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Electronic Notarization

Traditional Assurances for Electronically Recorded Documents

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Table of Contents

Scope.....	1
Why Notarize Recordable Documents?	1
What Are the Essential Elements of a Notarial Act?.....	2
What is the Value of Notarization?.....	3
What is the Effect of Notarization?	3
On Document Content:.....	3
• Notarization does not validate or authenticate a document’s content.	3
• Notarization alone does not make a document “legal.”	3
On Document Integrity:	3
On Non-Repudiation:	4
On Document Validation:	4
• Document validation is not the recorder’s traditional duty	4
On the Notary’s Status:.....	5
• Requirement to validate the notary’s status.....	5
Electronic Notary Issues.....	5
A “New” Notary, or Just a New Way to Sign?	5
Does Electronic Notarization Compel New or Different Rules of Practice for Notaries or Recorders? ...	6
Electronic Notary Regulations – How Much is Just Right?	7
Personal Appearance in the Virtual World	7
Does Electronic Notarization Provide the Essential Elements of a Notarial Act?.....	9
Summary	10
Glossary.....	12

Electronic Notarization

Traditional Assurances for Electronically Recorded Documents

Scope

The Property Records Industry Association (PRIA) prepared this white paper to provide all recording jurisdictions with confidence that the concept of electronic notarization is valid and acceptable in the process of recording documents in the public record.

This paper is limited to the discussion of electronic notarial acts as related to land records and recordable documents. PRIA has subject matter expertise in this area. It seeks to answer key questions and dispel misperceptions surrounding notarization in general and electronic notarization.

Why Notarize Recordable Documents?

Notaries public provide an essential function to the public land records industry. Most documents are required by statute to be notarized in order to be accepted for recording. The practice of using a trusted third party to acknowledge or certify that certain formalities of document execution have taken place between individuals dates back to early civilization and has carried forward to modern times.

There are several important assurances that the notarial act adds to the signing of documents. These assurances are consistent, whether the notarial act occurs in the paper or electronic realm.

- Independent witness. The notary, as an officer commissioned by the state, acts as an impartial witness to the signer's intent.
- Awareness. The notary assesses the signer's awareness that they are about to sign a document that commits them to a certain obligation. (The assessment is a reasonable care assessment.)
- Voluntary act. The notary evaluates whether the signer is voluntarily entering into the obligations created in the documents including whether the signer appears to be of sound mind at the time of notarization and understands the obligations to which they are committing themselves by signing the document.
- Prima facie evidence. The Federal Rules of Evidence Rule 902(8) establishes that properly acknowledged documents are self-authenticating and can be presented as evidence in a legal proceeding without additional corroboration. This "face-value" status provides the foundational assurance that facilitates confidence in the transaction. Relying parties are able to accept a notarized document as authentic with a high degree of confidence.

What Are the Essential Elements of a Notarial Act?

A notarial act for paper or electronic documents includes the following:

- Personal appearance. The signer must personally appear for the act to be performed. With very few exceptions, this means that the signer must be in the physical presence of the notary for both paper and electronic notarial acts. The Revised Uniform Law on Notarial Acts (2010) (“RULONA”) requires that “the individual making the statement or executing the signature shall appear personally before the notarial officer,” and does not permit a technology substitute such as two-way audio-visual communication. Exceptions are found in Virginia and Montana. Virginia allows its notaries to perform electronic notarial acts for signers geographically located anywhere in the world, subject to means of satisfactorily identifying the signer specified in the statute. Montana allows its notaries to perform electronic notarial acts via two-way, audio-video technology, for Montana residents, subject to limitations addressed in the statute.
- Positive identification. The notary requires the signer to prove by personal knowledge or satisfactory evidence that he or she is the individual named in the document.
- Oath or Acknowledgment. The signer makes an oath, usually prescribed by state statute, in which they swear that the contents of the document are true to the best of their knowledge and signs the document in the notary’s presence. For an acknowledgment, the document may be signed prior to notarization or in the notary’s presence. In either case, the signer acknowledges that the signature on the document is their signature and that they signed the document voluntarily.
- Signature event by the parties appearing. The parties who need to sign the document sign in the presence of the notary (or personally appear to acknowledge an earlier signature).
- Properly completed notarial certificate. The notary completes the notarial certificate with the facts of the notarization, including the date, venue, names of the parties and other items prescribed by state statutes.
- Signature event by the notary. After observing the parties’ signatures, the notary certifies the events of the notarial act by signing the notarial certificate.
- Stamp or seal. The notary affixes an official stamp or seal to the notarial certificate. This is required by statute in many states and is in common practice elsewhere. Whether an ink impression or electronic process, the official stamp or seal conveys essential commission information about the notary.

