New York State Bar Association
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Memorandum in Opposition

TRUSTS & ESTATES LAW SECTION
ELDER LAW AND SPECIAL NEEDS SECTION

TRUSTS-ELDER #1 July 16, 2020

S. 4352-B By: Senator Skoufis
A. 4076-B By: M. of A. Rozic
Senate Committee: Finance
Assembly Committee: Governmental Operations
Effective Date: 90th day after it shall have become a law

AN ACT to amend the executive law, in relation to providing for electronic notarization.

LAW & SECTION REFERRED TO: Section 137-a of the executive law.

THE TRUSTS & ESTATES LAW SECTION AND ELDER LAW AND SPECIAL NEEDS SECTION OPPOSE THE ELECTRONIC NOTARIZATION LEGISLATION

This bill would add new § 137-a to the Executive Law to permit electronic notarizations. In the bill's justification, it is claimed that this is being done "not merely for convenience", but to allow homebound citizens to have access to Notary services and to prevent lost wages for employees who otherwise need to have their documents notarized.

While we applaud the stated goals of the bill, we believe that the bill has a number of serious flaws, especially as it relates to the documents that members of our respective Sections address on a regular, if not daily basis: trust agreements, trusts, powers of attorney, deeds, self-proving affidavits used with wills, and affidavits and other pleadings.

1. The Bill Needlessly Creates New Opportunities for Fraud and Misuse of Notarized Instruments

A Notary Public ("Notary") is a public officer whose duty is to attest to the genuineness of any deeds or writings in order to render them available as evidence of the facts set forth therein. As set forth in Executive Law §135, a Notary's functions include:

- Administering oaths and affirmations;
- Taking affidavits and depositions;
- Receiving and certifying acknowledgments or proofs of deeds, mortgages and power of attorney and other instruments in writing;

- Demanding acceptance or payment of "foreign and inland bills of exchange, promissory notes and obligations in writing"; and
- To protest such writings for non-acceptance or non-payment.

In each of these cases, the Notary is authenticating and verifying the identity of the signor of the instrument or the person making the affidavit or being deposed. Hence, the Notary's primary function is to identify that the instrument in question was, in fact, signed by the person whose name appears on the instrument in the State of New York on the date set forth in the instrument.

We are concerned that the legislation as written will be subject to further potential abuse by either unscrupulous Notaries or persons seeking to engage in fraud by having a person notarize their signature without controls. The legislation does not contain the prophylactic measure in Executive Order 202.7 ("EO 202.7") that the signor must "transmit by fax or electronic means a legible copy of the signed document directly to the Notary on the same date it was signed," introducing the possibility that the notarized page will be used for an instrument other the one presented to the Notary, or worse, multiple times without the Notary's knowledge or consent. While we have concerns about the efficacy of the requirement in EO 202.7 to transmit the entire signed document electronically to the Notary, especially where an attorney-Notary drafted and transmitted the instrument prior to signature and notarization, it does address our concern about misuse of an electronically notarized page in an instrument.

The alleged "convenience" that the statute offers does not outweigh the newly created possibilities for fraud and abuse that come with electronic notarization. For these policy reasons, the bill should be rejected.

2. The Bill Is Too Broad and Would Encompass Remote, As Well as Electronic, Notarizations, and Impose Onerous Conditions Upon Them

As discussed above, one of the stated purposes for this proposed amendment to the Executive Law is to facilitate notarization services for the homebound. However, the legislation as written is too broad because it would encompass remote, as well as electronic, notarizations. During the State of Emergency declared by Governor Andrew M. Cuomo as a result of the COVID-19 pandemic, the Governor issued EO 202.7, which permitted notarization of documents transmitted electronically between the Notary and the person whose signature was being notarized. As long as the procedure was being met, namely that the Notary and signor can see each other via live videoconference, that the signor affirm his or her physical presence in the State of New York, that the signor, if not otherwise, known to the Notary show a photo identification via the videoconference, and that the signed instrument was then immediately transmitted electronically to the Notary, the Notary could then affix his or her *manual* signature to the instrument.

In some cases, practitioners have performed remote notarizations with clients who could access technology such as Zoom or Skype videoconferences. In other cases, however, the technology used to accomplish remote notarizations was as simple as mutual use of

smartphones. In this manner, even "technophobes" were able to sign and have notarized documents during this health crisis.

