



NEW YORK
CITY BAR

**REPORT ON LEGISLATION BY THE COMMERCIAL LAW
AND UNIFORM STATE LAWS COMMITTEE
AND THE REAL PROPERTY LAW COMMITTEE**

**A.399-A
S.1780-B**

**M. of A. Rozic
Sen. Skoufis**

AN ACT to amend the executive law, in relation to providing for electronic notarization.

THIS BILL IS OPPOSED

I. INTRODUCTION

The New York City Bar Association, through its Commercial Law and Uniform State Laws Committee and Real Property Law Committee (the “Committees”), recommends against enactment of A.399-A/S.1780-B. The purpose of the Bill is to permit electronic notarization, including remote online notarization (“RON”), of electronic records by New York notaries. However, the Bill falls far short of providing much-needed notarial law reform in New York. The City Bar strongly urges the Legislature to consider alternatives that would provide a comprehensive and long-overdue update of New York’s notarial law. For example, the Uniform Law Commission’s 2018 Revised Uniform Law on Notarial Acts (“RULONA”), adapted for New York, could potentially address many of the concerns described below.¹

Authorization of RON for New York notaries would be desirable. Unfortunately, the Bill as drafted is substantially inadequate. It fails to protect homeowners from deed fraud or consumers from identity theft perpetrated by improper notarial practices. It fails to improve notarial practices with respect to wet-ink or paper notarizations. It does not provide for, and would prohibit, remote wet-ink notarization (“RIN”), which is currently authorized by New York Executive Order 202.7 issued under Executive Law Article 2-b, section 29-a, and which has become useful to estate planning lawyers during the COVID-19 pandemic.

¹ See Revised Uniform Law of Notarial Acts (2018), drafted by the National Conference of Commissioners On Uniform State Laws, Oct. 16, 2018, <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=aec212eb-a1e8-183a-13dd-587c7604666e> (all websites last visited March 25, 2021).

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.

The Bill cannot be implemented without prior adoption of new rules by the Secretary of State, for which the Bill provides no guidance. The Bill does not follow any of the model notarial laws that have won the support of the legal profession, the notarial associations, the title insurance industry, and the mortgage banking industry, and which have been enacted successfully in many other states. It is unclear what the source of the Bill is or whether relevant organizations or notarial experts have vetted the Bill. The Bill was opposed by the Trust & Estates and Elder Law sections of the New York State Bar Association during the 2019-20 legislative session.² (Attached as Appendix A to this Report is a comprehensive analysis of the specific deficiencies in the Bill.)

The Bill will impose additional immediate expenses on the Secretary of State to develop the required regulations, but it will not generate any offsetting fee or tax revenue. Longer term, the Bill's deficiencies will delay New York's enjoying the full financial benefits of a more carefully drafted authorization of remote electronic notarization. The Bill's failure to address the current deed fraud problem will subject the tax base of New York cities to further erosion.

II. THE PURPOSE AND FUNCTION OF NOTARIZATION

A notary public is a resident of New York appointed and authorized by the Secretary of State to administer oaths. Because of this authority, a notary public has the ability to perform various "notarial acts", which include authenticating signatures on legal documents and completing a certificate of the signatory's "acknowledgment", which is attached to the legal document.

This function is particularly important when it involves documents that are legally effective upon delivery or recordation, such as deeds or other conveyances: "Upon the faith of these acknowledgments rests the title of real property, and the only security to such titles is the fidelity with which notaries ... perform their duty..." *Matter of Gottheim*, 153 App. Div. 779, 782 (1st Dept. 1912) (attorney/commissioner of deeds disbarred for admitting he had signed a certificate falsely stating the grantor of a deed had personally appeared before him and acknowledged signing the deed). The *Gottheim* court noted that proof of the fraud had been a fortuity in that case because the attorney had initially denied it and there had been no record of the circumstances of the acknowledgement to refute his denial.

