

INS AND OUTS OF E-NOTARIZATION

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by Carolyn Daughters

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INS AND OUTS OF E-NOTARIZATION

INTRODUCTION

Quoted material below comes from the Commentary included with the Model Notary Act, Article III, Electronic Notary—

An important part of many signed documents is a notarization for the purpose of helping to protect the parties to a contract. In the foreseeable future, this notarization will be able to be performed electronically. Electronic notarization will have an “emerging role in the arena of electronic commerce. Electronic documents and signatures – created, exchanged, and authenticated by computers – are accounting for more and more of the nation’s business. ... Further, the federal Electronic Signatures in Global and National Commerce Act (“E-Sign) (15 U.S.C.A. §§ 7001 et seq.) now authorizes every state-commissioned notary in the nation to use electronic signatures in performing official acts.”

Electronic notarization will have the same legal effect and enforceability as paper notarization. As a result, the “fundamental principles and processes of traditional notarization must remain the same regardless of the technology used to create a signature.” In the interest of making e-business cheaper, faster, and easier to conduct, it is important to retain a focus on the importance of security, safety, and integrity. The principles of security and trust cannot be sacrificed to speed, convenience, and lower costs.

With regard to electronic notaries, special commissioning will not be required. The “electronic notary is not a creature distinct from the traditional paper-based notary. Rather, every paper-based notary has the statutory authority to act as and become an electronic notary – if the desire is there. However, just as most notaries today elect to eschew their statutory authority to take depositions for lack of facility in shorthand reporting, so too, no doubt, many notaries will pass up the opportunity to notarize electronically for lack of facility in computers. A traditional notary is not obligated to become an electronic notary.”

DIFFERENCES BETWEEN E-NOTARIZATION AND PAPER NOTARIZATION

The Uniform Electronic Transactions Act (UETA)

A good place to begin a discussion on electronic notarization is with the Uniform Electronic Transactions Act (UETA), which is a template, or starting point, for state legislation regarding electronic transactions. The main purpose of UETA is to promote interstate electronic commerce by establishing uniform legitimacy for electronic contracts and digital signatures. The proposed legislation removes legal barriers that have maintained paper as the sole standard for legal documents.

UETA was approved and recommended in 1999 by the National Conference of Commissioners on Uniform State Laws (NCCUSL). NCCUSL, an organization of attorneys, judges, and law professors, drafts proposals for uniform legislation and works toward their enactment in state legislatures.

The model Act recognizes electronic signatures (including electronic signatures used by notaries) as legally binding and enforceable. UETA says that if a law requires a signature or record 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 law, is attached to or logically associated with the signature or record.

UETA, thus, permits a notary public and other authorized officers to act electronically, effectively removing the stamp/seal requirements. However, UETA 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. In sum, the fundamental principles and process of notarization remain the same regardless of the technology used to make a signature.

Powers and Limitations

Basic prohibitions are common to all notarizations, whether paper-based or electronic. Electronic notarizations, then, carry the same fundamental responsibilities as their paper-based counterparts. As with a paper notarization, an electronic notarization shall not be performed if the signer of the electronic document

- (1) is not in the presence of the electronic notary at the time of notarization
- (2) is not personally known to the notary or identified by the notary through satisfactory evidence
- (3) shows a demeanor that causes the notary to have a compelling doubt about whether or not the signer knows the consequences of the transaction requiring a notarial act
- (4) is not acting of his or her own free will in the notary's judgment.

Electronic notarization does not mean "remote" notarization, with the notary using a computer at Location A and the signer using a computer at Location B. Not only must the signer be present, but the notary also must meet the same identity, volition, and competence (awareness) standards imposed for paper-based notarizations.

All notarized acknowledgments and jurats have the following five components:

Personal Appearance, which allows the notary to interact and observe the signer. The document signer must appear in person before and communicate with the notary public face to face in the same room. Physical presence allows the notary not only to identify the signer but also to make observations that the individual is willing and aware. Personal appearance is the cornerstone of the acknowledgment or jurat because the subsequent four components are based on the signer's physical presence.

Identification, which allows the notary to make sure the person signing the document is who they say they are. The notary must positively identify the document signer beyond a reasonable doubt, either through personal knowledge of the individual's identity, the sworn vouching of a personally known credible witness, or reliable identification documents. The personal physical presence of the signer is critical to the notary's ability to assess identity.

Lack of Duress, which allows the notary to prevent signatures under coercion or physical threat. Only by personal appearance can a notary ensure that the signer was not under direct physical threat or duress at the hands of a third party.

Competence (Awareness), which allows the notary to detect if drugs, mental impairment, or other infirmity may have influenced the decision to sign. Notaries should not proceed with a notarization if there is any reasonable doubt about the signer's awareness of the transaction.

Acknowledgment, Oath, or Affirmation by the Signer, which allows the notary to determine that the signer is authorized to sign and is not doing so under duress. Personal appearance and identification are meaningless without a context, and the signer's active acknowledgment, oath, or affirmation of a particular signature, document, and transaction that provides that context.

Disqualifications and Limitations

All notarial acts, paper and electronic, shall follow the same rules with regard to disqualifying interest, false certificates, blank documents, testimonials, and unauthorized practice of law.

