

The Ohio House of Representatives
Civil Justice Committee
Testimony in Opposition to H.B. 339
By Lee M. Stautberg, Esq.
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Chairman Hillyer, Vice-Chair Grendell, Ranking Member Galonski, and members of the House Civil Justice Committee, thank you for the opportunity to present testimony in opposition to House Bill 339.

My name is Lee Stautberg. I am an attorney and have practiced in the area of estate planning and probate law, in Cincinnati, for nearly 25 years and. I am a member 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. I am here as a long-time practitioner in the area of estate planning, trust and probate law.

Yes, we have come a long way in the past 25 years in terms of the ability to connect and communicate. Who knew then that one day many of us would be able to carry the means to communicate with our office in a backpack? Or, would anyone have predicted that you would be able to read my testimony on your Ipad, replacing stacks of paper?

While advances in technology make many aspects of life easier, they should not be mistaken as mandates to dispose of longstanding and well-thought-out statutory requirements in the execution of a will. The invention of the telephone allowed us to be "electronically present" with others years ago, yet the importance of following formalities outweighed modern day conveniences.

House Bill 339 eliminates the serious formalities which should be followed in the execution of important documents, that is, execution of a will in the physical presence of two witnesses. This formality is 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 requirements force the testator to recognize the gravity of the undertaking, as well as protect the testator from fraud and abuse. The bill would make execution of this important document subject to a greater risk of fraud and abuse for all adults, which is even more significant for our older citizens.

Having two witnesses physically present during the execution of a will imposes barriers and hurdles to those who would like to take advantage of the elderly. The physical presence also allows the witness to have a better ability to assess the testator's competence. Contrary to prior proponent testimony, the witnesses are frequently not strangers, but they are advisors, neighbors or friends who are available to assist in the witnessing a document.

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?

What kind of protections are given to testators who pursue execution in the electronic presence of witnesses? Are the witnesses going to have access to read the will before electronically signing it as a witness? The bill is silent as to accessibility to the will. Whereas a written will is under the control of the testator or lawyer, the bill contemplates storage on some electronic medium without any specified guardrails protecting the security of the document. Although we would like to think our documents in the cloud are secure, there are too many reports of hacking to have full confidence.

If your mother or father uses a third-party service to store the document, what happens if they forget to pay the invoice and get cut-off, or unwittingly change cloud service providers – forgetting they have an electronic will out there. It could be too late by the time the will is needed and that is discovered.

What happens if the cloud service experiences a ransomware attack, causing the electronic will to be deleted, and by that time, Mom or Dad no longer have the capacity to execute a will?

There are data privacy concerns with the ability to store the will electronically. 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?

There are additional confidentiality concerns. An attorney has an ethical obligation to maintain the confidence of the client. In addition, communications between an attorney and the client are protected by the attorney-client privilege. Communications that are not between an attorney and client are not afforded the same privileges and protections. Would someone recognize that by "clicking through" the terms and conditions of an electronic will service provider that their communications are not confidential, and in fact, they may have granted the service provider the right to sell or use their personal data?

There are serious risks of fraud. What is to prevent a wrongdoer from using a third-party service provider to create an account and a will in someone else's name? Although the bill requires the electronic execution of the will to be recorded, there is apparently no consequence for failing to do so, and such a recording is not required to be submitted to the court as evidence of proper execution. Moreover, such a recording is important only if there is a family member or friend who cares enough to question the authenticity of the submitted electronic will.

The bill purports to protect "vulnerable adults" as the bill does provide that a witness shall sign the will in the physical presence of a "vulnerable adult." However, the bill does not state who makes that very subjective determination of vulnerability or how the determination is made. In fact, a determination of vulnerability may not even be possible without a full evidentiary hearing. Because the determination of "vulnerable adult" is so subjective, a testator with any potential for an allegation of "vulnerability" could never be certain whether his or her will witnessed in the electronic presence would be enforceable. The existence of such a subjective determination could in effect deprive someone of making a valid will.

As a practitioner, I believe it is unwise to change the law regarding execution of wills in this manner, and urge that HB 339 not be advanced

Mr. Chairman and members of the committee, thank you for the opportunity to present this opposition testimony.