



Colorado Bar Association

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November 16, 2020

The Honorable Jena Griswold
State of Colorado, Department of State
1700 Broadway, Suite 200
Denver, Colorado 80290

Re: Colorado Bar Association Written Comments – 8 CCR 1505-11

Dear Secretary Griswold:

The Colorado Bar Association (“CBA”) respectfully submits these written comments to the proposed Notary Program Rules, 8 CCR 1505-11 (“Rules”), published October 15, 2020. The CBA appreciates both the Department’s ongoing work to implement Senate Bill 20-096 and the opportunity to provide comment.

1. Sections 2.3.1 and 2.3.2 – Communication:

- a. This provision requires direct communication and understanding between notary and signer and prohibits the use of a translator. This section may discriminate against individuals with disabilities and those who face language barriers. If translators are prohibited, it leaves these individuals without any options other than to locate a notary that can overcome any number of communications barriers directly.
 - b. The foregoing provisions of the Rules also seem inconsistent with Senate Bill 20096, which provides at section 24-21-502(11.7): “REMOTE NOTARIZATION SYSTEM” MEANS AN ELECTRONIC DEVICE OR PROCESS THAT: (a) ALLOWS A NOTARY PUBLIC AND A REMOTELY LOCATED INDIVIDUAL TO COMMUNICATE WITH EACH OTHER SIMULTANEOUSLY BY SIGHT AND SOUND; AND (b) **WHEN NECESSARY AND CONSISTENT WITH OTHER APPLICABLE LAW, FACILITATES COMMUNICATION WITH A REMOTELY LOCATED INDIVIDUAL WHO HAS A VISION, HEARING, OR SPEECH IMPAIRMENT.** (Emphasis added).
- 2. Section 5.1.1 – Definition of “Personal Information”:** The second sentence should indicate that “The term **includes but** is not limited to data included in the electronic record...” (Emphasis added).

3. Section 5.2.1 – Application:

- a. 5.2.1(A) – If the required exam and the approved providers are not set by December 31, 2020, remote online notary (“RON”) rules will not be practically implemented, and, for example, title companies, will be without a means to notarize documents remotely during that gap in time (during which we are likely to be experiencing a higher COVID incidence rate). This gap should be addressed through an extension of the temporary rule until the process for examination and approval of providers can be established.
- b. 5.2.1(E) – This section provides that in applying to become a remote notary, the individual must “SELECT AN APPROVED REMOTE NOTARIZATION SYSTEM PROVIDER.” However, section 5.2.8 provides that the remote notary must notify the secretary of state “AFTER CHANGING A REMOTE NOTARIZATION SYSTEM PROVIDER OR REMOTE NOTARIZATION STORAGE PROVIDER.” These sections should be clarified to provide whether a notary can utilize more than one remote notarization system provider. Notaries should be allowed to select more than one remote notarization system provider.

4. Section 5.2.3 – Requirements for Remote Notary Public Seal:

- a. Pursuant to section 5.2.3(B)(1)(A), “THE REMOTE NOTARY’S SEAL AND SIGNATURE MUST: (A) BE RETAINED UNDER THE REMOTE NOTARY PUBLIC’S SOLE CONTROL AND ACCESS THROUGH THE AUTHENTICATION REQUIRED BY RULE 5.3.3(A)(4).” A similar requirement is set forth in section 5.3.3(A)(4) for system providers. But 5.2.3(B)(3) requires, on the death or incompetency of a notary, that the personal representative or guardian delete the notary’s seal and signature from the system. How will that requirement be implemented? The obligation should be limited to a “personal representative or guardian with knowledge of the existence of or knowingly in possession of the seal and signature.”
- b. The prohibition in section 5.2.3(B)(2) on “A REMOTE NOTARY PUBLIC’S EMPLOYER, INCLUDING THE EMPLOYER’S EMPLOYEES AND AGENTS, MUST NOT USE OR PERMIT THE USE OF A REMOTE NOTARY’S SEAL OR SIGNATURE BY ANYONE EXCEPT THE REMOTE NOTARY PUBLIC,” should be an outright prohibition on any other person’s use of the remote notary’s seal or signature, with the prohibition on the employer’s use being an example or subset.

5. Section 5.2.7 - Fee. Does section 5.2.7 (and C.R.S. § 24-21-529(2)) prohibit the notary from charging (or passing through) a fee in excess of \$10.00 to cover the Remote Notarization System Provider or Remote Notarization Service Provider?

6. **Section 5.2.9 – Expiration of the Secretary of State’s Approval to Perform Remote Notarizations:** Section 5.2.9(B) requires a notary’s authorized representative (or the notary) to delete the notary’s seal and signature from the remote notary provider’s system. This requirement seems inconsistent with section 5.2.3(B)(1)(A) that the remote notary public’s seal be retained under the notary’s “SOLE CONTROL AND ACCESS” See also 5.3.3(A)(4) regarding related requirements for system providers.
7. **Section 5.3.5(A) – Notifications:** Section 5.3.5(A) provides: “IF A REMOTE NOTARIZATION SYSTEM PROVIDER OR STORAGE PROVIDER BECOMES AWARE OF A POSSIBLE SECURITY BREACH INVOLVING ITS DATA, THE PROVIDER MUST GIVE NOTICE TO BOTH THE SECRETARY OF STATE AND EACH COLORADO REMOTE NOTARY PUBLIC USING ITS SERVICES NO LATER THAN THIRTY DAYS AFTER THE DATE OF DETERMINATION THAT A SECURITY BREACH OCCURRED. THE PROVIDER MUST COMPLY WITH ANY OTHER NOTIFICATION REQUIREMENTS OF COLORADO’S DATA PRIVACY LAWS.” The underlined language should be revised to clarify that notice should be given to each notary using the service provider prior to and at the time of the breach.
8. **Privacy of Personal Information:** With respect to privacy, Senate Bill 20-096 addresses what can and cannot be recorded and how personal information can be used.

