



NEW YORK
CITY BAR

**COMMERCIAL LAW & UNIFORM
STATE LAWS COMMITTEE**

ALAN KOLOD
CHAIR
akolod@mosessinger.com

LITIGATION COMMITTEE

JOHN LUNDIN
CHAIR
jlundin@schlamstone.com

**REAL PROPERTY LAW
COMMITTEE**

DOROTHY HEYL
CHAIR
DHeyl@primaadvisors.com

July 9, 2021

Via email

Hon. Andrew M. Cuomo
New York State Governor
State Capitol Executive Chamber
Albany, NY 12224

Re: A.399-B (AM Rozic) / S.1780-C (Sen. Skoufis), providing for electronic notarization

Dear Governor Cuomo:

On behalf of the Commercial Law and Uniform State Laws Committee, Litigation Committee and the Real Property Law Committee of the New York City Bar Association (“City Bar”), we are writing with regard to a bill authorizing qualified New York commissioned notaries to perform notarizations for remotely located persons using electronic signatures under regulations to be promulgated by the Secretary of State, A.399-B/S.1780-C (the “Bill”). This bill has passed both houses of the Legislature and awaits delivery to your office. Such notarizations, which do not involve ink signatures on tangible documents or the simultaneous in-person presence of the signer and the notary, are generally referred to as remote online notarizations or “RON”.¹ The City Bar supports RON under appropriate standards and regulations.

The Bill, as enacted, can be implemented only with the issuance of rules and regulations by the Secretary of State. In particular, Section 1 of the Bill amends the Executive Law to add a new Section 137-A, and Section 2 of the Bill adds a new subdivision 3 to Section 136 of the Executive Law. New Section 137-A, in subsections (1)(D), (E), 2(A), (3), 5(B) and (E) and (7) requires action by the Secretary of State before the Bill can be implemented. New subdivision (3)

¹ RON is distinct from remote notarization of ink on paper documents (“RIN”), which was facilitated by the Governor’s executive order 202.7 during the COVID-19 state of emergency. This memo does not address RIN.

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

of Section 136 requires the Secretary of State to set fees for electronic notarial services. Section 3 of the Bill authorizes the addition, amendment or repeal of any rule or regulation necessary for implementation of the Bill in advance of the effective date, which is 180 days after the Bill becomes law.

For the reasons explained below, it is vitally important that the Office of the Governor make sure that the Secretary of State has the authority to issue and does issue proper regulations to protect the remote electronic notarizations authorized by the Bill from forgery and fraud. Enactment of the Bill without rules and regulations that adequately deter and protect against forgery and other identity fraud will expose New York citizens to fraud, including the risk of deed fraud and home theft. We also urge that the Bill and/or regulations promulgated thereunder allow for “papering-out” of the RON notarization, so that an electronically notarized record could be printed out on paper and certified as true, correct and complete by the electronic notary. This would make such papered-out copies acceptable as authentic to title insurers and public officers, including county clerks and deed recorders.

I. REASONS FOR ENACTMENT OF THE BILL

The purpose of notarization, whether in person or remote, and whether involving paper or electronic documents, is to deter forgery and fraud by providing evidence of the identity and intent of the document signer and of the integrity of the signed notarized document. Notarial law does this by specifying how a notary is (i) to identify a person purporting to sign a document (to deter forgery); (ii) to confirm that the signature is the intentional act of a competent person (to deter fraud); and (iii) to confirm the integrity of the signed document (to prevent unauthorized alteration or substitution).

New York’s existing notarial laws do not include the kinds of protections found in the notarial laws of other states, and, as a result, New York suffers from an epidemic of paper deed fraud, which preys on vulnerable populations.² In light of this shortcoming, the City Bar has urged the Legislature to enact a comprehensive new notarial law, which would include RON.³ A crucial part of the City Bar’s recommendation was the need for clear antifraud standards for all forms of notarization. The Bill, in contrast, takes a more tailored approach to the subject of notarial reform rather than the comprehensive reform adopted by other states, such as those which have adopted model laws drafted by the Uniform Law Commission or National Notary Association.⁴

² A 2018 New York County Grand Jury found that an epidemic of home theft and deed fraud had been occurring in New York. It attributed this, in part, to lack of anti-fraud protections in New York notarial law, and its first recommendation was notarial reform to correct this, <https://www.manhattanda.org/wp-content/uploads/2018/12/Deed-Fraud-Grand-Jury-Report.pdf>. (All sites last visited July 8, 2021).

³ See “Report on Legislation by the Commercial Law & Uniform State Laws Committee and the Real Property Law Committee,” New York City Bar Association, March 2021, available at: <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/electronic-notarization-by-new-york-notaries-opposition>. The Bill has been amended since the issuance of this report.

