A Position On E-SIGN, UETA And The Need For Enabling Electronic Notarization Laws

Laws authorizing electronic notarization are needed to supplement state and federal laws recognizing the legal validity of e-signatures

A Position Statement From The
NATIONAL NOTARY ASSOCIATION

The Nation's Professional Notary Organization

Abstract

The 1999 Uniform Electronic Transactions Act (UETA) that has been adopted in virtually every state and the 2000 federal Electronic Signatures in Global and National Commerce Act ("E-SIGN") that is now the law of the land recognize the legal validity of electronic signatures and seals when used in an official capacity by Notaries.

However, these statutes fall far short of actually authorizing Notaries to perform the electronic notarizations that require such signatures, nor do they set any standards, definitions or procedures for these electronic acts.

This paper explains that additional rules are needed both to authorize Notaries to act electronically and to guide these Notaries in performing electronic notarizations; and that Article III of the *Model Notary Act* of 2002 provides such rules.

Context and Background

The federal E-SIGN act and the UETA were drafted to remove barriers to e-commerce presented by traditional Statute of Frauds rules and other laws requiring paper writings and traditional pen-and-ink signatures.[1]

Central to both acts is the assertion that the medium used to conduct a transaction is irrelevant. Under both, generally speaking, if a law contains a writing or signature requirement, an "electronic record"[2] and signature will satisfy it[3] just as well as the traditional paper document and handwritten signature.

Regarding the use of electronic signatures by notarial officers in an official capacity, the UETA provision reads as follows:

> **SECTION 11**. **NOTARIZATION AND ACKNOWLEDGMENT**. If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.

The corresponding language in E-SIGN is substantially similar.[4]

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[1] "Whether the legal requirement that information or an agreement or contract must be contained or set forth in a pen and paper writing derives from a statute of frauds affecting the enforceability of an agreement, or from a record retention statute that calls for keeping the paper record of a transaction, such legal requirements raise real barriers to the effective use of electronic media." (UETA, Prefatory Note)

[2] An "electronic record" is a "record created, generated, sent, communicated, received, or stored by electronic means" (UETA § 2(7)) and is the equivalent of a paper document.

[3] 15 USA § 7001(a); UETA § 7.

[4] E-SIGN's notarization provision starts out: "If a statute, regulation, or other rule of law requires a signature or record relating to a transaction in or affecting interstate or foreign commerce to be notarized..."

The architects of E-SIGN and the UETA assert that these acts lay the necessary legal foundation for electronic notarization by recognizing a Notary's electronic signature, and that, except for removing the need for a physical image of a Notary seal, neither act trumps existing or future state Notary laws regulating paper-based and electronic notarial acts and who is authorized to perform them.

Significantly, however, the UETA's "Draft Prefatory Notes" clearly state: "The deference of the *Act* to other substantive law does not negate the necessity of setting forth rules and standards for using electronic media."

Proponents point out that E-SIGN and the UETA are "business friendly" since they allow transacting parties to use any technology to affix a signature. Parties can sign documents by clicking a button, typing a name, pasting a graphic image of a physical signature, using a digitized pen and pad, applying cryptography and even recording a voice message. Many of these methods require little or no financial investment and allow businesses, government and individuals to realize the tremendous cost savings electronic transactions promise.

However, it has become clear that, in regard to implementation of both electronic notarization and electronic recording, E-SIGN and UETA are just starting points and supplementary enabling legislation is required in both cases. To ask Notaries to begin notarizing electronically without first enacting statutory enabling laws would be equivalent to asking county recorders to record electronically without first enacting specific electronic recording laws; either is inconceivable.

In the Aftermath of the UETA

Soon after states began adopting the UETA, county recorders questioned whether the UETA conferred the proper authorization to register electronic instruments in local land records. "Legacy" laws on the books in a majority of states required the documents presented for recording to be originals and writings in a tangible medium,[5] complete with handwritten signatures and Notary acknowledgment certificates.

This confusion resulted in the filing of three separate formal inquiries with the attorneys general of California, New York and Texas on the following issues:

- Does E-SIGN or the UETA specifically authorize county recorders to initiate electronic recording of instruments?[6]
- Does E-SIGN obligate a county recorder to accept documents submitted for recordation that bear only an electronic signature, or does existing state law still require "the rejection of documents that are submitted for recordation that lack an original signature but bear an electronic signature"?[7]

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[5] Illustrative of paper-bound recording laws is a Michigan statute, which specifies that all instruments executed after April 1, 1997, and presented for recording must be "legibly printed in black ink on white paper that is not less than 20-pound weight" (Mich. Comp. Laws § 565.201(f)(iv)).

