



# Louisiana notaries and the governor's remote online notary authorization

In our governor's Proclamation No. 37, signed on March 26, a provision is made purporting to authorize the commissioned notaries of this state to perform notarization for individuals not in the physical presence of the notary public under specific circumstances.

Because of numerous concerns, both practical and legal, the Louisiana Secretary of State has requested that our governor rescind the section of the proclamation authorizing notaries to exercise notary functions using remote online technology. Secretary Ardoin has discussed some of his concerns with our legislative affairs liaison and our lobbyist. The secretary is concerned that the proclamation omits vital provisions necessary to ensuring that Louisiana citizens do not fall victim to fraud. He supports the concept of remote online notary. He and his staff have worked for two years with the Louisiana State Law Institute helping to bring good legislation dealing with the subject. But he

is disappointed to see the governor attempting to authorize by proclamation what is not yet allowed in the law. The secretary's concerns are (1) the absence of the necessary security and party-privacy provisions; (2) the absence of regulations concerning the platforms on which these specialized notarial services could be performed; (3) the doubtful legality of the authorization. Generally, this board shares the secretary's concerns.

This article explores these concerns and the issues Louisiana notaries must consider before acting under this authorization.

## A brief history of legislative action on the subject.

It was 2012 when common-law notaries in Virginia secured legislation that gave legal standing to the novel idea that documents could be "notarized" online. In time, Louisiana notaries and lawyers were talking about it here and there, but because of our unique system of law, where so many things of great importance can be accomplished by notarial act, the tendency was to leave well enough alone. No other state has an authentic act. After all, in the common-law states, notaries are limited to administering oaths and witnessing affidavits and acknowledgments.

### The 2018 regular session

In 2018, a south Louisiana entrepreneur decided the cautionary nature of the authentic act was unnecessary, and he found a legislator who agreed with him.

During the regular legislative session, Senator Jay Luneau authored a bill ([SB 358](#)) to enable remote online notarization in Louisiana.

The bill did not advance because it left open many questions that were best answered by the Louisiana Law Institute and other interest groups.

Although the 2018 bill failed, the House passed a resolution ([HCR 31](#)) asking the Louisiana State Law Institute (LSLI) to report a proposal for remote online notarization legislation for consideration in 2019. As a result of that recommendation, Representative Ray Garofalo introduced [HB 514](#) in 2019.

### The 2019 regular session

Rep. Garofalo's bill had a few problems, but those problems were, with the help of the Law



Institute reporter, successfully eliminated during consideration by the House Committee on Civil Law and Procedure. The committee's amendments, plus the author's promise to seek floor amendments to include additional stakeholders in the implementation study committee, brought all interested parties into accord.

The Louisiana Notary Association board supported the 2019 bill once it was amended. It carried all the necessary safeguards to ensure the process would protect not only the parties to the acts, but the public record as well.

Unfortunately, the bill was delayed during the process, and it became impossible to move it through the senate before the session ended.

### The 2020 regular session

It is that bill, as amended in 2019 in the House committee, that has been re-introduced by two identical bills during this session: [HB 122](#) and [HB 274](#). The proposed legislation has been through the most thorough vetting by Louisiana's finest civilian jurists. The restrictions and safeguards provided for in these bills have satisfied the LNA, the LBA, the land title lawyers, the clerks of court, the secretary of state, and the Law Institute Council that whichever bill passes, the Louisiana notary and the citizens who are parties to any document executed under the protocols provided for will have as much, if not more, protection against fraud as the routine wet-ink in-physical-person signatures we all know and love.

### The problems with the governor's proclamation

It is the goal of this section to point out the specific problems and concerns our secretary of state has shared with us about the governor's order. It is in no way intended to call into question the motives of the governor. Our governor is daily making the toughest decisions any Louisiana governor has ever had to make and is doing a great job. Still, our secretary of state has been studying the issues surrounding the remote online notary protocols for several years, and he has grave concerns about this authorization.

