

Remote Online Notarization

03.30.20

As the disruption to the commercial real estate industry resulting from the coronavirus (COVID-19) pandemic has taken hold, many clients and industry contacts have inquired as to whether **Remote Online Notarization**, commonly referred to as "RON", is a viable option for parties to a commercial real estate transaction.

First, let's start with a few basics. In concept, RON broadens the definition of what it means to "personally appear" before a notary; physical presence is now satisfied via audiovisual technology where the signer and notary interact remotely (i.e. NOT in the same room). This differs from what is commonly referred to as electronic notarization (or e-notarization) which is employed in the absence of RON statutes and regulations, and requires the signatory and notary to be physically present in the same room when documents are electronically signed and notarized. RON thus encompasses e-notarization (i.e., utilizing a digital signature and a digital notary seal), but is performed remotely via a real-time, two-way video and audio communication and the transaction is validated with a digital certificate. The model legislation and guidelines for the adoption of RON in the United States (which states have used to enact RON statutes) has been a joint effort of the Mortgage Bankers Association (MBA) and the American Land Title Association (ALTA). At the end of this article we have included links to MBA and ALTA resources for the adoption and implementation of RON.

States are presently rushing to enact RON statutes, and in the absence of enacting legislation, state governors are issuing executive orders to create authority for RON on an emergency basis (see, e.g., N.Y. Executive Order 202.7 signed March 19). In addition, a U.S. Senate Bill (S.B. 3533) was introduced on March 18 for purposes of providing a federal law authorizing the use of electronic and remote notarizations throughout the United States. The Senate Bill provides that the states shall recognize the validity of a remote online notarial act if it affects interstate commerce or was performed under a law enacted in the state in which the notarial act was performed. Please refer to the links below for additional resources, including up-to-date information on the changing status state laws and regulations related to RON.

Let's take a closer look at the nuts and bolts of RON laws:

- A notarial act is performed where "personal appearance" or "appearing in the presence of" is satisfied by audio-video communication technology
- The notary must be physically located in the state that authorizes RON and in which the notary is certified (note that the signatory may be located outside the state)
- Some states (including Texas) require that notaries obtain additional certification in order to perform notarial acts using RON
- Tamper-evident technology must be used to facilitate RON (assuring the integrity of the electronic document to be notarized remotely)
- Multi-factor authentication is used to verify the identity of the signer and protect the public and parties to transactions from identity theft, forgery and fraud
- The notary acknowledgment must identify that it was notarized remotely online and/or through the use of audio-video communication technology

Now that we have an understanding of the remote online notarization process, we turn to the recordability of documents notarized using RON. For county recorders that permit electronic filing, the electronic version of the executed document that was acknowledged using remote online notarization can be electronically filed (e-filed) in the document's original, electronic format. However, if the recorder's office does not permit e-filing of documents, it is necessary to print a copy of the electronic document. Thus, you should determine whether the applicable RON statute includes a concept of "papering out" the electronically executed and notarized documents. "Papering out" involves a printed reproduction of the original, authenticated document that was executed and notarized using RON for purposes of recording the same with the county clerk/recorder. The notary that performs online notarization should be authorized by the RON statute or regulations to certify the printed document as being a true and complete copy of the electronic original.

If papering out is adopted as part of the RON statute, it should be binding on the county recorders' offices in that state. Thus, a paper version of the original electronic document must be accepted by the county recorder for recordation. In practice, convincing a particular county recorder to adhere to (or adopt policies) in this respect may involve prodding and trial and error until county recorders become comfortable with recording instruments notarized using RON. States that have already adopted legislation which specifically permits papering out as part of the RON framework include: Florida, Idaho, Montana, Minnesota, North Dakota, Ohio, Oklahoma, Tennessee, and Texas.

Below are some tips if you are considering (or want to recommend using) RON as part of a commercial real estate transaction:

- Modify the notary acknowledgment form in your real estate loan and conveyance documents to clearly indicate that remote online notarization was the method by which the signatory "appeared" before the notary. A sample provision has been included at the end of this article. However, you should check the applicable state law to determine if there is language that is prescribed or mandated by that State's RON statute.
- If you are recording documents, check the status of the County Recorder's and capabilities for e-filing, electronic searches of the county recorder records and whether these services are currently available despite any government-mandated shutdowns.
- If you will obtain Title Insurance as part of your transaction, be proactive in communicating with the Title Company and getting the most up-to-date information from the national office of that Title Company. Below is a preliminary list of items to verify with the Title Company:
 - Request a copy of its RON policy and determine if the Title Company will insure your commercial real estate transaction using RON (i.e., determine the limitations on the size and type of the transaction that the Title Company will insure using RON and whether your transaction fits within those limitations).
 - Confirm whether the Title Company requires any particular technology platform to administer RON transactions and verify whether the proposed online platform proposed meets the legislative standards of the state in which the RON transaction will take place (i.e., in the state in which the notary is licensed and will be present when performing the notarial act using RON)

Helpful Resources and Links:

- The MBA and ALTA have several resources and guides related to RON which can be accessed here: <https://www.mba.org/audience/state-legislative-and-regulatory-resource-center/remote-online-notarization> and here: <https://www.alta.org/advocacy/online-notarization.cfm>
- In addition, the Mortgage Industry Standards Maintenance Organization (MISMO) has developed RON standards that support MBA/ALTA model legislation, which multiple U.S. states are now using to enact RON laws in their jurisdictions. These standards can be accessed here: <http://www.mismo.org/standards-and-resources/emortgage-specifications/remote-online-notarization-standards>
- First American Title Insurance Company also has a good resource for e-closings which includes a State-by-State guide and status of RON laws: <https://www.firstam.com/title/eclosing/>
- For a detailed and up-to-date database of the status (and current capabilities) of County Recorder Offices across the country, refer to the following ALTA database: <https://www.alta.org/business-tools/county-status.cfm>
- See below for sample changes to a notary acknowledgment when using RON:

"The State of _____,

County of _____,

Before me _____ (here insert the name and character of the officer) on this day **personally appeared**

OR [RON- appearing by an interactive two-way audio and video communication that meets the online notarization requirements under Subchapter C, Chapter 406, Government Code, and rules adopted under that subchapter] _____, known to me (or proved to me on the oath of _____ or through

_____ (description of identity card or other document)) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

(Seal) Given under my hand and seal of office this _____ day of _____, A.D., _____."

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