What is the Value of Notarization?

Whether performed in a paper or electronic medium, notarization imparts value to document transactions:

- Part of the web-of-trust. Notarization provides assurances between parties of the genuineness of signatures without further proof or evidence.
- One more step that has to be circumvented to commit fraud. The notarial act can be an effective fraud preventative. The service of notaries public may reduce litigation involving real property transactions.
- Document meets recordability requirements. Notarization is a required formality for most documents that will be submitted to a recorder for entry into public records. As noted previously, notarization provides documents *prima facie* evidence. It is primarily for this reason that recordable documents are notarized. The constructive notice that recording provides is enhanced by the level of presumed authenticity of notarized documents in the public record. This evidence allows recorders and relying parties examining these documents to have confidence that the formalities of notarization have occurred and the requirement that the document be acknowledged has been met.

What is the Effect of Notarization?

On Document Content:

- Notarization does not validate or authenticate a document's content. The notarial act is a valuable means of third-party verification of the identity, capacity, willingness and participation of parties to the transaction. Notarization does not validate the truthfulness, accuracy, or content of documents.
- Notarization alone does not make a document "legal." Unauthorized practice of law by notaries is prohibited. Most notaries commissioned in the United States do not have legal training, and are prohibited from giving legal advice related to the contents or effect of the documents being executed. There are, however, exceptions in states like Louisiana or when the notary has other legal certifications or training as provided by law.

On Document Integrity:

Traditionally, and to this day, for paper documents to be recorded, the notary's ink signature (and seal or stamp, where required) must be affixed to the document to provide physical, visible proof that the formalities of notarization occurred. However, once the paper document leaves the presence of the notary, he or she has no control over document alteration.

Electronic signature technology can heighten document security by making electronic documents tamper-evident. Utilizing technology that heightens document security allows the public land records industry to have more confidence in the authenticity and validity of recorded documents.

On Non-Repudiation:

Many parties rely on the veracity of the documents in a real estate transaction. In addition to the seller and buyer, lenders, title companies and investors all must have confidence in the transaction's documentation. In the paper world that confidence comes, in part, from the fact that multiple stakeholders are involved in completing the transaction. A real estate agent, an appraiser, a lender, a home inspector, a title examiner, a closing agent and a notary all have essential roles in the transaction. Together, they comprise what some call a "web of trust."

In the electronic world, these parties can be aided by automated systems with audit trails that show who interacted with the documents, and when. Secure methods of transmission and tamper-evident seals allow us to verify that documents were received unaltered. Thus, the confidence we gain from the knowledge that a web of stakeholder parties reviewed the transaction is bolstered by the digital forensic evidence that is inherent in electronic document transactions.

Non-repudiation essentially means that enough process control and evidence exists to defend against a borrower saying, "I admit that that document was signed, but it wasn't actually me who signed it," or claiming that the document was altered after they signed it. Technologists and attorneys may view this concept differently.

Because of the availability of audit trails and other electronic evidence, technologists claim a greater level of non-repudiation for electronically signed documents. We can log which computer the document was signed on, and which user ID and password were used to log into the eSignature system and access the document. And while this is certainly true, attorneys might argue that we still don't know who was sitting at the keyboard pressing the Enter key, or what their state of mind was at the time of the event. Some eSignature systems also validate the borrower's identity by asking several "out-of-wallet" questions (things that only the borrower should know about previous addresses or loan payment amounts), and/or record a video log of the signing event.

