



November 15, 2022

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

RE: RENA ANPR #1 – SENT VIA EMAIL TO ANPR@SOSNC.GOV

Question A.1.

Given the fact that the RENA was placed in the Electronic Notary Act and given that the RENA allows remote notarial acts to be performed only on electronic records, we believe the best approach would be to regard RENPs as Electronic Notaries. Having three types of Notaries Public would confuse Notaries and the Public and add multiple layers of requirements – and costs – on those Notaries and their businesses.

Question B.1

The absence of a definition of United States in the RENA would likely mean that you would have to look at other authoritative sources for determining the extent of scope or application of remote electronic notarial acts. One such federal source for a definition is in 17 CFR § 230.902(l): “United States’ means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.” Various dictionaries take this broader approach, but others take a narrower approach in line with the strict interpretation of the RENA offered in ANPR#1. In state Notary Public laws, many states have adopted the definition of “United States” from the Revised Uniform Law on Notarial Acts (RULONA) (consistent with the CFR definition noted above).

Given the strict interpretation proposed in the ANPR #1, not even the District of Columbia would be considered part of the United States.

We encourage the Secretary of State to define the term in its rules by adopting the RULONA 2021’s definition (see Section 14A(a)(4) or the Model Notary Act of 2022’s definition (see Section 4-2(c)).

Question C.2

Nearly every state allows the use of credible witnesses, although the requirements differ from state to state. Credible witnesses have been instrumental in identifying principals for notarial acts on traditional paper documents, particularly for those principals who are elderly and lack documentary identification. This assumes, however, that a credible witness may present documentary identification to identify themselves to the Notary, which under North Carolina law is not permitted.

If the Secretary has authority to adopt a rule that a credible witness who meets the same identity verification requirements as a remotely located individual can be used, this would be of value as another means of identity verification. If not, then the existing credible witness requirements in Chapter 10B would not be nearly as valuable.

There is a view that regards credible witnesses as “relics whose sworn testimony was necessary as a means of identity verification before identification credentials became the predominant means for proving identity to a notary” (Model Notary Act of 2022, Comment, at 59) and “the use of a credible witness shifts the responsibility for a vital feature of a proper notarization away from the impartial governmental official (the notary) to a lay witness with no legal responsibility for the notarization” (Professor Closen’s Notary Best Notary Practices, Nat’l Notary Assoc. (2018) at 139).

Question C.3

The main policy argument in favor of the use of credible witnesses to establish the identity of a remotely located principal was stated in my answer to Question C.2, namely, to make notarial services accessible to individuals without documentary forms of identification. However, given the way credible witness is defined in G.S. 10B-3(5), this policy reason is negated unless the Notary personally knows the credible witness. It is not likely in any type of notarial act – traditional paper, in-person electronic, or remote electronic – that credible witnesses would be used because it is very difficult to find a credible witness who personally knows both the Notary and principal.

Question D.1

Yes. It is the RENP who has the authority to perform remote electronic notarial acts, not the employer. It is the RENP who has duties to the State of North Carolina with respect to remote electronic notarial acts, not the employer. It's not clear if the North Carolina Department of the Secretary of State would have jurisdiction and oversight over employers who select a remote notarization platform for Notary-employees.

Question D.5

No. Since the communication technology recording and electronic journal are defined separately in GS 10B-134.1, the RENA does not directly conflate the two as in some remote notarization statutes (see, e.g., Tex. Gov't Code 406.108(a)(6); Tenn. Code Ann. 8-16-308(a)(6) – but note that GS 10B-134.15(d) *indirectly* conflates them by titling the section "Electronic journal of remote electronic notarial acts"), and the RENA only addresses disposition of the electronic journal and not the communication technology recording in GS 10B-134.15(c), the RENP does not have the authority to provide the communication technology recording to an employer upon termination.

Question D.6

Yes. While the General Assembly did not provide for the surrendering of a RENP's communication technology recordings as it did for electronic journals in GS 10B-134.15(c), the General Assembly authorized the Secretary of State to adopt rules relating to the surrendering and destruction of both electronic journals communication technology recordings in GS 10B-124.15(d).

