

# PROBATE LAW JOURNAL OF OHIO

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## EDITOR'S MESSAGE

The omnibus trust and estate bill (pending HB 464) will soon become heftier. The OSBA Council of Delegates at its delayed spring 2020 meeting (probably on July 24) will have on its agenda seven more proposals from the EPTPL Section, all of which if approved by the Council are expected to be added to the bill before its enactment. Those seven proposals: clarifying claims presentment procedure, correcting disinterment statutes, simplifying procedure on trust termination, facilitating electronic wills, authorizing postnuptial agreements, adding TOD for tangible personalty and correcting the perpetuities statutes. See this and prior issues of PLJO for citations to explanations of them.

For lighter reading, consider the history of PLJO and its predecessors as recorded in the initial issue of PLJO of Sept/Oct 1989 (over 30 years ago!). That issue has now also been placed on the EPTPL Section portion of the OSBA website available to all Section members.

Coverage of *Probate Law Journal of Ohio* materials begins in Westlaw database OHPRLJ with volume 11 (Sept./Oct. 2000).

## ADVENTURES OF AN ONLINE NOTARY: ONE LAWYER'S QUEST FOR MASTERY IN THE EARLY DAYS OF THE COVID-19 PANDEMIC

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“Everything you possess of skill, and wealth, and handicraft, wasn’t it first merely a thought and a quest?”

—Rumi Jalalu’l-Din

When the Notary Public Modernization Act (S.B. 263)(the “Act”) and its online notarization provisions became effective in March 2019, Ohioans were blissfully unaware of the devastating pandemic that would sweep the globe just one year later. When, in September 2019, Ohio’s Secretary of State enacted regulations to implement the Act, he could not have known that just six months later Ohio’s government would

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order all Ohioans to stay at home, to cease all non-essential business operations, and to maintain “social distancing of at least six feet from any other person.”<sup>1</sup> Indeed, when most attorneys reviewed the process for becoming an Ohio online notary and performing online notarizations<sup>2</sup> in pre-pandemic 2020, the general response was a collective shrug and a “that seems like more trouble than it’s worth.”

How quickly things changed. As lawyers and clients alike hunkered down in makeshift home offices in March 2020, the Act now seemed a prescient piece of legislation poised to assist lawyers in keeping the business of client service rolling in these challenging times. But, practically speaking, how did it work? How quickly could one become trained and commissioned as an online notary? Would a lawyer be able to provide quick and easy notary services to clients and colleagues in the safety of their homes, just as she did as a traditional notary? This lawyer decided to find out for herself.

## BECOMING AN ONLINE NOTARY

As epidemiologists confirmed in mid-March 2020 that the deadly COVID-19 virus could be transmitted before symptoms even appeared, it became clear that in-person meetings were going to be dangerous and discouraged for the foreseeable future. But clients would still need to execute powers of attorney and deeds. Colleagues would still need to swear affidavits in support of motions in litigation. Having knowledge of the Act and looking for some way to help in a chaotic time, I set out to become an online notary as quickly as possible.

### STEP 1: THE TRAINING COURSE

The first challenge in my quest: the training course. To find the training course, I simply googled “become an Ohio online notary” and found my way to the Ohio Notary Services, LLC website at [becomeanohionotary.com](http://becomeanohionotary.com). According to the website, Online Notary Services, LLC<sup>3</sup> it is the “ONLY resource in Ohio certified to provide education and testing for the new designation of ‘Online Notary Public.’” It seemed I had come to the right place. A quick \$250 on my credit card later and I had access to a 2-hour training video that explained the requirements and process of online notarization. The first portion of the video is a basic recitation of the statute. The second portion is a conversation between the instructor from the first section and a vendor from a technology company that provides software like that needed to perform online notarizations.

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**TIP: TAKE NOTES!** This training course is not one you can listen to in the background while you do other work. The test that follows the course is as difficult as some portions of the bar exam, is timed, and if you do not receive an 80% or better on the first try you must wait 30 days to re-take it. There is a note-taking screen that appears next to the video and remains accessible to you during the test. Use it. If you navigate away from the test screen during the test a window pops up that tells you your navigation is being monitored (not that I tried. . .).

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### STEP 2: THE TEST

Immediately following completion of the

2-hour training course, I was prompted to begin a 30-question test on the material and given 90 minutes to complete the test. Not since taking the Ohio bar exam have I been so nervous. The questions were not designed for easy passage. There were true or false questions with double negatives and plenty of ambiguity. As I did when I was a law student, I made educated guesses and hoped for the best. A short time later I entered my final answer and received an exam score of 96%. Sweet relief! Onward to the next challenge.

