
To: Members of Senate Judicial Proceedings Committee

From: MSBA Estate & Trust Law Section

Date: February 9, 2022

Subject: SB 317 – Notarial Acts - Fees and Use of Communication Technology

Position: Support

The Estate and Trust Law Section of the Maryland State Bar Association (MSBA) **supports** Senate Bill 317 – **Notarial Acts - Fees and Use of Communication Technology**. **Senate Bill 317** seeks to amend Maryland’s Revised Uniform Law on Notarial Acts (“RULONA”) by (i) removing the exclusion of wills and trusts from being electronically notarized, (ii) clarifying a troublesome ambiguity in the law regarding credential analysis and identify proofing, (iii) permitting the use of remote ink notarizations with appropriate safeguards, and (iv) authorizing the Secretary of State to increase the outdated fees for notarial acts within certain reasonable limits.

Description of Current Law. The four parts to this bill are addressed separately below:
[Section references are to the State Government Article unless indicated otherwise.]

I. Application to Trusts and Wills

Currently, § 18-214(a) of RULONA excludes wills and trusts from being electronically notarized; however, Maryland’s new e-wills statute, § 4-102 of the Estates and Trusts Article, contains a conflicting provision that requires a notary to be involved with the execution of every electronic will. As a result of this conflict, no electronic wills may be signed in Maryland at this time. With the onset of the COVID-19 pandemic, trusts and estates attorneys found that it was critical to be able to remotely execute estate planning documents when an in-person signing was neither safe nor efficient. In response to this fundamental need, the Order of the Governor Number 20-09-29-01 (the “Emergency Order”) was issued permitting wills and other estate planning documents to be remotely and electronically executed so long as they were appropriately witnessed and signed under the careful supervision of a Maryland licensed attorney (a “Supervising Attorney”). Although Maryland law never required wills to be notarized, the Emergency Order also suspended the provisions of RULONA which excluded wills and trusts from being electronically notarized. Trusts and estates attorneys routinely took advantage of the Emergency Order to safely and efficiently assist Maryland residents with the remote execution of their fundamental estate planning

documents. However, effective August 15, 2021, the Emergency Order lapsed and these important rights vanished.

During the 2021 Session of the Maryland General Assembly, a permanent solution to allow the remote and electronic execution of wills and other estate planning documents was sought and, effective October 1, 2021, § 4-102 of the Estates and Trusts Article was revised to permit electronically and remotely executed wills (“e-wills”) so long as they contained a self-proving affidavit signed before a notary, along with a number of other protections. In sum, now that we have sufficient safeguards in place with respect to the remote and electronic execution of wills, it is both safe and appropriate to revise RULONA to permit wills to be electronically notarized.

With respect to trusts, Maryland law has never required trusts to be notarized and there are no specific execution requirements for trusts in Maryland. However, trusts and estates attorneys routinely advise clients to sign their trusts before a notary to enhance the integrity of the trusts especially with respect to real estate transfers. The Maryland Trust Act, §§14.5-101 to 14.5-1006 of the Estates and Trusts Article, imposes comprehensive safeguards pertaining to the creation, validity, administration and enforcement of trusts including, without limitation, revocable trusts which are commonly considered will-substitutes and included by many as part of their fundamental estate plan. Unfortunately, under current law, when an in-person signing is neither safe nor efficient, Maryland citizens are not permitted to have their trusts electronically notarized when seeking to implement their estate planning documents. In light of our newfound reliance on remote and electronic execution of documents with appropriate safeguards, the exclusion of trusts from being electronically notarized has become burdensome and forces in-person document executions even when it is not safe or efficient to do so.

II. Clarification Regarding When Identity Proofing and Credential Analysis are Required

Traditionally, a notary could identify an individual seeking a notarization in any one of three ways: (1) personal knowledge, (2) oath or affirmation of a credible witness, **or** (3) through presentation of satisfactory evidence of identification. If a notary could identify the individual by personal knowledge or the testimony of a credible witness, it was not necessary for the individual to present identification. Section 18-214(a)(1) of RULONA sets out these three same ways for a notary to identify a remotely located individual when performing a notarial act using communication technology. As with the traditional approach, any one of the three methods of identification are sufficient as is evident from the use of the term "or" in § 18-214(a)(1). When the third method is used for identifying the signor, i.e. “satisfactory evidence of identification”, § 18-214(a)(1)(iii) states that the notary must undertake a specific process including the presentation of identification, credential analysis, and identify proofing following the extensive procedures set forth in § 18-223.

It is important to emphasize that the identify proofing and credential analysis method is only relevant when the third method—presentation of identification—is used. As with traditional notarizations, if a notary can identify the remotely located individual by personal knowledge or upon the oath or affirmation of a credible witness, the presentation of identification, credential analysis, and identify proofing is not necessary.

