

# COVID-19 PANDEMIC

## COULD THIS BE A GAMECHANGER FOR THE PROFESSION?

If the many contributions concerning this subject in recent months posted on Notarytalk are representative of the views of our community, the profession has reacted to the pandemic in a wide variety of ways. Those who have felt it safe to do so have continued to see clients in person, no doubt taking all the recommended safeguards in terms of social distancing and wearing of masks and gloves. Office car parks, public open spaces and front gardens are just a few of the places where some Notaries have provided their services. Others have experimented with so called Remote Online Notarisations (RON's) where this has proved possible within the guidance provided.

A big question up for discussion is whether the rules by which we practice are sufficiently flexible to meet the challenges which this particular pandemic has presented and to allow Notaries to provide as near a normal service as possible, whilst maintaining standards of best practice. If not, what, if anything, can we do to try and ensure that we can continue to provide Notarial services if a similar set of circumstances should re-occur? Also, has the pandemic challenged us to think seriously about whether we need to make more fundamental changes in the way we practice? A particular comment that stands out in my mind is one made to one of our members who was unable, within the Rules, to provide a client with the service he needed and whose somewhat unsympathetic response was to say that it was time for the profession to move out of the "stone age, quill pen world in which Notaries practice". Opinions on how we should

meet clients' expectations with regard to their urgent documents in these difficult times vary widely. There are those who believe we should adjust the way we do things on-line, provided we can satisfy the relevant guidance and that our certificates accurately reflect what we have (or have not) been able to certify. Others feel that any permanent move in that direction could compromise our standards, the protective or gatekeeping role which we play and the value of our acts or even pose a threat to our very existence as a profession.

When the pandemic first began to have its effects on the workplace, some colleagues sought guidance as to how accommodating they could be in response to requests to notarise signatures on-line. On 18th April, the Council re-iterated its opinion of 26th January 2017 to the effect that the use of Distant Communication Technology ("DCT") such as video conferencing, was not consistent with best practice and, except in limited circumstances, Notaries should continue to insist on personal appearance, because that method is "essential to the integrity and security of our notarial acts". On 7th May 2020, following formal consultation with the profession, the Faculty Office issued new guidance on remote notarisation in the light of the Health Protection (Coronavirus Restrictions) (England) Regulations 2020. This guidance set out a number of steps subject to which a Notary could, at his or her own discretion and risk, achieve an online notarisation using DCT.<sup>1</sup> These steps are not reproduced here but I

would mention a couple of key points:

1. The Notary must be satisfied the individual whose signature is being attested is physically situated in England and Wales; and
2. A check should be made to confirm that the receiving jurisdiction will be likely to accept any notarial act based upon the use of DCT.

This second point is important in order to ensure that costs and time are not wasted. An example of such a document might be a Power of Attorney in public form for use in Spain, where the expectation is that the signatory is personally present when signing.

The guidance from the Faculty Office also reminds Notaries that oaths, affidavits and statutory declarations should only be sworn or made where the deponent is in the physical presence of the Notary. In the context of using DCT and making declarations or signing documents other than in the presence of the attesting officer, it is worth mentioning some recent examples which have no direct impact on our profession but where initiatives have been put into operation or are being discussed and which may provide some guidance as to the direction in which the execution of documents and the administration of oaths and declarations are developing:

1. The Insolvency Service introduced on 6th April 2020 the Temporary Insolvency Practice Directive.<sup>2</sup> Among other things, this introduces a relaxation of the rules so that if a declaration of solvency is taken remotely, that will not of itself be regarded as causing any substantial injustice. What I take from that is that if everything else appears to be in order, it is open to the

Court to accept certain types of oaths or declarations taken otherwise than in the physical presence of the official administering it;

2. The Ministry of Justice has announced it is to amend the Electronic Communications Act 2000 to allow the witnessing of Wills by video link. Unusually, the legislation is to be made retrospective to 31st January 2020 to save any instances of Wills that have already been witnessed in this way from being challenged on the grounds that the witnesses were not personally present at the time of signing. Also, the legislation is to be time limited and reviewed again in two years' time, no doubt to coincide with the outcome of the Law Commission's deliberations on a range of topics, including Wills. On 25th July the Government issued guidance on this topic and its intention to introduce the legislation by statutory instrument. It is worth noting that this particular legislation does not appear to contemplate the use of electronic signatures or the use of counterpart Wills.<sup>3</sup> There are also recent interesting articles on this subject in the Law Society Gazette<sup>4</sup> and from STEP.<sup>5</sup>