Over time it has become even clearer that what notaries do that is most useful is (i) to take prudential steps to actually confirm the identity of the persons appearing before them as the signatory, and (ii) to create a reliable record of the steps taken and the identities of persons involved in the transaction that is subjected to the notarial process.³

Thus, the notary's primary job is to deter fraud and identity theft. Notaries do this, first, by using their own personal knowledge or objective information (such as government identification, credential analysis, credit bureau data, or the testimony of a credible witness who knows the signor) to confirm the identity of a person signing an instrument. Second, the notary confirms that

² A copy of the report is on file with the City Bar.

³ See Michael Lewis, "Real Estate Fraud: Notaries at Risk," National Notary Association, Apr. 2, 2019, <https://www.nationalnotary.org/notary-bulletin/blog/2019/04/real-estate-fraud-notaries-at-risk>.

the signatory is acting knowingly and voluntarily, with adequate understanding of the effect of the document being signed.⁴

The modern system of recordation of real estate records is entirely dependent on proper performance of the notarial function by these non-governmental volunteers—The Notaries Public. It is impossible to affect record title to real estate without a conveyance acknowledged by a notary and various supporting documents containing a notary’s certificate.

For this process of notarial confirmation to function effectively to prevent fraud, certain steps must be insured. These include (i) training notaries in the best authentication practices; (ii) development and identification of technology to make the authentication process more efficient and reliable; (iii) requiring notaries to maintain accessible records of their notarial acts and the bases used for authentication; (iv) providing financial incentives to notaries to acquire and use this technology; and (v) imposing serious penalties to deter dereliction of duty and malfeasance.

To further strengthen these protections, it is important for governmental appointing bodies to test notaries periodically; to confirm their identities and maintain records as to commissioned notaries; to place stringent controls on the instruments and seals used by notaries to evidence their acts; and to limit the persons who can perform notarial acts to persons properly identified, vetted, trained, and licensed. The effectiveness of these protections may also depend on holding notaries responsible for dereliction of duty using such means as bonding requirements, civil liability and criminal penalties.

Unfortunately, New York has been slow to implement such prudential steps. The proposed Bill fails to provide any mechanisms to improve the situation.

III. DEFICIENT NOTARIAL PRACTICES IN NEW YORK

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 in taking an “acknowledgment”. More than 90% failed to administer required oaths: They “cavalierly” applied their stamp and official signature to documents they were supposed to be notarizing.⁵

This notarial dereliction is facilitated by the fact that New York notaries are not subject to prudential practices and requirements found in many other states. For example, the 17-page collection of notarial laws published by the Division of Licensing Services of the Department of State contains a mere half-page discussion of Notarial Professional Conduct, and the only useful pointer it gives is that a notary should not identify a person over the telephone.⁶

⁴ A further function of the notary is to deter perjury by administering oaths to persons signing affidavits, thereby obtaining confirmation of the truth of statements in those documents under penalty of perjury. The Bill, however, does not have specific provision for the administration of oaths remotely.

⁵ See A. Piombino, *Notary Public Handbook: A Guide for New York* (4th ed. 2011) (East Coast Publishing). In a telephone conversation in 2020, the author stated that a more recent repetition of the survey produced similar results.

⁶ See Notary Public License Law, at 5, May 2020, <https://www.dos.ny.gov/licensing/lawbooks/notary.pdf>.

New York notaries are not provided with formal training. New York law does not mandate notarial standards of performance. New York law does not provide standards for how a notary is to confirm identity or determine whether a signatory comprehends the effect of what she is signing and is doing so voluntarily. Notaries are not required to use official seals. Notaries are not required to maintain a journal of each of their notarial acts with vital information concerning the notarization. Notaries do not have to post surety bonds for damage caused by their neglect. In addition to this lack of notarial training and standards, New York does not maintain a notarial database to identify problematic notaries and does not have carefully developed penal laws for deed fraud and notarial crimes.⁷

The Bill does not correct any of these current deficiencies in New York notarial practice.

