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## The Harmless Error Rule: Some Background, the Rule Nationwide and in Oregon, and the COVID-19 Pandemic

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### Introduction

There are cases where the decedent's testamentary intent cannot be given proper legal effect due to an error or omission in their will. Obstacles to accomplishing a testator's intent have become our reality lately with the pandemic of the novel Coronavirus beginning in late 2019 ("COVID-19"), as many people are in quarantine, practicing social distancing, possibly sick, or simply uncomfortable entering a business such as a law firm. However, state law may provide legal remedies that enable the testator's intent to go forward, by permitting some flexibility or deviation in the will formalities. The remedies we can rely on in Oregon are the doctrine of substantial compliance and the statutory remedy of the harmless error rule. The harmless error rule is a statutory process aimed to fix an error made in the execution of a will, so that the testator's intent is prioritized over an error in the will's execution that would otherwise result in an automatically invalid will.

This article will address some historical background regarding will formalities and legal remedies aimed to preserve a decedent's testamentary intent when the strict formalities required in will execution fail. Of these legal remedies, the focus of this article is on the harmless error rule, both nationwide and in Oregon, and how COVID-19 has interfered with the creation of valid wills, thereby making the harmless error rule a go-to procedure that is designed to ensure that the testator's intent can survive the pandemic.

### Will Formalities and Strict Compliance

In Oregon and in a majority of jurisdictions, a valid will is created only when a written document is signed by the testator and witnessed by two people present at the same time.<sup>1</sup> These formal execution requirements date back to 1676 England, when the Statute of Frauds was enacted. From the Statute of Frauds' requirements that an asset may be conveyed only by a written document, emerged the Wills Act of 1837, which created a series of formal execution requirements that allowed for the creation of a valid will.<sup>2</sup> The Wills Act more specifically requires that posthumous transfers of property shall be in writing, signed by the testator, or by someone else at the testator's direction, in the presence of two competent witnesses who subscribe their names to the will. There are good reasons behind these rigid requirements for a will's execution. The requirements for executing a valid will emphasize the gravity and finality of the creator's final disposition, help to prevent fraud, coercion, and undue influence, and allow for a more efficient estate administration by

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1 Oregon Revised Statute ("ORS") 112.235 contains the requirements for a valid will.

2 See Statute of Frauds, (1677) 29 Car. II, ch. 3 (Eng. & Wales); Wills Act, (1837) 7 Will. 4 & 1 Vict. ch. 26, § 9 (Eng., Wales & N. Ir.).

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### In This Issue

1 **The Harmless Error Rule:  
Some Background, the Rule Nationwide  
and in Oregon, and the COVID-19  
Pandemic**

7 **Remote Online Notarization**

9 **Oregon Law Commission Notarial  
Work Group and Protections Against  
Elder Abuse**

10 **Events Calendar**

providing standardized clarity. Compliance with all of these formalities is strong evidence of the testator's intent. Due to the importance of these precautions, courts often require strict compliance with these formalities to create a valid will.

Strict compliance requires that a will is executed according to the statutory formalities, and any deviation from those formalities results in an invalid will that cannot be admitted to probate, which often leads to intestacy. Therefore, a slight mistake or unintended circumstance in a will's execution invalidates the will and thereby disregards the intent of the testator due to the requirements of strict compliance.

The unforgiving requirements of strict compliance can be seen in the West Virginia case of *Stevens v. Casdorff*, 203 W. Va. 450, 508 S.E.2d 610 (1998). Homer Miller was elderly and confined to a wheelchair, and two months prior to his death he was taken to his local bank branch to sign his will. Mr. Miller signed his will at the bank in front of a teller, who was also a notary. The notary then brought the will to a separate working area where two other tellers signed as witnesses to the will. The two witnesses did not see Mr. Miller sign his will. Mr. Miller's will left most of his estate to his nephew's family, the Casdorffs. Upon Miller's death, his nieces, the Stevenses, challenged the will as improperly executed. The evidence at the trial level found that everyone in the bank knew why Mr. Miller was there. The lower court also did not find any evidence of fraud, coercion, or undue influence. Motions for summary judgment ensued and the lower court granted the nephew's motion, holding that the will was properly executed and it could be probated. The nieces appealed, arguing the will did not meet the strict statutory execution requirements. The West Virginia Supreme Court of Appeals reversed the trial court, finding that a will is not valid if the testator did not sign it or acknowledge his signature in the presence of two witnesses who are all together, and who sign their names or acknowledge their signatures on the will. The Court acknowledged that the law favored testacy over intestacy, but that it had also held that a valid will must show testamentary intent and be executed in a manner provided by state statute, which required strict compliance. Each statutory element of a valid will's proper execution was not met, resulting in failure of the will and intestacy, even though this result was not what Mr. Miller wanted.

