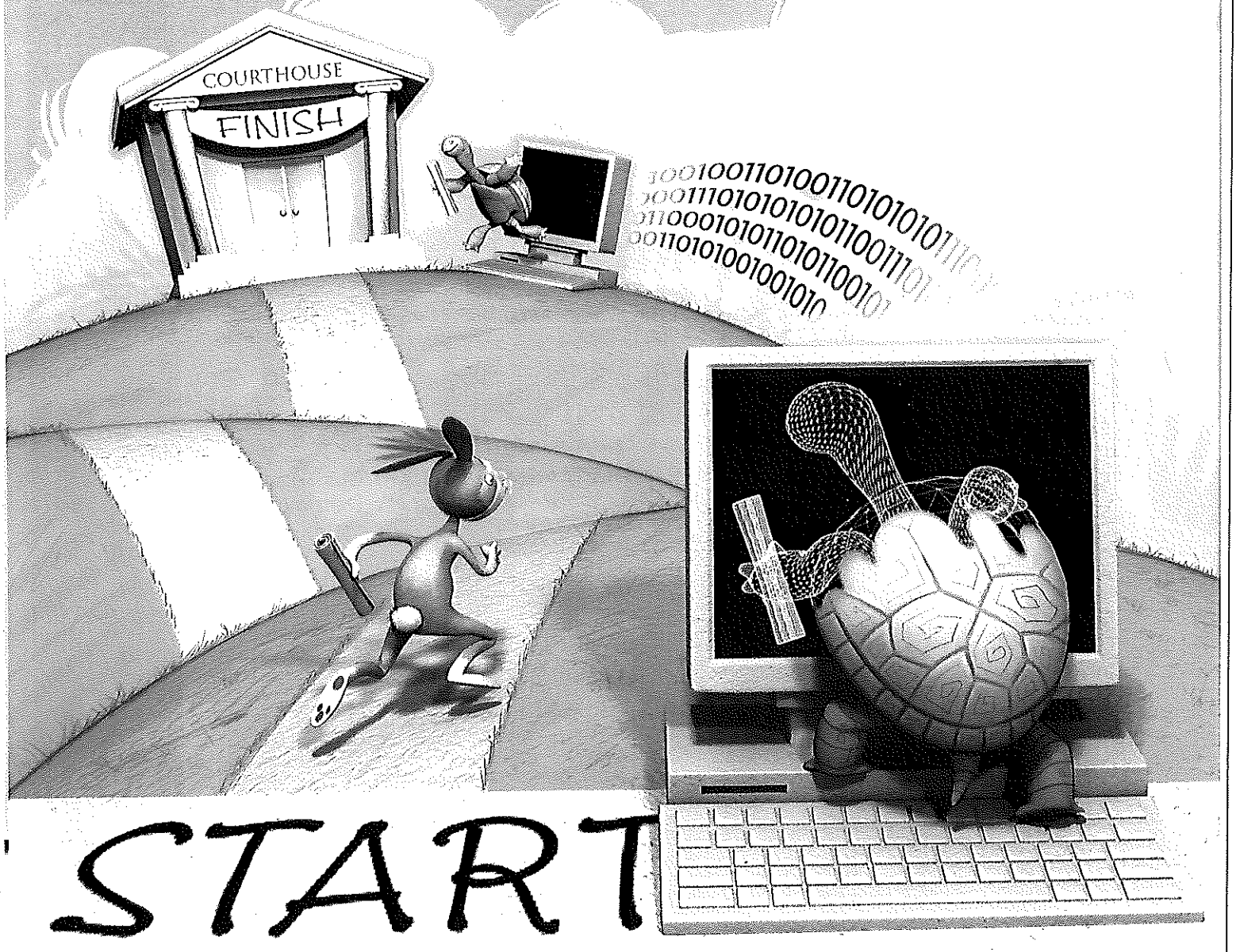
# Race to the (Virtual) Courthouse

## How Standards Drive Electronic Recording of Real Property Documents

By David E. Ewan and Mark Ladd



In 2006, $2.51 trillion in new mortgage loans were originated in the United States. Almost all of these mortgages were recorded in the land records of one of approximately 3,600 counties, cities, or other municipalities, using a land records system that dates back to the 17th century, which largely relies on accepting paper documents for recordation. In a growing number of jurisdictions, however, fairly recent legal advances in the form of the Uniform Electronic Transactions Act (UETA), the Electronic Signatures in Global and National Commerce Act (ESIGN), and the Uniform Real Property Electronic Recording Act (URPERA) now empower county recorders to accept electronic documents. See UETA, 7A(I) U.L.A. 211 (1999), 15 U.S.C. §§ 7001–7031; URPERA, 7B ULA 263 (2005).

