

# Core Estate Planning Documents During COVID

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# Core Estate Planning Documents During COVID

By: Martin M. Shenkman, Esq.,  
Jonathan G. Blattmachr, Esq. and  
Abigail E. O'Connor, Esq.

  
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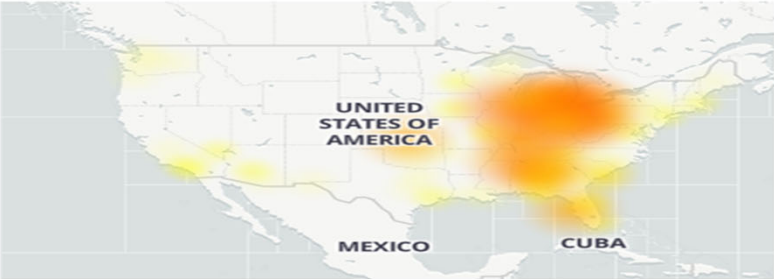
  
*InterActive Legal*



**A KEY ESTATE  
PLANNING GUIDE**

**Law Easy**

# Internet Issues – We’re Trying: Fewer Panelists, Pre-Recording and Off-Hour Times

INFORMATION	WOW ISP Related Issues
WHO:	This message is being sent to all firms and may apply to certain firms routing internet traffic through the primarily the Midwest & Southeast.
WHAT:	WOW ISP reporting issues
MORE INFO:	<p>We are receiving reports of some users showing latency and connection issues. When tracing those connections it appears that the common cause is internet traffic being routed through the WOW ISP provider.</p> <p>This is a heat map for reported issue with WOW ISP Provider</p>  <p>The heat map shows a concentration of high latency and connection issues in the Midwest and Southeast regions of the United States. The map is labeled with 'UNITED STATES OF AMERICA', 'MEXICO', and 'CUBA'.</p> <p><a href="https://downdetector.com/status/wow/map/">https://downdetector.com/status/wow/map/</a></p>
WHAT TO EXPECT	Generally speaking, ISP providers are responsive to solving these issues including those providers that may utilize other ISP services for certain routing. If you are having issues related to WOW they will persist until the ISP’s resolve the issues or reroute traffic.
QUESTIONS?	Please contact <a href="mailto:admin@procirrus.com">admin@procirrus.com</a> with any questions.

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- InterActive Legal
  - Vanessa Kanaga
  - (321) 252-0100
  - [sales@interactivelegal.com](mailto:sales@interactivelegal.com)



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- Peak Trust Company
  - Nichole King
  - Phone: 702.462.6677
  - Toll Free: 844.391.2789
  - [NKing@peaktrust.com](mailto:NKing@peaktrust.com)





Jane Ransom, Executive Director  
[jransom@americanbrainfoundation.org](mailto:jransom@americanbrainfoundation.org)

[AmericanBrainFoundation.org](http://AmericanBrainFoundation.org)

# **Core Estate Planning Documents During COVID**

**Introduction**



# Introduction – Helping Clients Update Estate and Related Planning During COVID

- We are living in difficult times: stock market declines, economic turmoil (according to many a recession), the strain of quarantine, and mostly the worries and health challenges of coronavirus.
- What steps can advisers help clients take to make this difficult time easier from the financial and legal perspective?
- What legal documents should your clients have? What changes generally might we advise clients to consider? How might estate planning documents be different now? How do we navigate through social distancing requirements and shelter-in-place mandates?
- While the answers will vary to address each person's unique circumstances, and the laws vary by state, this program will provide you with ideas to guide clients.
- A sample client communication to adapt based circumstances that practitioners might use to communicate with clients is provided.

# Does the Client Have Core Documents? Do they Suffice?

- The key documents that every client should have in place are obvious to practitioners, as is the need to assure that these documents are current. But there are several unique nuances to consider now.
- It's ever more important during these trying times that everyone have critical documents that meet their needs.
- The first step is to make sure clients have necessary documents. If not, practitioners should assist completing them as quickly as possible.
- If the client has existing documents, review them and confirm that they are adequate generally and also address the unique aspects of COVID-19.
- Given the need for social distancing, and in particular, for those with underlying health conditions, if the documents do suffice you may recommend to the client to defer changes to a later date.
- To build client goodwill, some advisors may be willing to discuss the status of current documents as a courtesy to help clients determine whether or not immediate changes are necessary.

# **Core Estate Planning Documents During COVID**

**Estate Planning  
Documents  
Generally**

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# Estate Planning Documents

- Practitioners are well aware that all estate planning documents should be periodically reviewed with clients to determine if updates are necessary. Certainly the fear and risks of COVID-19 make now a time that should be done. While practitioners know the common points to consider in such a review, the following slides and discussions will provide a summary of those points that hopefully will be a helpful reminder.
- Moreover, in the current COVID-19 environment there are unique considerations for each of the core documents that practitioners should discuss with clients and that might require urgent update.
- If your client has elderly parents or other loved ones, those relatives also may need immediate advice. Whether you assist those other family members or merely encourage your clients to get their parents/relatives back to their own lawyer, it could be helpful.
- Clients with college-age children need to make sure those children (legally adults) have at least a health care proxy and power of attorney.

