



# Atrium Health

November 30, 2022

Ann B. Wall  
General Counsel and Rulemaking Coordinator  
N.C. Department of the Secretary of State  
[ANPR@sosnc.gov](mailto:ANPR@sosnc.gov)

**RE: RENA ANPR #1**

Dear Ms. Wall:

Thank you for the opportunity to comment on the proposed rulemaking related to the implementation of the Remote Electronic Notarization Act. On behalf of Atrium Health, please find attached comments to certain questions posed by the Advance Notice of Proposed Rulemaking.

One of the principal concerns of Atrium Health is the ability to provide Remote Electronic Notarization for the benefit of patients who wish to complete an Advanced Directive in accordance with the Federal Patient Self-Determination Act. Many RENPs do not have the individual knowledge or ability to verify the security of electronic platforms used for REN or to maintain the systems. Accordingly, RENPs should be allowed to rely on vendors of electronic platforms and/or their employers to evaluate the security of such systems and to maintain them.

Rules that place an unreasonably high burden on individual RENPs regarding the security and maintenance of the REN and associated records would limit adoption of the RENA and frustrate the primary purposes of the Act.

At Atrium Health we support the Remote Electronic Notarization Act and look forward to rules that allow for ease of adoption and simplified usage in order to promote care of patients.

Please let me know if you have questions or concerns.

Sincerely yours,

*Ken M. Nanney*

Ken M. Nanney,  
Attorney for Atrium Health

**COMMENTS TO THE N.C. DEPARTMENT OF THE SECRETARY OF STATE REGARDING PROPOSED RULES  
FOR THE REMOTE ELECTRONIC NOTARIZATION ACT**

**RE: RENA ANPR #1**

**Question D.1 Should the Agency provide that platform vendors must contact exclusively with RENPs commissioned by the Secretary?**

**Response:** No. Many RENPs provide services to the public on behalf of an employer, such as Notary Publics employed by a Medicare participating hospital which is charged with compliance with the Federal Patient Self-Determination Act (42 USC 1395cc(f)), that provides in part, for hospitals to assist patients in formulating Advanced Directives. Many RENPs in this capacity do not have the ability to negotiate directly with vendors that provide such platforms. Moreover, many RENPs do not have the technical knowledge to determine what is an appropriately secure electronic platform. Therefore it would be an unfair burden to require the RENP to personally contract with a vendor when they likely do not possess the appropriate technical knowledge. A RENP should be able to rely on satisfactory assurances from the vendor or their employer that the platform complies with generally accepted security standards either promulgated by the N.C. Department of the Secretary of State or with comparable industry standards.

**Question D.2 If the rules were to permit a platform vendor to contract with parties other than RENPs commissioned by the Secretary, how should the rules ensure that the vendor communicates appropriately with the RENP?**

**Response:** The rules should provide that the platform vendor can provide an annual statement, certification or other representation that it complies with generally accepted security standards. The statement, certification or representation should be available for review by the RENP. In addition, the rules should provide that the platform vendor should notify a RENP when the platform vendor has credible evidence that the security or stability of the platform has been compromised.

**Question D.4 Should the rules provide guidance to the RENP about how to exercise discretion and decide whether to provide the electronic journal to the employer upon termination?**

**Response:** Yes. The rules should indicate that the RENP has the obligation to reasonably provide for the maintenance of the electronic journal upon termination of employment. In the absence of the RENP's ability to adequately maintain the electronic journal upon termination of employment, then the RENP should have the discretion to provide responsibility for maintenance of the electronic journal to their employer, provided that the employer represents that the employer can adequately maintain the electronic journal. In the event that the RENP nor the RENP's employer adequately represents that they can maintain the electronic journal, then the rules should provide that the RENP can provide responsibility for maintenance of the electronic journal to the N.C. Department of the Secretary of State.

**Question D.9: Under what circumstances should the rules permit the RENP to surrender or destroy the electronic journal or CT Recording, other than in response to a court order?**

**Response:** The rules should permit the RENP to surrender the electronic journal or CT Recording in response to an order from the N.C. Department of the Secretary of State. In addition, the rules should permit the RENP to surrender the electronic journal or CT Recording to the N.C. Department of the Secretary of State in the event the RENP or the RENP's employer cannot adequately maintain the electronic journal and/or CT Recording.

**Question D.12 Should the rules include the controls that should be in place to assure the security and proper use of such materials?**

**Response:** Any rules regarding assurance of the security and proper uses of such materials should provide for the RENP to rely on statements, certifications or representations from the platform vendor and/or the RENPs employer. In addition, it is impossible for an individual or a corporation to guarantee the security of an electronic platform which is connected to the internet from being hacked by a Nation-State intent on breaching the security associated with the platform. The ability to withstand such an attack is limited to certain Federal Government agencies. Accordingly the rule should not punish a RENP, their employer or a vendor in the event the platform is hacked so long as the security of the platform is consistent with generally accepted security standards. In short, the security of the platform should be based on a reasonable standard of care applicable to the industry instead of an absolute assurance of security.

**Question D.14: Should the rules address with specificity the requirement of maintaining the confidentiality of the REN transaction?**

**Response:** Any rules which address the confidentiality of the REN transaction should allow for the principal to waive the confidentiality requirements. The principal should not be coerced into waiving their confidentiality rights, or have waiver serve as a prerequisite to an RENP performing the REN. Moreover, it should not be considered a breach of the confidentiality of the REN when minor or immaterial aspects of the REN are inadvertently overheard or shared with a non-party to the REN such as a healthcare provider who is caring for a patient engaged in a REN transaction or a member of the public who happens to hear immaterial aspects of the REN.

**Question E.8.a: Is there an industry standard definition or other definition of "unauthorized interception" the Agency should consider adopting?**

**Response:** "unauthorized interception" means the interception of material aspects of the REN that may be used to identify parties to the REN and the subject matter of the REN for malicious purposes. It shall not be considered unauthorized interception for a party to the REN or an agent or person assisting a party to the REN to have access to material aspects of the REN. It shall not be considered unauthorized access when a party to the REN has granted access to another party. It shall not be considered unauthorized access when minor or immaterial aspects of the REN are inadvertently overheard or shared with a non-party to the REN, such as a health care provider who is caring for a patient engaged in a REN transaction or member of the public who happens to hear an immaterial aspect of the REN.

**Question E.9.a Should the rules require the RENP to periodically confirm that the electronic journal and CT Recordings are fully accessible and properly secure?**

**Response:** Yes. The rules should require that the RENP should receive annual statements, certifications or representations from the platform vendor and/or their employer that the platform is consistent with generally accepted accessibility and security standards and if the vendor or employer is aware of any security breaches since the most recent representation.

**Question E.15: Are there circumstances in which the remotely located principal may waive the RENP's statutory duty of ensuring the confidentiality of the REN? If Yes, what is the legal basis for allowing such a waiver?**

**Response:** Yes. A principal should be able to waive confidentiality of the REN because the confidential nature of the transaction is designed to protect the rights and autonomy of the principal. Accordingly, the principal should have the ability to assert their autonomy and waive their rights in this regard, based on the values to which the principal subscribes. To require confidentiality when that is not desired by the principal would frustrate the ability of the principal to exercise their autonomy and share information about the REN as they deem appropriate. The principal should not be coerced into waiving their confidentiality rights, or have waiver serve as a prerequisite to an RENP performing the REN.