



COUNTY CLERKS DIRECTED TO REFUSE REMOTE NOTARIES

At the request of several County Clerk Offices throughout the state, the attorney for the County Clerks offered guidance regarding remote notaries. In short, the attorney opined that because a notarization performed pursuant to Executive Order 2020-015 violates the law and is a criminal act, the instrument is not duly acknowledged and therefore a County Clerk should refuse to record any document that was signed in New Mexico and contains a remote notarization. Further, he opined that the legality of documents filed in New Mexico that were notarized remotely in other states where remote notarization is provided for by statute (opposed to Executive Order) may also be legally questionable and that the "fall-out" of filing these remote notarized documents may not be recognized until the seller attempts to obtain title insurance when transferring the property in the future.

In light of the above opinion, County Clerks are unlikely to accept documents with remote notaries at this time. If the County Clerk's office will not accept the document for filing, it is questionable whether the title company will proceed with closing. If a remote notary is necessary, brokers will need to determine the title company's policy on remote notaries well in advance of closing, as well as the local County Clerk's position on filing of documents with remote notaries.

Several groups, including NMAR, will be working on a bill allowing for remote notarization to be introduced during the 2021 legislative session.

To Read Executive Order 2020-15, [click HERE](#).

To read the County Clerk Attorney's Opinion, please see below.

OPINION:

In response to several requests for me to review the Governor's Executive Order on remote notarizations, and whether that order permits a County Clerk to record an instrument in the office of the County Clerk, please note the following technical assistance:

1) On March 30th, 2020, the Governor issued Executive Order 2020-015 titled *Order Temporarily Permitting Notarial Acts through Certain Audio-Visual Technology Under Certain Conditions*, effective from the date of issue through June 20, 2020.

2) The Executive Order does NOT authorize a County Clerk to accept an instrument of writing to be recorded in the Office of the County Clerk.

3) Section 14-8-4(A) provides in relevant part: "Any instrument of writing duly acknowledged may be filed and recorded. Any instrument of writing not duly acknowledged may not be filed and recorded or considered of record, though so entered, unless otherwise provided in this section." The issue then becomes whether a document notarized remotely pursuant to Executive Order 2020-015 is "duly authorized" -- which in the provision of technical assistance I believe that because such a notarization violates the law and is a criminal act the answer is: No, it is not duly authorized.

4) New Mexico has an in-person requirement for notarizations (see #5, below). The Executive Order merely says that between March 30th and June 20th the Governor will not discipline any notary public who performs a notarial act which is not in-person, even though the law says the act must be done in-person. A determination by the Governor not to discipline a notary public for violating the law is different from the action by the notary public being lawful. It remains contrary to the law, however, the person will not be disciplined by the Governor for violating the law as long as they follow the process laid out in the Executive Order.

5) In terms of the in-person requirement for performing a notarial act, according to Section 14-12A-2 of the Notary Public Act, titled Definitions:

A. "acknowledgment" means a notarial act in which a person at a single time and place:

(1) appears in person before the notary public and presents a document; . . .

B. "affirmation" means a notarial act that is legally equivalent to an oath and in which a person at a single time and place:

(1) appears in person before the notary public; . . .

F. "jurat" means a notarial act in which a person at a single time and place:

(1) appears in person before the notary public and presents a document; . . .

J. "oath" means a notarial act that is legally equivalent to an affirmation and in which a person at a single time and place:

(1) appears in person before the notary public; . . .

L. "personal appearance" means that the principal and the notary public are physically close enough to see, hear, communicate with and give identification documents to each other;

6) In addition, although the Governor will not administratively discipline a notary public who performs a notarial act pursuant to Executive Order 2020-015, such an action is a crime. The Executive Order does not guarantee that a person prosecuted and convicted will be pardoned, so any notary public who performs

a remote notarization pursuant to Executive Order 2020-015, each such notarization is a criminal act, specifically:

Section 14-12A-11: If a notary public . . . appends his official signature to acknowledgments or other documents when the principals executing the documents have not appeared in person before him, is guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding one thousand dollars (\$1,000), or by imprisonment for a period not exceeding six months, or both.

7) Because a notarization performed pursuant to Executive Order 2020-015 violates the law and is a criminal act, the instrument is not duly acknowledged and therefore shall not be recorded in the Office of the County Clerk. A County Clerk should refuse to record any document presented that was signed in New Mexico and contains a remote notarization.

8) If a County Clerk has recorded such documents since the Executive Order was issued, the County Clerk should record a copy of the Executive Order as an attachment to the recorded instrument so that in the future a proper analysis can be made as to whether the instrument should be considered of record. In addition, the County Clerk may wish to contact the person who recorded the document to alert them that the notarization did not comply with New Mexico law and that they may wish to consider signing the instrument with a proper notarization and recording the newly-signed and properly-notarized instrument.