

Ann Elmore - [Caution: External Mail] FW: RON ANPR #1; NCBA RPS Council Response

From: Lindsay Parris Thompson <lthompson@vwlawfirm.com>
To: Ann Wall <awall@sosnc.gov>
Date: 11/29/2022 12:25 PM
Subject: [Caution: External Mail] FW: RON ANPR #1; NCBA RPS Council Response
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Attachments: RON Committee Real Property Section Council Response to ANPR 1 (003) 4883-8514-4640 v.1.docx

Ann, please find attached the Real Property Section's response to RON ANPR1. This response was prepared by the RON committee led by Jason Peltz with input from Nancy Ferguson, both of whom have been heavily involved and spent a great deal of time working on the RON initiative the last few years. We thank them for their hard work and we greatly appreciate the Secretary's solicitation of input from our section on this important issue. Please let me know if I need to submit these another way or if this is sufficient to get it to the right place.

Best Regards,

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RON Committee of NCBA Real Property Section Council Response to ANPR1

RENA ANPR #1

November, 2022

Question A.1: It is advisable to have two types of commissioned North Carolina Notaries:

- (a) Notaries Public; and
- (b) eNotaries, all of whom are trained and commissioned as RENPs.

This avoids confusion for notaries and the public. Not all electronic notarizations will be remote. To distinguish the notary type between wet-ink notarizations and electronic notarizations sets a clear line of delineations, allowing the eNotary to conduct in-person electronic notarizations and remote electronic notarizations.

Question B.1: There is no legal basis to conclude that U.S. Territories are “inside the United States.” There is no legal basis under which an RENA could perform an REN for a principal located in a U.S. territory.

While some federal regulations include territories and possessions in the definition of United States (*see* 17 CFR § 230.902(l)), RENA does not have an expanded definition. The U.S. Board on Geographic Names (BGN) defines United States as the 50 states and the District of Columbia. <https://www.usgs.gov/faqs/what-constitutes-united-states-what-are-official-definitions>.

Additionally, the Act does not speak to how the NC RENA can reliably and independently verify (other than relying on the principal’s word) that the principal is “physically on the military installation or vessel named in the military orders assigning the member to active duty for more than 120 days, provided the remotely located principal is a member, spouse of a member, or dependent of a member of the Armed Forces of the United States.” More information is needed on how the RENA is to make this determination.

Question D.1: Yes.

Question D.2: If rules permit a platform vendor to contract with an employer of the RENA, the vendor and employer must have an updated list of all RENPs employed by employer and must require that the platform vendor communicate directly with the employee RENA. It is preferred that the vendor contract directly with the RENA but allow a separate payor (i.e., employee’s law firm). This will assist in allowing the RENA to satisfy the requirements that the RENA control the CT Recording as required by 134.15(d).

Question D.3: See above.

Question D.4: The rules do not need to provide guidance to the RENA with respect to sharing the journal with the RENA’s employer. Any electronic notarial act taken within the scope of employment could give the employer rights to maintain a copy of the journal upon termination of employment. By providing insight or requirements relative to the sharing of the journal with the employer, the Agency could inadvertently infringe upon employment law concerns or run afoul of individual employer’s policies, as well as requirements promulgated by the employer’s liability insurer.

Question D.5-7: RENA does not authorize the RENA to provide the CT Recording upon termination of employment. Only the journal is referenced in RENA.

Question D.8: See answer to Question D.9, below.

Question D.9-13: 10B-134.9(f) requires all information gained from a remotely located principal to be treated as confidential. 10B-134.15(d) prohibits surrender of the CT Recording other than by court order. Any rules that allow a derivation from these requirements must be limited to general rules of confidentiality and privilege. For example, in a law firm setting, an employer has the right to supervise and review an employee attorney’s work product without jeopardizing client confidentiality. While the attorney/client privilege is broken if others are present, a lender involved in a REN transaction has an interest in and is a party to the transaction. Such lender therefore has a right to the CT Recording. An open question remains as to whether a lender who purchases the loan from the originating lender has the same rights. For clarity, the Agency should consider rules that limit the sharing of the CT Recording to employers and lenders involved in the REN transaction.

Further, lenders, MERS, and government agencies (FHA, VA, Fannie, Freddie, SBA, etc.) will likely require that copies of the CT Recording be submitted to the lender with the loan package. The RENP must have the ability to do so to comply with the closing instructions requirements in real property transactions.

