

HB77 HD1

Measure Title: RELATING TO NOTARIAL ACTS.
Report Title: Remote Notarization; Notaries Public
Description: Authorizes notaries public to perform remote notarizations under certain circumstances. (HB77 HD1)
Companion:
Package: None
Current Referral: CPH, JDC
Introducer(s): TAKUMI, ICHIYAMA



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTIETH LEGISLATURE, 2019**

ON THE FOLLOWING MEASURE:

H.B. NO. 77, H.D. 1, RELATING TO NOTARIAL ACTS.

BEFORE THE:

SENATE COMMITTEE ON COMMERCE, CONSUMER PROTECTION, AND HEALTH

DATE: Tuesday, March 12, 2019

TIME: 9:00 a.m.

LOCATION: State Capitol, Room 229

TESTIFIER(S): Clare E. Connors, Attorney General, or
Michael S. Vincent or Dean A. Soma, Deputy Attorneys General

Chair Baker and Members of the Committee:

The Department of the Attorney General ("the Department") appreciates the intent of this bill, but the Department does not support this bill as written.

The purpose of this Act is to permit notaries public to perform notarial acts utilizing electronic documents with electronic signatures and seals, without the necessity of the notary public and the individual requesting the notarial services being at the same physical location, provided that the notary and individual can communicate with each other simultaneously by sight and sound using communication technology.

This bill is not based on the Revised Uniform Law on Notarial Acts (2018) ("RULONA") drafted by the National Conference of Commissioners on Uniform State Laws. The Department was informed that it was based on the Mortgage Bankers Association – American Land Title Association Model Legislation for Remote Online Notarization ("MBA-ALTA Model"). Currently only 9 other states have enacted laws regarding remote online notarizations. None have the exact same language as the current bill.

The Department is concerned that electronic documents with electronic signatures or seals could lead to increased fraud. There has been no comprehensive study nationwide to ensure that the available technology appropriately protects against

fraud. Most of the requests to the Department's Notary Office for past record books are regarding transfers of real property where at least one party is disputing the authenticity of a signature. Before permitting notarization by using electronic signatures and seals, the Department would like to better ensure that fraudulent activity would not be increased because of this technology.

Furthermore, permitting notarization by using electronic signatures and seals will directly impact the filings at both the Judiciary and the Bureau of Conveyances. Currently, the court procedures have the clerk verify notarized documents against the filed specimen cards containing copies of the commissioned notary's seal. This bill exempts the notaries from filing a specimen of their electronic notary seal with the courts under new section 456-D(e) on page 11, lines 1 to 7. By having the clerk verify the notarized document against the filed specimen card, the courts have been able to confirm whether the notary is currently commissioned with the Department or is performing unauthorized practices as a notary public in violation with section 456-7. Also, the Bureau of Conveyances does not allow for electronic signatures. Both the courts and the Bureau of Conveyances will need funds to update their systems to accommodate the filing of electronic documents with electronic signatures and seals.

The Department has the following additional concerns:

1. The process or service whereby the notary conducts a credential analysis, does identity proofing, and uses a tamper-evident format should be approved by the Attorney General.

Specifically, the definition on page 2, lines 17 to 20, in the new section 456-A should be changed as follows:

"Credential analysis" means a process or service that meets the ~~[requirements of this part]~~ standards established by the attorney general through which a third person affirms the validity of an identification card or document through review of public or private data sources.

In addition, the definition on page 3, lines 16 to 20, should be changed as follows:

“~~[Identify]~~ Identity proofing” means a process or service ~~[that meets the requirements of this part]~~ that complies with standards established by the attorney general through which a third person provides a notary public with a means to verify the identity of a remotely located individual by a review of personal information from public or private data sources.

Page 4, lines 14 to 16, should be changed as follows:

“Remote online notarization” or “remote online notarial act” means a notarial act performed by means of communication technology that meets the standards adopted under this part.

Page 9, lines 18 to 21, should be changed as follows:

“(a) In performing a remote online notarization, a notary public shall attach or logically associate the notary public’s electronic signature and electronic seal to the notarial certificate in a tamper-evident format approved by the attorney general”

2. The Attorney General should also approve any electronic seal and the method by which it is protected from unauthorized use.

Specifically, page 3, lines 7 to 11, should be changed as follows:

“Electronic seal” means an electronic image approved by the attorney general containing information attached to or logically associated with an electronic record that contains the notary public’s name, the notary public’s commission number and commission expiration date, and the words “notary public” and “State of Hawaii”.

3. Page 3, lines 4 to 6, should be changed as follows:

“Electronic record” means information that is created, generated, sent, communicated, retrieved in a perceivable form, or stored by electronic means.

