

New York State Bar Association
Resolution to Approve Reports and Recommendations of
Task Force on Notarization
Approved by the Executive Committee on March 2, 2023

WHEREAS, Executive Law 130 and 135-c, and regulations from Secretary of State 19 NYCRR 182 have been recently promulgated regarding electronic and non-electronic notarizations;

WHEREAS, these new laws and regulations have a significant impact on notaries and attorneys;

WHEREAS, there is no statutory basis for the record keeping and retention requirement for non-electronic notarizations;

WHEREAS, the new laws and regulations are unduly broad and burdensome on notaries and attorneys;

WHEREAS, the new law requires that a licensed electronic notary select a Credential service provider who meets certain technical requirements;

WHEREAS, in many circumstances, the licensed electronic notary lacks sufficient knowledge to determine whether the technical requirements have actually been met; and

WHEREAS, there is no showing that the new laws and regulations will diminish concerns of fraud that the legislation was intended to address;

WHEREAS, the efficiency of attorney notaries will be impacted by the above resulting in increased costs to consumers,

NOW, THEREFORE, IT IS RESOLVED that the Executive Committee approves the Reports and Recommendations of the Task Force on Notarization.

AND IT IS FURTHER RESOLVED that the officers of the New York State Bar Association are hereby authorized to take such other and further action as may be necessary to implement this resolution.



Report on Notary Regulations

On January 25, 2023, the New York Department of State promulgated regulations purporting to implement New York’s new Electronic Notary legislation. However, these new regulations contained new record keeping requirements that have no basis in the enabling legislation, are not tailored to meet their goal, and create significant challenges for attorneys practicing in New York State.

Notary Record Keeping Regulations

New regulations were released by the Department of State in January 2023 implementing a new electronic notarization process.¹ These electronic notarization regulations contained record keeping requirements for all New York notaries, effective January 25, 2023.

These new regulations contain §182.9 which requires notaries to maintain records for all notarial acts. Such records must be made contemporaneously with the notarial act and must include:

1. the date, approximate time, and type of notarial acts performed;
2. the name and address of any individuals for whom a notarial act was performed;
3. the number and type of notarial services provided;
4. the type of credential used to identify the principal;
5. the verification procedures used for any personal appearance before the notary; and
6. for electronic notarial acts, identification of the communication technology, certification authority, and verification providers used.

These records must be maintained for at least 10 years and must be “capable of being produced to the secretary of state and others as necessary in relation to the performance of the notary public’s obligations”² under the notary law.

Absence of Statutory Authority

Notaries are governed by multiple sections of New York law.³ A review of the Notary Public License Law reveals no statutory basis for a record keeping and retention requirement prior to the recent passage of the electronic notarization legislation. In fact, since 2015, the New York State legislature has repeatedly rejected efforts to statutorily impose notary record keeping requirements for even the more limited purpose of residential property transfers.⁴

¹ See Notary Public License Law (January 2023), https://dos.ny.gov/system/files/documents/2023/01/notary-public-license-law_01.2023.pdf.

² See Notary Public License Law above page 15; §182.9 Recordkeeping and Reporting, page 18.

³ See above.

⁴ An Assembly bill and Senate companion have been introduced in the legislature every year since 2015, except this year when Senate companion legislation has not been introduced. The Senate versions have never reached a vote. The Assembly passed the legislation during the 2021-2022 (A4277A) session and just recently passed it again during the 2023-2024 (A329) session. Additionally, Senate bill S218, introduced as S904 in the previous legislative session, currently in the Senate Finance Committee, would in addition to record keeping requirements, impose a form colloquy asking the principal questions the answers to which the notary is required to record and retain. A previous version of this bill was introduced during the 2021-2022 legislative session as S9404.



In 2022, Executive Law §135-c was passed outlining the requirements and procedures to be followed for electronic notarization.⁵ The legislation delineates conditions that must be met to engage in electronic notarization but does not modify existing requirements for in person notarizations. The new law also requires separate registration by those notaries who intend to engage in electronic notarization.

As it relates to retaining records, Exec Law §135-c(2)(b) requires as follows:

If video and audio conference technology has been used to ascertain a documents signer's identity, the electronic notary shall keep a copy of the recording of the video and audio conference and a notation of the type of any other identification used. The recording shall be maintained for a period of at least 10 years from the date of transaction.

