

# Texas Online Notary Law and Technology<sup>1</sup>

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**Introduction.** The Texas Government Code was amended effective July 1, 2018 to allow online notarizations.<sup>3</sup> An online notary is a traditional notary that has applied and received an online notary commission issued by the secretary of state authorizing performance of online notarizations.<sup>4</sup> An online notarization is a notarial act performed by means of two-way audio and video conferencing technology that complies with the rules and standards promulgated by the secretary of state.<sup>5</sup> An online notary may perform all of the notarial acts of a traditional notary and is authorized to take acknowledgements, protest instruments, administer oaths, take depositions and certify copies of documents not recordable in the public records.<sup>6</sup>

**Online Notary Law and Technology.** Texas Government Code Chapter 406, Subchapter C and Texas Administrative Code Chapter 87 contemplate that third party providers of technology (online notarization systems) will be utilized to

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<sup>3</sup> Tex. Gov't Code § 406.101, et seq. Subchapter C, Online Notary Public.

<sup>4</sup> Tex. Gov't Code § 406.101(10) - "Online notary public" means a notary public who has been authorized by the secretary of state to perform online notarizations under this subchapter. 1 TAC § 87.1(9) - "Traditional Notary Public" means an individual commissioned by the secretary of state under Subchapter A, Chapter 406 of the Government Code. A traditional notary public does not have the authority to perform an online notarization unless also commissioned as an online notary public. 1 TAC § 87.1(5) - "Online Notary Public" means an individual commissioned by the secretary of state as an online notary. An online notary has authority: (A) as a traditional notary public; and (B) to perform an online notarization as provided by Subchapter C, Chapter 406 of the Government Code and this chapter.

<sup>5</sup> Tex. Gov't Code § 406.101(9) "Online notarization" means a notarial act performed by means of two-way video and audio conference technology that meets the standards adopted under Section 406.104. Tex. Gov't Code § 406.104 - STANDARDS FOR ONLINE NOTARIZATION. (a) The secretary of state by rule shall develop and maintain standards for online notarization in accordance with this subchapter, including standards for credential analysis and identity proofing. (b) The secretary of state may confer with the Department of Information Resources or other appropriate state agency on matters relating to equipment, security, and technological aspects of the online notarization standards.

<sup>6</sup> Tex. Gov't Code § 406.101 (8) - "Notarial act" means the performance by an online notary public of a function authorized under Section 406.016. Tex. Gov't Code § 406.016 - AUTHORITY. (a) A notary public has the same authority as the county clerk to: (1) take acknowledgments or proofs of written instruments;(2) protest instruments permitted by law to be protested; (3) administer oaths; (4) take depositions; and (5) certify copies of documents not recordable in the public records. (b) A notary public shall sign an instrument in Subsection (a) in the name under which the notary public is commissioned. (c) A notary public may not issue an identification card. (d) A notary public not licensed to practice law in this state may not give legal advice or accept fees for legal advice.

conduct online notarizations and store the electronic records. In fact, Chapter 87 requires a reputable third party to provide identity proofing and credential analysis when the online notary does not know the principal. Apian Systems has developed an online notary software platform called NOTARY.IO. We first discuss the law governing online notarizations in Texas and conclude with a step-by-step example of an online notarization using NOTARY.IO.

**Appearance.** A principal is an individual whose signature is notarized in a traditional or online notarization or who takes an oath or affirmation from a notary public.<sup>7</sup> A principal physically appears before a traditional notary at the time of the notarization in a manner permitting the notary public and the principal to see, hear, communicate and give identification credentials to each other. In an online notarization the principal personally appears in a videoconference that complies with statute and rules.<sup>8</sup> A principal may be located outside of Texas at the time of the online notarization.<sup>9</sup> An online notary public must be physically in Texas at the time of the online notarization.<sup>10</sup>

**Identification.** A traditional notary identifies a principal through personal knowledge; through the introduction and oath of a credible witness who personally knows the principal and either is personally known to the traditional notary public or provides qualifying identification; or by a credential.<sup>11</sup> An online notary identifies a principal through personal knowledge; through introduction and oath of a credible witness who personally knows the principal and either is personally known to the online notary public or provides qualifying identification; or the principal or credible witness is identified using the identity proofing and credential

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<sup>7</sup> 1 TAC § 87.1(7) - Principal means an individual: (A) whose signature is notarized in a traditional or online notarization; or (B) taking an oath or affirmation from a notary public but not in the capacity of a witness for the online notarization.

