

# Leimberg Information Services, Inc.

## Steve Leimberg's Estate Planning Email Newsletter - Archive Message #2794

**Date:** 11-May-20  
**From:** Steve Leimberg's Estate Planning Newsletter  
**Subject:** [Martin M. Shenkman, Jonathan Blattmachr, Andrew Wolfe & Thomas A. Tietz on the Slow Return to the New Normal and Different Approaches to Signing/Executing Estate Planning Documents](#)

*"The current COVID-19 pandemic has made it more important than ever for individuals to establish (or update) their core estate planning documents. Before COVID-19, the client would simply visit an attorney's office in order to sign core documents under the attorney's supervision and with the lawyer providing the witnesses and/or a notary public. In many instances, attorneys would have two witnesses and a notary on all documents, because it would meet most, if not all, state statutory requirements to sign the various documents and it was easy to do so.*

*However, the current situation is anything but normal, with the COVID-19 pandemic requiring social distancing, sheltering-in-place and an associated lockdown of non-essential businesses. Even as restrictions are beginning to lift, clients who are older or have underlying health conditions may continue to be concerned about close contact that in the past had been taken for granted as part of any estate planning signing ceremony.*

*This newsletter will provide an overview of different approaches to signing documents that various practitioners have considered or used in the current environment. In addition, a discussion of some of the general concepts of state law requirements for the valid execution of these core documents will be provided. Several checklists and samples will be provided to assist practitioners. Finally, a summary of the laws in several states prepared by practitioners in those jurisdictions will be provided. It is hoped that the general and various state discussions, and sample documentation, will be a practical aid to practitioners dealing with these challenging times."*

**Marty Shenkman, Jonathan Blattmachr, Andrew Wolfe and Tom Tietz** provide [LISI](#) members with helpful commentary that provides an overview of the different approaches to signing documents that various practitioners have considered or used in the current environment. In addition, a discussion of some of the general concepts of state law requirements for the valid execution of these core documents is provided. Several checklists and samples are included to assist practitioners. Finally, a summary of the laws in several states was prepared by the leading practitioners in those jurisdictions. It is hoped that the general and various state discussions, and sample documentation, will be a practical aid to practitioners dealing with these challenging times. If you would like to submit a summary for a state that has not been included above please email [shenkman@shenkmanlaw.com](mailto:shenkman@shenkmanlaw.com) and we will update this newsletter.

Their commentary can be found at this link: [Different Approaches to Signing/Executing Estate Planning Documents](#)

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

# Slow Return to the “New Normal”

By: Martin M. Shenkman, Esq., Jonathan Blattmachr, Esq., Andrew Wolfe, Esq., and Thomas A. Tietz, Esq

## State summaries by the following:

Alaska – Abigail O’Connor, Esq.

Arizona – Yaser Ali, Esq. Ali Legal, PLC

California – Matt Brown, Esq., Brown and Streza

Florida – John N. Beck, Esq. and Alan Gassman Esq., Gassman, Crotty and Denicolo, PA

Iowa – Mary Vandernack, Esq., Vandernack Weaver LLC

Kentucky – Turney P. Berry, Esq., Wyatt, Tarrant & Combs, LLP

Massachusetts - Ruth Mattson, Esq., Vacovec, Mayotte & Singer, LLP

Michigan – Anthony P. Cracchiolo, Esq. Bodman PLC

Nebraska – Mary Vandernack, Esq., Vandernack Weaver LLC

New Jersey – Andrew Wolfe, Esq., Thomas A. Tietz, Esq., and Martin M. Shenkman, Esq.

New York – Mitchell Gans, Esq.

South Dakota – Ashley G. Blake, Esq., Davenport, Evans Hurwitz & Smith, LLLP

Texas – Patrick Gordon, Esq. and Joshua Snider, Esq., Gordon Davis Johnson & Shane PC

Virginia – Andrew Hook, Esq., Hook Law Center

**If you would like to submit a summary for a state that has not been included above please email [shenkman@shenkmanlaw.com](mailto:shenkman@shenkmanlaw.com) and we will update this LISI article.**

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# Executing Estate Planning Documents During the Pandemic and the Slow Return to the “New Normal”

## 1. Introduction.

- a. The current COVID-19 pandemic has made it more important than ever for individuals to establish (or update) their core estate planning documents. These core documents will generally include a will (and often a revocable living trust) for testamentary dispositions as well as a durable power of attorney for financial matters while the client is living. For health care matters this may include a health care power of attorney (i.e. a health care proxy), living will, HIPAA (Health Insurance Portability and Accountability Act) release that allows a named agent to view protected Private Health Information (“PHI”), DNR (do not resuscitate order), and perhaps a POLST (physician order for life sustaining treatment).
- b. Clients often neglect to update their core documents. The fears of effects of COVID-19 and the horrifying number of deaths from the virus may drive many clients to update, or create for the first time, critical estate planning documents. Apart from the general reasons to update documents, COVID-19 itself raises special circumstances that might warrant a client revising documents. These might include:
  - i. If a blanket prohibition against intubation is included in various health care documents it could prevent the client from being placed on a ventilator, if necessary, to survive COVID-19. Any such prohibitions should be discussed with the client and modified accordingly to comport with current concerns and comfort level.
  - ii. The need to revise a springing power of attorney to make it effective immediately in light of the current difficulty of the client being examined by one or two physicians to confirm incapacity (or otherwise triggering whatever springing mechanism is contained in the documents). With the current stress healthcare providers are under, it may prove difficult if not impossible to find a physician(s) to make the determination required in a springing power thereby effectively rendering that power inoperable, unless it is modified as indicated.
  - iii. Providing express permission for an agent under a durable or health care power of attorney to communicate with institutions and individuals by telephone or electronically, such as via Zoom, FaceTime, GoToMeeting or similar systems, and to hold harmless the third parties relying on such communications.
  - iv. To shift the client’s dispositive documents to a revocable trust to avoid probate, not only because of the historic concerns with costs and time delays of probate, but because of the reality that many surrogate or probate courts have closed during the COVID-19 shutdown and may have incredible backlogs when they reopen.
- c. Clients should also review and update, as necessary, beneficiary designation forms for life insurance, IRAs, other qualified retirement plans and other assets that will have property pass by such designations. With the recent enactment of the SECURE Act in December 2019, many clients have not had time to respond

and update beneficiary designations or create, where now appropriate, conduit or accumulation trusts. These changes may be quite important, but clients and practitioners will need to grapple with the issues of how to properly execute a new beneficiary designation and trust during COVID-19.

- d. Before COVID-19, the client would simply visit an attorney's office in order to sign core documents under the attorney's supervision and with the lawyer providing the witnesses and/or a notary public. In many instances, attorneys would have two witnesses and a notary on all documents, because it would meet most, if not all, state statutory requirements to sign the various documents and it was easy to do so. It was also easier from an administrative perspective to have all documents signed with the same formalities, regardless of what the actual requirements were for any specific document.
  - e. However, the current situation is anything but normal, with the COVID-19 pandemic requiring social distancing, sheltering-in-place and an associated lockdown of non-essential businesses. Even as restrictions are beginning to lift, clients who are older or have underlying health conditions may continue to be concerned about close contact that in the past had been taken for granted as part of any estate planning signing ceremony.
  - f. This newsletter will provide an overview of different approaches to signing documents that various practitioners have considered or used in the current environment. In addition, a discussion of some of the general concepts of state law requirements for the valid execution of these core documents will be provided. Several checklists and samples will be provided to assist practitioners. Finally, a summary of the laws in several states prepared by practitioners in those jurisdictions will be provided. It is hoped that the general and various state discussions, and sample documentation, will be a practical aid to practitioners dealing with these challenging times.
  - g. Even if the social distancing and other restrictions are lifted, there is no assurance that that a resurgence of COVID-19 will not occur at a later date and the same issues arise again. Finally, even if COVID-19 is contained and a vaccine discovered, client comfort and preferences for signings may change forever. Hopefully, there will be a movement towards more flexibility in the signing of documents, including electronic and virtual signings that will provide permanent, practical and technically sound solutions for the long term.
2. **The Challenges of Signing.**
- a. The strict requirements for valid execution of certain core documents will often present a problem during the COVID-19 pandemic due to the social distancing and stay-at-home orders that prevent clients from visiting their attorneys' offices to execute their documents.
  - b. Practitioners should not assume that these issues will resolve near term as restrictions are relaxed. As noted above, many clients will remain concerned about close quarter signings, and a resurgence may occur.
  - c. Beyond the legal mandates and executive orders, many clients, particularly the elderly and infirmed, are and may remain appropriately reluctant to place themselves within the orbit of perceived risk of contracting the COVID-19 virus. In many instances, it may be impossible to arrange for multiple individuals to

witness the client's will or other core document or to have a client meet with a notary in person.

- d. Practitioners must also consider that many of the legal leniencies provided for by various states may only apply while a state of emergency remains in effect. These leniencies may then lapse. Further, even if a document is signed in conformity with a temporary measure enacted to address COVID-19 restrictions, is that first time special rule a comfortable signing arrangement to rely on once the temporary measures are no longer in effect after the state of emergency is rescinded? There may be little or no law interpreting the temporary measures. Thus, if a client is well following relaxation of the COVID-19 restrictions, might prudence suggest having the client resign the documents with more traditionally accepted procedures?
3. **Different Standards by State.**
  - a. Each state has different laws governing signing formalities.
  - b. These differences are further compounded by different approaches taken, or not, by various states to address the practical difficulties of signing documents during COVID-19.
  - c. Exhibit 4 provides a summary of the laws of different states so that practitioners can compare what different states have done, and perhaps elucidate how they choose to handle a signing in their home state.
  - d. For a table of all states with links to relevant statutes see the ACTEC commentary at <https://www.actec.org/resources/emergency-remote-notarization-and-witnessing-orders/>
4. **Different Requirements for Each Document Even within the Same State.**
  - a. There are often significant differences between the execution requirements for the various core documents. These differences create additional challenges for practitioners and clients, especially during COVID-19.
  - b. There seems to be little logic in requiring witnesses for a will, no witnesses for a trust, and requiring either witnesses or a notary for a power of attorney, when all of those documents govern the administration of a person's property. But that is the way it currently is structured in most states.
  - c. The witnesses to a will are supposed to ensure that the testator has the requisite capacity to sign the will and is not being coerced or unduly influenced. While those are certainly proper objectives, how many witnesses, in reality, truly know the testator and have the requisite level of knowledge to provide this kind of protection? Further, might a recorded web signing that permanently documents the events surrounding the signing be a better protection than the memory of witnesses, such as paralegals who might witness more than a hundred signings every year and have no actual recollection of any particular signing?
  - d. Consider whether there should be a single set of standards for all of these estate planning documents, and consistent execution requirements. Moreover, those execution requirements need to be updated for the 21st century and reengineered to balance the protection of the client from potential wrongdoers with making the execution requirements reasonable and approachable.
5. **Emergency Legislation and Actions.**

- a. Many states have enacted emergency legislation, or their governors have issued executive orders, authorizing remote online notarizations and other leniencies to formalities normally required to execute certain documents. As noted above, practitioners should be cautious as many of these modifications are only effective for a short duration of time specified, or only when a state of emergency continues in the state enabling the leniency.
  - b. Remote notarization should not be confused with electronic will legislation which, although passed in a few states, has not yet been introduced in most states.
  - c. The emergency legislation passed in some states may help attorneys assist clients in the proper execution of their core documents for the duration of COVID-19. However, some of these efforts have resulted in leniencies that may be too complicated or difficult for some clients to implement.
  - d. Generally speaking, wills and codicils must be executed in the presence of two witnesses in order to be presumptively valid. When a client already has those witnesses available, the use of a remote notary or other officer to acknowledge the will or codicil may make the document “self-proving” under applicable state law, thereby streamlining the probate process at death. Where the goal of remote notarization is difficult to achieve, the use of a pour over will and revocable trust may be preferred as an alternative to streamlining the probate process.
  - e. If a client does not have the required witnesses available, remotely executing a will or codicil in the presence of a notary or other officer may nonetheless provide additional support that the will or codicil qualifies as a “writing intended to be a will or codicil” which may, in some states, be admitted to probate even without the required formalities of execution. Practitioners should consider cautioning clients as to the costs and delays that would be involved in having a document admitted to probate as a writing intended to be a will or codicil, and recommend that all documents be resigned at a later date when witnesses are available to complete a document that meets the statutory requirements. These “emergent” steps should be considered only as a “stop-gap” to be used while the crisis is ongoing.
6. **Approaches That Might Be Considered for Signing Documents.**
- a. **Introduction.**
    - i. Traditional signings may still be possible, and no doubt practitioners are still using traditional signings, appropriately modified for COVID-19 concerns, to have documents executed. This might simply be the traditional signing with everyone wearing masks and gloves, each person having their own pen, and lots of Purell and Lysol spray. But the reality is that for many situations now, and even in the coming months or longer, the traditional approach might not suffice.
    - ii. The following is a discussion of options that practitioners might consider in light of a particular client’s circumstances and applicable state law (traditional state law, and any temporary measures if still effective when the signing is to occur) for accomplishing the desired execution of core estate planning documents. Some of these involve signings outside the usual office setting, but with proper social distancing and minimization of the COVID-19 risks to clients, attorneys and their staff. Some of these

suggestions certainly will not work in some or many states. The goal of this article is to give practitioners as many options and ideas as possible so that they can be tailored to address whatever circumstances a practitioner is facing, and obviously to conform with local law.