### STEP 3: THE APPLICATION

The application to become authorized as an online notary is available on the Ohio Secretary of State’s website at <https://www.ohiosos.gov/notary/>. The cost is \$20, and you must attach your certificate of completion of the Ohio Notary Services course and exam results to the application. No criminal background check is required for attorneys.

The most difficult question on the application is the request for a description of the software you will be using to perform online notarizations. There is no clear guidance regarding what information the Secretary of State is looking for in response to this question and the training course did not address this. Did they mean would I be using Skype, FaceTime, or Zoom? Something else? There was no list available regarding approved vendors or software, or even recommendations.

### IMPORTANT SIDE NOTE: A THIRD PARTY-VENDOR IS REQUIRED. HERE’S WHY:

When one first hears about online notarizations, they usually understand that audio-video technology will be required to allow the notary to see and hear the person whose

signature is being notarized. There are many platforms for this type of video conferencing that we are all becoming familiar with these days for both business and personal use. But online notarization requires something else.

R.C. 147.60 et seq. and O.A.C. 111:6-1-05 require two forms of third-party identity verification in addition to the notary seeing the person on their audio-video screen and seeing their driver's license presented to them through that medium. They are as follows:

#### Identity Proofing—R.C. 147.60(G)<sup>4</sup>

Signers must enter their social security number and date of birth into the software system, which then generates 5 questions for them to answer within 2 minutes. The notary does not see or record this information. The questions draw on “personal information from public and proprietary data sources” and can be difficult to answer. For example: [w]hich of the following streets have you lived on?

- (a) Cherry Ave.
- (b) Whiteside Ct.
- (c) East Fifth St.
- (d) Hopple St.
- (e) None of these

The information goes back at least 30 years; not everyone remembers the name of the street of the apartment where they lived during college. If the signer fails the first time they get a new set of questions, but if they fail a second time they cannot try again for 48 hours. In addition to these hurdles, some signers are wary of entering this information into a computer program at all and uncomfortable with the process. It goes

far beyond what is required for traditional in-person notarization.

#### Credential Analysis— R.C. 147.60(B)<sup>5</sup>

Once the signer passes the “20-questions” hurdle (ok, there are only 5), they must then pass a photography test. The software system asks them to enter their cell phone number, and texts them a link which guides them through the process of photographing the front and back of their drivers' license. The system then uploads that data and cross checks it with public records to confirm that it is a valid, unexpired, government-issued document. For most people, it takes more than one try to get photographs of their identification that is just right, with no glare or blurry images, so that the software will accept it. Again, this verification of the validity of the identification provided far exceeds that of in-person notarization.

◆ **Note:** Until the week before the writing of this article, the SIGNiX system required an additional step. The signer then had to take a “selfie” of themselves and the software made a determination whether the signer's “selfie” looked enough like the photograph on their driver's license to proceed with the notarization. This step was not required by Ohio's statute or regulations and was a source of extreme frustration, particularly for those whose faces and haircuts do not look the same after a month of quarantine as they do in their drivers' license photograph. SIGNiX has now eliminated this step from its program.

Having come to understand that I was going to need a third-party vendor to perform online notarizations, I was stymied. This was a hurdle I had not anticipated. Thanks to my position at a large law firm, I did what any diligent lawyer at a large law firm would do: I called my IT department. As it happened, our innovation and technology team had had their eye on implementing online notarization (albeit on the back

burner) since September 2019. They had vetted several vendors, and recently signed a contract with a company called SIGNiX.

Someone who had previously been authorized as an online notary with the Secretary of State also planning to use SIGNiX informed me I could simply insert the word “SIGNiX” into the application field, which I promptly did and submitted it online. My application was approved by the Secretary of State within 24 hours, via email, and my designation on the Secretary of State’s website directory of all notaries in Ohio immediately reflected that I was authorized as an online notary.<sup>6</sup>

## PERFORMING ONLINE NOTARIZATIONS

After a brief review of the SIGNiX system instructions and obtaining my login credentials, I was ready to roll. Using a colleague as test subject, I commenced my first online notarization. The first time took over an hour as we worked through technological glitches together. But it worked! The finished product is a.pdf document that contains two electronic signatures (mine and the signer’s) and an image of my notarial seal (an image that I uploaded after taking a photograph of my traditional notary seal).<sup>7</sup>

The process—start-to-finish—of an online notarization (when it works perfectly) is as follows:

1. The document to be notarized is sent to the online notary and modified to comply with the online notary statute.

- The document should be in word format, if possible, or someone will need to be savvy with the use of a PDF typewriter to ensure that the document

conforms to the statutory requirements for the notarial certificate.

