



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

eFILED

3/31/2020 2:25:45 PM

Office of West Virginia
Secretary Of State

NOTICE OF AN EMERGENCY AMENDMENT TO AN EMERGENCY RULE

AGENCY: Secretary Of State TITLE-SERIES: 153-45
RULE TYPE: Legislative Amendment to Existing Rule: Yes
RULE NAME: Guidelines and Standards for Electronic
Notarization

CITE STATUTORY AUTHORITY FOR PROMULGATING EMERGENCY RULE:

W. Va. Code 39-4-25

IF THE EMERGENCY RULE WAS PROMULGATED TO COMPLY WITH A TIME LIMIT ESTABLISHED BY CODE OR FEDERAL STATUTE OR REGULATION, CITE THE CODE PROVISION, FEDERAL STATUTE OR REGULATION AND TIME LIMIT ESTABLISHED THEREIN:

DATE EMERGENCY RULE WAS ORIGINALLY FILED: 03/27/2020

DATE(S) OF PREVIOUS EMERGENCY AMENDMENT(S)

PRIMARY CONTACT:

NAME: Donald Kersey
ADDRESS: State Capitol Bldg 1 Ste 157 K
Charleston, WV 25305
EMAIL: dkersey@wvsos.gov
PHONE NUMBER: 304-558-6000

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE AFTER APPROVAL BY THE SECRETARY OF STATE OR THE 42ND DAY AFTER FILING, WHICHEVER OCCURS FIRST. THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

Pursuant to Section 6 of Executive Order 11-20, notary publics are no longer required to be in person to notarize documents. However, the current rule does not prescribe other manners for notaries to satisfy the law without in-person appearance. Without established standards, in-person appearances are nonetheless required, which is inadvisable and potentially illegal per the WV Governor's, Department of Health and Human Resources', and U.S. Center for Disease Control and Prevention's guidance to avoid contact with others and remain at home during the current State of Emergency for the COVID-19 epidemic.

DOES THIS EMERGENCY RULE REPEAL A CURRENT RULE? No

HAS THE SAME OR SIMILAR EMERGENCY RULE PREVIOUSLY BEEN FILED AND EXPIRED? No

SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED LEGISLATIVE RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

C. ECONOMIC IMPACT OF THE RULE ON THE STATE OR ITS RESIDENTS:

D. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2020 Increase/Decrease (use "-")	2021 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost			
Personal Services			
Current Expenses			
Repairs and Alterations			
Assets			
Other			
2. Estimated Total Revenues			

E. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

Donald Kersey -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

TITLE 153
LEGISLATIVE RULE
SECRETARY OF STATE

SERIES 45
STANDARDS AND GUIDELINES FOR ELECTRONIC NOTARIZATION

§153-45-1. General.

1.1. Scope. -- This rule defines the requirements for electronic notarization of electronic documents, as well as remote notarization during a State of Emergency when in-person appearance is impractical, illegal, or otherwise inadvisable due to a public health emergency or other natural disaster.

1.2. Authority. -- W. Va. Code § 39-4-25.

1.3. Filing Date. -- ~~April 30, 2015~~

1.4. Effective Date. -- ~~April 30, 2015~~

1.5. Sunset Provision. -- This rule shall terminate and have no further force or effect after five (5) years following the Effective Date in Section 1.4. of this rule.

§153-45-2. Definitions.

2.1. “Capable of independent verification” means that any interested person may confirm the validity of an electronic notarial act and an electronic notary public’s identity and authority through a publicly accessible system.

2.2. “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

2.3. “Electronic document” means information that is created, generated, sent, communicated, received, or stored by electronic means.

2.4. “Electronic journal of notarial acts” and “electronic journal” mean a chronological electronic record of notarizations that is maintained by the notary public who performed the same notarizations.

2.5. “Electronic notarial act” and “electronic notarization” mean an official act involving an electronic document that is performed in compliance with this Rule by an electronic notary public as a security procedure.

