

Report of the Oregon Law Commission
on
Proposal to Adopt Remote Attestation

Prepared by:
Professor Susan N. Gary
University of Oregon School of Law
Oregon Law Commissioner
Reporter, Probate Modernization Work Group

From the Office of
Director Sandy Weintraub

June 10, 2020

I. Introductory summary

In the face of the Coronavirus-19 (Covid-19) pandemic, the Governor of Oregon ordered Oregonians to shelter at home. People who needed to execute legal documents were unable to meet with lawyers and witnesses in person and, therefore, were unable to execute the documents. The Probate Modernization Work Group took on the task of creating remote witnessing rules to meet this emergency.

II. History of the project

The Probate Modernization Work Group (“Work Group”) was appointed by Oregon Law Commission (“OLC” and “Commission”) in October 2013 to review and recommend changes to the Oregon probate statutes. The Work Group has recommended several bills related to the probate statutes, and the legislature has enacted those bills over several legislative sessions. When the Covid-19 crisis developed, the Work Group was working on another bill related to the probate statutes. The Work Group set its other work aside to work on this emergency legislation.

Work Group members who have participated in this project are: Lane Shetterly, Chair of the Work Group, OLC Commissioner and Attorney; Sandy Weintraub, Director of the Oregon Law Commission; Susan N. Gary, Reporter for the Work Group, OLC Commissioner and Professor at University of Oregon School of Law; Lori Anne Sills, Deputy Legislative Counsel; Cleve Abbe, Lawyers Title of Oregon LLC; Kathy Belcher, Attorney; Judge Claudia Burton, Marion County; Retired Judge Rita Cobb, Washington County; Mark Comstock, Attorney; Shannon Conley, Attorney; Brooks Cooper, Attorney, Judge Matthew J. Donohue, Benton County John Draneas, Attorney; Heather Gilmore, Attorney; Christopher Hamilton, Attorney; Sara Kearsley, Attorney; Rebecca Kueny, Attorney; Bryan Marsh, Probate Coordinator/Attorney: Oregon Judicial Department; Melissa May, Attorney; Gretchen Merrill, Senior Assistant Attorney General: Oregon Department of Justice; Rick Mills, Policy Analyst: Oregon Department of Human Services; Jeff Petty, Clackamas County Probate Coordinator; Bonnie Richardson, Attorney; Matthew Schrupf, Assistant Attorney General: Oregon Department of Justice; Ken Sherman, Attorney; Linda Thomas-Bush, VP & Senior Trust Officer: U.S. Bank; Jennifer Todd, Attorney; Eric Weiland, Attorney; Judge Janelle F. Wipper, Washington County; Amy Zubko, Oregon State Bar.

III. Statement of the problem area and objectives of the proposal

Oregonians need to be able to execute legal documents that must be witnessed. There are circumstances, such as the Covid-19 pandemic and the Governor’s Emergency Orders directing social distancing, in which the signing of a document in the physical presence of a witness or witnesses may not be possible or safe.¹ The proposal seeks to balance need for the execution of legal documents with protection for the person executing the document and for the integrity of the document. The Work Group concluded that as a policy matter, the ability to execute documents safely and

economically outweighs the possibility of fraud. The proposal will permit remote witnessing for many types of legal documents.

IV. Review of legal solutions existing or proposed elsewhere

Due to the pandemic, many states have adopted some version of remote witnessing. The Work Group reviewed actions taken in several other states.

V. The proposal

Witnesses

The proposal provides new rules for the presence requirement for someone witnessing a writing. The term witness is used in the proposal and is defined in ORS 42.030: “A subscribing witness is one who sees a writing executed, or hears it acknowledged, and at the request of the party thereupon signs one’s name as a witness.”

Section 1(1). Electronic Presence

The definition of electronic presence means that if the person signing or acknowledging a writing and the witness are in each other’s electronic presence, they can communicate as if they were together in each other’s physical presence. They must be able to communicate in “real time,” a term that means “the actual time during which something takes place.” MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/real%20time> (last visited May 20, 2020). The term is used in connection with electronic communication to mean that the people communicating do so without a delay in the exchange of information. Communication in real time can be accomplished using electronic tools like Zoom or Skype, in which all participants can see and hear each other. Electronic mail and text or chat functions on a phone do not occur in real time.