The audit trails and electronic evidence that these automated systems can provide are best understood as reinforcements to the traditional web of trust created by the multiple stakeholder parties that touch the transaction. The notarial event within that web of trust is one that can be bolstered by these technologies, building even greater confidence than was ever available with paper documents.

On Document Validation:

- Document validation is not the recorder's traditional duty. Any expectation for recorders to prove that the documents presented for recording are authentic or valid exposes the recording jurisdiction to an additional risk. From a recorder's perspective, a more realistic expectation is that documents presented for recording are executed with due diligence by knowledgeable notaries who have met their responsibilities under state law.

On the Notary's Status:

- Requirement to validate the notary's status.

As of this writing, Arkansas, North Carolina and four boroughs in New York City require real-time validation of the notary's active commission status at the time of notarization.¹ If the potential for notary fraud is a relevant concern and validation of a notary's status is considered to be of benefit, counties need resources in technology and funds to create the infrastructure to support a central automated database of notary information.

There are pros and cons to proposing a national registry to validate a notary's status. Under RULONA, a state may be required to maintain an online database that reflects the commission status of each notary. However, as of this writing, RULONA has been enacted in only six states (IA, MT, ND, OR, PA² and WV).

Electronic Notary Issues

A "New" Notary, or Just a New Way to Sign?

Some wonder if the authority to notarize electronically creates a new or different class of notary. PRIA suggests that the authority granted by the **Electronic Signatures in Global and National Commerce Act** ("ESIGN") and the **Uniform Electronic Transaction Act** ("UETA") simply provides notaries a new method—an electronic signature—of affixing the notary's official signature to the notarial certificate on an electronic document.³

This principle is stated plainly in the authorizing provisions of ESIGN and UETA.

- **ESIGN: NOTARIZATION AND ACKNOWLEDGMENT.**—*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, acknowledged, verified, or made under oath, that 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 statute, regulation, or rule of law, is attached to or logically associated with the signature or record.*⁴

¹ New York City validates a high percentage of all notarizations. Arkansas and North Carolina validate only electronic notarizations.

² Although Pennsylvania enacted RULONA in 2013, the law's effective date awaits regulations by the Department of State.

³ Thirteen states that authorize electronic notarization require notaries to obtain additional approval, certification or a separate commission from the commissioning authority, prior to performing any electronic notarial acts. Other requirements, such as training or registration of the notary's chosen electronic signature technology, may also apply. These requirements expand a notary's skill set and help the commissioning authority track which notaries are electronically enabled, but they do not create a different class of notary.

⁴ 15 U.S. Code, Chapter 96, §7001(g).

- UETA: *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.*⁵

The following commentary, supplied within UETA by its drafters, further evidences creation of a new signing tool for notaries (not a new class of notary):

*Comment: This section permits a notary public and other authorized officers to act electronically, effectively removing the stamp/seal requirements. However, the section **does not eliminate any of the other requirements of notarial laws**, and consistent with the entire thrust of this Act, **simply allows the signing and information to be accomplished in an electronic medium.** [Emphasis added.]⁶*

Electronically-enabled notaries remain governed primarily by the same statutes, rules and recommended practices applicable to their performance of paper-based notarial acts; their authority to notarize is simply extended to include electronic documents. Some states have separate statutes for electronic notarization that parallel statutes for paper notarization; other states take a unified approach.

Does Electronic Notarization Compel New or Different Rules of Practice for Notaries or Recordors?

Some adopting states *have* enacted new notary statutes and rules dealing specifically with electronic notarial acts. Rather than negate the fundamental requirements for notarial acts on paper, new statutes and rules are intended to provide needed guidance on how those same fundamentals should be practiced using electronic notarization's "new way to sign."

The basic questions addressed by new notary statutes and rules for electronic notarization include:

- May the notary adopt any type of electronic signature as the official signature, or is there a specific technology requirement?
- Must an official seal requirement for paper documents be evidenced on an electronic document?
- May the notary use the same notarial certificate wording for paper and electronic notarial acts?
- Must the signer be physically present before the notary?
- What about journal records?