# **Core Estate Planning Documents During COVID**

**Create an  
Emergency  
Envelope**



# Create an Emergency Envelope - 1

- Make sure your client has physical copies of key legal documents and other critical information prepared and available for an emergency.
- Recommend that clients consider creating an envelope with copies of critical documents, such as a copy of their health care proxy, HIPAA release, and living will, to take with them should they have to go to the hospital.
- The emergency envelope should have critical information:
  - Emergency contact (in case of an emergency - “ICE”) name, phone number and email.
  - Detailed list of all known medical conditions.
  - Detailed list of all medications.
  - Detailed list of all vitamins and supplements
  - Health insurance information

# Create an Emergency Envelope - 2

- Ideally, copies of all client documents should be saved in an online cloud portal that loved ones can access. Further, that portal should be accessible by a smart phone app so the client can retrieve documents anywhere, e.g., in a hospital if they don't have their emergency envelope.
- As all practitioners know, all original client documents, especially their will, should be safeguarded in a fireproof secure location either at with one of their advisers or their home. Clients should also be certain that family or loved ones are informed of where that location is and how to access the originals. Now is a good time to remind client to make sure those originals have not been misplaced.

# **Core Estate Planning Documents During COVID**

**Beneficiary  
Designations**

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# Beneficiary Designations

- Review beneficiary designations that can be change online to coordinate with the plan.
- You as the adviser can do a web meeting with the client and turn control of the screen over to the client, have the client share their screen with you, and you can discuss what selections to make to guide the client through the process. Alternatively, you can use a product like logmein to control the client's computer through the process.
- Consider the impact of the SECURE Act and changes that might be advisable, e.g. naming an accumulation trust as beneficiary. If advisable, that may require an update to the will or trust.

# **Core Estate Planning Documents During COVID**

**Power of Attorney**



# Power of Attorney - 1

- As every practitioner is aware, a power of attorney is a legal document in which your client names a person, called an agent, to handle legal, tax, financial and other matters if the client cannot do so. Having a power of attorney in place now may be particularly important so that an agent can transact business for a client who might fall ill to COVID, or merely to help a well client avoid unnecessarily having to go to a bank or other business location.
- If your client has an existing document, adviser might typically review with the client:
  - Who they named as agent and successor agent. Are these still people that the client can rely on? Does the agent know that they have been named? Some clients name close friends or family who live at a distance. But in this difficult time, it may be best to have somebody local who can help the client address specific matters.

# Power of Attorney - 2

- Is the document so old that banks or others might be concerned about its validity?
- What gift provisions are provided for?
- Does the agent have authority to change beneficiary designations, e.g. to deal with decision making post-Secure Act?
- In “normal” times advisers might review with the client/principal the detailed powers given to the agent to determine if they should be restricted or perhaps made broader. Advisers may consider gift, tax and other provisions in these documents. While that still may be the ideal you should differentiate optimal provisions and documents from what might suffice to help your client for the time being. If important issues are identified, e.g. no or insufficient gifting power, it might be worth discussing with the client whether that issue should be addressed now by drafting and signing a new document, drafting a new document and signing when in-person meetings might again be feasible, etc.

# Power of Attorney - 3

- Considerations new to the COVID situation:
  - Many powers of attorney are “springing” powers that become effective only if your client becomes incapacitated and cannot manage their affairs. If the document says your agent cannot act until the principal is incapacitated, you might want to counsel the client to change that immediately to a new power of attorney that lets the agent act immediately (i.e. not contingent on the principal being disabled) so that the agent can help you today. The restriction of only being effective when you are disabled might make your form useless in the current environment.
  - Another consideration has been brought to the fore by the current unique and difficult coronavirus experience. If you’re preparing a new document consider permitting the agent to communicate decisions via email, electronically signed documents, and perhaps even via Skype, FaceTime and similar services. It is not clear that banks or other providers will accept this, but it might nonetheless be worth considering. You might also hold banks and other third parties harmless for relying on such electronic communications to encourage them to be more accepting.

# **Core Estate Planning Documents During COVID**

**Living Wills/DNRs**



# Living Wills/DNRs - 1

- As practitioners know, this is a document in which you express healthcare wishes. This may include desires for medical treatment under different circumstances, end of life wishes, the desire for organ and tissue donations for medical research, for example research on PD, and so forth.
- Practitioners might review with clients whether an existing living will reflects the client's current wishes and what the client wants to communicate:
  - Who they named as agent and successor agent. Are these still people that the client can rely on? Does the agent know he/she has been named? Some clients name close friends or family who live at a distance. But in this difficult time, it may be best to have somebody local who can help the client address specific matters. Some clients name the same people they selected as financial agents without considering the differing roles.

# Living Wills/DNRs - 2

- Have client religious considerations been addressed?
- Have funeral and burial/internment decisions been communicated? If so, do they reflect what the client currently wishes?
- In “normal” times advisers might review with the client the detailed provisions in this document (as well as the health proxy and HIPAA release). While that still may be the ideal practitioners should differentiate optimal provisions and documents from what might suffice to help your client for the time being during the COVID-19 challenges. If important issues are identified, discuss with the client whether that issue should be addressed now by drafting and signing a new document, drafting a new document and signing when in-person meetings might again be feasible, etc.

# Living Wills/DNRs - 3

- One of the issues for practitioners to be particular focused on in the current COVID-19 environment is whether documents expressly prohibit intubation. During the current coronavirus tragedy, intubation may be necessary for the client to survive a bout with the virus. This should be distinguished from a statement that the client may not want intubation if in a persistent vegetative state or terminally ill with a short time to live.
- Review the language in existing health care related documents generally. Too often when clients sign these documents, they view the issues as theoretical and do not always put the thought into some of the provisions that might be advisable. Those theoretical provisions may now be real due to COVID-19. Specially help them address what their living will or DNR says about intubation. Intubation is the process of inserting an endotracheal tube into the trachea to secure an airway and breathe for the patient (i.e., provide oxygen to the patient). The machine used to do this is a ventilator, which is also referred to as a breathing machine, or a respirator. Because of the nature of coronavirus, this may be essential to treat the patient/client for coronavirus.

