Electronic Real Estate Recording Task Force

Memorandum

To: **Members of the Drafting Committee of the NCCUSL – Uniform Real Property Electronic Recording Act**

From: **The State of Minnesota Electronic Real Estate Recording Task Force (ERERTF)**

Date: **October 23, 2003**

Re: **Comments of NCCUSL Subcommittee on URPERA**

The Minnesota Electronic Real Estate Recording Task Force (ERERTF) thanks the members of this committee for the opportunity to express our thoughts regarding the URPERA draft. The ERERTF has been working for the past two years on the development and testing of electronic recording standards. Based on our experiences in this area we have collected comments on this draft.

Beth McInerny, the Project Coordinator for the task force will attend the drafting sessions in Chicago this November and will share with you the current status of the task force and take questions on these comments.

Thank you for your time and consideration of our comments.

1. Prefatory Note

NCCUSL Draft Text:

The Prefatory Note to the current draft of the Act reads: "Limited experiments with recording electronic documents have been initiated in a few counties in a few states. These approaches have resulted from the initiatives of individual recorders."

Subcommittee Comments:

Minnesota's example contradicts that statement. The Electronic Real Estate Recording Task Force (ERERTF) envisioned and is implementing a statewide standard for recording; as well, the effort is actively supported by a broad constituency of stakeholders, including but certainly not limited to county recorders.

On the basis of that experience, reflecting the intensive activity and analysis undertaken since 1999, Minnesota can offer some detailed suggestions and comments on the conceptual, legal, technological and organizational architectures that would support electronic recording. The ERERTF has done extensive work in this area and developed standards applicable across the state. Further, it is now implementing those standards in pilot tests in five counties. As a result, Minnesota offers a model that other states and the drafting committee could profitably study. [1]

2. Definition of "electronic recording system"

NCCUSL Draft Text:

"Electronic recording system" means a system, including its databases, duplicate archives, hardware and software, established under this [act] for the electronic recordation [or registration] of documents.

Subcommittee Comment #1:

The Act's definition of "electronic recording system" needs clarification. Compare Minnesota's definition of a system, which reads:

> A publicly owned and managed county system, defined by statewide standards, that does not require paper or "wet" signatures, and under which real estate documents may be electronically: created, executed, and authenticated; delivered to and recorded with, as well as indexed, archived, and retrieved by, county

[1] There is copious documentation on the ERERTF's activities on the project web site: http://www.commissions.leg.state.mn.us/ lcc/erertf.htm.

recorders and registrars of title; and retrieved by anyone from both on- and off-site locations.

From the ERERTF's perspective, the Act's definition raises some concerns. In one respect, it is too general. The value of an electronic recording system will be increased if it is integrated or communicates with other systems, particularly among other county or state government offices, but also with the private sector.

Recommendation:

The URPERA definition should encompass that functionality.

Subcommittee Comment #2:

In another respect, the definition is too limiting. It refers exclusively to "databases," which in common usage means a specific type of application.

Recommendation:

The URPERA definition should include the range of options and technologies, including images, XML and authentication tools, for example, which Minnesota's example suggests are practical.

Subcommittee Comment #3:

Last, the term "duplicate archives" is seemingly a synonym for a backup system. But virtually all states have records management statutes which establish and define government entities and procedures for the long term preservation of valuable records. A state archives or a records management program almost invariably has the responsibility for this function.

Recommendation:

The Act should differentiate between the possible connotations of the term "archives" and their different implications to avoid any legal confusion.

3. Section 5

URPERA Draft Text:

SECTION 5. ELECTRONIC DOCUMENT RECORDING [GUIDELINES] [REGULATIONS].

[Alternative A:

(a) Except as required by law other than this [act], the recorder shall promulgate guidelines regarding:

(1) the manner and format in which an electronic document must be created, submitted, received, returned, and retrieved and the systems established for those purposes;

(2) the type of electronic signature required, the manner and format in which an electronic signature must be affixed to an electronic document, and the identity of, or criteria that must be met by, any third party used by a person filing an electronic document to facilitate the process;

(3) any other attributes for electronic documents that are specified for corresponding paper documents and reasonably necessary under the circumstances.

(b) In promulgating guidelines under subsection (a), the recorder shall, to the extent feasible, consult with other recorders in the state, professional associations of recorders, and other electronic recording industry organizations and adopt uniform guidelines.]

