

WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

Committee Substitute

for

Senate Bill 469

BY SENATORS MAYNARD, STOLLINGS, RUCKER, AND

WOODRUM

[Originating in the Committee on the Judiciary;

reported on March 3, 2021]

1 A BILL to amend and reenact §39-4-6 of the Code of West Virginia, 1931, as amended; and by
2 adding thereto three new sections, designated §39-4-6a, §39-4-37, and §39-4-38, all
3 relating to personal appearance required for notarial acts; requiring the Secretary of State
4 to propose legislative rules establishing requirements for the performance of a notarial act
5 on behalf of an individual appearing before a notary public by means of communication
6 technology; recognizing the validity of notarization performed by means of communication
7 technology pursuant to section 6 of the Governor's Executive Order 11-20 effective March
8 25, 2020; defining terms; authorizing a notary public to perform notarial acts for remotely
9 located individuals using communication and identity-proofing technology provided certain
10 requirements are fulfilled; and specifying the means by which a notary public must identify
11 a remotely located individual.

Be it enacted by the Legislature of West Virginia:

ARTICLE 4. REVISED UNIFORM LAW ON NOTARIAL ACTS.

§39-4-6. Personal appearance required.

1 (a) If a notarial act relates to a statement made in or a signature executed on a record, the
2 individual making the statement or executing the signature shall appear personally before the
3 notarial officer, unless the An individual making the statement or executing the signature does not
4 appears personally if the appearance is by video or audio communication technology, even if the
5 video is synchronous as provided in §39-4-37 or §39-4-38 of this code.

6 (b) The Secretary of State shall propose rules for legislative approval in accordance with
7 the provisions of §29A-3-1 et seq. of this code establishing specific requirements for the
8 performance of a notarial act on behalf of an individual appearing before a notary public by means
9 of communication technology.

§39-4-6a. Remote acknowledgements and notarizations under COVID-19 Executive Order deemed valid.

1 Acknowledgements and notarizations performed by means of remote communication
2 technology, pursuant to section 6 of the Governor’s Executive Order 11-20 effective March 25,
3 2020, by which the Governor suspended the provisions of §39-4-6 of the code applicable to court
4 reporters and other notaries, are deemed to be valid and cured of any defect from failure to comply
5 with §39-4-6 of this code if the acknowledgements and notarizations were performed in
6 accordance with the emergency rules promulgated by the West Virginia Secretary of State, which
7 are found at the Code of State Rules §153-45 et. seq.

§39-4-37. Remote online notarial act performed for remotely located individual.

1 (a) In this section:

2 (1) “Communication technology” means an electronic device or process that:

3 (A) Allows a notary public and a remotely located individual to communicate with each
4 other simultaneously by sight and sound; and

5 (B) When necessary and consistent with other applicable law, facilitates communication
6 with a remotely located individual who has a vision, hearing, or speech impairment.

7 (2) “Foreign state” means a jurisdiction other than the United States, a state, or a federally
8 recognized Indian tribe.

9 (3) “Identity proofing” means a process or service by which a third person provides a notary
10 public with a means to verify the identity of a remotely located individual by a review of personal
11 information from public or private data sources.

12 (4) “Outside the United States” means a location outside the geographic boundaries of the
13 United States, Puerto Rico, the United States Virgin Islands, and any territory, insular possession,
14 or other location subject to the jurisdiction of the United States.

15 (5) “Remotely located individual” means an individual who is not in the physical presence
16 of the notary public who performs a notarial act under subsection (c) of this section.

17 (b) A remotely located individual may comply with the provisions of this section by using
18 communication technology to appear before a notary public.