# Living Wills/DNRs - 4

- Many standard documents and forms include an absolute prohibition of intubation and could prove to be a death sentence if you or a loved one contracts coronavirus. Think about it. There is a shortage of ventilators. If your client is hospitalized and the medical facility has to make decisions which patients get to use the limited number of available ventilators, if the living will mandates not to be put on a ventilator, why would your client be allocated a scarce respirator? Review client documents and revise it if necessary.
- Another COVID-19 consideration may pertain to whether experimental medical treatments should be permitted? This might be critical to survival. For example, Remdesivir at the date of this outline is totally experimental. Many clients might wish to reconsider expressly permitting experimental treatments.

# Sample Addendum to Health Care Documents - 1

- **SUPPLEMENT TO ADVANCE HEALTH CARE DIRECTIVE DUE TO COVID-19**
- This document is a supplement to the Advance Health Care Directive that I signed on [Date] (my “AHCD”). The purpose of this supplemental document is to express my specific wishes in the event that I am diagnosed with COVID-19 or exhibit symptoms of COVID-19 that suggest testing for the virus is appropriate. I intend for this supplement document to be treated as an Advance Health Care Directive under Alaska Statute 13.52.300.
- NOTWITHSTANDING any directions, instructions, wishes, choices, or intentions expressed to the contrary in my AHCD:
- If I exhibit any symptoms that suggest I may be afflicted with COVID-19, I wish to be tested for such virus and consent to any means of testing that are available.
- If I am diagnosed with COVID-19, I consent to being quarantined in a hospital; however I prefer to be quarantined in my own home if at all possible.
- I consent to my [agent],[spouse],[children],[parents],[\_\_\_\_\_] to visit me in any way possible and communicate with me by whatever means possible during any period of quarantine due to COVID-19. I wish to remain in contact with the above-described individuals to the extent possible.

# Sample Addendum to Health Care Documents - 2

- If intubation, artificial ventilation, or any other medical aids or devices may provide assistance to me while diagnosed with COVID-19, I expressly wish and consent to the administration of those aids. Any “end of life” decisions that I have previously made indicating a wish to withhold life-sustaining measures do not apply while I am afflicted or diagnosed with COVID-19. I intend to be kept alive by all means possible if I am afflicted or diagnosed with COVID-19.
- I expressly consent to any medication that may help me recover from COVID-19, including any medication that is considered experimental. I give my agent authority to sign all documentation, including waivers, indemnification agreements, and “hold harmless” agreements, that may be required for me to receive such medication.
- I consent to participate in any trials being conducted for treatment of COVID-19 and give my agent the authority to sign any documentation regarding such trial.
- I give consent for my agent to communicate with all health care providers in person, by phone, by video or other electronic communication, and to send, receive, and view any documents or health information electronically.
- If there is any conflict between a provision in my AHCD and a provision in this supplemental document, the provision in this supplemental document will apply.

# Sample Addendum to Health Care Documents - 3

- I give my agent the authority to consent on my behalf to any additional precautionary measures, treatments, communications, provisions, routines, arrangements, or other matters that may be beneficial to me due to COVID-19. I intend for the preceding sentence to be interpreted as broadly as possible, knowing that all matters regarding COVID-19 are rapidly changing and developing any likely will further change after I sign this supplemental document.
- [If I am unable to comply with state law regarding the execution of Advance Health Care Directives due to shelter-in-place mandates or because I am in quarantine or my concern for my health and safety precludes compliance with such formalities, I ask my health care providers and any court of competent jurisdiction to give this document the same force and effect as if it had been signed in compliance with state law.]
- Dated: \_\_\_\_\_  
\_\_\_\_\_  
[PRINCIPAL NAME]
- Notary form here

# **Core Estate Planning Documents During COVID**

**Health Care  
Proxies and HIPAA  
Releases**

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# Health Care Proxies and HIPAA Releases - 1

- As practitioners know, a health care proxy, or medical power of attorney, is a document in which your client names an agent to assist if the client is unable to act for themselves. The health care proxy designates an agent to make medical decisions. A HIPAA release authorizes a named agent to access private health information and communicate with medical providers, but not make medical decisions for the client. The review of these documents, as well as the issues that affect these two documents, are similar.
- Be certain that the client have a signed documents and that they named people as agents, and successors, are able and willing to assist. If for example the client named a family member who lives a thousand miles away it may be preferable to have somebody closer by, certainly through the current COVID-19 circumstances.