IV. THE VALUE OF ELECTRONIC NOTARIZATION

Electronic notarization comprises two related but separate functions. First, it permits the notarization of electronic signatures on electronic documents or records. This is known as electronic notarization. This has become ever more important as electronic commerce and the use of electronic (rather than paper) mortgages and notes has accelerated. The future of real estate finance depends on electronic closings, and electronic closings require electronic notarizations.

Second, it permits notarization of a signature to be performed by a notary, who need not be present with the signatory, using audio-visual technology over the internet to identify a signatory and confirm that signatory's signature. This second function is known as remote notarization. Together, the two functions are referred to as remote online notarization or "RON".

RON provides at least four major security and convenience advantages over paper or "wet ink" notarization:

1. It protects against subsequent tampering or alteration of a notarized record, both the underlying instrument and the signatures.
2. It ensures that proper fraud prevention notarial "best practices" are actually performed by the notary, including specifically approved forms of identity-proofing using data and processes available only on the internet.
3. It permits audio-visual recordation of the notarization ceremony. This both deters participation by fraudsters and creates evidence to establish conclusively the voluntary signature by the correctly identified signatory.
4. It enables a signatory to obtain notarization of a document via computer at his or her location, without the inconvenience of having to travel to a notary's, lawyer's or title insurer's office, by enabling notarization to be done "remotely" over the internet. This has become especially important during the COVID-19 pandemic.

⁷ See "Information to Help Recording Officials Fight Real Estate Deed Fraud," <https://www.deeds.com/deed-fraud/recorders.html> (describes real estate deed fraud and some measures that would help address it).

Any electronic notarization law that New York enacts should fulfill all of these purposes.

Properly conducted RON, under a well-drafted law, protects consumers and homeowners against deed fraud. It provides them additional convenience and facilitates efficient and more secure real estate lending and transfers, promoting commercial activity involving real estate. In short, it would benefit New York consumers, homeowners, investors in real estate, real estate lenders and title insurers and protect the real estate tax base on which New York government depends.

V. CONCLUSION

For these reasons, we recommend against enactment of the Bill and strongly urge the Legislature to consider alternatives that would provide a comprehensive and long-overdue update of New York’s notarial law. As noted above, model laws such as the Uniform Law Commission’s 2018 Revised Uniform Law on Notarial Acts (“RULONA”) could provide needed guidance on ways to address many of the aforementioned concerns.⁸

The Committees are currently studying RULONA as a possible model for enactment in New York to provide for both RON and RIN types of remote notarization and granting the Secretary of State comprehensive rule making powers with respect to all notarial practices, whether involving paper document or electronic documents. The City Bar and its various committees stand ready to work with the Legislature and all relevant actors in developing a comprehensive reform bill to update and strengthen New York State’s notarial law.

Commercial Law and Uniform State Laws Committee
Alan Kolod, Chair

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⁸ *Supra* note 1.

APPENDIX A

REASONS NOT TO ENACT THE BILL

The Commercial Law and Uniform State Laws Committee has been studying the Uniform Law Commission's 2018 Revised Uniform Law on Notarial Acts ("RULONA") as a possible model for reform of New York's outmoded notarial law. An important benefit to enacting a law based on a model statute like RULONA is to ensure that New York notarial law would not be preempted if the proposed federal notarial law affecting interstate commerce were to be enacted. If the Bill were to be enacted as currently written, New York notaries might be forced to comply with two different notarial regimes depending on whether an instrument was to be used in interstate or intrastate commerce. For this reason alone, New York would be poorly served by adoption of the proposed Bill rather than a law that is based on a model statute like RULONA.

But there are additional reasons for New York not to enact the Bill.

The proposed Bill does not conform to any of the accepted models for remote online notarization discussed above. The Bill seems to be based on an incomplete version of the very first RON law adopted in Virginia in 2011, before any of the model bills were developed, but it lacks many of the protections contained in even that first attempt by Virginia to authorize remote online notarization.