2.6. “Electronic notarial certificate” means the part of, or attachment to, a notarized electronic document that, in the performance of an electronic notarization, is completed by the electronic notary public, bears the notary’s registered electronic signature and seal, and states the date, venue, and facts attested to or certified by the notary in the particular electronic notarization.

2.7. “Electronic notary public” and “electronic notary” mean a notary public who has registered with the Secretary of State the capability to perform electronic notarial acts.

2.8. “Electronic notary seal” and “electronic seal” mean information within a notarized electronic document that includes the electronic notary’s name, title, jurisdiction, commission expiration date, and other information required by subdivision 11.2.c of this rule.

2.9. “Electronic signature” means an electronic sound, symbol, or process attached to or logically associated with an electronic document and executed or adopted by a person with the intent to sign the document.

2.10. “Registered electronic notary seal” means an electronic notary seal produced by a notary in the performance of an electronic notarial act by a means that was registered with the Secretary of State.

2.11. “Registered electronic signature” means an electronic signature produced by a notary in the performance of an electronic notarial act by a means that was registered with the Secretary of State.

2.12. “Security procedure” means a procedure employed for the purpose of verifying that an electronic signature, document, or performance is that of a specific person or for detecting changes or errors in the information in an electronic document. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or callback, or other acknowledgment procedures.

§153-45-3. Registration with the Secretary of State.

3.1. A notary public shall register the capability to perform electronic notarial acts with the Secretary of State before notarizing electronically.

3.2. Upon recommissioning, a notary public shall again register as an electronic notary with the Secretary of State before notarizing electronically.

3.3. A person may apply or reapply for a notary commission and register or reregister to perform electronic notarial acts at the same time.

§153-45-4. Term of Registration of Electronic Notary.

4.1. The term of registration of an electronic notary public begins on the registration starting date set by the Secretary of State and continues as long as the notary’s commission remains in effect or until registration is terminated under sections 24 or 26 of this rule.

§153-45-5. Electronic Notarization Authorization Form.

5.1. To register the capability to perform electronic notarial acts, a notary public shall sign and submit to the Secretary of State a form prescribed by the Secretary of State which includes the following information:

5.1.a. A description of each separate means that will be used to produce electronic signatures and electronic notary seals;

5.1.b. The names of any licensing authorities or companies issuing the means for producing the electronic signatures and seals, the source of each license, and the starting and expiration dates of each pertinent certificate, software, or process;

5.1.c. An explanation of any revocation, annulment, or other premature termination of any certificate, software, or process ever issued or registered to the applicant to produce an electronic signature or seal; and

5.1.d. A declaration that the notary public will use the means issued or authorized for issuance by the Secretary of State for producing an electronic notary seal.

§153-45-6. Registration of Multiple Means.

6.1. Under section five of this rule, a notary public may register at the same, or at different times, one or more respective means for producing electronic signatures and electronic notary seals, or single elements combining the required features of both, consistent with the requirements cited elsewhere in this rule.

§153-45-7. Material Misstatement or Omission of Fact.

7.1. The Secretary of State shall deny registration to any applicant submitting an electronic registration form that contains a material misstatement or omission of fact.

§153-45-8. Authorized Electronic Notarial Acts.

8.1. The following notarial acts may be performed electronically:

- 8.1.a. Taking an acknowledgment;
- 8.1.b. Administering an oath or affirmation;
- 8.1.c. Witnessing or attesting a signature;
- 8.1.d. Certifying or attesting a copy; and
- 8.1.e. Noting a protest of a negotiable instrument.

§153-45-9. Requirements for Electronic Notarial Acts.

9.1. An electronic notary public shall perform an electronic notarization only if the individual seeking an acknowledgment:

9.1.a. Is in the presence of the notary at the time of notarization;

9.1.b. Is personally known to the notary or identified by the notary through satisfactory evidence as prescribed in W.Va. State Code 39-4-7;

9.2. An electronic notary public may refuse to perform a notarial act if the officer is not satisfied that:

9.2.a. The individual executing the record is competent or has the capacity to execute the record;
or

9.2.b. The individual's signature is knowingly or voluntarily made.

