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THE DEED IS DONE: ON-LINE NOTARIZATION BECOMES A REALITY

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For prevention of many fraudulent Practices which are commonly endeavoured to be upheld by Perjury ... Bee it enacted. ... That noe Leases Estates or Interests either of Freehold or Terms of yeares. ... in to or out of any ... Lands ... shall at any time after the said fower and twentyeth day of June be assigned, granted or surrendred unlesse it be by Deed or Note in Writeing signed by the party soe assigning granting or surrendring the same ...

An Act for prevention of Frauds and Perjures, 1677

A notary shall not ... Notarize a document if the signer is not in the presence of the notary at the time of notarization, unless (i) in the case of an electronic notarization, satisfactory evidence of the identity of the signer is established in accordance with § 47.1-2 ...

Virginia Code authorizing on-line electronic notarization, effective July 1, 2012

The public interest in ensuring the integrity of conveyances in land has a long and distinguished lineage. The Statute of Frauds adopted in England in 1677 sought to prevent fraud in part by effectively requiring that all conveyances of interests in land beyond a three-year lease had to be in writing and signed by the grantor. The end of the twentieth century saw, in the United States, the nationwide legal recognition of the electronic signature through adoption of the federal E-SIGN law and, in 48 states and the District of Columbia, the Uniform Electronic Transactions Act, both of which also authorize notaries to sign and seal electronic documents.

But while electronic signatures are now widely utilized in commercial and banking transactions, the special concern over ensuring the transactional integrity of real estate

transactions has limited the use of electronic signatures for documents that need to be recorded in the land records. In particular, the requirement for documents to be notarized – which has always required the signer to make a personal appearance before the notary in the form of a physical presence – has for all practical purposes foreclosed the use of electronic signatures in these transactions.

With effect from 1 July 2012, the Commonwealth of Virginia became the first state in the United States to authorize the notarization function to be fulfilled by use of two-way audio-video conference. Virginia's Electronic Notaries Act of 2011¹ authorizes on-line notarization by treating audio-video teleconferencing that meets certain standards to be treated the same as a traditional 'in person' presence. In effect the law allows for a direct, personal electronic presence to be treated the same as a direct, personal 'molecular' presence. As a result, a signer who is located anywhere in the world can personally appear on-line before a duly commissioned Virginia notary via audio-video conference technology. To enable this connection, both the signer and the notary must have a computer with a webcam and audio capability so that the signer and notary can both see and hear each other in accordance with Virginia Supreme Court standards.

Following years of discussion and speculation about the future of 'cyber notaries' at the American Bar Association, this marks the first time that on-line notarization has been authorized in the United States.² The intent of the on-line notarization law is to improve the notary process by strengthening identification methods for principals and notaries, provide better tools to deter and detect fraudulent notary transactions and so adapt notarization – virtually unchanged in form or function since Roman times – to twenty-first century consumer, business and government transactions in today's global digital network-based information economy.

¹ Chapter 731, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?111+ful+CHAP0731>.

² Note that French notaries have been

the first to use video conferencing for the notarization of deeds. Ugo Bechini and Dominik Gassen, A New Approach to Improving the Interoperability of

Electronic Signatures in Cross-Border Legal Transactions, 17 MICH. STATE J. INT'L L., No. 3 (2009) at 4.

In paper notarization, a notary identifies a signer by viewing the signer's identity document (in the United States, typically a driver's license). The notary, of course, has no means to determine if the identity document is itself forged. The procedures for electronic notarization under the Virginia law actually ensures that on-line electronic signing is more reliable and resistant to fraud and manipulation than traditional notarization, because the remote notary must confirm the identity of the signer by (1) reliance on prior (antecedent) in-person proof of identity³ by a trusted third party (such as a series of knowledge-based questions provided by a credit information company) or (2) reliance on the signer's use of a digital certificate that is authenticated either by a biometric or a high-security smartcard.

To comply with the traditional Statute of Frauds, a notary binds a signer to a document and establishes an evidentiary presumption of due execution that is very difficult to overcome. By enabling notaries and signers to meet in real time on-line and communicate with each other by audio and video conference technology, the new on-line notarization process provides the functional equivalent of traditional, pen-and-ink notarization. Under the Virginia process, the closing agent for the entire real estate transaction ensures that either the full electronic version or a paper print-out of the deed (depending on the e-filing capabilities of the recording official) is recorded with the Circuit Court Clerk. This makes the electronically signed and notarized deed part of the permanent public record. In addition, the notary archives an audio-visual recording of each audio and video conference for a minimum of five years.

However, going from statutory acceptability to transactional reality can be difficult. Under Virginia's new law, on-line notarizations have been taking place since July of 2012, but until recently no electronically notarized deed had been officially accepted for recording.

