

Insights

U.S. – COVID-19 LITIGATION RISKS OF COVID-19 REMOTE WITNESS AND NOTARY LAWS

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In response to the crisis caused by the novel coronavirus pandemic, many states are authorizing the temporary use of remote notarization and, in some cases, remote witnessing for estate planning documents. While individuals have been encouraged – or ordered – to shelter in their homes and remain six feet away from others, remote notarization and witnessing allows key transactional and estate planning documents to be executed. There are some risks, however, to remote notarization and remote witnessing, particularly in the context of the execution of estate planning documents. States have taken varying steps to address these risks, some more robust than others. Because of the risks, clients should still execute documents in person where possible or, where not possible, execute their estate plans again, and in-person, after stay-at-home orders and other restrictive measures are lifted. Although the full impact of remote notarization and witnessing may not be known until the courts reopen, this article attempts to forecast the litigation risks for documents signed during these extraordinary times and to minimize those risks where possible.

BACKGROUND ON REMOTE NOTARIZATION AND WITNESSING DURING THE COVID-19 CRISIS

Remote notarization permits a notary to witness the signing of a document using audio-visual technology live over the internet. It eliminates the need for the notary and signer to be in the same room at the time of signing. Remote notarization is not a novel concept. Several states had a statutory framework already in place to permit remote notarization. However, in light of the current crisis, many states without remote notarization in place, or with more limited statutory schemes, have acted to permit the use of remote notarization temporarily.

States have structured their remote notarization orders and statutes in various ways, some more restrictively than others. On April 6, 2020, Missouri's governor, Mike Parson, issued Executive Order 20-08, which suspended the personal appearance requirement for notarization and permitted the use of remote notarization.

Missouri's requirements for remote notarization are relatively lax. This article will use Missouri's Executive Order to highlight and compare relevant aspects of remote notarization.

Identification: Missouri's executive order requires that a photo I.D. be presented to the notary, but no other identification requirements are implemented. By contrast, Vermont's executive order requires that two forms of identification be provided if the signer is not already known to the notary. Utah requires either knowledge-based authentication (five multiple choice questions with at least five possible answers for each), credential analysis, or biometric data.

Audio-Video Communications: Missouri mandates that the signing must be witnessed by the notary through video conference with live, interactive audio-visual communication between signer and notary, but it has not implemented any requirement that the audio-visual communication be recorded or maintained. Alabama's governor, on the other hand, issued a proclamation on April 2, 2020 that requires a recording of the audio-visual communication be maintained for five years following the signing of the document.

Signatures: Missouri does require that either the document must be signed electronically with software approved by the secretary of state or the signed document must be mailed or otherwise transmitted to the notary for notarization within five business days. This requirement is fairly standard across the states.

Eligible Notaries: Many states have restricted remote notarization to only certain categories of notaries. For example, in Arkansas, only attorneys licensed to practice in Arkansas, title agents licensed in Arkansas, notaries under the supervision of a title agent or attorney, and notaries employed by a financial institution registered with the Arkansas State Bank Department may act as a remote notary. Missouri, on the other hand, has not established any such requirement.

Eligible Documents: Missouri also places no limitation on the type of documents that may be remotely notarized. The Executive Order even suspends the in-person execution requirement under Missouri probate law for all estate planning documents. By contrast, Maine's executive order only allows licensed attorneys to remotely notarize signatures on estate planning documents. Arizona allows the notarization of signatures on a will to be performed remotely but does not permit signatures on estate planning documents to be witnessed remotely. Louisiana's order explicitly excludes notarization of signatures of wills and donations from its order.

Witnesses: There is also considerable variance by state in the ability for the witnesses to sign the documents remotely. Under Missouri law, the two required witnesses and the testator must sign the will in the presence of one another. Missouri's executive order has explicitly waived the in-person requirement for witnesses, however, and permits the witnessing of the execution of a will to also be conducted remotely. The documents must still be signed in physical form, meaning in practice that the document will be signed by the testator while the witnesses observe live using audio-visual technology. The signed document then must be transmitted to the witnesses for their signatures. If this transmission is through electronic means (such as through email), there may be multiple original copies of the documents to be maintained as the testator and each witness prints off and individually signs the signature page.

Potential Benefits: There are some possible benefits to remote notarization and witnessing, even beyond the convenience—and currently the necessity—of being able to execute documents from the comfort of one’s home. For example, a document that has been remotely notarized may include metadata embedded in an electronic signature or notary stamp that could be used to verify the authenticity of the signature. In states that require, or for practitioners who voluntarily utilize, video recordings for remote notarization and witnessing, the preservation of these recordings could provide useful evidence in the case of a challenge to the signature.