The electronic record must be able to be retrieved without having a specific program or code.

4. In the new section 456-D(d), page 10, lines 17 to 20, “actual knowledge” requirement should be deleted as that may deter the notary from reporting the loss or use by another person of the notary public’s electronic seal or journal. If the notary has a reasonable belief that the electronic seal has been lost or used by another person, the notary should report that to the Attorney General.

5. In the new section 456-G on page 13, line 17, to page 14, line 6, add the requirement that upon termination, suspension, or resignation of the notary public's commission, the notary should provide a certification of the destruction of the coding, disk, card software, and password regarding the electronic seal to the attorney general. Failure to do so shall be subject to a fine.

6. In the new section 456-A, add a definition as follows: "Remote online notary public" means a notary public who has been authorized by the attorney general to perform remote online notarizations under this part. This definition was deleted from the MBA-ALTA Model upon which this bill is allegedly based.

7. The new section 456-H on page 14, line 18 to page 18, line 16, should be deleted as this would be better effected through administrative rules, especially since technology is constantly evolving.

8. The new section 456-J on page 19, line 9, lines 9 to 20, should be deleted as there should be no automatic validity of remote online notarial acts, especially if there is a failure of a notary public to perform a duty or meet a requirement.

9. Add a new section for rulemaking such that the Attorney General is authorized to adopt rules necessary to implement this part, including rules to facilitate remote online notarizations. This section was deleted from the MBA-ALTA Model upon which this bill is allegedly based.

10. Add a new section for registration requirements as follows:

Registration required. A notary public commissioned in this State may become a remote online notary public in accordance with this part. Before a notary performs a remote online notarization, the notary must register with the attorney general in accordance with rules for registration as a remote online notary and identify the technology that the electronic notary public intends to use, which must conform to any standards adopted by the attorney general.

This requirement was deleted from the MBA-ALTA Model upon which this bill is allegedly based.

11. The Department presently does not have the expertise to implement this bill. Therefore, the Department will need additional funds to conduct the research, hire

a consultant, and hire a specialist to ensure that the available technology appropriately protects against fraud and to promulgate the standards by which electronic signatures and seals may be utilized.

The Department appreciates the opportunity to provide comments on this measure and recommends that the bill be held.



Testimony of First American Title
on
H.B. 77, H.D.1 Relating to Notarial Acts
before the
Senate Committee on Commerce, Consumer Protection and Health

Tuesday, March 12, 2019
9:00 a.m., Room 229

Chair Baker and Distinguished Members of the Committee on Commerce, Consumer Protection and Health:

First American Title¹ is grateful for the opportunity to **support** H.B. 77, H.D.1 relating to notarial acts and to discuss how this legislation will benefit Hawaii’s residents and business community.

This bill would enact “remote online notarization” in Hawaii. Just like it sounds, remote online notarization takes the traditional notarial process and moves it online—allowing a signer to get a document notarized over a webcam or smart phone. Remote online notarization benefits and protects consumers through its convenience and by providing enhanced security to the notarial process.

Along with others in the mortgage and land title industries, we have taken a keen interest in remote online notary laws because notaries are the lynchpin of our system of real estate transfer and recording. As a leading settlement provider, we are also a major consumer of notary services. We are therefore extremely interested in making sure that any remote online notary law provides sufficient safeguards and protections to consumers’ identities.

Nationally Vetted Model and a National Trend

H.B. 77, H.D.1 is based on a nationally vetted model already adopted in 10 states and currently under consideration in 26 others, and it would implement a legal framework to support the National Electronic Notarization Standards adopted by the National Association of Secretary of States (NASS) in February 2018.

Because the internet knows no borders, tens of thousands of remote online notarizations are already happening each year across the country and in every state. Today, Hawaii residents are going online to use the services of remote online notaries based in other states instead of being able to use Hawaii notaries operating under Hawaii law. H.B. 77, H.D.1 would safeguard consumers by extending the protections of Hawaii law to this rapidly expanding type of notarial

¹ First American Title Insurance Company is a subsidiary of First American Financial Corporation (NYSE:FAF), one of the nation’s largest title insurance companies and providers of real estate settlement services.

practice. By getting out in front of this trend, we can make sure that the safeguards embodied in the national model and the NASS Standards are available to protect Hawaii consumers.

Enhanced Security for the Most Important Transactions

With fraud and other scams hitting both Hawaii's residents and its business community, remote online notarization is a secure option that uses the latest technologies to prevent fraud. It is crucial to use available tools to protect people's most valuable assets—ownership of their homes.