- As discussed in prior articles,<sup>8</sup> it is recommended that the notarial certificate state clearly whether it is a jurat certificate or acknowledgment certificate and whether an oath was administered.
  - More importantly however, R.C. 147.62(A)(6) and Ohio Admin. Code § 111:6-1-04 require that the notarial certificate for an online notarization state “this certificate pertains to an electronic notarial act performed with the principal appearing online using audio-video communication.” Because online notarization is still relatively new, I also include a reference to R.C. 147.60 et. seq. in my certificates to alert unfamiliar courts or other recipients of the notarized documents of the statutory authority.
  - Once the document is in the proper form it must be saved as a.pdf that is under 10 MB and placed in a location that is easily accessible from a browser.
2. The document to be notarized is loaded into the SIGNiX (or other vendor) system by the online notary.
  - A series of administrative tasks is required to set up the transaction such as entering the signer’s name, email address, uploading the document to be notarized, and marking where on the document the document is to be signed.
  3. Once the document to be notarized is prepared and the transaction created in the SIGNiX system, the online notary initiates an email to the signer that invites him or her to the transaction.

4. The online notary then initiates an invitation to a Zoom meeting (through the SIGNiX system) to be sent to the signer via email.

5. When both the signer and the notary are ready (and this can be scheduled for a later time or started immediately), they both join the Zoom meeting. The Zoom meeting is automatically recorded and the recording must continue without interruption throughout the entire transaction. (I warn my signers about this in advance so that they know any swearing—of the non-notarial kind—will be preserved for the record; in the early days of technological hurdles swearing was quite prevalent.)

6. Once the notary and the signer are both on the Zoom meeting and the signer has successfully completed the identity proofing questions and credential analysis process, they receive a notification through the SIGNiX system that takes them to an image of the document to be notarized. At this time, the notary asks the signer to share their screen with the notary on the Zoom meeting so the notary can see the document that the signer is reviewing.

7. The notary then administers the oath (if notarizing a jurat) and the signer clicks “sign” next to their pre-placed signature.

8. The SIGNiX system gives the notary access to the photograph of the signer’s driver’s license and asks the notary to confirm that this is the person who they are viewing on the Zoom meeting.

9. Once identity of the signer is confirmed, the notary views the document to be notarized and applies her signature and notary seal to the document in the SIGNiX system. The Zoom meeting concludes and the process is complete.

10. The notary then saves copies of the document, the Zoom recording, and updates her notary journal, which is to be maintained for five years and then delivered to the Ohio Secretary of State.

Over the next few weeks, I performed seven online notarizations for my colleagues and clients. Some took several tries and several hours each. Some took as little as 15 minutes. Technological hurdles we experienced included:

- Signer’s internet speed was too slow;
- Signer’s company’s virtual private network (VPN) did not allow screen sharing during a recorded Zoom call (workaround was to use private email address and have them disconnect from their VPN temporarily);
- Signer was told there was insufficient information about them to generate the identity-proofing questions (isolated glitch, but no fix found);
- Signer’s identification and “selfie” were deemed not to match (this has been remedied, as noted above).

## THE PROS

- This process allows online notaries to provide notarization services to those who do not wish to have any personal contact or proximity with others during a time when it is extremely dangerous to do so—particularly for those in high-risk groups.
- An Ohio online notary can notarize a document for a signer who is outside of Ohio, as long as the notary herself is physically present in Ohio. This expands the usefulness of this service for those with witnesses or clients in other

parts of the country and in states that may not have laws or orders governing online notarizations.

- The online notarization process we have in place in Ohio was enacted as law before this pandemic began. Other states have issued executive orders to allow for some form of online notarization during the pandemic state-of-emergency, but whether documents notarized under these orders will be recognized and accepted remains to be seen. While cumbersome, the process we have in place is the law in Ohio and documents notarized in compliance with these statutes must be accepted.