This article aims to provide an overview of the legal and technological foundations, as well as practical real-world experiences of eRecording implementations.

## Legal Foundations

### Historical Background of Real Property Transactions

The current U.S. system of transferring interests in real property is rooted in the English feudal system. Under this system, transfers of real property were accomplished by the ceremony known as livery of seisin. To a large extent, seisin at common law was synonymous with possession. The new owner's possession provided notice of the transaction to third parties.

As English society grew and developed, it became necessary to develop additional methods to convey land. First, the statute of uses was enacted, enabling the common use of deeds. Shortly thereafter, the statute of enrolments was enacted, requiring every sale of a freehold estate to be in writing. The statute of enrolments also purported to require the recording of conveyances of freehold estates and the payment of a tax. It could be viewed as the first statutory recording law. Next, the statute of wills was enacted, which allowed real property to be freely devised by a testator in his will. The final act was the statute of frauds, which, among other things, required that all transfers of interests in real property be in writing and signed "by the party to be charged."

Although the laws required real property conveyances to be in writing and signed by the parties, they did not require the use of one original document. Real property conveyances often used indenture (the practice of writing two or more copies of the document on a single large sheet of parchment, which was then cut apart with a jagged or wavy line—the indenture—into two parts) to document the transaction. This created more than one original document.

Originality was not important because of the talismanic effect of having one original document; instead, originality allowed one to be confident of the accuracy of the information displayed in the medium. The method of creating an indenture bore witness that the information contained in the indenture was trustworthy. Similarly, the UETA (which includes ensuring accuracy of the information contained in the record) does no less. The focus is on the information itself and whether the source of the information can be relied on or trusted, not on the form in which it is presented.

### The Policy Aim of Recording Statutes

The Massachusetts Bay Colony enacted the first detailed recording law in the American colonies in 1640. 1 Records of the Governor and Company of the Massachusetts Bay in New England 306–07 (Nathaniel Shurtleff ed., 1853–54). This act, as well as the statute of enrolments, was the primary influence on the later recording acts of other American colonies and states. In general, early American jurisdictions created recording systems in which parties to a land transaction appeared before some public official and acknowledged the transaction, the official created a short record of the substance and effect of the transaction, and the transaction documents were copied either in their entirety or in summary or abstract form into a public record. These practices, by and large, remain intact today. Thus, the official record consists of nothing more than copies of the documents underlying the transaction, which the recorder has reason to believe are accurate representations of the information presented.

The recording statutes were designed to impart notice to the world that the recorded transaction may have some bearing on the state of the title to real property. This type of notice, often called constructive notice, is imputed by law to a person without actual knowledge of the transaction. Recording statutes provide this constructive notice of all properly recorded instruments relating to a specific piece of real property to all persons who subsequently obtain an interest in that property.

Generally, an instrument has been properly recorded when it has been (1) duly executed, (2) proved or acknowledged, and (3) indexed and recorded in the appropriate record book. As long as a state has enacted the applicable provisions of UETA and a county recorder has determined to accept electronic documents, then notice may be imparted through electronic recording.

Although numerous methods may be employed in electronically recording documents with the local recorder, they fit into one of three broad "models":

- Model 1—A wet-ink signed paper document is converted into an electronic document by scanning the paper into a format acceptable to the local recorder. The electronic document is then transmitted to the local recorder for recording in the official land

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records. When recordation has been completed, a copy of the recorded document with recording information is returned to the submitter by the same method as the submission. This model most closely duplicates the submission of a paper document for recording.

- Model 2—A wet-ink signed paper document is converted into an electronic document by scanning the paper into a format acceptable to the local recorder, just as in Model 1. Unlike Model 1, the data used to create the index entry for the document at the recorder's office also are transmitted or sent to the local recorder with the electronic document. Thus, the local recorder does not have to "create" an index entry for the document because the document arrives with one already created.
- Model 3—The document starts off in electronic form, is signed electronically, is acknowledged electronically, is transmitted electronically, and is returned electronically. The document is never rendered to paper. This model provides the highest integration of data with the document because many aspects of the document can be read or handled by the computers processing the documents and, by design, they are easily read by both machine and human without conversion.