- a. Regarding what can and cannot be used, the statute provides:

24-21-514.5(11)(c). PROVIDER OF A REMOTE NOTARIZATION SYSTEM OR STORAGE SYSTEM MUST: . . . NOT USE, SELL, OR OFFER TO SELL TO ANOTHER PERSON OR TRANSFER TO ANOTHER PERSON FOR USE OR SALE ANY PERSONAL INFORMATION OBTAINED UNDER THIS SECTION THAT IDENTIFIES A REMOTELY LOCATED INDIVIDUAL, A WITNESS TO A REMOTE NOTARIZATION, OR A PERSON NAMED IN A RECORD PRESENTED FOR REMOTE NOTARIZATION, EXCEPT . . .

The Rules goes on to define “Personal Information” as:

5.1.1 ANY INFORMATION OR DATA THAT IS COLLECTED OR USED IN ORDER TO COMPLETE THE TRANSACTION SUBJECT TO REMOTE NOTARIZATION OR IN THE REMOTE NOTARIZATION ITSELF. THE TERM IS NOT LIMITED TO DATA INCLUDED IN THE ELECTRONIC RECORD THAT IS BEING REMOTELY NOTARIZED.

It goes on to prohibit:

5.4 THE USE OF PERSONAL INFORMATION FOR THE PURPOSE OF GENERATING ADDITIONAL BUSINESS OR MARKETING OPPORTUNITIES BY OR FOR: (A) THE REMOTE NOTARY; (B) THE REMOTE NOTARY'S EMPLOYER OR ANY BUSINESS FOR WHOM THE REMOTE NOTARY 18 MAY BE PROVIDING CONTRACTED SERVICES; OR (C) THE PROVIDER OR ANY OF ITS AFFILIATES.

And that the service provider:

5.3.3(B)(6) PROVIDE REASONABLE SECURITY MEASURES TO PREVENT UNAUTHORIZED ACCESS TO: (A) THE LIVE TRANSMISSION OF THE AUDIO-VIDEO COMMUNICATION; (B) A RECORDING OF THE AUDIO-VIDEO COMMUNICATION; (C) THE VERIFICATION METHODS AND CREDENTIALS USED TO VERIFY THE IDENTITY OF THE PRINCIPAL; AND (D) THE ELECTRONIC RECORDS PRESENTED FOR REMOTE NOTARIZATION.

- b. However, there remains a privacy-related issue on which further clarification in the Rules would be helpful. The statute provides:

24-21-514.5(9)(b). THE RECORDING MUST INCLUDE THE INFORMATION DESCRIBED IN THIS SUBSECTION (9)(b). A NOTARY PUBLIC SHALL MAKE A GOOD-FAITH EFFORT TO NOT INCLUDE ANY OTHER INFORMATION ON THE RECORDING.

Subsection 9(b) references:

- (I) A RECITATION BY THE NOTARY PUBLIC OF INFORMATION SUFFICIENT TO IDENTIFY THE NOTARIAL ACT;
- (II) A DECLARATION BY THE REMOTELY LOCATED INDIVIDUAL THAT THE INDIVIDUAL'S SIGNATURE ON THE RECORD IS KNOWINGLY AND VOLUNTARILY MADE;
- ...
- (V) THE STATEMENTS, ACTS, AND CONDUCT NECESSARY TO PERFORM THE REQUESTED NOTARIAL ACT OR SUPERVISION OF SIGNING OR WITNESSING OF THE SUBJECT RECORD.

At the same time, the statute requires the notary to:

24-21-514.5(4)(c). CONFIRM THAT ANY RECORD THAT IS SIGNED, ACKNOWLEDGED, OR OTHERWISE PRESENTED FOR NOTARIZATION BY THE REMOTELY LOCATED INDIVIDUAL IS THE SAME RECORD SIGNED BY THE NOTARY PUBLIC;

It seems likely that recording the information necessary to confirm that a record being signed is the same as that which the notary is notarizing would violate the requirement to use good faith efforts not to include in the recording information outside that which is required by 9(b) to be recorded, especially in circumstances where only slightly different documents are being revised and finalized up to closing. It also ultimately seems that such recording would not violate the prohibitions on what can be done with personal information. Does that mean a notary can record such information as long as it is kept private? The Rules should provide clarification in such circumstances.

9. **Venue for the signatory whose signature/acknowledgement is the subject of the notarial act:** Section 24-21-514.5(4)(e) of Senate Bill 20-096 requires a RON to:

IDENTIFY THE VENUE FOR THE NOTARIAL ACT AS THE JURISDICTION WITHIN THE STATE OF COLORADO WHERE THE NOTARY PUBLIC IS PHYSICALLY LOCATED WHILE PERFORMING THE ACT.

It would be helpful to include (or at least be authorized to include) in the record and/or certificate, information on where the signatory is located both in case it becomes relevant to future disputes and to confirm compliance with section 24-21-514.5(2)(a).

10. **Electronic Notarization versus RON:** The Rules are unclear as to whether a remote notarization must comply with the requirements for an electronic notarization. It seems like documents notarized via RON must comply with RON requirements but not those for electronic notarizations since, for example, in electronic notarization there is no seal and a DAN (or a DAN plus a signature) is used in place of a signature whereas RON contemplates using an actual signature and seal.