### Substantial Compliance

Separate from the strict compliance requirements, there is the doctrine of substantial compliance. Under the equitable doctrine of substantial compliance, as long as the document reflects the testator's intent, a technical defect in the formal execution of the intended will does not make it invalid. The doctrine of substantial compliance does not completely abandon the formalities required in the Wills

Act, but it proposes that if a document meets some but not all of the statutory requirements, it may be close enough to pass as a valid will. In Oregon and nationwide, substantial compliance has been allowed by the courts to validate a will that is not fully compliant. The doctrine of substantial compliance is non-statutory in most states, and courts have often invoked the doctrine in circumstances where some but not all of the formalities of execution have been met.

In *Walker v. Walker*, the Oregon Court of Appeals clarified that the formalities to create a valid will listed in ORS 112.235 do "not prescribe that only use of the statutory language meets the requirements." 145 Or. App. 144, 929 P.2d 316, 318 (1996) (emphasis added). The testator in *Walker*, Ralph Walker, was partially paralyzed after a stroke, so he could speak only a few words and could no longer write. Mr. Walker's estate planning attorney, Paul Pierson, drafted his will and included language in the will citing that he gave "authority" and "willingly direct Paul Pierson to sign for me." *Id.* at 317. Mr. Walker could not sign the document but did leave his mark. The appellant argued at the probate court level and on appeal that ORS 112.235(2) requires that the signer write on the will that they signed the testator's name at the testator's direction, and due to this missing formality the will was invalid. The signer here was the attorney, not the testator, and yet the will cited how Mr. Walker directed his attorney to sign on his behalf – not the other way around. The lower court found that a statement by the testator directing the signer to sign the testator's name is the equivalent of the signer who signs the testator's name and writes that the signer did so at the direction of the testator. The Oregon Court of Appeals in *Walker* agreed with the probate court's decision to honor the will, referencing how the will formalities are aimed to avoid fraud, yet there was no issue of fraud in this case. Therefore, to

hold the will invalid because of a failure to repeat for a third time that Pierson signed at the direction of the testator would be to observe the letter of the statute as interpreted strictly, and fail to give heed to the statute's obvious purpose. Thus, the statute would be turned against those for whose protection it had been written.

*Id.* at 319 (internal quotation marks and citation omitted).

The court in *Walker* was willing to allow substantial compliance with the will formalities to preserve Mr. Walker's will.

### The Uniform Probate Code's Harmless Error Rule

While substantial compliance proposes that a document which meets some, but not all formal will requirements, is close enough to pass as a valid will, the harmless error rule disregards a will's formal statutory requirements, focusing

instead on whether the testator intended the document at issue to be their will.

In 1990, the Uniform Probate Code (“UPC”) adopted a harmless error provision, reflected in UPC § 2-503, which provides:

Although a document or writing added upon a document was not executed in compliance with Section 2-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute:

1. the decedent’s will,
2. a partial or complete revocation of the will,
3. an addition to or an alteration of the will, or
4. a partial or complete revival of the decedent’s formally revoked will or of a formerly revoked portion of the will.

Section 2-502 addresses the UPC’s requirements for a valid will requiring a writing that is signed by the testator and two witnesses contemporaneously, similar to the Wills Act. Also relevant here is that the UPC does not require the testator’s signature to be at the end of the document, and it permits holographic wills. So Section 2-502’s execution requirements provide more flexibility and are easily complied with by a layperson.

The UPC’s harmless error rule reflected in Section 2-503 permits defects in a will’s formal execution to be overcome “by clear and convincing evidence that the decedent intended the document” to operate as the decedent’s will. Following the UPC’s adoption of the harmless error rule in 1990, a minority of states have adopted UPC § 2-503, or a form thereof.

### Nationwide Adoption of the Harmless Error Rule

Subsequent to the UPC’s codification of the harmless error rule, seven states (Colorado, Hawaii, Michigan, Montana, New Jersey, South Dakota, and Utah) adopted UPC § 2-503 in essentially the same form. A few other states, such as Virginia, Ohio, and California, have adopted a “partial” harmless error rule. Their statutes do not mirror UPC § 2-503 and instead allow for some deviations from the Wills Act, but not others. For example, California’s statute forgives deviations related to the requirements of two competent witnesses, but is not flexible on deviations relating to the testator’s signature. Cal Prob. Code § 6110(c)(2) (West 2008).