### UETA Provides Baseline Rules for Electronic Transactions

The overarching objective of UETA, and one contained in all 48 enactments of UETA to date, is to "[f]acilitate electronic transactions." UETA pref. note. UETA is a self-effectuating legislative vehicle that acts as an overlay statute, which means it can be used to meet "writing," "signing," or "originality" requirements in a wide variety of laws without having to amend these existing laws or regulations. UETA accomplishes this goal by making electronic documents or records equivalent to paper documents or records. Id. In short, UETA allows parties to focus on the message that they are trying to convey rather than on the medium in which it is presented.

### What Is an Electronic Record?

UETA defines an electronic record as "a record created, generated, sent, communicated, received, or stored by electronic means." Id. § 2(7). Model 3 documents are easy to envision as electronic records because they live their entire lives in an electronic environment. Perhaps less intuitive, however, is the classification of a Model 1 or Model 2 scanned document as an electronic record. At first blush, some may consider the electronic (that is, scanned) document to be a "copy" of the "original" paper document. The Official Comments to UETA, however, resolve any doubt that scanned documents are, indeed, electronic records: "[An electronic record] is any record created, used or stored in a medium other than paper. . . . Information processing systems, computer equipment and programs, electronic data interchange, electronic mail, voice mail, facsimile, telex, telecopying, scanning, and similar technologies all qualify as electronic under this Act." Id. § 2 cmt. 6.

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In addition, UETA makes electronic records legally equivalent to paper records. Section 7(c) of UETA states that "[i]f a law requires a record to be in writing, an electronic record satisfies the law." See id. § 7(c). Electronic signatures are also equivalent to ink signatures. See id. § 7(d) ("If a law requires a signature, an electronic signature satisfies the law."). These provisions embody the underlying concept of UETA. See id. § 7 cmt. 1 ("[UETA] is designed to eliminate the single element of medium as a reason to deny effect or enforceability to a record, signature, or contract. The fact that the information is set forth in an electronic, as opposed to paper, record is irrelevant."). Thus, UETA allows almost any type of document to be turned into an electronic record and be equally effective.

This sine qua non of UETA's section 12 (dealing with retention of records in electronic form) stems from a recognition on the part of its framers that in the electronic environment there is really no such thing as an original. In the electronic context, what is meaningful and dispositive about an electronic record—as is the case with all records preserved for eventual possible entry into evidence—is that the information in the record remains unaltered and accessible. Indeed, the ultimate objective of any record-keeping regime is not a rigid preservation of the physical artifact in the medium in which such information was initially created (or, for that matter, presented); rather, it is the preservation of both the information and the indicia of integrity of the information in a given artifact, however created, however initially presented, and, in the end, however put on as evidence. This is the notion advanced by the framers of UETA.

Historically, real estate records have been maintained as copies or transcripts of the underlying documents, and electronic documents and record-keeping are both authorized by UETA. It follows that, unless there is some exemption, electronic real estate documents could exist under the existing legal framework. UETA § 3(b) exempts only certain document types from its scope, and real estate documents are not among those exempted; so elec-

tronic deeds and mortgages would, per force, be valid and enforceable if the parties to them decide to use electronic documents.

### ESIGN

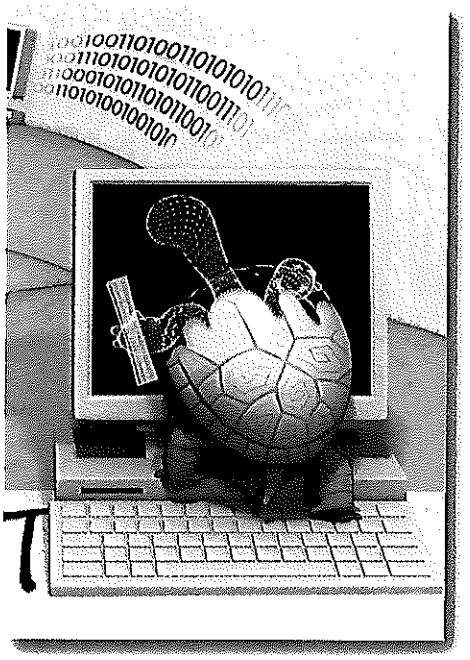
While UETA was being developed, the Federal ESIGN Act (Electronic Signatures in Global and National Commerce Act) was enacted by Congress and signed into law by President Clinton. See 15 U.S.C. §§ 7001–7031. Immediately thereafter, confusion arose over which act (ESIGN or UETA) would govern electronic commerce, and questions abounded about the interrelation of the two. Although an in-depth analysis of the interrelation of the two acts is beyond the scope of this article, certain parallels and differences are noteworthy.