In the definition of electronic presence, “to the same extent” includes accommodations for people who are differently-abled. The definition incorporates whatever accommodations would be required for persons in each other’s physical presence. The definition does not provide specific accommodations due to the concern that any attempt at specificity would be too restrictive and to allow the standards to keep current with future advances in technology.

Section 1(2). Presence Includes Electronic Presence

A witness required to be in the presence of a person executing or acknowledging a writing can be in the person’s physical presence or electronic presence.

Section 1(3)-(5). Requirements for Electronic Presence

This subsection provides requirements that must be met if a witness is in the electronic, rather than physical, presence of a person executing or acknowledging a writing. The Work Group concluded that some additional safeguards should be required and wanted the proposed statute to explain the procedure for executing a writing using electronic presence. The goal is protection without undue expense or complication.

If electronic presence is used for the witnessing of a document, the following requirements must be met for a valid attestation:

- The person signing or acknowledging the writing must confirm the identity of the witness;
- The person must deliver the signature page to the witness;
- The witness must sign and return the signature page to the person; and
- Both the person and the witness (or witnesses) must execute a declaration of remote attestation.

The witness must have satisfactory evidence of the witness's identity. Section 1(4) sets out the types of evidence of identity that will be satisfactory. That subsection tracks ORS 194.240, the requirement for the identification of an individual for purposes of notarial acts. During the Covid-19 crisis people have been unable to renew their driver's licenses, a common form of identification. It is useful, therefore, that the requirements allow the person confirming the identity of the witness to rely on a form of identification that has expired no more than three years before the date the witness signs the writing.

After the person signs or acknowledges the writing, the person must deliver a copy of the executed signature page to the witness, using either facsimile or electronic mail. The Work Group discussed whether the person should be required to send the entire writing to the witness. The Work Group concluded that sending only the signature page was sufficient, for two reasons. First, in a physical presence situation, a witness may not have access to the contents of a writing being executed; the witness simply attests that the signer has signed or acknowledged the writing. If the person executing the writing were required to send the witness the entire writing, the witness would then be able to see the contents. This difference from the usual rules for witnesses did not seem appropriate. Second, if the writing being executed is long, the process of transmitting the writing may be unduly burdensome for a person signing a writing at home and not in an office.

Although the person signing the writing must deliver it to the witness "while in the electronic presence of the witness," the person will be considered in the witness's presence even if the person must step out of view momentarily in order to send the writing by fax or an email.

The witness must then sign the copy of the signature page and return the copy to the person who had signed it, by facsimile or email, taking both actions in the electronic presence of the person and while located within the U.S. (As with the person signing the writing, the witness will be considered in the person's presence even if the witness must step out of view momentarily to send the writing by fax or email.) With electronic presence a witness could be located anywhere in the world. The Work Group worried that use of witnesses located in other countries could create concerns about document validity and could create difficulties if someone contesting the writing needed to locate a witness. To avoid difficulties involved with using a witness located in another country, the proposal requires the witness to be in the U.S.

Both the person executing the writing and the witness must create declarations of electronic presence under penalty of perjury. These declarations may be completed at the time the writing is executed or at a later time. The Work Group did not want to impose a timeframe for the declarations, because doing so could result in invalid documents if the person signing or the witness did not complete a declaration on time. The writing is not effective until the declarations are completed, so there is a benefit to completing the declarations quickly, and a best practice would be to do so at the time the writing is signed.

Section 1(5) provides forms for the two declarations, although a declaration need only be in substantially the form in the proposal. The declarations are statements that each person was in the electronic presence of the other at the time the writing was executed. The form for the declaration of the witness is a declaration for only one witness, and many writings will require only one witness. If a writing requires more than one witness, the names of all witnesses can be added to the declaration or each witness can sign a separate declaration.

Section 1(6). Counterparts

A writing using electronic presence for a witness or witnesses may be executed in counterparts.

