

NOTARY PUBLIC UPDATE

PRESENTED BY
OFFICE OF THE SECRETARY OF STATE
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Comparison of Recent Legislative Acts

20 RS SB 150 v. 19 RS SB 114

Limited to duration of Covid-19 Emergency

- Section 1(11)(a) and (b) Authorizes temporary use of “counterparts” in notarizing documents
- Authorizes witness to satisfy “presence” remotely

Permanent comprehensive notary law codified at KRS 423.300 to 423.465 authorizing, among other things, remote notarizations

- No distinction between originals, duplicates, and counterparts
- No effect on witnessing documents
- Acceptance by county clerks of notarized electronic records is permissive, not mandatory per KRS 423.385, 423.440, but is deemed lawfully recorded if accepted (but county clerk may require additional certification for “paper-printout” under KRS 382.076).

Effect of Failure to Follow Notary Law Requirements

- Failure to perform duty or meet a requirement does not invalidate the notarial act so long as performed by a person “authorized” to perform notarial acts (KRS 423.410) but could subject a notary public to discipline
- However, notarial act performed by a person without “authority” or in which notarial officer or immediate family member has a personal interest is *voidable* (KRS 423.310(4))
- Validity of notarial act does not prevent invalidation by a court of law of the underlying record or transaction that is the subject of the notarial act or seeking other remedies
- Standards for notarial acts under KRS Chapter 423 more likely to establish breach of duty of care than to invalidate notarial act; *but see In re Shannon*, 343 B.R. 585, 589 (Bankr. E.D. Ky. 2006) (granting summary judgment to bankruptcy trustee to avoid mortgage for invalid notarization)

NOTARIZATION STANDARDS & PROCEDURES



Types of Notarial Officers

Who is “authorized” to perform notarial acts?

- Notary Public: a public office recognized by Ky. Const. § 165; commission issued by SOS for four-year term pursuant to KRS 423.390(3); must give \$1,000 surety bond and take oath of office “in person” at local county clerk’s office (30 KAR 8:005 Section 2)
- Special commission (governor’s discretion), “in or outside this state... for recordation in this state” (KRS 423.110(5)).
- County Clerk (when performing official duties) pursuant to KRS 423.340(4)
- State officials who have been given notarial powers by virtue of their office
- Certain federal officers pursuant to KRS 423.345(3)(a) (judge, clerk, or deputy clerk of court, military officers, US Department of State officers with notarizing authority overseas)



Types of Common Notarial Acts

- **KRS 423.310** provides examples (indicated by notary certificate per KRS 423.360):
- **Acknowledgements** (The individual confirmed his or her signature not under oath.)
- **Witness/attestation of signatures** (Notarial officer witnessed the individual sign his or her name.)
- **Verifications on oath or affirmation** (After being duly sworn, the individual affirmed the statement and signed his her or her name.)
- **Administering oaths/affirmations** (Verbal only, but may be documented and recorded)
- **Certifications of copies and transcripts** (Notarial officer certifies true and correct copy of record in the possession of notary or someone else)
- **Protests of negotiable instruments** (notice of dishonor of a promissory note or order/draft)



30 KAR 8:005

“Notary public application; requirements for notarial acts performed with respect to electronic records and for remotely located individuals; notary public discipline”

- Section 1. Definitions
- Section 2. Notary Public Application, Approval or Denial of Application, Voluntary Termination, and Required Notice of Change of Information.
- Section 3. Registration to Perform Notarial Acts with Respect to Electronic Records and Electronic Notarizations.
- Section 4. Standards for the Performance of Notarial Acts with Respect to Electronic Records.
- Section 5. Standards for Electronic Notarizations.
- Section 6. Record Retention Requirements for Notarial Acts with Respect to Electronic Records and Electronic Notarizations.
- Section 7. Prior Notice to the Secretary of State and Standards for the Use of Communication Technology in the Performance of Notarial Acts with Respect to Tangible Records.
- Section 8. Notary Discipline.



Notary Public Application Process

- Complete SOS notary public application and mail-in or submit online
- \$10 fee
- Notary receives a postcard or email notifying applicant that commission certificate is available to receive at local county clerk's office identified in application as county where residence or business is located
- Applicant must deliver a \$1,000 surety bond and take the Oath of Office (Ky. Const. § 228) in person at the county clerk's office to assume the office



Notary Discipline

- A notary public may be disciplined for various violations and for conviction of a felony or “crime involving fraud, dishonesty or deceit.” KRS 423.395; implemented by 30 KAR 8:005 Section 8
- Secretary of State conducts disciplinary review and provides notice and right to a hearing under KRS Chapter 13B.
- Presumption of constitutionality given to authority of SOS to revoke the office of a notary public (*i.e.*, that notary public is not a “civil officer” subject to removal via impeachment under Ky. Const. 68)

UPDATE TO METHODS OF NOTARIZATION



In-Person v. Remote Notarizations

Four Methods of Notarization

In-person Tangible Record

- Notarial officers may perform (KRS 423.310)
- Traditional method, individual must “personally appear” before notarial officer

In-person Electronic Record

- *Notary public only*, must register with SOS first KRS 423.385(1)(a)
- 30 KAR 8:005 Section 3