The Bill does not address any of the serious deficiencies in New York law concerning notarization of paper instruments, whether done in person or via audio-visual conference. The Bill presumes New York notarial law and procedures are adequate for the notarization of paper instruments and provides for the existing New York rules to continue to apply to notarization of electronic instruments. However, as explained above, current New York law is not adequate for the notarization of paper instruments.

The Bill is drafted in a way that requires the New York Secretary of State to adopt regulations before the Bill can be implemented. That office has no history of regulating notarial practices and currently has little or no statutory authority to issue notarial regulations. The proposed Bill requires such regulation, but it gives the Secretary of State very limited authority and limits it to acceptable technology and the features of the "electronic notarial signature." The Bill fails to recognize that in New York, the Office of Information Technology, not the Secretary of State, issues such technical regulations. The Bill also fails to provide the Secretary of State with any guidance as to what goals the authorized regulations would be required to accomplish. The Secretary of State undoubtedly will grow into the role of regulating notarial practices to prevent fraud and should be given wide authority to do so. But it is not in anyone's interests to enact a law that cannot be implemented until the Secretary of State does that work, provides the Secretary of State no guidance as to how to do that work, and provides the Secretary of State with no source of revenue to do the work.

Furthermore, the Bill fails to provide useful anti-fraud standards for notaries performing either paper-based or electronic notarizations or to authorize the Secretary of State to set such standards. Most important, it will fail to protect owners of real estate from improper notarial

practices that enable fraudsters to deprive them of their property, using notarized forged or fraudulently obtained deeds and mortgages. In short, the Bill fails to provide for any means of quality control over electronic notarizations.

SPECIFIC DEFICIENCIES IN THE BILL

1. The proposed law becomes effective by its terms 90 days after enactment. Section 3. However, it cannot be implemented unless and until the Secretary of State adopts implementing regulations authorizing means for “electronic notarial acts”, governing registration of “electronic notaries public”, and approving forms of “notary electronic signature”. Section 1 (137-a (1)(c), (d) and (g) and (3)). The Bill further requires the Secretary of State to establish standards for both “credential analysis” and “identity proofing” to identify signers. Section 2(d). Until all such implementing rules are adopted, the proposed law cannot be utilized.
2. The Bill provides no guidance or standards to govern the adoptions of any of these new regulations.
3. While imposing the burden of developing these new regulations on the Secretary of State, it makes no provision to pay the expenses which this development of regulations will entail. It does not provide any new source of fee revenues for the Secretary of State to cover these costs.
4. The Bill also makes no provision for the new business opportunities the registration of electronic notaries will create in New York. Failing to recognize the investment in equipment required by an electronic notary, the Bill does not provide that an electronic notary may be employed by a non-notary and does not provide for such employer to be liable for the misconduct of the notarial employee. It also does not prohibit the employer from interfering with the notary’s performance of his or her duties. The Bill permits the Secretary of State to regulate fees for electronic notarial services, but does not expressly permit a notary’s employer to charge market-based fees or for the notary to collect new market-based charges relating to travel or closing services.
5. While the Bill authorizes the Secretary of State to adopt rules relating to a notary’s electronic signature (Section 5(e), it does not authorize the Secretary of State to adopt any of the other rules required by the Bill.
6. This authorization to the Secretary of State relating to the notary’s electronic signature is inconsistent with New York’s Technology Law, including the Electronic Signatures and Records Act Section 303, which provides that the Office of Information Technology shall issue rules relating to electronic signatures.
7. The Bill presumes that the “problem” it is “solving” is that New York law does not permit in person electronic notarization of documents. That does not appear to be the case. Thus, section 4, permitting electronic notarial acts, is superfluous.
8. The model notarial laws recognize that the problem that must be solved is granting permission to perform a notarial act for a person who is not physically present before the notary. The

model laws permit such remote notarial acts, but only if they are performed in accordance with specified best-practice, anti-fraud notarial standards. The Bill does not follow this format. Instead, section 2 permits audio-visual technology to be used *to identify a signor* for an electronic notarization.