Presently, a total of eleven states (including Oregon) have adopted the harmless error rule in some form as follows: California (Cal. Prob. Code § 6110(c)(2)),

Colorado (Colo. Rev. Stat. § 15-11-503 (2010)), Hawaii (Haw. Rev. Stat. § 560:2-503 (1996)), Michigan (Mich. Comp. Laws. § 700.2503 (2000)), Montana (Mont. Code. Ann. § 72-2-523 (1993)), New Jersey (N.J. Stat. Ann. § 3B:3-3 (West 2005)), Ohio (Ohio Rev. Code. Ann. § 2107.24(A) (West 2008)), Oregon (ORS 112.238), South Dakota (S.D. Codified Laws § 29A-2-503 (1995)), Utah (Utah Code Ann. § 75-2-503 (West 1998)), and Virginia (Va. Code. Ann. § 64.2-404 (2012)). The low number of states adopting the harmless error rule is largely attributed to concerns related to the risk of abuse, undue influence, and resulting litigation related to non-compliance with the long-standing protective measures contained in the Wills Act.

States are divided in how they apply their harmless error rule to the question of whether or not the testator signed the document at issue. One of the few states that have been very liberal in applying the harmless error rule is New Jersey. New Jersey has allowed a remedy even when neither the testator nor any witnesses signed the purported will. *In re Estate of Ehrlich*, 427 N.J. Super. 64, 47 A.3d 12 (App. Div. 2012), the testator, Richard Ehrlich, was an estate and trust attorney who apparently never executed a formal will. Following Mr. Ehrlich’s death, a detailed 14-page document entitled “Last Will and Testament” was found in a cabinet drawer of his home. The document was typed on traditional legal paper with Mr. Ehrlich’s name and law office address printed in the margin of each page. The document did not include any signatures whatsoever. However, the document did include, in Mr. Ehrlich’s handwriting, a notation at the right-hand corner of the cover page: “Original mailed to H.W. Van Sciver, 5/20/2000[.]” *Id.*, 47 A.3d at 14.

This document included several specific bequests in the amounts of \$50,000 and \$75,000, it directed who the residue would go to, and it nominated the executor, trustee, and their successors. The court found there was clear and convincing evidence that this document was Mr. Ehrlich’s “final assent” and the unsigned, unwitnessed document was admitted to probate via the harmless error rule. Because the lack of a signature is a challenging execution error to overcome, this case represents a very broad and atypical result. Reminiscent of how the cobbler’s children have no shoes, it is curious how a trust and estates attorney would maintain a document that was titled a will, read like a will, but failed to include the specific (and surely known to him) statutory requirements for a valid will. This is an example of a case allowing a broad reading of the harmless error rule, which could be helpful when a broad reading is needed to promote the testator’s intent.

In contrast to New Jersey’s *Ehrlich* case, Colorado amended its harmless error rule to specifically “apply only if the document is signed or acknowledged by the

decedent as his or her will.” Colo. Rev. Stat. § 15-11-503. An acknowledgment by the decedent, however, could be a verbal acknowledgment versus a written signature, or that acknowledgment could possibly be a secondary document relating to the purported will. When the harmless error rule is used, it must be carefully analyzed in light of the facts and evidence on hand, and of course each case is fact specific.

### Oregon’s Harmless Error Rule

Effective January 1, 2016, Oregon codified the harmless error rule in ORS 112.238, appropriately titled, “Exception to will execution formalities.” First, the statute addresses when the harmless error rule can be used; subsection (1) says:

Although a writing was not executed in compliance with ORS 112.235 (Execution of a will), the writing may be treated as if it had been executed in compliance with ORS 112.235 (Execution of a will) if the proponent of the writing establishes by clear and convincing evidence that the decedent intended the writing to constitute:

- (a) The decedent’s will;
- (b) A partial or complete revocation of the decedent’s will; or
- (c) An addition to or an alteration of the decedent’s will.

Next, the notice and procedural requirements for bringing a purported will to the court are detailed in ORS 112.238(2) and (3). The statute parses out the types of petitions because the filing could be a petition to administer the purported will in order to open a new case or a petition subsequently filed in an existing probate matter to admit a purported will.

Regardless of the type of petition, it must be noticed on all interested persons, which is a precautionary measure to ensure due process and avoid fraud. Notice to all interested persons includes noticing all heirs of the decedent, devisees of the purported will, and anyone else asserting an interest in the estate. *See* ORS 113.035(5), (7), (8), (9). If there is any question about whether someone is an interested person, it is wise to be broad and inclusive in your notice. For example, if there is an existing probate and the will admitted to probate contains different devisees than the devisees in the purported will, all devisees should be included in the notice. A petition filed after a probate estate is open must also notice the personal representative appointed by the court. Regardless of the type of petition, the objection period is 20 days. ORS 112.238(2), (3).

