



# LEGAL UPDATE

MARCH 2020, 20.03

## A MONTHLY GUIDE TO WISCONSIN REAL ESTATE LAW & POLICY

### Legislative Changes Impacting Real Estate Technology

The transaction side of real estate often relies on technology. For instance, agents and firms have been utilizing virtual showings and digital signatures and encouraging electronic earnest money payments by buyers. However, on occasion the lack of technology has either created a hurdle or questions for agents, firms and consumers in real estate transactions. When such questions or hurdles occur, one of the ways the industry attempts to address such concerns is to explore the need for legislation.

There were two specific areas in the real estate transaction where legislation proved to be the best method of modernizing the real estate transaction by use of remote online notarization and clarifying the rights of sellers to have surveillance equipment, such as cameras, in and on the property. Therefore, the WRA decided to add seller surveillance and Remote Online Notarization (RON) to its legislative priorities during the 2019-20 legislative session.

This *Legal Update* takes a closer look at these two pieces of legislation.

### Seller Surveillance of Property

2019 Wis. Act 72 (<https://docs.legis.wisconsin.gov/2019/related/acts/72>)

In 2020, technology is not just something we use but has become a way of life professionally and personally. As consumers we can talk to families and friends across the globe on phones, tablets and laptops; have items delivered to homes with the click of a button; and start a car and open a house without a key. But above all we can see who is knocking on our door, ringing our doorbell, dropping off a package and not picking up after their dog in our yard. We can also have interactive conversations with individuals on our property even when we are not home.

The interesting thing about seller surveillance is that it has gone on for decades. Agents recall experiencing sellers in the late 1980s having their double tape deck (yes, cassette tapes) recording showings while the sellers were not there. Additionally, agents have shared memories of sellers leaving baby monitors on and going to the neighbor's house to listen or watch as prospective buyers were in their house.

However, the advancement and accessibility of affordable, wireless security systems and wireless cameras have offered a larger group of

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property owners the opportunity to have surveillance on their property. Thus, owners are equipping their properties with cameras on the outside, possibly on the inside, and even in the doorbells. Some, or all, of this equipment may allow property owners to hear, see and record what is going on in and around the property.

### Why do owners have surveillance devices?

The motivations behind homeowners' decisions to have cameras in their homes and on their property are numerous and have often been the same. For instance, it is not uncommon for property owners in more rural settings to have cameras at the beginning of their driveways to deter individuals from coming onto their property or to see wildlife coming onto their land. In addition, individuals may have surveillance equipment to protect their property, to have a watchful eye on their children who come home from school before an adult can be home, to monitor a caregiver who attends to a family member while they are away at work or to confirm the delivery of a package.

As the number of property owners with surveillance equipment grew, so did the series of questions from real estate licensees and their buyers. Did the seller need to disclose they had surveillance equipment? Aren't the buyers' rights violated if the seller has surveillance equipment and does not disclose it to the buyer? Do listing agents need to disclose the seller has surveillance equipment? Does the listing agent have to post that the seller has surveillance equipment in the MLS? What are the cooperating agent's rights regarding seller surveillance equipment? What about the rights of appraisers, home inspectors and testers coming on or into the property of a seller with surveillance equipment? And if the seller has surveillance equipment on the property, who can they share that audio and video with?

Therefore, due to the increasing questions by real estate agents surrounding this issue, the WRA added seller surveillance as a legislative priority for the 2019-20 legislative session.

## Legislative response

### Background

Prior to the law change, Wisconsin law did not prohibit a seller from using surveillance equipment or recording devices to monitor their home during open houses, individual showings or other viewings of the property. Further, Wisconsin law did not require sellers or their agents to notify buyers or post any signs informing the prospective buyers, agents or others there was surveillance in or on the property.

However, after the series of questions over the last several years from REALTOR® members, it was evident the law needed to provide clear guidance as to seller surveillance devices.

### The crux of the legislation

The WRA's legislative message became clear - clarify in Wisconsin law that it is not a violation of privacy for a seller to have audio or video recording equipment in the property during an open house, individual showing or other viewing of the real estate.

Governor Evers signed 2019 Senate Bill 247 into law on January 21, 2020. Thus, Wis. Stat. §995.60 became law effective on January 22, 2020.