<sup>8</sup> 1 TAC § 87.1 (6) - Personal appearance or personally appear means: (A) when performing a notarization other than an online notarization, the principal for whom the notarization is being performed physically appeared before the notary public at the time of the notarization in a manner permitting the notary public and the principal to see, hear, communicate and give identification credentials to each other; and (B) for an online notarization, the principal for whom the notarization is being performed appears by an interactive two-way audio and video communication that meets the online notarization requirements as provided by Subchapter C, Chapter 406 of the Government Code and this chapter.

<sup>9</sup> Tex. Gov't Code § 406.110. ONLINE NOTARIZATION PROCEDURES. (a) An online notary public may perform an online notarization authorized under Section 406.107 that meets the requirements of this subchapter and rules adopted under this subchapter regardless of whether the principal is physically located in this state at the time of the online notarization.

<sup>10</sup> 1 TAC § 87.41(b) - An online notary public shall not perform an online notarization if the online notary public is not physically in Texas at the time of the notarization.

<sup>11</sup> 1 TAC § 87.40(b) - The methods by which a traditional notary public identifies a principal are as follows: (1) Traditional notary public personally knows the principal; or (2) Principal is introduced by oath of credible witness who personally knows the principal and either is personally known to the traditional notary public or provides qualifying identification in accordance with paragraph (3) of this subsection; or (3) Identification by a credential. 1 TAC § 87.1(1) - Credential means a valid, unexpired identification card or other document issued by the federal government or any state government, as defined by §311.05 of the Government Code, that contains the photograph and signature of the principal. With respect to a deed or other instrument relating to a residential real estate transaction, credential also includes a current passport issued by a foreign country.

analysis standards in accordance with Texas Administrative Code, Chapter 87, Subchapter H.<sup>12</sup>

**Notarial and Electronic Notarial Certificates.** The traditional notary public shall attach a notarial certificate that names the principal, the date of the notarization, the state and county in which the notarization is performed, and language evidencing the type of notarial act performed. The notarial certificate shall be signed by the notary and include an impression of the notary's seal.<sup>13</sup> The online notary public shall attach an electronic notarial certificate that identifies the principal, the date of the notarization, the state and county in which the notarization was performed, *that the notarial act was an online notarization*, and language evidencing the type of the notarial act performed. The notarial certificate shall be signed by affixing the *online notary's digital certificate* and include an attachment of the *online notary's electronic seal*.<sup>14</sup>

**Online Notary's Digital Certificate and Electronic Seal.** A digital certificate is an electronic file issued to a notary for the purpose of creating an official electronic signature.<sup>15</sup> In the online notary's application to the secretary of state the notary must certify compliance with certain technology standards concerning the notary's electronic seal and digital certificate.<sup>16</sup> The online notary shall not disclose any access information used to affix the notary's digital certificate and seal - except when requested by the secretary of state, law enforcement, the courts, and with

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<sup>12</sup> 1 TAC § 87.41(d) - The methods by which an online notary public identifies a principal are as follows: (1) Online notary public personally knows the principal; or (2) Principal is introduced by oath of credible witness who personally knows the principal and either is personally known to the online notary public or provides qualifying identification in accordance with paragraph (3) of this subsection; or (3) Principal or credible witness is identified using the identity proofing and credential analysis standards in accordance with subchapter H of this chapter. 1 TAC § 87.1(2) - **Credential Analysis** means the process which complies with Subchapter H of this chapter by which the validity of a government-issued identification credential is affirmed by a third party through review of public and proprietary data sources...(4) **Identity Proofing** means the process which complies with Subchapter H of this chapter by which the identity of an individual is affirmed by a third party through review of public and proprietary data sources.

<sup>13</sup> 1 TAC § 87.40(c) - For all notarial acts that require a notarial certificate, the traditional notary public shall attach a notarial certificate that names the principal, the date of the notarization, the state and county in which the notarization is performed, and language evidencing the type of notarial act performed. The notarial certificate shall be signed and include an impression of the notary's seal.