The first recorded electronically signed and notarized deed involved a couple on June 6, 2013 who were physically located in France and who needed to finalize the sale of an apartment they owned in Alexandria, Virginia. The initial sales contracts had all been physically signed in France, scanned and then sent by e-mail to the real estate agent in Alexandria as attached PDF files. But to close on the transaction, of course, they needed to be able to deliver a signed deed at closing – and the deed would need to be notarized, as would the power of

attorney they were providing to a family friend to address other matters at closing. The nearest United States qualified notary they could locate in France was nearly two hundred miles away at a United States consulate. The qualified Virginia electronic notary was located in Richmond, Virginia, 103 miles south of the closing attorney's office in Alexandria and some 3,800 miles from the signatories – in short, the perfect case for an on-line notarization.

The American couple was already very familiar with the use of internet video, communicating regularly around the world via one-on-one and group video from Skype and zoom.us.com. The closing agent uploaded the documents to be signed and notarized into a secure on-line system, and both the signer and the notary logged in and viewed the document simultaneously. The couple successfully completed a knowledge based questioning procedure to fulfill the identity confirmation requirement, and then electronically signed the document by affixing digital signatures. The signers then verbally acknowledged their intent to sign the document to the notary. The notary then counter-signed the document by affixing a digital signature and an electronic official seal that includes the jurisdiction, notary's full name and title, commission number, and date of commission expiration.

The electronically notarized deed for the apartment was duly forwarded electronically to the closing attorney's offices prior to the day scheduled for closing, which then proceeded to completion with routine recording of the documents among the land records at the Alexandria court house.

The following lessons were learnt as a result of this process:

1. Virginia's on-line notarization law recognizes the reality that, with cloud-based services and storage, electronic documents and their signers now can act virtually more easily than ever before. Signers located outside of Virginia and not in the physical presence (as traditionally understood) of the notary can still appear on-line before a Virginia notary using common and easily understood software and hardware. But it is necessary to test the software and the connection all the way through to make sure that the signing party is familiar with it.
2. With digital networks and cloud computing, there is no

³ For a description of antecedent in-person proofing' see FPKIPA – CPWG Antecedent, In-Person Task Group, FBCA Supplementary Antecedent, In Person Definition, (16

July 2009) available at http://www.idmanagement.gov/fpkipa/documents/FBCA_Supplementary_Antecedent.pdf.

longer a geographically-limited physical connection between the document and the signer. Therefore, the logic of requiring a signer to physically appear in 'molecular form' before a notary in order to attribute a particular person to a particular document no longer applies. A direct personal appearance in electronic form may suffice.

3. Both the signer's signature and the notary's signature and commission information are affixed to the electronic document using digital signatures. Any attempt to modify the document after notarization would be detectable to anyone viewing the document. Hence, unlike a molecular appearance where corrections may be confirmed by initialing each change in the margin, correcting similar errors in an electronically-notarized document may require re-executing and re-notarizing the entire document. Given how often minor errors need to be corrected at a real estate closing, it may be helpful to explain this possibility to the signatories prior to commencing the signature and notarization process.
4. The electronic signature of the notary and the signers appear as a 'script font'. The electronic platform used for this transaction presently offers six script fonts among which the signer may choose. The software platforms could presumably allow for the use of a scanned image of the signer's handwritten signature. For fraud prevention reasons however, many signatories may hesitate to upload an image of their handwritten signature into a third party database, and it would perhaps not be surprising if the general practice evolves of using a unique font signature for each transaction.
5. While the law now allows for recording documents that have been executed and properly notarized electronically, the process remains new and may be unfamiliar of those responsible for the actual recording of land records. Accordingly, electronic notaries and closing counsel would do well to coordinate ahead of time with the relevant clerk's office in order to explain the procedure, answer any questions, and generally make sure that the clerk's office is comfortable with the process. While Virginia law certainly accepts electronic notarization, the world of professional relationships and trust among local counsel and clerks'

offices is profoundly 'molecular' (thank goodness!) and likely to remain so for the foreseeable millennia.

Conclusion

Virginia's on-line notarization brings the notary into the stream of electronic commerce in a manner never before possible. Now, signers outside of Virginia may appear before a duly commissioned Virginia notary and take advantage of all the conveniences of on-line transaction processing, including greater speed, efficiency, security and electronic archiving. Relying parties can place greater trust in the reliability of remotely notarized transactions due to the more stringent identity and authentication requirements for signers and the notary's electronic journal, which includes a real time recording of the notarial act itself.

Digital data and ubiquitous connectivity now render impractical, undesirable and even obsolete requirements for physical appearance in many contexts. Indeed, it seems entirely possible that we will soon largely interact virtually for both personal and commercial reasons. If this prediction is accurate, then on-line notarization may seem logical and even necessary. Virginia's on-line notarization law is in the vanguard at the moment. But in a few short years, it may appear to have been inevitable, much as the Statute of Frauds of 1677 did when the commercial system was based on paper, and 'traditional' notarization of signed deeds may begin to go the way of 'livery of seisin'.

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