- **Enhanced Identification Requirements:** With enhanced ID requirements and using a multi-factor approach to authenticate signers, remote online notarization leverages the latest technologies and forensic tools to stop fraud before it happens.
- **Robust Audit Trail:** With a secure electronic journal entry and audio-video recording made of each notarization, there will be an auditable record to deter potential fraudsters. Criminals will be much less likely to steal someone's identity when the camera is rolling.
- **Secure Technologies:** H.B. 77, H.D.1 supports the latest tamper-evident technologies so that third parties can detect whether someone has tried to alter an electronically notarized document.

The Consumer-Friendly Choice

Remote notarization is the consumer-friendly alternative to the difficult and time-consuming process of finding a traditional notary for an in-person notarization. Significant benefits include:

- **Ease of Access:** Hawaii residents can get documents notarized *anywhere, anytime*. It is especially useful to disadvantaged or immobilized residents who need to notarize official documents.
- **Save on Time, Lost Wages and Travel Costs:** Remote online notarization eliminates the need to make appointments, take leave from work, or drive for miles to find a notary—all you need is a computer and an internet connection.
- **Good for Rural Residents and Members of the Military:** It benefits Hawaii residents who live in remote areas and members of the military on deployment.
- **Consumer Choice:** Remote online notarization will be strictly optional and preserve consumer choice. It will simply be an alternative for Hawaii residents who wish to use it.

* * *

Thank you for the opportunity to provide testimony in support of this bill.

MCCORRISTON MILLER MUKAI MACKINNON LLP

ATTORNEYS AT LAW

March 11, 2019

Senator Rosalyn H. Baker, Chair
Senator Stanley Chang, Vice Chair
Members of the Senate Committee on
Commerce, Consumer Protection, and Health
Thirtieth Legislature
Regular Session, 2019

Re: H.B. 77, H.D.1
Hearing on Tuesday, March 12, 2019, 9:00 a.m.
Conference Room 229

Dear Chair, Vice-Chair and Members of the Committee:

My name is Charles Pear. I am testifying as legislative counsel for ARDA Hawaii.

ARDA Hawaii supports the bill with a correction, as follows: It appears that the term “identify proofing” in proposed §456-A of H.B. 77, H.D.1 should instead say “identity proofing.”

Currently, deeds signed outside of the United States must go through a cumbersome, and sometimes expensive, process in order to be recorded in Hawai‘i. This can prove to be a detriment to Hawai‘i property and business.

To address this in the context of the time share industry, in 2013 the Legislature adopted Chapter 503B, HRS. This law authorizes the Lieutenant Governor to appoint a person to be a Commissioner of Deeds for the purpose of authenticating the execution of deeds, mortgages, and other documents relating to a time share interest or time share plan.

Pursuant to Chapter 503B, proposed regulations implementing the Commissioner of Deeds legislation were drafted and application forms were prepared. However, adoption of the regulations was sidetracked when a change of administration took place. To date, the State has not yet adopted regulations and no commissioners have been appointed.

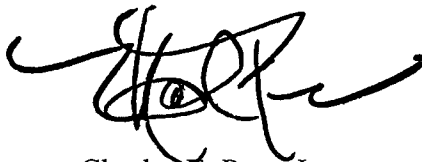
HB 77 appears to provide another avenue for notarization of the kinds of documents that Chapter 503B is intended to address. Accordingly, ARDA Hawaii supports the adoption of this bill.

Chair, Vice Chair, and Members of the
Senate Committee on Commerce,
Consumer Protection, and Health
March 11, 2019
Page 2

Thank you for your kind consideration of this legislation.

Very truly yours,

MCCORRISTON MILLER MUKAI MACKINNON LLP

A handwritten signature in black ink, appearing to read 'CEP', with a stylized flourish extending to the right.

Charles E. Pear, Jr.

CEP:kn



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Presentation to The
Committee on Commerce, Consumer Protection and Health
March 12, 2019 at 9:00 A.M.
State Capitol Conference Room 229

Testimony on House Bill 77, HD 1

TO: The Honorable Rosalyn H. Baker, Chair, Committee on Commerce, Consumer Protection and Health
The Honorable Stanley Chang, Vice Chair Committee on Commerce, Consumer Protection and Health

My name is Neal K. Okabayashi, the Executive Director of the Hawaii Bankers Association (HBA). HBA is the trade association representing eleven banks, including eight with headquarters in Hawai'i and offers comments on this measure.

This bill is an effort to modernize the present notary system by adding to the notary system the capacity to notarize a document remotely by permitting the absence of a physical presence of the signer before a notary and permitting the presence of the signer be done remotely. We understand that concerns have been raised by the Attorney General, and for one, concerns have been expressed that the ten year record retention requirement is too short.

