

## **The Debate Over Remotely Notarizing Signatures by Webcam**

To drive efficiency and customer satisfaction, banks and other lenders are pushing to fully-automate the lending process – from application through loan signing. A significant roadblock to full automation is the traditional requirement that loan and real estate documents be signed in-person before a notary public. In 2011, Virginia became the first state to pass legislation permitting remote notarization by webcam. This year, several other states are considering remote notary legislation. With this backdrop, the esoteric topic of remote notarization is receiving a lot of attention around the country among notary experts, state legislatures and the banking community.

Virginia law now allows three different notarization procedures: (i) “traditional notarizations” where an individual physically appears in-person in the presence of a notary, and the individual and notary physically sign paper documents; (ii) “electronic notarizations” where an individual physically appears in-person in the presence of a notary, and the individual and notary electronically sign electronic documents; and (iii) “remote notarizations” where an individual appears before a notary via audio and visual communications technology (i.e., webcams), without the signer physically appearing in-person before the notary, and the individual and notary electronically sign electronic documents. Electronic notarizations are gaining acceptance as electronic documents and signatures become more common. Remote notarizations, however, are controversial because of the elimination of the in-person appearance requirement.

The most relevant concerns for the banking industry are whether Virginia remote notarizations will be accepted in other states or by Freddie Mac and other GSEs. It is unresolved whether other states will accept Virginia remote notarizations. The full faith and credit clause of the Constitution and notary reciprocity statutes in most states require states to honor notarizations performed in compliance with other states’ laws. However, most states require in-person appearance in their notarization statutes and may not accept remote notarizations. This is problematic for lenders because in wrongful foreclosure actions, the adequacy of signatures on mortgage and foreclosure documents is often challenged (remember the robo-signing allegations). If remotely notarized mortgage and foreclosure documents are later attacked in court and invalidated for having improper notarizations or inadequate signatures, lenders could experience significant monetary losses and reputational damage.

Freddie Mac recently revised its eMortgage Guide to provide that in states that do not permit remote notarization, the borrower must be physically in the presence of the notary. In states that permit remote notarization, remotely notarized e-mortgages are eligible for purchase by Freddie Mac, provided the notary is licensed and domiciled in the state in which the mortgaged premises is located and the remote notarization law was enacted. Interstate remote notarization is not permitted. The Virginia remote notary statute arguably permits a Virginia licensed notary to notarize loan documents secured by real estate located in other states. Those loans would not qualify under the Freddie Mac guidelines, which could significantly impair their value on the secondary market. Montana’s remote notary statute is limited to Montana real estate transactions.

There are other issues raised by notary experts, many of whom believe that physical appearance, in-person, before a notary is the most essential principle of notarization. Some of their concerns include that notarized signatures are often required on important documents to allow the notary to evaluate the signer's mental capacity to make decisions and enter into contracts and to evaluate the signer's ability to exercise free will without undue coercion. These evaluations are probably not performed as well via on-line video interaction than with an in-person meeting. Experts are also concerned that, while electronic identity verification tools exist that may be better than witnessing a drivers' license in person, many on-line notaries do not use those electronic tools. They simply observe the individual's driver's license via on-line video.

On the other hand, the proponents of remote notarization (many of whom are young technology entrepreneurs with start-up remote notary companies) believe that remote notarizations are an innovative use of technology to make the notary process more efficient and available to the public. They believe that remote notarizations offer many of the benefits of the traditional notary process and may even provide better identity validation and documentation than the traditional process. They believe the in-person requirement is outdated and should not stand in the way of progress.

In January, the National Notary Association issued a Model Electronic Notarization Act (MENA) with substantial commentary on remote notarization. The commentary notes that, "[t]he greatest challenge faced by the MENA drafters was deciding whether the Act should ignore, bar, legitimize or strictly condition 'remote electronic notarizations.'" It concludes that, "[t]he MENA drafters decided that remote electronic notarization could not be passively ignored in the Act, but neither could it be unconditionally endorsed nor affirmatively banned. There is no doubt that remote electronic notarization can solve certain problems that flow from a signer's lack of geographic proximity to an available notary. It, however, also is clear that remote electronic notarization carries a high potential for fraudulent exploitation and legal challenge unless the governing rules are carefully crafted and enforced."

Within the banking industry, there are opinions on all sides. Some believe on-line notarizations are as good, or nearly as good, as in-person notarizations, and the advantages of innovation and automation far outweigh any minor limitations associated with remote notarizations. Others believe the concerns discussed above necessitate a more cautious, deliberate approach. The Virginia Bankers Association is involved in the state and national discussions, and stands ready to advocate for legislative solutions as needed.

*For more information about remote notarization, contact Mel Tull, VBA General Counsel, at [mtull@vabankers.org](mailto:mtull@vabankers.org) or (804) 819-4710. This article has been prepared for informational purposes only and is not legal advice.*