b. **Client Signs at Home with Witnesses and Notary.**

- i. For the client that can assemble two adult witnesses and a notary public (i.e., arrange for a mobile notary to visit their home wearing a mask and perhaps gloves as well), the attorney can organize and send all necessary documents to the client's home with tabs affixed at all points of signing and notarizing together with detailed execution instructions for the client.
- ii. As mentioned above, if necessary, the testator's spouse and/or adult children may, depending on applicable state law, act as witnesses to the will. Also, if possible, the attorney can setup a web meeting with the client in order to supervise the document signing remotely. The attorney might consider recording that signing to further corroborate the events that occur, and instructions given.

c. **Client Signs Using Neighbors as Witnesses.**

- i. For the client who can assemble two adult neighbors as witnesses, the attorney can organize and send all necessary documents to the client's home with sticky tabs affixed at all points of signing together with detailed execution instructions or provide the instructions live over the phone.
- ii. The client would arrange with two neighbors (or two adults living in one neighboring house) to meet outside 20 feet apart, all wearing gloves and masks. The client would announce the signing of the document and that they are requesting the neighbors to witness that document. After signing, the client would walk forward 10 feet and place the documents on the ground. The two neighbors would then walk forward 10 feet and witness the documents. The neighbors would then leave, and the client could walk forward and reclaim the documents, sending them to counsel in a prepaid provided overnight mail envelope.

d. **Client Signs Through Glass Window.**

- i. How can a practitioner aide a homebound client with age and health concerns who needs to sign a will and is reluctant to sign in the office, and who is also not comfortable with an electronic or virtual signing (if even permissible)?
- ii. The attorney can deliver the documents in an envelope to the client's door and then back off the porch and sufficiently far away for safety's sake. The client can then come to the front door and retrieve the envelope, go back into the house and stand visibly in front of a large first story living room window.
- iii. The attorney, witnesses and notary can stand outside the client's living room glass window and provide instructions to the client through the glass, supplemented, perhaps, via cell phone. So long as the witnesses and notary or other officer can see and hear the client, the signing of the will and self-proving affidavit should be effective under traditional will signing witnessing and notarization constructs.

- iv. After the client announces that the will has been read and understood and declared to be the client's will, the client can sign where indicated. Then the client returns the documents to the envelope and leaves them outside the front door. The attorney retrieves the envelope and the attorney, notary and other witness sign in front of the client (through the glass) and each other.
  - v. The above process should suffice to create a valid will while also protecting all those involved in the will execution ceremony.
  - vi. Alternatively, perhaps the original will can be mailed to the client several days before the scheduled signing, or an electronic copy emailed to the client so that the client can print the will at home, thereby minimizing the multiple handlings of the document. If so desired, the actual signatures of the witnesses and/or notary or other officer may, if state law permits, be added to the will within a reasonable time (i.e. 72 hours) after they witnessed the client's signing of the will or his or her acknowledgement of that signature or of the will itself. In the case of a client that has tested positive for the COVID-19 virus, this might allow sufficient time for the document to be free of any trace virus, helping protect all parties involved in the signing.
- e. **The "Drive By" Signing.**
- i. A "drive by" signing at the attorney's office or elsewhere is yet another option some attorneys have employed.
  - ii. The client can sign the will or other documents while remaining in his or her car, the witnesses and notary, or other officer, can remain at a safe distance outside of the car or in another car. The will or other documents can be passed to/from the client through an open car window. Or more safely, the client can sign and then leave the car, leave the documents on the hood of the car and get back in the car. The attorney, then each witness and notary can approach the car hood one at a time to sign.
  - iii. Similar to the signing through the glass window or door at the client's home, this "drive-by" signing should be effective so long as the witnesses and notary can see and hear the client throughout the document signing ceremony.
  - iv. Another option for a client who prefers not to sign documents from within the confines of his or her car or on the hood could be to setup a folding table and chairs (or a picnic table) in the parking lot of, or other property adjacent to, the attorney's office to be used for the document signing. The witnesses and notary would watch the document signing from a safe distance (provided they can see and hear the client) and then sign the documents either simultaneously or sometime later if permissible under applicable state law (i.e., after 72 hours) once any traces of virus would have faded.
  - v. Face masks and gloves should also be worn by all participants as appropriate.
- f. **Use of Holographic "Pour-Over" Will with a Revocable Trust.**

- i. If the situation is such that it is impossible or otherwise impracticable to assemble witnesses and a notary, the attorney might consider, depending on state law, having the client write in his or her own hand and sign a holographic will that is designed as a very short “pour over” will into a revocable trust. The holographic will does not require any witnesses or a notary to be considered valid. Note that some states, such as New York, permit holographic wills only in very limited circumstances, such as being a mariner at sea. Some states may not permit holographic wills at all. In any case, the holographic will should state that it is the writer’s last will and testament, name an executor (personal representative), waive bond, name a guardian for minor children, and provide to the disposition of all property to pass to the revocable trust, which if possible should be executed before the holographic will is made. The signing of the revocable trust can also be completed in some jurisdictions (but not in all, such as New York) with very little formality. In a state that has difficulty to accomplish formalities, it might be best to select the laws of another state by having a trustee located in that other (more lenient) state and a recital that that laws of the trustee’s state shall govern the validity of the document. This is discussed in the next section below.
- ii. This technique uses documents that are easy to execute and without relying on unproven electronic or remote signing, or a state’s temporary emergency legislation. Rather, it relies on longstanding statutes governing holographic wills and trusts.
- iii. In such case, the attorney should create a holographic will sample for the client to duplicate in his/her own handwriting. The attorney would also draft a revocable trust for the client with the desired testamentary language. This trust can be similar to any other revocable trust.
- iv. The attorney would then send the sample holographic will (to be handwritten by the client) via email or in hard copy by mail, as well as the actual revocable trust to the client. Email avoids the issue of paper documents potentially containing the virus, but that option will depend on the client’s ability to print a potentially long trust document at home.
- v. If the client has the ability to print the documents, the attorney can email the documents to the client. An email mechanism may permit the attorney to get a receipt confirming that the client has opened and downloaded the documents (e.g., ShareFile or Microsoft Outlook read receipt, etc.) That confirmation should be saved to the attorney’s system as a PDF to confirm the client had the document with ample time to review it before the signing. If the documents are physically mailed to the client, certified mail or an overnight courier with tracking to confirm receipt might be best to use so again counsel can save corroboration that the client received the documents in advance of signing to have permitted the client reasonable time to read and understand the documents.
- vi. The attorney might setup a web meeting with the client to provide instructions on how the client should write their holographic “pour-over” Will and then sign and date it. That meeting might be recorded, and the

recording saved, to prove that it was the client who wrote the holographic will.

- vii. The client should be instructed to copy the entire will below in his/her own handwriting, in ink, and then sign and date the document as instructed. If possible, the attorney should record the signing of the holographic will via webcam. That recording can be easily and inexpensively saved indefinitely on the law firm's computer system.
- viii. A sample Holographic Will is attached as Exhibit 1.

g. **Use of Holographic "Pour-Over" Will with a Revocable Trust Specifying Other State Law.**

- i. This is a slight variation on the above technique. Assume that the particular state has formalities for the execution of a revocable trust that are difficult to meet.
- ii. The revocable trust might name a trustee located in a state that has no requirements for witnessing or notarization for a revocable trust and apply that state's laws. For example, assume state law where the client resides requires a witness and notary for a revocable trust to be valid. The client might name an institutional trust company in Alaska as trustee. Alaska has no formalities for the proper execution of a revocable trust. Naming an Alaskan trust company to have nexus in Alaska would seem to permit the client to avail themselves of Alaska's more lenient rules, if necessary, to effectuate the signing. The trust should recite that its validity shall be determined under the laws of the trustee's domicile (e.g., Alaska).
- iii. This entire signing could be done as a web meeting, recorded and transcribed as further corroboration of what took place. See discussion below and Exhibit 3.

h. **Client Signs Via Recorded Web Meeting.**

- i. The will and other core documents can be sent to the client's home via regular mail, or preferably a type of mailing that has tracking to prove receipt, or via email also with a read receipt (to be printed by the client).
- ii. The client can thereafter sign the documents at home as part of a recorded web meeting, with all persons involved participating in the web meeting. The attorney, witnesses and notary or other officer will typically be participating in the ceremony remotely and not from the client's home. However, with proper social distancing, one or more of the witnesses and/or the notary can participate from the client's home. The notary or other officer can acknowledge the self-proving affidavit to the will or other documents remotely so long as all of the requirements of state law are satisfied. Moreover, the witnesses can properly attest to the client's signature so long as they can see and hear the client clearly via the videoconferencing technology.
- iii. The will or other documents will have to be "shared" by those involved for purposes of securing the necessary signatures. Perhaps, this can be done by emailing PDF copies of the document between the client and other participants in the web meeting, or by having each participant sign appropriate counterparts to the documents being executed. The signing

does not necessarily have to be simultaneous unless applicable state law requires that. If relevant statutory language permits the will acknowledgement to occur after-the-fact, the witnesses can sign the original will within a reasonable time (e.g., 30 days in New York) after they witnessed the signing of the will. This would allow the participants in the will signing to send the original document from participant to participant via overnight courier (e.g. Federal Express) envelopes that could be provided to each participant before the signing by the client, allowing the original to be transported to each required individual during the reasonable time period. By having the document sent by trackable mail, it would also create a “chain of custody” showing clearly how the original was handled during signing process. Such an approach, however, negates the efficiencies of a more truly electronic signing process.

- iv. Whatever specific form the recorded web ceremony may take, and there are undoubtedly many variations, if done properly, this type of web meeting may produce, depending on state law, a valid “self-proved” will as well as other core documents. The main obstacle, if any, will likely be the attorney’s and/or client’s lack of the necessary video conferencing equipment or lack of tech savvy. That being said, most smart phones and computer systems have or can be retrofitted with the required technology to accomplish this kind of recorded web meeting and properly store the audio/video recording of the document signing ceremony. Most laptops and recently purchased home computers have built in cameras. If not, a USB web camera can be purchased inexpensively online and shipped directly to the client’s home. Most of the web meeting services are very easy to use and permit recording and transcription.
- v. A sample agenda for a virtual web signing is attached as Exhibit 3.
- i. **Reflect Witnessing by Web Meeting.**
  - i. The attorney could modify the self-proving affidavit contained in the will to reflect that the witnesses observed the signing “in the presence of the testator via a recorded web meeting using GoToMeeting [or the specific service other system used].”
  - ii. Some practitioners suggest stating that the specific approach taken was used because the testator had underlying health risks, such as diabetes, that made the testator at increased risk for COVID-19, which made it too dangerous to sign at an in-person meeting.
  - iii. See Exhibit 2A and 2B.
- j. **Writing Intended as a Will or the “Harmless Error Doctrine”.**
  - i. While it may be preferable to have the client sign a will (or pour over will and revocable trust) in a manner that meets the requirements of applicable state law (or state law as made more lenient by temporary actions), that may not be feasible for a variety of reasons. If not, then as backup approach consider that in certain states a non-conforming document may be signed that may later be admitted to probate as a will.
  - ii. State law may incorporate a “harmless error doctrine,” that permits documents, in limited circumstances, to be admitted to probate as

“writings intended as a will,” even though they fail to satisfy the requisite formalities for a valid will.