Notary's Electronic Signature

House Bill 02-1119 was adopted on May 30, 2002, and incorporated into Title 12, Article 55, of the Colorado Statutes. The bill authorizes the recording of electronic documents and establishes minimum requirements for electronic notarization of documents.

The sections below summarize the portion of the bill that relates to electronic notarization.

12-55-106.5. Notary's electronic signature – secretary of state.

- (1) In every instance, the electronic signature of a notary public shall contain the following elements, all of which shall be immediately perceptible and reproducible in the electronic record to which the notary's electronic signature is attached: The notary's name; the words "NOTARY PUBLIC" and "STATE OF COLORADO"; and the words "my commission expires" followed by the expiration date of the notary's commission. A notary's electronic signature shall conform to any standards promulgated by the secretary of state.
 - (2) The secretary of state shall promulgate rules necessary to establish standards, procedures, practices, forms, and records relating to a notary's electronic signature.
 - (3) To the extent the provisions of this Part 1 differ from the requirements of the federal "Electronic Signatures in Global and National Commerce Act", 15 U.S.C. sec. 7001 et seq., the provisions of this Part 1 are intended to modify, limit, or supercede the requirements of such act, as provided for in section 7002 (a) of such act.
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12-55-112. Official signature - rubber stamp seal - seal embosser - notary's electronic signature.

- (1) At the time of notarization, a notary public shall sign such notary's official signature on every notary certificate or in the case of an electronic record, a notary public shall affix his or her electronic signature.
- (2) Under or near such notary's official signature on every notary certificate, a notary public shall rubber stamp or emboss clearly and legibly such notary's official seal. The official notary seal shall contain only the outline of the seal, the name of the notary, exactly as such notary writes his or her official signature, the words "STATE OF COLORADO", and the words "NOTARY PUBLIC".(3) Under or near such notary's official signature on every notary certificate, a notary public shall write or stamp "my commission expires (commission expiration date)".
- (4) Every notary public may provide, keep, and use a seal embosser engraved to show such notary's name and the words "NOTARY PUBLIC" and "STATE OF COLORADO". The indentations made by the seal embosser shall not be applied on the document where the notary certificate appears in a manner that will render illegible or incapable of photographic reproduction any of the printed marks or writing.
- (4.5) In the case of notarization of an electronic record, the application of a notary's electronic signature in lieu of a handwritten signature and rubber stamp seal or seal embosser is sufficient.

PROMULGATION OF RULES— TYPE OF TECHNOLOGY REQUIRED

Digital Signatures

Encryption is the process that transforms data to an unreadable format so that the information remains secure. This encryption process allows for a measure of integrity and confidentiality. By using encryption, a person can validate the integrity of a document and verify the identity of an individual.

Digital signatures are part of a system called Public Key Infrastructure (PKI) and have a corresponding component called a digital certificate. A digital certificate holds vital information and allows for authentication of the certificate through the use of two related "keys," your private key and your public key, known as a key pair. A public key is distributed freely to anyone with whom the public key owner wishes to communicate securely; a private key is used to sign a message that only the public key can verify.

A Certification Authority (CA) validates individuals or organizations by issuing private keys (digital certificates). A digital certificate is a credential that allows a user to authenticate other users and to sign transactions with legally binding signatures. The CA maintains records of digital certificates issued, identify and authenticate certificate holders, maintain a directory of publicly available keys, and audit both themselves and key holders. CA methodology can vary from vendor to vendor, but all CAs provide a means to distribute digital signatures, maintain a repository of issued certificates, and validate the identity of the certificate holder.

For all practical purposes, a notary's digital signature is identical to a notary's handwritten signature and seal. This digital signature shall contain the following elements: the notary's name, the notary's title ("NOTARY PUBLIC"), the words "STATE OF COLORADO", and the expiration date of the notary's commission. A document that has been both signed and notarized, then, will actually contain two digital signatures.

Electronic Notarization Committee – Project Scope

House Bill 02-1119 (adopted May 30, 2002) notes that "The secretary of state shall promulgate rules necessary to establish standards, procedures, practices, forms, and records relating to a notary's electronic signature." Accordingly, an electronic notarization committee has been formed to review standards and procedures for electronic notarizations. The committee membership includes county clerks and recorders, representatives from law firms and title companies, independent consultants, and staff from the Secretary of State's office. This committee represents the interests and needs of a broad base of Colorado-based entities (e.g., the business and banking communities, the title insurance industry, law offices, technology vendors, county clerks and recorders, accountants, and the notaries themselves) regarding electronic notarization.

The committee has determined that it will take a minimalist approach and that it will promulgate rules that are fairly basic in content and scope. Doing so will build a foundation upon which additional rules (or future legislative action) can be based. Just as importantly, doing so will make allowances for advancements in technology and will ensure that decisions made do not have a negative impact on the longer-term feasibility and use of electronic notarization in the State of Colorado.

The committee is making excellent progress towards promulgating rules regarding electronic notarization. The committee hopes to develop text from which rules can be drafted starting in May 2003; it is the committee's hope that the rules can be adopted by December 2003.