#### The absence of the necessary security and party-privacy provisions

A notary has an affirmative duty to safeguard the party's Non-public Personal Information (NPI).

Proclamation No. 37, however, makes no provisions that ensure the notary can meet his obligations under federal law to maintain data security and party privacy.

In contrast to the authorization, the proposed legislation includes a key component that tasks the secretary of state with a duty to ensure notaries who are authorized to perform remote online notary services are properly informed on the use of the technology that will safeguard the privacy of the parties and the security of their non-public personal information. Unlike the authorization in Proclamation No. 37, the proposed legislation requires the secretary of

state to gather stakeholders and subject matter experts to establish the standards for the protocols that notaries will use to keep data secure and NPI private.

***Proclamation No. 37 is devoid of provisions that ensure necessary data security and party privacy.***

#### The absence of regulations concerning the platforms on which these specialized notarial services could be performed

Proclamation No. 37 makes no provisions for the standards to which technical service providers must adhere in providing platforms and interfaces for notaries and parties to use to conduct their business online.

Remote online notarization is not as simple as connecting via Facetime or Skype. Considerations involving the need for the



instrument being signed to be simultaneously visible to both parties on their screens, along with images of all the people “at the table” during signing, are all in play. With no guidelines or rules, the safeguards against fraud that are assured by the proposed legislation will be non-existent. The law of the jungle will rule. People will be hurt.

A fundamental function of a notary is to help keep people from getting hurt. Ironically, the intent of the governor is to help Louisiana citizens remain free from infection by an insidious virus. But opportunity for our citizens to be victimized by the lack of safeguards in the proclamation can be just as devastating to the individual who becomes a victim of the lack of standards and guidelines and the failure to establish a registration of valid platforms.

The secretary of state is concerned, as are we, that the Proclamation has made no provisions for establishing standards for the platforms hosting remote online notarial services. The lack of those standards will most certainly assist people who would take advantage of the situation at the expense of the very people the notary is engaged to protect.

Secretary Ardoin expressed frustration that his office was not given a heads-up sufficient to enable his staff to prepare any guidelines for Louisiana notaries.

## In summary

Essential notary services can be provided under [Proclamation No. 33 JBE 2020](#) such that the commerce of this state is not impeded during this public health emergency. Instead of Proclamation No. 37 being an enhancement to commerce, every remote online notary transaction performed thereunder will be under a cloud. The opportunity for fraud and the near certainty of litigation make this authorization particularly inadvisable. The improper, uninformed, and unregulated attempts to perform notarizations without the safeguards provided for in the current proposed legislation have no place in our commercial, financial, or legal transactions.

The LNA board is of the opinion that no prudent notary would avail him-or-herself of this authorization but would instead take advantage of the provisions under Proclamation No. 33 and wait for the legislature to enact the Remote Online Notarization Act proposed under the bills cited above.

***Proclamation No. 37 fails to provide for standards for platforms that will host remote online notary services, and it fails to provide any guidelines for the notaries of the state as to how they might implement the authority in a safe and secure manner.***

## Doubtful legality of the authorization.

The secretary of state is keenly aware of the need for the executive branch to be mindful of the constitutional provisions for the separation of powers. La. Const. of 1974, Art. II, makes it clear that no branch of the government can exercise powers of another branch. The Louisiana Supreme Court, in *State v. Lareche*, Man. Unrep. Cas. 381 (1880) ruled that the office of notary public in Louisiana is a “creation of the legislature and subject only to its control.”

Proclamation No. 37 is executive overreach. The powers granted in La. R.S. 29:721 et. seq. and La. R.S. 29: 760 et. seq. (the laws on which the proclamation relies) give no authority to the governor to exercise powers reserved to the legislature.

Under our law, with respect to notaries public, the governor has only the power of appointment; he has no power to change the duties or powers of the notary public.

***Proclamation No. 37 may very well result in every instrument signed under its authority having no standing as a notarial act.***