

Introduction
by
Representative Mary Schneider
House Bill 1439
House Judiciary Committee
Lawrence Klemin, Chairman
February 10, 2021

Chairman Klemin and Members of the Judiciary Committee:

I'm Mary Schneider, District 21-Central Fargo, here to seek your support for HB 1439, an adjustment of the current requirements for remote notarization. It's a very narrow adjustment, and it likely only applies to Legal Services of North Dakota (LSND) who has been serving only low income, elderly and disabled clients in our state, and doing it reputedly, for decades. The bill would keep the exception limited with very specific and narrow criteria. It applies only to:

1. a non-profit,
2. providing legal services,
3. to low income and elderly
4. residents of this state,
5. who are clients of theirs, and
6. remotely located.

So why do we want to do that? Because Legal Services, or another entity who might in the future fall within the exception, is providing valuable services to this state by helping its most needy citizens who otherwise couldn't get counsel--in areas of critical legal need. And because it's doing it without charge or financial gain, and with limited resources. Because it serves the poor, LSND priorities focus on the critical—basic needs, health, safety, protection from abuse.

The Director of LSND will come after me, and you can ask him, but I don't think real estate transfers are something they do often, or ever. Their most commonly notarized documents are Advance Directives, where clients state what kind of health care and end of life medical care they want. I think we might agree those are important documents for all of us to have and to share with our families and medical providers.

Our current notarial law is based on The Uniform Law Commission's Notarial Acts model, and it's exciting that North Dakota was the first state to adopt the model law originally in 2011, and that your Chairman was largely responsible for that.

In 2019 the remote notarization provisions were adopted, so they are very new. I guess we can expect some feedback as they are tried and tested in these first years. And we should welcome that. This bill is to address an issue the drafters likely didn't consider at the time. Unless they worked with LSND or asked them directly, the drafters likely wouldn't have known changes would cause a hardship. I don't believe anyone asked them, and Legal Services is prohibited from lobbying or contacting a legislator unless specifically requested in writing to do so. So it's no one's fault if the concerns in this bill were not known or addressed, but the model act could use a tweak—for the poor and elderly, and LSND, the nonprofit legal aid program that serves them.

I have provided you a copy of the final Revised Uniform Law on Notarial Acts (2018) with comments, in your LAWS testimony on the bill. It's around 70 pages long so perhaps you haven't read it yet. Relevant to this bill, it says:

- Page 37: "Subsection (c)(3) requires that an audio-visual recording of the performance of the notarial act be created. Being able to witness the sight and sound of the conversation between a notary public and a remotely located individual provides substantial evidence as to the validity of the performance of a notarial act as well as evidence as to compliance with the requirements of this Section. The recording may be created either by the notary public or by a person acting on behalf of the notary public. The period for retention of the recording is specified in subsection (f)."
- Page 39: "Subsection (f): This subsection requires that a notary public; a guardian, conservator, or agent of the notary public; or a personal representative of a deceased notary public must retain the audio-visual recording created under subsection (c)(3). Alternatively, the recording may be retained by a repository on behalf of a person required to retain the recording. The suggested period for retention of the recording is ten years, although this may be varied by the legislature at the time of enactment. Furthermore, the commissioning officer or agency may require a different period by rule pursuant to its powers under subsection (h)(4) and may vary retention period for different types of documents."

I'm guessing many of you are or have been notaries, like I have, and have signed and stamped or sealed a lot of documents without much problem, and in the traditional way: witnessing the signing by a person you know as someone they purport to be, with adequate mental capacity, putting their signature on a document and attesting with your signature, date and seal that you witnessed them signing. Unfortunately, COVID has created additional wrinkles and expanded some old ones for those doing very remote or very rural work requiring a notary, especially during a pandemic that limits personal contact. In some ways, change has been good. We have learned to provide services at remote locations or in clients' homes, instead of our offices. That helps expand access for clients, and is often more convenient for our clients, and for us, too.

It's great North Dakota got remote notarization just in time for the pandemic, too. It's a good law for most. The costs, however, have been especially hard for Legal Services, as they would be for any nonprofits serving low income, elderly and disabled person with limited funding.

You will hear from the Director of Legal Services of North Dakota after me, and he will let you know about his long-established and small (11 attorneys statewide) program that does priority legal cases for very low income, elderly and disabled clients. Their priorities do not, I think, include real estate work, trusts, wills, banking, or the property and financial work of concern to the opponents of this bill. Legal Services clients can't pay, and their cases are mostly ones that don't involve valuable property, because they don't have any. But they do still have documents that need to be notarized.

The problem that resulted in this bill is the cost of the newly required electronic recording and its storage. There are significant costs to the recording equipment and storage of recordings for ten years, or the use of vendors to do it.

The change requested by this bill would allow nonprofits who do work at no cost for the poor, elderly and disabled citizens of the state to forgo the recording and storage requirements when serving their remote clients through video, such as Zoom or Teams.

After conferencing with clients or remotely reviewing documents that have been prepared by the nonprofit, they would view the execution or signing of the documents by the client, much as notaries always have, but then would notarize the documents when received by them. With clients (1) known to them and (2) viewed by them signing, (3) dealing with documents prepared or reviewed by them, there is considerable credibility and legitimacy – what notarization is designed to enhance. Legal Services also has a legal ethics code, a governing board providing oversight, and a Bar Association to take complaints, if any, so there are additional overlays of protection other notaries may not have. I don't think Legal Services has had any issues, or factors in any of the complaints or concerns expressed in opposition to the bill, but you can ask its long-time Director.

Dropping the recording and storage requirements has already been done elsewhere so it's not something unique. Twelve states have now adopted the Uniform Act. One of the states is **South Dakota**, and the relevant South Dakota statute (South Dakota Codified Laws section 18-1-11.1) **does not include the requirement for the audio-visual recording of a remote notarial act.**

Here are the South Dakota requirements:

“A notarial officer in this state, while located in this state, may perform by means of communication technology a notarial act executed on a document by a person who appears before, but is not in the physical presence of the notarial officer if the notarial officer:

- (1) Has personal knowledge of the identity of a person through dealings sufficient to provide reasonable certainty that the person has the identity being claimed;
- (2) Affixes the notarial officer's signature to the original tangible document executed by the person;
- (3) Indicates in the notarial certificate the remote location of the person executing the document;
- (4) Indicates in the notarial certificate that the notarial act involved a statement made or a signature executed by a person not in the physical presence of the notarial officer, but appearing by means of communication technology; and
- (5) Is able reasonably to confirm that the document before the notarial officer is the same document in which the person made the statement or on which the person executed a signature.”

This bill doesn't go as far as South Dakota, by dropping the recording and storage for entities described in opposing testimony—those doing property transactions, other commercial transactions, etc. It does not change any of the notary fundamentals the Secretary of State describes historically that date from 1893 in North Dakota and that he says remain unchanged.

Legal Services notaries will continue to respect the oaths of office they take to uphold the Constitutions of the United States and North Dakota. They will still be able to form opinions about the capacity of the signer, view and confirm that the signer is voluntarily and freely affixing his or her signature to a document before a third party. The only thing they won't have to do is keep an electronic record and store it for 10 years. And until 2019, that wasn't one of the fundamentals.

It's all up to you, of course, but I hope you will consider this accommodation so LSND can use its limited resources to continue to serve the state, by providing needed legal services to poor and elderly North Dakotans who have limited income and assets. Legal Services has been a trusted resource in this state for many decades, and I hope you can continue to trust and respect it enough to make the change necessary.