- iii. No particular formality may be required to fall within the scope of this approach. Rather, again depending on state law, the proponent of the defective document must show by “clear and convincing evidence” that the decedent intended the document to serve as his or her will.
- iv. When such a non-conforming document is to be signed by the client, it is best that the client include an express acknowledgement that the document is intended to be his or her will.
- v. The signing of the will might also be done through a recorded and transcribed web meeting to corroborate the client’s intent to sign the document and that the document is intended to be his or her will.
- vi. Counsel might consider recommending to the client sharing concrete facts about his or her signing of the “defacto” will with close friends or relatives who do not benefit under the document, and perhaps to provide copies of same to these persons, in order to support the client’s intent to establish a will.
- vii. If this approach is used, counsel might recommend in writing to the client that the client should also make an appointment to see his or her attorney promptly following the end of the pandemic for the express purpose of signing a more traditionally executed will and thereby correct any deficiencies (and thereby perhaps avoiding a court proceeding with respect to the will, which may be required to have a non-conforming will admitted to probate).

## 7. **Conclusion.**

- a. There are a number of options that may be available to address having clients sign core documents during the Covid-19 pandemic and for a period of time thereafter (perhaps until a vaccine is available and received by all).
- b. The concepts and signing techniques discussed above may provide some insights to practitioners to adapt depending on a particular client’s circumstances, and applicable state law.
- c. Best practices might suggest that in appropriate cases the attorney provide the client with a letter or email that summarizes the unusual or exigent circumstances surrounding the document signing and confirming that after the pandemic ends the client is to visit the attorney’s office in order to resign the documents observing the formalities required under state law.
- d. Ideally, much more flexible, uniform, modern and reasonable means of signing estate planning and other documents can be proposed and enacted before a resurgence of COVID-19 or another future emergency situation arises.

## Exhibit 1: Sample Holographic Will

### Will for Client Name

Last Will and Testament for Client Name dated Month Day, Year.

I, Client Name, a resident of City Name, State Name, publish and declare this to be my Last Will and I hereby revoke all prior Wills and Codicils.

I appoint Executor Name - 1 as my Personal Representative to serve without bond.  
If Executor Name – 1 is unable to serve for any reason, I appoint Executor Name - 2 as my successor executor.

My Executor/Personal Representative shall serve without bond.

I give and bequeath my entire estate to the Client Name Revocable Trust dated today.

*I grant to my Personal Representative all powers under State Name [or alternative state] law.*

*My Executor/Personal Representative shall pay all obligations, expenses, and taxes of my estate as provided by New Jersey [alternative state] law and the Client Name Revocable Trust.*

[The above two italicized paragraphs are not necessary and are listed as options should counsel wish to include them].

My Personal Representative should make tax elections and allocations as provided in the Client Name Revocable Trust.

The validity and interpretation of this Will shall be governed by New Jersey [alternative state] law.

I intend for this Will to constitute my holographic Will.

\_\_\_\_\_  
Client Name

Date: Month, Day, Year



## Exhibit 2B: Sample Acknowledgement Modified for Later Signing

### Sample Notary Acknowledgement to Reflect a Remote Online Notarization

State of State Name :  
: ss  
County of County Name :

Subscribed, sworn to and acknowledged before me during a physical meeting with Client Name on Month Day, Year, and subscribed and sworn to before me by the witnesses Witness No. 1 and Witness No. 2, who observed the entire signing ceremony on this Month Day, Year which said date is 72 hours after the aforementioned signing ceremony in order to lessen or eliminate the potential risk of any COVID-19 virus remaining on said documents.

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Jane Doe  
Attorney at Law, State Name  
Notarized pursuant to [cite applicable law]

### Exhibit 3: Sample Checklist/Agenda for Virtual Web Signing Meeting

1. Email the documents to the client using software that can confirm the client received and downloaded the document, including the date and time of each.
2. E-SIGN: if the documents are to be electronically signed set up the documents for electronic signature and use that software to send the documents to the client.
3. Set up a web meeting with the client, witnesses, and if valid a notary. All participants should be advised that the meeting will be recorded, and it will be required that participants all be visible on web camera. Include instructions on purchasing web cameras before the signing meeting if the client's computer does not already have a camera, and offer to assist with operating web cameras. Counsel should confirm the date, time and counsel's location and who is attending the web signing.
4. Once the web meeting begins, each person, client, witness, notary if any, and counsel should identify themselves and that they are aware that the signing is being recorded.
5. Establish on the recorded web meeting how the client received the documents (e.g. via ShareFile on a date stated) or via regular mail received on a date stated. If mailed have the client show the envelope with the documents to the camera.
6. Have the client confirm that the documents were received, read/reviewed and understood between the time of receipt and the web conference signing, and that no changes were made to the documents being signed from those sent.
7. Have the client state the address where they are physically located during the signing. Have the client use the laptop web camera to shoot a picture outside of a window to facilitate corroborating the location, in case it is ever questioned.
8. Have the client state who is in the room during the signing. Have the client use the web camera to pan the room to confirm the accuracy of who is present, if anyone. If anyone enters the room of any participant during the signing, that participant's web camera should be panned to show that individual, and have the person identify themselves. However, it may be preferable that no one should enter or leave the testator's room during the course of the signing.
9. The client should show a driver's license and second form of picture identification to the web camera to confirm the client's identity. Ideally, use government issued ID with signatures and pictures. This identification should be held up in such a way that a later viewing of the recording will allow the identification to be clearly read and understood.
10. Counsel may choose to ask additional questions to corroborate on the recording that the client knows the object of the client's bounty, the nature of the client's assets and what in general terms the documents to be signed provide for.
11. The client can initial and sign whatever pages are required of each document as counsel directs. After each page is initialed or signed the client should show each page to the web camera. If, at a later date, there is any question over what was signed by the client each page will appear on camera for proof.
12. E-SIGN: If instead of wet signing in pen the client is electronically signing the documents the steps of that process can be narrated. The web conference might also switch the "presenter" of the web meeting from the attorney to the client so that the client's computer screen can be recorded during the actual signing. Consider continuing the recording until counsel receives back the electronically signed documents. Download

and save both the e-signed documents as well as the certificate of signing that indicates the date and time of signing and other critical data. Any certificate received from the E-Signature service can then be corroborated with the date and time of the recording of the web meeting.

13. The witnesses, and if deemed appropriate, the notary, can sign affidavits of witnessing and notarizing the document. This might be done also during the course of the web meeting signing ceremony so that all is recorded. Each can show their affidavit to the camera. Thus, the witnessing, and perhaps notarization is completed, and affidavits signed, contemporaneously with the document signing.
14. The web signing meeting recording should be saved and also transcribed.
15. Each witness, notary if applicable and perhaps even the client/ signer might sign a second affidavit indicating that they reviewed the transcript of the web signing meeting and that, other than typographical errors, it is a true recordation of the events that occurred.
16. The client/signer should transmit documents to counsel who can then collect all original affidavits from counsel, the notary if applicable and the other witnesses if any and combine them into a single document. That compilation should include the transcription and signing of an affidavit affirming that as well, signed after it is provided.
17. E-SIGN: If the documents were signed electronically the certificate from the electronic signature software should be included in the document compilation.

## Exhibit 4: Analysis for Selected States

### Alaska – Abigail O’Connor, Esq.

Alaska has different execution requirements for wills, trusts, powers of attorney, and advance health care directives (which include health care powers of attorney).

Alaska wills must be in writing, signed by the testator or by another individual in the testator’s conscious presence and by the testator’s direction, and signed by at least two witnesses who sign within a reasonable time after witnessing the testator’s signature or the testator’s acknowledgement of his or her signature on the will.<sup>1</sup> Alternatively, Alaska will accept a holographic will, which requires that the signature and material portions of the will be in the testator’s handwriting.<sup>2</sup> A will may be made self-proved by having the testator and witnesses make acknowledgements before a notary.<sup>3</sup>

Trusts have no actual execution requirements. Alaska law says that a trust “includes an express trust, private or charitable, with additions to the trust, wherever and however created...”<sup>4</sup> There is no definition of an “express trust” in the Alaska Statutes. Alaska law even allows oral trusts.<sup>5</sup> Generally, good practice suggests that a trust should at a minimum be in writing and signed by the settlor, and ideally notarized or witnessed.

A power of attorney must be signed by the principal and the principal’s signature must be acknowledged before a notary.<sup>6</sup> If the principal is physically unable to sign, he or she may direct someone else to sign the power of attorney in the principal’s conscious presence and while in the presence of a notary.<sup>7</sup>

A traditional Alaska advance health directive includes a durable power of attorney for health care. The durable power of attorney for health care is the portion that has strict execution requirements. The document must be in writing, contain the date of execution, be signed by the principal, and witnessed by two individuals or acknowledged before a notary.<sup>8</sup> The witnesses must witness either the signing of the document or the principal’s acknowledgement of his or her signature.<sup>9</sup> There are a myriad of requirements and restrictions for witnesses. The witnesses must be personally known by the principal.<sup>10</sup> The witness may not be the agent nominated by the document, a health care provider employed at the health care institution or health care facility where the principal is

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<sup>1</sup> AS 13.12.502(a).

<sup>2</sup> AS 13.12.502(b).

<sup>3</sup> AS 13.12.504.

<sup>4</sup> AS 13.06.050(59).

<sup>5</sup> AS 13.36.010 (see reference to oral trust).

<sup>6</sup> AS 13.26.600(a).

<sup>7</sup> AS 13.26.600(a)(1)-(b).

<sup>8</sup> AS 13.52.010(b).

<sup>9</sup> AS 13.52.010(b)(1).

<sup>10</sup> AS 13.52.010(b)(1).

receiving health care, or the employee of such a health care provider.<sup>11</sup> At least one witness must be someone who is not related to the principal by blood, marriage, or adoption, or who is entitled to a portion of the principal's estate in the event of the principal's death, either by way of the principal's will or codicil or by operation of law.<sup>12</sup> Because of all of the requirements and restrictions for witnesses, it is easier just to have the document notarized.

The Alaska legislature enacted emergency legislation during the COVID-19 pandemic to allow the witnessing of a will by videoconference. During the public health disaster emergency and for 10 days afterwards (as defined), a will may be signed or witnessed by videoconference. There is specific language required in the will that says the testator is a member of a group declared by the WHO or the US CDC to be at higher risk of COVID-19 or the testator has been advised by a health care provider or government agency that being in the physical presence of others may expose the testator to health risk related to COVID-19, and the witnesses must sign the will or a copy within 60 days with additional language requirements.<sup>13</sup> The rule is an uncodified law and applies only to wills and only for a limited time. There are no provisions for signing powers of attorney or advance health care directives without the traditional in-person witnessing or notary requirements, which is problematic for many people.

A great planning technique in this COVID-19 era of Alaska is to use a revocable trust combined with a holographic pour over will. This technique accomplishes two beneficial results. First, the documents are easy to execute by the client without relying on the emergency legislation and instead relying on longstanding statutes. The attorney can email the trust to the client along with instructions on exactly what to write and how to make the holographic will. If possible, the attorney can watch the client execute the documents via Zoom, Skype, or another web conference platform. Second, by funding the revocable trust, the client can decrease his or her dependence on a power of attorney, which he or she cannot execute if visiting a notary is not possible. The client can then transfer financial assets and other personal property to the revocable trust without leaving home. Whether the client can transfer real estate to the trust without leaving home depends on whether the real estate is situated in a state that allows remote notarization for real estate transfers. Alaska has such legislation pending but it has not yet been passed as of the date of this article.<sup>14</sup>

The extreme differences between execution requirements for the basic suite of estate planning documents is challenging, especially during this pandemic. There is little logic in requiring witnesses for a will, no witnesses for a trust, and no witnesses but a notary for a power of attorney, when all of those documents govern the administration of a person's assets. Theoretically the witnesses to the will are required to ensure that the testator has the requisite capacity and is not being coerced or unduly influenced; however, how many witnesses truly and actually know these matters for a client? How often do members of the attorney's staff serve as witnesses, who may have met the client once or twice at best and have no way of knowing the client beyond mere introductions? There should be one set of standards for all estate planning documents, and

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<sup>11</sup> AS 13.52.010(d).

<sup>12</sup> AS 13.52.010(e).

<sup>13</sup> See Section 25 of Senate Bill (SB) 241 of the 31<sup>st</sup> Legislature of the State of Alaska.

<sup>14</sup> See Senate Bill (SB) 103 of the 31<sup>st</sup> Legislature of the State of Alaska.

consistent execution requirements. Those requirements need to be updated for the 21<sup>st</sup> century and reengineered to balance the protection of the client from wrongdoers with making the execution requirements reasonable and approachable.

