

The Law of Electronic Notarization: A Strategic Look at Document Authentication

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Authenticating Documents in State and Federal Courts

- Authentication
 - » Evidentiary meaning
- Self-authenticating documents under FRE 901
 - » Acknowledged documents
 - » Documents with seals
- Admissibility of electronic records
 - » American Express v. Vinhee (9th Circuit) – Electronic records not admissible without ability to establish the originally created record
 - » Capability to test for document authenticity

Authenticating Documents for Recording Purposes

- UETA requirement that a record must accurately reflect the information in the record when it was first generated in final form
- E-SIGN requirement of accuracy, integrity, and accessibility of retained records
- URPERA requirement of security protection to ensure electronic documents are accurate, authentic, adequately preserved, and resistant to tampering

The Secret to Understanding Electronic Notarization

- Paper v. electronic signature functionality
 - » Identification
 - » Attribution
 - » Signer intent
- Prescribed v. non-prescribed form of the seal
 - » All states except VT require the denoting of commissioning information on paper
 - » 17 states mandate a specific form of paper seal/credential
 - » 5 states prescribe a specific form of electronic seal/credential
 - » 4 states require a non-prescribed form of electronic Notary seal/credential
- Manner of attributing the notarial act
 - » California
 - » Colorado
 - » Arizona, Kansas, Minnesota, and Pennsylvania

UETA and Other State Laws Affecting Electronic Notarization Enforceability

- Attribution requirement
 - » The document/record
 - » Notary signature
 - » Notary seal
- Security procedure
 - » Origin
 - » Unaltered documents
 - » Fulfills attribution requirement
- The four non-UETA states (GA, IL, NY, and WA)
 - » Digital certificates
 - » Secure signatures

Federal Law Affecting Electronic Notarization Enforceability: E-SIGN

- Superseded by UETA
- Notary signature
- Notary seal

Legal Issues for Digital Certificates as Notary Credentials

- Current legislative recognition of digital signatures (29 states and DC)
- Certification authority (CA) laws and rules (10 states)
- Liability and trustworthiness concerns
 - » CA liability
 - » Registration authority (RA) liability
- Accreditation – SISAC

National Association of Secretaries of State (NASS) Electronic Notarization Standards (2006)

- NASS requirements for evidencing the notarial act
 - » Notary's electronic signature
 - » Notary's electronic seal
 - » Notary's electronic notarial certificate
- NASS requirements for issuing certificates of authenticity
 - » Ability to independently verify origin of document
 - » Document integrity

Hague Conference on Private International Law Electronic Notarization Standards (2005)

- Hague requirement for establishing origin of document
- Hague requirement for establishing document integrity
- E-Apostille program requirements
 - » Ability to independently verify origin of document
 - » Document integrity

Legal Barriers to Adoption

- Non-uniform rules for the manner of attributing the notarial act
- Current processes for recording TIFF images “flattens” the records and removes digital signature tamper-evidence capability
- 9 states need authorizing laws for electronic recording
- Unclear liability framework for Notary use of credentials other than digital certificates
- Unclear liability framework for non-credential electronic notarization systems
- Different liability framework for state-issued credentials v. industry-issued credentials

Strategic Value of Credential-Based Electronic Notarization

- Document admissibility and authentication
- Document enforceability
- Compliance
- Risk management