Subsections (2) and (3) of ORS 112.238 also provide that the court may make a ruling on the purported will at

either an evidentiary hearing or on the basis of affidavits. If there are objections, all parties must consent to the Judge making a ruling on the pleadings in lieu of a hearing. The petition may also propose a ruling on the pleadings, if there are no objections within the 20 days, assuming all relevant written evidence is submitted and is strong enough to satisfy the clear and convincing evidentiary standard.

Subsection (4)(a) and (1) of ORS 112.238 provides the evidentiary hurdle that must be overcome to allow a purported will to be probated: the clear and convincing evidentiary standard. The statute clarifies that the court must determine “that clear and convincing evidence exists showing that a writing described in subsection (1) of this section was intended by the decedent to...” be one of the following:

- (a) The decedent’s will;
- (b) A partial or complete revocation of the decedent’s will; or
- (c) An addition or alteration of the decedent’s will.

The statute also provides that the court must issue written findings of fact that support its determination, and a limited judgment must admit the purported will as the decedent’s will or otherwise acknowledge the validity and intent of the writing. ORS 112.238(4)(a). Specific findings in the proposed judgment should be included to both provide clarity in the probate administration and to assist the Judge with the statutorily required findings.

ORS 112.238 applies to decedents dying after January 1, 2016, the statute’s effective date. Although several years old now, ORS 112.238 remains fairly new law, and we have only one published case interpreting our harmless error rule.

### Oregon’s *In Estate of Boysen*

In 2019, Oregon heard its first appellate case on the harmless error rule, *In re Estate of Boysen*, 297 Or. App. 21, 441 P.3d 633 (2019). In this case, Marilyn Boysen created a handwritten document in 2008, in the presence of two family members, and the document listed personal property and real property distributions passing to her grandchildren. Ms. Boysen signed the document, but it was not witnessed. Ms. Boysen gave the document to her grandchild for safekeeping until she died.

In 2016, Ms. Boysen died and her grandchild offered the purported will for probate under ORS 112.238, arguing there was clear and convincing evidence that Ms. Boysen intended the document to be her last will and testament. Everyone agreed that Ms. Boysen’s handwriting and signature were authentic in the purported will. The probate court denied the petition to admit the writing to probate

and ordered the estate to pass by intestate succession. The probate court gave weight to how Ms. Boysen had no opportunity to reflect on what she wrote, she did not access legal or other professional advice, and statements made by Ms. Boysen after the 2008 writing were inconsistent with the terms of the purported will. The probate court focused on facts that occurred after Ms. Boysen created the writing.

The appellate court addressed how, when a compliant will is analyzed, the Oregon Supreme Court has already clarified that it looks to the testator's intent at the time of execution of the will. *See In re Nawrocki's Estate*, 200 Or. 660, 677, 268 P.2d 363, 370 (1954) ("A will speaks as of the time of the testator's death, but the intent of the testator is manifested as of the time when the will is executed."); *see also In re Lutke's Estate*, 145 Or. 299, 301, 27 P.2d 1018, 1019 (1933) ("In construing a will the vital requirement is to ascertain what the testator meant, and his intention must be gathered from the instrument as a whole, read in the light of the circumstances which surrounded him when it was made.").

The *Boysen* court went on to say that nothing existed in the text of ORS 112.238, the statute's legislative history, or ORS chapter 112, that suggests that courts should focus on anything other than the testator's intent at the time of execution in construing a noncompliant will under ORS 112.238. 297 Or. App. at 26, 441 P.3d at 635-36. So the *Boysen* court determined that an evaluating court must look for clear and convincing evidence of whether the decedent intended the specific writing at issue to be her will at the time of its creation. *See Estate of Whitlatch v. Richardson*, 99 Or. App. 548, 553, 783 P.2d 46, 48 (1989) (drawing a distinction between a decedent's intent with respect to the disposition of property and the intent that a specific document be his or her last will).

The *Boysen* court, because the lower court's ruling focused on events outside this central question of the testator's intent at the time of execution of the document, vacated the probate court's ruling and remanded the matter for consideration of the facts under the appropriate standard of the testator's intent at the time of execution. The *Boysen* court clarified that under ORS 112.238, the question was whether there was clear and convincing evidence of the decedent's intent at the time the document was created, and not at the time of death, or before or after the creation of the purported will.

### The Clear and Convincing Evidentiary Standard

The harmless error statutes allow a noncompliant will to be probated if clear and convincing evidence demonstrates that the decedent intended the document at issue to be the decedent's will. The clear and convincing standard means that "the truth of the facts asserted is highly probable."

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*Krueger's Estate v. Ropp*, 282 Or. 473, 478, 579 P.2d 847, 850 (1978).