Question D.7

I would urge the Secretary of State to adopt a rule on a RENP's surrendering of communication technology recordings that parallels GS 10B-134.15(c) related to the surrendering of a RENPs electronic journal. Having parallel provisions for both the electronic journal and communication technology recordings will help ensure the RENP will comply with the requirement. Further, if the Secretary does not adopt a parallel rule, employers likely will require a RENP to surrender the communication technology recordings anyway.

Question D.8

It appears that GS 10B-134.17(a)(2) already implies transmission of the communication technology recordings between the participants involved in a remote electronic notarial act will occur. For example, the broader term "participant" and not "principal" is used. One could argue a mortgage lender is a "participant" in a remote electronic notarial act if a security instrument is the subject of the remote electronic notarial act.

The Secretary should consider defining the term “participant” in this section. How that term is defined will determine the extent of applicability of surrendering communication technology recordings under this question as well as under Question D.10.b.

Question D.10

Although not technically “surrendering” the journal or communication technology recording, the rules should permit any member of the public to present a request for a copy of an electronic journal entry or communication technology recording. I suggest that such a rule could follow the Model Notary Act of 2022 Section 6-6(a) (note that under the MNA 2022 a “notarial record” includes a journal and audiovisual recordings of remote notarial acts – Section 2-16).

Question D.11

Consistent with my answer to Question D.10 above, I recommend that any provision of a copy of an electronic journal entry or communication technology recording be time limited and defined by the details of the specific written request presented to the Notary.

Question D.12

Is this even possible? Once a RENP provides an electronic journal entry or communication technology recording to an authorized party, it is impossible to control how the record will be used. The Secretary can only regulate the RENP’s provision of these notarial records.

Question F.1.a

Yes. At the beginning of the communication technology recording the remotely located principal should be asked to state their name for the record. The RENP should ask the remotely located principal to state on the recording that they are signing the electronic record as their free act and deed as well. These two matters are compelling enough to require their inclusion on the recording.

Question. F.1.b

Yes. While the means for verifying the identity of the remotely located principal – by identity proofing, credential analysis, and remote presentation of a government issued ID – takes place off camera (10B-134.19(e)(2), (4)c), the RENP should state on the communication technology recording that the remotely located principal’s identity was verified and by which means. Since verification of identity is arguably one of the most important responsibilities in performing any notarial act, there is a compelling reason for including a statement on the recording that this duty has been accomplished. If there are transaction identification numbers for the identity proofing, credential analysis or other technological means for verifying the identity, those transaction numbers should be recorded in the electronic journal.

Question F.1.c

Yes, the signing of the record and swearing or affirming by the remotely located principal should be included on the communication technology recording because they are foundational to the performance of the notarial act in which they are required. The document that is signed, however, should not be shown on the video for privacy reasons. In this case, the RENP can do a “play by play” analysis of this for the recording, such as by saying in effect, “Please sign the electronic record with your electronic signature now.” And after the signing is complete, the RENP can say, “I confirm that you have

signed the electronic record with your electronic signature.”

Question F.1.d

As indicated in the ANPR document itself, the statute does not identify a bright line to indicate when a remote electronic notarization begins and ends. All the interactions that take place during that time should be recorded, even many of the steps the statute says must be completed prior to the performance of the notarial act. As indicated in the ANPR document itself, the Secretary of State has authority to adopt rules that would include some or all of the eight steps in GS 10B-134.15(b), 10B-134.13 in the remote electronic notarial act. I will outline which should be included in the communication technology recording below.

Question F.2.a

Steps 4, 5, 6, and 8 should be memorialized because they all are essential elements for the performance of the notarial act. Arguably, these 4 steps should be memorialized on the communication technology recording, but if the statute precludes them from being on the communication technology recording itself, then they should at least be memorialized in the electronic journal. Steps 2 and 3 can be posed to the remotely located principal prior to being admitted to the RENP for the performance of the remote electronic notarial act.

