

# **It's the Right Time to do the RON Thing: Why California Should Adopt Remote Online Notarization in 2020**

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## **Introduction**

The COVID-19 pandemic has made social distancing a priority for public health and safety. Throughout the country, all but three states have enacted remote online notarization, either permanently, prior to the pandemic, or temporarily or permanently, in response to the pandemic, to support notary publics and signers in need of notary services. Remote online notarization (RON) allows notary publics to notarize documents by utilizing audio-visual communications through third-party platforms. In California, remote online notarization has not been enacted, so signers must still appear before a notary public in person, or signers must use a mobile notary public service. RON gives notary publics the ability to provide notary services to COVID-positive patients in isolation, using methods secured by multi-factor and knowledge-based authentications. Even with security measures in place, remote online notarization carries a potential for fraud and data breaches. The California legislature has twice rejected proposals for remote online notarization. Two bills introduced in Congress seek to pass legislation that enacts remote online notarization nationwide for interstate commerce. Whether or not California or Congress enacts remote online notarization, it should still be enacted, at least temporarily, in California until the passing of the COVID-19 pandemic.

## **Notary Public Duties**

A notary public is an individual appointed by the state. Generally, the duty of a notary public is to ensure the signer of important documents has been properly identified as the signer of the document, is not under duress, and is aware of the contents of the document or transaction. The identity of the signer is verified through acceptable official identification such as a driver's license, military identification card, or passport. Traditionally the duties of a notary public have required the physical presence of the signer before the notary public, but with modern technology and the appearance of COVID-19, some states have enacted provisions for emergency RON. Before the pandemic, a handful of states previously enacted RON, and others were considering legislative proposals to do so.

The authority of the notary public is governed by the states. Each state has its own unique notary laws and notaries must follow the laws of their particular state. This means that notaries in one state may have authority to perform duties that notaries in another do not<sup>1</sup>. Other differences from state to state include the official forms used by the notary public, if any, which in some states are statutorily mandated; the type of signer identification that may be relied upon, and if (and the type of) notary journal is to be maintained by the notary public. In California, it is a notary public's duty, when requested, to additionally take depositions, affidavits, and administer oaths and affirmations<sup>2</sup>. Though there are no federal laws specifically governing notaries, a federal legislative proposal, the Securing and Enabling Commerce Using Remote and Electronic Notarization Act of 2020 (SECURE Act) was introduced to the Senate on March 18, 2020 as Senate Bill 3533 and H.R. 6364 was introduced to the House of Representatives on March 23, 2020. Both proposals would introduce minimum, nationwide standards for remote online notarization.

## **Notarization in California**

In California, the personal appearance of the document signer is required before the notary public<sup>3</sup>. California is one of three states, together with Delaware and South Carolina, that has not passed either a permanent or emergency law for electronic notarization<sup>4</sup>. Neither California statutes nor emergency orders provide the authority for California notaries public to perform remote online notarization, meaning that in place of RON, the California Secretary of State, which regulates California notary publics, has recommended the use of a mobile notary public, an individual who will travel to an agreed-upon location to perform the notarization while observing suggested guidelines for social distancing<sup>5</sup>.

## **Remote Online Notarization**

Some states have previously enacted statutes allowing RON, which is the use of audio-visual technology to complete a notarial act when the principal is not in the same physical location as the notary public<sup>6</sup>. Others have temporarily authorized RON as a response to the COVID-19 pandemic. On March 26, 2020, the Governor of Illinois also signed an executive order to temporarily allow RON under the requirements of two-way, real time audio-visual communication for direct interaction between the notary public and signer, the signer stating that their physical location is in Illinois, and retaining the recording by the notary public for a minimum of three years. On June 30, 2020, Oregon signed HB 4212A into law which legalized RON when meeting specific technology requirements<sup>7</sup>. In response to COVID-19, Hawaii released an executive order to allow notaries to perform their duties while complying with social distancing guidelines. The executive order allows notaries to perform notarial acts on paper documents using video conference technology known as remote ink-signed notarizations (RIN)<sup>8</sup>. It is not required that notaries in Hawaii use RIN but if they choose to do so, they must follow

guidelines approved by the Governor; which include identification of the signer via personal knowledge or government-issued ID, and ensuring the signer appears to be aware of the significance of, and is willing to perform, the transaction<sup>9</sup>. RON has been enacted and permanently implemented in fifteen states. RON or other remote notarization has been temporarily enacted in 32 states and the District of Columbia due to COVID-19<sup>10</sup>.

The SECURE Act, Senate Bill 3533 and H.R. 6364 would establish minimum standards for electronic and remote notarizations that occur in or affect interstate commerce. If the SECURE Act were to become law in its current form, it would authorize every notary public in the United States to perform RON using audio-visual communications and tamper-evident technology in connection with interstate transactions<sup>11</sup>.

