated with identity authentication, recording, and storage will be prohibitive for most attorneys and notaries.
2. **Technology Required is Complex.** This will render the process unavailable to those who are not technologically savvy.
3. **The Record-Keeping Requirement is Oppressive.** It creates an entirely new category and expands greatly the time frame for which notaries are required to keep recordings and records, thereby creating two separate standards for notaries to track.
4. **Contradictory Language Regarding the Process.**
5. **Electronic Signatures and Records Act (ESRA).** The proposal, in its definitions and elsewhere, invokes ESRA which itself excludes all estate planning documents.

While we believe the intent of this proposal was good, based on the reasons stated in this memo, we must oppose its passage as written. Our sections welcome the opportunity to work with the Executive and the Legislature to craft legislation that codifies technology-assisted notarization that is available and accessible to all New Yorkers.

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<sup>i</sup> (1) Executive Budget Proposal; (2) S.1780/A.399 introduced by Senator Skoufis and Assemblyperson Rozic, respectively; and (3) A.4673 introduced by Assemblyperson McMahon