⁵ Uniform Electronic Transactions Act, Section 11 – Notarization and Acknowledgment
http://www.uniformlaws.org/shared/docs/electronic%20transactions/ueta_final_99.pdf, p. 37-38, retrieved Nov. 6, 2015.

⁶ Uniform Electronic Transactions Act, Comment to Section 11 – Notarization and Acknowledgment
http://www.uniformlaws.org/shared/docs/electronic%20transactions/ueta_final_99.pdf, p. 38, retrieved Nov. 6, 2015.

The same questions have long been addressed for notarial acts on paper; new regulations provide answers to these same questions about electronic notarial acts emphasizing that electronic notarization is equivalent to notarizing a paper document.

While one can generally expect new notary regulations governing electronic notarization, recorders must recognize that their creation does not automatically place new obligations or rules of practice on recorders. They are, after all, notary regulations—not recorder regulations. In the great majority of U.S. jurisdictions, prior adoption of the Uniform Electronic Transactions Act and the Uniform Real Property Electronic Recording Act ensure that recorders may simply accept electronic documents and electronically notarized documents into the public record, without any added duty of verification or validation.

The duty to properly execute documents resides with the transacting parties and the notary public, whether the medium is paper or electronic. Thus recording of electronic documents entails no additional examination for recorders than recording paper documents.

Electronic Notary Regulations – How Much is Just Right?

PRIA suggests that additional guidance for electronic notarization is not only helpful, but necessary. Notaries need clear, specific guidance to ensure their electronic notarial acts comply with existing regulations that apply to all acts, whether paper-based or electronic.

Regulations governing electronic notarial acts can, however, be so extensive that they have a chilling effect on the rate of adoption. Conversely, too little guidance or too few regulations leave so many questions unanswered that notaries interested in electronically notarizing do not know where to begin.

PRIA's view is that electronic notarization is just another way for notaries to sign. PRIA encourages states to adopt regulations that help notaries comply with fundamental requirements applicable to all notarial acts, paper-based or electronic, while allowing the broadest possible range of electronic signature technologies.

Personal Appearance in the Virtual World

Until 2011, the requirement that a document signer be in the physical presence of the notary was universal throughout the United States, for both paper and electronic notarial acts.

In 2011, however, the Commonwealth of Virginia enacted a law allowing a signer, in the case of an electronic notarization, to appear before the notary via audio/video conference technology (subject to specific forms of satisfactory identification of the signer).⁷ In 2015, the State of Montana enacted a law

⁷ Virginia Acts of Assembly, 2011 Session, Chapter 731 and Chapter 834 amending Va. Code § 47.1-2 *et. seq.* Satisfactory evidence of identity may be based on audio-video conference technology that allows the notary to communicate with and identify the signer at the time of the notarial act, provided such identification is confirmed by 1) personal knowledge; or 2) reliance on prior in-person identity proofing by a trusted third party; or 3) a valid digital certificate accessed by biometric data or a Personal Identity Verification card issued in accordance with

allowing a signer to appear before a notary by means of real-time, two-way audio/video communications technology (subject to rules and standards adopted by the Secretary of State and other restrictions). Montana's law allows this method of "remote" notarization for paper or electronic documents, with greater restrictions than the Virginia model.⁸

Proponents of these laws point to a world that has wholly embraced life conducted online, and assert that the public expects personal appearance to mean not only physical appearance, but electronically enabled appearance as well.

Do these interpretations of personal appearance compel recorders to know or verify how a signer actually appeared for an electronic notarial act, and to reject documents that were not notarized using a compliant means of signer appearance?

