

## **Electronic Recording in North Carolina; Basics Which Real Estate Practitioners in 2005 and beyond *must* know**

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### **A little technological history**

A new technology, X, was researched by authorities, legal and banking, with the following results: “The main objects in writing a signature in an individual way are to make distinctive and difficult to forge successfully. . . The only individuality that can be put into a signature with X is the mere forms of the letters, and these are the easiest parts of a signature for a forger to imitate. . . With an ordinary pen of a sharp and flexible character, each hesitation in the motion of the pen is shown unmistakably in the defective quality of the written line. A signature with X is ‘made to order’ for the forger.” And, regarding archiving of records: “[T]here are no means of knowing in advance what [technologies] are nonfading and which will fade badly.” The year was 1948. The institution was the Mortgage Bankers Association of America, including its best and brightest outside counsel. The technology was the ball-point pen. (Query: How many attorneys still use or insist upon the fountain pen for all documents wherein the authenticity of the signature and the identity of the writer are of critical import?)

### **A Quiz regarding recording savvy – in the "paper" world**

#### ***True or False:***

1. If a document is recorded, it is legally presumed to be properly executed, that it was not a forgery or executed by an incompetent.
2. If a document is recorded, it is legally presumed to be properly acknowledged.
3. If a document is recorded, it is legally presumed that the notary’s commission was effective and in good standing.
4. A notarial “seal” can only be obtained upon presentation of the commission from the Secretary of State.
5. A person with a notarial “seal” is legally presumed to be duly commissioned and in good standing.
6. If a document is recorded, it is legally presumed that it was properly signed.
7. Paper copies are retained of all documents recorded with a public authority.
8. NC has only a few acknowledgment forms, all of which are statutory, simple and clear, as well as consistent with forms in the other 49 states.
9. A person’s “signature” must always appear exactly the same way, for all purposes, in order for their “signature” to be legally effective; a person cannot adopt “X” as their signature, or sometimes sign with an initial rather than a middle name.
10. All notaries are required to take mandatory educational courses and are well-educated about their notarial responsibilities.
11. All documents in every Registry in NC are recorded exactly chronologically, through a single queue, based on the exact moment that the document arrives in the office of the Registry, whether by hand delivery, by Federal Express or by other delivery method.
12. All documents presented are recorded immediately, without delays in questions back to the attorney recording.

13. All counties have effective means for immediate real-time complete updating of titles right up to the actual recording of documents.
14. On-line Register of Deeds indexes and documents are reliable and can be the only search needed for a complete title search.

### Electronic recording in 2004 and beyond

#### **THIS IS NOT A “NEXT-GENERATION” ISSUE – E-RECORDING IS HERE TODAY!!**

Across the nation, over 35 counties are using some form of electronic recording, including Mecklenburg County, North Carolina (for cancellations of deeds of trust). The North Carolina Uniform Electronic Transactions Act, 2001 (“UETA”) and the federal Electronic Signatures in Global and National Commerce Act, 1999 (“E-SIGN”) have already legally authorized electronic transactions of all kinds, which includes electronic recordings. The banking industry has long ago adopted technology as their increasing standard of operation, -- i.e. ATM machines, on-line banking, key-pad credit card signatures, MERS, electronic payoff statements, -- and the list goes on. The law is struggling to keep up. And all of those who will be participating must adopt and adapt to technology in order to stay in the process, effectively. (Query: How many real estate practitioners can continue to practice, even today, without electronic HUD-1 software, word processing, fax, e-mail or internet access?)

#### **E-RECORDING STATUTES PROVIDE *MECHANISMS* FOR E-RECORDING; ALL OF THE LEGAL REQUIREMENTS APPLICABLE TO “PAPER” TRANSACTIONS STILL APPLY.**

Most importantly, the signer must *still* personally physically appear before the notary public. However, the document and the signatures may now be done electronically. The actual language and assurances in acknowledgment forms applicable to paper will *still* apply to e-notarization. (One possibility is that a new universal acknowledgment form will be adopted. But, if so, it would apply to paper and to electronic transactions.) An embossed or stamped notarial “seal” is no longer required so long as the electronic acknowledgment contains the requisite information.

#### **STATUTES MUST BE TECHNOLOGY NEUTRAL**

Technology changes faster than legislation could possibly keep up. Already, the existing and developing methods of e-recording range widely -- from a fax of the signed paper document by a reliable source to delivery via a third-party certificate authority. An e-recording statute must facilitate ongoing maintenance and development of standards by those involved in the process, those with a vested interest in the viability and reliability of public records, making business and legal decisions. Because of the every-growing myriad of possibilities, the Mortgage Bankers Association, the American Bar Association, the American Land Title Association and others have joined together to create and maintain the Property Records Industry Association (“PRIA”) for the sole purposes of (1) evaluating and setting e-recording standards and (2) educating others in the industry about e-recording. FannieMae has already published an e-mortgage announcement of the technologies that it will *not* accept because of inability to satisfactorily verify authenticity – even for documents which are *not* public records.

