

**The Ohio House of Representatives**  
**Civil Justice Committee**  
**Testimony in Opposition to H.B. 172**  
**By Lee M. Stautberg, Esq.**  
**February 6, 2024**

Chairman Hillyer, Vice-Chair Mathews, and members of the House Civil Justice Committee, thank you for the opportunity to present testimony in opposition to House Bill 172.

My name is Lee Stautberg. I am an attorney in Cincinnati, and have practiced in the area of estate planning, trust and probate law for over 25 years. I serve as Vice Chairperson of the Ohio State Bar Association's Estate Planning, Trust and Probate Law Section Council. I am certified by the OSBA as a specialist in Estate Planning, Trust and Probate Law and I am a fellow with the American College of Trust and Estate Counsel. During my years of practice, I have been a witness to the signing of over a thousand wills. I am testifying in opposition to this legislation as a long-time practitioner in the area of estate planning, trust and probate law, and on behalf of the Bar Association.

There have been many advances during the time that I have practiced law. Even during the last three years, there have been significant technological changes in the practice of advising clients. The pandemic ushered in new means of communicating with clients. Meetings over Zoom, Webex, Teams or similar means have allowed us greater communication with clients. Our clients no longer need to travel to us and it is easier to have more frequent communications that are meaningful.

But, there are challenges and deficiencies with these virtual meetings. We are still saying "you're on mute" or "you're frozen." And there are questions like "can you hear me?" Or, more disturbing, "is there someone there with you?" There have been a number of times during virtual meetings that I have heard a rumbling in the background and only then learned that my conversation with a client was not private. On occasion, I have asked people to leave the room so that I can have a virtual meeting with my client that is protected by the attorney-client privilege. Although I can ask my client if they are alone, I cannot verify that the interloper has really left because I cannot see the entire room during a virtual meeting.

While it is important to embrace technology and the improvements technology brings to our lives, it is also important to recognize the limitations of technology. Advances in technology should not be used as an excuse to eliminate important aspects of the execution of a will.

HB 172 eliminates the serious formalities which should be followed in the execution of a will, that is, execution of the will in the conscious presence of two witnesses. Ohio Revised Code Section 2107.03 requires that the will be "attested and subscribed in the conscious presence of the testator, by two or more competent witnesses, who saw the testator subscribe, or heard the testator acknowledge the testator's signature." The term "conscious presence" means within the range of any of the testator's senses, excluding the sense of sight or sound that is sensed by telephonic, electronic, or other distant communication.

The formality of executing a will is, and should be serious, because a will is a critical document securing an individual's liberty to distribute assets in the way he or she sees fit, and the execution requirements force the testator to recognize the gravity of the undertaking, as well as protect the testator from fraud and abuse.

Having two witnesses physically present during the execution of a will imposes barriers and hurdles to those who would like to take advantage or unduly influence someone. The physical presence of the witnesses allows the observance of facts such as who is in the room (or not in the room); what the testator said or did before and after the execution of the will; the demeanor of the testator; and other facts important to validating capacity of the testator and the validity of the will.

What protections are really afforded by this proposed legislation for testators who pursue execution in the electronic presence of witnesses? By allowing witnesses to be "electronically present," as that term is created in the bill, a witness is deprived of the ability to observe all that is going on in the room where the testator is present. Who knows what is going on outside of the video frame, or who might be imposing undue influence?

The proposed legislation creates data privacy concerns regarding the electronic storage of the will. The bill requires that the "recording shall be preserved and stored in a safe, secure and appropriate manner." Who has the duty or responsibility to store that will in a safe, secure and appropriate manner? What happens if it is not, and what is the recourse of the testator, if the testator is still alive? What kind of data privacy rights are going to be surrendered to be able to keep a will on a third-party provider's cloud service? Is the data collected by the third party going to be sold to others? Will that data be used sell products or services to the testator or the family of the testator?

The word "ceremony" is used for important events such as graduation ceremonies, marriage ceremonies, and swearing-in ceremonies. The formality surrounding a ceremony is a marker that something meaningful is happening and that the event is important. Many people refer to the gathering of witnesses and the testator to sign a will as a "signing ceremony." Use of the word ceremony reflects the importance and significance of the testator's act of making a will and the two people who are acting as legal witnesses to the testator's execution of the will. Two people being in the conscious presence of each other and the testator to give witness to this event and the surrounding circumstances should not be replaced with a video camera.

The Ohio State Bar Association and I, as a practitioner, believe it is unwise to change the law regarding execution of wills in this manner, and oppose HB 172.

Thank you for the opportunity to present this opposition testimony, and I am happy to answer any questions you may have.