

ASSEMBLY THIRD READING

AB 1093 (Jones-Sawyer)

As Amended January 3, 2022

Majority vote

SUMMARY

Enacts the Online Notary Public Act (Act), authorizing remote online notarization within California.

Major Provisions

- 1) Permits an individual to apply to the Secretary of State for registration as an online notary public.
- 2) Authorizes an online notary public to perform an online notarization for a principal located in California. Further authorizes performance of an online notarization for a principal in another state or outside the United States if the act is not prohibited in the jurisdiction in which the principal is physically located.
- 3) Mandates that a person or entity apply for registration with the Secretary of State to be an online notarization platform. Requires any such entity to first obtain a certificate of qualification from the Secretary to transact business in California.
- 4) Requires audio-visual communications with an online notary public to consist of continuous, synchronous audio and video feeds with adequate clarity such that all participants can be clearly seen and understood at all times. Mandates online notaries public to terminate a session if, in their judgment, this standard is not met.
- 5) Requires online notaries public to keep one or more secure electronic journals to record each online notarial act that they perform, and establishes standards for what information must be contained in an electronic journal, including an audio-video recording of the notarial act.
- 6) Requires county recorders to accept for recording a tangible copy of an electronic record bearing electronic signatures if it contains the online notary public's certification that it is an accurate representation of the electronic record.
- 7) Prohibits an online notarization platform from accessing, using, sharing, selling, disclosing, producing, providing, releasing, transferring, disseminating, or otherwise communicating any of the following, absent a court order or an express written request (as defined) by the principal: a) the contents of the online notary public's electronic journal; b) the contents of a document notarized by an online notary public; c) the contents of a record of an online notarial act; d) the personal information of a person whose signature is notarized, or whose oath or affirmation is taken, during an online notarization.
- 8) Permits, notwithstanding 7), an online notarization platform to access, use, share, disclose, produce, provide, release, transfer, disseminate, or otherwise communicate the contents of a document or record of an online notarial act to the extent necessary to facilitate the transaction of which the document or record is a part, or else to comply with notarial law in California.

- 9) Requires the Secretary of State to maintain a secure, indexed repository of records of online notarizations, including electronic journal entries. This repository may not be connected to the public internet. Directs the Secretary of State to establish a protocol for an online notarization platform to transfer records of online notarizations to the Secretary of State at least once each calendar quarter.
- 10) Permits the Secretary of State to destroy a record of an online notarization ten years after the date the corresponding electronic journal was deposited with the Secretary, provided that no request for a record contained or referenced in that journal has been made.
- 11) Provides a private right of action against an online notarization platform for a violation of the Act. Remedies include the greater of the actual damages sustained or statutory damages of \$250 per violation, injunctive or declaratory relief, and attorney's fees and costs.
- 12) Requires the Secretary of State to adopt rules necessary to implement the Act before July 1, 2023.

COMMENTS

This measure would authorize a person registered with the California Secretary of State as an online notary public to perform remote online notarizations. In other words, a California online notary could notarize an individual's signature without the individual having to personally appear before the notary, as required for notarization under current law.

The bill in print is the product of a months-long stakeholder process led by the author's office and Judiciary Committee staff. Among the entities participating were the California Secretary of State; the California Attorney General's Office; two online notarization companies; several trade associations affected by notarization; an organization representing California notaries; an organization representing national notaries; and various nonprofit privacy and legal groups.

Despite significant differences among stakeholders, the bill in print provides a framework for remote online notarization to be made legal in California. It is hoped that this version of the bill can pass out of the Assembly by the January 31, 2022 constitutional deadline and the remaining issues worked out in the Senate over the seven months remaining in this legislative session.

What types of documents can be remotely notarized under this bill? This measure authorizes remote online notarization of electronic signatures on electronic documents. It does not authorize remote online notarization of handwritten "wet" signatures on paper documents. The latter task presents numerous challenges, including safeguarding the privacy of the document that is being notarized, and is better considered as the subject of future legislation.