Given the complexity of this concept, which impacts more than mortgages but other documents such as will and trusts, HBA believes that it be more prudent that Hawaii should take its time to ensure that we carefully examine all aspects of this worthwhile concept before adopting it. While this concept will likely be adopted in the future, presently, the framework of the bill appears to be in words of Panasonic: to be a bit ahead of its time.

Neal K. Okabayashi
(808) 524-5161

CPH 3/12/19 Hearing - 9 a.m.
Opposition Testimony

LATE

Cheryl Kaster, Honest Notary
Dba Honest Hawaii Notaries

Consumer Protection Committee
Hearing: March 12, 2019 9:00 a.m. Conference Room 229

Chair Senator Baker
Members of the Commerce, Consumer Protection and Health Committee

Thank you for the opportunity to submit written and oral testimony in opposition to HB77.

Section 1 of HB 77 says "The legislature finds that electronic communications make it possible to perform notarial acts by new means." What it fails to say is that these "new means" seek to do away with the very foundational requirements of notarization and substitute **CONVENIENCE** in place of **INTEGRITY, DILIGENCE, and SKILL**.

There are many issues that require, no, demand, opposition to remote notarization but, in the interest of time, I will address one issue, the issue of the abandonment of a requirement for knowledgeable, prudent, notarial practice carried out with integrity, diligence and skill (66 C.J.S. Notaries, Section 26), in favor of a "new process" done for **CONVENIENCE** only.

The very crude visual depiction included in this testimony lists the fundamental requirements for Notarial practice if the Notary is to do their duty. That **duty is to protect ALL parties to a transaction from being a victim of fraud**. Unlike a publication by this state's Notary Public Office, the complete purpose of notarization is NOT to protect only the signer from fraud.

The purpose is to protect all parties to a transaction from becoming victims of fraud. This includes the Notary Public, the

Notary's Employer, in addition to all parties to the notarized transaction.

At this point, the laws, rules, and practices that work to protect the consumer from notary fraud are not being enforced. The legislature should first be concerned about the adequate support of existing Hawaii Notaries before getting on board for a "new" means of Notarization.

The **FOUR CORNERSTONES OF NOTARIZATION** are:

PERSONAL APPEARANCE. It is personal appearance of the signer that permits the appropriate, SKILLED performance of the other Cornerstones during the notarial act that prevents parties from being victims of fraud.

POSITIVE I.D. The vast majority of Hawaii Notaries, today, do NOT KNOW what is acceptable I.D. under Hawaii Law. That is bad enough when it comes to the traditional conduct of notarization.

Electronic notarization proposed by HB77 restricts the ability of the Hawaii Notary to THEMSELVES assess whether the identification presented has potentially been tampered with, whether the demographics (height, weight, age) actually apply to the remote signer (if the signer is sitting down, how would height be verified?). This bill would require reliance on yet a third party to "vet" the legitimacy of the identification as it pertains to the signer.

WILLINGNESS & AWARENESS. Everytime I type these words together the song "Love and Marriage" runs through my mind, even though that is not necessarily true.

The signer of any notarized document must be both: Aware of what it is they are signing, what they are committing themselves to, in order for the transaction to be valid. I believe this is described in legal arenas as a "Meeting of the Minds."

A signer to a notarized transaction must not be coerced into signing a document. When the signer and any others accompanying the signer are also physically in the presence of the Notary Public, undue influence on the signer by other parties can be dealt with because the Notary Public has the last word on how the notarization is conducted.

If the Notary believes there may be undue influence being exerted, the Notary has the authority as a Public Official of the State of Hawaii, to ask that all other parties leave the room.

With remote notarization this very important requirement is removed. It is not possible for the Notary to see everyone who is in the room, or who might be bringing undue influence to bear on a signer who is "on camera."

Notarization requires PERSONAL APPEARANCE of the signer for several reasons.

The "new way" offered by remote notarization removes all of the means to ensure the integrity of a notarized transaction, FOR CONVENIENCE.