RISKS OF REMOTE NOTARIZATION IN THE ESTATE PLANNING CONTEXT

Although remote notarization may be permitted for the execution of wills, trusts, and powers of attorney, there are some significant risks associated with the practice. These risks vary in severity from a delay in the time it takes the probate court to admit a will to a court’s complete disregard of the estate planning documents.

Undue Influence: One risk for remote notarization and witnessing is the potential impact if estate planning documents are later challenged for coercion or undue influence. For example, in the case of a claim that the signer was threatened, pressured, or coerced by an unseen witness, it would be impossible for a remote witness to know what is happening beyond the view of the camera. If no witness was in the room with the signer at the time the documents are executed, there may be no witness to later verify that the signer did indeed act of his or her own accord.

Competency: Remote execution could also make it more difficult for the witnesses to observe the signer’s demeanor and to judge his competency to sign the documents. When individuals engage with one another in-person, they are better able to observe one another’s body language and nonverbal cues. They also engage in more small talk. Conversations via video conferencing only permit visualization of facial cues and tend to be shorter and on-topic. Accordingly, it may be harder for a witnesses to observe the signer’s demeanor and assess both their willingness and competence to execute the documents.

Technology: While video recordings aid in the verification that a signature was not forged, they may also make it easier for a challenger to claim the testator was not competent to sign. Many signers may be unfamiliar with the technology they are using to sign the documents. The resulting confusion and frustration could be mistaken by a later viewer of the video recording as evidence of more general confusion and mental incompetence.

Authority: Finally, a will or probate document executed remotely pursuant to executive order risks challenge and for noncompliance with the state’s probate code. If a state’s probate code requires in-person attestation to properly execute a will, it is not a certainty that a governor’s unilateral action pursuant to an executive order can waive that requirement. Accordingly, attorneys should expect challenges on the basis that the documents were never properly executed.

CONSIDERATIONS FOR EXECUTING ESTATE PLANNING DOCUMENTS IN THE TIME OF COVID-19

Where possible, attorneys should still encourage their clients to execute their documents in the physical presence of witnesses and a notary. The challenge is finding a way to execute documents in person while still observing appropriate social distancing. One reported solution is to have a testator sign documents on his or her porch while witnesses, notaries, and attorneys observe the signing of estate planning documents from inside their vehicles. The observers wait for the testator to move either into the home or six feet away from the documents and then sign and/or notarize the documents in turn.

If an attorney or client determines that remote witnessing or notarization are necessary, there are protections that can and should be implemented, even where not required by law, to guard against future challenges. Consider the following:

- The witnesses can and should make an effort to engage the individual in conversation and assess the signer's demeanor and apparent mental state. They should also ask targeted questions to determine whether the individual is acting of his or her own free will and whether the individual understands that he or she is signing a will or other estate planning document.
- The witnesses may also request that the signer move the camera around the room so that they can observe who else might be present.
- Attorneys should also consider the use of enhanced identity verification, even when the state does not mandate that the notary do so.
- The notary's observations should be recorded in the notary's journal and preserved in case of any later challenge to the execution of the documents. The notary should also make note in the journal of what software is being utilized for the videoconferencing, and if applicable, for electronically signing the documents.
- Where possible, the execution of the documents should be recorded, and the recording should be preserved by the attorney.
- Finally, the notary should make note that the notarization was conducted remotely pursuant to the applicable state law or executive order. When social distancing restrictions are lifted, attorneys should have their clients re-execute their documents in-person as soon as possible.

Attorneys should be sure to verify that the temporary order permitting remote witnessing and notarization have not been rescinded prior to their planned expiration date.

In states where holographic, or handwritten, wills are admitted to probate, some attorneys may be tempted to recommend – or some individuals may be tempted to utilize – a holographic will rather

than execute a traditional will. While it is outside the scope of this discussion, the risks of utilizing holographic wills may be greater than the risk of remote witnessing and remote notarization. Therefore, the use of a holographic will should not be considered as a viable alternative to remote notarization and witnessing.

Although it will be some time before we know how courts will view documents signed during these unprecedented times, the requirements for executing estate planning documents are often strictly enforced. Attorneys must therefore carefully consider advising a client to stray from the traditional methods of execution for key estate planning documents. Any deviation should be necessary and gilded in protective measures. This is true even with the enactment of government action permitting the deviation. And again, when stay-at-home and other restrictive measures are lifted, and it is again safe to execute documents in the traditional manner, attorneys should encourage their clients to re-execute the documents.

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