3. Although the Land Registration Act 2002 contemplated the possibility of using digital signatures in land transactions<sup>6</sup>, the Land Registry has not until now accepted electronically signed Deeds. They have sought views from practitioners on whether to accept electronic signatures and/or qualified electronic signatures in the future.<sup>7</sup> On 27th July, the Land Registry published Practice Guide 8 in which they confirmed that they will until further notice, accept for the purposes of registration,

documents will know that in an increasing number of States the form of Notarial certificates provides the possibility of ticking one of two boxes. The first states that the acknowledgement was taken in the physical presence of the signatory and the other one, that it was taken remotely or online. My own experience has been that there is little point in selecting the on-line option because some title companies appear only to accept that method where the Notary is licensed to practice in the relevant State.

It had been my understanding that "e-notarization" had only been taken up in a few U.S. States but in emergency legislation passed by the Senate in March 2020, the Securing and Enabling Commerce Using Remote and Electronic Notarization Act of 2020 (the "SECURE Act") was introduced to establish minimum standards for electronic and remote notarisations that occur in or affect interstate commerce. If the SECURE Act becomes law in its current form, it would authorise every notary in the U.S.A. to perform remote online notarizations (RON) using audio-visual communications and tamper-evident technology in connection with interstate transactions.<sup>10</sup> In the light of the experience in recent years in the U.S.A, designers and suppliers of on-line signature platforms have turned their attention to Notaries worldwide believing there is a ready market for their product based perhaps on the U.S model.<sup>11</sup> I have noticed a marked increase in people contacting the Society to demonstrate how their particular offering could be ideal for our members. Some of the large international

documents which are signed using so called "Mercury Signatures" according to the steps set out in the guidance and which involve passing copies of signed pages by email.<sup>8</sup> (See Section 12). As part of the same guidance, the Land Registry will also accept certain electronically signed Deeds (but not Lasting Powers of Attorney) if they are signed in accordance with the relevant guidance using an electronic signature platform under the control of the Conveyancer. (See section 13).

4. I suspect that where documents are being signed using DCT or via an electronic signature platform, we may be encouraged to make a video recording of the process to support evidence of identity and signatures. It is therefore worrying to read in the Press that video manipulation software could make such recordings unreliable.<sup>9</sup> Views posted on-line concerning the third initiative vary from welcoming such a step as an indication that the legal profession has entered the 21st Century, to complaining that it could prove a temptation to fraudsters. From my own experience in recent weeks, the public at large have little appreciation as to why the use of DCT might not be a safe method of identifying people and witnessing their signatures. There is a tendency to see it from the point of view of convenience only. It is interesting to look at what actions other countries have taken in the light of the pandemic.

United States of America

I have been asked a number of times recently if I will notarise documents remotely for use in the USA. Practitioners who are used to dealing with U.S.

companies have already designed their E-Notary platform, but it appears in some cases they may not have consulted with the profession and may be unaware of notarial practice in individual jurisdictions. This could mean that some platforms may not, without adaptation, be fit for purpose in all jurisdictions. Also, it is important that electronic signature platforms designed by the computer industry do not themselves become the providers to the public of "e-notarisation services" because they are perceived and accepted as a cheap and convenient way of certifying signatures without the intervention of a Notary and the security and protection which that process offers.

