

PRESENTED AT

51st Annual
William W. Gibson, Jr.

Mortgage Lending Institute

September 28-29, 2017
AT&T Conference Center, Austin, TX

Online Notary Legislation Toward the Electronic Mortgage

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ONLINE NOTARY LEGISLATION

TOWARD THE ELECTRONIC MORTGAGE

The Texas Legislature passed HB 1217 in its 2017 regular session. HB 1217 is included as an appendix to this paper. This bill is not the first online notary legislation adopted in the United States. Both Montana and Virginia had adopted legislation prior to 2017. However, the Texas act differs from both the restrictive approach taken in Montana and the wide open approach adopted in Virginia. Importantly, the Texas legislation is the first legislation that was crafted by the title insurance industry and the mortgage industry. Because of this pedigree, it may become the model for similar legislation across the nation.

Defining Terms.

An “online notarial act” is a notarial act performed online where the principal appears before the notary by means of a two-way interactive audio and visual technology. The principal can be located in one geographic location, and the notary may be located in a different geographical location. The principal and notary can see, hear, and communicate with one another by the internet connection. Under HB 1217, this interaction is digitally recorded and becomes part of the notary’s records. Some have used the term “webcam notary” to describe this process. However, the Texas act uses the term “online notary.”

Frequent reference is made in discussions relating to this new notarial process to the terms “remote notary,” or “electronic notary.” However, those terms have been used in other contexts to describe other notarial processes. For instance “remote notary” may be a notary who contracts with a title company or other entity to travel to the location of a principal for the purpose of performing a traditional “face to face” acknowledgement. The term “electronic notary” also refers to a notary that applies an electronic signature and electronic seal to an electronic document that is electronically signed by a principal that physically is present with the notary. Current practice also includes a remote notary that engages in a face to face transaction with the principal at the principal’s location but takes signature and acknowledgement of the principal on an electronic pad.

Thus, for purposes of HB 1217, the term “online” was adopted to describe the function and to clearly distinguish this function from existing remote notary and electronic notary processes.

Electronic notarization has been permitted in Texas since the adoption of the Texas Uniform Electronic Real Property Act, Property Code Chapter 15. Specifically, Property Code Section 15.04 provides:

Sec. 15.004. VALIDITY OF ELECTRONIC DOCUMENTS. (a) If a law requires, as a condition for recording, that a document be an original, be on paper or another tangible medium, or be in writing, the requirement is satisfied by an electronic document that complies with the requirements of this chapter.

(b) If a law requires, as a condition for recording, that a document be signed, the requirement is satisfied by an electronic signature.

(c) A requirement that a document or a signature associated with a document be notarized, acknowledged, verified, witnessed, or made under oath is satisfied if the electronic signature of the person authorized to perform that act, and all other information required to be included, is attached to or logically associated with the document or signature. A physical or electronic image of a stamp, impression, or seal need not accompany an electronic signature.

The provisions of the Texas Uniform Electronic Transactions Act, also specifically authorizes an electronic notary. Tex. Bus. & Com. Code Section 322.011 reads:

“If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.”

Statutory Requirements for Acknowledgements

Current Texas law on acknowledgements and proof of written instruments is found in Civil Practices and Remedies Code Chapter 121 (We use current law to mean the law as it existed prior to enactment of HB 1217 and continues to exist until HB 1217 is takes effect on July 1, 2018). This Chapter sets out who is authorized to take acknowledgements and other proofs; sets out the requirements for the method of taking acknowledgements and proofs, and contains provisions relating to the content of the acknowledgement form itself.

Property Code 12.001(b) requires that an instrument conveying real estate must be signed and acknowledged or sworn to before two credible witnesses or a notary or

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First appeared as part of the conference materials for the
51st Annual William W. Gibson, Jr. Mortgage Lending Institute session
"Electronic Notarization"