

Daily Journal

Remote Online Notarization and Estate Planning: Not a Good Fit

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RON is useful for real estate and business transactions, but not for estate planning, which requires more careful verification of the signer's intent and mental state.



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As a Los Angeles-based estate planning attorney, I am uneasy about California's enactment of the Online Notarization Act, which took effect on Jan. 1, 2024.

The act and its related statutes authorize remote online notarization or RON by California notaries. RON is the process used when the notary and signatory are in different locations and no paper copy of the document is available to sign. RON uses audio-visual communication and electronic devices to verify identity and record signatures.

California's RON system may not be operational until 2030, but the act permits the use of RON by California signers if a notary public is authorized to perform RON in another state.

As the 44th state to enact a RON statute, California is way behind the curve on this issue. However, those of us in estate planning appreciate the delay as we determine the best ways to ensure the safety of our clients' documents.

RON is highly effective in the world of real estate and business transactions. Title companies and lenders love RON, as do their clients. RON expedites closings and cuts costs. It was highly touted as a godsend in many jurisdictions during the Covid-19 pandemic.

Estate planning is different. Speed in signing is not typically desired, although there are exceptions such as upcoming changes in tax law, a client's travel plans, or health issues. Far more important in the estate planning process is whether the documents reflect the signer's intent, and whether the signer has *compos mentis* and is free from undue influence.

The California RON statutes do not apply to wills, codicils, and testamentary trusts, which cannot be treated as "electronic transactions" under Civil Code Section 1633.3(b)(1), part of the Uniform Electronic Transactions Act. Wills and codicils are never notarized in California and, when not hand-written, their signing must instead be witnessed by two disinterested individuals in order for the documents to be effective.

For living trusts, powers of attorney and other estate planning documents, it remains unclear whether the RON statutes apply. The key issue is whether an estate plan is transactional in nature. Civil Code Section 1633.2(o) defines a transaction qualifying for electronic signatures as “an action or set of actions occurring between two or more persons relating to the conduct of business, commercial or governmental affairs.”

Since estate planning is not a business affair (at least not in the traditional sense) and since a living trust can be created by just one person, the establishment of a living trust may not qualify as a transaction that could utilize RON. For that reason, it is conceivable that a living trust executed with the use of RON could be contested, one claim being that trusts created for beneficiaries at the death of the grantor are testamentary trusts.

The Online Notarization Act does not clarify these issues. That alone provides good reason for continuing to use in-person notaries when estate planning documents are executed.

Another concern for estate planners is whether artificial intelligence or AI will eventually replace notaries. AI is currently used to verify a signer’s identity by analyzing biometric data, such as fingerprints, facial features and voice patterns. The easy availability of biometric data has caused many to wonder whether AI will replace the need for human identity verification.

That very issue was addressed at the 2023 National Notary Association conference as seen in a video posted on TikTok. A conference speaker had entered prompts into a form of generative AI called ChatGPT and asked, “Will AI take away jobs from notaries public?”

ChatGPT had an interesting reply. It stated that a human notary in the RON process is “still critical for identity verification” and that AI could not replace a notary’s “discernment” in determining whether the signatory is under duress. The chatbot also affirmed that “AI does not possess the ability to make these nuanced human judgments. AI cannot read people’s minds.”

This response is somewhat reassuring but does not mention the surge of illegal use of AI still under development. For example, AI can mimic voices otherwise used in RON recordings that when used by humans can trigger legal claims (just ask the representatives of George Carlin’s estate).

AI can also spoof other biometric data relied on by notaries in order to generate deepfake photos and false fingerprints. These are referred to as presentation hacks in identity verification systems such as RON.

Appeals for the ethical use of AI have emerged in every field, from a tech-savvy Franciscan friar at the Vatican to the Chief Justice of the U.S. Supreme Court. Despite these appeals, AI systems will continue to be developed by those with a nefarious intent that an in-person notary public does not possess.

A final concern regarding RON relates to the ages of our estate planning clients. In 2020, 10% of the U.S. population was age 65-to-74. That group experienced the largest growth rate since 2010 for the older U.S. population and is expected to continue to grow as these baby boomers age into the 75 and older age groups.

It is true that as boomers age they bring their cell phone and computer skills with them. However, some in the older age groups have never acquired those skills. They may not be adept at the use of technology and often fall within the age range when elder abuse can occur.

In fact, someone exerting undue influence or attempting to coerce a client to sign an estate planning document could be out of sight of a RON camera or in the next room during a signing.

It is those estate planning clients who warrant our greatest consideration. Even ChatGPT thinks so. We owe our clients a level of care they may not be offered using RON.