How The Model Notary Act Facilitates E-Recording

A Position Statement From The
NATIONAL NOTARY ASSOCIATION

The Nation's Professional Notary Organization

Abstract

A state's enactment of the Uniform Real Property Electronic Recording Act (URPERA), promulgated by the National Conference of Commissioners on Uniform State Laws in 2004, is widely regarded as a necessary step in adapting the state's property records system to accept electronic documents.

This paper outlines key components of URPERA and discusses four important Notary-related considerations to be taken into account before establishing any statewide system of electronic recording. These considerations are:

(1) A system for recording "digital" electronic documents will require amending a state's Notary code; a system for recording "digitized" electronic documents will not.

(2) Notarization is as important, if not more important, in preparing digital electronic documents for recording, as it is in preparing traditional paper documents.

(3) To enable notarization of digital electronic documents, rules for designating electronically capable Notaries and for performing electronic notarial acts must be adopted or enacted. Only in Article III of the *Model Notary Act* (MNA) of 2002 are such rules systematically proposed.

(4) The basic principles of electronic notarization must be congruent with the time-tested basic principles of traditional paper-based notarization. Such congruency exists in Articles I, II and III of the *Model Notary Act* of 2002.

The Uniform Real Property Electronic Recording Act

The URPERA was published after enactment of some form of the Uniform Electronic Transactions Act (UETA) by virtually every state, starting with California in 1999, and after enactment of the Electronic Signatures in Global and National Commerce Act ("E-Sign") by the U.S. Congress in 2000.

UETA and E-Sign made it legal to execute real estate transactions electronically, but these acts did not satisfactorily address the issue of whether or how the documents resulting from an electronic real property transaction could be publicly registered in local land records. State laws generally require that a document be in writing and in a tangible form such as paper before it can be recorded. URPERA removes this limitation by specifying that the documents presented for recording, including all signatures and accompanying notarial certificates, may be in electronic form.[1]

Under URPERA, local recorders who choose to implement electronic recording must follow standards established by a "state recording commission" (or, alternatively, a state agency) tasked with setting technical, administrative and practical rules for electronic recording.[2] If a state recording commission is established, URPERA dictates that the commission be comprised of a majority of members who are recorders.

'Digitized' Versus 'Digital'

In all known pilot and permanent public electronic recording programs for land records in the United States to date, two types of electronic document are being recorded: "digitized" and "digital."

(1) "Digitized" documents: These are traditional paper documents that are drawn, signed and notarized in ink, then afterwards electronically scanned and converted into images. These electronic images are then electronically transmitted to a recorder's office for filing.

(2) "Digital" documents: These are entirely electronic documents that are drawn, signed and notarized without a tangible medium such as paper or such traditional implements as inking pens and seals. The electronic instruments are then electronically transmitted to a recorder's office for filing.

Digital documents may be created in a word processing or graphics program, or in a widely accepted electronic file standard, such as Adobe PDF, which preserves the visual layout of the documents as they would appear on paper.

In their most sophisticated form, digital documents are comprised of the text contained in the document and a "presentation layer" with the specifics of the transaction coded in computer programming language known as extensible markup language (XML). Coined "SMART"[3] documents, these all-digital records can be viewed on any computer system through a Web browser that can display extensible hypertext markup language (XHTML).

While SMART documents promise to fully automate the recording process and deliver the greatest efficiencies at the lowest cost, many county recorders will opt initially to deploy electronic systems that will accept only digitized documents or limit recording of digital records to certain instruments. California is one state favoring this approach.

California's Approach

The state's Electronic Recording Delivery Act of 2004[4] permits each California county recorder to deploy a system for recording digitized electronic instruments affecting a right, title, or interest in real property — but only after the system is scrutinized for anti-fraud security by the state Attorney General. Significantly, since digitized documents are executed on paper with ink signatures and Notary seal impressions, no new laws for notarization are needed; existing state Notary laws already govern performance of the notarial acts on these electronic instruments.

However, the new California law does allow county recorders to accept digital reconveyance instruments, substitutions of trustee and assignments of deeds of trust, but no other documents. The signatures and notarizations on these specified paperless instruments will be affixed with electronic signatures.

Nationally, to allow for notarizations on digital documents, the outdated and often anachronistic state laws which now govern Notaries must be amended and supplemented before digital notarizations can be performed on a widespread basis. URPERA and California's electronic recording law recognize this need. Both laws overrule any existing law which requires a physical or electronic image of the Notary's official seal for notarization of electronic documents.

Does New Technology Cancel Need for Notaries?

It has been suggested by some that new electronic signature technology has eliminated the need for the services of Notaries.

In the early years of the electronic document age, as secure standards were sought for Electronic Data Interchange (EDI), some proponents of the technology called Public Key Infrastructure contended that PKI negated the need for Notaries. It has since become clear, however, that while PKI offers an all but impregnible mechanism for protecting the integrity of electronic message transmissions, without the scrutiny of a trusted third party PKI is vulnerable to fraudulent exploitation at the point of transmission in at least four ways:[5]

- The digital certificate may have been issued to an impostor.