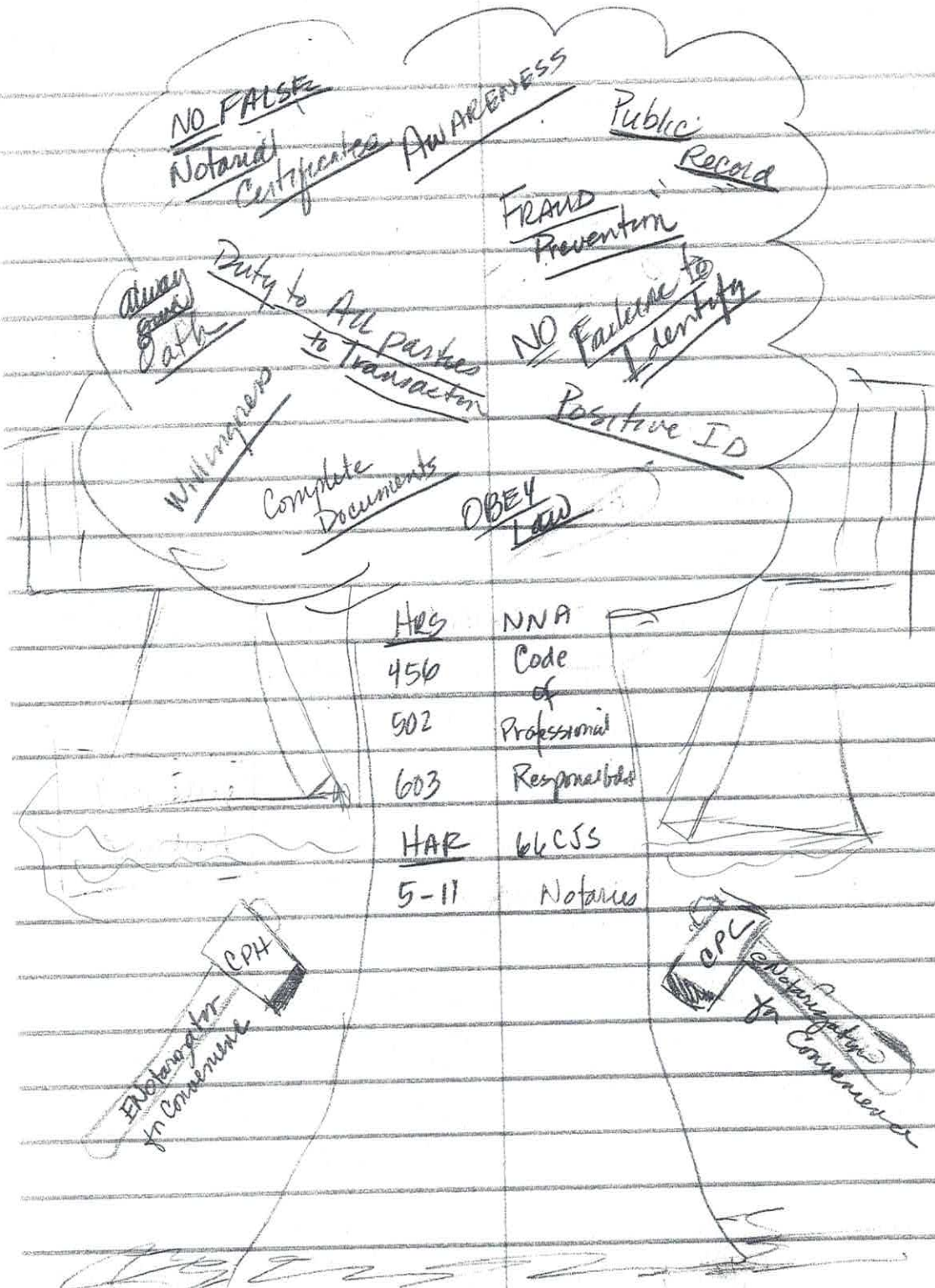
This or any electronic notarization sacrifices the integrity of the notarized transaction for the sake of CONVENIENCE.

Submission of HB77 underscores the failure of those requesting its introduction to understand the notarial process at all. If this legislature holds the process of Notarization in such low regard then please go even farther and in conference gut all of the notary laws and get it over with. It is, in my opinion, immoral to legislate a law that guts consumer fraud protection measures in favor of convenience.

This bill demonstrates even further the sad state of affairs that neither the legislature, nor the Notary Public Office, nor the Consumer Protection Committees understand at even the most basic level the purpose of Notarization.

There are already states that permit remote notarization. Why should Hawaii be willing to put their consumers at risk with this "new" means that really has not basis to be called Notarization in the first place.

Remote notarization is already available to anyone in Hawaii from Virginia and I believe also North Carolina. Remote doesn't just mean another island, it also means notarization from another state or another country.



NO FALSE

Notarial Certificates

AWARENESS

Public Record

Willingness

Duty to Advise Parties to Transact

FRAND Prevention

NO Failure to Identify

Positive ID

Complete Documents

OBEDIENT LAW

HRS

456

602

603

HAR

5-11

NNA

Code

of

Professional

Responsibility

66 CSS

Notaries

CPA

Notary Public for Commerce

CPA

Notary Public for Commerce