While the procedure provided in EO 202.7 was not flawless and can be improved upon, it provided a mechanism that was somewhat user-friendly both to attorneys and to clients – many of whom were elderly – to accomplish necessary estate and elder law planning at a time when it was needed the most.

The bill, as written, would encompass this. The definition of "electronic notarial act" includes notarizing an "electronic document", regardless of whether the document itself is notarized using the Notary's electronic signature.

In other words, this law would impose a series of stringent rules on the Notary that would defeat the purpose of facilitating services for the homebound. It would *require* the notarization to be done in the fashion of an electronic signature (Proposed Executive Law § 137-a(5)) with all of the technological requirements attendant thereto, which we view as flawed and as discussed herein, and a requirement that the Notary record the video and audio conference and maintain it for 10 years (Proposed Executive Law§137-a(2)(b)).

It is neither necessary nor practical for either practitioners or their clients to have to address the technological requirements of electronic notarization to enjoy the benefits afforded by remote notarization if the legislature and the Governor believe that additional flexibility through the use of technology has benefit.

The legislation as it is written defeats the purpose of the flexibility necessary to practitioners and our clients, especially those who cannot readily be in the physical presence of a Notary.

3. The Bill Creates an Unnecessary and Inequitable Registration Category of "Electronic Notary".

The bill, as written, disallows Notaries from conducting electronic notarizations, unless they are specifically registered to conduct *electronic* notarizations. (Proposed Executive Law § 137-a 1(d)). All notaries are registered with the Secretary of State in order to conduct notarizations. There should not be a separate category of Notary or a separate registration for "electronic" notarizations. Under the COVID-19 regulations, **Notaries** were allowed to conduct virtual/remote notarizations. The bill now requires that, in order to conduct electronic/virtual notarizations, the Notary must, in essence, re-register with the Secretary of State in order to be able to do so. This could become burdensome, time consuming, and create much confusion.

Many notaries are not attorneys and might misunderstand the bill and believe, incorrectly, that their registration with the Secretary of State as a Notary is enough to allow them to conduct electronic notarizations. An uninformed Notary may conduct virtual/electronic notarizations without being explicitly registered as an "electronic notary." This will lead to defective/ineffective notarizations resulting in harm to their clients/customers. In other

words, the client/customer will suffer unwittingly and, possibly, irreparably, from an invalid electronic notarization simply because the Notary, while registered properly as such, was not registered properly as an "electronic notary".

There should not be, and there is no need for, a separate "registry" for persons licensed as an "electronic notary" as long as the Notary complies with all of the requirements of conducting an electronic/virtual notarization. This would also operate conversely – we should not want to preclude someone who is licensed as an "electronic notary" from conducting "in-person" notarizations as he or she is licensed only as an "electronic notary". This is neither practical nor feasible. To circumvent this issue, any legislation permitting electronic notarization should require a Notary in his or her initial license application to provide the additional information (i.e., email address, exemplar of their electronic signature, etc.) required for electronic notaries, and require this information on renewal applications for persons already registered should the person choose to engage in electronic notarizations.

To be clear, we are not suggesting that a Notary who currently notarizes instruments manually or a future Notary, such as a paralegal in a law firm or employee at a bank branch, be required to take the steps necessary to engage in electronic notarizations. However, should any of these persons choose to do so, then the ability to register as such should be straightforward.

4. The Bill Is Burdensome In Its Requirement That The Video/Audio Verification of Identity Be Recorded And Maintained For 10 Years.

The bill requires that a Notary maintain a recording of the video and audio verification of identification and keep that video and audio recording for ten years. (Proposed Executive Law § 137-a 2(b)). Although the same verification of identify procedures are used, an in-person notarization does not require a recording of the identification process or notarization process. The person conducting the notarization would then confirm that the identification provided was, in fact, for the person being notarized. Maintaining recordings of video/audio verifications of identity can become burdensome, and costly to the providers of the notarizations as it may require them to acquire different software in order to conduct, record, and store the recordings of the identifications.

This problem is exacerbated considering that the identification process will occur during, or at least immediately prior to, the notarization process. In that case, the requirement to record the process becomes even more burdensome.

The purpose of the bill is to provide ease in facilitating notarizations when and where necessary not make matters worse for the Notary.