<sup>14</sup> 1 TAC § 87.41(e) - For all notarial acts that require a notarial certificate, the online notary public shall attach an electronic notarial certificate that identifies the principal, the date of the notarization, the state and county in which the notarization was performed, *that the notarial act was an online notarization*, and language evidencing the type of the notarial act performed. The notarial certificate shall be signed by affixing the **online notary public's digital certificate** and include an attachment of the **online notary public's electronic seal**.

<sup>15</sup> 1 TAC § 87.1(3) - Digital Certificate means a computer-based record or electronic file issued to a notary public or applicant for appointment as a notary public for the purpose of creating an official electronic signature. The digital certificate shall be kept in the exclusive control of the notary public.

<sup>16</sup> 1 TAC § 87.4(7) - a statement certifying that the applicant: (A) will comply with the standards set forth in this chapter relating to identity proofing and credential analysis; (B) will use a third party provider who has provided the notary with evidence of its ability to provide an electronic technology standard that **utilizes Public Key Infrastructure (PKI) technology from a PKI service provider that is X.509 compliant when attaching or logically associating the notary's electronic seal and digital certificate to an electronic document**; (C) will, upon request by the secretary of state, promptly provide any necessary instructions or techniques supplied by a vendor that allow the online notary public's digital certificate and seal to be read and authenticated;...

reasonable precautions, electronic document preparation and transmission vendors - and shall attach their digital certificate and seal to the electronic notarial certificate of an electronic document in a manner that is capable of independent verification and renders any subsequent change or modification to the electronic document evident.<sup>17</sup>

**Online Notarization System.** The online audio-video system used to perform online notarial acts has several technical requirements outlined under Subchapter H.<sup>18</sup> Consistency and clarity of the audio-visual feed are required to ensure that proper identification and credential analysis may be performed online. Cyber security, authentication and secure electronic storage are required to ensure that only proper parties have access to the audio-visual communication, a proper electronic record of the notarial act is created and to prevent unauthorized access to the recording of the online notarization and electronic record.

**Identity Proofing and Credential Analysis Standards.** Identity proofing and credential analysis must be performed by a reputable third party who has provided evidence to the online notary public of the ability to satisfy the requirements of Subchapter H.<sup>19</sup> Identity proofing is performed through dynamic knowledge based authentication (“KBA”) that involves a short quiz of no less than five multiple-choice questions about the principal’s personal history or identity and requiring an accuracy score of 80% to pass.<sup>20</sup> Credential analysis is performed utilizing public

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<sup>17</sup> 1 TAC § 87.41(i) -The online notary public shall not disclose any access information used to affix the notary's digital certificate and seal except when requested by the secretary of state, law enforcement, the courts, and with reasonable precautions, electronic document preparation and transmission vendors...

(j) Online notaries public shall attach their digital certificate and seal to the electronic notarial certificate of an electronic document in a manner that is capable of independent verification and renders any subsequent change or modification to the electronic document evident.

<sup>18</sup> 1 TAC § 87.71 – Online Notarization System. An online system used to perform online notarial acts by means of audio-video communication shall: (1) provide for continuous, synchronous audio-visual feeds; (2) provide sufficient video resolution and audio clarity to enable the online notary public and the principal to see and speak to each other simultaneously through live, real time transmission; (3) provide sufficient captured image resolution for credential analysis to be performed in accordance with subchapter H of this chapter. (4) include a means of authentication that reasonably ensures only the proper parties have access to the audio-video communication; (5) provide some manner of ensuring that the electronic record that is presented for online notarization is the same record electronically signed by the principal; (6) be capable of securely creating and storing or transmitting securely to be stored an electronic recording of the audio-video communication, keeping confidential the questions asked as part of any identity proofing quiz, and the means and methods used to generate the credential analysis output; and (7) provide reasonable security measures to prevent unauthorized access to: (A) the live transmission of the audio-video communication; (B) a recording of the audio-video communication; (C) the verification methods and credentials used to verify the identity of the principal; and (D) the electronic documents presented for electronic notarization.

<sup>19</sup> 1 TAC § 87.70(a) - Identity proofing and credential analysis must be performed by a reputable third party who has provided evidence to the online notary public of the ability to satisfy the requirements of this chapter.