§153-45-10. All Notary Rules Apply.

10.1. In performing electronic notarial acts, an electronic notary shall adhere to all applicable rules governing notarial acts provided in this rule, W.Va. 153 CSR 46, and W.Va State Code 39-1-1, *et seq.*

§153-45-11. Completion of Electronic Notarial Certificate.

11.1. In performing an electronic notarial act, the notary shall properly complete an electronic notarial certificate.

11.2. A proper electronic notarial certificate must contain:

11.2.a. Completed wording appropriate to the particular electronic notarial act, as prescribed in subsection 11.3 of this rule;

11.2.b. A registered electronic signature; and

11.2.c. A registered electronic notary seal, which must include:

11.2.c.1. The words "Official Seal;"

11.2.c.2. The words "Electronic Notary Public";

11.2.c.3. The words "State of West Virginia;"

11.2.c.4. The notary public's name as it is spelled on the commissioning document;

11.2.c.5. The notary public's address as it is listed on the commissioning document;

11.2.c.6. The commission expiration date of the electronic notary;

11.2.c.7. An image of the West Virginia State Seal; and

11.2.c.8. The commission or registration number of the electronic notary.

11.3. The wording of an electronic notarial certificate must be in a form that:

11.3.a. Is set forth in W.Va. State Code §39-4-16;

11.3.b. Is otherwise prescribed by the law of this state;

11.3.c. Is prescribed by a law, regulation, or custom of another jurisdiction, provided it does not require actions by the electronic notary that are unauthorized by this state; or

11.3.d. Describes the actions of the electronic notary in such a manner as to meet the requirements of the particular notarial act, as defined in section 2.5 of this rule.

11.4. A notarial certificate must be worded and completed using only letters, characters, and a language that are read, written, and understood by the electronic notary.

§153-45-12. Electronic Signature and Seal Attributed to Notary.

12.1. In notarizing an electronic document, the notary shall attach to, or logically associate with, the electronic notarial certificate a registered electronic signature and a registered electronic notary seal, or a registered single element in conformance with section 6 of this rule, in such a manner that the signature and the seal, or the single element, are attributed to the notary as named on the commission.

§153-45-13. Attributes of Registered Electronic Signature.

13.1. A registered electronic signature must be:

13.1.a. Unique to the electronic notary public;

13.1.b. Capable of independent verification;

13.1.c. Attached to or logically associated with an electronic notarial certificate in such a manner that any subsequent alteration of the certificate or underlying electronic document prominently displays evidence of the alteration; and

13.1.d. Attached or logically associated by a means under the electronic notary's sole control.

§153-45-14. Signature of Registered Electronic Notary Seal.

14.1. At all times the means for producing registered electronic notary seals, or registered single elements as described in section 6 of this rule, must be kept under the sole control of the electronic notary.

14.2. If the means for producing registered electronic notary seals, or registered single elements as described in section 6 of this rule are accessed by a username and password, the electronic notary must maintain sole control of the access information.

§153-45-15. Employer Shall Not Use or Control Means.

15.1. An employer of an electronic notary shall not use or control the means for producing registered electronic signatures and notary seals, or registered single elements combining the required features of both, nor upon termination of a notary's employment, retain any software, coding, disk, certificate, card, token, or program that is intended exclusively to produce a registered electronic signature, notary seal, or combined single element, whether or not the employer financially supported the employee's activities as a notary.

§153-45-16. Non-Notarial Use.

16.1. A registered electronic signature may be used by the electronic notary for lawful purposes other than performing electronic notarizations, provided that neither the title "notary" nor any other indication of status as a notarial officer is part of the signature.

