

The Future of Notarization is Online

A Whitepaper

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Introduction

Notarization has a long history, steeped with tradition and involvement by church and state alike. However, at a fundamental level notarization seeks to answer two questions about a document:

- Who signed this? (Identification)
- Did the signer mean to sign this? (Intent)

These essential questions form the core of many contract disputes and enforceability questions. Specific questions pertaining to intent include: What exactly did a person sign (Data Integrity) and how can I confirm this (Authentication)? The purpose of the notary public is to resolve these questions in some way through the use of an independent witness with a government commission. This paper addresses the insufficient proof and flaws inherent in a traditionally conducted pen-and-ink notarization. While a perfect system does not exist, the online notarization system proposed here substantially improves the efficacy of a notarization to answer each question individually and collectively. Ultimately, this can lead to more enforceable contracts with additional convenience for consumers and efficiency for businesses.

When compared to traditional pen-and-ink notarizations, online notarizations can be more secure in identifying signers, more consistent in quality, and offer video proof the notarization occurred. Furthermore, the enormous convenience of online notarization benefits everyone involved. Perhaps most importantly, online notarization can offer convenience and security to signers and relying parties at a greatly reduced cost. The benefits of online notarization are significant, and the risks associated with traditional pen-and-ink notarizations are too great to ignore any longer.

2010 - A Year of Notary Failure

Notaries do not often hit the national news cycle, but 2010 was an exception. On several occasions, the limitations of the current notary system became painfully obvious and the businesses involved incurred huge financial cost.

The terms “robo-signing” and “foreclosure-gate” were coined in response to events that were discovered late 2010. After the US real estate market collapse starting in 2007, mortgage

holders were forced to foreclose on approximately 3.2 million properties in only three years.¹ The foreclosure process is one that often requires notarized documents. Banks such as Bank of America and JP Morgan Chase previously hired outside firms to handle much of the foreclosure work. The less reputable of these firms allegedly used so-called “robo-signers” who were individuals who would sign up to a thousand documents a day without reading them, forge signatures, and apply a notary stamp with nothing resembling a traditional notarization.² These wet-ink original signatures were ultimately fraudulent.

“One GMAC Mortgage official admitted during a December 2009 deposition that his team of thirteen people signed approximately 10,000 foreclosure documents a month without reading them. One Bank of America employee confessed during a Massachusetts bankruptcy case that she signed up to 8,000 foreclosure documents a month and typically did not look them over ‘because of the volume’.”³

The scope of frauds like this is huge. Attorney Richard Kessler has studied foreclosure in depth and claims that errors exist in a majority of repossession paperwork.⁴ In many cases, little is known about what documentation was received or signed and many consumers may not have undergone proper foreclosure procedure. The effect on the victims is devastating, and some consumers may lose their houses without proper procedure. Many banks involved in the 2010 notary fiasco have suffered significant short and long-term damage. Banks such as PNC Financial and GMAC placed a moratorium on foreclosures for weeks, costing them collectively billions of dollars. States have filed suits against the banks for up to \$25,000 per false document plus damages for homeowners.⁵ The public relations damage is ongoing.

The Mortgage Electronic Registration System (MERS) was designed to make tracking and trading mortgages easy on the secondary and tertiary marketplaces. However, without an appropriate mechanism to store, track, and monitor signatures, many mortgage records lost

1 “National Real Estate Trends.” RealtyTrac. <http://www.realtytrac.com/trendcenter>.

2 David Steitfeld and Gretchen Morgenson. “Foreclosure Furor Rises; Many Call for a Freeze.” *New York Times*, October 8th, 2010. <http://www.nytimes.com/2010/10/06/business/06mortgage.html>.

3 Michael T Snyder. “‘Foreclsouregate’ About to Explode.” *Seeking Alpha*. October 11, 2010. <http://seekingalpha.com/article/229362-foreclosuregate-about-to-explode>.