### Application of Wis. Stat. §995.60

Wis. Stat. §995.60 addresses the rights of those owning and entering properties under surveillance that are for sale. It is important to emphasize again, that Wis. Stat. §995.60 only applies to the narrow discussion of surveillance equipment when the property is being sold, not any other scenario. Any discussion outside of the sale of real estate is not addressed by this legislation and thus is not analyzed in this *Legal Update*.

### Limited to real estate sales

Wis. Stat. §995.60, "Use of surveillance devices in connection with real estate sales," only applies to open houses, individual showings and other viewings in connection to the sale.

Therefore, this legislation applies to any viewing of the property related to the sale of the real estate, including open houses; individual showings; and other viewings in connection to the sale such as walkthroughs, inspections, testing, appraisals, the buyer coming to measure, etc.

### Commercial and residential properties

The law was intentionally drafted to include broad definitions of "property" and "owner" to include all types of properties, not limiting the law to residential.

### Surveillance when being sold is NOT an invasion of privacy

Wis. Stat. §995.60 provides, it is not an invasion of privacy when the owner of real estate has surveillance, whether audio or video, in an open house, individual showing or other viewing in connection to the sale of real estate.

## Seller's rights

### Sellers are not required to post or disclose

The law does not require a seller to post or disclose that he or she has surveillance equipment in the property.

Sellers arguably have the right to protect their property and, for

safety reasons, should not have to publicly announce by posting on the property or via the MLS that there is surveillance equipment in the property. Requiring sellers to announce that they have surveillance equipment impedes their safety rights in many ways.

### Sellers are prohibited

However, the law does place some prohibitions on the seller. Specifically the law prohibits the seller:

- From copying, selling, renting, broadcasting, posting, publishing, distributing, disclosing, transferring or otherwise sharing a representation of an individual recorded with a surveillance device unless it is pursuant to a court order or the request of law enforcement investigating possible criminal conduct.
- From placing surveillance equipment in washrooms and bathrooms.



### REALTOR® Practice Tip

Since the law prohibits placement of surveillance equipment in bathrooms, and theft of prescription medications is common during open houses, REALTORS® should encourage sellers to either remove medications from the bathroom or lock them up by purchasing a medicine lock box. Alternately if the seller cannot remove the medication from the property during showings, open houses or other viewings of the property, they may consider splitting up the medication so all the medication is not in the same location.

## Buyer's rights

Sellers have placed their home on the market and allow buyers, agents and others authorized by the seller to be on the property to be in their home potentially without the seller or their agent there. Sellers are not inviting the buyer, their agent or others involved in the real estate transaction as an overnight guest, but again are offering an opportunity to be in their home with a very limited set of facts.

For this reason, the law provides it is not an invasion of privacy for the seller to have surveillance devices in the property. However, to offer balance, the law also provides the owner cannot have surveillance devices in the bathrooms. Further, the law provides the seller cannot distribute, sell, etc., any of the audio or video they legally were able to capture.



### REALTOR® Practice Tip

Keep in mind, the buyer does have rights per the state-approved WB forms to, "photograph or videotape Property unless otherwise provided for in additional provisions at lines 303-308 or in an addendum per lines 309-310." (See lines 261-262 of the WB-1 Residential Listing Contract Exclusive Right to Sell).

Therefore, by default, a seller allows a prospective buyer to videotape or photograph the seller's property during open houses and showings. If the seller doesn't want the buyer to have that ability, then the seller would indicate such in the listing contract in the additional provisions or an addendum; the listing agent would then communicate such to the cooperating agents, likely by use of the MLS remarks section and the datasheet.



### REALTOR® Practice Tip

Best practice would be to always advise your buyers to pretend they are being videotaped or recorded when in a property for an individual showing, open house or other viewing of the property relating to the sale.

## REALTOR® obligations

The law does not require the real estate licensee to ask the seller about surveillance equipment in the property. Further, the law does not require any disclosure of the real estate licensee as to any surveillance equipment in the property. Lastly, there is no requirement for licensees to investigate if the property has surveillance equipment.



### REALTOR® Practice Tip

Even with Wisconsin law clarifying it is not an invasion of privacy to have surveillance equipment in or on the property, REALTORS® would be best served to be very careful about their observations and comments regardless if they are knowingly being recorded.