# Health Care Proxies and HIPAA Releases - 2

- There is an important change to these documents that should be considered. Typically, when an agent made medical decisions, they would be in the hospital speaking to the client's care providers and perhaps signing documents. With COVID-19 being so contagious, and many hospitals overwhelmed, this is not practical. Consider instead modifying your documents to expressly authorize electronic communication of decisions by the agent.
- Sample Clause: ***"I expressly authorize my Agent to communicate decisions to any medical provider verbally, in person, by telephone, via email, via web conference including but not limited such services as Skype, FaceTime, or in any other manner appropriate to the circumstances. Further, I expressly hold harmless any medical provider for relying on such communications of decisions and directions by my Agent. The express purpose of this provision is to foster decision making by my Agent in remote or indirect manners that may be necessary or advisable given whatever circumstances accompany such decision making."***

# **Core Estate Planning Documents During COVID**

**Will and Revocable  
Trust**

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# Will and Revocable Trust - 1

- As all practitioners know, a will is essential to name guardians if your client has minor children and provide for how assets will be distributed.
- In the current environment, and perhaps for the future, relying on a “pour-over will” and revocable trust rather than simply a will might become the default approach to documentation.
- As practitioners know, a pour over will pours or transfers assets on the testator’s death, from the estate, into a revocable trust that would then provide for the client’s dispositive plan. With probate courts closed a revocable trust might be a better option. It may also be easier to sign in the current situation.
- During “normal times” a practitioner might review a client’s will with the client to assure:
  - The persons named as executors to administer the estate, and trustees to administer any trusts formed under the will, are people that the client still feels confident in naming.
  - That the dispositive scheme is in fact what the client wants.
  - Many clients have ignored their documents for so many years or decades that little of what the documents contain is what they presently want.

# Will and Revocable Trust - 2

- At the present time practitioners should endeavor to help clients identify whether the old existing will has the basic structure, provisions and people named that are generally consistent with the client's wishes. If it is, practitioners might advise clients to defer addressing correcting more minor issues until the current crisis has concluded, or perhaps drafting new documents now to be signed when it is safe for the client to meet with counsel to sign the documents, or to take other steps.
- If your client feels an urgency and importance to change their will, and perhaps replace it with a pour over will and revocable trust. Consider how as the attorney you can guide the client to validly sign a will, and whether remote or electronic signing will work in your state. Many states have passed emergency actions to permit some remote signing, witnessing and even notarization. The rules, discussed below, vary significantly from state to state, and in some cases will not suffice to practically get a document signed. Some states permit a "holographic will." But the rules vary by state and handwriting a will has to be done with great caution as your handwritten document won't practically be able to include many of the standard provisions that even a simple online form might include.

# **Core Estate Planning Documents During COVID**

**How to Sign  
Documents?**



# How Might Documents be Signed?

- A critical issue for anyone signing any estate planning documents is what has to be done to validly sign those documents.
- This is a complex question and the rules are changing frequently. Each state has different rules determining what is required for a document to be valid.
- Many states have adopted emergency legislation, or orders by Governors, to relax some of these requirements. The temporary rules vary widely by state and many are only effective while a coronavirus emergency is in force. The ACTEC website has a list of current emergency orders by state.
- A will might be the most stringent and require a notary and witness to sign the document in your presence, and that might preclude remote notarization or witnessing using e-signatures and web meetings like Zoom, GoToMeeting or WebEx.
- Practitioners have to be careful navigating this new and changing landscape, while still endeavoring to help clients.
- Consider whether a trust protector action could modify a trust to eliminate a requirement that another action be notarized.

# Electronic Wills

- Will Executions (e.g., cannot travel or enter the facility where the testator resides).
- Uniform Electronic Will Act.
- Uniform Probate Code Section 2-502.
- Line of Sight v. Physical Presence.
- Telephone communication v. Skype/Zoom presence.
- Through a “looking glass” – the living window signing.
- Federal proposal: Mike [Sorohan-msorohan@mba.org](mailto:Sorohan-msorohan@mba.org), “Sens. Cramer, Warner Introduce Federal Remote Online Notarizations Bill March 19, 2020” See: <https://newslink.mba.org/mba-newslinks/2020/march/sens-cramer-warner-introduce-federal-remote-online-notarizations-bill/> - *reconcile with state law issues*

# Sign Through Window via Cell Phone

- Hypothetical: Client with age and health concerns needs to sign a will. Can the lawyer and witnesses stand outside the client's window, talk through the will signing ceremony while the client is visible through the window and can hear, and pass the document through the front door mail slot for signing? Will this suffice to create a valid will but also protect all that is involved?
- Alternatively, what about mailing the documents to the client days before or emailing the documents to the client and he/she can print, so you do not have to handle same documents?

# Holographic Pour Over Will and Revocable Trust in Some States -1

- If your state permits holographic wills (e.g. New Jersey does, Alaska does [AS 13.15.502(b)], New York does in only very limited circumstances that will rarely apply), this may provide an approach to address the difficulties of signing in the current environment.
- For example: A New Jersey Court in Macool stated: "...N.J.S.A. 3B:3-2b, "[a] will that does not comply with [the requirements of N.J.S.A. 3B:3-2a] is valid as a writing intended as a will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting." Stated differently, a so-called holographic will must have all material testamentary provisions in the handwriting of the testator and must also be signed by the testator." In *Re Probate of Will and Codicil of Macool*, 3 A.3d 1258 (N.J. Super. Ct. App. Div. 2010).

# Holographic Pour Over Will and Revocable Trust in Some States -2

- Create a holograph will sample for the client to handwrite. See following slides.
- Create a revocable trust. This can be similar to any other revocable trust, however, see the comments elsewhere in this presentation on changes to make to address the current COVID environment.
- Send the sample holographic will and the actual revocable trust to your client. If the client has the ability to print the documents, you can email the documents to the client. Use an email mechanism that permits you to get a receipt confirming that the client has opened and downloaded the documents, e.g. Sharefile. Save that confirmation in your system as a PDF.

