

April 3, 2020

A Guide to Electronic Witnessing and Notarization

Estate Planning & Wealth Transfer

Real Estate

While the Stay at Home order issued last month by Illinois Gov. J.B. Pritzker as a result of the coronavirus (COVID-19) pandemic has numerous (and obvious) impacts on business, a perhaps overlooked aspect of social distancing and working from home affects witnessing and notarizing important legal documents such as wills, trusts, powers of attorney, deeds and other real estate documents, mortgages and other loan documents, etc.

Since the Stay at Home order, Gov. Pritzker also issued Executive Order 2020-14 regarding electronic witnessing and notarization of documents for the duration of his proclaiming the COVID-19 pandemic a disaster.

Basically, the order permits witnessing documents by two-way audio-video communication, and guidelines were issued in connection with the order. But there may still be some limitations on the type of documents that can be witnessed electronically (see discussion below).

A few points to keep in mind if you have documents needing witnessing:

- The audio-video communication must be simultaneous. The guidelines provide that the parties can be in different locations but must be able to see, hear and communicate with each other.
- The audio-video communication must be recorded and preserved for a period of 3 years. Therefore, any technology that is used must be able to preserve the record safely and securely.
- The signatory and the witness must be physically present in Illinois during the communication.
- The signatory must affirmatively state on the communication what document is being signed.
- Each page to be signed or initialed must be shown to the witnesses in a way that is clearly legible.
- The act of signing must be clearly captured in the communication.
- A legible copy of the entire signed document must be faxed or sent electronically to the witness no later than the day after the document is signed.
- The witness must sign the transmitted copy as a witness and the signed copy must be faxed or sent electronically back to the signatory within 24 hours of receipt.
- If necessary, the witness may sign the original document signed by the signatory provided the witness receives the original signed document together with the electronically witnessed copy within 30 days from the date of remote signing.

The guidelines define “remote notarization” as acts that include taking acknowledgements, administering oaths of affirmation, certifying true and correct copies and performing “such other duties as may be prescribed by a specific statute performed by remote means.”

The remote notarization must include:

- The notary’s signature, seal, title and commission, and expiration date.
- Other required information concerning the date and place of the remote online notarization.
- Conform to the requirements of the Illinois Notary Public Act for acknowledgments, verifications, affirmations or attestations.
- Indicate that the person making the acknowledgment, oath or affirmation appeared remotely.

Keep in mind that every notary is required by Illinois law to confirm the identification of a signatory. This can be established by driver's license or passport (which contain the signatory's picture and signature) or personally knowing the signatory. If you do not know the signatory, a notary should obtain and retain a copy of the identification presented.

Possible Limits on Electronic Witnessing and Remote Notarization

The order does not prohibit notaries from utilizing electronic or remote notarization platforms available that meet industry standards. Some real estate title companies have this technology available.

What is not included in the order or the guidelines that accompanied the order was what type of certification that would be required to document the remote notarization. Unfortunately, Illinois does not have an electronic notary act so there is no statutory framework for electronic notarizations. The Revised Uniform Law on Notarial Acts (2018) is a more comprehensive statute that includes a format of what should be included in a certification and how that certification should be associated with the document. Statutes allowing electronic notarizations have been adopted in a number of states and further guidance could be found in those statutes.

If an Illinois county permits electronic recording, an electronically notarized document would likely be acceptable for recording. If an Illinois county requires "wet signatures" as Cook County does, the document signed by the signatory and the notarization signed by the notary must be combined into one original document prior to recording. If one is closing through a title company, the escrow officer could be the party to assemble the parts. It is not known if these electronic notary provisions will cause underwriting issues with title companies.

Deeds and mortgages may prove to be difficult to notarize pursuant to this order although other documents such as powers of attorney or certifications would likely work more smoothly.

The Illinois Electronic Commerce Security Act excludes electronic signatures for wills, trusts and any "transferable instrument of rights and obligations including, without limitation, negotiable instruments and other instruments of title wherein possession of the instrument is deemed to confer title, unless an electronic version of such record is created, stored, and transferred in a manner that allows for the existence of only one unique, identifiable, and unalterable original with the functional attributes of an equivalent physical instrument, that can be possessed by only one person, and which cannot be copied except in a form that is readily identifiable as a copy."