Why is notarization important? California courts recognize the "important function notaries serve in our society[.]" (*McComber v. Wells* (1999) 72 Cal. App. 4th 512, 518.) The purpose of notarization is to ensure the identity of persons whose signatures document certain vital life-altering transactions and events, such as real estate sales and purchases, the granting of powers of attorney, and the creation of advance health care directives. These events and transactions occur relatively rarely in most people's lives. Lawsuits challenging the legality of these transactions and events regularly turn on proof that a signature was, or was not, validly notarized. To make significant changes in California's notary laws has significant implications for California's civil justice system, and therefore should be undertaken with caution and the utmost care.

What is the impetus for California to legalize remote online notarization? The principal reason for California to legalize remote online notarization is in anticipation of preemption by federal legislation. The SECURE Notarization Act, passed the United States House of Representatives in 2021 as part of the National Defense Authorization Act; it would immediately legalize remote online notarization in all states, including California. The federal legislation fails to address important issues of data privacy, evidentiary accessibility, user privacy, and liability, all of which this bill addresses.

Given that remote online notarization's proponents will likely reintroduce similar federal legislation in the near future, it is important that California legalize online notarization in 2022. If federal legislation passes, Californians would benefit from having a sensible implementation of remote online notarization in place, rather than being forced to immediately adopt, and adapt to, the inadequate framework set out in the SECURE Notarization Act.

What is the significance of California's fingerprint requirement for certain notarial acts? California is the only state in the nation that requires its notaries to take the fingerprints of all persons signing real estate documents and powers of attorney. Under Government Code Section 8206 (a)(2)(G), "If the document to be notarized is [one] affecting real property, or [is] a power of attorney document, the notary public shall require the party signing the document to place his or her right thumbprint in the journal." This fingerprint requirement originated in the early 1990s with a wave of falsified loan documents in Los Angeles. As detailed in the Judiciary Committee analysis of this bill, the fingerprint requirement has proven successful at both deterring fraud and solving crimes, including cases of murder and property theft from elders.

This bill uses the recording of the notarization as a substitute for the fingerprint. For this substitution to succeed, it is absolutely essential that recordings be preserved and available, including for law enforcement purposes, if a notarization is challenged as fraudulent.

Why does this bill currently place restrictions on the recognition of online notarial acts conducted by out-of-state notaries? This bill restricts recognition of remote online notarizations performed by notaries licensed under the laws of other states. Currently, these sorts of out-of-state notarizations are relatively rare. Most California residents spend most of their time in California, and so usually sign significant documents that require notarization while present in this state. Out-of-state notarizations have not proven a sufficiently-large source of fraud to warrant scrutiny or regulation, with the notable exception of the fraudulent notarizations that supported many foreclosures in the wake of the 2008 financial crisis

However, many online notaries in other states maintain records of remote notarizations in databases maintained by private companies. What happens if one of these companies goes out of business, or if its records were hacked and corrupted? Hundreds of thousands, or millions, of records could become unavailable. By comparison, a single lost paper notary journal jeopardizes the records of, at most, a few hundred transactions. To address this issue in California, this bill requires the Secretary of State to maintain a secure, indexed repository of records of online notarizations, including electronic journal entries, and for platform companies to transfer records of online notarizations to the Secretary at least once each calendar quarter.

All of this bill's provisions meant to ensure preservation of records will be meaningless if out-of-state companies are not required to transfer records to the Secretary of State. The public gains no benefit from a race to the bottom in notarial standards. A compromise can be found, such as recognizing out-of-state notarial acts if the facilitating online notary platform is registered with

the Secretary of State and satisfies this bill's other requirements. The validity of documents notarized online before enactment of this bill could also be recognized.