# Holographic Pour Over Will and Revocable Trust in Some States -3

- If the client doesn't have the equipment to print mail paper copies of the documents to the client.
- Set up a web meeting to provide instructions on how the client should write their pour-over holographic Will and then sign it.
- Depending on the state law consider how the revocable trust can be witnessed and whether a notary is required and how to do so. In some states, (e.g. Alaska) no witnesses or notary are required. In states that require witnessing and notarization in a manner that cannot be accomplished electronically and is not feasible, considering naming a trustee for the revocable trust, e.g. a trust company in Alaska, and having Alaska law apply. If you can comply with applicable state law for a valid revocable trust (Florida may be difficult), then do so.

# Holographic Pour Over Will and Revocable Trust in Some States-4

- If you require two adult witnesses, consider who may qualify. Will family members qualify to be witnesses? If not, it may be possible for the client to arrange to have neighbors assist using the dueling witness approach.
- Dueling witnessing is a phrase suggesting the historic military duel where each participant may stand 50 paces apart. Here the trustor would stand say 25 feet from two neighbors (who if they are observing social distancing will stand 6 feet apart from each other). The trustor signs the revocable trust and then walks 12 feet and places the document on the lawn in front of him (or hallway if in an apartment) and walks back. The witnesses advance 12 feet, with their own pens, and witness the document and then step back to their starting line. The trustor retrieves the fully signed and witnessed document. All participants wear gloves and masks.
- Consider whether you should re-execute documents when the pandemic wanes. If whatever mode of execution, witnessing and notarization (if applicable) is used does not comply with applicable state law, consider recommending in writing to the client re-execution and confirming that the form of signing used may not suffice.

# Sample Holographic Will - 1

- Copy the entire will below in your own handwriting, in ink, and then sign when and as we instruct you to while we record the signing via webcam.
- **Holographic Will for Client Name**
- Last Will and Testament for Client Name dated Month Day, Year.
- I, Client Name, a resident of City Name, State Name, revoke all prior Wills.
- I declare and publish this document as my Last Will and Testament on this Month Day, Year.
- I appoint Executor Name - 1 as my Personal Representative to serve without bond.
- If Executor Name – 1 is unable or unwilling to serve, I appoint Executor Name - 2 as my successor Personal Representative to serve without bond.
- I appoint Guardian Name - 1 to serve as guardian for the person and property of my minor children.
- If Guardian Name – 1 is unable or unwilling to serve as guardian, I appoint Guardian - 2 to serve as guardian for the person and property of my minor children.

# Sample Holographic Will - 2

- I give and bequeath my entire estate to the trustee of the Client Name Revocable Trust of even date.
- I grant to my Personal Representative all powers under State Name law.
- My Personal Representative shall pay all obligations, expenses, and taxes of my estate as provided by State Name law and the Client Name Revocable Trust.
- My Personal Representative may make tax elections and allocations as provided in the Client Name Revocable Trust of even date.
- The validity and interpretation of this my Will shall be governed by State Name law.
- I intend for this Will to constitute my holographic Will.
- \_\_\_\_\_ Date: Month Day, Year
- Your Name

# Sign via e-Signature on Web Meeting Recorded

- Statutes on lost or stolen wills may provide some guidance.
- The few places electronic wills are permitted the requirements and procedures are stringent. Will those really help in the current environment?
- Consider modifying the notary signed by counsel to reflect an electronic signing:
  - ***State of State Name*** :
  - : ***SS***
  - ***County of County Name*** :
  - ***Subscribed, sworn to and acknowledged before me during a recorded GoToWebinar recorded meeting by Client Name, and subscribed and sworn to before me by the witnesses Jim Smith and Joan Ray, this Month Day, Year.***
- \_\_\_\_\_
- ***Jane Doe***
- ***Attorney at Law, State Name***
- ***Notarized pursuant to [cite applicable law]***

# Modify Self-Proving Affidavit For Web Signing

- Will modifying the affidavit and procedure suffice to make an electronic/remote will valid? What choice might a practitioner have with an at-risk client? What choice is there if there is no access to a hospitalized client?
- Reflect Witnessing by web meeting.
- Modify affidavit in will to say that witnesses observed the signing “in presence of testator via web meeting using GoToMeeting [or the specific service used].” Some might suggest stating that the specific approach was used because the testator had underlying health risks such as diabetes that made the testator at particular risk from COVID-19 which made it too dangerous to sign in an in-person meeting.

# Signing Powers of Attorney & Health Care Documents

- State laws vary signing requirements for powers of attorney and health care documents.
- Significant focus on remote witnessing of wills, sometimes the disability documents have received too little attention but present even more critical issues for client than the will.
- If documents cannot be executed according to state law and there is no emergency law in place:
  - If there are current but old documents in place, will they do?
  - Consider a supplement to the health care documents that address COVID, not executed in compliance with state law but at least have a chance of expressing the client's intent? Client needs to understand implication of document being invalidly executed.
  - Use of properly funded revocable trust will reduce reliance on a power of attorney.
  - If all else fails, consider at least a nomination of guardian.

# The “Drive By” Signing

- “Drive by” signing may be necessary and possible if no other option.
- Client stays in car, witnesses or notary (you) at a safe distance of in another car.
- Visual line of sight and hearing.
- Consider emailing or mailing documents that client signs in advance as discussed in previous slides, and you print your own witness page.
- When everyone is done signing, they take turns depositing signed documents in box.
- 24 hours or days later you then assemble documents.