16.2. Neither a registered electronic notary seal nor a combined single element containing the seal may be used by the electronic notary for any purpose other than performing lawful electronic notarizations.

§153-45-17. Maintaining Journal of Electronic Notarial Acts.

17.1. An electronic notary public may keep, maintain, protect, and provide for lawful inspection a chronological journal of notarial acts that is either:

17.1.a. A permanently bound book with numbered pages; or

17.1.b. An electronic journal of notarial acts as described in section 18 of this rule.

17.2. An electronic notary may keep a record of electronic and nonelectronic notarial acts in the same journal.

§153-45-18. Attributes of Electronic Journal.

18.1. An electronic journal of notarial acts shall:

18.1.a Allow journal entries to be made, viewed, printed out, and copied only after access is obtained by a procedure that uses a username and a password;

18.1.b. Not allow a journal entry to be deleted or altered in content or sequence by the notary or any other person after a record of the notarization is entered and stored;

18.1.c. Have a backup system in place to provide a duplicate record of notarial acts as a precaution in the event of loss of the original record;

§153-45-19. Form of Evidence of Authority of Electronic Notarial Act.

19.1. On a notarized electronic document transmitted to another country or nation, electronic evidence of the authenticity of the registered electronic signature and seal of an electronic notary public of this state, if required, must be in the form of an electronic certificate of authority signed by the Secretary of State in conformance with any current and pertinent international treaties, agreements, and conventions subscribed by the government of the United States.

19.2. The electronic certificate of authority described in subsection 19.1 must be attached to or logically associated with the electronically notarized document in such a manner that any subsequent alteration of the notarized document, or removal or alteration of the electronic certificate of authority, produces evidence of the change.

§153-45-20. Certificate of Authority for Electronic Notarial Act.

20.1. An electronic certificate of authority evidencing the authenticity of the registered electronic signature and seal of an electronic notary public of this state must be in substantially the following form:

Certificate of Authority for Electronic Notarial Act
I, (name and title of commissioning official), certify
that (name of electronic notary public), the person named as
Electronic Notary Public in the attached, associated, or accompanying
electronic document, was registered as an Electronic Notary Public for the
State of West Virginia and authorized to act as such at the time the
document was electronically notarized. I also certify that the document
bears no evidence of illegal or fraudulent alteration.
To verify this Certificate of Authority for an Electronic Notarial Act, I have
included herewith my electronic seal and signature this ____ day of _____, 20 ____.
(Electronic seal and signature of Secretary of State)

§153-45-21. Change of E-Mail Address.

21.1. Within 5 business days after the change of an electronic notary public's email address, the notary shall electronically transmit to the Secretary of State a notice of the change. The email must include the notary public's notary identification number issued by the Secretary of State.

§153-45-22. Change of Registration Data.

22.1. Any change or addition to the data on the electronic registration form described in section five, must be reported within 10 days to the Secretary of State.

§153-45-23. Change of Means of Production.

23.1. Upon becoming aware that the status, functionality, or validity of the means for producing a registered electronic signature, notary seal, or single element combining the signature and seal, has changed, expired, terminated, or become compromised, the notary shall:

23.1.a. Immediately notify the Secretary of State;

23.1.b. Cease producing seals or signatures in electronic notarizations using that means;

23.1.c. Perform electronic notarizations only with a currently registered means or another means that has been registered within 30 days; and

23.1.d. Dispose of any software, coding, disk, certificate, card, token, or program that has been rendered defunct, in the manner described in subsection 25.1 of this rule.

23.2. Pursuant to subsection one of this section, the Secretary of State shall immediately suspend the electronic status of a notary who has no other currently registered means for producing electronic signatures or notary seals, and if such means is not registered within 30 days, electronic status must be terminated.

§153-45-24. Termination of Electronic Notary Registration.

24.1. Any revocation, resignation, expiration, or other termination of the commission of a notary public immediately terminates any existing registration as an electronic notary.

