
To: Members of House Health Government and Operations Committee
From: MSBA Estate & Trust Law Section
Date: March 15, 2021
Subject: **HB 1265** – State Government – Notarial Acts – Remote Notarizations
Position: **Support**

The Estate and Trust Law Section of the Maryland State Bar Association (MSBA) **supports** House Bill 1265 – **State Government – Notarial Acts – Remote Notarizations**. **House Bill 1265** clarifies the requirements associated with identifying the person who is the subject of the notarial act and develops the procedure for a remote notarization of a tangible record, a "remote ink notarization" or "RIN."

Description of Current Law

At the time the COVID-19 shutdown began in March 2020, Title 18 of the State Government Section of the Maryland Code did not permit remote notarizations. Acting quickly to reduce in-person meetings, Governor Hogan issued Order of the Governor Number 20-03-30-04 which permitted remote notarizations using video conferencing technology (the "Emergency Order"). Practitioners in Estates and Trusts performed notarial acts under the Emergency Order primarily in two ways:

- By signing counterparts—the remotely located individual (referred to herein as the "individual") and the notary would have duplicate copies of the tangible record and would each sign their copy. The original signatures would then be compiled.
- By transmitting the signed record by fax, mail, or email to the notary who would then perform the notarial act.

On October 1, 2020, in the middle of the pandemic, an amendment to Title 18 that had been passed during the 2019 Session became effective. That amendment, the Revised Uniform Law on Notarial Acts ("RULONA"), provided a permanent structure for remote notarizations but specifically excluded wills and trusts from its remote notarization provisions. Governor Hogan passed a second emergency order, Order of the Governor Number 20-09-29-01, which suspended

RULONA's exclusion of wills and trusts so that those documents could be notarized remotely under the terms of RULONA while the state of emergency continued.

There is a substantial difference between how remote notarizations are performed under the Emergency Order and under the terms of RULONA. RULONA, as interpreted by the Secretary of State's binding guidance, does not permit remote notarizations of tangible records, RINs. Instead, a remote notarization under RULONA must be done electronically through one of the 11 vendors approved by the Secretary of State. These remote electronic notarizations are known as "remote online notarizations" or "RONs."

RULONA also set in place a highly technical method of confirming an individual's identify when the notary is unable to identify them by personal knowledge or the testimony of a credible witness. This procedure is known as identity proofing and credential analysis.

Problem with the Current Law

There are three ways a notary may identify a person appearing before him or her: personal knowledge, testimony of a credible witness, or presentation of identification. *See* 18-214(a)(1) of the State Government Section. These methods of identification are not specific to remote notarizations, they have been the generally accepted methods. *See* 18-206. Because it would be difficult to examine identification over a video conference, RULONA established the identify proofing and credential analysis process so that an individual's identity could be established through electronic means. *See* 18-214(a)(1)(iii). Because the identify proofing a credential analysis process was created to address the unique issues present when a notary must identify an otherwise unknown individual over a video conference, it only applies when a notary cannot identify an individual by personal knowledge or testimony of a credible witness. *See* 18-214(a)(1)(iii).

Even though 18-214(a)(1) states that the identify proofing and credential analysis process is only necessary when the notary identifies an individual through the presentation of identification and *not* by personal knowledge or the testimony of a credible witness, the section setting out the procedures for identity proofing and credential analysis, 18-223, can be interpreted to apply to all remote notarizations. This application of identify proofing and credential analysis to every remote notarization would be a departure from the traditional means of identifying an individual and is not consistent with the requirements articulated in 18-214(a)(1). This lack of clarity leaves notaries uncertain about the proper procedure for identifying an individual during a remote notarization.

RULONA poses another issue, it was drafted with RONs in mind, not RINs. While acting under the Emergency Order, the bar had become accustomed to using RINs. RINs worked especially well for smaller firms that can not afford the annual and transaction fees associated with RON vendors (for a summary of these fees, see Appendix 1) and for clients who are not tech-literate. Adopting legislation that permits *both* RONs and RINs is a trend in many states. *See* Appendix 2.

How the Legislation Solves the Problem

HB 1265 clarifies that the identity proofing and credential analysis procedure is only required when a notary identifies an individual through the presentation of identification, but that it is not necessary when the notary identifies the individual by personal knowledge or testimony of a credible witness.

HB 1265 permanently removes the exclusion of wills and trusts from RULONA's remote notary provisions.

HB 1265 also adds 18-214.1 to Title 18 to allow RINs. Similar to the Emergency Order, Section 18-214.1 permits a notary to perform a notarial act remotely on a tangible record. There are two acceptable methods to perform a RIN under 18-214.1, both require the notary and the individual to be on an audio-video call. First, a notary may notarize the tangible record that the individual has signed and then sent to the notary. *See* 18-214.1(a). Second, a notary may notarize a counterpart of the tangible record. *See* 18-214.1(b).

For either situation, the individual must complete a declaration stating that the tangible record is the same, whether transmitted or in counterpart, that the notary notarized. This notarial act is still subject to the proviso under 18-214(a)(2) that the notary be "reasonably able to confirm that a record before the notary public is the same record in which the remotely located individual made a statement or on which the individual executed a signature."

Permitting RINs is not merely a matter of convenience, nor is it limited in scope to a pandemic. Many individuals, whether due to their health or disability, are unable to leave their homes for the purpose of having a document notarized. Those same individuals frequently struggle with the more complex technology involved in RINs. As a result, some individuals effectively do not have access to a notary. This raises access to justice concerns that could be addressed, in many situations, by the availability of RINs.

For the reasons stated above, the Estate and Trust Law Section of the MSBA **supports HB 1265 and urges a favorable committee report.**

For Further Information, Please Contact:

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