### **URPERA and the need for national standards**

After years of meetings, research, participation by industry and technology experts and many significant redrafts, the Uniform Real Property Electronic Recording Act (“URPERA”) was adopted by the National Conference of Commissioners on Uniform State Laws at their August 2004 Annual Convention. It is available on-line at:

<http://www.law.upenn.edu/bll/ulc/urpera/Approvedfinal2004.htm>

(Official Comments and edits by Style Committee should be completed but are not posted as of this date.)

This is an enabling statute, not setting standards but integrating electronic documents and signatures into existing standards, providing that:

1. Electronic documents and electronic signatures satisfy state law requirements for original documents.
2. Authorizes electronic notaries.
3. Removes the requirement for an embossed or affixed notarial seal so long as the information required of the seal is in the electronic acknowledgment.
4. Allows but does not require a register to accept, index, store, archive, transmit and maintain record for title examiners of electronic documents, while continuing to maintain a paper registry indexed in the same place.
5. Authorizes registers to convert paper documents to electronic format, to accept recording fees electronically and to agree to procedures in coordination with other departments involved (such as the tax department).
6. **Most importantly:** Either an ongoing electronic recording commission is to be created or a state agency must be assigned responsibility for maintenance of ongoing standards. The determination of which type of entity, under whose auspices, the statutorily required composition, and imposition of statutory requirements for ongoing consideration of PRIA and other states’ standards, are subjects of significant importance to the recording industry.

The stated goal of URPERA is “the need to promote uniformity of the law with respect to” electronic recording among all states.

### **North Carolina’s activities**

Anticipating that adoption, the North Carolina Legislature had adopted as Part VI of the Studies Act of 2004:

**SECTION 6.1.** The General Statutes Commission shall study the issue of electronic recordation, specifically with regard to real property documents and other documents filed with registers of deeds. The Commission shall study methods for establishing uniform legal standards for the receipt, recordation, authentication, preservation, and retrieval of electronic documents. The Commission shall include in its study consideration of the Uniform Real Property Electronic Recordation Act drafted by the National Conference of Commissioners on Uniform State Laws as well as other resources on electronic recording standards from national organizations such as the Property Records Industry Association (PRIA) and the Mortgage Industry Standards Maintenance Organization (MISMO). The General Statutes Commission shall report its findings and recommendations and any legislative proposals to the 2005 General Assembly upon its convening.

**SECTION 6.2.** The Secretary of State shall study the issue of amending the notary public laws in order to modernize and simplify their administration. The study shall also address the issue of electronic notarization. The Secretary of State shall report its findings and recommendations and any legislative proposals to the 2005 General Assembly upon its convening.

The Secretary of State established the NC Electronic Recordation / Notarization Advisory Council (the “Council”), composed of representatives from the NC State Bar (Julius E. Banzet III), NC Bar Association Real Property Section (Don Lampe), the NC Land Title Association (Nancy Ferguson), the NC Association of Registers of Deeds (Amanda Garrett), and other agencies and associations involved in real estate recording and public records maintenance.

Both the General Statutes Commission and the Secretary of State’s Advisory Council have sought information from, heard presentations by and had in-depth discussions with industry experts, including:

- Carmen Bramante, a nationally recognized industry expert and leader regarding real estate records technology issues, who recently left Fannie Mae to open his own consultancy, CDB Consultancy, and is co-chair of the PRIA Technology Committee
- Tim Reiniger, Executive Director of the National Notary Association
- Gabe Minton, Vice President of Industry Technology for the Mortgage Bankers Association,, Executive Vice President of MISMO, and serving on PRIA Board
- Judy Gibson, Mecklenburg County Register of Deeds
- Ann Shaw, Randolph County Register of Deeds

The Advisory Council is drafting a proposed new article to Chapter 10A of the North Carolina General Statutes which will address electronic notarization requirements. Issues discussed include: Additional educational requirements, electronic standards (industry-led vs. statutory) for notary acknowledgments consistent with paper requirements, possible new form facilitating paper and electronic acknowledgment, journal requirements (consistent with changing national standards), on-line verification of active commissions (already in process, similar to the corporations database). All decisions are being made after deliberation regarding URPERA, other states’ standards, and real estate industry activities. However, e-notarization will affect far more than just real estate transactions, so that broader perspective is being constantly considered as well.