In *Boysen*, the court dug deeper into the legislative history and relied on Professor Susan Gary's detailed reporting to give it context on the clear and convincing standard in its application of the standard under ORS 112.238. The *Boysen* court said:

The legislative history reveals that, in the context of ORS 112.238, the clear and convincing evidence standard requires more than presenting the document itself or the document and an authenticated signature. Exhibit 2, Senate Committee on Judiciary, S.B. 379, Mar. 18, 2015 (amendments to the Oregon Probate Work Group Report prepared by Susan Gary). Although the document and an authenticated signature are certainly relevant, the standard requires more and may be satisfied with, for example, "evidence of the circumstances of the creation of the document, testimony of people who heard the decedent discussing his [or her] intent to execute a will, testimony of people who saw the decedent

prepare or sign the will, or other documents prepared by the decedent that described the will.”

297 Or. App. at 27, 441 P.3d at 636.

The petitioner must prove by clear and convincing evidence, outside of the will itself, that the decedent intended the writing to actually be their will at the time the writing was created, otherwise the will fails. The hurdle of the clear and convincing standard is tough to overcome, but it is certainly helpful to have a published case in Oregon that provides some useful guidance on meeting this high burden in relation to our harmless error statute.

### **Boysen Factors to Consider to Support the Harmless Error Doctrine**

The court in *Boysen* addressed some of the evidence it relied on to support the clear and convincing evidentiary standard, as discussed below:

**Supporting Declarations/Affirmation the Document is Their Will.** Sworn declarations were submitted in *Boysen* by family members who had firsthand knowledge of the decedent’s testamentary intent, her wishes regarding her estate distributions, and how she specifically referred to and intended the document at issue to be her will. Supporting declarations from eye witnesses and/or the testator her or himself during the COVID-19 crisis will be useful to prove that the testator intended the document to be his or her will. During COVID-19, that declaration can specify the facts and circumstances surrounding the pandemic, why the will formalities are unable to be satisfied by the testator, and how the testator intended the separate writing to be his or her will. These sworn declarations are separate from the will and stand alone. They are aimed to be used in conjunction with the purported will to show the testator’s intent, with additional documents that are consistent with the will and are authenticated.

**Handwriting Authentication.** The testator’s authentic signature on the document should suffice here as evidence of authenticity. In *Boysen*, the purported will was handwritten and signed, and its authenticity was never a problem. If the testator’s signature is missing, that is an uphill battle, and the specific facts of the case as well as the surrounding evidence would be critical.

**Mental Capacity.** Like all wills, the testator must be of sound mind to create a valid will. ORS 112.225. If the testator was clearly mentally capable at the time of signing the purported will, as was the case in *Boysen*, that helps to alleviate the inherent concerns of fraud, coercion and undue influence. The contrary is also true, so being mindful of this factor during execution can be helpful to support your case involving the harmless error rule.

With authentic, reliable evidence that can support the above-mentioned *Boysen* factors, and in light of our ability to use the harmless error rule, there is hope that probate judges will allow electronically witnessed and signed wills to be probated, as long as the evidence is clear and convincing that the testator intended the document to be his or her will.

### **The COVID-19 Pandemic**

As we currently experience the COVID-19 pandemic, a healthy sense of fear and mortality has motivated some clients to more urgently pursue their estate plan. The pandemic has also created some obstacles with executing estate planning documents, particularly wills. With the stay-at-home orders, social distancing, and simple discomfort with person-to-person interaction, a client coming into a law office and the participation of two witnesses may not be possible or is not easily accomplished. In addition, our clients are often the elderly, a demographic that is at the highest risk of serious illness. As a culture, we are only now adjusting to how to properly use and regularly wear a face mask, but that too is not always the solution to the many challenges we currently face in executing wills.

In addition to the formalities of will execution, there are other estate planning documents that require a notary, and we often notarize the witnesses’ signatures on a will so it is self-proving.

On June 30, 2020, the Oregon Legislature passed HB 4212-A, which legalizes Remote Online Notarization (RON) through June 29, 2021. RON allows an Oregon notary public to receive training to enable them to perform notarial acts using qualified audio-video technology for remotely located individuals under certain circumstances and restrictions. A qualified notary may use RON to notarize the witnesses to a will, yet the witnesses must be present with the testator to allow for proper witnessing of the will.

The legislative process is a dynamic, time consuming and challenging process, so emergency legislation is difficult to accomplish. Some states have enacted emergency orders or legislation to flex the strict requirements required to execute a will. For example, on April 7, 2020, New York Governor Andrew Cuomo issued an executive order that authorizes its residents to use “audio-video technology” to complete “the act of witnessing” a will. (Executive Order No. 202.14.) The executive order details conditions that must be met for video witnessing to be valid, such as presenting valid photo identification during the audio-video signing. Assuming all steps are followed in this order, New Yorkers

now have the ability to execute a will without leaving their homes.