⁴ The Uniform Law Commission has promulgated the Revised Uniform Law on Notarial Acts (“RULONA 2018”) and the National Notary Association has promulgated the Model Notarial Act (“MNA”) and Model Electronic Notarization Act (“MENA”).

Nevertheless the Bill represents an important step forward in modernizing New York’s notarial law.

The subject of remote online notarization in particular has become a hot topic during the past decade due to technology advances. Interest in the subject increased dramatically as a result of the public health crisis and need for social distancing caused by the COVID-19 pandemic, which made in-person notarization a health risk, as well as an inconvenience to persons without easy access to a local notary.

The United States Treasury has encouraged enactment of remote online notarization laws as an important means of facilitating financing transactions.⁵ Remote online notarization has become possible because the technology used and the antifraud protections associated with such remote electronic notarization laws are extremely effective to protect against forgery and fraud.⁶

New technology renders remote online notarization as effective in deterring fraud as properly performed customary in-person notarization procedures, if not more effective.⁷ First, audio-visual recording of electronic notarization is easily available online and is a strong deterrent against forgery by imposters. Second, identification methods available online, such as “credential analysis” and “identity proofing”, are more effective than simple visual inspection by a notary of a purported credential, such as a driver’s license.⁸ These robust and effective safeguards are not part of the Bill, and will apply only if the Secretary of State adopts appropriate regulations.

Enactment of the Bill without these safeguards could have disastrous consequences for the integrity of land titles in New York, because the security and integrity of New York’s land title system depends on proper notarial practices.⁹

⁵ *A Financial System That Creates Economic Opportunities: Nonbank Financials, Fintech, and Innovation* (July 2018), at pp.107-10, available at: <https://home.treasury.gov/sites/default/files/2018-08/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financials-Fintech-and-Innovation.pdf>. According to the Treasury report, the movement toward remote digital closings of real estate financing transactions is an important component of a strategy for expanding consumer financing activities, expanding financial activity generally and reducing the cost of, and increasing consumer satisfaction with, the mortgage closing process. The report identified the major impediment to modern real estate financings and closings as the failure of many states, including New York, to authorize notaries to perform electronic notarial acts or to perform remote electronic notarizations and to provide for the recordation of electronically notarized electronic conveyances.

⁶ The technology and rules governing notarization of electronic documents ensure “reliable evidence of identity, intent and document integrity.” Tim Reiniger, https://static1.squarespace.com/static/5feb9d8f175ffd115ab172d1/t/602808e53b4712454ba535cd/1613236453217/Online+Notarization+INFORMATION_LAW_JOURNAL-volume9_issue4+2018.pdf.

⁷ A 1989 survey of a random sample of 220 notaries in 22 New York cities revealed that over 80% failed to confirm the signatory’s identity when taking an in-person “acknowledgment”. A. Piombino, *Notary Public Handbook: A Guide for New York* (4th ed. 2011) (East Coast Publishing). RON cannot be done without a record of an identification process.

⁸ In a recent research survey, the tested notaries failed to spot imposters in nearly 30% of instances, even when they inspected IDs in person, <https://www.nationalnotary.org/notary-bulletin/blog/2015/11/face-matching-research-results>.

⁹ *In re Gottheim*, 153 App. Div. 799, 782 (1st Dept.).

II. THE SECRETARY OF STATE MUST ISSUE REGULATIONS TO IMPLEMENT THE BILL

Thus, the future success and usefulness of the Bill depend entirely on the Secretary of State's adoption of rules and regulations that further the purpose of notarization (*i.e.*, to prevent fraud).¹⁰ Under the Bill, the Secretary of State must: specify the authorized means of performing online notarial acts; provide the means for notaries to register the capability of performing online notarial acts; approve standards for the conduct of online notarizations using communication technology; prescribe the form for registration of capability to perform electronic notarial acts; set standards for the electronic signatures of notaries, which must be applied to electronic documents in the performance of electronic notarizations and render the notarized record tamper-evident; and adopt rules necessary to set standards, procedures, practices, forms and records relating to a notary public's electronic signature.

It is vitally important that the Governor's office ensures that the Secretary of State commits to adopt comprehensive rules and regulations for RON notarization that will protect against the use of online notarizations to commit forgery and fraud, which is already a scourge of in-person notarization of paper documents. The types of fraud that notarial law should deter include forgery by impostors, fraudulent use of notary stamps by non-notaries, procurement of signatures from incompetent or unwitting signatories, and post-signing alteration of a notarized document.