- The digital certificate may be accessed and exploited by an unauthorized person. Many trusting spouses, for example, might readily share their access codes with their marital partners, just as they share their ATM numbers.

- The digital certificate's owner may be coerced into using the certificate to sign an elec tronic document against his or her desires.

- The digital certificate's owner may be intellectually vulnerable and manipulated into signing an electronic document against his or her interest. Senility and medication could play a part in rendering certain signers temporarily unaware of the ramifications of making a signature.

Ironically, the computer and the proliferation of electronic documents in modern commerce and law has actually heightened the importance of the Notary Public office rather than undermined it. On this, there is widespread agreement:

> *When electronic mortgages started taking hold, there was a lot of talk going around that the Notary would no longer be needed. But it turns out that that is not the case. Notaries will be part of the electronic commerce revolution because (they) are critical to the process. The Notary verifies document signers' identity, capacity and willingness, witnesses signing of closing documents (and) assists borrowers with technical details of process. As far as we can see, you are never going to get a computer to determine whether or not someone is willingly signing a document.*[6]
>
> *Kim Weaver*
> *BCE Emergis, Inc.*

> *We want to preserve the role of the Notary in the real estate transaction process. We do not in any case want to eliminate the Notary for the simple fact that Notaries provide the celebratory experience. There's a comfort and the confidence level of our consumers who go through the witnessing, the identification, the (determination of) intent. They know there's a neutral third party that's witnessing the important real estate transaction they're closing.*[7]
>
> *Darren Ross*
> *Stewart Information Service Corp. (SISCO)*

> *At first blush it might seem that a Notary's purpose, to note the identity of one who signs a document, is rendered moot in the digital age since computers and not people will be generating documents. But perhaps the greater complexity…of today's technological documents should*

demand a greater effort to identity the person at the keyboard who signs or acknowledges an electronic document.[8]

Glen-Peter Ahlers, Sr.
Associate Professor of Law
University of Arkansas

In addition, URPERA's own security provision itself lends credence to the idea that Notaries could play a vital role in assuring that the electronically signed and notarized real property instruments transmitted into a county recorder's electronic recording system are accurate and authentic.[9]

Technology can improve certain processes, but it cannot perfect human nature. And it cannot improve upon the simple yet effective ceremony whereby trust in the execution of a valuable instrument — paper or electronic — is established through a Notary's screening and subsequently made a matter of public record.

Paper or Electronic: Same Signing Formalities

So far, no known pilot or permanent public electronic recording program for land records in the United States has eliminated the Notary Public from the electronic recording process. Indeed, one common thread through all such programs has been the impulse to make electronic recording as compatible and congruent with paper-based recording as possible.

There is a practical reason why notarization of electronic real property documents must continue. URPERA requires recorders who implement electronic recording to continue accepting paper documents. And, since neither URPERA nor California's electronic recording law actually requires a county recorder to accept electronic documents, it is likely that some recorders will determine that the costs of electronic recording outweigh the benefits. Thus, within the same office there will be documents received into the queue of an electronic recording system at the same time paper documents are received over the counter. And, at least in the short run, in the same state there may be offices that retain a paper-based recording system and offices that elect to implement an electronic system.

The integrity of the public system for recording land records as a whole would irreparably suffer if paper documents received over the counter were acknowledged before a Notary while electronic documents transmitted into the same recorder's electronic recording system were subject to an entirely different witnessing procedure.

In any jurisdiction, to inspire confidence in and respect for the instruments used to convey title to real property, both paper and electronic instruments must incorporate the same signing formalities.

What New Laws for eNotaries Must Do

If digital documents are to be executed, notarized and recorded with the same safeguards and formalities as paper documents, then states planning to implement electronic document recording must put in place some basic rules for electronic notarization. Unfortunately, neither the widely enacted UETA nor the federal E-Sign law provides such rules.

At a minimum, a state's rules for electronic notarization must address such matters as:

- What are the qualifications for an eNotary? Is special education required? Must a qualifying person already hold a current "regular" Notary commission?

- Should a special commission be issued to an eNotary? Must a qualifying person obtain a special electronic Notary commission in addition to a regular Notary commission? Would these two commissions be coterminous? Or should the qualifying person be a regular Notary who registers an intent and capability to notarize electronically?

- How should eNotarizations be journalized by the eNotary? In a bound paper journal? In an electronic journal? In both? If the Notary's journal is electronic, how can it be accessed when the Notary is deceased?

These are but three of a host of practical issues that state legislators and regulators must resolve before rules for eNotarization can be promulgated, whether legislatively or through administrative action.

Fortunately, a well-developed model statute resolving these issues exists that legislators and administrators may turn to — the *Model Notary Act* of 2002.