<sup>20</sup> 1 TAC § 87.70(b) - Identity proofing is performed through dynamic knowledge based authentication which meets the following requirements: (1) principal must answer a quiz consisting of a minimum of five questions related to the principal’s personal history or identity, formulated from public and proprietary data sources; (2) each question must have a minimum of five possible answer choices; (3) at least 80% of the questions must be answered correctly; (4) all questions must be answered within two minutes; (5) if the principal fails their first

and proprietary data sources and automated software processes to verify the credential presented by the principal and enable the online notary to visually compare for consistency the information and photo presented on the credential itself and the principal as viewed by the online notary public in real time through audio-visual transmission.<sup>21</sup>

**Online Notary Record.** Whereas records of a traditional notary are typically recorded in a book records of an online notarization shall be maintained electronically in computers or other storage devices that are capable of recording the information required by §406.108, Government Code, including a recording of any video and audio conference that is the basis for identifying the principal.<sup>22</sup>

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attempt, they may retake the quiz one time within 24 hours; (6) during the retake, a minimum of 60% of the prior questions must be replaced; and (7) if the principal fails their second attempt, they are not permitted to retry with the same online notary public for 24 hours.

<sup>21</sup> 1 TAC § 87.70(c) - Credential analysis is performed utilizing public and proprietary data sources to verify the credential presented by the principal. 1 TAC § 87.70(d) - Credential analysis shall, at a minimum: (1) use automated software processes to aid the online notary public in verifying the identity of a principal or any credible witness; (2) ensure that the credential passes an authenticity test, consistent with sound commercial practices that: (A) Use appropriate technologies to confirm the integrity of visual, physical or cryptographic security features; (B) Use appropriate technologies to confirm that the credential is not fraudulent or inappropriately modified; (C) Use information held or published by the issuing source or authoritative source(s), as available, to confirm the validity of personal details and credential details; and (D) Provide output of the authenticity test to the notary public. (3) Enable the online notary public to visually compare the following for consistency: the information and photo presented on the credential itself and the principal as viewed by the online notary public in real time through audio-visual transmission.

<sup>22</sup> 1 TAC § 87.51(a) and (b) - Form of Record Book (a) Notary records, other than records of online notarizations, may be maintained either in a book or electronically in a computer or other storage device so long as the records are adequately backed-up and are capable of being printed in a tangible medium when requested. (b) Records of an online notarization shall be maintained electronically in computers or other storage devices that are capable of recording the information required by §406.108, Government Code, including a recording of any video and audio conference that is the basis for identifying the principal...

Tex. Gov't Code § 406.108. ELECTRONIC RECORD OF ONLINE NOTARIZATIONS. (a) An online notary public shall keep a secure electronic record of electronic documents notarized by the online notary public. The electronic record must contain for each online notarization:

- (1) the date and time of the notarization;
  - (2) the type of notarial act;
  - (3) the type, the title, or a description of the electronic document or proceeding;
  - (4) the printed name and address of each principal involved in the transaction or proceeding;
  - (5) evidence of identity of each principal involved in the transaction or proceeding in the form of:
    - (A) a statement that the person is personally known to the online notary public;
    - (B) a notation of the type of identification document provided to the online notary public;
    - (C) a record of the identity verification made under Section 406.110, if applicable; or
    - (D) the following:
      - (i) the printed name and address of each credible witness swearing to or affirming the person's identity; and
      - (ii) for each credible witness not personally known to the online notary public, a description of the type of identification documents provided to the online notary public;
  - (6) a recording of any video and audio conference that is the basis for satisfactory evidence of identity and a notation of the type of identification presented as evidence; and
  - (7) the fee, if any, charged for the notarization.
- (b) The online notary public shall take reasonable steps to:
- (1) ensure the integrity, security, and authenticity of online notarizations;
  - (2) maintain a backup for the electronic record required by Subsection (a); and
  - (3) protect the backup record from unauthorized use.
- (c) The electronic record required by Subsection (a) shall be maintained for at least five years after the date of the transaction or proceeding.