Like the UETA, the federal ESIGN Act addresses electronic records and signatures. Drafted contemporaneously with UETA, it comes as no surprise that ESIGN closely parallels the uniform act. ESIGN does, however, differ from UETA in a few significant ways.

The federal ESIGN Act adds some documents to its exclusion section that UETA does not. Of the documents excluded by ESIGN from electronic form, only one category is tangentially involved in real property transactions: notice of utility termination, default, or foreclosure under a mortgage or a lease. Id. § 7003(b)(2). Thus, an electronic mortgage could be the subject of foreclosure, yet the notice of default or notice of foreclosure would have to be given in the traditional paper method as provided by state law.

ESIGN also expressly limits the regulatory authority of the state and federal governments so that regulations will not impede or obstruct the effective use of electronic documents under the statute. Id. § 7001(a). Conversely, ESIGN allows the states to "preempt" the federal act (this is sometimes referred to as "reverse preemption") if certain prerequisites are met. The ability of a state to preempt or supersede ESIGN is not unfettered, however. ESIGN may be superseded only by (1) enactment by a state of the Official Text of the UETA or (2) enactment by a state of any other statute or regulation that (a) is consistent with ESIGN, (b) does not favor a specific technology, and (c) if enacted after ESIGN, makes a specific reference to the ESIGN Act. Id. § 7002.

When read in conjunction with UETA, ESIGN supplies some additional explicit safeguards (consumer notices, for example) as well as an overarching requirement for technology neutrality in any government regulation. The two statutes, taken together, provide the legal framework for using electronic documents in a real estate transaction.



### URPERA

Even though documents resulting from electronic transactions are valid and enforceable between the parties, uncertainty and confusion remain about whether those electronic documents may be recorded in the various local land records offices in the several states. Legacy laws and regulations in many states purport to limit recordable documents to ones that are in writing or on paper or require that they be originals; other laws and regulations require signatures to be in writing and acknowledgements to be signed. See, e.g., Fla. Stat. Ann. § 695.26 (requires all instruments to be recorded have signatures of each person who executed the instrument). Thus, an electronic document that is not written on paper, or is an electronic version of an original paper document that has an electronic instead of handwritten signature and acknowledgement, might not be viewed as being recordable under the laws of some states.

The Uniform Real Property Electronic Recording Act (URPERA) was drafted to remove any doubt about the authority of the local recorder to receive and record documents and information in electronic form. URPERA pref. note. Its fundamental principle is that any state law requirements describing or requiring that a document be an original, on paper, or in writing are satisfied by a document in electronic form. Id. § 3(a). Furthermore, any requirement that the document contain a signature or acknowledgment is satisfied by an electronic signature or acknowledgement. Id. § 3(b), (c). The Act specifically authorizes a recorder, at the recorder's option, to accept electronic documents for recording and to index and store those documents. Id. § 4(b).

In addition, the Act charges an Electronic Recording Commission or an existing state agency with the responsibility of implementing the Act and adopting standards regarding the receipt, recording, and retrieval of electronic documents. Id. § 5. The commission or agency is directed to adopt those standards with a vision to foster intra- and interstate harmony and uniformity in electronic recording processes. Notably, the commission or agency is directed in section 5(b)(2) to consider the standards established by national standards-setting bodies, such as the Property Records Industry Association (PRIA).

