



National Association of Estate Planners & Councils
1120 Chester Avenue - Suite 470, Cleveland, Ohio 44114

May 20, 2020

Dear Estate Planning Council Leaders, Members, and Friends:

We have all seen the effects of the COVID-19 pandemic on our clients, not only among laypersons, but also among first responders, physicians, nurses and other healthcare workers. As the number of people who have the virus increases, the death toll does, as well. It is more important than ever to have estate planning documents – wills, trusts, durable powers of attorney, healthcare proxies, change beneficiary forms, deeds, etc. – in place.

In most jurisdictions there is a requirement that certain estate planning documents be witnessed and/or notarized. For those documents, witnesses and a notary public must be ‘in person’, and often in the same room as the signer. This requirement puts the health of those participating in the signing process in peril and often caused estate planning document execution to be needlessly delayed.

In the interest of the safety for our members and clients, NAEPC is committed to supporting remote execution of estate planning documents. This packet includes basic talking points that you and your council’s members may find helpful as we push to get emergency measures in place, and hopefully made permanent. You may want to use these talking points to further the efforts in your own state.

Following the talking points, we have included a sample checklist/agenda for a virtual web signing meeting prepared by Martin M. Shenkman, CPA/PFS, MBA, JD, AEP® (Distinguished). While we cannot say it is necessarily compliant in your particular jurisdiction, you might find it helpful in giving you some general guidance.

We welcome your thoughts, comments, and additions to the COVID-19 Resource Library found on our website. Please share them with our national office via email to admin@naepc.org or 866-226-2224.

With wishes for good health,

John P. “Jack” Garniewski, Jr., CPA/PFS, CFP®, AEP®
2020 President

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TALKING POINTS

1. In many jurisdictions, wills and healthcare proxies require two witnesses. Trusts and deeds and change beneficiary forms often require a notary, as do durable powers of attorney. Caregiver authorization affidavits require a notary.
2. Some people who want to update their estate plans cannot be physically present with other people in the same room because of quarantine or isolation restrictions, or they may be in intensive care units or significantly incapacitated to the extent that is difficult if not impossible to have others physically present for the signing of documents. Even where it is possible for people to sign in person using social distancing, this practice is dangerous for everyone who participates.
3. Execution of estate planning documents is becoming extremely difficult, if not impossible, without risking exposure to communicable diseases - either because the person signing the documents has such a disease or because the persons witnessing or notarizing has it.
4. In order to solve the problem of how to safely execute estate planning documents, it is being encouraged that videoconferencing be permitted in place of in-person meetings when witnessing and notarizing estate planning documents.
5. Those who are sick, those who are working to heal the sick and frail elders would all benefit from this as they would be able to have the documents notarized remotely, without further endangering their lives, the lives of witnesses, and the life of the notary.
6. This would support social distancing and permit attorneys, accountants, financial advisors, insurance agents and others under quarantine to continue to help clients similarly situated.
7. If estate planning documents cannot be updated due to the in-person witness and notary requirements, probate courts could be overwhelmed with clients who died without a will to express their intentions, wills of questionable validity, and proceedings regarding minors where the parents could not properly execute guardianship documents.
8. This vital function must be provided with a workaround, and there is the technology available to fulfill the need.

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9. Moreover, the lesson learned from the pandemic is that the public needs a way to create a will electronically and to allow you to have your will signed, witnessed, and notarized online. Currently, you are required to execute your documents face-to-face, which has created major challenges for people observing the stay at home orders caused by the pandemic.
10. E-wills legislation already exists in Indiana, Arizona, Nevada, and Florida.
11. Lawmakers should be encouraged to allow a testator to execute a will electronically and remotely, and giving electronic estate planning documents the same legal effect as physical estate planning documents.
12. Witnesses and notary requirements for wills can be met by having witnesses/notaries attend the signing session contemporaneously through live, audio-visual communication.
13. The current law on witness requirements would not change, with the exception that the witness could verify remotely during the time of the signing via real-time audio-video conferencing, thereby protecting the integrity of the signing process.
14. The laws should also give recognition of electronic wills executed under the laws of other states and allow someone domiciled in one state to execute a will electronically in a different state.
15. Remote signing and use of electronic wills should lower the cost of creating an estate plan for many citizens.
16. It would remove accessibility hurdles for those wishing to create wills, such as the elderly in nursing homes, the disabled, or military servicemen and women serving abroad.
17. It would allow someone who cannot be in the presence of a notary for health reasons to still be able to achieve their objectives by executing their estate plan via the Internet.
18. It would allow people who may have difficulty assembling disinterested witnesses to still be able to validly execute an estate plan (e.g. people in rural or hard to reach areas).
19. It only makes sense for the legal system to become more electronic-friendly as technology advances and access to resources grows, and given that we utilize the Internet for virtually all aspects of our lives.
20. Finally, the likelihood of fraud is reduced because the entire execution session is recorded on video.