### REALTOR® Practice Tip

Some REALTORS® find having surveillance devices on the property offers additional safety protection for the REALTOR®. Further, many REALTORS® support the fact the law does not require a seller to disclose there are surveillance devices on the property because it increases overall safety of the property. For a reminder about maintaining your safety, please see the *Wisconsin Real Estate Magazine*, September 2017, “Consider a Tuneup on your Safety Thinking,” at [www.wra.org/WREM/Sept17/SafetyTuneup](http://www.wra.org/WREM/Sept17/SafetyTuneup) and Episode 20: REALTOR® Safety of WRA’s Thursday Takeaways at [www.wra.org/Education/Thursday\\_Takeaways/Thursday\\_Takeaways\\_-\\_REALTOR%C2%AE\\_Safety](http://www.wra.org/Education/Thursday_Takeaways/Thursday_Takeaways_-_REALTOR%C2%AE_Safety).

## Penalties

An individual who copies, sells, rents, broadcasts, posts, publishes, distributes, discloses, transfers or otherwise shares a representation may be required to forfeit not more than \$500. Criminal penalties would exist for any individual who violated the law relating to placing surveillance in bathrooms.

Thus, it would be a penalty for sellers to share a funny thing on social media that occurred during an open house, individual showing or other viewing of the property in connection to the sale. The only time sellers are permitted to provide a copy would be pursuant to a court order or at the request of a law enforcement officer investigating possible criminal conduct.



### REALTOR® Practice Tip

REALTORS® should encourage buyers to refrain from saying certain things about the property – whether good or bad – until outside of the property. But keep in mind that “outside of the property” probably means out of earshot of the watchful doorbell that triggered a video or audio feed when you stepped out on the porch after the showing. Frank conversations by buyers about the merits of the property are best left until they have left the premises.



### REALTOR® Practice Tip

Whether there are surveillance devices in the property or not, REALTORS® should always avoid any suggestion of breach of confidentiality (Wis. Stat. § 452.133(1) duties to all persons in a transaction), or breach of loyalty (Wis. Stat. § 452.133(2) duties owed to a client and Article 1 of the Code of Ethics and Wis. Stat. § 452.133(4) subagent’s duties). Thus, REALTORS® should be mindful of their comments and representations.

## Each state handles seller surveillance differently

Each state creates their own regulations and disclosures surrounding surveillance devices and therefore presumptions should not be made regarding other state laws. At the time of publication of this *Legal Update*, our Midwest neighbors had a variety of ways to approach seller surveillance.

For instance, Indiana provides an owner may record using surveillance and therefore REALTORS® are encouraged to presume they and their buyers are being recorded. Illinois also provides an owner could record using a device on their property. However, the Illinois Association of REALTORS® encourages sellers to consider posting a notice that video or audio surveillance is in use.

Iowa law provides that property owners may use surveillance if all owners consent and Michigan law allows homeowners to have home surveillance unless the surveillance is for lewd or lascivious purpose. However, Minnesota does not speak on the matter on residential properties but it does provide commercial property owners may surveil, if it is posted.

Again, each state listed above and its related statements in this *Legal Update*, should not be relied on as advice or representation of that state’s law. Therefore, anyone wanting clarification as to the laws of Indiana, Illinois, Iowa, Minnesota or Michigan regarding seller surveillance should contact the respective state.





# Remote Online Notarization (RON)

2019 Wis. Act 125 (<https://docs.legis.wisconsin.gov/2019/related/acts/125>)

## Background

Real estate over the last decade has become a global market; buyers and sellers are executing real estate transactions from one country to another, including properties and businesses in Wisconsin. Furthermore, technology along with the need to accommodate the busy lives of consumers involved in a real estate transaction have made traditional face-to-face closings a thing of the past.

Generally, sellers execute their closing documents prior to the actual closing, a process referred to as pre-signing, thus eliminating the need for the seller to attend the closing. Moreover, buyers and sellers of all types of real estate often complete an entire transaction with digital signatures and without ever having to print a piece of paper. The only exception to this modernization movement of the real estate transaction was requiring notarization to be done in person – an antiquated method.

Prior to the law changing all documents had to be notarized in person. Documents included mortgage loan documents, title documents and trusts. However, with social distancing concerns relating to COVID-19, there has been an increase of questions and concerns from people not wanting to go into an office to sign certain documents.