# **Core Estate Planning Documents During COVID**

**Electronic Signing Checklist – What Technology Permits but the Law May Not**

# Checklist of Steps for Electronically Witnessed Documents – But Will It Work?-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.
- 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.*
- Set up a web meeting with the client, witnesses, and if valid a notary all on web camera. Counsel should confirm the date, time and counsel's location and who is attending the web signing. Each person, client, witness, notary if any, and counsel should identify themselves and that they are aware that the signing is being recorded.
- 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.
- Have the client confirm that the documents were received, read/reviewed and understood from the time of receipt and the web conference signing, and that no changes were made to the documents from those sent.

## Checklist of Steps for Electronically Witnessed Documents – But Will It Work?-2

- 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 if it is ever questions.
- 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.
- 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.
- Counsel may choose to ask additional question 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.
- The client can initial and sign whatever pages 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.

## Checklist of Steps for Electronically Witnessed Documents – But Will It Work?-3

- 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” 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.*
- 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 are completed, and affidavits signed, contemporaneously with the document signing.

## Checklist of Steps for Electronically Witnessed Documents – But Will It Work?-4

- The web signing meeting recording should be saved and also transcribed.
- 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.
- 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.
- *E-SIGN: If the documents were signed electronically the certificate from the electronic signature software should be included in the document compilation.*

# **Core Estate Planning Documents During COVID**

**Selected Laws from  
Selected States**

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# Alaska Emergency Remote Signing - 1

- SENATE BILL NO. 241 IN THE LEGISLATURE OF THE STATE OF ALASKA THIRTY-FIRST LEGISLATURE - SECOND SESSION
- Sec. 25. The uncodified law of the State of Alaska is amended by adding a new section to read:
- WITNESSING OF WILL SIGNING BY VIDEOCONFERENCE.
- (a) Notwithstanding AS 13.12.502, for the duration of the novel coronavirus disease (COVID-19) public health disaster emergency declared by the governor on March 11, 2020, as extended by sec. 2 of this Act, and for 10 days thereafter, a will may be signed or witnessed by
- videoconference by one or more of the witnesses required, if the will contains a statement substantially similar to the following:
- Under penalty of perjury, I assert that I am a member of a group that has been declared by the World Health Organization or the United States Centers for Disease Control and Prevention to be at higher risk for severe illness from novel coronavirus disease (COVID-19), or I have been advised by a health care provider or a state, local, or federal agency that being in the physical presence of others may expose me or others to a health risk related to novel coronavirus disease (COVID-19).

# Alaska Emergency Remote Signing - 2

- (b) Within 60 days after the execution of a will by videoconference under (a) of this section, each person who witnessed the will by videoconference shall sign and attach to the will, or an exact facsimile of the will, a statement substantially similar to the following:
- Under penalty of perjury, I assert that (1) the testator has informed me that the testator is a member of a group that has been declared by the World Health Organization or the United States Centers for Disease Control and Prevention to be at higher risk for severe illness from novel coronavirus disease (COVID-19) or I have been advised by a health care provider or a state, local, or federal agency that being in the physical presence of others may expose me or others to a health risk related to novel coronavirus disease (COVID-19); and (2) I am satisfied that the will to which this statement is attached is either the original will signed by the testator or is an exact facsimile of the original will.
- (c) In this section, "videoconference" means a conference using technology that enables the testator, notary, or the person making the acknowledgment and the person executing the document and witnesses to, while in different locations, simultaneously communicate orally and maintain visual contact.

# Florida Electronic Wills

- Florida law authorizes and provides oversight for the use of Remote Online Notarizations (RON) by Florida notaries public.
- Remote Online Notarizations are possible because of audio-video communication technologies, such as FaceTime and Skype, where two or more people may be able to both see and hear one another in real time using a computer or mobile device, even from different states.
- This also means that a notary public can view the face of the principle signer and any witnesses using audio-video technology while simultaneously reviewing the identification and other credentials of each person.
- <https://www.flsenate.gov/Committees/BillSummaries/2019/html/1960>

# Iowa Temporary Remote Authorization

- Iowa attorneys can now rethink document review and signing ceremonies for clients. See <https://www.kwqc.com/content/news/Iowa-Gov-569012091.html>
- REMOTE NOTARIZATION AND WITNESSING
- SECTION SIXTEEN. Pursuant to Iowa Code § 29C.6(6), I temporarily suspend the personal appearance requirement in Iowa Code § 9B.6, but only to the extent that the notarial act complies with the requirements of section 6 of 2019 Iowa Acts chapter 44 (Senate File 475) and any additional guidance provided by the Iowa Secretary of State regarding approved communication technology.
- SECTION SEVENTEEN. Pursuant to Iowa Code § 29C.6(6) and Iowa Code § 135.144(3), and in conjunction with the Iowa Department of Public Health, I temporarily suspend the regulatory provisions of Iowa Code §§ 144B.3, 633.279, and 633B.105, to the extent that they require the physical presence of a testator, settlor, principal, witness, or other person, if the person is present in a manner in which the witness or other person can see and hear the acts by electronic means, such as video conference, Skype, Facetime, Zoom, or other means, whether or not recorded.
- Acknowledgements to Len Sandler, Clinical Professor of Law, Director, Law and Policy In Action Clinic, University of Iowa College of Law.