Recorders do have a responsibility to know the laws pertaining to real estate recording in their state, and they should bear in mind that there may be additional legal issues surrounding "remote" notarizations that would need to be resolved by courts and legislatures. However, they should not assume new duties for themselves that are not explicitly defined for them. In the case of physical appearance for notarization of a paper document, recorders do not presently attempt to determine whether that standard was met for the document in hand. The paper document's notarial certificate is *prima facie* evidence that the notarization occurred; that is the extent of a recorder's examination of notarization. The same level of duty applies when the document is electronically notarized.

federal government specifications. A Handbook for Virginia Notaries Public, p. 9.

<https://governor.virginia.gov/media/2089/NotaryHandbook.pdf>, retrieved Nov. 6, 2015.

⁸ "Montana notaries may perform acknowledgments or verifications on oath or affirmation by means of a real-time, two-way audio-video communication (remote notarization) if: (a) the signer is personally known to the notary or identified by a credible witness; (b) except for a transaction that is pursuant to a proxy marriage under MCA §40-1-213 or MCA §40-1-301, the signer is a legal resident of Montana; and (c) the transaction involves real property located in Montana, involves personal property titled in Montana, is under the jurisdiction of any Montana court, or is pursuant to a proxy marriage under MCA §40-1-213 or MCA §40-1-301." Montana Secretary of State's Web site, http://sos.mt.gov/notary/Update/law_changes.asp, retrieved Nov. 6, 2015.

Does Electronic Notarization Provide the Essential Elements of a Notarial Act?

Yes! Because whether a notary officiates for paper or electronic documents, the fundamental requirements and steps of notarization are the same. The notary requires personal appearance of the signer, satisfactorily identifies the signer, assesses the signer's comprehension and volition, reviews the document for barriers to notarization such as blanks or missing pages, performs the required notarial act (oath/affirmation or acknowledgment), completes a notarial certificate including the notary's official signature and seal, and records the facts of the notarial act in a journal. The only difference is the medium—paper or electronic—in which all these steps are performed.

Paper vs. Electronic – The Essentials of Notarization Remain the Same		
Essential Element	Paper	Electronic
a) Presence of the signer before the notary	✓	✓
b) Satisfactory identification of the signer	✓	✓
c) Assessment of signer comprehension, volition	✓	✓
d) Document review, for barriers to notarization	✓	✓
e) Authorized notarial act (oath/affirmation or acknowledgment)	✓	✓
f) Complete notarial certificate with notary signature and seal	✓	✓
g) Journal record	✓	✓

Thus the assurances of notarization remain the same – only the medium differs.

Summary

Notarization is an important element of the web of trust that allows stakeholders to have confidence in a transaction's documentation. Real property documents are notarized as a means of deterring signature fraud. In taking an acknowledgment of a signature or administering an oath, a notary verifies that the signing parties are the persons they purport to be, assesses the parties' awareness of and intent to sign the documents, and completes a certificate of the notarial act to memorialize these facts. The notary's certificate facilitates confidence in the transaction and provides *prima facie* evidence that the notarization on the signed document is authentic.

Notarization is a required formality for most documents submitted for entry into public records, and it provides specific, important assurances about a recorded document's execution (see this paper's section titled, "Why Notarize Recordable Documents?"). These assurances are consistent, whether the notarial act occurs in a paper or electronic medium.

Also consistent are the fundamental requirements and steps of notarization, whether the transaction is paper-based or electronic. While states that allow electronic notarization have enacted new notary statutes and rules dealing specifically with electronic notarial acts, the general intent is to overlay existing regulations with needed guidance on how notarization fundamentals should be practiced using electronic notarization's "new way to sign."

Misperceptions persist about the effect of notarization. Whether paper or electronic, notarization does not create or impose undue legal responsibilities on the notary. Notarization:

- Does not validate the truthfulness, accuracy or content of documents.
- Does not make a document "legal."
- Does not make a document immune from tampering (although certain electronic signature technologies available to a notary can make a document tamper-evident).
- Does not guarantee non-repudiation (although certain electronic signature technologies have features that make it more difficult for a signer to later deny signing a document).
- Does not compel recorders to assess additional factors like the notary's commission status on the date of notarization, or whether fundamentals like personal appearance were practiced, or whether an electronic notary used an e-signature technology that complies with applicable state requirements.