Question F.2.c

Yes, that is a reasonable assumption. The Secretary of State might even create a rule which in effect says, “By performing a remote notarial act, the remote electronic notary public certifies having complied with the requirements of [statutes naming the eight steps].” (See RULONA Section 15(d) for a comparison of a comparable provision.)

Question H.2

Yes, the Secretary of State should put limits on the information to be added to the electronic journal by anyone other than the RENP. In every other state, the electronic journal is the *RENP’s* electronic journal. It is a record of a remote electronic notarial act, not a business transaction between transacting parties. North Carolina’s provision here is an outlier.

Any rules that address this matter should limit information required to be added by another party to information that directly pertains to the performance of the remote electronic notarial act itself.

Question H.4.

Yes, a condition of having information put in the electronic journal should be that the “party” requiring it be named in the electronic journal. If not the signing principals themselves, the entry should include the name and contact information of the party requiring the information.

Question I.3

It is my view that the mandatory surrender rules should apply if the RENP resigns only the registration as an RENP or Electronic Notary because the surrender rules apply narrowly to RENP and not Notaries Public.

Question I.4

There is a case to be made for a definite time to be set for a RENP who resigns but a “reasonable”

time for the eventualities of the RENA's death or adjudication of incompetency. This is because personal representatives and guardians will be involved, and the difficulties associated with these specific triggering events will likely make timely reporting within a definite time period challenging. Chapter 10B uses 45 days in numerous places for similar notifications (see 10B-55(a), for example).

If the RENP must use a particular form for reporting a resignation, the Secretary of State could require the RENP to name the repository where the records are located in the notification of resignation. Thus, the notification period could be instantaneous (upon submission of a proper resignation).

Question I.5

Surrender should occur whenever the Secretary of State revokes the registration of the RENP since the specific records requirements are duties only of a RENP.

Question I.7

Yes, the rules should. Incidentally, the grace period in 10B-55(b) involves the Notary's seal, not notarial records. But such a grace period is reasonable. Without it, there will be more work required of both the RENP and the Secretary of State to keep track of notarial records every commission term.

Question I.7.a

GS 10B-134.14(b)(5) could be construed to authorize the Secretary of State to designate that the electronic journal be "surrendered" to the RENP in the case of expiration of the RENP's Notary commission if the RENP is recommissioned within a certain amount of time.

Question I.7.b.

The grace period should be the same as in GS 10B-55(b) – three months.

Question I.12

If the RENP has utilized a steward, surrender should be deemed to have occurred. A "steward" denotes or at least implies authority to act. By contrast, a "repository" only "stores" records and has no authority to act on behalf of the RENP since the RENP retains control over the records (GS 10B-17(a)(1)). We recommend that the Secretary of State define and state the extent of the authority of a "steward" in the rules.

Question I.13.a

Yes. The rules should specify that the RENP submit a notice in writing or electronically to the Secretary of State naming the steward and confirming that all authority over the disposition of the electronic journal and communication technology recordings rest in the steward.

Question I.14

They should be surrendered temporarily to the Secretary of State. The reason is because if a triggering event has occurred, the RENP would no longer be a Notary who is accountable under Chapter 10B to name a steward. Further, it doesn't seem reasonable to allow a private person (the former RENP or the RENP's personal representative or guardian) to handle the disposition of notarial records.

Question I.14.a

The Secretary of State should name a steward for the electronic journal and communication

technology recordings once the Secretary has received notification of the triggering event.

Question I.14.b

If the Secretary temporarily retains authority of the notarial records of a RENP after a triggering event, then the Secretary can internally document the disposition of the records to a steward of the Secretary's choice so that the public can obtain access to the records later.

Question I.16

The National Notary Association's Model Notary Act of 2022 Model Rules (see pages 191ff) provide requirements for repositories of notarial records under our Act. They may be applicable to stewards. We recommend also that you consider the Colorado Secretary of State's Provider Protocols, available at https://www.coloradosos.gov/pubs/rule_making/files/2020/20201201ProviderProtocols.pdf.

Sincerely,

A handwritten signature in blue ink that reads "Bill Anderson".

Bill Anderson

Vice President, Government Affairs