# Michigan Law on Signing Estate Planning Documents - 1

- In Michigan, while a will requires two witnesses (unless holographic), statute provides that a writing intended to be a will is to be admitted as a will, even if it doesn't meet the statutory requirements, if it can be proven by clear and convincing evidence that it was intended to be a will.
- 700.2503 Writings intended as wills.
- Although a document or writing added upon a document was not executed in compliance with section 2502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute any of the following:
  - (a) The decedent's will.
  - (b) A partial or complete revocation of the decedent's will.
  - (c) An addition to or an alteration of the decedent's will.
  - (d) A partial or complete revival of the decedent's formerly revoked will or of a formerly revoked portion of the decedent's will.
- This statute has been law since 1998, effective 4/1/2000.

# Michigan Law on Signing Estate Planning Documents - 2

- Some Michigan attorneys have successfully used this statute to admit unsigned documents which looked more like memos of what would go into a will rather than a will itself. [See discussion of New Jersey law below].
- Currently we are drafting wills which provide for two witnesses, but then add an Article to establish the intent required by the statute, in case the client can't get witnesses.
- *“INTENT TO MAKE A WILL. I fully intend to satisfy all of the statutory requirements for a valid Will under the Estates and Protected Individuals Code as enacted in the State of Michigan, MCL Section 700.7502. However, should I fail to satisfy all of the requirements including, for example, the requirement that a Will be witnessed by two (2) witnesses, then I intend that MCL Section 700.2503 shall apply. This instrument shall in such event be treated as if it had been executed in compliance with MCL 700.2502 and this statement shall be taken as clear and convincing evidence that I intended this document to constitute my Will.”*

# Michigan Law on Signing Estate Planning Documents - 3

- In Michigan, a valid trust does not require either witnesses or notary. We draft to include both, but if the client can't get witnesses and/or notary we tell them to just sign.
- The Durable Power of Attorney and Designation of Patient are both required to have two witnesses. That's a problem. If they have a prior document, we sometimes tell them that if there are no major changes, just rely on the old document.
- If any documents are to be recorded in the public records, such as deeds, they must be notarized, so they will have to be done later.
- Other ancillary documents don't legally require either witnesses or notary, i.e., Nomination of Guardian and Conservator, and Appointment of Funeral Representative.
- Acknowledgements to Robert E. Kass, Esq., Detroit, MI.

# New Jersey Case Law Provides A Framework - 1

- NJ case where an unsigned copy of a will was admitted to probate. Estate of Ehrlich 47 A.3d 12 (N.J. Super Ct. App. Div. 2012). The unexecuted copy of Decedent's Will, which had purportedly been executed by the Decedent and sent to his attorney-executor for safe-keeping, sufficiently represented the Decedent's final testamentary intent allowing the document to be admitted to probate as a writing intended as a Will under N.J.S.A. 3B:3-3.
- The trial court appointed a temporary administrator and ordered a thorough search of Decedent's home and law office for any other Wills of Decedent to no avail. The unexecuted copy proffered by Decedent's nephew was a detailed 14-page document entitled "Last Will and Testament," which was prepared by the Decedent and written on traditional legal paper, with Decedent's name and law office address in the margin of each page. The document did not contain the signature of Decedent. It did, however, include a notation in Decedent's handwriting on the cover page, "Original mailed to H.W. Van Scliver, 5/20/2000," an attorney who was the named executor.
- The trial court admitted the unexecuted Will to probate, finding that Decedent's handwritten notation on the cover page of the Will provided clear and convincing evidence of Decedent's final assent that he intended the original document to constitute his Last Will and Testament.
- A summary of the case can be accessed at <https://www.saul.com/publications/alerts/unsigned-copy-will-admitted-probate-new-jersey>

# New Jersey Case Law Provide A Framework - 2

- Relying on the harmless error doctrine under *In re Probate of Will and Codicil of Macool*, 416 N.J. Super. 298, 311 (App. Div. 2010), the Appellate Division affirmed the trial court's decision, holding that a writing need not be signed by the testator in order to be admitted to probate. Some states permit oral trusts although with scanning, mail deliveries, etc., using an oral trust may be unnecessary.
- The Macool Court stated: “Although a document or writing added upon a document was not executed in compliance with N.J.S.A. 3B:3-2, the document or writing is treated as if it had been executed in compliance with N.J.S.A. 3B:3-2 if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute: (1) the decedent's will; (2) a partial or complete revocation of the will; (3) an addition to or an alteration of the will; or (4) a partial or complete revival of his formerly revoked will or of a formerly revoked portion of the will.”

# New Jersey Case Law Provide A Framework - 3

- The Macool Court stated: “After examining the record developed before the trial court, we affirm the court's judgment declining to admit into probate a will that was not reviewed by decedent before her demise. We reject, however, the part of the court's ruling that construes *N.J.S.A. 3B:3-3* as requiring that the writing offered as a will under the statute bear in some form the signature of the testator as a prerequisite to its admission to probate.”
- Consider, in light of Macool, a recorded web meeting where the client verbally confirms on camera that as testator he read and understood the document, signs it as his will, and after initialing or signing each page of the will, shows that page to the web camera. This process would appear to meet the requirements of Macool that the decedent read the document which is to be recognized as his will, and after reading it, gave his consent to that document being his will.