### **Practical Aspects of E-Recording**

**What is an “electronic signature”?** Any “signature” which a person adopts as their signature to the particular document being signed, if done or delivered electronically, is an electronic signature. Some examples: The signature pad at the grocery store at which you swipe your credit card. The signature block that automatically appears (or even your typed name) at the end of an e-mail. A click box when ordering items or filling out forms on-line. The sender’s identification or initials on a fax transmission. Delivery via a certificate authority, an independent third party which transmits only after verifying passwords, encrypted information, with sender’s access only using a unique USB hardware and a designated computer (so-called “PKI” technology).

**Will all Registers of Deeds be required to accept every type of electronic transmission?** No. Registers are still local officials, governed by local governmental decisions and subject to local governmental budgets. Though the URPERA commission would review types of technology and presumably provide education, information and technological assistance, the Registers can and already are adopting technology based on their own needs and resources. Many find this an excellent opportunity to review their entire workflow process and software upgrades; others will adopt a technology that simply works with their existing systems. A portion of the increases in recording fees a few years ago was legislatively mandated to be applied toward new technology, which will include e-recording upgrades.

**Will all recordings have to be electronic?** No. URPERA authorizes but does not require electronic recording. The electronic recording system would be running simultaneously with (and not outside of) the regular recording hours of the recording desks for paper documents, just as another queue for recording. Document number, book and page or other recording information will be assigned in this queue and integrated in whatever process the Register already has for paper documents.

**How would an “electronic document” recording operate?** The actual recording process will be totally dependent on the type and sophistication of the system used by the particular Register. The electronic document would be created by the drafter / sender. This could be as simple as Word or WordPerfect, to as sophisticated as SmartDocs format adopted by the Mortgage Industry Standards Maintenance Organization, MISMO, using xhtml “tags”. (Some familiar comparisons: “Tags” are similar to “Codes” in WordPerfect, which tell the document how to appear but do not actually appear unless the user checked “Reveal codes.” Or internet users sometimes copy and paste information from e-mails or web sites to Word and might see html tags or letters surrounded by “<” or “>” which were the instructions to the web site on how to information should appear, but did not appear in the web site itself.)

The electronic document would be signed electronically by the appropriate parties (see above) and acknowledged by an e-notary, then transmitted electronically to the office of the Register of Deeds (rather than delivered on paper). The document would come into the Register’s office electronically, using a software system consistent with that chosen by the Register. Depending on the Register's software, certain “tagged” information could be automatically indexed, such as the grantor, grantee, reference to prior document (for cancellations or releases, for example), brief legal description and the notary information which the Register must “certify” – the same information that the Register must address under applicable “paper” recording statutes. However, all data and information would be in the electronic document capable of being viewed and printed by the later title examiner, just as paper versions are viewed in electronic form on CD-ROM or microfilm computers now.

**How would title updating be handled, prior to recording?** Possibilities might include the need to have a title examiner on-site at the registry to update, call the office to hit the “send” button (though avoiding the travel back and forth to the office for original documents). But, more effectively, as Registers are able to accomplish real-time indexing of paper and electronic documents, *reliable, real-time* on-line access may be made available to do the examination and

the update remotely. Other states' offices that are using this technology are using a subscription membership fee, so far. Of those counties that are on-line in North Carolina, most if not all are *not* real-time because of gaps between the time of receiving the original "paper," indexing it on the computer and quality control processes delaying permanent indexing. And the on-line systems all have disclaimers that they are "unofficial", some even posting this across the face of the documents themselves. Again, this will involve workflow and technology changes for the public offices.

**How would the recording fees and excise tax stamps be paid?** Technology to "pull" funds from an account is already available and in use in many settings, such as on-line banking, automatic utility payments, etc. However, the Bar will have to address this issue in the context of the Good Funds Settlement Act and RPC 191. Approved methods will need to be developed for the county to pull the funds but without providing outside access to attorneys' trust accounts. This type of transfer could actually be much more efficient for attorneys and for counties, especially those requiring tax payments prior to recording, because the payment would only be withdrawn after the documents were recorded and funds would automatically be allocated to the various applicable departments.

#### **Where are we now?**

The General Statutes Commission meets to review URPERA and consider its study commission report at its regular meeting on November 5, 2004 (a public meeting).

The Secretary of State's Advisory Council on URPERA is scheduled to meet on the following Tuesdays: 10/19, 10/26, 11/9, 11/30, 12/14, 1/4/05 and 1/11/05 (Public meetings, though attendees should contact Patty Holloway with the Secretary of State's office prior to the meeting to assure seating.)

The North Carolina Legislature convenes for the 2005 Long Session on January 26, 2005.