[6] Op. Cal. Atty. Gen. No. 02-112 (Sept. 4, 2002).

[7] Op. N.Y. Atty. Gen. No. 03-2001 (June 8, 2001).

- Whether "a county clerk must accept for recording a paper copy, containing printed images of signatures or a printed image of a notary seal, of an electronic record of a real estate transaction."[8]

In 2002, the National Conference of Commissioners on Uniform State Laws (NCCUSL) began work on a model electronic recording law to dispel this uncertainty. Promulgated in August of 2004, the resulting Uniform Real Property Electronic Recording Act (URPERA) granted clear authorization for county recorders and registers of deeds to accept electronic documents for recording.

Similar strong and widespread uncertainty exists today among legal experts and state Notary officials who question whether E-SIGN and the UETA contain the positive authorization to notarize electronically as is sometimes presumed. Consider the following:

- Currently, a number of states and other U.S. jurisdictions have seen a need to authorize the secretary of state or other Notary-regulating official to issue rules and regulations governing the performance of electronic notarial acts and electronic signatures.[9]
- Pennsylvania was one of the first states to enact the UETA, in December of 1999, but the implementation date for the section on notarization and acknowledgment was delayed indefinitely until it could be determined that it no longer conflicted with the requirements and procedures in the state's Notary Public Law.[10]
- In 2000 and 2003, Arizona and Colorado, respectively, enacted their own electronic notarization laws and issued regulations supporting this legislation shortly thereafter.[11]
- In 2004 and 2005, Kansas, Maryland, Minnesota and North Carolina introduced legislation inspired by Article III of the NNA's *Model Notary Act* of 2002.

These events demonstrate that many state lawmakers and officials are unconvinced that E-SIGN and the UETA, unsupplemented and by themselves, empower Notaries to perform electronic acts, and underscore a need for a clear, positive enabling authorization for Notaries similar in form and function to the authorization that the URPERA grants county recorders. Section 16-1 of the *Model Notary Act* of 2002 provides this permission in language analogous to Section 4(b) of the URPERA[12]:

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[8] Op. Tex. Atty. Gen. No. GA-0228 (Aug. 5, 2004).

[9] See Ak. Stat. §§ 44.50.060(2), 44.50.065(d); Kan. Rev. Stat. § 16-1611; Nev. Rev. Stat. § 240.017; Or. Rev. Stat. § 194.582; S.C. Code Ann. § 26-6-190(b).

[10] 73 P.S. § 2260.5101(1).

[11] It should be noted that both Arizona and Colorado enacted their own versions of the UETA.

[12] Section 4(b) of the URPERA reads:
(b) A (recorder):
* * * *
(2) may receive, index, store, archive, and transmit electronic documents.
(3) may provide for access to, and for search and retrieval of, documents and information by electronic means.

§ 16-1 Types of Electronic Notarization.

The following types of notarial act, as permitted by Section 5-1 (a), may be performed electronically:

(1) acknowledgment;

(2) jurat; [and]

(3) signature witnessing[; and

(4) verification of fact].

As ministerial officials,[13] Notaries Public derive their authority and are guided in the performance of their duties by statute or administrative regulation. The ministerial Notary has no discretion to act on rules that are not written down. Thus, only when the law is clear and articulated can Notaries act.[14] E-SIGN and the UETA recognize the legal validity of electronic signatures used by Notaries in an official capacity, but fall far short of actually empowering Notaries to perform the electronic acts that use these e-signatures. Article III of the *Model Notary Act* of 2002 compensates for this shortfall by unambiguously providing the necessary authorization.

Public Interest Is Primary

Qualifying requirements for a Notary commission vary from state to state, but the process is generally intended to ascertain whether an applicant has the requisite integrity and character[15] to serve as an unbiased and impartial notarial officer in transactions involving large sums of money.

Upon commissioning, most states require Notaries to file a sample of the official handwritten signature that will be used to sign documents,[16] and some require Notaries to submit a sample impression of an official seal as well.[17] These requirements enable commissioning officials to authenticate the genuineness of notarial acts performed by the Notary and help deter acts of fraud involving Notary signatures and seals.

These qualifications are essential in order to maintain public confidence in the official witnessing acts of Notaries.

In transitioning to the electronic marketplace, state legislators must carefully review and revise Notary laws as necessary to assure the public that Notaries are qualified to perform electronic notarizations and that their electronic acts are as inherently trustworthy as paper ones.

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(5) may convert paper documents accepted for recording into electronic form.

(6) may convert into electronic form information recorded before the (recorder) began to record electronic documents.