In Texas, Governor Greg Abbott suspended certain statutes requiring appearance before a notary to execute a “self-proved will,” among other documents. In a press release issued April 9, 2020, the Office of the Governor explained that as a result of these suspensions, residents are temporarily permitted to appear before a notary “via videoconference” to execute a self-proven will. Again, there are conditions that must be met for video notarization to be valid, but documents executed in accordance with those conditions will be valid thereafter.

Interestingly, neither New York nor Texas has a harmless error statute. While remote attestation of many legal documents is now allowed in Oregon, the execution of wills is not included because we already have existing law, ORS 112.238, designed to address exceptions to will formalities. Without a “Plan B” in place with an adopted harmless error rule to statutorily address exceptions to will formalities, some states likely felt some pressure to immediately act to allow flexibility with the strict compliance requirements of wills due to the COVID-19 crisis. Such emergency legislation was not necessary in Oregon, and instead we can rely on the process detailed within ORS 112.238.

## Conclusion

Here in Oregon as we continue to work through the challenges of this pandemic, thankfully we already have a process in place with our harmless error rule. In addition to invoking the equitable doctrine of substantial compliance here in Oregon, we can also rely on ORS 112.238 to preserve a testator’s intent and probate their will, even when errors in the execution of their will occur, as long as clear and convincing evidence supports that the testator intended the document to be their last will and testament.

## Remote Online Notarization

*By Heather Gilmore, Heather Gilmore P.C., Salem, Oregon, and Jaime Weddle-Jones, Training, Compliance & Operations Officer, Oregon Secretary of State | Corporation Division*

The Oregon Legislature passed HB 4212A, which was signed into law by the Governor on June 30, 2020. While this bill contained many concepts, part of it legalizes remote online notarization (RON) through June 29, 2021.

RON allows a commissioned notary public to perform notarial acts using audio/video technology for remotely located individuals under certain circumstances **using vendors meeting specific requirements**. RON also allows notaries from other states to perform online notarizations for Oregonians.

### What Is Remote Online Notarization?

RON is the ability to perform notarial acts using audio/video technology for remotely located individuals under certain circumstances using vendors meeting specific requirements.

RON is not a process where a person can use Zoom, FaceTime, or some other contemporaneous audio-visual communication to notarize a document. It is a process where a properly authorized Oregon RON notary uses a vendor with an authorized system to provide notarizations. The authorized system must meet specific requirements including two different types of identity proofing as described in OAR 160-100-0800.

### Understanding the Process to Become an Oregon RON Notary

It is important to fully understand the process and ensure that all the requirements are met before starting to notarize remotely.

### Steps to Becoming an Oregon RON Notary

Start with the training.

**Training is required before you can begin.** The Corporation Division provides required RON training<sup>1</sup> and the vendor that you select will provide training on how to use their platform. This training will be very helpful in providing information on how to successfully complete the process in order to notarize remotely.

### Find a Vendor

The notary must select at least one qualifying vendor **prior to** submitting the request form to be authorized as a

<sup>1</sup> State of Oregon, Remote Online Notarization (RON) Education Course (Jun. 30, 2020), <https://www.youtube.com/watch?v=kAFhzjxqUrM&feature=youtu.be> (last accessed Sept. 14, 2020).

remote notary to the Secretary of State. The vendor must meet system requirements set forth in OAR 160-100-0800 and OAR 160-100-0850. Once a vendor is selected, they will be able to provide you with a final version of your electronic stamp and signature. You will need this for the next step.

### How to Know if a Vendor Meets the Secretary of State's Requirements?

Vendor requirements for Oregon remote notarization can be found at [OAR 160-100-0800](#) and [OAR 160-100-0850](#).

Some commonly used vendors are:

Digital Delivery, Inc.  
DocVerify  
eNotaryLog  
LenderClose  
Nexsys Technologies LLC  
Notarize  
NotaryCam, Inc.  
OnlineNotary.us  
Pavaso, Inc.  
Safedocs, Inc.  
SIGNiX  
Synrgo, Inc.

This is not a complete list. A web search may bring up more vendors.

Each online notarization company provides training for their respective systems and on how to perform a RON.

The Mortgage Industry Standards Maintenance Organization (MISMO) provides a list of RON providers that meet Oregon's requirements. Find MISMO RON certified providers<sup>2</sup> or visit [mismo.org](http://mismo.org) for more information.

