

Electronic Recording for Real Estate in New York

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Commerce in New York is increasingly using technology, except when transacting real property. In a transfer of title or execution of a mortgage, a pen must still be put to paper and recording the hard copy documents can be a tortured and time-consuming process. This may soon change.

Legislation has been submitted in Albany, and passed in the state Senate, to allow for the electronic recording of instruments affecting real property. If enacted, New York state will finally join the roster of states willing to take advantage of technology for real estate recordings.¹

[Senate Bill 2373](#), introduced by Senator Andrea Stewart-Cousins, a Democrat representing part of Westchester County, and Assembly Bill 6870, introduced by George S. Latimer, a Democrat representing the Sound Shore area of Westchester County, were introduced at the request of the New York State Association of County Clerks.² The co-chairs of the association's E-Recording Committee are Annette Hill, the New York City Register, and Timothy Idoni, the Westchester County clerk.

The association recognizes that there will be significant advantages to recording offices embracing electronic recording. As stated in the memoranda of support accompanying the bills, "[b]y implementing electronic recording, a local government would be able to reduce the volume of paper documents coming into the recorders' office. Moreover, local governments that permit electronic recording stand to save considerable money [on] personnel and postage for returning documents."

Further, according to the memoranda, "[o]wners of real property, real estate professionals and local government taxpayers would benefit from the more accurate and efficient land records system that this bill would facilitate." Certainly, for those who choose to record electronically, since it would not be mandatory, the time and money they would have expended traveling to a recording office will be saved, the possibility that documents in transit will be lost should be eliminated, and, most obviously, documents will be recorded promptly.

Recording and Signatures

New York state's Electronic Signatures and Records Act (ESRA), Article III of Chapter 57-A of the State Technology Law,³ is based on the Uniform Real Property Electronic Recording Act (URPERA), drafted by the National Conference of Commissioners on Uniform State Laws in 2004, and last amended in 2005. According to the Uniform Law Commission's website,⁴ URPERA has been adopted in 24 states, the District of

Columbia and the U.S. Virgin Islands. The prefatory note to URPERA notes that the act "was drafted to remove any doubt about the authority of the recorder to receive and record documents and information in electronic form...."

In enacting ESRA, the state Legislature recognized technology's importance to commerce. The statement of legislative intent in Chapter 314 of the Laws of 2002 which amended ESRA, states that "...the legislature finds that it is in the best interest of the state of New York, its citizens, businesses and government entities...to promote the use of electronic technology in the everyday lives and transactions of such individuals and entities..."

Accordingly, under ESRA, "an electronic signature may be used by a person in lieu of a signature affixed by hand."⁵ Further, under ESRA, "in accordance with rules and regulations promulgated by the electronic facilitator [the State's Office for Technology], governmental entities are authorized and empowered to produce, receive, accept, acquire, record, file, transmit, forward and store information by use of electronic means...."⁶

However, ESRA does not apply "[t]o any conveyance or other instrument recordable under article 9 [Recording instruments affecting real property] of the real property law."⁷ Further, whether the federal Electronic Signatures in Global and National Commerce Act (E-SIGN)⁸ preempts New York's statute of frauds⁹ to allow for electronic signatures in the context of real property is unresolved.¹⁰

This would be changed by enactment of the legislation under consideration. The bills, first and foremost, will delete from Technology Law section 307 the provision that ESRA does not apply to instruments being recorded under the Real Property Law.

Second, the bills amend the definition of "Recording" under section 290 (Definitions) of the Real Property Law to include within the definition "the entry...upon the papers of the proper record books...by an electronic process by which a record or an instrument affecting real property, after delivery, is incorporated into the public record."

Third, the bills will add a new section 291-I (Validity of electronic recording) to the Real Property Law. This section provides that a "digitized paper document" or an "electronic record" will satisfy any requirement that the document being recorded is an original.

A "digitized paper document" is defined in the bills' section 2 as "a digitized image of a paper document that accurately depicts the information on the paper document in a format that cannot be altered without detection." An "electronic record" is defined in section 2 to include, in part, "information evidencing any act, transaction, event or other activity, produced or stored by electronic means and capable of being accurately reproduced in forms perceivable by human sensory capabilities."

According to new section 291-I, taking into account New York's statute of frauds, a digitized image of a "wet signature" (defined in the bills) of the parties to an instrument

and of the notary, or their electronic signatures to an electronic record, will satisfy any requirement that an instrument be signed and acknowledged.