# New York Temporary Remote Signing Bill - 1

- March 19, 2020 Executive Order No. 202.7 allows virtual notarization and remains effective until April 18, 2020.
- <https://www.governor.ny.gov/news/no-2027-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>
- Any notarial act that is required under New York State law is authorized to be performed utilizing audio-video technology provided that the following conditions are met:
- The person seeking the Notary's services, if not personally known to the Notary, must present valid photo ID to the Notary during the video conference, not merely transmit it prior to or after;
- The video conference must allow for direct interaction between the person and the Notary (e.g. no pre-recorded videos of the person signing);
- The person must affirmatively represent that he or she is physically situated in the State of New York;
- The person must transmit by fax or electronic means a legible copy of the signed document directly to the Notary on the same date it was signed;

# New York Temporary Remote Signing Bill - 2

- The Notary may notarize the transmitted copy of the document and transmit the same back to the person; and
- The Notary may repeat the notarization of the original signed document as of the date of execution provided the Notary receives such original signed document together with the electronically notarized copy within thirty days after the date of execution.
- Comments: This leniency is for a very limited time period. How many clients have the capability of scanning and emailing a document or sending it via facsimile? Likely very few. How much flexibility does this approach really provide? Not enough. Also, note that the construct, just like that of many other states providing emergency “relief” is rooted in paper signing.

# Texas Emergency Remote Signing -1

- Texas emergency remote signing provisions include the following:
- A notary public shall verify the identity of a person signing a document at the time the signature is taken by using two-way video and audio conference technology.
- A notary public may verify identity by personal knowledge of the signing person, or by analysis based on the signing person's remote presentation of a government-issued identification credential, including a passport or driver's license, that contains the signature and a photograph of the person.
- The signing person shall transmit by fax or electronic means a legible copy of the signed document to the notary public, who may notarize the transmitted copy and then transmit the notarized copy back to the signing person by fax or electronic means, at which point the notarization is valid.
- This suspension, granted on April 8, 2020, is in effect until terminated by the Office of the Governor or until the March 13, 2020 disaster declaration is lifted or expires. Documents executed while this suspension is in effect, and in accordance with its terms, shall remain valid after the termination of this suspension.

# Texas Emergency Remote Signing -2

- As with many states the leniency only remains valid until emergency declarations cease. Note that Alaska's leniency on signing is in force for 10 days after their emergency legislation ceases. The time window is rather limited.
- Like New York the "relief" requires the signer to email or send via facsimile the document signed to the notary. Is that feasible for many clients? If not, what does this really provide?

# **Core Estate Planning Documents During COVID**

**What of Clients  
Sheltering in  
Another State?**

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# Which State Law?

- Your client might be temporarily residing, during the coronavirus outbreak, with family who lives in a different state.
- Your client might be domiciled live in New York but might have gone to Rhode Island to stay with family or friends temporarily.
- Will New York (home state) documents be valid/sufficient in the state your client is temporarily in?
- Should the client consider having new documents prepared in the new location as a temporary measure?

# **Core Estate Planning Documents During COVID**

**Ancillary Steps –  
Finances**

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# Ancillary Steps – Finances - 1

- It's become common during the coronavirus for people to rely on shop at home supermarket deliveries, etc. Recommend that your clients put their finances on autopilot to the same degree.
- To the extent clients can have bills charged automatically to their credit cards, or debited against their checking account, and have their credit cards automatically paid out of their checking account, they will reduce the need to handle mail, or to leave your home.
- If the client falls ill, or is a caregiver to an ill family member, having as many ongoing bills automatically paid and charged, and as many deposits automatically deposited electronically, will reduce the risk of foul play, lessen worries, and reduce the tasks an agent under a power of attorney (or a successor trustee under a revocable trust) will have to carry out.

## Ancillary Steps – Finances - 2


- Suggest clients review their check register, credit cards bills (e.g., electric bills phone bills Internet bills), and so forth, and use the vendors websites to set up automatic payments. If the client is receiving income advise them to contact the payors and set up electronic payments only.
- Warn clients that wrongdoers are taking advantage of COVID and there appears to be increased fraud out there. Clients should be on the lookout for scammers that may pick up on the clients' increased use of internet payment systems.

# Ancillary Steps – Communication with Appointed Agents

- Suggest clients inform their appointed agents and fiduciaries of those appointments.
- Does the client have a current list of assets, debts, expenses, and accounts? If not, suggest creating one. Also the appointed agents/fiduciaries should know where to find the information.
- Health agents should have list of medical history, medications, health issues, with them and not have to rely on information that is only in hard copy in the client's home.
- Client also should consider a list of all relevant personal contacts that should be notified in case of emergency. The agent may not know the client's siblings, parents, co-workers, etc. Do the agents know how to access online information? Online access information should be incredibly guarded; however, consider that an agent may not be able to travel and may need to deal with a principal's assets remotely for the time being.

# **Conclusion and Additional Information**

**Communicate with  
Clients and Help  
Now**



# Conclusion

- There are a myriad ways that practitioners can help clients during this difficult time.
- Some of the most important means of helping clients will be with basic but critical planning and solving logistical challenges for signing.

# Additional information

- Abigail O'Connor [abigail@alaskatrustlaw.com](mailto:abigail@alaskatrustlaw.com)
- Jonathan G. Blattmachr  
[jblattmachr@hotmail.com](mailto:jblattmachr@hotmail.com)
- Martin M. Shenkman  
[shenkman@shenkmanlaw.com](mailto:shenkman@shenkmanlaw.com)
- Interactive Legal [sales@interactivelegal.com](mailto:sales@interactivelegal.com)
- Peak Trust Company [bcintula@peaktrust.com](mailto:bcintula@peaktrust.com)

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