An organisation in the U.S.A called "Authenticity Alliance" has initiated what it calls an "information sharing exchange" called "RONNIE" (after "Remote Online Notary") to promote debate on the subject. Whilst it is based in the U.S.A., it is targeting other countries to engage in debate through their website.<sup>12</sup> The prevailing view in the U.S.A appears to be that RON's are the future and not just during a pandemic. You may be interested in reading an article which recently appeared in the journal of the American Bar Association entitled: "Remote Online Notarization is Here to Stay".<sup>13</sup>

Scotland

The Coronavirus (Scotland) (No2) Act 2020 Schedule 4, part 7 came into effect on 27 May 2020 and has made changes to the requirements for the personal presence of a notary or solicitor when executing certain documents.<sup>14</sup> The Law Society of Scotland has issued comprehensive guidance on the use of

electronic signatures.<sup>15</sup> On 27th May, it updated its guidance on the requirements for physical presence where a Solicitor or Notary is attesting a signature or administering an oath. This is a temporary relaxation of the rules to allow the use of video technology while social distancing measures preclude meetings in person.<sup>16</sup> The conditions subject to which this form of attestation is permitted are similar to those in the guidance issued by the Faculty Office with two important differences:

1. The Scottish guidance includes the use of video technology in connection with the administration of oaths, affidavits and declarations; and
2. There does not appear to be any requirement that the signatory or deponent has to be physically present in Scotland.

Australia

In common with many other jurisdictions, the State of Victoria has also introduced temporary measures to allow certain documents (including affidavits and declarations) to be witnessed using audio visual technology. In a recent practice note written for the Australian and New Zealand College of Notaries, Professor Peter Zablud is keen to emphasise that this temporary relaxation does not replace "in person" witnessing and should only be used as a last option where no alternative is available and should not be used for the purposes of convenience. The signatory or deponent must be present in the State and the Notary must be able to fulfil his or her various duties such as checking the identity, capacity and understanding of the signatory. He also reiterates the need to check that attesting a signature

1. <https://www.facultyoffice.org.uk/notaries/news/covid-19-guidance-on-remote-notarisation/>

2. [https://www.justice.gov.uk/courts/procedure-rules/civil/rules/insolvency\\_pd](https://www.justice.gov.uk/courts/procedure-rules/civil/rules/insolvency_pd)  
[https://www.judiciary.uk/wp-content/uploads/2020/04/Temporary-IPD-April-2020\\_.pdf](https://www.judiciary.uk/wp-content/uploads/2020/04/Temporary-IPD-April-2020_.pdf)

3. <https://www.gov.uk/guidance/guidance-on-making-wills-using-video-conferencing>

4. <https://www.lawgazette.co.uk/news/video-wills-risky-and-unnecessary-solicitors-claim/5105165.article>

5. <https://www.step.org/sites/default/files/inlinefiles/Briefing%20note%20on%20execution%20of%20wills%2028E%26W%29.pdf>

6. <https://www.legislation.gov.uk/ukpga/2002/9/section/91>

7. <https://www.lawgazette.co.uk/practice/land-registry-to-sign-up-for-witness-free-e-signatures/5104954.article>

8. <https://www.gov.uk/government/publications/execution-of-deeds/practice-guide-8-execution-of-deeds>

9. <https://www.legalfutures.co.uk/latest-news/deepfake-warning-over-online-courts>

10. <https://www.dlapiper.com/en/us/insights/publications/2020/03/coronavirus-federal-and-state-governments-work-quickly-to-enable-remote-online-notarization/>

11. <https://support.docusign.com/en/guides/ndse-user-guide-notary-process>

12. [www.authenticityalliance.com](http://www.authenticityalliance.com)

13. [https://www.americanbar.org/groups/business\\_law/publications/committee\\_newsletters/banking/2019/201907/fa\\_2/](https://www.americanbar.org/groups/business_law/publications/committee_newsletters/banking/2019/201907/fa_2/)

14. <https://www.legislation.gov.uk/asp/2020/10/schedule/4/part/7>

15. <https://www.lawscot.org.uk/media/368577/electronic-signatures.pdf>

16. <https://www.lawscot.org.uk/news-and-events/law-society-news/coronavirus-updates/>

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remotely will be acceptable in the receiving jurisdiction.<sup>17</sup> Professor Zablud's closing remarks in his practice note include the following paragraph:  
"There is no doubt that in the foreseeable future, once suitable standards and procedures have been developed, in appropriate cases and circumstances, electronic notarisation and online intervention will become part of good notarial practice and service delivery".