This statutory record keeping language applies only to electronic notary acts using electronic technology for signer identification purposes.

The Department of State was given express authority under the statute to promulgate regulations regarding an electronic notarial act conducted utilizing communication technology.⁶ The unconsolidated law provisions implementing electronic notarization provided for “the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act...”⁷ The legislature could have, but did not, provide for the promulgation of new regulations dealing with notarization other than electronic notarization. as was done, for example, with advertising by notaries public.⁸ Pursuant to longstanding principles of statutory construction, when one or more things of a class are expressly mentioned, others of the same class are excluded. Since the notary statute expressly provides for record keeping and retention for electronic notarization, it excludes the same for in person notarization. This is further confirmed by the fact that the legislature has tried and failed to enact legislation in this regard even for the limited purpose of real property transfers.⁹

⁵ Full text of Executive Law §135-c Electronic Notarization - <https://casetext.com/statute/consolidated-laws-of-new-york/chapter-executive/article-6-department-of-state/section-135-c-effective-1312023-electronic-notarization>.

⁶ See NY Executive Law §§135-c and 137-a (renumbered) Electronic Notarization, subdivision 2 (a) and §137-a subdivision 5(e).

⁷ Chapter 767 Laws of 2021 §3 and Chapter 104 Laws 2022 §6.

⁸ For comparison see NY Executive Law §135-b subdivision 6 providing that the secretary may promulgate rules and regulations governing the provisions dealing with advertising by notaries public.

⁹ Nor does Executive Law §91 apply, which authorizes rules which “regulate and control the exercise of the powers of the department of state and the performance of the duties of officers, agents and other employees thereof.” See also *Campagna v. Shaffer*, 73 N.Y.2d 237, 536 N.E.2d 368, 538 N.Y.S.2d 933 (1989), where the Court of Appeals followed the principle in construing legislation that when one or more things are expressly mentioned others are excluded and found the Secretary of State exceeded the statutory prohibition on blockbusting by administratively limiting all broker-initiated solicitation, not just the illegal solicitation banned by the legislature.



Overly Broad to Address Deed Fraud

There has been a significant amount of conversation in many circles recently about the need to protect against fraud in the conveyance of residential real property. Some have even referred to it as an epidemic.¹⁰ While it is critical that systems be implemented to protect home-owners from deed fraud, these specific records and retention regulations do not advance that goal.

Prior to the records and retention requirements, notaries were required to sign their name to the deed and include their notary identification number. This makes it possible to identify the notary for all deed transfers. Keeping a log noting dates, times, locations, documents and identification for a decade, while burdensome, is not an obstacle for those using false identification or those who are simply bad actors. Additionally, with deed fraud as the main concern, if the record keeping and retention requirements are intended to be part of the solution, there is no need to apply the regulations to all notarial acts. The regulations should be more narrowly tailored applying just to the conveyance of real property by non-attorneys.

Deed fraud is a serious concern and should be addressed with targeted, intentional solutions to meet that goal. As drafted, these regulations apply far broader than necessary and are not actually tailored to achieve deed fraud reduction.

Issues Regarding Record Keeping Requirements for Attorneys as Notaries

Attorneys, as officers of the court, should be exempt from these record-keeping requirements. The application of these regulations to attorneys and their employees is superfluous, encroaches on attorney client privilege, and imposes unduly burdensome record retention requirements.

Attorneys are subject to a framework of extensive fiduciary and ethical obligations to their clients, with disciplinary proceedings and oversight already built in.¹¹ These obligations continue in the role of notary for such clients. Therefore, adding to that the notary record keeping and retention requirements is unnecessary, and poses an additional administrative burden for all attorneys. Rural attorneys with limited support staff in particular will find it extremely difficult and costly to adhere to these new regulations. Even more concerning is the impact these record and retention rules will have on the already limited budgets of Legal Services programs who are often required to notarize documents for their clients.

The new Department of State regulations raise serious attorney client privilege issues. Attorneys and members of their staff will often notarize statements by clients which are privileged or contain privileged information. The requirement that the notary log be capable of being produced to the secretary of state and others as necessary in relation to the performance of the notary public's obligations presents serious issues in this respect.

¹⁰ See for example the December 2018 Report of the Grand Jury of the Supreme Court First Judicial District issued December 2018 calling residential deed fraud an epidemic affecting every county in the state. <https://www.manhattanda.org/wp-content/uploads/2018/12/Deed-Fraud-Grand-Jury-Report.pdf>.

