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Electronic Notary:
How Does It Impact Recording?

Updated and Approved by the PRIA Board of Directors
January 21, 2026

www.pria.us

PROPERTY RECORDS INDUSTRY ASSOCIATION

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PRIA Completed Work Product

January 2026

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A Brief Overview

The federal Electronic Signatures in Global and National Commerce Act (ESIGN), adopted by Congress in 2000, permits notaries to use electronic signatures when notarizing electronic documents. The Uniform Law Commission recommended similar authorization to the states in three of its model acts: the Uniform Electronic Transactions Act (UETA), the Uniform Real Property Electronic Recording Act (URPERA) and the Revised Uniform Law on Notarial Acts (RULONA). The Uniform Law Commission also authorizes remote online notarization (RON), which adds an electronic aspect to the personal appearance requirement of notarial law, in addition to the electronic signature elements of RULONA.

How does this legislation interact with recording statutes that often imply a wet-ink signature is required on an original paper document? What can a recorder accept for recording? While it seems complicated, this paper demonstrates it is actually straightforward when considered in the context of the recorder's role in a real estate transaction.

Recording: Notice and Priority

The intent of recording statutes across the United States is to provide constructive notice of interests in real property and to establish the priority of those interests. Placing a document "on record" does not imbue it with some mystical legal quality it does not otherwise contain. It simply lets the world know that Party A is asserting they have an interest in a specific parcel of real property. If challenged, the interest asserted by Party A may be upheld by a court, or it may be set aside for a variety of reasons. However, everyone has been made aware of the claim by recordation in the land records.

Because of the importance of timely notice, recording statutes typically set minimal requirements. The parties and the real property must be identified. Formatting requirements are imposed according to state statutes to assist the recorder in locating key information, which is then used to index the document for searching and retrieval. Typically, the document must be notarized to be recorded.

The other key goal of the recording process is to establish the priority of interests. Who has the superior position when there are disagreements between the parties about who is paid first? This position is what is referred to as "race (to record) notice." Each state has some form of priority statute. While the specifics vary, they are all founded on the order of recording. The most common type of priority statute is "race (to record) notice," meaning, between two competing interests, the one recorded first wins, as long as there was no notice of the competing interest.

The Recorder: A Relying Party

Notarization actually plays an important role in both notice and priority. Notarized documents are considered "self-authenticating." The notarial act allows interested parties to rely on these documents at face value – they require no additional supporting evidence, unless they are challenged. In this context, if a completed notarial certificate is included as part of the document, the recorder can proceed with the recording process speeding the notice and helping to maintain priority.

While documents are required to be notarized for recording, the recorder has no enforcement authority over the notary or notarial act; that is the role of the notary regulator, typically the Secretary of State. It is the role of the recorder to record the document and the role of the court to resolve any challenges to the notarial act.

Electronic Records and Signatures

With the adoption of the laws referenced at the beginning of this paper, recorders moved from review of paper documents with wet-ink signatures to accepting electronic records and signatures. Perhaps the most important thing for recorders to remember about UETA and URPERA is that neither of these acts declares an electronic record an "original" in the sense it is represented by a tangible, paper document. Instead, these laws definitively state if a law requires a "writing" or a "signature," an electronic record or an electronic signature satisfies the requirement of the law and is enforceable. Additionally, both acts authorize notaries to use electronic signatures to notarize electronic records.

Interstate Recognition

Long before electronic commerce laws were developed, many states enacted interstate commerce laws giving equal recognition to the notarial acts of every other state (click to view the interstate notarial recognition laws by state). These interstate recognition laws are designed to aid the recording process by officially recognizing notarial acts performed by notaries of other states without requiring the recorder to know the specifics of every other state's notary laws. Thus, in states with interstate recognition laws, a recorder can generally rely on the notarized document at face value to record the document and provide notice of an interest in a timely and efficient manner.

If Hamlet Was a Recorder

To record, or not to record, that is the question. When it comes to notarized documents, the recorder is relying in good faith on the act of a commissioned notary public. Taking into account the importance of the notice and priority functions of the recorder's office, PRIA recommends erring toward the side of recording, if a document contains a completed notarial certificate. While PRIA does not support a cavalier approach which would disregard all recording requirements, the potential damages caused by taking on the role of notary enforcement undermines the key public policy aims of providing notice and establishing priority of claims.