## Arizona – Yaser Ali, Esq. - Ali Legal, PLC

In light of the Covid-19 pandemic and increased social distancing obligations, states across the US have had to accelerate, or in some cases, create entirely guidelines relating to the online notarization and execution of estate planning documents.

In Arizona Governor Doug Ducey issued an executive order on April 8, 2020, allowing Arizonans to get documents notarized remotely. The Order essentially allows for the procedures that had previously been passed into law under the Remote Online Notarization, A.R.S. 41-371 -- 41-380, which was slated to go into effect on July 1, 2020, to begin on April 10, 2020 because of the current public health emergency.

Before analyzing the applicability of the Executive Order on estate planning documents, it is important to review the existing execution requirements for estate planning documents in Arizona:

**Wills and Codicils.** Wills and codicils can be of multiple types and have varying formality requirements under Arizona law. A holographic will is valid if the signature and material provisions of the will are in the testator's handwriting. ARS § 14-2503-2505.

Alternatively, the statute requires the signature of the principal and two disinterested witnesses who must sign in the presence and hearing of the principal and who cannot be a devisee of that will, related by blood, marriage, or adoption. *See id.* If the document is notarized, the witnesses do not need to be disinterested. *See id.*

Arizona law does already allow for the creation of electronic wills where both the principal and witnesses, OR the principal, witnesses, and notary all sign electronically, but the statute requires that the witnesses must still be physically present with the principal. ARS § 2518.

**Revocable Living Trusts.** Like many states, the legal requirements for creating a trust in Arizona are not very rigid compared to other legal documents. In fact, a trust need not be evidenced by a trust instrument, but the creation of an oral trust can be established by clear and convincing evidence and the terms of the oral trust shall be established by a preponderance of the evidence. If a trust is created by written instrument, it may be amended or revoked only by written instrument executed by the settlor. ARS § 14-10407. In practice, the trust is usually notarized along with the certification of trust.

**Power of Attorney.** A Power of Attorney for financial affairs may be created by the Principal or signed in the principal's name by some other individual in the principal's conscious presence and at the principal's direction, in the presence of a witness who is not the agent, the agent's spouse, the agent's children, or the notary, and is done so in front of a notary. ARS § 5501 (D).

**Health Care Power of Attorney and Living Will.** A Health Care Power of Attorney must be signed by the person creating the instrument and must be notarized or witnessed

in writing by at least one adult who affirms that the notary or witness was present when the person dated and signed or marked the health care power of attorney. The notary or witness must not be A person designated to make medical decisions on the principal's behalf, or a person directly involved with the provision of health care to the principal at the time the health care power of attorney is executed. If a health care power of attorney is witnessed by only one person, that person may not be related to the principal by blood, marriage or adoption and may not be entitled to any part of the principal's estate by will or by operation of law at the time that the power of attorney is executed. ARS § 36-3221.

A standalone living will has the same formality requirements as a Health Care Power of Attorney. *See* ARS § 36-3261 (B).

The Governor's executive order was intended to make the notarizations process more efficient and safer. It requires notaries who would like to provide online notarizations must register with the Secretary of State as either an E-Notary and/or a Remote Online Notary. In the case of an electronic notary, all the signers and the notary must be physically present in the same room but the notarization act and the participant signatures are done electronically.

Remote Online Notary, on the other hand, refers to a situation where the notary and signor are appearing virtually. As part of the registration process for a remote online notary, the notary must agree to contract with a vendor that provides a secure identity verification process using online audio-video technology, allows the notary and signer to converse in real-time, allows for electronic signatures and tamper-proof seals that are placed on an electronic document, and ensures that all records are saved and backed up by the notary public.

While Governor Ducey's Executive Order was met with initial excitement by many attorneys and may be useful in many industries such as real estate, healthcare, and banking, it quickly became apparent that in the estate planning context, the Order does not go far enough and leaves practitioners and clients without good solutions in many cases. Most importantly, while it allows the notarization of signatures on a will to be performed remotely, it does not permit the signatures on estate planning documents to be witnessed remotely.

As such, for now, trusts, healthcare directives, and other documents don't require witnesses can be notarized under the Order but unless a client wants to rely on a "holographic" hand-written will which doesn't require witnesses, he or she will still be forced to have two physical witnesses be present at the time of the execution of a will or codicil. If Arizona really wants to simplify the estate planning process and make it easier for its residents to prepare last-wills and pour-over wills during this crisis it needs to go a step further and allow remote witnessing of documents electronically as well.

## California - Matt Brown, Esq., Brown and Streza

Remote notarization via online platform is already permitted in many states. And several states lacking such laws recently implemented emergency procedures that permit remote ink-signed notarization. But California does not permit either method. There are, however, signs of progress – albeit temporary. California Senator Susan Rubio introduced the Remote Online Notarization Act in February 2020, and the California Senate amended the bill at the beginning of April 2020. The April changes appear designed to allow for remote online notarization to address the challenges created by COVID-19. Unfortunately, the proposed legislation is brief and leaves the details of remote online notarization to the California Secretary of State. The bill further provides that remote online notarization will only be permitted during California’s current State of Emergency.

Irrespective of California’s dithering and the short-term nature of proposed changes, it is still possible for California residents to have documents notarized remotely. California Civil Code Section 1189(b) provides that a notary acknowledgement that is “taken in another place will be sufficient if it is taken in accordance with the laws of the place where the acknowledgment is made.” Additionally, the California Secretary of State has posted guidance on its website suggesting that notarizations performed by a notary on a remote online platform in a state where such remote notarizations are permitted will be recognized under California law as valid notarizations (<https://www.sos.ca.gov/notary/faqs/>). But practitioners should further ensure they use the remote online services of a notary in a jurisdiction, such as Nevada, that permits the notary to perform services for clients outside of the notary’s home state.

As a result, a notary in a state that permits remote notarization can validly notarize the documents of a client located in California by means of remote notarization. This is welcome news for California attorneys and their clients, but there are some limitations for California estate planners.

### Third-Party Reluctance

Although remote online notarizations performed in other jurisdictions may be recognized as valid under California law, third parties may not agree. Clients attempting to transact business with durable powers of attorney or certifications of trust that are acknowledged by remote notaries may encounter challenges having those documents honored by banks, brokerage houses, and similar institutions.

Also, even if a deed conveying California real estate to a living trust is validly notarized remotely, it could still be rejected by the county recorder's office. In California, some county recorders will not accept a deed that is acknowledged by a remote notary. Other county recorders *will* record such a deed, but only if the recording is requested by a title company. Unfortunately, title companies will typically not record deeds on behalf of an attorney or the attorney's client unless there is an underlying escrow related to a sale or refinance. But we have periodically seen title companies record such deeds if the title company has an established relationship with a law firm or would like to establish a relationship with a law firm.

### No Electronic Wills - Yet

Another limitation for estate planners is that even if most estate planning documents can be signed remotely under the authority of Civil Code Section 1189(b), remote witnessing of a will is not permitted under California law. A bill permitting digital wills was recently proposed in the California legislature, but it has not yet been passed. On April 24<sup>th</sup>, the bill was amended to address the present challenges of having witnesses sign a paper will. Before this recent amendment, the bill would have created a new breed of will in California that would be administered through a remote online notarization platform. But, post-amendment, the bill simply provides that wills that are executed in compliance with the provisions applicable to written wills are not invalid solely because they are written or stored in an "electronic record," or signed by the testator or witnesses using an electronic signature.

Despite these limitations, there are two nontraditional work-arounds for signing a will without witnesses. Although less-than-ideal, these are worthy of consideration given limited alternatives.

### Witnessing Alternatives

The first potential work-around is providing the client with the language to create a holographic will. This could be done for either a pour-over will or a more traditional will. But since most wills are lengthy, transcribing a will by hand is not only onerous for the client but increases the risk of mistake. And it may be physically impossible for older clients and clients with physical limitations to transcribe a lengthy holographic will.

A second potential work-around is to sign a will without any witnesses whatsoever, relying on the provisions of Probate Code Section 6110(c)(2). Probate Code Section 6110(c)(2) provides that if a non-holographic will is signed without witnesses, it may still be a valid will if it can be established by clear and convincing evidence that, at the time the testator signed the will, the testator intended the will to constitute the testator's will. To increase the likelihood of meeting

this heightened standard the estate planner should consider including the following in the will: (i) a recitation of facts explaining that the will is being signed during the COVID-19 global pandemic and witnesses are unavailable, whether due to government directives, fear of disease, or other cause; and (ii) a statement indicating that, notwithstanding the unavailability of witnesses, it is the testator's intention to create a valid will and to invoke the provisions of Probate Code s. 6110(c)(2). The estate planner should also consider having the will signed with a remote notary in another state, lending credibility to the claim that the will is intended to be the testator's will and, thereby, increase the likelihood of establishing the instrument as the testator's will by clear and convincing evidence.

### Traveling Notaries

For situations that do not necessitate one of the methods described above, the best means of getting estate planning documents properly signed and notarized in California during the pandemic may be to work with a reliable and experienced mobile notary who will travel to the client's home and notarize/witness the documents in-person (along with a neighbor serving as a second disinterested witness for the will). It is ideal to work with a mobile notary who understands the signing formalities that are specific to estate planning documents and has significant experience working with estate planning attorneys. Mobile notaries are currently permitted to continue operating in the state, and the California Secretary of State has issued sanitation and physical distancing guidelines to be observed while acknowledging documents. It is also ideal for the drafting attorney to attend the signing via telephone or videoconference to direct the process and answer client questions.

Florida – John N. Beck, Esq. and Alan Gassman, Esq., Gassman, Crotty and Denicolo, PA

On June 7, 2019, prior to COVID-19's prevalence and spread, Florida enacted Remote Online Notarization (RON) laws that became effective on January 1, 2020. These changes are reflected in Fla. Stat. §§ 117.201-117.305. These laws allow for many non-testamentary documents to be notarized electronically without a notary being physically present at the signing, however, virtual notary presence is required.

These laws also include provisions allowing for wills to be signed electronically that will become effective July 1 of this year. There have been no updates for RON in Florida during the COVID-19 pandemic to address RON and testamentary documents.

In order for an electronic will to be self-proving, the will must be signed on or after July 1, 2020 in the electronic presence of two witnesses and a remote online notary, using the same procedures that are currently required for the remote notarization of other documents. Notably, certain documents like trusts and wills do not need to be notarized to be valid in Florida, but do need to be notarized in the presence of two witnesses and the testator to be self-proving.

Due to COVID-19's impact, Florida's Supreme Court issued AOSC20-16, suspending the requirement for a Florida notary to be physically present in front of an individual to administer an oath through May 29<sup>th</sup> of this year.

AOSC20-16 provides that a Florida notary may swear in a witness remotely if the notary can positively identify the witness from a location within the State of Florida using audio-video communication. If the witness is outside the State of Florida, the witness may simply consent to being placed on oath via audio-video communication.

AOSC20-16 only applies to administrations of an oath, however, and does not apply to notarization of document signings. RON is Florida's primary method of dealing with COVID-19's implications for document signing. Unlike many states which temporarily authorized RON, Florida's statutes already outline its requirements.

It is important to note that not all Florida notaries are able to perform a valid RON. In order to become remote online notary, a Florida notary public must complete the following:

1. The individual must already have a valid and current notary commission, a civil-law notary appointment, or a commissioner of deeds appointment in Florida;
2. The notary must successfully complete an education training course and receive a certificate of completion RON;
3. The notary must obtain an Errors and Omission policy with a minimum of \$25,000 coverage and a bond in the amount of \$25,000 and provide evidence of the same;

4. The notary must submit an Application Registration for Online Notary Public to the Florida Secretary of State, Division of Corporations, along with copies of the support documents indicated above and the Application filing fee of \$10.00;

5. After registering as a Florida remote online notary, the notary must contract with an approved third party vendor to provide the remote online notary with the technological support that is required to perform online notarizations, including a secure online audio-video platform, advanced identity proofing and credential analysis, and long-term document storage; and

6. RONs must keep an electronic journal record for at least 10 years, which includes the video and audio recording of each RON service.

Notary boxes must now also indicate whether the notarization was completed via RON or in the physical presence of the signor.

For the average person seeking notarization of a signature, RON does not require much more than a document needing a notarization — even if it must be witnessed — and a computer or device with audio and recording capabilities. There are many businesses that are currently offering RON service for Florida signings and a simple Google search for “Florida remote online notary” will provide several options available 24 hours a day. The maximum fee for a RON is set statutorily at \$25.00 per signature. Some RON providers charge a flat \$25.00 per notary signature fee and others will charge less for additional signatures.