## Legislation

Recent legislation regarding Remote Online Notarization (RON) was signed by Gov. Tony Evers on March 3, 2020, as 2019 Wis. Act 125. However, the law, which created Chapter 140 of the Wisconsin Statutes was not effective until May 1, 2020. RON, based on the Revised Uniform Law on Notarial Acts (RULONA), allows for remote online notarization in Wisconsin, which essentially allows consumers to have certain documents notarized remotely, including deeds and mortgage documents, rather than in person.

As of May 6, 2020, 23 states have passed RON laws. However, due to COVID-19 and the potential inability of the consumer, notary and the service provider to meet in person, Wisconsin and other states made RON effective under emergency guidance. Therefore, the Department of Financial Institutions (DFI) enacted RON in mid-March to begin immediately under emergency guidance. The law still goes into effect May 1, 2020. This emergency guidance from DFI to allow RON to be effective immediately offered opportunities otherwise not available because all notarizations would have been required be accomplished in person.



### REALTOR® Practice Tip

Read the DFI emergency guidance relating to RON at [www.wdfr.org/Apostilles Notary Public and Trademarks/pdf/Remote%20Notarization%20-%20webpage%20announcement.pdf](http://www.wdfr.org/Apostilles%20Notary%20Public%20and%20Trademarks/pdf/Remote%20Notarization%20-%20webpage%20announcement.pdf) and [http://www.wdfr.org/Apostilles Notary Public and Trademarks/pdf/Emergency%20Guidance%20-%20Remote%20Notarization.pdf](http://www.wdfr.org/Apostilles%20Notary%20Public%20and%20Trademarks/pdf/Emergency%20Guidance%20-%20Remote%20Notarization.pdf)

The legislation struck a balance of offering RON as an alternative to an in-person notarization while ensuring the protection of the consumer's private information.

This *Legal Update* covers RON broadly to highlight the technology resource now available for real estate closings. Therefore, several details in the legislation are not covered in this *Legal Update*. Visit 2019 Wis. Act 125 to learn more.

## Remote notary council

The legislation created in Wis. Stat. 15.01(4) a remote notary council that would be allowed powers and duties specific in s. 140.145(11), which provides the council will adopt rules promulgated by the Department of Financial Institutions (DFI). Further s. 140.145(11)(c) provides the council will review statutes and recommend to the Legislature any changes in the statutes the council finds necessary or advisable.



### REALTOR® Practice Tip

The remote notary council is statutorily composed of the following members appointed for three-year terms:

1. One member who represents an association of title insurance companies.
2. One member who represents attorneys who practice real estate law.
3. One member who represents an association of bankers.
4. One member who represents the providers of communication technology used to perform a notarial act involving a remotely located individual.
5. The secretary of financial institutions or the secretary's designee.

See Wis. Stat. § 15.185 (8)

## Who can perform a RON?

For a RON to be executed in Wisconsin, the person performing the notarial act must be located in Wisconsin.

Additionally, while the State of Wisconsin now allows RON, in-person notarization will continue under the law. Further, there is a separate commission for someone who wants to perform RON. The fact that someone currently has the authority to perform in-person notarization does not by default permit them to conduct RON.

Additionally, the legislation recognizes documents executed with RON in other states, federally recognized Indian tribes and under federal authority have the same effect as if performed under the laws of Wisconsin. See Wis. Stat. § § 140.140.11, 12, and 13.

## How is a RON performed?

The statute requires the notarial act be performed by an electronic device or process that allows a notary public and an individual who is not in the physical presence of the notary public performing the notarial act to communicate with each other simultaneously by sight and sound. "And when necessary and consistent with other applicable law, the device or process facilitates communication with a remotely located individual who has a vision, hearing, or speech impairment." See Wis. Stat. § 140.145

To see exactly what a RON notarial act needs statutorily, see Wis. Stat. § 140.145(3).

## Can a RON be performed on all documents?

No.