9. The Bill requires a notary to register before performing electronic notarizations (Section 3), but it does not require the Secretary of State to maintain a publicly accessible, online database of electronic notaries to enable the public to confirm notarial credentials.
10. The Bill requires the registering notary to identify the technology that will be used to apply his electronic signature, but it does not limit the notary to using that technology for electronic notarizations.
11. The Bill does not require the electronic notary to have any specific training or to pass any test and does not authorize the Secretary of State to charge fees for providing those services.
12. The Bill does not authorize the Secretary of State to de-list an electronic notary for any misconduct or abuse.
13. The Bill does not limit the performance of notarial acts for persons out of the United States to actions lawful under the local law of the signor or relating to transactions affecting New York.
14. The Bill does not authorize administration of an oath using such technology. *See In re Napolis*, 169 App. Div. 469, 471-472 155 N.Y.S 416 (1st Dept. 1915) (administration of an oath to affiant over the telephone is “entirely illegal and unauthorized” despite the fact that affiant had signed the affidavit and notary knew him and recognized his voice). It does not authorize administration of an oath to a person outside New York.
15. The Bill does not authorize an electronic notary to perform the notarial act of certifying that a tangible record is a true copy of an electronic record. This “papering out” of electronic records is essential to recordation of electronic documents.
16. The Bill does not require the notary to confirm that the document signed by the signor is the same document the notary is notarizing remotely or that the notary use technology that facilitates that determination.
17. The Bill permits use of the “same methods” required for identifying signers of paper documents for the identification of signers of electronic documents. Section 2(a). This appears to presume that New York law has such requirements. New York’s Executive Law does not specify how the notary is to identify a signor or authenticate the knowing and voluntary signature on a paper document. The case law provides little guidance for how a satisfactory identification is to be made, other than the need for the signatory to appear personally before the notary, which is the requirement the Bill would repeal.
18. New York’s Real Property Law § 303 does provide that an acknowledgment of a real estate conveyance must not be taken unless the notary knows or has satisfactory evidence that the

person making the acknowledgment is (a) the person described in and (b) who executed the document. But because no New York statute sets out what constitutes “satisfactory evidence” of identity or execution, the Bill effectively leaves the question of what constitutes such “satisfactory evidence” to the discretion of each notary. This is a major defect in New York law which the Bill does not correct. Furthermore, the requirement of identification and execution set out in the Real Property Law applies only to acknowledgments of conveyances and not to any other notarial act which the Bill permits to be performed electronically.

19. While allowing the notary to use whatever identification methods she may currently use for paper notarizations, the Bill specifies *additional* methods *that must be* used if audio-visual technology is employed to identify the signor. Section 2(c). But the Bill fails to include one of the most common and useful methods: identification by oath or affirmation of a credible witness. It also does not permit identification where the notary has confirmed identity by using two forms of identity proofing, neither of which involves a government-issued credential.
20. Most of the additional audio-visual technology standards specified in the Bill as acceptable for identification are of no practical utility. The notary will seldom if ever have personal knowledge of the signor. Antecedent in-person identity proofing in accordance with the specifications of the Federal Bridge Certification Authority will rarely, if ever, be available. Use of a valid digital certificate accessed by biometric data or use of a Personal Identity Verification card meeting specified standards of the National Institute of Standards and Technology is also unlikely.
21. The only means the Bill recognizes that likely will be used requires presentation of government identification, analysis of the credential for authenticity (“credential analysis”) and any additional means of identity proofing approved by the Secretary of State. The Bill fails to follow other model laws in expressly permitting identification by any two means of identity proofing or by confirmation of identity from a credible witness under oath.
22. There is no requirement that the government-issued ID credential be a passport or New York driver’s license or that it have a description of the holder, such as height or eye-color; any government-issued picture ID issued by any government will do. It is unclear whether expired government-issued ID credentials are acceptable. Many model laws permit their use for a specified period after expiration.
23. The creation of a recording of the entire remotely performed notarial act, from start to finish, is vital to the integrity of remote online notarizations. Indeed, it may be the single most important deterrent of fraud or notarial negligence because wrongdoers seldom consent to being video-recorded in the wrongful act. But the Bill does not require this. It only requires the notary to retain a copy of the recording of the audio-visual conference used to ascertain a document signer’s identity. A “notation” of any type of other identification used is also required, but it is unclear where the notation is to be made or what the notation must contain.
24. All model notarial laws require the notary to create a notarial certificate of each notarial act, whether in person or online. The model laws authorizing remote online notarization extend