24.2. A notary's decision to terminate registration as an electronic notary shall not automatically terminate the underlying commission of the notary.

24.3. A notary who terminates registration as an electronic notary shall notify the Secretary of State in writing and dispose of any pertinent software, coding, disk, certificate, card, token, or program as described in section 25 of this rule.

§153-45-25. Disposition of Software and Hardware.

25.1. When the commission of an electronic notary public expires or is resigned or revoked, when registration as an electronic notary terminates, or when an electronic notary dies, the notary or the notary's duly authorized representative within 30 business days shall permanently erase or expunge the software, coding, disk, certificate, card, token, or program that is intended exclusively to produce registered electronic notary seals, registered single elements combining the required features of an electronic signature and notary seal, or registered electronic signatures that indicate status as a notary.

§153-45-26. Causes for Denial, Conditioning, Suspension, or Termination of Registration.

26.1. The Secretary of State shall deny, condition, suspend, or terminate an electronic notary public's registration for any of the following reasons:

26.1.a. Submission of an electronic registration form containing material misstatement or omission of fact;

26.1.b. Failure to obtain or maintain the capability to perform electronic notarial acts, except as allowed in section 24 of this rule; or

26.1.c. The electronic notary's performance of official misconduct.

26.2. If the Secretary of State denies a registration for electronic notarization, the individual making application may request a hearing according to the provisions of W.Va. 153 CSR 47 to contest the decision of the Secretary of State.

26.3. Prior to conditioning, suspending, or terminating an electronic notary's registration, the Secretary of State shall provide notice to the electronic notary in the form of a short, plain statement of the basis for action, the date, time, and place of a hearing on the matter, and the name of the hearing examiner. The procedures for any hearing regarding the conditioning, suspension or termination of an electronic notary's registration must be conducted according to the procedures set forth in W.Va. 153 CSR 47.

26.4. Neither resignation nor expiration of a notary commission or of an electronic notary registration precludes or terminates an investigation by the Secretary of State into the electronic notary's conduct. The investigation may be pursued to a conclusion, whereupon it must be made a matter of public record whether or not the finding would have been grounds for conditioning, suspension, or termination of the commission or registration of the electronic notary.

§153-45-27. Remote Notarization Authorized during State of Emergency.

27.1. Definitions specific to the provision under this Section heading:

27.1.a. "Individual" means a person who requests a notary to notarize a document.

27.1.b. "Notary" means a notary public commissioned to perform a notarial act by the West Virginia Secretary of State pursuant to W. Va. Code § 39-4-1 et seq.

27.2. Upon declaration of a State of Emergency and a lawful suspension of the requirements of W. Va. Code § 39-4-6 for notarizations to be made in person, unless otherwise expressly prohibited by law, a document may be notarized for an individual by a notary who utilizes an electronic device, technology, process or combination thereof if the following requirements are satisfied:

27.2.a. The individual(s) and the notary are not in the same physical presence of each other; and

27.2.b. The individual(s) and the notary can communicate simultaneously by sight and sound through an electronic device, technology, process or combination thereof at the time of the notarization; and

27.2.c. The identification, record-keeping, and procedural requirements of Sections 27.3 through 27.7 of this rule are satisfied.

27.3. For a notarization communicated simultaneously by sight and sound through an electronic device, technology, process or combination thereof at the time of the notarization to be deemed proper, the notary must reasonably identify the individual by one or more of the following manners:

27.3.a. Personal knowledge of the individual; or

27.3.b. Identification of an individual based on at least one current document or record which includes the individual's photograph, name and signature. Common acceptable forms of identification include but are not limited to a state or federal ID such as a driver's license, personal identification card, or passport; or

27.3.c. At least two different types of processes or services by which a third person provides a means to verify the identity of the individual through a review of public or private data sources; or

27.3.d. Oath or affirmation by a credible witness who (1) is in the physical presence of either the notary or the individual; or (2) is able to communicate with the notary and the individual simultaneously by sight and sound through an electronic device or process at the time of the notarization, if the credible witness has personal knowledge of the individual and has been reasonably identified by the notary under Subsection 3.1. or 3.2. of this Section.