### **Importance of Physical Presence, Public Safety, and Notarization**

To prevent and detect fraud the notary public must verify the identity of the signer, that the signer has the apparent capacity to sign the documents, and complete a certificate, often a “notary acknowledgment” that the signer has signed the documents. Preventing fraud is at the forefront of California’s notary statutes. The California Legislature has twice rejected implementing RON because of several issues, among them the potential for increased fraud, and the costs of implementation and enforcement. In his recent letter to Congress, California’s Attorney General Xavier Becerra requested Congress shelve any legislation that would authorize RON in California<sup>12</sup>. The physical presence of both notary public and signer are viewed by the Legislature and by others, including without limitation courts, county recorders, title insurance companies, and attorneys, as paramount to California combating fraudulent transactions.

In California, the physical presence of the signer is considered imperative for a notary public to verify the identity of a signer. The failure of notaries to ensure the signer's physical presence before the notary public at the time and place of the notarial act has been a significant issue in recent decades<sup>13</sup>. A notary public must remain vigilant to the possibility of fraud, duress, or deceit. A notary public may be subject to discipline by the California Secretary of State, and to civil litigation if the notary public has failed to properly discharge the notary public's duties. For the official misconduct or neglect of a notary public, the notary public and the sureties on the notary public's official bond are liable in a civil action to the persons injured thereby for all the damages sustained<sup>14</sup>. *See, Lewis v. Agricultural Ins. Co.*, 2 Cal.App.3d 285, (Cal. Ct. App. 1969) (the act of a notary public in falsely certifying signatures of an individual who had never appeared before her constituted official misconduct or neglect). *McComber v. Wells*, 72 Cal.App.4th 512, (Cal. Ct. App. 1999) (holding that a notary who negligently notarizes a trust deed is liable for emotional distress damages).

In the face of the COVID-19 pandemic, the necessity of the signer's physical presence needs to be weighed against public safety. As of August 13, 2020, there were over 586,000 total cases of COVID-19 in California<sup>15</sup>. California is also rolling back its re-opening, closing public indoor areas such as zoos, museums, and movie theaters, and all non-essential places of business<sup>16</sup>. If an individual were to need to have documents notarized, the options are limited. A mobile notary public could meet the individual at their home or other open-air location, but if the individual has tested positive for COVID-19, the notary public would then be at risk of infection.

Many hospitals within California have enacted strict visitor restrictions. The U.C. Davis Medical Center requires that two visitors are registered by the patient before visiting and only

one of the pre-identified visitors will be allowed to visit at a time, but outside of in-person visiting recommend communication via cell phone, FaceTime, Skype or instant messaging services<sup>17</sup>. Regarding COVID-19 positive adult patients, the University of San Francisco Health allows only video visitation with exceptions made at the end of life<sup>18</sup>. UCLA Health updated their visitation guideline on June 12, 2020 stating that all patients were allowed to receive one visitor a day, with the caveat that COVID-positive patients were exempt from this changed guideline<sup>19</sup>. COVID-19 is a disease that varies wildly on a spectrum, from a positive test with few or no symptoms, to a life-threatening illness resulting in long-lasting health issues or death. Patients without a will or needing to sign legal documents are unable to simply call a mobile notary public and have them arrive at their hospital bed. The patient's options are limited, as California has not approved RON, even on a temporary basis.

### **Advantages of RON**

In Fresno, California, an 80-year-old woman, Shirley McClain, tested positive for COVID-19 and has been in isolation in her nursing home. After testing positive, she decided to sign estate planning documents but due to the COVID-positive test, the nursing facility would not allow her to do so, and Shirley must wait until she is out of isolation before signing any legal documents. Expanding notarization from mere physical presence to a digital one would enable notaries to notarize documents for immobile clients; additionally, because we now understand that a person can be infected with COVID-19 and be asymptomatic, RON would help prevent the spread of COVID-19. Authorizing RON on a temporary basis would allow COVID-19 afflicted patients, such as Shirley McClain, to notarize the legal documents they may need.

Even without the COVID-19 pandemic, notarizing a client at their home has its own safety concerns for notaries. On May 11, 2017, a mobile notary public arrived at a Bronx apartment in New York and was physically grabbed by the neck and threatened with a knife<sup>20</sup>. In Dyer, Indiana, a mobile notary public was held at gunpoint by a signer who demanded loan settlement money from the notary public<sup>21</sup>. In 2013, the National Notary Association (NNA) conducted an online survey of notaries which showed that isolated signing locations and angry signers were common safety concerns. Seven percent of the survey respondents stated that they had been threatened by the signer or a third-party present during the notarization<sup>22</sup>. RON would allow notaries to avoid dangerous situations and reduce safety concerns involved with mobile notarization.