PRIA asserts that while recorders do have a responsibility to know the laws pertaining to real estate recording in their state, they should not assume that new regulations affecting notarization in turn create new duties for recorders. A complete notarial certificate on a document—paper or electronic—is still *prima facie* evidence that the notarization occurred and thus represents the extent of a recorder's examination of any notarial act.

Finally, PRIA suggests that the authority granted by ESIGN and UETA simply provides notaries a new method—an electronic signature—of affixing the notary’s official signature to the notarial certificate on an electronic document. PRIA encourages states to adopt regulations that help notaries comply with fundamental requirements applicable to all notarial acts, paper-based or electronic, while allowing the broadest possible range of electronic signature technologies.

Glossary (Upon completion of PRIA's Consolidated Glossary, this Glossary will be deleted)

Acknowledgment — A declaration by an individual before a notarial officer that the individual has signed a record for the purpose stated in the record and, if the record is signed in a representative capacity, that the individual signed the record with proper authority and signed it as the act of the individual or entity identified in the record.

Appearance, Personal/Physical - The notary is physically close enough to see, hear, communicate with, and receive identification documents from a principal and any required witness.

Authentication - Within the scope of this paper, the process of confirming an identity of an individual or legal entity who participates in a signing transaction.

Awareness - The signer's basic capacity to understand the voluntary act of signing a document.

Certificate - A part of, or an attachment to, a notarized document that is completed by a notary, bears the notary's official signature (and seal, if required), and states the facts attested to by the notary for a particular notarial act.

Electronic Signature - An electronic sound, symbol or process executed or adopted by a person with the intent to sign a document or record.

eRecording - The process of recording documents into the public record via electronic methods.

ESIGN Electronic Signatures in Global and National Commerce Act — Federal law passed to provide a consistent framework for electronic commerce. Although every state has at least one law (for example, UETA) pertaining to electronic signatures, it is the federal law that lays out the guidelines for interstate commerce. ESIGN and UETA provisions are substantially the same.

Identification, Positive/Satisfactory — The personal knowledge or satisfactory evidence relied upon by a notary to verify a signer's identity.

Journal — A tangible or electronic record created by a notary to preserve a chronological account of the notarizations performed by that notary.

Notarization / Notarial Act — An act, whether performed with respect to a tangible or electronic record, that a notarial officer may perform under the law. The term generally includes taking an acknowledgment, administering an oath or affirmation, taking a verification on oath or affirmation, witnessing or attesting a signature, certifying or attesting a copy, and noting a protest of a negotiable instrument.

Notary Public — An individual commissioned to perform a notarial act by a commissioning officer or agency. For the purposes of this paper, the definition includes "notarial officer" (individual other than a notary public authorized to perform a notarial act).

Oath — A notarial act which is legally equivalent to an affirmation in which an individual makes a vow of truthfulness on penalty of perjury.

Personal appearance — See “Appearance, Personal/Physical.”

Prima Facie — A legal term meaning evidence accepted as authentic unless proven otherwise.

Record (noun) — Information that is inscribed on a tangible medium or that is stored in an electronic or other medium and that is retrievable in perceivable form.

Record (verb) — To deposit an authentic official copy in the public record.

Online Notarization — A notarial act in which the notary and signer complete the transaction while in communication by long-distance audio-video technology.

Signature — A tangible symbol or an electronic sound, symbol or process that evidences the signing of a record.

Tamper-evident seal— An electronic process that creates a numeric code, unique to a given electronic record (often called a “digital thumbprint” or, more accurately, a “PKI hash value”). The tamper-evident seal can be re-verified at any time to ensure that no changes have been made to the electronic record since the seal was put in place. The record is not tamper-proof but any changes made to the record are evident. Also known as: Tamper Seal, Tamperseal Signature and Tamper Evident Signature.

UETA Uniform Electronic Transaction Act — A uniform statute promulgated by the Uniform Law Commission and the American Law Institute that nearly all states have enacted to establish the legal validity and enforceability of electronic signatures, contracts, and other records.