#### Conclusion

I posed the question in the title to this article as to whether COVID-19 might be a gamechanger for the profession. I certainly think that it has stimulated an important discussion as to the way we do things and how we might better be able to serve the public in times such as these. Notwithstanding the pandemic, it is also a reminder that things change and we must be ready to embrace change but in a way that preserves the security and integrity of our acts (best practice) as well as the safety and protection of the parties involved and others who may seek to rely on our certificates. I would suggest there is an urgent need for debate on this subject and to think carefully

about the lessons we have learned from the experiences of the last few months and the developments which are already taking place around us and are already guiding practice in other areas of the legal profession. We also need to continue the discussion with other stakeholders, including the Foreign Office, where I believe the argument in favour of introducing the e-apostille has gained a new impetus and to continue the work we have started in relation to the use of electronic signature platforms and video technology and how we might better serve the public by the use of these tools. It is apparent to all of us that the Government (advised by the Law Commission), the Land Registry and a number of other authorities and

organisations are adopting modern technology to improve service levels and we must be ready to do the same and adjust our methods of practice accordingly. This is not just to address the problems raised by the pandemic, but it is in the long term interests of the profession. We should also liaise with the Department for Business, Energy & Industrial Strategy and the Ministry of Justice as that whether there are any legislative changes which may help to make progress in the ways in which we deliver our services. Guidance on this topic is subject to continual change and it is possible that legislation and guidance will have been further updated by the time you receive this edition of *The Notary*.

Michael Lightowler  
August 2020

17. "Limited 'Online' Notarising is now temporarily permitted in Victoria by the COVID-19 Emergency Measures Legislation". Professor Peter Zablud AM, RFD, Notary Public, 25th May 2020.

## Society's Arms & Badge

In the latest issue of "The Notary" the Notaries Society's Rules for the use of its emblems were set out. I read them with interest and a modicum of concern. Particularly so, since I had a hazy recollection of Anthony Northey writing somewhere and encouraging Notaries to exercise the privilege of using the Society's Arms. As I have always understood it, a Coat of Arms is personal to the holder alone and acts in effect as such holder's pictorial signature or to indicate its or his personal presence. An Heraldic Badge on the other hand is I believe rather different and enables the holder to endorse his patronage of another by permitting or insisting on him its use. I was minded to seek out the Grant made to me by the Society on 10th February 1994 (on payment I am reminded of £100!) of my right to use its Badge – this was soon after

the Society had received its Arms (presumably its Badge as well) on 11th June 1993. I have noted that no reference is made in the Grant to me for me to use the Society's Arms, only the Badge. The Grant does sport the Society's Arms in all their glory at the head of the document indicating quite properly that it is the Society giving the right for me to use its Badge (which is nicely illustrated at the bottom) in specific circumstances and thereby show my association in such circumstances with (but not authority to represent) the Society. Just the sort of thing I think a Badge might be used for and I guess exactly what the Society at the time had in mind (and as well, no doubt, the financial opportunity). Maybe those who were involved in obtaining the Grant of Arms at the time could comment? Although these days heraldic rules are not commonly

understood, I remain concerned nonetheless that a hazardous situation could arise for the Society if e.g. a Notary using the Society's Arms on his writing paper should express thereon something improper or even in these hazardous times "un woke", then a mischievous third party might well suggest the same to have been said on behalf of, or endorsed by, the Society. This particularly so, now that the Rules seem to actively encourage any Notary to use the Arms. There are also other aspects of this which might merit enquiry. For example: is the right to use the Society's Badge now a freebee and without limit while I remain disciplined by the limits in my Grant and burdened by the financial outlay I had to make in 1994? I also wonder if those Notaries who parade so splendidly in Comper's Hue with the Society's Arms emblazoned on the shoulder

believe themselves on every occasion to be authorised representatives of the Society and if the Society believes that too. Perhaps the easy answer to all this is for every Notary who does not bear Arms to seek them and use them with the Society's badge on their accoutrements as I do with my own Arms. The Heralds would certainly be delighted to welcome so distinguished a bunch (and their fees) into the realms of gentility. It is not cheap but perhaps something could be done by the Society to encourage those Notaries who seem to use the profession as a loss leader not to do so so that we might all be rather better remunerated for our efforts and thereby to afford the elevation.