19 (c) A notary public located in this state may perform a notarial act using communication
20 technology for a remotely located individual if:

21 (1) The notary public:

22 (A) Has personal knowledge of the identity of the individual;

23 (B) Has satisfactory evidence of the identity of the remotely located individual by oath or
24 affirmation from a credible witness appearing before the notary public under §39-4-1 et seq. of
25 this code; or

26 (C) Has obtained satisfactory evidence of the identity of the remotely located individual by
27 using at least two different types of identity proofing;

28 (2) The notary public is reasonably able to confirm that a record before the notary public
29 is the same record in which the remotely located individual made a statement or on which the
30 individual executed a signature;

31 (3) The notary public, or a person acting on behalf of the notary public, creates an audio-
32 visual recording of the performance of the notarial act; and

33 (4) For a remotely located individual located outside the United States:

34 (A) The notary public is commissioned as an Out-of-State Commissioner pursuant to §39-
35 4A-1 et seq. of this code; and

36 (B) The record:

37 (i) Is to be filed with or relates to a matter before a public official or court, governmental
38 entity, or other entity subject to the jurisdiction of West Virginia; or

39 (ii) Involves property located in or a transaction substantially connected with West Virginia.

40 (d) If a notarial act is performed under this section, the certificate of notarial act required
41 by §39-4-15 of this code and the short-form certificate provided in §39-4-16 of this code must
42 indicate that the notarial act was performed using communication technology.

43 (e) A short-form certificate provided in §39-4-16 of this code for a notarial act subject to
44 this section is sufficient if it:

45 (1) Complies with rules adopted under subdivision (1), subsection (h) of this section; or

46 (2) Is in the form provided in §39-4-16 of this code and contains a statement substantially
47 as follows: “This notarial act involved the use of communication technology”.

48 (f) A notary public, a guardian, conservator, or agent of a notary public, or a personal
49 representative of a deceased notary public shall retain the audio-visual recording created under
50 subdivision (3), subsection (c) of this section or cause the recording to be retained by a repository
51 designated by or on behalf of the person required to retain the recording. Unless a different period
52 is required by rule adopted under subdivision (4), subsection (h) of this section, the recording
53 must be retained for a period of at least five years after the recording is made.

54 (g) Before a notary public performs the notary public’s initial notarial act under this section,
55 the notary public shall notify the Secretary of State that the notary public will be performing notarial
56 acts with respect to remotely located individuals and identify the technologies the notary public
57 intends to use. If the Secretary of State has established standards under subsection (h) of this
58 section for approval of communication technology or identity proofing, the communication
59 technology and identity proofing must conform to the standards.

60 (h) The Secretary of State may adopt legislative rules under the provisions of this section
61 regarding performance of a notarial act. The rules may:

62 (1) Prescribe the means of performing a notarial act involving a remotely located individual
63 using communication technology;

64 (2) Establish standards for communication technology and identity proofing;

65 (3) Establish requirements or procedures to approve providers of communication
66 technology and the process of identity proofing; and

67 (4) Establish standards and a period for the retention of an audio-visual recording created
68 under the provisions of this section.

69 (i) Before adopting, amending, or repealing a legislative rule governing performance of a
70 notarial act with respect to a remotely located individual, the Secretary of State shall consider:

71 (1) The most recent standards regarding the performance of a notarial act with respect to
72 a remotely located individual promulgated by national standard-setting organizations and the
73 recommendations of the National Association of Secretaries of State;

74 (2) Standards, practices, and customs of other jurisdictions that have laws substantially
75 similar to this section; and

76 (3) The views of governmental officials and entities and other interested persons.

77 (j) By allowing its communication technology or identity proofing to facilitate a notarial act
78 for a remotely located individual or by providing storage of the audio-visual recording created
79 under this section, the Secretary of State shall be the provider of the communication technology,
80 identity proofing, or storage as the provider's agent for service of process in any civil action in this
81 state related to the notarial act.

§39-4-38. Remote ink notarial act performed for remotely located individual.