In addition, attorneys are only required to maintain records for seven (7) years. (22 NYCRR 1200). Requiring that they maintain records for a period of ten (10) years is burdensome. (Proposed Executive Law § 137-a 2(b)). In addition, as technology is constantly changing, there is no guarantee that the recording will be able to be played ten

(10) years in the future as the format of the recording may no longer be compatible with the technology available at that time.

5. The Bill Requires Notaries To Be Knowledgeable About Aspects Of Technology Which Is Unfeasible.

The bill requires that an electronic notary describe "the electronic technology or technologies to be used" in attaching their electronic signature to a document. (Proposed Executive Law § 137-a 3(b)(iv)). Not only is this phrase vague and ambiguous, but many Notaries, be they lawyers or otherwise, do not have the technological education to understand, much less describe, the technology used to create and attach such an electronic signature. Many lawyers may know the name of the program they use to attach an electronic signature to a document, but, to require a Notary to describe, in depth, the technology used in order to create and attach an electronic signature, is unfeasible and burdensome and would, in effect, require one to become an expert in technology in order to conduct electronic notarizations.

A more feasible option is to require a Notary to give the name and version of the software they used to create and attach their electronic signature to a document; however, this will also cause a complication in the future, due to the fact, as stated above, technology is constantly changing, new versions of programs are constantly being released, and new programs in and of themselves are released frequently. In order to maintain such a record, for example, the Secretary of State's records would have to be updated each time Adobe Acrobat came out with an update.

This would be cumbersome and time consuming, not only for the person conducting the notarizations, but also for the persons at the Office of the Secretary of State who would maintain and update such records.

An intricate knowledge of the technology used would also be required in connection with the provision of the bill wherein it states that a Notary's electronic signature is to be "linked to the data in such a manner that any subsequent alterations to the underlying document are detectible and may invalidate the electronic notarial act". (Proposed Executive Law § 137-a 5(b)(v)). It is unclear what that entails or, short of an intricate knowledge of the technology used, it is unclear how one would be able to ascertain same.

6. The Bill Places Undue Burden Upon Notaries In The Requirement That Their Electronic Signature Be Used Solely For Electronic Notarizations.

Many attorneys use electronic signatures for purposes of sending out documents, letters, etc., to colleagues, Courts, and for a variety of other reasons. The requirement that the "notary public's electronic signature shall be used only for the purpose of performing notarial acts" (Proposed Executive Law § 137-a 5(c)) suggests that a person conducting electronic/virtual notarizations must maintain more than one electronic signature. This will create confusion and become burdensome for those that use electronic signatures for purposes other than electronic notarizations.

This requirement could potentially raise issues of the authenticity of the electronic signatures of different documents generated from the same person, where the signatures are different. In addition, if the electronic signatures get confused – and one electronic signature is inadvertently used in the place of another - the Notary's license could be placed in jeopardy and the document which was notarized could potentially become defective.

A simpler solution to this issue is a certification that the Notary's electronic signature is their electronic signature, but not strictly for the purposes of electronic notarizations. Their electronic signature should not have to change whether they are notarizing an electronic document, or sending an electronic document to the Courts, etc.

7. The Bill Fails to Exclude Trusts and Estates Matters Similar to How Such Matters are Already Excluded in the Electronic Signatures and Records Act.

The Electronic Signatures and Records Act, State Technology Law § 301 et seq., permits use of an electronic signature "in lieu of a signature affixed by hand" unless specifically provided otherwise by law. Specifically excluded from the Electronic Signatures and Records Act are "any document[s] providing for the disposition of an individual's person or property upon death or incompetence, or appointing a fiduciary of an individual's person or property, including, without limitation, wills, trusts, decisions consenting to orders not to resuscitate, powers of attorney and health care proxies". (State Technology Law § 307(1)).

Trusts and Estates documents, such as wills, trusts, decisions consenting to orders not to resuscitate, powers of attorney, health care proxies, and any other documents that provide for the disposition of an individual's person or property upon death or incompetence or that appoint a fiduciary of an individual's person or property, are highly sensitive documents for which only one unique, identifiable, and unalterable version should be allowed. The bill, as written, fails to exclude such documents as they are excluded in the Electronic Signatures and Records Act.

Based on the foregoing, the Trusts & Estates Law Section and the Elder Law and Special Needs Section **OPPOSE** this legislation.