

ANPR@sosnc.gov ANPR@sosnc.gov - [Caution: External Mail] RENA ANPR #2

From: Bill Anderson <banderson@nationalnotary.org>
To: North Carolina Secretary of State <anpr@sosnc.gov>
Date: 3/31/2023 7:16 PM
Subject: [Caution: External Mail] RENA ANPR #2
Cc: Brooke Merritt <bmerritt@nationalnotary.org>
Attachments: NNA Response North Carolina RENA ANPR2.pdf

Ms. Wall,

Attached please find the National Notary Associations answers to a couple of questions you pose in ANPR #2. Please let me know if I can clarify our answers further or if I can be of assistance to you related to this matter in any other way.

Regards,

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March 31, 2023

Ann B. Wall
General Counsel and Rulemaking Coordinator
N.C. Department of the Secretary of State

RE: RENA ANPR #2 – SENT VIA EMAIL TO ANPR@SOSNC.GOV

Question A.2

The answer to your question is yes, the term “custodial services” should be defined. We have been in industry conversations in which parties have expressed the opinion that the notarial records of a remote electronic notarial act are business records of a platform, a lender, or a title company. It is the NNA’s view that notarial records belong exclusively to the Notary Public or RENP who created them and the Notary and RENP are the gatekeepers of these records. To us, “custodial services” should not allow repositories to provide copies of the notarial records to parties asking for them or even to the Secretary of State. That is the Notary Public’s and RENP’s responsibility, even if a repository provides custodial services to the Notary or RENP. G.S. 10B-134.17(a)(1) is clear that the RENP retains control of the journal and recordings even when a repository is used.

The introduction of a “steward” in GS 10B-134.17(a)(1) begs the question whether the steward is subject to the same control of the notarial records by a RENP as a repository. Should you write a rule that invests control over notarial records in the steward, everyone should be very clear what this control entails. That said, the NNA would prefer RENPs to retain control over their notarial records even if they utilize a steward and that the steward only be granted authority to control the records in the event the RENP’s commission is terminated or the RENP is adjudged mentally incompetent, comes up missing or cannot be located, dies, or in other extraordinary exigencies like these that may arise where the RENP is unable to act. Incidentally, any rules related to the provision of custodial services should clarify these matters for the RENPs who utilize a repository. For example, the RENP might be required to provide final disposition of the RENP’s notarial records stored in a repository upon termination of the RENP’s commission, and the RENP’s personal representative or successor in interest might be required to do the same in case of the RENP’s adjudication of incompetency or death.

Question C.1.a

There are several states that have defined “real time” in their statutes or administrative rules. Most are iterations of the same thought. I prefer the Nevada and Ohio formulations, which are largely based on the Model Electronic Notarization Act of 2017. The elaborations on buffering and the like do not add material clarifications that “uninterrupted, simultaneous communication” does not already provide.

1. Alaska (6 Ak. Admin. Code 88.990(8))

“‘real time’ means the actual span of uninterrupted, simultaneous communication using audio-video feeds during which all parts of an online notarial act occur excluding issues or buffering that does not materially affect the substantive communication between the notary public and the individual”.

2. Colorado (CRS)

“‘Real-time’ or ‘in real time’ means, with respect to an interaction between individuals by means of audio-video communication, that the individuals can see and hear each other substantially simultaneously and without interruption or disconnection. Delays of a few seconds that are inherent in the method of communication do not prevent the interaction from being considered to have

occurred in real time.”

3. Indiana (75 Ind. Admin. Code 7-1-5)

“Real time” means the actual span of uninterrupted, simultaneous communication during which all parts of an online notarial act using audio visual communication occur excluding issues or buffering that does not materially affect the substantive communication between the notary public and the signer.

4. Nevada (Nev. Admin. Code 240.722.3) and Ohio (Ohio Admin. Code 111: 6-1(V))

“‘Real time’ means the actual span of uninterrupted, simultaneous communication during which all parts of an electronic notarial act using audio-video communication occur.”

“‘Real time’ means the actual span of uninterrupted, simultaneous communication during which all parts of an online notarial act using audio-video communication occur.”

Question C.1.b

Our answer will address the part of your question which asks should the determination that there is an unacceptable time lag rest upon the subjective judgment of the RENP? The answer is yes, because ultimately it is the RENP who is performing the notarial act and making certifications of the facts of the remote electronic notarial act in a certificate of notarial act. The RENP has unlimited financial liability for the RENP’s actions and is accountable to oversight by your office. An audiovisual communication session could satisfy the letter of any objective standard adopted in a rule (for example, see the last sentence of the Colorado provision cited above), but the RENP still might not understand the audiovisual communication. Or two RENPs could be presented with the same audiovisual communication and one could be comfortable proceeding while the other may not. We fear that any objective standard that is adopted in a rule could be used against the RENP for the RENP’s reasonable refusal to perform a remote electronic notarial act.

In answer to the follow-up question you pose, the RENP would determine a time lag to be unacceptable if it prevented the RENP from making the determinations required of a RENP in a remote electronic notarial act. These determinations include the verification of identity of the RLP to the RENP’s satisfaction. In addition, an unacceptable time lag would prevent the RENP from making observations related to the RLP’s competency, ability to understand the nature and consequences of the transaction, and acting voluntarily, under duress, or undue influence. (See the first full paragraph of ANPR 2, page 12 where you essentially state the same in positive terms.) An unacceptable time lag would also prevent the RLP from complying with any instructions the RENP makes during the remote electronic notarial act (for example, the response to an oath or affirmation administered by the RENP).

In conclusion, the danger here is to overthink what should be a matter of common sense. Should a time lag prevent the RENP and RLP from communicating with each other, the RENP should make the call to halt the remote electronic notarization.

Sincerely,



Bill Anderson

Vice President, Government Affairs