## THE CONS

- The people who are most in need of no-contact notarization services are often those who are elderly or uncomfortable with the use of technology. This process requires a computer with a webcam, a smartphone with a camera, a basic knowledge of how to navigate unfamiliar computer programs, and a good deal of patience. It requires an unexpired drivers' license and a good memory of your past addresses. This is not likely to be a workable process for most elderly people who live alone or in nursing facilities.
- The cost of the third-party vendor needed to perform online notarizations and the limitation on charges for the service make it a loss-leader for the online notary. A SIGNiX license for one online notary currently costs \$250 per year and each notarization costs an additional \$10 per transaction. The statute limits online notaries to a \$25 charge for each notarial act. When you

add the \$250 training course and \$20 application fee, an online notary is out-of-pocket at least \$520 before he or she can perform their first online notarization (to say nothing of the hours spent in training, vetting other vendors, and on technological hiccups). It would take at least 35 online notarizations per year at \$25 each to recoup those costs. While some lawyers will embark on the same quest as the author for the sake of client service—or outsource it to paralegals or administrative staff—because the process is so cumbersome, more are likely to soldier on with masks and gloves providing “drive-thru” notarization services for their clients and colleagues.

## CONCLUSION

While Ohio is fortunate to have a statutory process for performing online notarizations during this unprecedented time of social distancing, the current process is too cumbersome to make it accessible and useful for most Ohioans. It remains to be seen for how long the need for no-contact notarization will be pressing, and how quickly both notaries and signers will become comfortable with the processes required by our current statute. But we are all doing our best to learn, to adapt, and to rise to the challenges of this post-pandemic world—for both our colleagues and our clients. Godspeed on your quests, fellow travelers!

### ENDNOTES:

<sup>1</sup>Director's Stay at Home Order dated March 22, 2020.

<sup>2</sup>See Forbes, Online Notaries and Beyond: An Update on Ohio's Notary Public Modernization Act, 29 PLJO 52, 29 No. 3 Ohio Prob. L.J. NL 5 (Jan/Feb 2019).

<sup>3</sup>According to the website, “Ohio Notary Services is a partnership of the Akron, Cincinnati, Cleveland, Dayton, Ohio State and Toledo bar associations, founded in 2019. This unique partnership harnesses 120+ years of notary public education and testing experience.”

<sup>4</sup>“ ‘Identity proofing’ means a process or service operating according to standards adopted by the secretary of state under section 147.62 of the Revised Code through which a third person affirms the identity of a natural person through the review of personal information from public and proprietary data sources.” R.C. 147.60(G), effective Sept. 20, 2019.

<sup>5</sup>“ ‘Credential analysis’ means a process or service operating according to standards adopted by the secretary of state under section 147.62 of the Revised Code through which a third person affirms the validity of a government-issued identification credential through review of public and proprietary data sources.” R.C. 147.60(B), effective Sept. 20, 2019.

<sup>6</sup>At that time there were only 8 online notaries in all of Hamilton County. As of the date of this writing there are 66.

<sup>7</sup>The definition of an “electronic seal” is not particularly clear R.C. 147.60(E); none is provided by the Secretary of State upon one’s authorization as an online notary.

<sup>8</sup>Weinewuth, Update on Notarial Certificate Requirements Following Notary Modernization Act: Statutory Revision Forthcoming, 30 PLJO 76, 30 No. 3 Ohio Prob. L.J. NL 2 (Jan/Feb 2020); Weinewuth, Ohio Notaries Take Note: Your Notarial Certificates Might Not Pass Muster Under the 2019 Notary Modernization Act, 30 PLJO 33, 30 No. 2 Ohio Prob. L.J. NL 2 (Nov/Dec 2019).

## EXECUTING ESTATE PLANS DURING THE LOCKDOWN

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For many reasons, practical and other-

wise, I have always preferred to be physically present when my clients execute their estate plans:

- The client may have last-minute questions for me.
- The client may need help with a beneficiary form that the client could not get to me for review ahead of time.
- The client normally needs help plodding his or her way through all the boxes on the advance directive forms.
- The client may have a last-minute change.
- I can serve as a witness.
- I can most easily observe the client’s demeanor.
- I can satisfy myself one more time that the client’s wishes are adequately represented in the legal documents.
- My presence conveys a sense of completing the service for which I was engaged and the solemnity of the execution.

The lockdown has certainly complicated my ability to accomplish many of these objectives. Indeed, even had the Executive Committee of the Estate Planning, Trust and Probate Law Section of the Ohio State Bar Association been successful in causing the emergency enactment of “electronic witnessing” provisions, I would have sensed a loss at only being able to be present virtually during execution.

Several times during the lockdown I have stood, masked and gloved, in the doorway or on the attached deck of a client who was clothed with the same protection, separated by a storm door. Constantly reminding the