¹¹ See New York Rules of Professional Conduct.



Current notary law reflects the need to treat attorneys differently, and attorneys should be exempt from these rules as well. For example, under Exec. Law §130(2), attorneys admitted to practice can be appointed as a notary without an examination. Additionally, a notary generally cannot act if they have a pecuniary interest in a matter. However, Exec. Law §135 allows an attorney who is a notary to act as such for their own client in respect of “any matter, claim, action or proceeding.”

Conclusions and Recommendations

- 1) Record keeping requirements for notarizations other than electronic notarizations have no statutory basis and should be repealed.
 - 2) The record keeping requirements for notarizations other than electronic notarizations contained in the regulations do not advance the goal of deed fraud reduction and should be repealed.
 - 3) The application of the record keeping and record retention regulations to attorneys acting in the regular course of the attorney’s business is superfluous, implicates attorney client confidentiality, and imposes burdensome record retention requirements.
 - 4) If the regulations are not repealed, a notary public who is an attorney at law regularly admitted to practice in this State or an employee of such attorney acting in the regular course of the attorney’s business should not be required to maintain records of notarizations other than electronic notarizations.
 - 5) The Association shall support legislation and engage in legislative advocacy as appropriate to bring about these recommendations.
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Report on Remote Online Notarization Credentialing Regulations

New York, one of the last states to allow RON, places the burden to use required technology on the notary public instead of the third-party provider.

Specifically, as defined in rule [19 NYCRR 182.2](#), to perform a remote online notarization (RON), a licensed electronic notary must use a “Credential service provider” to provide “Identity proofing” through “Communication technology.” Pursuant to rule [19 NYCRR 182.4\(2\)](#), the electronic notary must “use only those vendors or providers who comply with the standards outlined in this Part and any communication or reporting relating to those standards as required by the secretary of state.” Pursuant to rule [19 NYCRR 182.6](#), the third-party provider must provide “*evidence to the online notary public* of the provider's ability to satisfy requirements set forth in this rule” (emphasis added).

New York’s regulatory requirements are technical and specific. For example, the third-party provider “must meet at a minimum, the Identity Assurance Level 2 standard as outlined in the Digital Identity Guidelines of the National Institute of Standards and Technology ... document SP 800-63-3, Revision 3, dated June 2017 and includes updates as of 03-02-2020 ...” (see, [Rule 182.7](#) for Identity Proofing).

How is an attorney – let alone a layperson – able to understand whether a third-party provider meets the minimum technology requirements set forth in the rules? It is an impossible task.

Most other states that enacted RON legislation require the third-party provider to be authorized by the secretary of state. The authorization procedure is either through “self-certification” or “application and certification” issued by the secretary of state. Self-certification is when a third-party provider is approved by filing a certification of compliance (see excerpts of Florida law attached in Appendix A). The application and certification model is when the third-party provider’s application is reviewed and approved by the secretary of state (see excerpts of Colorado and Wisconsin law attached in Appendix B).

In both models, the secretary of state provides a list of authorized third-party providers. By requiring RON use of an authorized third-party provider, the onus of complying with regulatory technology requirements shifts away from the notary public.

Recommendation

The regulation should be amended so that an electronic notary must use a third-party provider licensed by the Secretary of State through a Self-Certification Model or an Application and Certification Model. The amended regulation will shift credentialing requirements away from the electronic notary to the third-party provider – simplifying the RON process. It will remove any confusion and doubt concerning compliance with the law, and promote the underlying



purpose of NY Executive Law 135-c (to adopt societal advances and new technology).¹

The Association shall support legislation and engage in legislative advocacy as appropriate to bring about these recommendations.

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¹ See, [2021 New York Senate Bill No. 1780, New York Two Hundred Forty-Fourth Legislative Session.](#)



Appendix A Self-Certification Model

Florida is an example of a self-certification model. Self-certification is through a [form](#) filed with the secretary of state. Pursuant to Florida statute,

“A RON service provider must file a self-certification with the Department of State, on a form adopted by department rule, confirming that its audio-video communication technology and related processes, services, software, data storage, or other services provided to online notaries public for the purpose of directly facilitating their performance of online notarizations satisfy the requirements of this chapter and any rules adopted by the Department of State pursuant to this section. Each certification shall remain active for a period of 1 year after the date of filing. The Department of State must publish on its website a list of each [remote online notarization] service provider that has filed a self-certification, the date of filing of the self-certification, any secure repositories to which the [remote online notarization] service provider may have delegated its duties pursuant to [FS] s. 117.245(4) from January 1, 2022, and thereafter, and the effective dates of that delegation” ([FS 117.295\[4\]\[a\]](#)).