Technology Specifications

The committee has discussed in depth the level of detail with which any promulgated rules should address technology specifications. Guidelines provided by the Electronic Recording Fund Advisory Panel recommend adoption of and, wherever possible, adherence to the newly evolving standards of the Mortgage Bankers Association of America (MISMO). MISMO's mission is to develop, promote, and maintain voluntary electronic commerce standards for the mortgage industry. The committee consensus, then, is that it makes sense to embrace the technology neutrality promoted in the Model Notary Act and that the simplest and least expensive option may be to capitalize on the research performed and any recommendations made by MISMO.

Along those lines, notaries could access the Secretary of State's website or MISMO's website in order to choose both a vendor and a technology approved by MISMO. The committee plans to learn more about MISMO-approved vendors, technology specifications, and other standards. The committee so far has recommended that the rules not contain specific information about vendors and technologies.

PROMULGATION OF RULES— OTHER RULES TO KNOW ABOUT

Using the Model Notary Act (Article III, Electronic Notary) as a basis, the committee has reached the preliminary conclusions described below.

Registration with the Secretary of State

Before performing electronic notarial acts, an electronic notary shall register the capability to notarize electronically with the Secretary of State. Before performing electronic notarial acts after recommissioning, an electronic notary shall reregister with the Secretary of State.

Electronic Registration Form

The existing notary application form shall be revised to include a section that allows applicants to indicate whether or not they plan to perform electronic notarization. The form also shall require applicants who plan to perform electronic notarizations to describe the technology that will be used and to list the vendor from whom that technology will be obtained.

Copy Certifications

As noted in the Model Notary Act, copy certifications shall be excluded “because of the problems attendant to setting copy production standards for diverse technologies, though future revisions of the Act may offer a solution to this problem and propose electronic certified copies.”

Disposition of Software

As noted in the Model Notary Act, “the software or other electronic devices used to create the notary’s electronic signature [should] be properly disposed of to prevent their misuse by unauthorized parties.”

OTHER CONSIDERATIONS

The committee has tabled a number of issues as outside the scope of the present rules promulgation mandate. Some of these tabled issues may be addressed by the committee at a later date, as appropriate. These issues are described below.

Course of Instruction

As noted in the Model Notary Act, “all [electronic] notaries [should] ... satisfactorily complete an education and testing requirement. This is in addition to and not a substitute for the general education and testing requirement for basic notary commissioning. ... As with the basic notary education course, the electronic course is set at three hours. The goal is to ensure that the electronic notary is at a minimum proficient at performing electronic tasks.” The Act takes that position that, in order to protect the public, any notary who wants to perform electronic notarizations must prove the capability to do so.

However, the Secretary of State's office currently does not have the resources or the funding necessary to provide any instruction for electronic notaries. Perhaps more importantly, the rules cannot contain a training requirement that is not incorporated into the law itself. As a result, the Secretary of State's office will recommend rather than require training for electronic notaries. In addition, while the Secretary of State's office might not bar the use of some sorts of electronic signature by rule, the office could set forth some basic operating procedures and provide sufficient guidance as to how particular electronic signature technologies work.

Electronic Registration Form

The committee may want to consider the use of an electronic registration form at a later date. Such a form could require registrants to report information relating to any certification authority with which the notary's electronic signature may be registered; provide the Secretary of State's office with evidence that the registrant has the requisite electronic capability; require the registrant to sign the electronic registration form using an electronic signature; include any public keys or other decrypting information; and transmit the form electronically to the Secretary of State's office. By requiring electronic notaries to use public key technology to create an electronic signature and to forward the public key to the Secretary of State's office, the office could validate that public key and test the notary's ability to perform electronic notarization.

However, electronic registration and storage of public keys will have associated costs. Currently, approximately 100,000 notaries are licensed in Colorado. As such, the Secretary of State's office would need a system that could be used to manage the collection, storage, and validation of public keys for some subset of these 100,000 notaries. Prior to requiring electronic registration and public key submission, the Secretary of State's office will need to devise a scalable and efficient solution for managing public key data on an ongoing basis. As a result, the committee concluded that electronic registration forms and validation and collection of public keys will not be mandated in the rules at this time.

Notarization of Electronic Signature

The committee is considering the inclusion of the following text in the rules: "In notarizing an electronic signature, an electronic notary shall take reasonable steps to ensure that any registered device used to create the electronic signature is current and has not been revoked or terminated by its issuing or registering authority." The committee is attempting to determine whether or not the notary public, prior to notarization, should be responsible for ascertaining that a digital signature actually belongs to the individual claiming it.

FINAL NOTES

Only electronic recording levels 1 and 2 are authorized until such time as e-notary rules have been promulgated. Electronic recording level 3 involves the following: documents are generated in electronic form; no paper is produced; the type of file may vary but must be a type that may be converted to a .tif image for recording at the county; indexing data is in electronic form; and electronic signatures are used as the original signatures. Once electronic notarization standards have been promulgated, fully electronic documents can be generated and recorded. As a result, crossing the boundary of electronic notarization will open up a number of electronic recording opportunities.