The *Model Notary Act* of 2002

The *MNA* of 2002 is a comprehensive statute prototype designed to modernize the Notary Public office. It is a significant updating and expansion of two earlier model statutes promulgated by the National Notary Association: the *Model Notary Act* of 1984 and the original Uniform Notary Act of 1973, which was created in a special collaboration with Yale Law School. Over the course of three and a half decades, legislators and Notary-regulating officials have borrowed extensively from the 1973 and 1984 models in reforming state and territorial Notary laws. In some instances, only a few sections were adopted into statute; in others, the model was enacted virtually in toto.

Article III of the 2002 *Act* (i.e., "Electronic Notary") provides systematic rules for the screening, training, authorizing and regulating of Notaries performing electronic notarial acts. It is the first and — to this date — only comprehensive set of rules for electronic notarization. The *Act* was drafted by a 29-member national committee of distinguished experts from the business, governmental and legal communities. A wide range of industries that handle or generate notarized documents was represented on the drafting panel.

MNA Integrates Paper-Based and Electronic Notarial Acts

The significant achievement of the 2002 *Model Notary Act* is to integrate the definitions and procedures of electronic notarization with those for traditional paper-based notarization.

Article I of the *MNA* provides unifying definitions (e.g., "acknowledgment," "credible witness," "official misconduct," "satisfactory evidence of identity") that apply to both traditional and electronic notarial acts. While Article II applies these definitions to traditional notarizations, Article III applies them to electronic acts. At the same time, all pertinent *MNA* definitions are congruent if not identical to definitions in both UETA and E-Sign.

Two cornerstone rules underlie Article III. The first is that the fundamental principles and processes of traditional notarization must remain the same regardless of the technology used to create a signature. No principle is more critical to notarization than that the signer must appear in person before a duly commissioned Notary Public to affix or acknowledge the signature and be screened for identity, volition and basic awareness.

The second cornerstone of Article III is technology neutrality. Unlike a hand-drawn signature, an electronic signature can be affixed in a multitude of ways, including: (a) typing a name at the bottom of a document; (b) affixing a holographic signature with a digital pen on an electronic pad; (c) clicking a button on a Web site; (d) entering a personal ID number or password into a form field; (e) "cutting and pasting" a digitized image of a hand-drawn signature into an electronic document; (f) using an encryption technology such as PKI to create a digital signature; (g) applying a thumbprint or other biometric identifier; or (h) recording a voice message. Article III of the *Model Notary Act* neither embraces nor rejects any particular electronic signature technology.

At the same time, the Act does not prevent or discourage a jurisdiction's prescription or proscription of a particular technology for electronic signatures or Notary journals. Rather, the *Act* posits software performance standards for electronic notarization which any qualifying technology must meet. The drafters preferred to let the forces of the marketplace winnow out the less capable and relevant technologies.

Summary and Conclusion

The Uniform Real Property Electronic Recording Act and such legislation as California's Electronic Recording Delivery Act set rules for electronic recording of digitized and digital documents. While the rules of traditional paper-based notarization apply to digitized instruments, which are electronically scanned images of paper documents, new notarial rules must be enacted or adopted for digital documents.

Notarization has a widely acknowledged heightened importance when it comes to digital documents. Within any jurisdiction, the basic principles and practices of electronic and traditional notarization must be congruent in order to inspire respect in the integrity of the official instruments generated and recorded in that jurisdiction.

Articles I, II and III of the *Model Notary Act* seamlessly integrate the basic definitions, principles and processes of traditional and electronic notarization, so that a recorded electronic document will be accorded no less respect, confidence and legal stature than a recorded paper instrument.

End Notes

1. See § 3, *Uniform Real Property Electronic Recording Act*, as approved by the National Conference of Commissioners on Uniform State Laws, July 30-August 6, 2004.

2. *Ibid.*, § 5.

3. SMART (Secure, Manageable, Archivable, Retrievable and Transferable) document specifications are currently being developed by the Mortgage Industry Standards and Maintenance Organization (MISMO). See www.mismo.org.

4. See Assembly Bill No. 578 of 2004.

5. See *A Position On Digital Signature Laws And Notarization*, National Notary Assocation, September 2000, p. 5.

6. See *Professionalism: The Keystone of Success* ("A Report on the 26th Annual Conference of the National Notary Association"), June 2-5, 2004, p. 9.

7. *Ibid.*, p. 13.

8. See "The Impact of Technology on the Notary Process," *The John Marshall Law Review*, Spring 1998, Vol. 31, No. 3, p. 912.

9. At the urging of the American Bar Association an important security provision was added into URPERA after the Act had been adopted. Section 5(b)(5) instructs the state commission or agency tasked with developing standards for implementing electronic recording under the Act to consider:

   (5) standards requiring adequate information security protection to ensure that electronic documents are accurate, authentic, adequately preserved, and resistant to tampering.