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SAMPLE CHECKLIST/AGENDA FOR VIRTUAL WEB SIGNING MEETING

1. Email the documents to the client using software that can confirm the client received and downloaded the document, including the date and time of each.
2. E-SIGN: if the documents are to be electronically signed, set up the documents for electronic signature and use that software to send the documents to the client.
3. Set up a web meeting with the client, witnesses, and if valid, a notary. All participants should be advised that the meeting will be recorded, and it will be required that participants all be visible on web camera. Include instructions on purchasing web cameras before the signing meeting if the client's computer does not already have a camera, and offer to assist with operating web cameras. Counsel should confirm the date, time and counsel's location and who is attending the web signing.
4. Once the web meeting begins, each person, client, witness, notary if any, and counsel should identify themselves and that they are aware that the signing is being recorded.
5. Establish on the recorded web meeting how the client received the documents (e.g. via ShareFile on a date stated) or via regular mail received on a date stated. If mailed have the client show the envelope with the documents to the camera.
6. Have the client confirm that the documents were received, read/reviewed and understood between the time of receipt and the web conference signing, and that no changes were made to the documents being signed from those sent.
7. Have the client state the address where they are physically located during the signing. Have the client use the laptop web camera to shoot a picture outside of a window to facilitate corroborating the location, in case it is ever questioned.
8. Have the client state who is in the room during the signing. Have the client use the web camera to pan the room to confirm the accuracy of who is present, if anyone. If anyone enters the room of any participant during the signing, that participants web camera should be panned to show that individual, and have the person identify themselves. However, it may be preferable that no one should enter or leave the testator's room during the course of the signing.

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9. The client should show a driver's license and second form of picture identification to the web camera to confirm the client's identity. Ideally, use government issued ID with signatures and pictures. This identification should be held up in such a way that a later viewing of the recording will allow the identification to be clearly read and understood.
10. Counsel may choose to ask additional questions to corroborate on the recording that the client knows the object of the client's bounty, the nature of the client's assets, and what in general terms the documents to be signed provide for.
11. The client can initial and sign whatever pages are required of each document as counsel directs. After each page is initialed or signed the client should show each page to the web camera. If, at a later date, there is any question over what was signed by the client each page will appear on camera for proof.
12. E-SIGN: If instead of wet signing in pen the client is electronically signing the documents the steps of that process can be narrated. The web conference might also switch the "presenter" of the web meeting from the attorney to the client so that the client's computer screen can be recorded during the actual signing. Consider continuing the recording until counsel receives back the electronically signed documents. Download and save both the e-signed documents as well as the certificate of signing that indicates the date and time of signing and other critical data. Any certificate received from the E-Signature service can then be corroborated with the date and time of the recording of the web meeting.
13. The witnesses, and if deemed appropriate, the notary, can sign affidavits of witnessing and notarizing the document. This might be done also during the course of the web meeting signing ceremony so that all is recorded. Each can show their affidavit to the camera. Thus, the witnessing, and perhaps notarization is completed, and affidavits signed, contemporaneously with the document signing.
14. The web signing meeting recording should be saved and also transcribed.
15. Each witness, notary if applicable, and perhaps even the client/ signer might sign a second affidavit indicating that they reviewed the transcript of the web signing meeting and that, other than typographical errors, it is a true recordation of the events that occurred.
16. The client/signer should transmit documents to counsel who can then collect all original affidavits from counsel, the notary if applicable and the other witnesses if any and combine them into a single document. That compilation should include the transcription and signing of an affidavit affirming that as well, signed after it is provided.

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17. E-SIGN: If the documents were signed electronically the certificate from the electronic signature software should be included in the document compilation.
18. The attorney should store and save the recording according to any ethical requires of the applicable state bar for handling of client documents, including protection from outside interference (hacking) and storage in multiple locations to facilitate retrieval in the event of technological failure.

Reference to a specific product, process, or service within this document or the COVID-19 Resource Library does not constitute an endorsement or recommendation by NAEPC. NAEPC assumes no legal liability or responsibility for the accuracy, completeness, or usefulness of any information, product, process, or service offered within this packet or the association's resource library.

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