The problem arises when we turn to § 18-223 which conflicts with § 18-214(a)(1) because it uses overly broad language that may be read to imply that comprehensive identity proofing and credential analysis are required for every remote notarization – not just in situations where the

notary uses “satisfactory evidence of identification” to identifying the signor under § 18-214(a)(1)(iii). It is non-sensical and burdensome to require time consuming and expensive identity proofing and credential analysis where there is personal knowledge of the signor or where there is a credible witness who affirms the identity of the signor, and, as stated, it directly contradicts the identification requirements set out in § 18-214(a)(1).

III. Need for Remote Ink Notarizations

RULONA expressly permits the use of remote online notarizations, sometimes called “RONs”, but does not expressly permit remote ink notarizations, sometimes called “RINs”. RONs involve document execution and notarization with all electronic signatures and RINs involve the execution of a tangible record (i.e. paper), rather than electronic execution. While acting under the Emergency Order, which permitted the use of RINs, Maryland attorneys and notaries became accustomed to using RINs. RINs worked especially well for smaller firms that cannot afford the annual and transaction fees associated with RON vendors and for clients who are not tech-literate. Currently, a person who is not computer savvy or comfortable with electronic signatures is denied the option of having essential documents remotely notarized. Currently, only electronic signatures can be remotely notarized. This is a denial of access to justice for many elderly who are not tech-literate or comfortable with signing electronically, but instead desire to sign a tangible record (i.e. paper copy) in the remote presences of a notary.

IV. Problems With Fee Structure for Notarial Acts

The \$4 fee limit for a notary act under § 8-107 is obsolete. Almost all remote notarization platform vendors charge a fee per transaction (averaging approximately \$25 per transaction) that far exceeds the current amount a notary can recoup from the individual under § 18-107. These out-of-pocket costs per transaction plus the annual fees place a financial burden on many solo and small firms and many Maryland notaries simply will not perform remote notarizations because of the cost burden. Allowing the Secretary of State to adopt regulations increasing the fee will help alleviate this burden. If we do not allow the Secretary of State to set a reasonable fee for remote notarizations, we are essentially forcing Maryland residents to use out of state notaries from jurisdictions that allow a reasonable fee to be charged. Notarizations that are completed in conformance with another state’s laws have always been accepted in Maryland; however, the Secretary of State has no ability to regulate out of state notaries.

V. Confirmation of Validity

Prior to RULONA's October 1, 2020 effective date, Maryland law did not permit remote notarizations. To provide a means of notarizing documents without compromising individual's health during the COVID-19 pandemic, Governor Hogan issued Order Number 20-03-30-04. This order authorized remote notarizations during the state of the emergency caused by COVID-19. Governor Hogan amended this Order by issuing Order Number 20-09-29-01. There is now a need to confirm the validity of the remote notarizations performed under these emergency orders.

How the Legislation Solves the Problem:

I. Removing Exclusion for Wills and Trusts. SB 317 would remove the carve out at the beginning of § 18-214(a) that excludes wills and trusts from RULONA's provisions relating to remote and electronic notarizations.

II. Clarification Regarding Credential Analysis and Identify Proofing. SB 317 would add language to § 18-214(h)(3) and § 18-223(a)-(d) clarifying that credential analysis and identity proofing are only necessary when a notary identifies a remotely located individual by the presentation of identification method.

III. Permitting the Use of Remote Ink Notarizations (RINs). SB 317 would revise § 18-214.1 to permit a notary to perform a notarial act remotely on a tangible record, which is what we are referring to as RINs (remote ink notarizations). A notary may notarize the tangible record that the individual has signed and then sent to the notary. The individual must complete a declaration stating that the tangible record is the same record that the notary notarized. This notarial act is still subject to the requirements of § 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." Further, as with other remote notarial acts, (i) the notary and the individual must participate in an audio-video session and (ii) any notary performing RINs has to notify the Secretary of State that they are performing remote notarizations and the methods they are using. This change provides greater access to justice for Maryland citizens by giving them the important option of signing a tangible record (i.e. paper) in the remote presence of a notary when they are not comfortable or able to provide an electronic signature.

IV. Permitting Secretary of State to Increase Fees for Notarial Acts. The proposed bill revises § 18-107 to permit the Secretary of State to adopt regulations increasing the fees that can be charged for a notarial act from \$4 to \$25 for an original notarial act and from \$4 for \$50 for a notarial act performed under § 18-214. Giving the Secretary of State the power to increase fees from time to time within the above stated limits will allow it to encourage Maryland notaries to perform remote notarizations and help eliminate a situation where Maryland residents are forced to use out-of-state notaries that the Secretary of State cannot regulate.

V. Confirmation of Validity. The proposed legislation would add § 18-301 which affirms that any notarization done in conformance with either of Governor Hogan's Order Number 20-03-30-04 and Order Number 20-09-29-01 shall be valid.

For the reasons stated above, the Estate and Trust Law Section of the MSBA **supports SB 317 and urges a favorable committee report. For Further Information, Please Contact:**

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