

Legislative Analysis



REMOTE AND ELECTRONIC NOTARIZATION SYSTEMS

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<http://www.house.mi.gov/hfa>

House Bill 5882 as introduced
Sponsor: Rep. Rachel Hood

Analysis available at
<http://www.legislature.mi.gov>

House Bill 5883 as introduced
Sponsor: Rep. Helena Scott

Committee: Judiciary
Complete to 12-4-24

SUMMARY:

House Bill 5882 would amend the Michigan Law on Notarial Acts (MiLONA) to allow notaries public,¹ witnesses to a *notarial act*, and the individuals for whom a notarial act is being performed to employ a wider variety of *communication technologies* during the notarization process.

Notarial act is an act that a notary public commissioned in Michigan is authorized to perform, including:

- The taking of an acknowledgement.
- The administration of an oath or affirmation.
- The taking of a verification upon oath or affirmation.
- The witnessing or attesting of a signature.

Communication technology means an electronic device or process that does one or both of the following:

- Allows a notary public and a remotely located individual, including an individual for whom the notarial act is being performed or a witness to the notarial act (or other legal transaction), to communicate with each other simultaneously by sight and sound, and allows the notary public to record and store an audio or visual recording of the notarial act.
- If necessary, facilitates communication between a notary public and a remotely located individual who has a vision, hearing, or speech impairment.

Current law allows notaries public to use electronic notarization (“e-notarization”) software, systems, and platforms for the digital signing, sealing, and authentication of documents, as long as the platform is approved for use by the secretary of state and the Department of Technology, Management, and Budget (DTMB). However, the provisions of MiLONA allowing for the use of *remote e-notarization platforms* (i.e., platforms that also satisfy the physical presence requirement for notarial acts via the use of two-way real-time audiovisual technology) expired on June 30, 2021. The bill would amend MiLONA to reinstate these

¹ A *notary public* is an officer commissioned by the secretary of state to serve as an unbiased and impartial witness on business, public, and other documents, and whose notarization on a document certifies that the person whose signature appears on the document personally appeared before the notary, established their identity, and personally signed the document in the presence of the notary.

provisions (namely section 26c) to both allow for the use of remote e-notarization platforms and expand the forms of communication technology that may be used by notaries public to perform notarial acts for or involving remotely located individuals, as long as the technology of choice has been approved for use by the secretary of state and DTMB and all of the following requirements are met:

- The technology allows direct interaction between the individual seeking the notary public's services, any witnesses, and the notary public, such that all parties can communicate simultaneously via sight and sound at the time of the notarization.
- The technology is capable of creating an audio and visual recording of the complete notarial act and the recording is made and retained as a notarial record.
- The individual seeking the notary public's services and any required witnesses (if not personally known to the notary) present satisfactory evidence of their identity to the notary during the video conference.
- The individual seeking the notary public's services affirmatively represents that the individual is physically located in Michigan; if the individual is not physically situated in Michigan, the notarial record must either involve property in Michigan or be intended for filing with a matter before an entity subject to the jurisdiction of the state.
- All parties to the notarial act are able to affix their signatures to the record in a manner that renders subsequent modifications to be tamper evident and the entire signed record is transmitted to the notary public within two business days of being signed.

The bill would require the secretary of state and DTMB to jointly create and maintain statewide standards for remote and non-remote e-notarization systems, as well as review these standards at least once every four years. These entities would also be required to approve the use of any remote e-notarization platforms that are either a government-sponsored enterprise² or already certified for use in another state. In addition, the bill would allow third-party providers of other remote e-notarization systems (or a notary public) to submit requests to the secretary of state and DTMB to approve new remote and non-remote e-notarization systems. These requests would be reviewed on a rolling basis.

MCL 55.263 et seq. (amended); MCL 55.286d (repealed); MCL 55.286e (proposed)

House Bill 5883 would amend the Estates and Protected Individuals Code to allow for the electronic signing and witnessing of the following documents:

- A will (section 1108).
- A disclaimer (section 2903).
- A funeral representative designation (section 1104).
- A parental appointment of a guardian of a minor (section 5202).
- An appointment of a guardian of a legally incapacitated individual (section 5203).
- A durable power of attorney (section 5501).
- A patient advocate designation (section 1106).