Pursuant to Florida’s administrative code,

“Within 30 days of the effective date of this rule, and annually thereafter, a RON service provider shall provide the Florida Department of State, a self-certification form confirming that its audio-video communication technology and related processes, services software, data storage, or other services provided to online notaries public for the performance of online notarization satisfy the requirements of Chapter 117, F.S., and any rules promulgated by the Florida Department of State pursuant to Section 117.295, F.S.” (FAC 1N-7.005[2][a]). Form Number DS-DOC-51 (“RON Service Provider: Self-Certification and Required Information”) must be used to report this information ([FAC 1N-7.005\[2\]\[d\]](#)).

“The RON service provider’s self-certification is effective for a period of 1 year after the date the RON service provider files it with the Department” ([FAC 1N-7.005\[2\]\[b\]](#)).



Appendix B

Application and Certification Model

Colorado is an example of an application and certification model. The third-party provider must submit an [application](#) and receive approval from the secretary of state before the provider can provide services to a Colorado remote notary public. The regulation outlines the criteria and standards for approving providers. Colorado’s regulatory language sets forth the following:

5.3. Requirements for providers

5.3.1 Provider Protocols

(a) The Colorado Secretary of State's Provider Protocols (December 1, 2020) are hereby incorporated by reference.

(1) Material incorporated by reference in the Notary Rules does not include later amendments or editions of the incorporated material.

(2) Copies of the material incorporated by reference may be obtained by contacting the Colorado Department of State, 1700 Broadway, Suite 550, Denver, CO 80290, (303) 894-2200. Copies are also available online at <https://www.sos.state.co.us/pubs/notary/home.html>

(b) All providers must meet the requirements of the Provider Protocols.

5.3.2 Application

(a) A provider must submit the approved application form and receive approval from the Secretary of State before the provider can provide services to a Colorado remote notary public.

(b) The applicant must provide to the Secretary of State in its application:

(1) The certification required by section 24-21-514.5(11)(a), C.R.S.

(2) The following information:

(A) The names of all business entities and any of their affiliates that will have access to either personally identifying information and any non-personally identifying data gathered during the remote notarization process and procedures; and

(B) A copy of the data privacy policy provided to users, which clearly specifies the permissible uses for both personally identifying and non-personally identifying data.

(3) All data and technology specifics required in the application and set forth in the Provider Protocols under Rule 5.3.1.

(c) At the time of application, the applicant must be in Good Standing status as a business entity registered to do business in Colorado and must continue to



maintain that status while providing remote notarization services to Colorado remote notaries public.

(d) The Secretary of State may require an applicant to supplement its application with additional information, including an in-person demonstration or electronic demonstration of the applicant's system.

(e) The applicant must pay the required application fee.

5.3.3 Criteria and standards for approval of remote notarization system providers.

(a) In order to be approved and maintain continuing eligibility, a remote notarization system provider must:

(1) Provide a remote notarization system that complies with the technical specifications of these rules and the standards, including data security and integrity requirements, set forth in the Secretary of State's Provider Protocols under Rule 5.3.1;

(2) Verify the authorization of a Colorado notary public to perform remote notarial acts before each remote notarization;

(3) Suspend the use of its remote notarization system for any remote notary public if the notary's underlying commission or the Secretary of State's approval of the notary public to perform remote notarizations has been denied, suspended, or revoked by the Secretary or when the notary has resigned; and

(4) Ensure that access to a remote notary public's electronic signature and seal is limited solely to the remote notary public and protected by the use of a password authentication, token authentication, biometric authentication, or other form of authentication that is described in the remote notarization system provider's application.

(5) Verify that a Colorado remote notary public has Active status with the Secretary of State's office at the time of each remote notarization.

<https://regulations.justia.com/states/colorado/1505/1505/rule-8-ccr-1505-11/section-8-ccr-1505-11-5/>.