According to the Author

AB 1093 will increase consumer access to vital notarial services, improve physical safety while making transactions, and ensure California leads the way in adapting a safe and secure [remote online notarization (RON)] system. The COVID-19 pandemic further heightened the need for RON systems given notaries public designation as essential workers, therefore placing them and their client at greater risk of contracting the covid virus. California should welcome the adoption of a safe RON system that will preserve the integrity of the notary process and expand access for California consumers

Remote online notarization can help eliminate obstacles of accessing notary services in rural communities and provide consumers with flexibility by reducing travel time. Adoption of reliable and secure remote options for notarization is not just important now when businesses and individuals need help moving forward due to the challenges posed by the pandemic, but will also remain a critical access point for Californians in the future.

Arguments in Support

LeadingAge California, a nonprofit organization focused on senior living and care, recognizes this bill's balanced approach:

Requiring in-person notarization presents a health risk to older adults who require notarial services for the revision of estate planning documents and certification of other personal documents. The pandemic has reduced access to notaries for this vulnerable population, but AB 1093 presents a solution. LeadingAge California applauds this bill's fraud protection provisions as most notary fraud targets California's older adults. COVID-19 induced isolation has made older adults more susceptible to exploitation and fraud schemes, amplifying the need for such protections. The newly amended version of this bill also addresses previously held concerns regarding privacy data by enforcing strict controls for the use of personal data collected.

Arguments in Opposition

The California Association of Realtors and California Land Title Association oppose the bill because of the conditions it places on recognizing remote notarizations performed by out-of-state notaries:

The recognition of the notarization process goes both ways and avoids requiring US citizens having to be physically present in their state of residence when it is impossible or inconvenient for the consumer to do so. This multi-layered framework made up of state statutes, common law, and Constitutional law, is invaluable to all US citizens following the same path as interstate recognition of judgments and other official acts of other states.

FISCAL COMMENTS

According to the Assembly Appropriations Committee:

- 1) Costs (General Fund (GF)) in the tens of millions of dollars to the SOS to develop, implement and operate a RON program. SOS estimates one-time costs of approximately \$24.5 million dollars and annual costs of approximately \$11 million dollars to implement,

maintain and operate a RON program. Costs include additional staff, staff overtime, information technology infrastructure and significant data storage costs to store records of online notarizations. SOS also stated that while fees may offset annual operations costs, significant one-time GF money will be necessary to draft regulations and implement the RON process.

- 2) Costs (Trial Court Trust Fund) possibly in the low hundreds of thousands of dollars to the trial courts in workload to hear and adjudicate civil and criminal violations of the RON program. This bill creates a new misdemeanor for tampering with an online notary's electronic signature or seal and a new private right of action against RON platforms. A defendant charged with a misdemeanor is entitled to no-cost legal representation and a jury trial. If five new crimes are filed annually statewide and proceed to trial resulting in the use of two days of court time, at an estimated cost of approximately \$8,000 for an eight-hour court day, the approximate cost to the trial courts would be \$80,000. If five new lawsuits are filed for violations of the RON process, resulting in 50 hours of court staff workload, at a cost of \$1,000 per hour, the total cost to the trial courts would be \$250,000 annually. Although courts are not funded on the basis of workload, increased pressure on the Trial Court Trust Fund and staff workload may create a need for increased funding for courts from the to perform existing duties.
- 3) Unknown, but possibly significant costs in excess of \$150,000 annually to the Department of Justice and Judicial Council to collaborate with the SOS to draft and implement regulations related to retention and storage of online notarial records as required by this bill.

VOTES

ASM JUDICIARY: 9-0-1

YES: Stone, Gallagher, Bennett, Kalra, Kiley, Maienschein, Reyes, Wicks, Mia Bonta

ABS, ABST OR NV: Davies

ASM APPROPRIATIONS: 12-0-4

YES: Holden, Bryan, Calderon, Luz Rivas, Gabriel, McCarty, Levine, Quirk, Robert Rivas, Akilah Weber, Stone, Mullin

ABS, ABST OR NV: Bigelow, Megan Dahle, Davies, Fong

UPDATED

VERSION: January 3, 2022

CONSULTANT: Jith Meganathan / JUD. / (916) 319-2334

FN: 0002073