### Submit the Remote Online Notarization Notice Form

1. Complete the  [Remote Notarization Notice form](#).<sup>3</sup>
2. Email the completed form ("request") and a copy of the electronic stamp and signature that will be used to [program-services.sos@oregon.gov](mailto:program-services.sos@oregon.gov).
3. The request will be reviewed to ensure all requirements are met.

4. An acknowledgment will be sent by the Corporation Division either approving or rejecting the request.
5. Once the request is approved, you may begin remote notarizations through your vendor.

### More Answers to Your Questions:

#### Do I need to have GoToMeeting or Zoom or some such web-based resource?

GoToMeeting and Zoom **do not** meet technology requirements for remote online notarizations. Requirements for Oregon remote notarization can be found at [OAR 160-100-0800](#) and [OAR 160-100-0850](#). Requirements include credential analysis and authentication, along with the recording of the notarization be logically associated with the electronic notary journal.

#### What is the difference between remote notarization and electronic notarization?

Electronic notarization involves documents that are notarized and signed in person in electronic form.

Remote notarization allows for the entire notarization process to be done using specific audio/video technology.

Does the signer have to be in Oregon during an Oregon RON notarization?

The signer does not have to be in Oregon when an Oregon RON notary notarizes. The great thing about performing a notarial act by remote notarization is that while the Oregon notary must be in Oregon, the signer can be at any location.

#### Can I confirm through the Secretary of State's office if a notary can perform RON?

Yes, contact the Secretary of State Corporation Division by telephone, 503-986-2200, or by email, [corporation.division@oregon.gov](mailto:corporation.division@oregon.gov).

#### Do I need to be able to scan or download documents to the correct platform?

You will need to be able to scan and upload and download documents. The remote online notary platform will have training to help you understand their process.

#### How is identity verified?

The signer's identification will be verified by the remote online notary platform. Most commonly, this will require the signer to show identification that meets the requirements under ORS 194.240 and includes knowledge based authentication.

<sup>2</sup> MISMO, Ron Providers, <https://www.mismo.org/standards-and-resources/digital-mortgage-resource-center/ron-providers> (last visited Sept. 14, 2020).

<sup>3</sup> Secretary of State, Corporation Division, Remote Online Notarization Notice (Sept. 2020), <https://sos.oregon.gov/business/Documents/notary-forms/remote-notarization-notice.pdf>.

### How much can an Oregon RON notary charge for remote notarization?

The **maximum fee** for remote notarizations is \$25.

### What are the notary journal requirements?

An electronic journal as well as a paper journal is required for remote notarizations. The electronic journal will include the signature of the individual. It is recommended that you also keep a paper journal. The paper journal must list “remote notarization” in the signature portion of the journal.

### Is a document that was notarized by remote notarization by a notary in another state valid in Oregon?

Yes, remote notarizations performed by a notary in another state that is authorized to perform remote notarizations are valid in Oregon.

### How do I get an apostille for my document that was notarized using remote notarization?

At this time, Oregon is unable to authenticate notarial acts performed by remote notarization. The document will need to be notarized traditionally before it can be authenticated.

### How do I get tips on how to identify elder abuse?

The Secretary of State’s Corporation Division provides an Advanced Notary Webinar that discusses protecting others. You can sign up to attend one of these webinars by going to <https://notsem.sos.state.or.us/>.

The [Notary Guide](#)<sup>4</sup> is also a very good resource and has information regarding financial exploitation of the vulnerable.

<sup>4</sup> Secretary of State, Corporation Division, Oregon Notary Guide, Pub. No. 1500 (June 2020), <https://sos.oregon.gov/business/documents/notary-guide/notary-guide.pdf>.

## Oregon Law Commission Notarial Work Group and Protections Against Elder Abuse

*By Heather Gilmore, Heather Gilmore P.C., Salem, Oregon*

Oregon Law Commission’s Notarial Acts Work Group began in early 2019. The work group was tasked with reviewing, and if appropriate, recommending a version of the uniform remote online notarization (“RON”) act to be adopted in Oregon. The work group was chaired by attorney Mark Comstock. Members of the work group included the Secretary of State’s Office, real estate

attorneys, title company representatives, county clerk representatives, Oregon Bankers’ Association, estate planning attorneys, and elder law attorneys. Also involved in the work group were national expert attorneys who had worked on the national Uniform Laws Commission legislation, and a number of platform representatives such as Quicken Loans and notarize.com.

The work group recognized that RON legislation is an interesting response to the changing manner in which business is being done. At the beginning of the process, there was some concern that the remote online notarization process would increase the potential for elder abuse or exploitation. The members of the work group were particularly sensitive to the concerns expressed about the potential for elder abuse and exploitation.