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13 The Notary's status as a ministerial official is addressed in Bernal v. Fainter, 467 U.S. 216 (1984).

14 Historically, Notaries derive their authority from the custom and usage of the law merchant, common law, and statute (traced in Kumpe v. Gee, 187 S.W.2d 932 (Tex. App. 1945). Courts have ruled that Notaries must be specifically granted the authority to administer oaths by statute (*see* U.S. v. Curtis, 107 U.S. 671 (1882). Today, every state has laws prescribing the Notary's authorized powers.

15 See Ohio Rev. Code Ann. § 147.02(A)(1); 57 Penn. Stat. § 151(b).

16 See Mo. Rev. Stat. § 486.235(4); 5 Ill. Comp. Stat. 312/2-106; 24 Vt. Stat. Ann. § 441.

17 See Cal. Gov't Code § 8207.3(d); N. D. Cent. Code § 44-06-04; Kan. Rev. Stat. § 53-102.

Article III of the *Model Notary Act* of 2002 proposes minimum standards to ensure that Notaries are qualified to perform electronic notarizations.

Article III does not establish a separate office or commissioning process for "electronic" Notaries, which would be burdensome for state Notary officials to administer and could potentially discourage Notaries from applying. Instead, the *Act* simply requires any Notary interested in performing electronic notarizations to register the capability to perform electronic acts with the commissioning official.[18] The Notary would be required to notify the commissioning official of the technology used to affix the Notary's electronic signature, the equivalent to providing an official handwritten signature sample today.[19]

Article III calls for mandatory education and testing of Notaries who want to register the capability to perform electronic notarizations.[20] While signing a document with pen and ink is second nature, states cannot assume that Notaries will intuitively know how to perform electronic acts. The technologies and processes for affixing an electronic signature are sufficiently complex to warrant instruction.[21]

Further, in light of increasing instances of computer and Internet crime, education is needed to train Notaries in how to recognize and prevent these frauds.

The minimal requirements proposed by Article III of the *Model Notary Act* of 2002 are needed to assure the public that the jump from paper to electronic transactions with electronic notarizations will not result in a loss of consumer protections.

Interstate and International Recognition of Electronic Acts

In most states, the offices of county clerk and secretary of state typically issue certificates providing any needed authentication of the commission, signature and seal of Notaries on documents sent to other states and nations.[22]

The rules for executing these certifications are largely bound to traditional paper-based processes. For example, the internationally recognized Apostille — the certificate used among nations subscribing to the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents — must conform to the treaty's precise specifications for dimensions, format and content.[23] Obviously, these requirements presuppose the use of paper certificates.

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[18] *Model Notary Act* § 15-1.

[19] Ibid. § 15-2.

[20] See Note 18.

[21] Florida's version of the UETA provision on notarization and acknowledgment is unique in mandating the additional requirement that all first-time Notary Public applicants have "completed at least 3 hours of interactive or classroom instruction, including electronic notarization, and covering the duties of the notary public" (Fla. Stat. Ann. § 668.50(11)(b) - emphasis added).

[22] See Mon. Code Ann. § 1-5-407; R.I. Gen. Laws § 42-30-15.

[23] "The certificate referred to in the first paragraph of Article 3 shall be placed on the document itself or an 'allonge'; it shall be in the form of the model annexed to the present Convention" (Hague Convention Abolishing the Requirement of Legalization (Authentication) for Foreign Public Documents, Article 4). "Model of certificate. The certificate will be in the form of a square with sides at least 9 centimetres long" (Annex to the Convention).

Statutory or administrative rules are needed authorizing commissioning officials to electronically sign and transmit authenticating certificates. Section 20-1 of the *Model Notary Act* of 2002 grants this authorization and directs the commissioning official to issue electronic certificates in conformance with any treaties or arrangements that may be in force. In addition, Section 20-2 prescribes the form and content of the certificate of authority for an electronic notarial act.

Conclusion

However necessary the federal Electronic Signatures in Global and National Commerce Act and the Uniform Electronic Transactions Act were to establishing the full legal effect of electronic documents and signatures, these acts alone and by themselves are insufficient in granting express permission to perform electronic notarizations. While E-SIGN and the UETA recognize the legal validity of electronic signatures and seals when used by Notaries, they do not authorize Notaries to perform electronic acts.

Article III of the *Model Notary Act* of 2002 unambiguously authorizes Notaries to perform electronic notarial acts and provides rules for qualifying them, as well as technology-neutral rules for performing the electronic notarizations.

Article III of the *Model Notary Act* of 2002 also authorizes Notary commissioning officials to authenticate electronically the signature, seal and commission of Notaries for electronic notarial acts.

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