Rule 87.51 provides: “An online notary public may contract with a third party to provide such storage if the third party: (1) has provided reasonable evidence to the online notary public that it is capable of providing such services; and (2) provides complete access to the online notary public of all the notary's records for an agreed period of time, which at minimum, complies with the retention requirements in §87.54 of this title (relating to Records Retention) even if such a contract is terminated. If the contract between the online notary public and the third party is terminated, all records must be transferred to the online notary public”.<sup>23</sup> Online notary must retain the original electronic record and a back-up for five (5) years, store securely and protect from unauthorized use.<sup>24</sup> The records of an online notary shall remain within the exclusive control of the online notary at all times.<sup>25</sup>

**Example of an Online Notarization Using NOTARY.IO.** The following is a step-by-step example of an online notarization performed pursuant to Texas law.<sup>26</sup>

1. The principal follows a link to the Notary.io platform.
2. The principal reviews the electronic document, which is associated with the specific link, to be signed and notarized or uploads their electronic document.

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<sup>23</sup> 1 TAC § 87.51(b) – “...An online notary public may contract with a third party to provide such storage if the third party: (1) has provided reasonable evidence to the online notary public that it is capable of providing such services; and (2) provides complete access to the online notary public of all the notary's records for an agreed period of time, which at minimum, complies with the retention requirements in §87.54 of this title (relating to Records Retention) even if such a contract is terminated. If the contract between the online notary public and the third party is terminated, all records must be transferred to the online notary public.

<sup>24</sup> 1 TAC § 87.54 - Records Retention (a) Records of a notarization other than an online notarization shall be retained, in a safe and secure manner, for the longer of the term of the commission in which the notarization occurred or three years following the date of notarization. (b) Records of an online notarization shall be retained, in a safe and secure manner, **for five years** following the date of the notarization. An online notary public must also maintain a back-up of the electronic records for the same period of time. Both the original records and the back-up shall be protected from unauthorized use.

<sup>25</sup> 1 TAC § 87.51(c) - The records of a notary public shall remain within the exclusive control of the notary public at all times.

<sup>26</sup> Tex. Gov't Code § 406.110. ONLINE NOTARIZATION PROCEDURES. (a) An online notary public may perform an online notarization authorized under Section 406.107 that meets the requirements of this subchapter and rules adopted under this subchapter **regardless of whether the principal is physically located in this state at the time of the online notarization.**

(b) In performing an online notarization, an online notary public shall verify the identity of a person creating an electronic signature at the time that the signature is taken by using two-way video and audio conference technology that meets the requirements of this subchapter and rules adopted under this subchapter. Identity may be verified by:

(1) the online notary public's personal knowledge of the person creating the electronic signature; or

(2) each of the following:

(A) remote presentation by the person creating the electronic signature of a government-issued identification credential, including a passport or driver's license, that contains the signature and a photograph of the person;

(B) credential analysis of the credential described by Paragraph (A); and

(C) identity proofing of the person described by Paragraph (A).

(c) The online notary public shall take reasonable steps to ensure that the two-way video and audio communication used in an online notarization is secure from unauthorized interception.

(d) The electronic notarial certificate for an online notarization must include a notation that the notarization is an online notarization.

3. The principal enters their personal information: name, address, date of birth<sup>†</sup>, and last 4 digits of their social security number<sup>†</sup>.
4. The principal uploads a copy of their driver's license (automated credential analysis commences).
5. Principal verifies their identity with the KBA test<sup>†</sup> (see Identity Proofing details above).
6. The online notary verifies successful completion of automated credential analysis and identity proofing.
7. After testing their connection, audio, and video inputs the principal joins the recorded video session with their online notary.
8. The online notary completes the credential analysis by either comparing the principal with the driver's license photo or makes an affirmative statement that the principal is personally known to the online notary.
9. The online notary verifies the document is in the proper order and adds any appropriate changes to the online notarial certificate.
10. The online notary completes the notarial act and the principal signs the electronic document.
11. The online notary affixes their electronic seal and then signs the online notary certificate with their digital signature. The online notary's digital certificate locks and encodes the document to prevent tampering. Modifications made after this point will be obvious.

<sup>†</sup> In the event that the principal is personally known to the notary this information or step may be skipped.

**Conclusion.** Use of online notarizations will greatly increase the efficiency of transactions and significant convenience and cost savings will be realized. A principal's personal appearance before a traditional notary, with paper and ink stamp certification, will no longer be required and an uninterrupted electronic transaction utilizing an appearance via videoconference and an online notarial certificate may be substituted. Software platforms such as NOTARY.IO will allow one-off online notarizations for individuals by utilizing online notary pools. Further, such online notary platforms may be integrated with electronic transaction workflows wherein employee online notaries (or contractor online notary pools) complete the transactions.