

DRAFT AMENDMENT TO SECTION 14A OF THE REVISED UNIFORM LAW ON NOTARIAL ACTS

Purposes and Issues

The Draft: This proposed amendment to the Revised Uniform Law on Notarial Acts authorizes notaries public to perform notarial acts in the state in which they are commissioned for remotely located individuals using audio-visual communication technology regardless of where the individual may be located. This amendment is not limited to foreign located individuals; it extends the authority to any remotely located individuals.

This amendment was prepared in response to a rapidly emerging trend among the states to authorize the performance of notarial acts by means of audio-visual technology. Currently such laws are in effect in Indiana, Minnesota, Montana, Ohio, North Dakota, Tennessee, Texas, and Virginia, and have been introduced for consideration in at least 12 other states and the District of Columbia. The ability of notaries public to perform notarial acts by audio-visual technology is being promoted by the American Land Title Association and the Mortgage Bankers Association. They have prepared a Model On-Line Notary Act which contains provisions very similar to these RULONA amendments, but which are not incorporated into the framework of RULONA.

Purpose: Traditionally an individual has been required to physically appear before a notary public in order for a notary public to perform a notarial act on behalf of that individual. The objectives of that appearance have been to enable the notary public to verify the identity of the individual and to assess the competency of the individual and whether the individual's acts are knowingly and voluntarily made. In recent years, technology and commercially available identification services have made it possible to accomplish these goals by means of synchronous communication technology, thus allowing the performance of notarial acts for persons who are not in the physical presence of a notary public. This amendment authorizes notaries public to perform notarial acts for remotely located individuals using communication technology provided its requirements have been fulfilled.

Summary of amendment: Subsection (b) provides that an individual may appear before a notary public by means of communication technology and thereby comply with the provisions of RULONA Section 6 calling for appearance before the notary public. Subsection (a)(1)(A) defines communication technology as any means or process that allows a notary public and a remotely located individual to communicate with each other simultaneously by sight and sound. This definition would allow a notary public and a remotely located individual, both of whom have and employ video screens with microphones and speakers, to comply. Inasmuch as communication technology will undoubtedly grow and change in future years, specific technology is not identified in the amendment. When necessary and consistent with other applicable law, communication technology also permits the use of alternative or additional devices or processes that facilitate communication with a remotely located individual who has a vision, hearing, or speech impairment. Subsections (h)(1), (2), and (3) authorize a commissioning officer to adopt rules prescribing the means of performing such a notarial act, establish standards for communication technology, and establish requirements or procedures for approving the providers of communication technology.

Subsection (c)(1) specifies the means by which a notary public must identify a remotely located individual. Subsection (c)(1)(A) permits a notary public to identify a remotely located individual by personal knowledge as provided in Section 7(a) of RULONA.

Subsection (c)(1)(B) permits a notary public to identify a remotely located individual from satisfactory evidence provided by the oath or affirmation of a credible witness. The witness may physically appear before the notary public and execute the oath or affirmation as provided in Section 7(b) of RULONA. The remotely located witness also may appear before a notary public by means of communication technology. In that case, the witness is subject to the same identification and other requirements as a remotely located individual.

Subsection (c)(1)(C) permits a notary public to identify a remotely located individual by at least two different types of identity-proofing processes or services. Although identity proofing continues to evolve, with today's technology it involves a third-party service provider who is able to verify the identity of an individual by a review of personal information from public or private sources (see subsection (a)(3)). This may include having a remote individual answer a number of questions for which there is a very high probability that only the true individual would be able to answer correctly. The third-party service provider might also use technology such as biometric identification technology or credential analysis. Subsections (h)(2) and (3) authorize, but do not require, the commissioning officer to establish standards for identity proofing and requirements and procedures to approve providers of identity proofing.

The Drafting Committee considered, but rejected, suggestions that the legislation should not take effect until standards are adopted by a state. Some of the Committee's advisors representing state agencies objected to a mandate to develop such standards. The Committee also concluded that processes being utilized under current standards to identify remotely located individuals may better and more reliably identify persons than occurs in face-to-face notarizations which rely on tangible identity credentials that may be fraudulent. Standards have been adopted by the National Association of Secretaries of State [NASS] and technical standards are being drafted by MISMO, the Mortgage Industry Standards Maintenance Organization.