Generally, a RON can be performed on the documents for a real estate closing. However, the law-specific RON cannot be performed as to:

- creation and execution of wills, codicils or testamentary trusts
- creation and execution of living trusts or trust amendments for personal use, not including a transaction, as defined in s. 137.11 (15)
- creation and execution of powers of attorney, not including a transaction, as defined in s. 137.11 (15)
- creation and execution of marital property agreements
- creation and execution of powers of attorney for health care, declarations to physicians (living wills), and authorizations for use and disclosure of protected health care information

See Wis. Stat. § 140.145(10)

A power of attorney (POA) is a written document executed by a principal who wants to give an authorized agent the authority to act on the principal's behalf. A POA should be a written, preferably notarized, document with the fullest, most detailed instructions from the authorizing party. REALTORS® drafting POAs is the unauthorized practice of law.

Learn more about POAs on Episode 22 of WRA's Thursday Takeaways at [www.wra.org/ThursdayTakeaways/Episode22](http://www.wra.org/ThursdayTakeaways/Episode22).

The WRA worked to ensure the person agreeing to have the notarization occur by RON had their privacy protected.

The legislation maintained consistency with current federal or future Wisconsin laws regulating privacy, but requires a remote notary platform to provide a consumer an independent, written consent separate from any other permission, disclosure or acknowledgement if the remote notary platform is going to distribute the consumer's information collected during the remote notary process.

Therefore, the legislation includes, "the notary public or any provider of communication technology shall keep confidential all documents and information provided to the notary public or provider of communication technology or contained in any documents reviewed by the notary public or provider of communication technology while performing his or, her, or its duties as a notary public or provider of communication technology and may release the documents or the information to a 3rd person only with the separate written consent, independent from any other consent, permission, disclosure, or acknowledgement, in a manner consistent with applicable law, of the person who requested the services of the notary public or the provider of communication technology. The prohibition under this paragraph does not apply when the notary public or the provider of communication technology is complying with a request from a regulatory agency or supervisory agency or is responding to a lawful subpoena or court order."

See Wis. Stat. § 140.02(5m)(b)

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## DFI Database

The DFI will maintain an electronic database of notaries public. This database will allow a person to verify the authority of a notary public to perform remote notaries as well as indicate whether the notary public has notified the DFI that he or she will be performing notarial acts for remotely located individuals under 14.0145.

See Wis. Stat. § 140.24

## Validity of notarial acts

The legislation clarifies the:

- failure of a notarial officer to perform a duty or meet a requirement does not invalidate a notarial act performed by the notarial officer
- validity of a notarial act does not prevent an aggrieved person from seeking to invalidate the record or transaction or from seeking other remedies based on law of this state other than this chapter or law of the United States
- statute does not validate a purported notarial act performed by an individual who does not have the authority to perform notarial acts
- notarial act performed in violation of s. 140.04 (2) is voidable. Section 140.04(2), prohibits a notarial officer to perform a notarial act with respect to a record to which the officers, the officer's spouse or officer's domestic partner is a party or in which either has a direct beneficial interest.

See Wis. Stat. § 140.26



### REALTOR® Practice Tip

Real estate licensees cannot provide legal advice and therefore should not provide any commentary or guidance to a consumer about the validity of a contract under any circumstance. A party should be directed to private legal counsel for consultation relating to the validity of a contract.

## Condo disclosure documents

The legislation did confirm condominium disclosure documents can be delivered electronically.

See Wis. Stat. § 703.33(9)

Lastly, the legislation made a series of modifications in Wis. Stat. Chapter 706, Conveyances of Real Property; Recording; Titles to reflect the updates made in Wis. Stat. Chapter 140. Once again, for more detailed information about the RON legislation please see (<https://docs.legis.wisconsin.gov/2019/related/acts/125>).



### REALTOR® Practice Tip

Parties and their agents are encouraged to work their lenders and title agents as to RON capabilities.

## EDITORIAL STAFF

### Authors

Cori Lamont

### Production

Emily Zampardi

## ASSOCIATION MANAGEMENT

### Chairman

Steve Beers

### President & CEO

Michael Theo, CAE

## CONTACT INFORMATION

Wisconsin REALTORS® Association  
4801 Forest Run Road, Suite 201  
Madison, WI 53704  
608-241-2047  
800-279-1972

## LEGAL HOTLINE

Ph: 608-242-2296  
Fax: 608-242-2279  
Web: [www.wra.org](http://www.wra.org)

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4801 Forest Run Road,  
Madison, WI 53704-7337

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