

Remote Online Notarization - A Sea Change for a Longstanding Legal Requirement
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Most individuals have at some point had special documents executed in the presence of a notary public- perhaps in connection with estate planning, banking, or the purchase or sale of real estate. Massachusetts, like many other states throughout the Country, has a very specific and particular set of statutory requirements for notaries public compliance. In fact, to become a notary individuals must complete an application, and obtain signatures of known and respected members of their community, and then swear an oath to abide by the Massachusetts law.

Further, the process of a document being certified by a notary likewise follows a strict set of statutory disciplines- most notably, that the notary and the individual executing the document be physically located together “in person.” This “in person” requirement has been part the statutory regime since the inception of the notary statutes.

However, not unlike the countless other challenges that arose during the COVID shutdown, it became difficult for parties to meet in person for notary purposes. As a result, on April 27, 2020, Governor Charlie Baker signed into law an act providing for virtual notarization to address challenges related to COVID. The act permitted notaries in the Commonwealth to notarize documents remotely with the assistance of electronic videoconferencing technology but has since ended and been repealed.

As a result of the temporary change, parties throughout the Commonwealth undoubtedly became accustomed to the convenience and practicality of the ability or remote notary, but with the protections put in place to ensure the integrity of the process. Recognizing the benefits that came about, the Legislature has enacted a new law that will make virtual/remote notary a permanent feature of the Commonwealth. Indeed, the Massachusetts legislature has enacted, and the Governor has signed into law, Chapter 2 of the Acts of 2023 (the “Acts of 2023”) which specifically make extensive changes to notarial law in Massachusetts to become effective as of January 1, 2024. The substantive provisions of this law are distinctive from those in the now-repealed Acts and while the specifics of the law is currently being composed by the state regulatory lawmakers- the new law will have some certain features.

Under Section 28 of Chapter 2 of the Acts of 2023, a notary public physically located in the Commonwealth may perform a notarial act using communication technology, like Zoom, for a remotely located individual if the notary public:

(i)(A) has personal knowledge of the identity of the remotely located individual; (B) has identified the remotely-located individual by means of an oath or affirmation of a credible witness unaffected by the document or transaction who is personally known to the notary public and who personally

knows the remote-located individual; or (C) can reasonably identify the remotely located individual by not less than 2 different types of identity proofing process or services;

(ii) is able to execute the notarial act in a single, real-time session;

(iii) is 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 remotely-located individual executed signature; and

(iv) the notary public, or a person acting on their behalf, creates an audio-visual recording of the performance of the notarial act.

While Chapter 2 of the Acts of 2023 revises relevant sections of the Act to continue to allow notarization via electronic means, there are notable distinctions in the revisions.

Notable Distinctions in the Act

1. The Acts of 2023 allow for electronic notarial seals. The notary public can attach the notary's electronic signature and electronic seal to an electronic record using a digital certificate in a manner that is capable of independent verification and renders any subsequent modification to the electronic document evident.
2. The Acts of 2023 allow for remote notarizations with technology approved by the Secretary of the Commonwealth. A notary public may select one or more tamper-evident technologies to perform notarial acts with respect to electronic records. Any technology approved by the state secretary and selected by the notary shall require the notary's electronic signature and electronic seal to be:
 - (i) unique to the notary public;
 - (ii) capable of independent verification;
 - (iii) retained under the sole control of the notary public; and
 - (iv) attached to or logically associated with the electronic record in a tamper-evident manner.
3. The Acts of 2023 create a registry for individuals seeking to notarize documents electronically. Before a notary public performs the initial notarization using communication technology, the notary public must register as a remote notary with the

state secretary, inform the state that they intend to perform remote notarization and identify the technology that will be used. The state secretary will create and maintain a registry of service providers who meet the established standards.

4. The Acts of 2023 require that notaries be located in the Commonwealth of Massachusetts. A notary public physically located in the Commonwealth may perform a notarial act using communication technology for a remotely located individual if the notary public meets the above-referenced criteria.
5. The Acts of 2023 require attorney-managed closings for one to four residential homes. However, this does not extend to commercial transactions. With respect to any document executed in the course of a closing, only a notary public who is an attorney licensed to practice law in the Commonwealth or a non-attorney under the direct supervision of the attorney managing the closing, shall perform an acknowledgment, affirmation or other notarial act utilizing communication technology. Many of the activities that necessarily are included in conducting a real estate closing constitute the “practice of law” and as a result, the person performing them must be an attorney.
6. Finally, pursuant to the Acts of 2023, notaries must retain electronic records for a period of ten years.

Future Implications

Naturally, one may consider what else is to come moving forward due to these revisions. The remote online notarization bill will go into effect on January 1, 2024.

Pursuant to the Acts of 2023, the state secretary may require the completion of a course to address the duties, obligations, and technology requirements for conducting remote notarizations offered by the state secretary or vendors approved by the state secretary. However, if such a course is required, its duration will not exceed three hours.

In the event that this course is required, it must be successfully completed prior to notarizing any documents electronically. Most notably, certification of completion of the course would be a requirement in addition to registration with the state secretary.

The Commonwealth is no doubt following a growing trend in permanently solidifying the virtual notary revisions made in response to COVID. In doing so, it will allow both permitted attorneys and paralegals alike increased flexibility in the notarial act required when executing documents. Overall, this legislation will allow a streamlined process for attorneys and their clients in addition to the cost benefit.

While the Acts of 2023 are sure to continue evolving, it is imperative to stay informed regarding further changes and it is our continued attention to this legislation that will allow us to provide the insight you may need ahead of the curve.