It is important to recognize what notarization does. A “notarial act” is defined in ORS 194.215(8) as:

- (a) Taking an acknowledgment;
- (b) Administering an oath or affirmation;
- (c) Taking a verification on oath or affirmation;
- (d) Witnessing or attesting a signature;
- (e) Certifying or attesting a copy;
- (f) Making, noting or recording a protest of a negotiable instrument; **or**
- (g) Any other act, whether performed with respect to a tangible or electronic record, that a notarial officer may perform under the law of this state.

Inherent in the act of notarization is the concept that the individual executing the record has capacity to execute the record. However, there is no affirmative obligation for the notary to determine capacity in Oregon. A limited number of other states restrict or prohibit a notary from performing a notarial act if the notary does not believe the individual has capacity. However, Oregon’s statute is permissive and does not contain an outright prohibition preventing the notary from notarizing. Rather, it authorizes the notary to refuse to perform the notarial act.

ORS 194.245(1) provides:

A notarial officer may refuse to perform a notarial act if the officer is not satisfied that:

- (a) The individual executing the record is competent or has the capacity to execute the record;
- (b) The individual’s signature is knowingly and voluntarily made; **or**
- (c) The individual has provided sufficient information or identification credentials

necessary to confirm the identity of the individual.

The work group discussed this at length and decided that the imposition of determining capacity on a notary was unrealistic. If the notary is not satisfied that the person does not have capacity, the notary should refuse to notarize the document. The liability under ORS 124.100(2) should be sufficient incentive for notaries to properly determine whether to notarize a document. However, training, knowledge, expertise, potential discrimination, and the impact of an outright prohibition on commerce led the committee to agree that the statute should not be modified.

Once the work group decided to not modify the statute to create an outright prohibition, the work group turned their attention to safeguards within RON to prevent or reduce elder abuse and exploitation. At this time, the work group had the opportunity to see what vendors do for the audio/visual notary journal, identification standards, and the questions created to verify identity.

The work group learned that the notarization process is entirely captured on audio and video. It makes an excellent record about the signer's participation in the process. The audio/visual journal is available for subpoena like a paper journal. The quality of information provided by the audio/visual journal is likely to far exceed any simple entry in a paper notary journal if the validity of the notarized document is challenged.

The work group also learned how the identification protocol worked. The identification protocol includes several questions that require some knowledge of the signer's personal affairs. For example, the questions generated by a third-party provider include inquiries like: "Which of the following cars have you owned?" Then the list would include some correct and some incorrect vehicles. While it is true that a bad actor may have knowledge of this information and that an incapacitated person may be able to recall the correct answers, it is another level of protection that does not exist with in person notarization.

If a notary determines that there is a problem with the ability of the person to sign documents, it is very easy to refuse the notarization in the online setting. The notary can simply communicate the refusal to notarize and terminate the session. This is much easier and less awkward than the situation where the notary must directly advise the person and any accompanying others in person that the notary will not be providing the service. The online nature of the situation makes it easier for the notary to avoid a potential scene or problem. The online notary also knows that if something is "off," the audio/visual journal will document that something is not right. The paper journals do not have this added factor of a real record of what happened. This

should be extra incentive for the notary to properly refuse to provide notarization services.

Whether the audio/visual journal and the identification protocol are enough to relieve some of the concerns about the potential for RON to allow for elder abuse and exploitation should be considered in contrast to the traditional in-person system where someone can take the elderly person to a UPS store and obtain a notarization from the counter clerk for a very limited fee. In that scenario, there will only be a paper journal and there would be no audio/visual record.

The work group ultimately settled on a version of the RON legislation that it recommended to the Oregon Uniform Laws Commission. The Oregon Laws Commission adopted the committee's recommendation and moved forward on trying to have the legislation adopted by the Oregon legislature. Although the legislation was not originally part of the legislative agenda for 2020, when the coronavirus pandemic hit, the legislation became of much greater interest, which fast tracked its adoption by the Oregon legislature. The legislature eventually adopted the legislation in the form originally recommended by the work group.

## Events Calendar

### Advanced Estate Planning 2020

*Co-sponsored by the Oregon State Bar and the OSB Estate Planning and Administration Section*  
**Friday, November 13, 2020**

### Annual Estate Planning Seminar

*Co-sponsored by the Seattle Estate Planning Council and the University of Washington School of Law*  
**October 29 through November 4, 2020**

The Editors want to include announcements of upcoming events that are open to the public and may be of interest to our readers. If you know of an event, please send basic information, including point of contact information to Chris Cline at [chriscline@riverviewbank.com](mailto:chriscline@riverviewbank.com) for inclusion in the next issue of the Newsletter.