[**Alternative B:**

(a) A [state board] consisting of [number] members appointed by [appointing authority] is hereby created. The majority of the members of the [state board] must be recorders. The members of the [state board] shall receive no compensation but shall be reimbursed for reasonable expenses.

(b) The [state board] shall adopt [regulations] [guidelines] that specify:

(1) the manner and format in which an electronic document must be created, submitted, received, returned, and retrieved and the systems established for those purposes;

(2) the type of electronic signature required, the manner and format in which an electronic signature must be affixed to an electronic document, and the identity of, or criteria that must be met by, any third party used by a person filing an electronic document to facilitate the process;

(3) control processes and procedures to ensure adequate preservation, disposition, integrity, security, confidentiality, and auditability of electronic documents; and

(4) any other attributes for electronic documents that are specified for corresponding paper documents and reasonably necessary under the circumstances.]

Subcommittee Comment

Section 5 should consider the practical examples of Minnesota's experience and the language used in the Federal government's Electronic Signatures in Global and National Commerce Act (E-Sign). For example, both Minnesota and E-Sign stress that standards should be "infrastructure independent," so they will not require both parties to a transaction to purchase the same, proprietary hardware and software. In this context, an analogous section of E-Sign reads:

> ACCURACY, RECORD INTEGRITY, ACCESSIBILITY- Notwithstanding paragraph (2)(C)(iii), a Federal regulatory agency or State regulatory agency may interpret section 101(d) to specify performance standards to assure accuracy, record integrity, and accessibility of records that are required to be retained. Such performance standards may be specified in a manner that imposes a requirement in violation of paragraph (2) (C) (iii) if the requirement (i) serves an important governmental objective; and (ii) is substantially related to the achievement of that objective. Nothing in this paragraph shall be construed to grant any Federal regulatory agency or State regulatory agency authority to require use of a particular type of software or hardware in order to comply with section 101(d).

Using similar language, Alternative B, section (3) calls for "control processes and procedures to ensure adequate preservation, disposition, integrity, security, confidentiality, and auditability of electronic documents." But it does not specifically call for infrastructure independence. As well, this section is not applicable to Alternative A, as the comments note, because these functions are considered "an internal matter," for counties.

There are two reasons to argue the opposite. First, all states and jurisdictions have statutes and case law precedents that specifically refer to and set procedures pertinent to the control processes and procedures noted. Records management acts, for example, in virtually all states will specifically address preservation and disposition of records; as such, these are rarely, if ever, purely internal matters for any office of government.

Second, and this points to the importance of standards in general, when those processes and procedures are not defined adequately, clearly and in accord with broader constituencies, then it is less likely that the private sector, which creates the records in the first place, will be comfortable with electronic recording. As a purely practical matter, standards mean the establishment of a consensus across boundaries. Their purpose is to ensure consistency and quality. If standards are shared no further than a county's border, then their value is severely reduced. As well, there is a tremendous amount of work involved in establishing standards; working on a county by county basis reduces significantly any return on investment for government and will undoubtedly increase the costs of compliance in the private sector.

Recommendation:

Standards should be "infrastructure independent," so they will not require both parties to a transaction to purchase the same, proprietary hardware and software. Alternative B is preferable to Alternative A.

Subcommittee Comment #2:

Along the same lines, giving one set of stakeholders – in this case, county recorders – a majority on a state board that sets standards will be problematic. Under that approach, the special and necessary public/private partnership aspect of recording will be lost. There are many players in this industry and a coalition of groups is necessary to evaluate and adopt standards.

Recommendation:

Membership in a state board should include bankers, title companies, mortgage companies, real estate attorneys other government agencies that receive parcel information from the county or who search systems for information, technology providers involved in property record technology, national groups, and, on the county level, auditors and treasurers who play important roles in the recording process.

Subcommittee Comment #3

Finally, the Preliminary Comments on this section say, "Generic provisions adopted for accepting electronic documents by other governmental offices may have little or no bearing on the procedures and processes unique to the recording of real estate documents." The term "generic provisions" seems to dismiss a variety of standards. This is problematic on two counts. First, many states, such as Kansas, Minnesota, Missouri, Connecticut etc., as well as the Federal government, are creating enterprise technology architectures for the express purpose of standardizing information, procedures and processes for e-government. Second, given the importance of the information generated in real estate transactions and its potential value, in an electronic format, to other state and local government entities, electronic recording is a central function that should, far more than most governmental activities, be subject to standards.