27.4. The notary, either directly or through an agent, shall satisfy the following record creation and retention processes:

27.4.a At the time of the performance of the notarization, the notary or notary's agent shall create an audio and visual recording of the signing and notarization; and

27.4.b. The notary or notary's agent shall retains such recording as a notarial record during the term of the notarial officer's office, including renewals thereof, unless a State law requires a different period of record retention, and if any State laws govern the content, retention, security, use, effect, and disclosure of such recording and any information contained therein such recording shall be subject thereto; and

27.5. When an individual who is physically located outside the geographic boundaries of the State of West Virginia seeks to have a document notarized under the conditions and requirements set forth in Section 27.2 of this rule, the following additional requirements must also be met:

27.5.a. The notary is commissioned as an Out-of-State Commissioner under W. Va. Code § 39-4A-1 *et seq.*; and

27.5.b. The notary has no actual knowledge that the act of making the statement or signing the record is prohibited by the laws of the jurisdiction in which the individual is physically located; and

27.5.c. The record:

27.5.c.1. Is intended for filing with or relates to a matter before a court, governmental entity, public official, or other entity subject to the jurisdiction of West Virginia; or

27.5.c.2. Involves property located in the territorial jurisdiction of West Virginia or a transaction substantially connected to the State of West Virginia; or

27.5.c.3. Is otherwise permitted by West Virginian law to be notarized outside the state of West Virginia.

27.6. Once signed by the individual under the procedures set forth in Section 27.3. of this rule, the individual shall mail the signed copy of the documents to the notary for certification and execution with the notary's signature and the official stamp or seal.

27.7. The official date and time of the notarization shall be the date and time when the notary witnessed the signature via the electronic device, technology, process or combination thereof that provide(s) the audio and video presence.

27.8. The validity and recognition of a notarization under this rule shall not prevent an aggrieved person from seeking to invalidate a record or transaction that is the subject of a notarization, or from

seeking other remedies based on state or federal law, for any reason not addressed in this rule including the following grounds:

27.8.a. That an individual did not, with present intent to authenticate or adopt a record, either (1) execute or adopt on the record a tangible mark or symbol; or (2) attach to or logically associate with the record an electronic signature; or

27.8.b. That an individual was incompetent, lacked authority or capacity to execute the record, or did not knowingly and voluntarily execute a record; or

27.8.c. That a record was signed on the basis of fraud, forgery, mistake, misrepresentation, impersonation, duress, undue influence, or other invalidating cause.

27.9. Nothing in this rule shall affect or supersede a state law or rule governing, authorizing, or prohibiting the practice of law.

27.10. The failure of a notary to comply with any requirement of this Section shall not invalidate or impair the recognition of a notarization performed by the notary under the procedures of this Section so long as substantial compliance is met. *Provided*, that substantial compliance is not met if any of the invalidating circumstances set forth in Section 27.8. have occurred.

27.11. This Section shall not be construed to create a public or private cause of action or remedy.

27.12. This Section shall not affect the validity of a notarization performed before the effective date hereof. The validity and recognition of a notarization performed pursuant to the terms of this Section and during the period hereof, shall not be affected by the subsequent expiration, modification, amendment or revocation of this Section or rule, including after which time a State of Emergency is declared no longer in effect.

27.13. If any provision of this Section or the application of such provision to any person or circumstance is held to be invalid or unconstitutional, the remainder of this Section and the application of the provisions thereof to other persons or circumstances shall not be affected thereby.

27.14. Nothing in this rule shall require a notary commissioned under West Virginia law to perform a notarization:

27.14.a. With respect to an electronic record;

27.14.b. For an individual not in the physical presence of the notarial officer; or

27.14.c. Using a technology that the notarial officer has not selected.