² Federal law defines a *government-sponsored enterprise* as a corporate entity created by a law of the United States that has a federal charter authorized by law; is privately owned; is under the direction of a board of directors, a majority of which is elected by private owners or shareholders; is a financial institution with the power to make loans or raise funds by borrowing; does not exercise powers reserved to the government; does not have the power to commit the government financially; and has employees whose salaries and expenses are paid by the enterprise and are not federal employees (2 U.S.C. 622).

These provisions originally expired on June 30, 2021, under the sunset clause in 2020 PA 338. The bill would reinstate the provisions and allow them to apply going forward from the effective date of the bill.

MCL 700.1202

BACKGROUND:

The notarization process is designed to prevent fraud or forgery on important business, public, and legal documents by having a third-party (a notary public, or simply “notary”) present to serve as an unbiased and impartial witness to the signing of these documents. A notary’s most common function is to attest to the authenticity of the signature on a document through verification of the signer’s identity. Michigan notaries public are required by law to authenticate notarial acts by affixing their stamp or seal on documents they notarize.

While notarial acts traditionally involved exclusively paper documents, changes to various state and federal laws in the early 2000s for the first time authorized notaries to use electronic signatures. The National E-Notarization Commission was formed in response to these changes to develop technology neutral standards for the secure implementation of “e-notarization,” and in 2006, these standards were endorsed by the National Association of Secretaries of State (NASS).³ Among the standards were requirements that a notary’s electronic signature and seal be independently verifiable, and that a tamper-evident certificate be attached to notarized documents to deter fraud and misuse.⁴

Despite allowing for the use of digital signatures and seals by notaries public, many early state e-notarization laws still required that the document signer appear in person before the notary at the time of notarization. This practice shifted after 2011, when Virginia became the first state to fully authorize *remote* e-notarization, allowing document signers to satisfy the physical appearance requirement for notarial acts remotely via the use of audio and visual technology (e.g., webcams, video conferencing software).⁵ As more states followed, NASS adopted revised national standards that incorporated remote e-notarization guidelines in 2018.

The onset of the COVID-19 pandemic also had a dramatic impact on e-notarization authorizations across the states. Business groups across the country urged state governments to adjust limitations on remote notary work so that commerce could resume, and some states attempted to reduce person-to-person contact by expanding access to remote notarization services. For example, beginning September 1, 2020, Governor Whitmer issued a series of executive orders extending the suspension of some in-person notarization requirements as a direct response to the pandemic aimed at preventing transmission of the respiratory disease.⁶ At the beginning of 2020, only 16 states permitted remote e-notarization;⁷ currently, 47 states

³ <https://www.nass.org/initiatives/remote-electronic-notarization>

⁴ https://www.sosnc.gov/documents/forms/notary/NASS_National_Electronic_Notary.pdf

⁵ Va. Code Ann. § 47.1 et seq. (2011), <https://lis.virginia.gov/cgi-bin/legp604.exe?111+ful+SB827ER+pdf>.

⁶ Executive Orders 2020-41, 2020-74, 2020-131, 2020-158, 2020-173, and 2020-187

(<https://www.michigan.gov/whitmer/news/state-orders-and-directives/>).

⁷ <https://afsaonline.org/wp-content/uploads/2022/08/AFSA-E-Notary-RON-White-Paper-August-2022.pdf>

(including Michigan) and the District of Columbia have laws on the books allowing for at least some form of remote e-notarization.⁸

As of August 2023, the Michigan Department of State has approved 21 vendors for remote e-notarization, and four vendors for non-remote e-notarization.⁹ Several bills have also been introduced in Congress to authorize notaries nationwide to perform e-notarization (remote or otherwise), as well as require courts and states to recognize notarizations that are performed by a notary public commissioned in any state.¹⁰

FISCAL IMPACT:

House Bills 5882 and 5883 would not have a fiscal impact on the state or on local units of government. The Department of Technology, Management, and Budget would be able to incorporate the additional requirements of the bills with its existing review and approval process of electronic notary systems and support them with ongoing appropriations.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.

⁸ <https://www.nass.org/initiatives/remote-electronic-notarization>

⁹ https://www.michigan.gov/-/media/Project/Websites/sos/19delrio/List_of_Vendors.pdf?rev=78226875aab941608528776135f3dc51

¹⁰ The most recent of these federal bills are S.1212 (introduced in the Senate on April 19, 2023) and H.R.1059 (introduced in the House of Representatives on February 27, 2023). Both are reintroductions of similar bills from the 117th Congress, namely S.1625 and H.R.3962, which were introduced in 2021.