1 (a) A document may be notarized for an individual who is not in the physical presence of
2 the notary public at the time of the notarization if the following requirements are met:

3 (1) The individual and the notary can communicate simultaneously, in real time, by sight
4 and sound using communication technology defined in §39-4-37 of this code;

5 (2) In performing a remote notarization pursuant to the provisions of this section, the notary
6 reasonably identifies the individual at the time of notarization by one or more of the following
7 methods:

8 (A) Personal knowledge of the individual;

9 (B) The individual presents a government-issued, unexpired identification document or
10 record which includes the individual's photograph, name, and signature. Common acceptable
11 forms of identification documents include, but are not limited to, a driver's license, government-
12 issued identification card, or passport;

13 (C) At least two different types of processes or services by which a third person provides
14 a means to verify the identity of the individual through a review of public or private data sources;
15 or

16 (D) Oath or affirmation by a credible witness who:

17 (i) Is in the physical presence of either the notary or the individual; or

18 (ii) Is able to communicate in real time with the notary and the individual by sight and
19 sound through an electronic device or process at the time of the notarization, if the credible
20 witness has personal knowledge of the individual and has been reasonably identified by the notary
21 by a method provided in this section.

22 (b) The notary, either directly or through an agent, shall satisfy the following requirements
23 for generating and retaining a record of a notarization performed pursuant to this section:

24 (1) At the time of the performance of the notarization, the notary or notary's agent shall
25 create an audio and visual recording of the signing and notarization; and

26 (2) The notary or notary's agent shall retain the recording as a notarial record for five years
27 unless otherwise provided by law.

28 (c) When an individual who is physically located outside of the state of West Virginia seeks
29 a remote notarization pursuant to this section, the following additional requirements shall also be
30 met:

31 (1) The notary must be commissioned as an Out-of-State Commissioner pursuant to §39-
32 4A-1 et seq. of this code; and

33 (2) The record being notarized must:

34 (A) Be intended for filing or presentation in a matter before a court, governmental entity,
35 public official, or other entity subject to the jurisdiction of West Virginia;

36 (B) Involve property located in the territorial jurisdiction of West Virginia or a transaction
37 substantially connected to the state of West Virginia; or

38 (C) Otherwise not be prohibited, by West Virginia law to be notarized outside the state of
39 West Virginia.

40 (d) Once signed by the individual according to the procedures set forth in this section, the
41 individual shall mail or otherwise cause to be delivered the signed original copy of the documents
42 to the notary public for certification and execution with the notary's commission signature and
43 official stamp or seal.

44 (e) The date and time of the notarization shall be the date and time when the notary
45 witnessed the signature being performed via communication technology.

46 (f) Nothing in this section affects the authority of a notary public to refuse to perform a
47 notarial act or requires a notary to perform a notarization remotely:

48 (1) With respect to an electronic record;

49 (2) For an individual not in the physical presence of the notary; or

50 (3) Using a technology that the notary has not selected.

51 (g) The Secretary of State may adopt rules under this section regarding performance of a
52 notarial act. The rules may:

53 (1) Prescribe the means of performing a notarial act involving a remotely located individual
54 using communication technology;

55 (2) Establish standards for communication technology and identity proofing;

56 (3) Establish requirements or procedures to approve providers of communication
57 technology and the process of identity proofing; and

58 (4) Establish standards and a period for the retention of an audio-visual recording created
59 under this section.

60 (h) Before adopting, amending, or repealing a rule governing performance of a notarial act
61 with respect to a remotely located individual, the Secretary of State shall consider:

62 (1) The most recent standards regarding the performance of a notarial act with respect to
63 a remotely located individual promulgated by national standard-setting organizations and the
64 recommendations of the National Association of Secretaries of State;

65 (2) Standards, practices, and customs of other jurisdictions that have laws substantially
66 similar to this section; and

67 (3) The views of governmental officials and entities and other interested persons.

68 (i) By allowing its communication technology or identity proofing to facilitate a notarial act
69 for a remotely located individual or by providing storage of the audio-visual recording created
70 under this section, the Secretary of State shall be the provider of the communication technology,
71 identity proofing, or storage as the provider's agent for service of process in any civil action in this
72 state related to the notarial act.