that paper certificate requirement to the notarization of electronic documents. The Bill does not require creation of an electronic notarial certificate or specify its contents or form.

25. Additionally, all model notarial laws require the notary to maintain a journal of each notarial act performed or declined, and specify what each journal entry must contain. This is also a recommendation of the New York Grand Jury. Current New York law does not mandate maintenance of a journal for any notarial acts. The Bill does not require a journal entry of each electronic notarial act.
26. The Bill focuses on the electronic notarial signature, but does not make clear that this signature must be applied to an electronic certificate which itself must be attached to the electronic record to which it applies. The Bill only provides that any remote online notarial certificate, if created, contain the statement that the signatory appeared remotely online. The Bill sets no other requirements for the certificate.
27. The Bill also omits any requirement for attachment of an official seal or stamp by the notary. This is contrary to all model acts.
28. The Bill defines the term “Electronic notarial statement of authority,” but does not use it in the text of the law for any purpose. It also defines the term “electronic notarial acts”, but in section 2 dealing with audio-visual technology, it refers to “electronic notarizations.”
29. The Bill does not authorize the notary to decline to perform a notarial act if the notary is not satisfied that the signer is acting voluntarily (not under duress) or has requisite knowledge or capacity to understand the consequences of signing the document. This is a standard provision in model notarial acts.
30. The Bill makes no provision for the posting of surety bonds by electronic notaries.
31. The Bill’s section 5(a) requires the notary to apply his electronic signature to the electronic document. That is not what occurs in a notarization. The notary applies his signature to the notarial certificate which certificate is affixed, attached or logically associated with the document. This section is also unclear in requiring that the notarial signature have the effect of causing the removal or alteration of the signature to be detectable and to render evidence of alteration of the document that may invalidate the electronic notarial act. The required effect of the attachment of the notarial certificate (whether or not altered or removed) should be to render any subsequent change to the electronic document evident (“tamper evident”), not to cause removal or alteration *of the notarial signature* to be detectable.
32. Section 5(b) of the Bill is also confusing in that it provides when a notary’s electronic signature is “deemed reliable.” First, it is unclear why this is in the Bill because the Bill does not utilize the concept of a “reliable” electronic signature for any purpose. Second, the Bill does not specify the effect or consequence of an electronic signature’s not being “deemed reliable.” Third, the requirements for reliability are actually taken from regulations of the Office of Information Technology and, thereby, unnecessarily transform them from modifiable rules of that office into statutory requirements requiring legislative change. Fourth, some of the

requirements may have been satisfied at the time of a notarization but may subsequently cease to be satisfied (such as the notary's sole control of the electronic signature); it is unclear whether this would retroactively render a notarization invalid. Furthermore, it is not possible for persons relying on the notary to confirm satisfaction of these conditions at the time of the notarization.

33. The Bill permits a paper copy of a notarized electronic record to be recorded as an original, but fails to provide for how such a copy is created. The Bill itself does not authorize the notary to certify that a paper copy of an electronic document is a true copy, which is required for recordation, and Executive Law § 135 does not empower a notary to certify true and correct copies of records.