Documents accompanying an instrument being submitted electronically, which would include transfer tax returns and affidavits required for recording, could also be submitted as a digitized paper document or in the form of an electronic record.

Lastly, if a document is being submitted to the recording office as a digitized paper document, a custodian of the original paper document would be required to transmit with the digitized paper document his or her affirmation, in the form set forth in the legislation, executed under penalty of perjury, that the document is a true, accurate and complete electronic image of the original paper document, and that the signature or mark on the original paper document is a wet signature or mark. The custodian's signature must be acknowledged. Once the electronic image of the document is recorded or filed, the custodian is not required to maintain the original document.

Accordingly, if this legislation is enacted, real estate closings would take place in one of three ways. The closing could be entirely paper-based with the documents being delivered to the recording office, as is now the case. Alternatively, the title closer would take the hard copy documents back to the office of the title company or title agent, the documents and any accompanying forms will be imaged and, together with the affirmation of a "custodian," be transmitted for recording. As a further alternative, closings will not involve paper documents at all. Envision the parties to a transaction affixing their electronic signatures to documents displayed on a device such as an iPad; the documents, once signatures are electronically affixed, can then be transmitted electronically to the recorder's office.

To ensure consistency in standards and practices, and in the technology to be used, the state's Office for Technology, as the electronic facilitator, is charged with promulgating rules, regulations, guidelines and standards governing the use and acceptance of digitized paper documents, electronic records and electronic signatures.

Amendments Needed

Some amendments to the bills do need to be made. For example, Subsection 4 of proposed new Real Property Law section 291-l needs to be amended to delete the word "requires" in the text at line 16 stating "[w]here any recording officer permits or requires instruments affecting real property and any accompanying documents to be presented for recording or filing as digitized paper documents or electronic records...." As stated in Subsection 3 of new section 291-i, recording by electronic means would not be mandatory, as should be the case, to enable recording by persons who do not have access to the technology necessary to create an electronic record.

Also of concern is the bills' section 4, which amend Real Property Law section 317. Existing section 317 provides that an instrument entitled to be recorded must be

recorded by the recording officer in the order and as of the time of its delivery. Section 4 adds that "a digitized paper document or an electronic record shall be considered delivered for purposes of this section at the date and time of receipt indicated on an electronic or other written notification which shall be provided by the recording officer immediately upon receipt of a digitized paper document or electronic record."

Section 317, as so amended, could (depending on how the law is administered) enable a digitized paper document or an electronic record to be recorded after hours to the disadvantage of someone recording a paper submission against the same property during usual business hours. Also, amended section 317 does not condition receipt of a digitized paper document or an electronic record on the payment of all fees and recording taxes. These issues may, however, be best resolved by the electronic facilitator.

In the near future, the electronic recording of real estate-related instruments could be commonplace, and we will wonder why New York allowed only the traditional pen and ink execution and the in-hand delivery of documents to the recording office for as long as it has.

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Endnotes:

1. See, for example, Florida's Uniform Real Property Electronic Recording Act, F.S.A. Section 695.27 and Florida's Real Property Electronic Recording Standards, Fla. Admin. Code r. 1B-31.002.
2. [Assembly Bill 5418](#) has also been introduced by Assemblyman Robert Castelli, a Republican representing northeastern Westchester County. The bills differ only in their effective dates. Senate Bill 2373 and Assembly Bill 6870 would be effective 270 days after becoming law; Assembly Bill 5418 would be effective 280 days after becoming law.
3. Chapter 4 of the Laws of 1999, effective March 26, 2000.
4. <http://nccusl.org>.
5. [State Technology Law, Sec. 304](#) (Use of electronic signatures).
6. [State Technology Law, Sec. 305](#) (Use of electronic records).
7. [State Technology Law, Sec. 307](#) (Exceptions).
8. [15 U.S.C. Sec. 7001 et seq.](#)

9. [General Obligations Law, Sec. 5-703](#) (Conveyances and contracts concerning real property required to be in writing).

10. "There is a substantial possibility that E-SIGN does not preempt Article 9 of the RPL or otherwise obligate county recording officers to accept for recording a filing that obtains only an electronic signature...." Informal Opinion No. 2001-3, Office of the Attorney General, State of New York, reported at 2001 A.G. LEXIS 6.

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