Question D.14-16: Yes, the rules must reinforce the need for maintaining confidentiality of the REN transaction. RENP should not be allowed to conduct an REN transaction in a public place.

Question E.1: The RENP should conduct the REN transaction in a non-public area to maintain confidentiality and security.

Question E.2: Shared computers should not be used for REN transactions if possible. If allowed, strong passwords for accessing the REN technology, CT Recording, and electronic journal should be required.

Question E.3.b.: Yes. See NIST Special Publication 800-63B (<https://pages.nist.gov/800-63-3/sp800-63b.html>).

Question E.3.d.: Passwords should not be shared or written down.

Question E.3.e.: Multi-factor authentication should be required.

Question E.3.f.: The RENP should regularly change the password.

Question E.4: Yes.

Question E.5: Yes. REN transactions should not be performed on public wi-fi unless a VPN connection is utilized and ensures that the traffic is encrypted end-to-end utilizing the latest and highest level of encryption.

Question E.6.a.: Yes.

Question E.6.b.: See above.

Question E.7.c.: See above.

Question E.8.b.: Yes.

Question E.8.c.: Any unauthorized access to the information related to the REN transaction.

Question E.8.d.: Yes, the RENP should be responsible to ensuring they follow at least 1) keep their screen private so no one can oversee 2) avoid public Wi-Fi or utilize VPN 3) Ensure disk level encryption of their laptop/computer and 4) Utilize strong passwords per above.

Question E.9.a.: Annually.

Question E.9.b.: Not more than 10%.

Question E.9.c.: The platform provider should provide a certification, at least annually, that the journal and CT Recordings are secure.

Question E.12.a-c.: Yes to all.

Question F.1: The CT Recording of the remote electronic notarial act should include items F.1.a-c, but not F.1.d. The term, “any other interaction” is too broad and could include advice or assistance offered by an RENP who is also a licensed attorney. It is also unclear how the act of credential analysis would be included in the CT Recording. More information is needed on this.

Question F.2: The acts above should be part of the CT Recording. However, it is unclear how the requirement that the “RENP must verify, through the communication technology, the geolocation of the remotely located principal” is to be achieved. Upon information and belief, using geolocation via IP addresses from a desktop or laptops is currently inaccurate. Users upon wifi networks are often assigned external addresses from internet service providers that could be in different city or state. Users on private wifi networks may employ VPN or dynamic IP addresses which also assign users addresses from other cities or states. If a principal does not know that they will fail the geolocation requirement, this could stop the REN transaction until the issue is addressed in compliance with the statute. In a real property transaction, this could result in significant losses to all parties involved. Similar concerns regarding the inaccuracy of geolocation of the principal are prevalent when using mobile devices.

Question F.2.a.: No.

Question F.3: The REN should end after the notarial certificate is completed by the RENP.

Question G: In real property transactions, lenders, MERS, and government agencies involved in a loan transaction may require additional information to be included in the CT Recording. The rules must be flexible enough to allow the RENP to comply with specific requirements of lenders or other parties to the REN transaction.

Question J: The Secretary should provide the ability of third parties to verify the current commissioning of RENPs through real-time accessible database, as is done by the State Bar for licensed attorneys and many other regulatory agencies. Many other states provide this ability, precisely so that members of the public who are relying on this commissioning, training and regulatory oversight can verify that the particular notary, whether wet-ink or RENP, is actually currently commissioned. Lack of access to that information is an opening for fraud. Similarly, the list of approved platform providers should be available in real time to all RENPs.

Question L: It is unclear how a non-lawyer RENP can make the determinations required in this section. It is also unclear how any RENP can determine whether a remotely-located principal is physically on the military installation or vessel named in the military orders assigning the member to active duty for more than 120 days, provided the remotely located principal is a member, spouse of a member, or dependent of a member of the Armed Forces of the United States. Not all REN transactions will be conducted by an attorney. Focus must be given to Chapter 84 and the penalties for the unauthorized practice of law.

It is not advisable that the rules declare any REN document *void ab initio*. Doing so places the Secretary in the position of acting as a judge when parties in good faith relied on the transaction. Voiding any document under this section should require a court order.

Question N: There will always be other laws that affect notarial acts. See, for example, recognition of document execution in other states, such as G.S. 31-46, UEWA and UEEPDA (now under consideration at the General Statutes Commission), Constitutional protections (Commerce Clause, Full Faith and Credit), among many others. RENA needs to remain flexible enough to recognize the applicability of those other laws and can never be pared down to specifics.