It may not be practical to use a remote online notary for signings where a large number of documents need to be notarized because the process may take much longer than a document signing in the physical presence of a notary due to RON procedures. These procedures include extra qualifying statements, extra steps involved to verify the person’s identity, and the client needing to be computer savvy enough to utilize the audio/video software and upload their identifying documents in an acceptable form.

The following chart provided by Florida’s Real Property, Probate and Trust Law Section of the Florida Bar outlining certain document signing requirements for documents executed prior to July 1, 2020:

**Florida Notarization Summary Chart For Documents Executed Prior to July 1, 2020**

(as of 04-09-2020)

*DISCLAIMER: Each lawyer needs to individually review the applicable statutes and make his/her own determinations.  
This is provided as guidance and assistance, but should not be relied upon in any manner as a formal legal opinion or position provided to you.*

**PLEASE NOTE THAT THIS CHART APPLIES TO DOCUMENTS EXECUTED PRIOR TO JULY 1, 2020. THE REQUIREMENTS RELATED TO REMOTE NOTARIES AND REMOTE WITNESSES FOR ESTATE PLANNING DOCUMENTS CHANGE FOR DOCUMENTS EXECUTED AFTER JULY 1, 2020.**

Document	In Person Notary		In Person Witnesses		Citations	Remote Notary**		Remote Witnesses**		Citations
	Yes	No	Yes	No		Yes	No	Yes	No	
Will with self-proving affidavit	X		X		-Requires 2 witnesses -Not invalid if witness is "interested" F.S. §§ 732.502-732.504		X		X	F.S. § 732.522
Will without self-proving affidavit		X	X		-Requires 2 witnesses -Not invalid if witness is "interested" F.S. § 732.502 F.S. § 732.504		X		X	F.S. § 732.522
Revocable Trust		X	X		-Requires 2 witnesses -Requires formalities of a deed if contains real property F.S. § 736.0403(2)(b) F.S. § 732.502 F.S. § 689.03		X		X	F.S. § 736.0403(2)(b) F.S. § 732.522
Durable Power of Attorney	X		X		-Requires 2 witnesses F.S. § 709.2105(2)	X		X*		F.S. § 117.285 F.S. § 709.2202(6)  *NOTE: Durable Power of Attorney with estate planning "superpowers" cannot be executed unless the witnesses are physically present
Living Will		X	X		-Requires 2 witnesses -One witness must be neither spouse nor blood relative F.S. § 765.302(1)	n/a		X		F.S. § 765.302(1) F.S. § 117.285
Designation of Health Care Surrogate		X	X		-Requires 2 witnesses -Surrogate cannot be a witness -One witness must be neither spouse nor blood relative F.S. § 765.202(1)-(2)	n/a		X		F.S. § 765.302(1) F.S. § 117.285
HIPAA Release		X		X		n/a		n/a		
Declaration of Preneed Guardian		X	X		-Requires 2 witnesses F.S. § 744.3045(2)	n/a		X		F.S. § 744.3045(2)
Spousal Waivers		X	X		-Require 2 witnesses F.S. §§ 732.701-702	n/a			X	F.S. §§ 732.701-702 F.S. § 732.522

\*\*Note: Remote notarization and witnessing must comply with requirements of F.S. §§ 117.265 and 117.285 (See F.S. § 117.215).

COVID-19 has impacted the ability of most firms to easily conduct in-person signings. RON laws in Florida, especially starting on July 1, 2020, should somewhat ease this problem.

## Iowa – Mary Vandenack, Esq., Vandenack Weaver LLC

Iowa has not adopted the Uniform Electronic Wills Act.

Iowa has adopted the Online Notary Public Act. The Act was originally to be effective July 1, 2020. By Executive Order on March 22, 2020, the effective date was accelerated to allow for an immediate effective date. In addition, the in person signature requirements related to signing wills was suspended and remote witnessing by means such as video conference is permitted.

### **Requirements for Estate Planning Documents in Iowa:**

**Wills.** A will is required to be signed by the testator and at least two witnesses. A notary is not required to create the will but it is required for the will to be self-proving. Online notarization is currently permitted for wills under the Executive Order from the Iowa Governor.

**Holographic Wills.** Iowa does not have provisions for a holographic will but will recognize a valid holographic will created under the laws of another state.

**Trust.** Notarization of a trust is not required; however declarations or creations of trusts or powers in relation to real estate must be executed in the same manner as deeds of conveyance, which do require notarization. Remote notarization is permitted

**Financial Power of Attorney.** A power of attorney must be acknowledged by the principal before a notary public.

**Health Care Power of Attorney.** A power of attorney for health care must be either acknowledged by the principal before a notary or two witnesses.

To execute estate planning documents in Iowa, a videoconference can be utilized for the will. An online notary can be used for all documents requiring notarization. Documents that do not require notarization can be provided via electronic signature software such as Docu-sign or RightSignature or the client can be coached through affixing an electronic signature in a pdf program.

## Kentucky - Turney P. Berry, Esq. Wyatt, Tarrant & Combs, LLP

In Kentucky we were very fortunate because the Kentucky Legislature was still in session as the reality of the COVID crisis became apparent. We had not introduced Electronic Wills in the session because we were focused on other improvements – the Uniform Power of Appointment Act (with creditor protection for testamentary general powers), the Uniform Power of Attorney Act, and the Uniform Fiduciary Access to Digital Assets Act, and a Community Property Trust Act – but the legislature did have an omnibus emergency act that would be adopted. We suggested that the notion of “physical presence” be modified to include electronic presence. A good example is our Wills Act that requires the testator and witnesses to be in one another’s physical presence. We started with the language of the Electronic Wills Act which provides “individuals not in the same physical location are in the presence of one another if they can communicate in real time to the same extent as if they were physically present in the same location.”

Happily, the legislature picked up the language and we made some other tweaks to end up with a straightforward provision as follows:

For purposes of complying with any law, rule, order, or other requirement relating to the receipt of testimony or signature from any party or witness, or the acknowledgement or notarization of any document, for any legal purpose: (a) Individuals, whether acting for themselves or in a representative capacity, not in the same physical location shall be considered in the presence of one another if the individuals can communicate via a video teleconference in real time to the same extent as if they were physically present in the same location; and 2 (b) Any document resulting from a video teleconference conducted in accordance with paragraph (a) of this subsection may be executed, acknowledged, or notarized in counterparts, which together shall be considered a single document;

We use this for witnesses and for notarization during the current emergency. When the Governor decides the emergency is over then remote witnessing will expire unless we can inspire the legislature to reenact it. Personally, I would like to see it extended, perhaps sunseting in 99 years.

A nuance of the E-wills definition, that Kentucky retained, is that it allows persons who are hearing or visually impaired to be witnesses to the same extent they could be witnesses otherwise, because what is required is only that the testator and witnesses be able to communicate by video the same extent that they could were they physically present. We worked hard to accomplish that result for E-wills.

## Massachusetts - Ruth Mattson, Esq., Vacovec, Mayotte & Singer, LLP

- Chapter 71 of the Acts of 2020, “An Act Providing for Virtual Notarization to Address Challenges Related to COVID-19”, available at <https://malegislature.gov/Laws/SessionLaws/Acts/2020/Chapter71> Chapter 71 of the Acts of 2020 is a session law, effective only during this emergency period. It will not be entered into the Massachusetts General Laws.
- Signed by Governor Baker on April 27, 2020. This Act will be repealed three business days after the Massachusetts state of emergency ends. There is no currently scheduled end to the Massachusetts state of emergency.
- Massachusetts took a legislative approach rather than an executive order because a previous executive order related to notarization in Massachusetts had been successfully challenged in the context of acknowledgments on mortgages. From 2004 to 2017, notarial acts in Massachusetts were governed by Executive Order No. 455, available at <https://www.mass.gov/executive-orders/no-455-revised-standards-of-conduct-for-notaries-public> The effect and requirements of that Executive Order were called into question in various bankruptcy cases including In re Giroux, Chapter 7, Case No. 08-14708-JNF (Bankr. D. Mass. May 21, 2009), and In re Reznikov, 548 B.R. 606 (Bankr. D. Mass. 2016). The legislature responded and enacted General Laws chapter 222. Effective January 4, 2017, the statute became effective and Executive Order No. 455 was rescinded. <https://www.mass.gov/executive-orders/no-571-rescinding-executive-order-no-455> Given this history, leaders in the legislature and in the real estate industry were concerned that an emergency executive order would not provide effective relief for real estate financing transactions.
- The Act authorizes a principal and witnesses to sign documents before a notary via videoconference. Any document signed in conformity with the Act will be valid as if the principal, each witness, and the notary were physically present together at the time of signing.
- The Act authorizes remote notarization and remote witnessing for any document in Massachusetts, but there are unique rules for real estate documents, and for estate planning documents.
  - Real estate documents are defined as follows: “executed in the course of closing a transaction involving a mortgage or other conveyance of title to real estate”
    - Must be notarized by a notary who is an attorney or an attorney-supervised paralegal
    - Two separate videoconferences are necessary
    - Two forms of identification may be necessary
  - Estate planning documents are defined as follows: will, nomination of guardian or conservator, caregiver authorization affidavit, trust, durable power of attorney, health care proxy, HIPAA authorization
    - Must be notarized by a notary who is an attorney or an attorney-supervised paralegal. The term paralegal is not defined in the law and may be anyone whom the lawyer designates a paralegal.
- The Act requires wet-ink signatures and does not authorize electronic signatures. To facilitate this, any document signed under the Act may be signed in counterparts.

- The principal, each witness, and the notary must be physically present in Massachusetts at the time of signing.
- A person whose signature is being notarized (a “principal” under the Act) may be identified by personal knowledge or by presenting a valid form of identification. If identified by personal knowledge, no ID need be displayed. If identified by presenting a form of identification, further rules apply.
- To validate the signature of a remote witness as if personally present, the witness’s signature must be separately notarized. This causes the remote witness to be a “principal” under the Act.
- The notary must prepare and sign an affidavit in addition to the notarial certification. The affidavit must be retained for ten years.
- If the principal or any witness is identified by presenting a form of identification, the identification must be displayed during the video conference and copies must be retained by the notary for ten years.
- The videoconference must be recorded and the recording must be retained by the notary for ten years.
- The notary’s stamp and seal cannot be applied until all counterparts of the document are received. (In the case of real estate documents, the stamp and seal are applied during the second videoconference.) To address the delay in the application of the stamp and seal on estate planning documents, many practitioners are using a two-part notarial certificate for Massachusetts documents. Links to these and other sample forms are provided below.
- Several bar organizations have collaborated to issue common FAQs, a sample Affidavit, a checklist, and sample notarial certificates. These materials and many helpful webinars are available to the public without charge on the following websites:  
<https://www.bepc.org/page/Advocacy> <https://massnaela.com/remote-notary/>  
<https://www.reba.net/about-us/covid-19-resources/>

## Michigan – Anthony P. Cracchiolo, Esq., Bodman PLC

Given the current health crisis caused by the spread of COVID-19 estate planning is top of mind for many people. In general, an individual's estate plan includes a last will and testament, revocable trust, durable power of attorney, and patient advocate designation (also known as a health care proxy). Generally, the Michigan Estates and Protected Individuals Code governs the execution requirements of these documents. Those requirements, as they relate to written documents, are set forth in Section A below.

For Michigan residents, meeting the formalities required for execution of estate planning documents during the health crisis has been made very difficult as a result of an executive order issued by Michigan Governor, Gretchen Whitmer, requiring people to remain home. Acknowledging the difficulties in signing contracts and other documents, including estate planning documents, Governor Whitmer issued Executive Orders No. 2020-41 and 2020-74 to facilitate the use of electronic signatures, remote notarizations, remote witness attestations and acknowledgments under the current stay at home order. Those rules are set forth in Section B below.

### Section A – Execution Requirements under Michigan Law

1. Last Will and Testament (the “Will”) – A Will is a legal document that goes into effect after a person's death that details such matters as the disposition of the decedent's property, funeral and burial arrangements and the care of minor children.
  - a. Age/Mental Capacity: The individual making the will (the “testator”) must be 18 years of age or older and have sufficient mental capacity (as defined by Michigan law). MCL 700.2501(1)
  - b. Signature/Date: The Will must be signed by the testator (or in the testator's name by a third party in the testator's direction). MCL 700.2502(1)(a), (b). While the statute does not specifically require that the testator date the Will, it is highly recommended that the Will be dated.
  - c. Witnesses: The Will must be signed by two witnesses within a reasonable time after witnessing the testator signing the Will or acknowledgement of the Will. MCL 700.2502(1)(c)
  - d. Notary: A Will is not required to be notarized in Michigan.
2. Revocable Trust (the “Trust”) – A Revocable Trust is a legal document that goes into effect during a person's lifetime and generally details the management and distribution of their property upon incapacity and death. A few benefits of a Revocable Trust over a Will are privacy and probate avoidance.
  - a. Age/Mental Capacity: The person creating the Trust (the “settlor”) must have sufficient mental capacity to create a Trust. The capacity to create a Trust is the same as for a Will; therefore, it is presumed that the settlor must be 18 years of age or older to create a Trust. MCL 700.7402(1), MCL 700.7601.

