

Member Advisory:

NEW STATE LAW ALLOWS REMOTE NOTARIZATION

A new law – effective immediately as an emergency measure – has been enacted to allow the remote notarization of documents, commercial and residential alike, through the period ending three business days after the current coronavirus state of emergency is lifted. Here’s how the procedure will work:

General Requirements

Notarizations taken via electronic video conferencing in real time will be valid and effective if:

- (i) the notary observes each signatory’s execution of a document;
- (ii) both the notary and the signatory are physically located within Massachusetts;
- (iii) each signatory provides the notary with satisfactory evidence of identity, namely (a) at least one current document issued by a federal or state government agency bearing the photographic image of the individual’s face and signature; or (b) the notary’s personal knowledge of the identity of the signatory. However, if the signatory is not a United States citizen, a valid passport or other government-issued identification credential displaying the signatory’s nationality or residence and bearing the photographic image of the signatory’s face and signature will suffice. Any government-issued credential must be shown to the notary during the electronic video conference and a copy of the front and back must be sent to the notary, either with the executed document or separately through electronic means. In the case of a passport book, all that’s needed are copies of the front cover and the page displaying the signatory’s photograph, name and signature. The notary must keep any such identification materials received from the signatory in a secure location for a period of ten years;
- (iv) the signatory makes the appropriate acknowledgement to the notary;
- (v) the signatory forwards the executed document to the notary by courier or other means in accordance with the notary’s instructions; and
- (vi) following receipt of the executed document, but only if the transaction involves a mortgage or conveyance of real estate, the notary and the signatory participate in a second video conference during which the signatory verifies to the notary that the document received by the notary is the same document executed during the first video conference.

A document may be signed on multiple pages or in multiple locations within the commonwealth.

Conducting the Video Conference

During any video conference, the signatory must (i) swear or affirm under the penalties of perjury that he or she is physically located within the commonwealth and (ii) identify any person present in the room with the signatory, making that person viewable to the notary. The

fact that a signatory was actually located outside of the commonwealth during the video conference or failed to accurately disclose others in the room will not affect the validity of a mortgage or the acquisition of real property by a purchaser for value. Each notary who utilizes electronic video conferencing must create an audio and video recording of the performance of the notarial act, to be retained for a period of ten years.

Notary's Certificate and Affidavit

Once the statutory procedure has been completed, the notary may affix his or her stamp and signature to the executed document, at which point the notarial act is considered complete. The notary's certificate on the document must recite (1) that the document was notarized remotely pursuant to the statute, (2) the county in which the notary was located at the time that the notarial act was completed and (3) the date on which the notarial act was completed, although failure to include any such recitals will not affect the validity or recordability of the document. Where the document was notarized in connection with a mortgage financing, the notarial certificate may recite the date of the document, even if earlier than the date on which the notarial act was completed.

The notary must execute an affidavit confirming under the penalties of perjury that the notary has: (1) if applicable, received a copy of each signatory's form of identification and visually inspected the applicable document during the initial video conference; (2) obtained each signatory's verbal assent to the recording of the electronic video conference; (3) taken each signatory's affirmation as to his or her physical presence within the commonwealth; and (4) been informed of, and noted on the affidavit, any person present in the room, including a statement of his or her relationship to the signatory. The affidavit is to be retained for a period of ten years by the notary but need not be recorded.

Special Provisions

The following special provisions apply to any transaction involving a mortgage or conveyance of real estate or any will, nomination of guardian or conservator, caregiver authorization affidavit, trust, durable power of attorney, health care proxy or authorization under the federal Health Insurance Portability and Accountability Act of 1996:

- (i) only a notary who is an attorney licensed to practice law in the commonwealth or a paralegal under the direct supervision of such an attorney, may perform a notarial act utilizing electronic video conferencing in real time; and
- (ii) if the notary is a paralegal, any copy of a signatory's form of identification, any audio and video recording and any required affidavit is to be retained by the notary's supervising attorney.

Additionally, with respect to any document requiring notarization in the course of closing a transaction involving a mortgage or conveyance of real estate, if a signatory's identity is verified by a government-issued form of identification and the signatory is not otherwise personally known to the notary, the signatory must, during the initial video conference, display a secondary form of identification which (1) includes the signatory's name and (2) may contain the signatory's photograph, signature or be issued by a government entity. Acceptable secondary forms of identification include, but are not be limited to, a credit or debit card, a social security

card, a municipal tax bill or a utility bill (so long as any such bill is dated within 60 days of the first video conference).

Completion of Non-Real Estate Documents

With respect to any will, nomination of guardian or conservator, caregiver authorization affidavit, trust, durable power of attorney, health care proxy or authorization under the federal Health Insurance Portability and Accountability Act of 1996, the document will be considered complete when all original signed copies and the notary's affidavit are assembled.

As usual, newly-enacted legislation – particularly when enacted during the course of a major crisis – is subject to ambiguities and interpretive issues. Members are urged to consult their own attorneys.

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