### **Disadvantages of RON**

While on one hand RON may make notarization safer for notaries, it may make it less reliable for signers and those relying on the notarization process to prevent fraud. RON has raised concerns of increased fraud due to the lack of physical presence of the signer. On June 25, 2020 the American Land Title Association (ALTA), released a document detailing its proposed principles for RON. To reduce fraud and protect consumers, ALTA suggests protection measures should be multifactor, third-party authentication, recording the signing process, and retaining the record for 7-10 years<sup>23</sup>. Some states, such as Utah, also require knowledge-based authentication (KBA), where the signer must answer a series of computer-generated questions based on the signer's personal history, credit, and financial information. In Utah, a signer requesting RON must correctly answer 4 out of 5 KBA questions in under 2 minutes, with each question having 5 possible answers<sup>24</sup>.

Moving the notarization process from physical presence where the notary public can verify the signer in person to an online format carries the risk of fraudulent activity. The notary public also ensures that the signer is not under duress from a third-party who is present at the signing. For an in-person signing, the notary public can request non-signing parties leave the room. Given the limited view of a phone or web-camera it will likely be difficult for a notary public to detect if the signer is under duress from an off-screen third party.

Even with the use of KBA questions as a security measure, effectiveness may be negated by data breaches. A data breach exposes confidential, sensitive, or protected information to an unauthorized person. The files in a data breach are viewed and/or shared without permission<sup>25</sup>. In March, Marriot hotels announced that hackers accessed internal data that contained information such as names, addresses, employer information, and phone numbers of over 5 million guests<sup>26</sup>. Nintendo discovered a data breach in April that exposed the date of birth, country, e-mail addresses and credit card information associated with Nintendo accounts of over 300,000 customers<sup>27</sup>. An individual could use the information from these data breaches to circumvent the KBA security questions of online notarizations. Another concern is the possibility of a data breach of signer and notary information while using an online third-party platform for online notarization.

For states that have authorized RON, the notary public wishing to provide RON must sign up with a platform that offers RON services to customers. NotaryCam and Notarize are two such platforms, and they both train notaries how to use the platform and direct customers to the notary public. These platforms store the audio-visual recordings and secure data involved in online notarization. With RON, the control of a notary public's journal data is extended to a



third-party<sup>28</sup>. California law imposes that a notary public keep an active, sequential journal that is under the direct and exclusive control of the notary public. California law also states that the journal of notarial acts is the exclusive property of the notary public, and shall not be surrendered to an employer or any other person, except the county clerk or a peace officer investigating a criminal offense<sup>29</sup>. With RON, the control over the audio-visual recordings and secure data would not be in the exclusive control of the notary; instead, RON platforms such as NotaryCam and Notarize would store this information. Though in California a notary public has exclusive control over their journal, upon written request any member of the public providing statutorily specified information about the particular notarial act, the notary public must supply a copy of the requested information. It is not clear if this would also apply to information and recordings held by RON platforms, but if so, it creates a third-party provider where the notary public would not have exclusive control over notarial acts and information, and this would need to be considered in any proposed implementation of RON in California.

### **Conclusion**

With the COVID-19 pandemic, the importance of social distancing is paramount for public safety. Forty-seven states have either permanently enacted RON or temporarily enacted it due to COVID-19. After recent spikes in COVID-19 cases, California is rolling back the plan to re-open the state. Implementing RON would allow notary publics to notarize documents from the safety of their own home and would also allow COVID-positive patients in isolation to have any needed documents notarized. However, enacting RON raises the issue of increased potential for fraud because of the lack of physical appearance by the signer, and the authentication of identification documents through an audio-video connection. RON also raises concerns of

security due to third-party platforms maintaining records which may alter the way the notary journal is maintained by the notary public, and may make these records subject to data breaches. Even with these concerns, enacting RON on a temporary basis because of COVID-19 would provide relief for isolated patients and increase safety for notary publics. It would also allow California to use the temporary enactment to ensure that RON is efficient and secure. If weaknesses or implementation problems remain after California's COVID-19 emergency has subsided, then the enactment could be ended, and notary publics would continue using the physical presence of the signer to fulfill their duties.

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<sup>1</sup> *What is a Notary Public?*, American Society of Notaries (2019), <https://www.asnnotary.org/?form=whatisnotary>.

<sup>2</sup> Cal. Gov't Code § 8205 (West 2017).