- b. Signature/Date: While there is not an explicit requirement that a Trust be signed or dated (i.e., because oral trusts are permitted in the state of Michigan), signing and dating a written Trust is highly recommended to avoid any confusion as to the validity of the Trust.
  - c. Witnesses: A Trust is not required to be witnessed in the State of Michigan.
  - d. Notary: A Trust is not required to be notarized in the State of Michigan.
3. Durable Power of Attorney (the “DPOA”) – A “durable” power of attorney is a document that authorizes a third party to handle financial matters on a person’s (the “principal”) behalf and remains effective after the principal is incapacitated. Upon the principal’s death, a power of attorney expires and is no longer legally enforceable.
- a. Age/Mental Capacity: The principal must be an adult (a minor cannot appoint an agent or attorney). *Woodman v. Kera LLC*, 486 Mich. 228, 785 NW2d 1 (2010)
  - b. Signature/Date: The DPOA must be signed and dated by the principal (or by a notary on the principal’s behalf). MCL 700.5501(2)
  - c. Witnesses: The DPOA must be signed by two witnesses (neither of whom are the designated agent). MCL 700.5501(2)(a)
  - d. Notary: As an alternative to witnesses, the DPOA may be acknowledged and signed by a notary. MCL 700.5501(2)(b)
  - e. NOTE: Unlike, a DPOA, a “nondurable” power of attorney ends when the principal becomes incapacitated; and is not required to be witnessed or notarized.
4. Patient Advocate Designation – A Patient Advocate Designation is a document that empowers a third party to make healthcare decisions on a person’s (the “patient”) behalf. A Patient Advocate Designation also typically includes Living Will provisions regarding life sustaining treatment.
- a. Age/Mental Capacity: The patient must be 18 years of age or older who is of sound mind. MCL 700.5506(1)
  - b. Signature/Date: The Patient Advocate Designation must be signed and dated by the principal. MCL 700.7506(3)
  - c. Witnesses: The Patient Advocate Designation must be signed by two witnesses who are not excluded persons. MCL 700.7506(4)
  - d. Notary: The Patient Advocate Designation is not required to be notarized in the State of Michigan.

The Executive Orders establish the process for allowing electronic signatures, remote witnessing and remote notarization of estate planning documents. Under the orders, if certain guidelines are met, persons and entities engaged in transactions are permitted to use (i) electronic signatures, (ii) remote electronic notary via two-way real-time audiovisual technology, and (iii) remote witness attestations or acknowledgements via two-way real-time audiovisual technology. This Section B sets forth the summary of the guidelines within the executive orders.

It is suggested that these formalities are documented (i.e. inserted as a statement within the document or in a separate standalone document) so that it is clear that the conditions are followed. Note, many of the requirements within the executive orders are unclear regarding its implementation, and further clarification from the Governor may be needed.

1. Electronic Signatures – Prior to the executive orders, the Uniform Electronic Transactions Act (“UETA”), 2000 PA 305, as amended, MCL 450.831 et seq. governed the creation, generation, transfer, communication, receipt, or storage of electronic records and electronic signatures relating to a transaction. The UETA, however, did not govern transactions related to the execution of wills, codicils, or testamentary trusts. Given the suspension of the UETA pursuant to the executive orders, the exclusion for Wills, codicils and testamentary trusts is no longer applicable, and the orders permit the use of electronic signatures for transactions whenever a signature is required under Michigan law.

2. Witnesses and Notaries – Witnesses and Notaries must satisfy the following conditions:

a. The two-way real-time audiovisual technology must allow direct interaction between the individual executing the document (the “signatory”), any witnesses, and the notary.

b. The interaction must be recorded. The Michigan Law on Notarial Acts requires that the notary retain the recording for 10 years; however, if the document is not notarized but witnessed, then the signatory must retain the recording for a period of at least 3 years.

c. The signatory must affirmatively represent either that the signatory was physically situated in the State of Michigan or if not physically located within the state fulfill other requirements as outlined by the executive orders.

d. The signatory must transmit by fax, mail, or electronic means a copy of the entire signed document directly to the notary (on the same date it was signed) and witnesses (within 72 hours of its execution).

e. The notary and witnesses must sign the transmitted copy of the document and return the signed copy of the document to the signatory. Note, the witnesses must return the document within 72 hours via fax, mail, or electronic means.

3. Witnesses – Witnesses must also satisfy the following conditions:

a. The signatory must affirmatively state during the interaction what document the signatory is executing.

- b. The signatory must show the witnesses each title page and signature page of the document and every page of the document must be numbered to reflect both the page number of the document and the total number of pages of the document.
  - c. Each act of signing the document must be captured sufficiently up close.
4. Notaries – Notaries must also satisfy the following conditions:
- a. The signatory and any witnesses, if not personally known to the notary, must present satisfactory evidence of identity during the video conference.
  - b. The notary must confirm that the signatory, any witnesses, and the notary, affix their signatures to the document in a manner that renders any subsequent changes to be tamper evident.
  - c. The official date and time of the notarization must be the date and time when the notary witnesses the signature.
5. Counterparts – Absent an express prohibition in the document against signing in counterparts, any document signed under the orders may be signed in counterparts.

## Nebraska – Mary Vandenack, Esq. - Vandenack Weaver LLC

Nebraska has not adopted the Uniform Electronic Wills Act.

Nebraska has adopted the Online Notary Public Act (Neb. Rev. Stat. §64-401). The Act was originally to be effective July 1, 2020. By Executive Order of Nebraska Governor made April 1, 2020, the effective date was accelerated to allow for an immediate effective date. Pursuant to the Online Notary Public Act, the following online notarial acts may be performed: acknowledgements, jurats, verifications or proofs and oaths or affirmations. An online notary may notarize regardless of whether the principal is in the state at the time of the online notarial act. The online notary provisions do not apply to the execution of wills, codicils, or testamentary trusts.

### **Requirements for Estate Planning Documents in Nebraska:**

**Wills.** A will is required to be signed by the testator and at least two witnesses (Neb. Rev. Stat. §30-2327). A notary is not required but notarization, in addition to two witnesses, does result in the will being self-proving.

**Holographic Wills.** Holographic wills are permitted in Nebraska. An instrument is valid as a holographic will if, in the handwriting of the testator, there are material provisions, an indication of the date and the signature of the testator. Non-material provisions can be typed or in a form other than the handwriting of the testator; however, best practices is to have the entire will in the handwriting of the testator. A holographic will that is valid in Nebraska may not be valid in other states.

**Trust.** Notarization of a trust is not required unless real property is being transferred. Oral trusts are permitted, except where real estate is being transferred, in which case a subsequent writing must be made sufficiently memorializing the oral trust. The limitation on online notarization applies to testamentary trusts, which are trusts created in a will. Such limitation does not extend to inter vivos trusts. Thus, an inter vivos trust can be executed, and valid, without a notary or witness. Of course, best practices would be to have a witness or notary.

**Financial Power of Attorney.** A power of attorney must be acknowledged by the principal before a notary public. Online notarization is now permitted.

**Health Care Power of Attorney.** A power of attorney for health care must be either acknowledged by the principal before a notary or two witnesses. Online notarization can be used.

**Transfer on Death Deed.** A transfer on death deed requires two witnesses and a notary.

To execute estate planning documents entirely remotely, you can coach a client through creation of a holographic pour-over will, execute a trust remotely with or without an online notary, and execute powers of attorney via an online notarization. It may be beneficial to coordinate assets with the trust document with assignments, and other transfer documents. Many of such documents do not require notarization but can be notarized using an online notary if notarization is required or desirable. Documents that do not require notarization can be provided

via electronic signature software such as Docu-sign or RightSignature or the client can be coached through affixing an electronic signature in a pdf program.

## **How Might Core Documents be Executed**

### **Signing Various Documents Under New Jersey Law.**

**Powers of Attorney.** New Jersey powers of attorney must be in writing, signed by the principal and acknowledged by a notary public or other individual authorized to administer oaths and affidavits, such as an attorney (herein referred to as an “officer”) (see NJSA 46:2B-8.9). The notary or other officer taking an acknowledgement must sign a written certificate which states the following: (1) the principal personally appeared before the notary or other officer; (2) the notary or other officer was satisfied that the person who made the acknowledgment was in fact the principal; (3) the jurisdiction in which the acknowledgement was taken; and (4) the date on which the acknowledgement was taken. Although witnesses are not required for a power of attorney, best practices often include having the principal’s signature witnessed as well.

**Health Care Powers of Attorney.** New Jersey health care powers of attorney (i.e. a proxy directive and/or advance directive (a/k/a living will)) must be in writing, signed and dated by the principal, or at his or her direction, and the principal’s signature must be either acknowledged by a notary or other officer in the manner discussed above for powers of attorney, or witnessed by two adults (who cannot be the agent or an alternate agent designated in the document), who shall attest that the principal is of sound mind and free of duress or undue influence, and who must also sign and date the document (N.J.S.A. 26:2H-56 and -58).

**Wills and Codicils.** The law regarding the validity of wills and codicils is more complex than those discussed above. A New Jersey will or codicil must, in general, be in writing, signed and dated by the testator (or another person at the testator’s direction) and signed by at least two adult witnesses in order to be presumptively valid. If necessary, the witnesses may include the testator’s spouse and/or adult children, as a will or any provision thereof is not invalid because the will is signed by an interested person (see N.J.S.A. 3B:3-8). The testator must sign the will or codicil in the presence and hearing of the witnesses, each of whom must be made aware that the testator is signing his or her will or codicil. An acknowledgement by a notary or other officer is not required for a will or codicil to be valid. However, an acknowledgement is necessary to make the will or codicil “self-proving” under New Jersey law. A will can be made “self-proving” after-the-fact (see N.J.S.A. 3B:3-5). If the will or codicil is “self-proving,” then the probate process should be more seamless, as the witnesses should not be required to appear at the Surrogate’s Court to “prove” their signatures.

A holographic will or other writing “intended as a will” may result in a valid testamentary disposition without the need for a notary or any witnesses, but each requires a formal probate at a minimum and potentially a lengthy court proceeding. Holographic wills are subject to their own statutory requirements in order to be valid, including that the document be entirely handwritten and signed and dated by the testator.

**Revocable Living Trusts.** New Jersey has adopted the Uniform Trust Code (or “UTC”), which has a broad and flexible view of what is required to establish a valid trust. Only a written

instrument is required to create a valid revocable trust in New Jersey, and neither a notary nor any witnesses are required, so long as certain other requirements are satisfied, i.e. the settlor indicates his or her intention to create the trust, has capacity to create a trust, the trust has a definite beneficiary, etc. However, the usual practice is to have the settlor's signature notarized and/or witnessed, especially if it is intended that the trust will hold real estate. It is prudent to have the Trustees sign the trust instrument as well.

### **Emergency New Jersey Legislation Permitting Remote Notarization.**

On April 14, 2020, Governor Murphy signed emergency legislation into law (New Jersey A3903) that allows notary publics and other officers to authenticate documents remotely, including estate planning documents such as wills and codicils, but the order is only valid for the duration of the COVID-19 pandemic. The legislation authorizes the use of audio-video technology, such as video communication via webcam or smartphone, by an individual as an acceptable means of appearing before a notary or other officer.

However, this remote notarization is permitted only if: (1) the notary or other officer has personal knowledge of the remotely located person, or has satisfactory evidence of the remote person's identification (i.e. by seeing two different forms of the individual's government issued identification, such as a state issued driver's license and U.S. passport); (2) the notary or other officer can reasonably confirm that the document before the notary or other officer is the same as what is being signed; (3) the notary or other officer creates an audio-visual recording of the notarial act; (4) the notary or other officer indicates by certificate, that the notarial act was performed remotely; and (5) the recording of the notarial act is retained by the notary or other officer (or his or her agent) for 10 years.