To prevent such fraud, the regulations should deal with the means by which a notary identifies a document signer, confirms the intentional nature of the signature, and ensures the integrity against alteration of the signed and notarized document, and also with the "reliability" or integrity of the notary's electronic signature and the training and technology used by the notary.

III. RECOMMENDATIONS: ALLOW FOR "PAPERING OUT" AND OTHER ANTI-FRAUD PROTECTIONS

Unfortunately, unlike the RON laws in 13 other states,¹¹ the Bill does not expressly include authority for electronic notaries to "paper-out" electronically notarized electronic records. "Papering out" involves a printed reproduction of the original, authenticated document that was electronically signed and notarized using RON, so that it can be recorded in real estate records by the county clerk/recorder. The notary who performs electronic notarization should be authorized to certify that the printed document is a true, correct and complete copy of the signed and notarized electronic original.¹²

¹⁰ This is not unusual for RON laws, most of which require adoption of regulations by the Secretary of State. See National Association of Secretaries of State (NASS) Resolution Affirming the Role of the Secretary of State or Other State Notary Commissioning Entity as Sole Authority to Establish Standards for New Forms of Notarization, (amended and reauthorized July 22, 2020), available at: <https://www.nass.org/sites/default/files/resolutions/2020-07/nass-resolution-enotary-authority-summer2020.pdf>.

¹¹ Florida, Idaho, Iowa, Kentucky, Maryland Minnesota, Montana, North Dakota, Ohio, Oklahoma, Tennessee, Texas and Washington.

¹² No provision of the Executive Law authorizes a New York notary public to certify that a copy is a true, correct and complete copy of an original document.

There are a number of reliable and recommended sources for RON provisions providing for papering-out and various anti-fraud regulations. These include Section 14A of the Revised Uniform Law on Notarial Acts (RULONA) promulgated by the Uniform Law Commission,¹³ the suggested model rules in Appendices I, II and III of the National Notary Association's Model Electronic Notarization Act (MENA),¹⁴ and the remote notarization Standards of the National Association of Secretaries of State.¹⁵

These models for regulation recognize the importance of such safeguards as notarial journals; notary bonding requirements; notary training and testing; notarial disciplinary proceedings; recording (and retention of recordings) of remote online notarizations evidencing the identity and intention of the signer; reliable methods of identification of remote individuals (such as use of credible witnesses or two separate means of online identity proofing and credential analysis); methods to ensure that remotely notarized documents are made "tamper-evident;" protection of electronic notary equipment and signatures; and privacy and security protections for notarial records. In addition, it should be made clear that New York notaries have the authority to certify that a copy of an electronic document is true, correct and complete and to administer an oath remotely (particularly to a person out of state). Existing New York law does not permit either of these, and the Bill itself implies such authority rather than stating it expressly.

We urge the Governor's Office to recommend that such safeguards and papering-out be included by the Secretary of State in regulations implementing the Bill. And in the event your Office determines that rules and regulations on any of these subjects might exceed the authority of the Secretary of State under the Bill or any other provision of the Executive Law, we respectfully urge your Office to undertake measures to clarify and extend the authority of the Secretary of State to encompass these measures.

We strongly urge your office, if you are inclined to sign the Bill, to ensure that adequate resources and, if necessary, additional statutory authority are made available to the Secretary of State to draft and adopt appropriate regulations dealing with the above-described matters, utilizing the widely accepted models, in order to protect remote online notarizations effectively against forgery and fraud. We particularly urge the Governor's Office to ensure that the Bill and regulations promulgated thereunder allow for "papering out."

¹³ See Revised Uniform Law on Notarial Acts (RULONA) 2018, available at: <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=aec212eb-a1e8-183a-13dd-587c7604666e>.

¹⁴ See Model Electronic Notarization Act (MENA), National Notary Association (Jan. 2017), available at: <https://www.nationalnotary.org/file%20library/nna/reference-library/model-enotarization-act.pdf>.

¹⁵ See also NASS Support for the Revised National Electronic Notarization Standards (amended and readopted on Feb. 19, 2018), available at: https://www.nass.org/sites/default/files/resolutions/2018-02/nass-support-revised-enotarization-standards-winter18_0.pdf.

Thank you for your consideration.

Respectfully,

Alan Kolod, Chair
Commercial Law & Uniform State Laws Committee

John Lundin, Chair
Litigation Committee

Dorothy Heyl, Chair
Real Property Law Committee

Cc: Hon. Nily Rozic
Hon. James Skoufis

Contact

Mary Margulis-Ohnuma, Policy Counsel | 212.382.6767 | mmargulis-ohnuma@nycbar.org
Elizabeth Kocienda, Director of Advocacy | 212.382.4788 | ekocienda@nycbar.org