<sup>3</sup> *COVID-19 Frequently Asked Questions: Is the Secretary of State open for business?*, California Secretary of State (2020), <https://www.sos.ca.gov/business-programs/bizfile/covid-19-frequently-asked-questions/>.

<sup>4</sup> *Answers To Urgent Questions Notaries Are Asking About Remote Online Notarization*, National Notary Association (March 26, 2020), <https://www.nationalnotary.org/notary-bulletin/blog/2020/03/answers-urgent-questions-notaries-ron>.

<sup>5</sup> California Secretary of State, *supra*

<sup>6</sup> *Remote Online Notarization*, Mortgage Bankers Association (2020), <https://www.mba.org/audience/state-legislative-and-regulatory-resource-center/remote-online-notarization>.

<sup>7</sup> *Remote Online Notarization – Its Here!!!*, Oregon Secretary of State (July 1, 2020), <https://content.govdelivery.com/accounts/ORSOS/bulletins/2926b84>.

<sup>8</sup> Bill Anderson, *10 Standards Of Practice For Remote Ink-Singed Notarizations*, National Notary Association (April 16, 2020) <https://www.nationalnotary.org/notary-bulletin/blog/2020/04/10-standards-video-conference-notarizations>.

<sup>9</sup> *States Take Emergency Action*, *supra*.

<sup>10</sup> *Answers To Urgent Questions Notaries Are Asking*, *supra*.

<sup>11</sup> Liz Cairns, Andrew Grant, Margo H. K. Tank & David Whitaker, *Coronavirus: Federal and state governments work quickly to enable remote online notarization to meet global crisis*, DLA Piper (July 30, 2020), <https://www.dlapiper.com/en/us/insights/publications/2020/03/coronavirus-federal-and-state-governments-work-quickly-to-enable-remote-online-notarization/>.

<sup>12</sup> Letter from Xavier Becerra, Attorney Gen., State of Cal., to Dianne Feinstein & Lindsey Graham, Committee on the Judiciary (May 19, 2020), [https://cdn.ymaws.com/www.clta.org/resource/resmgr/covid19/AGBecerraLtrReRON\\_05-19-20.pdf](https://cdn.ymaws.com/www.clta.org/resource/resmgr/covid19/AGBecerraLtrReRON_05-19-20.pdf).

<sup>13</sup> Charles N. Faerber, *Being There: The Importance of Physical Presence to the Notary*, 31 J. Marshall L. Rev. 749, (1998).

<sup>14</sup> Cal. Gov't Code § 8214 (West, 2020).

<sup>15</sup> *COVID-19 Updates*, California Department of Public Health (August 13, 2020), <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx>.

<sup>16</sup> Alix Martichoux & Anabel Munoz, *Gov. Newsom order major reopening rollback in attempt to control rampant COVID-19 spread*, ABC News (July 13, 2020), <https://abc7.com/health/gov-newsom-orders-new-statewide-closures/6315327/>.

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- <sup>17</sup> *Visiting a patient*, UC Davis Health (August 5, 2020), <https://health.ucdavis.edu/medicalcenter/visitors/visitors.html>.
- <sup>18</sup> *Visitor Restrictions Due to the Coronavirus*, UCSF Health (August 5, 2020), <https://www.ucsfhealth.org/for-visitors/visitor-restrictions-due-to-coronavirus>.
- <sup>19</sup> *COVID-19 Visitor Guidelines*, UCLA Health (June 12, 2020), <https://www.uclahealth.org/covid-19-visitor-restrictions>.
- <sup>20</sup> David Thun, *Police: Accused Times Square Assault Driver Threatened A Notary With A Knife*, National Notary Association (June 6, 2017), <https://www.nationalnotary.org/notary-bulletin/blog/2017/06/police-accused-driver-threat-notary-knife>.
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- <sup>23</sup> *American Land Title Association Develops Principles for Remote Notarization*, ALTA Press Releases (June 25, 2020), <https://www.alta.org/publications/press-release.cfm?American-Land-Title-Association-Develops-Principles-for-Remote-Notarization->.
- <sup>24</sup> David Thun, *How Do You Identify Signers For A Remote Online Notarization?*, National Notary Association (April 15, 2020), <https://www.nationalnotary.org/notary-bulletin/blog/2020/04/identify-signers-remote-online-notarization>.
- <sup>25</sup> *How Data Breaches happen: What they are and why it matters*, Kaspersky, <https://www.kaspersky.com/resource-center/definitions/data-breach>.
- <sup>26</sup> Megan Leonhardt, *The latest Marriott data breach impacts up to 5.2 million people-here's what to do if you were affected*, CNBC (March 21, 2020), <https://www.cnbc.com/2020/03/31/what-to-do-if-you-were-affected-by-the-latest-marriott-data-breach.html>.
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