### Interplay Between UETA and URPERA

Some commentators have argued that a state's passage of both UETA and URPERA indicates that UETA does not provide statutory authority for recordation of electronic documents. See David E. Ewan et al., *It's the Message, Not the Medium!—Electronic Record and*

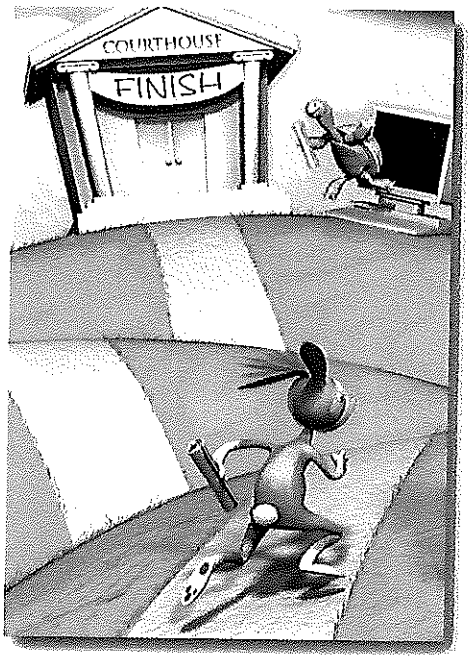
*Electronic Signature Rules Preserve Existing Focus of the Law on Content, Not Medium of Recorded Land Title Instruments*, Bus. Law., Aug. 2005, at 1487, 1488 n.9 (citing letters from attorneys commenting on the legal effect of enacting both statutes). In fact, passage of both acts does not indicate that either act is insufficient. There are several reasons why a state legislature might enact both UETA and URPERA.

First, passage of both UETA and electronic recording legislation could mean that the electronic recording legislation was enacted before the state's adoption of UETA and, as such, would have been entirely appropriate in a jurisdiction intent on providing for the enforceability of such transactions in the absence of UETA. In fact, at least one state—Virginia—had allowed electronic recording statutes enacted before its adoption of UETA to lapse and currently relies on its adoption of UETA to validate electronically recorded documents. See Va. Code Ann. § 17.1-256 (Lexis 2003) (expired July 1, 2004).

Second, passage of electronic recording legislation such as URPERA could provide the basis for a coordinated statewide implementation of electronic recording systems, as well as to remove any lingering doubt about the ability to present any type of electronic record to a county recorder for recordation.

Third, URPERA addresses several additional or ancillary issues that are specific to real estate recording and that UETA does not address head on. For example, outside of UETA, but related to electronic recordation, are issues such as standard document forms, notaries, and fee collection. In addition, URPERA may be a vehicle to provide more specific guidance from the viewpoint of real estate recording on some matters that are already included in UETA. In short, because of its expansive scope, URPERA provides specific guidance to county recorders that could not be provided in UETA.

Finally, as noted, many provisions of URPERA are intended to clarify earlier authority provided by UETA that may have been overlooked by enacting states. For example, URPERA explicitly states that stamps and seals are not needed for electronic notarial acts. Such an approach was directly informed by regulatory initiatives in a number of states, most notably California, for the reimposition of electronic stamp and seal requirements (see Cal. Gov't Code § 8207), even though the Official Comments for UETA clearly point out that they are no longer called for, and ESIGN's legislative history provides similar guidance.




As of July 2007, URPERA has been enacted in 14 states and the District of Columbia. See www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-urpera.asp. It has also been introduced in another nine states. For more information on URPERA, see www.nccusl.org.

## Technological Foundations

Even though ESIGN maintains a technology-neutral position for electronic commerce, technology cannot be ignored. To adequately understand what electronic documents are and how they behave in a real property setting, one must understand some of the technology that makes electronic documents in general, and electronic recording of title documents in particular, possible. Several distinct pieces, when combined, enable the eRecording process.

### XML

The eXtensible Mark-up Language (XML) is a publication of the World Wide Web Consortium (W3C) that provides the key technological foundation for electronic documents. XML is a general-purpose markup language. It is called "extensible" because it allows users to define their own tags. Its primary purpose is to facilitate the sharing of data across disparate systems.

A markup language provides structure and context for the content of a document. Although not referred to as markup at the time, markup has been around at least since Guttenberg invented movable type. References to "lowercase" and "uppercase" are actually markups that describe how the various letters will appear or be displayed. Similarly, fonts such as Times New Roman and Arial are also markups.

Whether the document is paper-based or electronic, the markup itself is not seen, but it is there. Thus, all documents are actually a combination of content (the letters, words, and numbers) that is controlled by markup (the font, size, location, emphasis, and spacing). Without markup, it would be difficult to decipher the words on the page.

XML goes well beyond traditional markup. In fact, it separates document content from markup in an extremely powerful and flexible format. The XML standard allows a community of interest (such as the real estate finance community) to define its own language elements to control the data in electronic documents that the various trading partners need to exchange.