The most cumbersome of the requirements may be the need for an audio-visual recording of the ceremony which must be retained for 10 years. However, audio-video technology available for most computers and smart phones (e.g. Web-X, GoToMeeting, Skype, Zoom) should allow for the recording and subsequent file storage of the document signing ceremony without too much inconvenience.

In addition, it is a very simple and virtually cost-free process to save the recording to the law firm's computer system where it can be backed up indefinitely. Law firms should review policies on destruction of electronic documents and perhaps modify those policies so that recordings of will and other document signings are never deleted. That could be done by creating a new file for these electronic recordings that has a different rule for destruction (i.e., never).

This emergency legislation should help attorneys to assist clients in the proper execution of their core documents during the duration of this pandemic.

Generally speaking, although wills and codicils must be executed in the presence of two witnesses in order to be presumptively valid, when a client already has those witnesses available, the use of a remote notary or other officer to acknowledge the will or codicil can make the document "self-proving" under New Jersey law, thereby streamlining the probate process at death. If a notary is not available at the time of the will signing, the "self-proving" can be

completed at a later date. If the notarization is not completed before the passing of the client, then the witnesses will need to appear at the probate court to “prove” their signatures on the will.

If a client does not have the required witnesses available, remotely executing a will or codicil in the presence of a notary or other officer should provide additional support that the will or codicil qualifies as a “writing intended to be a will or codicil” under New Jersey law, that may be admitted to probate even without the required formalities of execution (see *In Re Probate of Will and Codicil of MacOol*, 416 N.J. Super 298, 9/16/2010).

### **New Jersey Law Concerning a Writing Intended as a Will.**

Having adopted the so-called “harmless error doctrine,” New Jersey allows documents, in limited circumstances, to be admitted to probate as “writings intended as a will,” even though they fail to satisfy the requisite formalities for a valid will (see N.J.S.A. 3B:3-3). No particular formality is required to fall within the scope of this statute. Rather, the proponent of the defective document must show “by clear and convincing evidence that the decedent intended the document” to operate as his or her will. When such a non-conforming document is to be signed by the client, it is best that the client includes an express acknowledgement that the document is intended to be his or her will. The client should also make an appointment to see his or her attorney promptly following the end of the pandemic for the express purpose of correcting the deficiencies.

Additionally, the client should be encouraged to share concrete facts about his or her signing of the “defacto” will with close friends or relatives who don’t stand to benefit under the document, and perhaps to provide copies of same to these persons, in order to support the client’s intent to establish a will.

In *Estate of Ehrlich*, 47 A.3d 12 (N.J. Super Ct. App. Div. 2012), an unsigned copy of the decedent’s will was admitted to probate. The appellate court held that the unsigned copy of the will, the original of which had purportedly been executed by the decedent and sent to his attorney-executor for safekeeping, sufficiently represented the decedent’s final testamentary intent allowing the document to be admitted to probate as a “writing intended as a will” under N.J.S.A. 3B:3-3. The trial court had appointed a temporary administrator and ordered a thorough search of the decedent’s home and law office for any other wills of decedent, but to no avail. The unexecuted copy proffered by decedent’s nephew was a detailed 14-page document entitled “Last Will and Testament,” which was prepared by the decedent and written on traditional legal paper, with decedent’s name and law office address in the margin of each page. The document did not contain the signature of decedent. It did, however, include a notation in decedent’s handwriting on the cover page, “Original mailed to H.W. Van Scriver, 5/20/2000,” an attorney who was the named executor. The trial court admitted the unexecuted Will to probate, finding that decedent’s handwritten notation on the cover page of the Will provided clear and convincing evidence of decedent’s final assent that he intended the original document to constitute his Last Will and Testament.

The appellate court in *In re Probate of Will and Codicil of MacOol*, 416 N.J. Super. 298, 311 (App. Div. 2010), relying on the harmless error doctrine, affirmed the trial court’s decision,

holding that a writing need not be signed by the testator in order to be admitted to probate. The MacOol Court stated: “Although a document or writing added upon a document was not executed in compliance with N.J.S.A. 3B:3-2, the document or writing is treated as if it had been executed in compliance with N.J.S.A. 3B:3-2 if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute: (1) the decedent's will; (2) a partial or complete revocation of the will; (3) an addition to or an alteration of the will; or (4) a partial or complete revival of his formerly revoked will or of a formerly revoked portion of the will.”

The MacOol Court stated: “After examining the record developed before the trial court, we affirm the court's judgment declining to admit into probate a will that was not reviewed by decedent before her demise. *We reject, however, the part of the court's ruling that construes N.J.S.A. 3B:3-3 as requiring that the writing offered as a will under the statute bear in some form the signature of the testator as a prerequisite to its admission to probate* [Emphasis added].”

Consider, in light of MacOol, a recorded web meeting where the client verbally confirms on video that as testator he or she has read and understands the document, signs it as his or her will, and after initialing or signing each page of the will, displays that page to the web camera. This process would appear to meet the requirements of MacOol, that the decedent read the document which is to be recognized as his or her will and, after reading it, gave his or her affirmation that the document was intended as his or her will.

The New Jersey Court in MacOol stated: “...N.J.S.A. 3B:3-2b, “[a] will that does not comply with [the requirements of N.J.S.A. 3B:3-2a] is valid as a writing intended as a will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting.” Stated differently, a so-called holographic will must have all material testamentary provisions in the handwriting of the testator and must also be signed by the testator.” In *Re Probate of Will and Codicil of MacOol*, 3 A.3d 1258 (N.J. Super. Ct. App. Div. 2010).

## New York – Prof. Mitchell Gans, Esq. - Hofstra University

In New York, Wills normally must be executed in the following manner: They must be in writing, must be signed at the end by the testator or by another, in the name of the testator, at the testator's direction and in his or her presence, with at least two attesting witnesses and the testator must sign in the presence of or acknowledge his or her signature to the witnesses. This may be done with each witness separately but it must all be accomplished within one 30 day period. The testator must declare to the witnesses that the document is his or her will and must ask that the witnesses act as such. EPTL 3-2.1.

A holographic or nuncupative will is only valid if made by a member of the military service during war or other armed conflict in which members of the military are engaged, or made by a person who serves or accompanies a member of the armed forces, or made by a mariner while at sea. EPTL 3-2.2.

A trust to be validly created in New York must be in writing and either be notarized or witnessed by at least two others who executed the instrument as witnesses. EPTL 7-1.17.

For a power of attorney to be valid in New York, it must be executed in the state and be signed and dated by the principal and notarized, but there is no requirement that the principal and agent both sign within a specified period of time. It must be signed and dated by the agent (the attorney-in-fact) as well. To permit the agent to make significant gifts, the principal must execute a statutory rider which must be notarized and witnessed by two others. New York General Obligations Law Sec. 5-1501B.

A health care proxy must be signed and dated in the presence of two witnesses who must also sign. New York Public Health Law Sec. 2981.

New York Governor Andrew Cuomo has issued two orders relating to witnessing and notarizations. Executive Order 202.7 dealing with remote notarization and Executive Order 202.14 dealing with remote Will executions.

Order 202.7 authorizes audio-video notarization provided certain conditions are met. The person seeking the Notary's services, if not personally known to the Notary, must present valid photo ID to the Notary during the video conference, not merely transmit it prior to or after; the video conference must allow for direct interaction between the person and the Notary (e.g. no pre-recorded videos of the person signing); the person must affirmatively represent that he or she is physically situated in the State of New York; the person must transmit by fax or electronic means a legible copy of the signed document directly to the Notary on the same date it was signed; the Notary may notarize the transmitted copy of the document and transmit the same back to the person; and the Notary may repeat the notarization of the original signed document as of the date of execution provided the Notary receives such original signed document together with the electronically notarized copy within thirty days after the date of execution.

Order 202.14 authorizes audio-video witnessing for Wills, health care proxies, trusts and the statutory rider to a power of attorney to allow the agent to make gifts. The person requesting that

their signature be witnessed, if not personally known to the witness(es), must present valid photo ID to the witness(es) during the video conference, not merely transmit it prior to or after; the video conference must allow for direct interaction between the person and the witness(es), and the supervising attorney, if applicable (e.g. no pre-recorded videos of the person signing); the witnesses must receive a legible copy of the signature page(s), which may be transmitted via fax or electronic means, on the same date that the pages are signed by the person; the witness(es) may sign the transmitted copy of the signature page(s) and transmit the same back to the person; and the witness(es) may repeat the witnessing of the original signature page(s) as of the date of execution provided the witness(es) receive such original signature pages together with the electronically witnessed copies within thirty days after the date of execution.

Governor Cuomo just extended virtual witnessing and virtual notarization in New York to June 6th: <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO202.28.pdf> .

South Dakota - Ashley G. Blake, Esq., Davenport, Evans, Hurwitz & Smith, L.L.P.

On April 19, 2020, the South Dakota Supreme Court issued an emergency order in response to the COVID-19 pandemic entitled, “[Amended Emergency Order Regarding Court Reporters, Witnesses and Notarization in Midst of the COVID-19 Pandemic](#)” (the “Emergency Order”). The Emergency Order will stay in effect until modified or repealed by the South Dakota Supreme Court.

One requirement for a valid non-holographic will in South Dakota is that the will must be “[s]igned in the conscious presence of the testator by two or more individuals who, in the conscious presence of the testator, witnessed either the signing of the will or the testator's acknowledgment of that signature.” See SDCL 29A-2-502 (but except in the limited circumstances otherwise provided for in SDCL 29A-2-503). In a time of social distancing and social precautions to limit potential exposure to COVID-19, a will execution with two witnesses in the physical presence of the testator is a scenario that many testators and witnesses are uncomfortable being in at this time. The Emergency Order alleviates these concerns and specifies that the use of “communication technology” is permitted in order to meet the requirement of being in the “conscious presence” of the testator during the time that the Emergency Order is in effect. This function requires two or more witnesses to be able to communicate virtually with the testator through use of electronic devices or methods that allow all of the parties to both hear and see each other while not in the personal vicinity of one another (e.g. video conferencing).

Pursuant to SDCL 34-12D-2, a declaration (i.e. a living will) also requires two witnesses. The Emergency Order, however, also permits the use of communication technology for the execution of these documents. All witnesses who participate via communication technology for the execution of wills or declarations as covered by the Emergency Order are required to mail the page, or pages that contain the witnesses’ original signatures to the declarant or testator or the declarant’s or testator’s attorney.

The execution of a South Dakota trust does not require witnesses, and neither South Dakota trusts nor wills or declarations require a notary, unless the will is to be a self-proved will under SDCL 29A-2-504, but notarization is generally a best practice and used by many practitioners. Durable powers of attorney, including health care powers of attorney, in South Dakota require that the signature of the principal “must be witnessed by two other adult individuals or by a notary public.” SDCL 59-7-2.1.

As of July 1, 2020, South Dakota had already passed a statute, SDCL 18-1-11.1, that allows the remote notarization of documents. Specifically, a South Dakota notary can notarize documents through the use of “communication technology.” “Communication technology” is defined as “an electronic device or process that allows a notarial officer and a person not in the physical presence of the notarial officer to communicate with each other by sight and sound.” SDCL 18-1-1.1(2). The requirements for a notarial officer to be able to notarize documents remotely, as provided for in SDCL 18-1-11.1, are as follows:

1. The notarial officer must have “personal knowledge of the identity of a person through dealings sufficient to provide reasonable certainty that the person has the identity being claimed”;
2. Once an individual has signed the document remotely, the notary must affix her signature “to the original tangible document executed by the person”; and
3. The notary must indicate in her certificate:
  - a. the remote location of the individual who executed the document;
  - b. “[T]hat the notarial act involved a statement made or a signature executed by a person not in the physical presence of the notarial officer, but appearing by means of communication technology”; and
  - c. That the notary was “reasonably [able] to confirm that the document before the notarial officer [was] the same document in which the person made the statement or on which the person executed a signature.” SDCL 18-1-11.1.

The only change that the Emergency Order makes for remote notarization is when there are witnesses involved, the Emergency Order specifies that, “Notaries and other persons qualified to administer an oath in State of South Dakota may swear a witness remotely by communication technology, provided that they can positively identify the witness.”