Wisconsin is another example of an application and certification model. Pursuant to Wisconsin law, a third-party technology provider must meet certain standards to ensure that acts performed using their technologies will be accurate, authentic, adequately preserved, and resistant to tampering. The Wisconsin Department of Financial Institutions and the Remote Notary Council have established procedures to approve providers of communication technology for use by Wisconsin notaries when performing remote online notarial acts.

To become an approved communication technology provider, the provider must return a completed [application](#) to the Department of Financial Institutions, appear before the Remote



Notary Council to answer questions, and satisfy the Council that its communication technologies meet the standards for providers under Wisconsin law.

Wisconsin law sets forth the following:

[DFI-CCS 25.04](#). Providers of communication technology. (1) Remote notary council approval required. (a) Except as provided in sub. (1) (b) of this section, a provider of communication technology used to perform notarial acts for remotely located individuals must obtain the approval of the remote notary council before allowing its platform to be used by a notary public of this state to perform a notarial act for a remotely located individual.

(b) A provider that was provisionally approved by the department prior to the effective date of these rules must submit the application materials described in sub. (2) of this section no later than August 1, 2020. Such provider's approval remains effective until such time as the remote notary council denies the application under sub. (3) of this section, in whole or in part, or the approval is restricted or terminated under sub. (5) of this section.

(2) Requests for approval; contents. A provider of communication technology may request approval of the remote notary council by submitting to the department verified documentation or other evidence sufficient to detail:

(a) how the provider will ensure that notarial acts for remotely located individuals performed on the provider's platform by a notary public of this state comply the requirements of ss. [140.145](#) and [140.20](#), Stats., and this chapter;

(b) the proposed methods of performing a notarial act involving a remotely located individual using the provider's communication technology;

(c) the process or service used to verify the identity of a remotely located individual by a review of personal information from public or private data sources ("identity proofing");

(d) the means used to ensure that notarial acts for remotely located individuals are accurate, authentic, resistant to tampering, and tamper-evident;

(e) the means used to ensure that all parties using the communication technology are viewing the same record, and that all signatures, changes, and attachments to the record are made in real time;

(f) the means used to ensure that the communication technology is secure from hacking or interception;

(g) the means used to ensure that notarial acts for remotely located individuals are recorded and adequately preserved for a period of at least seven years after the recording is made;



- (h) the means used to ensure that notaries public are properly instructed and competent to perform notarial acts for remotely located individuals using the provider's communication technology;
 - (i) all jurisdictions in which the provider's communication technology has been approved or disapproved for the performance of notarial acts for remotely located individuals;
 - (j) the provider's experience and track record in utilizing the aforementioned means, processes, and procedures in other jurisdictions;
 - (k) whether the provider has been approved or disapproved for use by companies that provide insurance for transactions requiring notarized signatures, such as land transactions;
 - (L) any warning letters or complaints received or disciplinary actions taken against a provider in any other jurisdiction;
 - (m) any pending, threatened, or adjudicated lawsuits against the provider relating in any way to the performance of notarial acts using the provider's communication technology in any jurisdiction;
 - (n) whether the provider has and will maintain insurance coverage or other security for potential errors or omissions relating to the communication technology or provider's processes;
 - (o) any other such information that may be necessary or helpful to evaluate the provider's request for approval; and
 - (p) any other such information that may be requested by the department or the remote notary council to aid in evaluating the request for approval.
- (3) Requests for approval; procedure. (a) Once the department is satisfied that an application is bona fide and includes the information required in sub. (2), the department will forward the application materials to members of the remote notary council.
- (b) The remote notary council will place the application on its agenda for deliberation at one of its next two regularly scheduled meetings or at any interim special meeting it may deem necessary and appropriate. The department will notify the applicant of the time and date of the meeting.
 - (c) A representative of the applicant with knowledge of its processes and authority to make binding representations on its behalf must be available to participate in the meeting and respond to questions from remote notary council members. Unless otherwise specified by the remote notary council, the representative may participate by phone or other remote means.
 - (d) Upon consideration of the merits of the applicant and application, the remote notary council may approve the application, impose additional conditions or



limitations upon approval, deny the application, table the application for further deliberation at a subsequent meeting, or require the applicant to supplement the application with additional explanations, information or evidence of its ability to ensure compliance with state law.

(e) Upon approval of a provider's application, the department will add the provider to a list of approved providers of communication technology for notarial acts for remotely located individuals.