Section 1(7). Writings to which the Proposal Applies

With a few exceptions specifically identified in the proposal, the proposal applies to any writing that must be executed or acknowledged in the presence of a witness, including the following documents:

- A consent for autopsy pursuant to ORS 97.082;
- A written instrument concerning the disposition of remains pursuant to ORS 97.130;
- A record of, revocation of or refusal to make, an anatomical gift pursuant to ORS 97.957, 97.959 or 97.961;
- An advance directive or form appointing health care representative pursuant to ORS 127.515;
- A declaration for mental health treatment pursuant to ORS 127.736;
- A request for medication under ORS 127.800 to 127.897;
- A consent to enrollment in the medical health database pursuant to ORS 181A.285;
- A written statement designating an authorized representative, as defined in ORS 432.005;
- A voluntary acknowledgment of paternity pursuant to ORS 432.098;
- Documentation of the transfer of a recorded brand pursuant to ORS 604.041 (1); and
- A consent to a life settlement contract pursuant to ORS 744.364.

Section 1(7)(b) lists three exceptions to the application of these rules on remote witnessing:

- A notarial act;
- The execution of a will; and
- The witnessing of signatures collected in connection with the circulation of a petition.

Notarial acts are governed by other law and present complications in connection with actions taken remotely. A different proposal recommends that the Legislature adopt a process for remote online notarization, and that process, if adopted, will apply to notarial acts.

The Work Group concluded that wills should not be covered by the remote attestation legislation. A number of concerns were raised in connection with the use of remote attestation for wills. Undue influence of a testator is a concern in connection with wills, and several members of the Work Group worried that relaxing the execution requirements associated with wills could lead to abuse. In addition, a will might be executed long before the testator died, and a court might need to determine the validity of a will under a temporary statute that had not been in force for many years.

Section 1(8). Proposal Does Not Affect Existing Wills Law

A process already exists that allows a court to treat a will as if it had been validly executed, even if it did not meet the required will formalities. ORS 112.238. That process, known colloquially as harmless error, requires a court to determine by clear and convincing evidence that a testator intended a writing to be the testator's will. If a testator signs a will and asks witnesses to sign the will remotely, a court could later agree to admit the will to probate based on evidence that the testator intended the writing to be a will. The reasons for the remote attestation (such as Covid-19 and the difficulty of having everyone execute the writing in the same place) can be shown as additional proof of why the will was executed without everyone present. Some members of the Work Group described a process they have used, with documentation of how the will execution took place, the reasons for doing it that way, and the ways in which the process used protected the testator. With that information presented, presumably a court would be willing to treat the will as if it had been validly executed.

The disadvantages of relying on harmless error for a will attested by a witness who is electronically present are that a court determination will be required and that courts may not apply the harmless error process consistently. Given the difficulties faced by testators during the Covid-19 crisis, the Work Group hopes that probate judges will approve wills executed with witnesses present electronically, if the evidence is sufficient to allay any concerns of misfeasance.

The harmless error statute applies only to wills and is not available for other writings that need to be witnessed. Thus, the Work Group concluded that wills could be excluded from the proposed statute, but that the proposed statute is needed for other types of documents.

Section 2. Repealer

The statutory change in this proposal is necessary to help people cope with the Covid-19 crisis. The Work Group thinks that there are good policy reasons to extend the use of remote witnesses beyond the current crisis. (Even beyond the circumstances of the current crisis, there are situations related to health, disability or lack of transportation in remote settings, for instance, in which it may not be convenient or feasible to gather witnesses together with a person signing a writing.) The legislature will have the opportunity to consider this proposal again, in the Legislature's regular 2021 session, and can decide then whether to make the changes permanent. The changes in this proposal will be repealed on June 30, 2021, to give the Legislature time to consider whether to make the changes permanent. If the changes are made permanent, then in order to avoid a gap in these rules, the Legislature would have to use an emergency clause to make the re-enacted provisions effective July 1, 2021. If the Legislature does not include an emergency clause, a reenacted bill will be effective January 1, 2022.