## Texas – Patrick Gordon, Esq. and Joshua Snider, Esq., Gordon Davis Johnson & Shane PC

Spurred by the COVID-19 crisis, most states across the country have taken measures to allow for the execution of documents to be made outside the presence of a notary public or through electronic signature mechanisms. For Texas, the use of an online notary has been codified into law prior to the COVID-19 crisis. However, as a result of the crisis, Governor Abbott has temporarily suspended certain statutes concerning in person appearance before a notary public to execute certain estate planning and real estate documents. The estate planning document that the temporary suspension applies to are a self-proved will, a durable power of attorney, a medical power of attorney, a directive to physician, or an oath of an executor, administrator, or guardian. <https://gov.texas.gov/news/post/governor-abbott-temporarily-suspends-certain-statutes-to-allow-for-appearance-before-notary-public-via-videoconference>. A separate temporary suspension of section 121.006(c)(1) of the Texas Civil Practices and Remedies Code applies to certain real estate documents, such as a mortgage instrument. <https://gov.texas.gov/uploads/files/press/Office-of-the-Attorney-General-Guidance.pdf>. Together, the suspension of these statutes have, in effect, temporarily granted “online notary” powers to a traditional notary public for the limited purposes of executing these types of estate planning and real estate documents.

No recent changes have been made to the electronic signature procedures under the Texas Uniform Electronic Transactions Act (“UETA”) as a result of the COVID-19 crisis. While the UETA continues to allow for the electronic execution of documents related to a transaction, the UETA prohibits the use of electronic signature for documents related to “a law governing the creation and execution of wills, codicils, or testamentary trusts.” *Tex. Bus. & Com. Code* § 322.003(b)(1).

The temporary Texas laws only address the remote notary requirements and do not change the requirement that estate planning documents, such as wills, codicils or testamentary trusts have original signatures, or in some cases have witnesses.

As described in more detail below, in response to the suspension of these statutes, the Texas Secretary of State has promulgated directives to allow for the safe execution of estate planning and real estate documents while minimizing in-person contact for both the notary public and the signatories of the documents. The temporary suspension of these statutes will be in effect until the earlier of May 30, 2020 or the termination of the March 13, 2020 disaster declaration.

This article will explain the changes to the notary requirements and how the changes differ from traditional notarizations as well as provide an overview of the electronic signature procedures under the UETA.

### **Texas Online Notary Rules**

a. **Pre Covid-19 Rules.** The Texas rules governing traditional and online notary licensing are found in Chapter 406 of the Texas Government Code (“TGC”). *Texas Government Code Chapter 406 Subchapter A* contains the rules and requirements that individuals must meet in order to be commissioned as a notary public. TGC Chapter 406, Subchapter C is the portion of the Code that governs online

notaries. An online notary must satisfy the requirements of a conventional notary. *TGC Chapter 406.105(b)(1)*. Therefore an individual must be a Texas resident, at least 18 years of age, and not have been convicted of a felony or a crime of moral turpitude. *TGC Chapter 406.004*. In order to be appointed as an online notary public, an individual must have a notary identification number and hold a current commission as a traditional Texas notary public. *TGC Chapter 406.105*.

The overlap of the base requirements for traditional notaries with those for online notaries enables an existing notary public to easily apply for qualification as an online notary by paying the \$50 application fee through the Secretary of State's website and the online commissioning system. An individual commissioned as an online notary will retain that status for the same duration as their traditional notary commission.

For an online notarization to be valid, the notary must be physically located within Texas at the time of notarization while the signing party may be located anywhere. *TGC Chapter 406.110(a)*. An online notary shall take reasonable steps to ensure that the device used to create the electronic signature is still valid at the time of signing. *TGC Chapter 406.109(a)*. The online notary must additionally keep a secure electronic record of all documents that have been notarized electronically. This record must include information regarding the date and time of notarization, the type of notarial act, the name and address of the parties involved, evidence of the identity of the parties, a recording of any video or audio used to confirm the identity of the parties, and the fee charged for the notarization. *TGC Chapter 406.108(a)(5) lists the forms of evidence for identity*.

b. **Post Covid-19 Rules.** In addition to the standard provisions for online notarization, as part of the COVID-19 disaster declaration, Governor Abbott temporarily suspended the requirements that a notary public appear in-person for the execution of a self-proved will, a durable power of attorney, a medical power of attorney, a directive to physician, or an oath of an executor, administrator, or guardian. *The full list of Texas statutes suspended can be found on the Secretary of State's website at <https://www.sos.state.tx.us/statdoc/oog-temporary-suspension.shtml>.* Governor Abbot has also temporarily suspended section 121.006(c)(1) of the Texas Civil Practices and Remedies Code to allow for appearance before a notary public via videoconference to acknowledge real-estate instruments such as mortgages. *<https://gov.texas.gov/uploads/files/press/Office-of-the-Attorney-General-Guidance.pdf>*. In response to these suspensions, the Texas Secretary of State has promulgated directives to allow for the safe execution of documents via video notary.

For estate planning documents, the Texas Secretary of State has promulgated the following directives:

1. A notary public shall verify the identity of a person signing the document at the time the signature is taken by using two-way video and audio conference technology.
2. A notary public may verify identity by personal knowledge of the signing person, or by analysis based on the signing person's remote presentation of a government-issued identification credential, including a passport or driver's license that contains the signature and a photograph of the person.

3. The signing person shall transmit by fax or electronic means a legible copy of the signed document to the notary public who may notarize the transmitted copy and then transmit the notarized copy back to the signing person by fax or electronic means, at which point the notarization is valid. <https://www.sos.state.tx.us/statdoc/oog-temporary-suspension.shtml>.

For real estate documents, the Texas Secretary of State has promulgated more stringent requirements for the use of notary publics via video conferencing:

1. A notary public shall use two-way audio-video communication technology that allows for direct and contemporaneous interaction between a person signing a document and the notary public by sight and sound.
2. A notary public shall verify the identity of a signatory at the time the signature is taken by using two-way audio-video communication technology. A notary public may verify identity by:
  - i. Personal knowledge of the signatory;
  - ii. Analyses based on the signatory's remote presentation of a government-issued identification credential, including a passport or driver's license, that contains the signature and a photograph of the signatory, and is of sufficient quality to allow for identification; or
  - iii. an introduction of the signatory by oath of a credible witness who personally knows the signatory, and who is personally known to the notary public.
3. During the two-way audio-video communication:
  - i. The notary public shall attest to being physically located in Texas;
  - ii. The signatory shall attest to being physically located in Texas;
  - iii. The signatory shall affirmatively state what documents are being signed; and
  - iv. The signatory's act of signing shall be close enough to the camera for the notary public observe it clearly.
4. A recording of the two-way audio-video communication of the notarial act shall be kept by the notary public for two years from the date of the notarial act.
5. The signatory shall send the original signed documents by courier, U.S. Mail, or overnight carrier directly to the notary public for the notary public to sign and to affix the official stamp or seal.
6. The official date and time of the notarization shall be the date and time when the notary public witnessed the signatory signing the documents during the two-way audio-video communication.
7. The documents shall include, whether in a notarial certificate, a jurat, or an acknowledgement, language substantially similar to the following: "This notarization involved the use of two-way audio-video communication pursuant to the suspension granted by the Office of the Governor on April 27, 2020, under section 418.016 of the

Texas Government Code.” [https://gov.texas.gov/uploads/files/press/Office\\_of\\_the\\_Attorney\\_General\\_Guidance.pdf](https://gov.texas.gov/uploads/files/press/Office_of_the_Attorney_General_Guidance.pdf).

The Texas Secretary of State has further stated that documents executed while the suspension of the above statutes is in effect, and in accordance with its terms, will remain valid after the termination of suspension.

### **Uniform Electronic Transactions Act**

The UETA, which governs electronic forms and signatures in Texas, is codified under Section 322 of the Texas Business and Commerce Code. It defines an “electronic signature” as an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record. *Tex. Bus. & Com. Code § 322.002(8)*. The UETA applies to transactions that have an electronic record or electronic signature that is created, generated, sent, communicated, received, or stored. *Id. at § 322.004*. The UETA does not apply to the creation and execution of wills, codicils, or testamentary trusts. *Id. at § 322.003(b)*. Moreover, the UETA does not apply to most transactions under the Uniform Commercial Code (“UCC”), except under Chapters 2 and 2A (Sales and Leases). *Id.* Nevertheless, certain UCC Articles, such as Article 9 for Secured Transactions, have their own electronic signature provisions which allow security interests, for example, to be signed electronically. *Tex. Bus. & Com. Code § 9.203(b)(3); Tex. Bus. & Com. Code § 9.102(a)(7)*. Notably, the Governor’s orders regarding special COVID-19 exceptions to certain electronic means of certification do not affect the UETA in any way.

The UETA does not set a requirement for transactions to be done through electronic means or in electronic form, it merely allows the parties involved to use such electronic resources if they choose. *Tex. Bus. & Com. Code § 322.005(a)-(b)*. Importantly, the UETA states that, in Texas: (1) a record or signature may not be denied legal effect or enforceability solely because it is in electronic form, (2) a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation, (3) if law requires a record to be in writing, an electronic record satisfies the law, and (4) if a law requires a signature, an electronic signature satisfies the law. *Id. at § 322.007(a)-(d)*.

## Virginia – Andrew Hook, Esq., Hook Law Center

As of May 6, 2020, Virginia has not adopted changes to its rules for execution of estate planning documents to address document execution issues arising from the Virginia Governor's declaration of a state of emergency due to COVID-19. The Virginia General Assembly may consider such issues at a special session later this year. At the present time the following are the Virginia execution requirements for basic estate planning documents.

### Last Will and Testaments

No Will is valid unless it is in writing signed by the testator, or by some other person in the testator's presence and by his direction. A holographic Will is valid if it is entirely in the testator's handwriting and signed by the testator. Holographic Wills do not require witnesses nor notaries, but at the time of probate the testator's writing must be proven by at least two disinterested witnesses. Generally, typewritten wills must be signed by the testator in the physical presence of two witnesses, who sign the will in the testator's presence and the presence of each other. A Will may be accompanied by an affidavit of the testator and witnesses to make the Will easier to probate, which affidavit will require a notary. Virginia law provides an exception to the requirement of witnesses where the proponent of the Will at probate establishes by clear and convincing evidence that the testator intended the document to constitute the testator's will. This exception does not excuse the requirement for the testator's signature, except for very limited circumstances. The Virginia Uniform Electronic Transactions Act specifically states that it does not apply to the creation of Wills, Codicils, or testamentary Trusts and, as of the date of this article, Virginia has not enacted the Uniform Electronic Wills Act or other electronic wills act.

### Trust Agreements

In Virginia, a Trust may be created orally, a parol trust. However, the proponent of a parol Trust must establish it with explicit, clear and convincing evidence. Most trusts are established by a written trust agreement signed by the settlor and trustee with their signatures notarized. However, Virginia does not require that their signatures be notarized for the trust to be valid. Additionally, the Virginia Uniform Trust Code does not require a trust agreement be in paper form, allowing a trust agreement to be in electronic form subject to the Virginia Uniform Electronic Transactions Act.

### Powers of Attorney

Virginia has adopted the Uniform Power of Attorney Act. A power of attorney must be in writing and signed by the principal, or in the principal's presence by another individual directed by the principal to sign, to be valid. The principal's signature does not have to be notarized, but the principal's signature is presumed to be genuine if the principal's signature is notarized. On occasion a power of attorney must be recorded in the circuit court, or its clerk's office, most

frequently when the agent is transferring title to real property. To record the power of attorney, the principal's signature must be notarized or proved by two witnesses. The Virginia Uniform Power of Attorney Act does not require a power of attorney be in paper form, permitting it to be inscribed on a tangible medium (i.e. paper) or in an electronic medium. The principal may sign by affixing his signature to a writing or by attaching to the electronic power of attorney an electronic symbol. Generally, a photocopy or electronically transmitted copy of an original power of attorney has the same effect as the original.

### Advance Medical Directives

Advance Medical Directives must be in (i) writing, signed by the principal before two witnesses, or (ii) a witnessed oral statement made by the declarant after being diagnosed as suffering from a terminal condition. The witnesses do not need to be disinterested. If the Advance Medical Directive is in a writing, there is no requirement that the principal's signature be notarized.

### Electronic Notaries

Since 2012, Virginia has permitted electronic notaries to perform remote online notarizations of electronic signatures (e-notarization). An electronic notary is a traditional notary who has registered with the Commonwealth and has been commissioned as an electronic notary public. Traditional notaries may not perform e-notarizations in Virginia, they must be in the physical presence of the signer. Virginia law requires that the electronic notary use approved audio/video conference and safekeeping technology. For more information about Virginia's e-notarization rules, the Secretary of the Commonwealth has posted frequently asked questions at <https://www.commonwealth.virginia.gov/official-documents/notary-commissions/enotary-faq/>

Virginia law permits electronic signing and e-notarization of trust agreements and powers of attorney.

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