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## Tribute to Christopher M. F. Langdon M.A. (Cantab) 1945 – 2020



Christopher Langdon

It was with the deepest sadness that I learned of Christopher's death on 17th April. Like a number of Notary colleagues of my age, I had known Christopher for many years. He made a huge contribution to the profession, both as a member of the Council (he was President from 1997 to 1999) and as a Notary based in Hastings where he also practiced for many years as a solicitor in the family firm of Young, Coles & Langdon. He was also a past president of the Local Law Society. Christopher's mighty intellect, his enquiring mind and his enthusiasm for life led him to undertake a vast array of activities. He was a true polymath. As a younger man, he was the youth leader of the local Crusader group. Later on, using his knowledge and experience in the law, he did a considerable amount of pro bono work in the fields of ecclesiastical and charity law. He also had a strong interest in military history and was a subaltern in the Royal Sussex Regiment. He gave much time to many local organisations, including the Citizens Advice Bureau and he was clerk to a local Charity. Christopher had a strong Christian faith and was keen on reading about other religions.

Those who knew him well would also be aware of his interest in bow ties, walking canes and modern gadgetry - to name but a few! He was also keen on keeping fit through athletics and running. Wherever he went, Christopher inspired affection and was a popular member of the profession with a keen sense of humour, always having something amusing to say or an interesting anecdote to relate, all of which made it a pleasure to be in his company. Past President David Wyatt recalls Christopher writing to him before the annual President's dinner in 1992, attended by the Archbishop and Lord Chancellor, when Christopher acted as Toastmaster and saying: "I have bought myself a scarlet waistcoat and have been given for my birthday a gavel. If the room is silent I will not use the gavel unnecessarily". During his period on the Council of the Society, Christopher wrote many interesting articles including historical items such as "English Bishops Chanceries 1100-1250", "Notaries Public in England in the 13th and 14th Centuries" and "St Francis and the Wolf of Gubbio". He also wrote the Index for the many articles appearing in the Notary and arranged them under useful headings for search purposes. He was also a keen follower of modern technology and wrote about encryption and the cybernotary. Among many other articles, he set out his thoughts on the future of the profession in three parts concerning quality of work, the organisation of Notaries and discipline. Without needing to do so, he took the time to study and pass the Notarial Diploma Course. I attended Christopher's funeral in Hastings on 7th May. Sadly, due to the Coronavirus, numbers were limited to just 20 people consisting of family, former colleagues from his law firm and close friends. A moving tribute was given by The Reverend Michael Brydon who knew Christopher well. These few words cannot possibly convey the many valuable contributions which Christopher made in so many ways during his lifetime. He will be greatly missed by so many but most of all by his widow Julie and his two sons Rupert and Toby to whom we all express our sincerest sympathy and condolences.

Michael Lightowler  
May 2020

## Identity Fraud

I have received reports from two members relating to documents which appear to be have been executed by them as Notaries but which are complete forgeries. In both cases the seal has been copied but the signature is quite unlike that of the member. The items in question concerned loan documents and fortunately the Notaries in question were approached by the proposed borrowers who were then able to resile from the transaction. The thieves were asking for an arrangement fee to be paid to enable a loan to be paid. Apparently, attempts to trace phone, email and office

addresses failed. In all cases matters had been reported to the local police and I am now publishing this article seeking further evidence from other members who may have had their identities stolen. Some years ago a group from the Society's Council went to see officers at Action Fraud (or their predecessors) with evidence of identity theft. They were unable to give us any satisfactory advice and indeed it would appear difficult, if not impossible, to prevent this kind of fraud happening. It is a clear indication of the value of the Apostille as, of course, the documents in question

would not receive the benefit of Apostille. Michael Lightowler has been keeping a register of incidents which have come to the Society's notice and I would hope to gain some further evidence from members and approach the relevant authorities again. If we can gain publicity about these criminal activities and show that we are taking our responsibilities seriously it will do the profession no harm and may indeed encourage people to think of using us and obtaining Apostille where in the past they have not thought of making use of our authentication services.

I would therefore ask anyone who has experience of this kind of fraud to get in touch with me and I will put any evidence with the papers already collected by Michael. I will obviously be most careful to conceal identities wherever appropriate, but it is important that we get as much information to the authorities as we can.

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