### Standards

Users of XML can define their own data tags and formats, so the issue of having to keep track of all of the trading partners' various tag names and formats to conduct business arises. Fortunately, the solution to that issue has been addressed by organizations

like the Property Records Industry Association (PRIA) and the Mortgage Industry Maintenance Organization (MISMO).

PRIA is the national standard-setting body for electronic recording of land documents. MISMO is the national standard-setting body for the mortgage lending industry. These two organizations are working together to establish one set of data standards for all parts of the real estate finance transaction. Through a formal alliance agreement between PRIA and MISMO, the two organizations work cooperatively to ensure that whereas PRIA maintains data standards for recording, and MISMO maintains standards for mortgage lending, the two sets of standards are synchronized so they act as a unified single standard that encompasses all aspects of the real estate transaction.

### Electronic Signatures

UETA defines an electronic signature as "an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." UETA § 2(B). The effect of this definition on real estate transactions is that it begins to move the focus away from the traditional notion of an "autograph" type signature and focuses instead on the process and intent of the signing itself.

When people first think of an electronic signature, they usually conjure up one type of electronic signature that everyone is familiar with. The majority of electronic signatures today are autograph-based technologies, such as the electronic signature pads used at an increasing number of retail outlets. Using an autograph-type technology can be comforting to people just getting used to electronic transactions because the now-familiar squiggle created by the stylus in their hand is displayed for them to see. But what about other types of electronic signatures? Even small things like those key-fobs that have a chip a gas pump can read (associated with a credit or debit card) actually are used to create an electronic signature. When the fob is waved across a scanner, an electronic signature is created.

Another form of electronic signature that most lawyers have heard about is a digital certificate, even if only a few of us have actually ever used them. These password-protected pieces of software, based on complex algorithms and large prime numbers, are mainly used for computer network authentication across the Internet. The same technology can be used, and in fact is being used, to sign electronic documents today.

In keeping with ESIGN's call for technological neutrality, it is easy to see that many available types of electronic signatures can be used for electronic real estate documents, almost all of which are compatible with the PRIA and MISMO standards.

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### Electronic Document Formats

In December 2000, Carl Ernst published an article describing the three models of electronic recording discussed briefly above. Carl Ernst, *The Three (or More?) Models of Electronic Recording*, The Real Estate Record, Dec. 2000, at 1, available at www.pria.us/Papers/eRecordingModelsDefined_CarlErnst.pdf. That article provided the foundation for electronic recording models that PRIA references today. The models implement the electronic markup and signature requirements as follows:

- Model 1: Scanned paper. This basic form of eRecording is simply a matter of a traditional paper document containing ink signatures being scanned and electronically submitted to the recorder by a closing agent. The scanned image is usually a static (or dumb) document that provides little process automation.
- Model 2: Scanned paper combined with XML data. This hybrid form of eRecording begins with traditional paper and ink signatures, like Model 1. In addition to the static (dumb) image, the submitter adds XML-based data that can be used by the recorder to automate various aspects of the recording process.
- Model 3: This is the "holy grail" of eRecording. The document is never in paper form; rather it is created in an electronic format such as XHTML or according to a published standard like the MISMO SMART Doc™ specification or Adobe's Intelligent PDF. Electronic signatures are used in lieu of ink signatures. The XML data necessary to automate the recording process are embedded in the document.

### More Than Just Pilot Projects

Some practitioners may be surprised to learn just how mature eRecording technology is and how widespread its use is. Each eRecording model traces its earliest implementations back to the late 1990s. The early adopting counties are quickly approaching their 10th year of service. Most of the major software vendors are into the second, third, and, in some cases, the fourth release of their products, keeping pace with new hardware availability and updates in the PRIA and MISMO standards.

PRIA has undertaken a project to track which counties have implemented the various versions of eRecording. As of July 3, 2007, PRIA's list included 254 counties in 24 states and the

District of Columbia. PRIA members have access to the full list, showing each of the counties or recording jurisdictions that accept electronic documents, as well as a specification of which model or models that jurisdiction accepts.

Although no scientific statistics have been compiled by anyone to date, counties that have implemented Model 2 eRecording systems report that within a few months of making their systems available, they receive between 50% and 75% of their documents electronically.