Subsection (c)(2) requires that the notary public be reasonably able to identify the record before the notary public as the same record in which the remotely located individual made a statement or on which the remotely located individual executed a signature. For example, a notary public might compare a record she or he has with the record the remotely located individual displays on the video screen. Or the notary public may verify the record by means of a secure electronic signature tied to an electronic record which he or she is notarizing.

Subsection (c)(3) requires that an audio-visual recording of the performance of the notarial act be created. Subsection (f) requires that the notary public or his or her representative retain the audio-visual recording for a period of at least 10 years or as otherwise required by rule of the commissioning officer or agency under subsection (h)(4).

The Drafting Committee considered, but rejected, suggestions that these recordings and other material relating to the performance of notarial acts by means of audio-visual communication be protected from any disclosure or use by the remotely located individual. The Committee concluded that drafting confidentiality requirements for personal information was outside of its scope of authority and presented difficult issues that apply not only to notarial acts

performed by means of communication technology, but also to face-to-face notarial acts. Action on the rejected suggestion also would require analysis of whether action at the state or federal level would have to address the European Union's recent implementation of the General Data Protection Rule.

Subsection (c)(4) deals with a remotely located individual who is located outside the United States. It sets forth essentially the same requirements as were contained in the 2016 amendment to RULONA.

Subsection (d) provides that the certificate of notarial act required under Section 15 must indicate that a notarial act performed in accordance with this Section was done by means of communication technology. Subsection (e) provides that a short-form certificate set forth in Section 16 complies with this requirement if it contains language substantially as follows: "This notarial act involved the use of communication technology." Under subsection (h)(1), the commissioning officer or agency may adopt rules setting other requirements for the certificate.

Before a notary public may perform her or his first notarial act under this Section, subsection (g) requires that the notary public must notify the commissioning officer or agency that the notary public will be performing notarial acts facilitated by communication technology and identify the technology. If the commissioning officer has adopted standards for the approval of communication technology or identity proofing, the communication technology or identity proofing must comply with those standards.

The Drafting Committee considered, but rejected, recommendations that all technologies used in the performance of notarial acts by means of communication technology should first be reviewed and approved by the commissioning officer or agency. The Committee concluded that because technologies used for performance of notarial acts involving electronic records and signatures do not require state approval, a mandate for prior approval should not be imposed on technologies used in the performance of notarial acts using communication technology, which will in most cases involve the use of electronic records and signatures. In addition, the Committee concluded that the proposed legislation provides adequate authority for states to adopt rules requiring the approval of technologies if they believe approval is necessary to prevent the use of inappropriate technologies.

Subsection (h) provides that the commissioning officer may adopt rules regarding the performance of notarial acts for remotely located individuals in addition to those authorized in Section 27. Subsection (i) provides that before adopting, amending, or repealing a rule governing the performance of a notarial act regarding a remotely located individual the commissioning officer or agency must consider the most recent standards promulgated by national standard-setting organizations and the National Association of Secretaries of State; the standards, practices, and customs of other jurisdictions that have laws substantially similar to this Section; and the views of governmental officials and entities and other interested persons.

**DRAFT AMENDMENT TO SECTIONS 4 AND 20 OF THE
REVISED UNIFORM LAW ON NOTARIAL ACTS**

Purposes and Issues

Draft: These two subsections, in combination, allow a notarial officer to certify that a tangible or paper copy of an electronic record is an accurate copy of an electronic record and authorize the recorder to accept that tangible or paper copy for recording.

Purposes: Since the promulgation of the Uniform Electronic Transactions Act, the Uniform Real Property Electronic Recording Act, and the Revised Uniform Law on Notarial Acts, the use of electronic records has increased considerably. Many of these records involve transactions that must or should be recorded in the local land records office. However, in many cases, local recorders are not equipped or authorized to accept electronic records. These subsections allow a notarial officer to certify that a tangible or paper copy of a record is an accurate copy and authorize the recorder to accept this “papered-out” copy for recording.

Summary of amendment: Section 4(c) allows a notarial officer to certify that a tangible or paper copy of an electronic record is an accurate copy of the electronic record. The notarial officer may be the same notarial officer who performed the notarial act regarding the electronic record or another notarial officer who has the ability to read the electronic record and compare it with the tangible or paper copy.

Section 20(c) authorizes the local recorder to accept the tangible or paper copy of the electronic record for recording. The “papered-out” copy satisfies any requirement that a record be an original in order to be recorded.