Remote Tangible Record

- *Notary public only*, no formal registration but prior notice to SOS required
- “Communication technology” satisfies “personal appearance” before notary public
- 30 KAR 8:005 Section 7

Remote Electronic Record

- *Notary public only*, must register with SOS first as an “online notary public” per KRS 423.385(1)(b) and KRS 423.355(1)(c)
- Requires electronic signature/digital certificate & registered technology provider
- 30 KAR 8:005 Section 3



Remote Tangible Record Notarization

[Also know as: Remote Ink Notarization (“RIN”)]

- Use of “communication technology” as a substitute for “personal appearance” authorized by KRS 423.455(1) (communication technology provider is not required to be registered but must be capable of confirming recording ability (*e.g.*, Zoom) or ability of notary to make recording independently)
- Became popular method among notary and legal community (approximately 700 prior notice for remote/tangible versus 70 registrations for remote/electronic)
- Validity confirmed by SOS in March 27, 2020 Press Release
- Prior notice to SOS required disclosing communication technology capable of recording remote notarial act
- Now formally recognized by 30 KAR 8:005 Section 7
- Statutory term “tangible record” defined to include duplicates of an original that do not require electricity under 30 KAR 8:005 Section 1(5).



Registration to Perform Notarial Acts with Respect to Electronic Records

- Required for both in-person/electronic and remote/electronic
- Main feature is the notary's digital certificate
- Digital certificate is **NOT** a scanned copy of the commission certificate
- Digital Certificate is **NOT** a scanned copy of a sample notary certificate
- "Digital Certificate" means an electronic record, issued by a third-party certificate authority, which certifies the ownership of a public key, rendering an electronic document as tamper-evident. 30 KAR 8:005 Section 1(1)

Third Party Certificate Authorities

- US-based Adobe-Approved Trust List Members

Note: Adobe does not include itself; digital certificates created using Adobe software are “self-signed”)

- DigiCert

- Department of Defense

- Entrust

- U.S. Federal Public Key Infrastructure

- GlobalSign

- IdenTrust

- SAFE-BioPharma

- Sectigo

- SSL.com

- Transglobal Secure Collaboration Program



Notarial Acts with Respect to Electronic Records

In-person Electronic – Remote Electronic/“Electronic Notarizations”

Standards for Performance

30 KAR 8:005 Section 4

- common to *both* in-person and remote/electronic record notarization
- Tamper-evident technology and use of voluntary stamp

30 KAR 8:005 Section 5

- Specific to Remote/electronic records (“electronic notarizations”)
- Identity-proofing requirements (KRS 423.325(c))
- Preferred method for mortgage/title community

Retention Requirements

KAR 8:005 Section 6

- 10-year journal requirement for both in-person and remote (KRS 423.380)
- 10-year audio visual recording of remote/electronic notarial act (KRS 423.355(5)(b) and (c))



Remote Notarial Acts Personal Identification Requirements

Remote Tangible Notarization

- KRS 423.455(2)(a) & 423.325
- Personal knowledge;
- Oath or affirmation of a “credible witness” (not defined);

Or

- 2 or more identity-proofing processes described in 30 KAR 8:005 Section 5(4)

Remote Electronic Notarization

- KRS 423.355(2)(a) & 423.325(3)
- Personal knowledge;

Or

“Satisfactory evidence” defined as:

- Government ID with photo & signature;
- Credential analysis of the ID; **and**
- Identity-proofing (*e.g.*, “dynamic knowledge-based authentication assessment”);

Or

- Use of a public key (digital) certificate
- 30 KAR 8:005 Section 5(4)(a)-(c)



List of Approved Technology Providers for Remote Electronic/“Electronic Notarizations”

- NotaryCam, Inc.
- DocVerify, Inc.
- PerfectDocs, Nationwide Title Clearing, Inc.
- Notarize Inc.
- Guardian Consumer Services, dba PAVASO, Inc.
- Nexsys Technologies LLC/Clear Sign
- Digital Delivery, Inc.
- eNOtaryLog, LLC
- SIGNiX, Inc.

FORWARD LOOKING



Proposed Legislative Amendments

- Change the statutory defined term “electronic notarization” (KRS 423.300(8) to “remote electronic notarization” and replace all references accordingly (as well as the singular reference to “initial online notarial act” in KRS 423.390)
- Replace term “notarial act with respect to electronic records” to “in-person electronic notarization” and define accordingly
- Repeal Uniform Acknowledgements Act (KRS 423.130 to KRS 423.200) as obsolete
- Repeal KRS 423.110 (“Recognition of notarial acts performed outside this state”) as obsolete by KRS 423.345 (“Effect of notarial act performed in another state, under authority of tribe, or under authority of federal law”) and KRS 423.350 (“Effect of notarial act performed under authority of foreign state or international governmental organization; establishing authority of officer and genuineness of signature”)



On The Horizon

Securing and Enabling Commerce Using Remote and Electronic Notarization Act of 2020 (“SECURE”) Act S.3533

- Would temporarily federalize notarizations conducted in interstate commerce and preempt state notary law to the contrary during Covid-19
- Could cause confusion and bankruptcy litigation on mortgages notarized inconsistently with state law
- Example, would make notary stamps mandatory if affecting interstate commerce (notarizations without a stamp would be invalid even though valid under Kentucky law)

QUESTIONS?

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