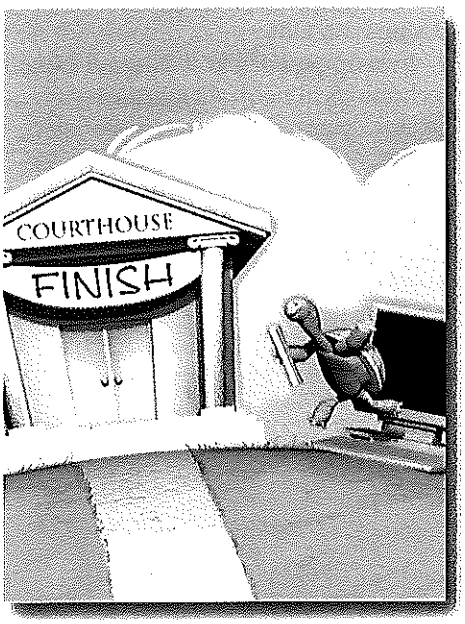
Innovative approaches such as the statewide portal projects being used in Iowa, New Jersey, and Missouri continue to drive adoption rates up and make submitter integrations easier than ever. Statewide portals allow document submitters to submit documents to or through a single web site without regard to the destination county. The routing of the document is handled by the portal design or by software on the portal. The submitter is presented with a uniform and familiar interface, even though the actual recording hardware and software of the various counties may be disparate.

### Advantages and Success Stories

To grasp the full effect of electronic recording, two viewpoints need to be considered: the county recorder and the submitter.

For counties, all three models of electronic recording reduce the number of paper documents that need to be scanned by office staff. For example, Maricopa County, Arizona, records between 8,000 and 10,000 documents every day. Barbara Frerichs, the records project manager, reports that the county receives approximately 53% of the documents in a Model 1 format. That equates to 4,000 to 5,000 fewer paper documents that the county staff has to handle every day. Add to that the 5% of documents that are received in a Model 3 format, and a significant dent in the workload has been achieved.

Both Models 2 and 3 provide the opportunity to leverage XML data to automate the recording process. This process can be as simple as having the recording software use the XML data to create index entries for the grantor and grantee names in the recorder's database. The XML data also can be used in complex business rules that fully automate reviewing the document for statutory compliance, calculating recording fees, initiating Automated Clearing House (ACH) payments, indexing the document (including legal or tract indices), and




routing the document to other governmental agencies that need to act on the newly recorded document. An example of Model 3 implementation comes from the experience of one of the authors as Racine County, Wisconsin, Register of Deeds. When implementing a Model 3 solution in January 2003, the author observed that the processing time for lien releases was approximately 11 minutes of direct staff time for a paper document, while a Model 3 electronic equivalent required less than one minute of system processing time.

For submitters, Models 1 and 2 require minimal internal process change and no consumer education. Traditional paper documents are still the foundational elements of these systems, so consumers do not need to understand any technology implementations to feel confident with the transaction.

All three models can, in appropriate circumstances, decrease the turnaround time for recording documents. Implementation specifics vary, so results also vary, but everyone agrees that eRecording reduces document turnaround from days or weeks to hours or even seconds. Of course, the more documents that are submitted electronically, the faster the overall turnaround time becomes.

Some of the more sophisticated implementations that include county-specific business rules integrated into the document creation templates have significantly reduced the number of documents that are rejected by the recorder. Common mistakes such as missing data or incorrect fees are easily eliminated by the computer systems before the document's submission to the county.

The PRIA and MISMO document standards also address security concerns. Although there have been no reports of forged or altered electronic documents to date, the security aspect of electronic commerce cannot be ignored. A full explanation of security as set forth in the PRIA and MISMO standards is well beyond the scope of this article, but the two organizations have conducted (and will continue to conduct) multiple analyses of every aspect of the electronic documents to make them as secure as necessary. Although a "fear-factor" tends to surround electronic transactions in general, and electronic real estate transactions in particular, the eRecording experience over the past 10 years has been reliable and trustworthy.

## Summary

UETA, ESIGN, and URPERA provide the legal framework for generating and recording electronic real estate documents. Sophisticated yet user-friendly technologies are at work behind the scenes, enabling powerful automation of an otherwise paper- and labor-intensive process. Over 250 counties in nearly half the states have already implemented eRecording systems.

Electronic recording of real estate documents is not a "wouldn't that be nice someday" concept. It is a proven, mature solution that is gaining momentum because it helps increase accuracy, reduce cost, and reduce turnaround on time-sensitive transactions. ■