4 Snyder.

5 Peter White. “Foreclosuregate Explained: Big Banks on the Brink.” 28 October, 2010. <http://www.truth-out.org/foreclosuregate-explained-big-banks-brink64621>.

even the names associated with them. This systemic problem led many firms to make an effort to rebuild information that was missing; this is where false pen-and-ink notarizations came into play. Because it is typically very difficult to notarize documents when signers are spread out around the country and difficult to determine a valid notarization, the situation was ripe for abuse. Investigations are ongoing, and it is likely going to be some time before the full story is uncovered.⁶

Another major fraud regarding notarization occurred when workers were hired to swing an election in Chicago by faking notary signatures. In order to get as many signatures as possible, and ensure a candidate was placed on a ballot, several political groups organized large numbers of fake signatures and had individuals copy and paste the notary stamp and seal onto thousands of documents. Chicago state police were investigating petitions for many political candidates, including four mayoral candidates, for forged signatures and commented, “State police will be interviewing the actual notaries whose stamps, which can easily be duplicated, allegedly were forged on the documents.”⁷ More than that, it is difficult for a court to sort out what is a legitimate signature and what is not, leading to confusion and what may or may not be the correct outcome.⁸ It is suspected that signature and notary abuse is widespread in many voting applications, where there are too many signatures for verification through traditional means and the stakes are high.

2010 was filled with other examples of fraud associated with financial instruments, petitions, commerce, and more. Most of these frauds occurred with wet-ink seals, and most could have been prevented with the use of modern technology.

6 National Association of Attorneys General. “50 States Sign Mortgage Foreclosure Joint Statement.” October 13, 2010. <http://www.naag.org/joint-statement-of-the-mortgage-foreclosure-multistate-group.php>

7 Ray Gibson. “State police probe notary fraud allegations.” *Chicago Tribune*. December 3, 2010. http://articles.chicagotribune.com/2010-12-03/news/ct-met-chicago-mayor-race-1204-20101203_1_notary-mayoral-candidates-state-police

8 Frank Medina. “Is the Election Board ignoring possible fraud in Treasurer’s race?” *Chicago Examiner*. <http://www.examiner.com/elections-2010-in-chicago/is-the-election-board-ignoring-possible-fraud-treasurer-s-race>

The System of Notarization is Deeply Flawed

Traditionally conducted notarizations are a practical solution in the absence of technology. However, the pen-and-ink notary system has an array of systemic issues made apparent by its many failures.

Inconsistent Quality of the Process

As there is almost no day-to-day oversight (by organizations or governments) over individual notaries after their commissioning, there is bound to be a wide range in the quality of the notaries and the jobs they perform. Until a notary is caught committing a serious crime, he or she is likely to continue to perform notary functions, even if poorly. Some notaries will conduct their business diligently and some will deliberately try to defraud the system. The majority of notaries appear to try their best to follow standards, but the lack of regular guidance and oversight in the current system makes it tough for even well-intentioned notaries to maintain consistent quality.

As a result, notary-related fraud is too easily perpetrated in the pen-and-ink world. As one example, the Los Angeles County District Attorney's Office reported in a legislative proposal the following facts regarding criminal acts by a notary: "In 2000 and 2001, notary public Moniate Toki provided notary services to Joseph Walton. She said she trusted Mr. Walton and did not require his clients to appear before her for the notarization. Instead, Ms. Toki photocopied pages of her sequential journal of official acts and gave them to Mr. Walton. He then returned the photocopy with signatures and thumbprints. Ms. Toki then clipped out the line-item and taped them into her journal. Ms. Toki's transgressions enabled Mr. Walton to purchase a house in the name of an identity theft victim and to rent the residence out for profit. . . . Ms. Toki's case was referred to the Secretary of State, but no hearing has ever been scheduled." In other words, Ms. Toki still had a valid notary commission as of the date of the proposal.⁹ Such a serious breach of a notary's duty could easily have been avoided using common, everyday online technologies, as discussed in more detail below.

In addition, while many notary associations make the argument that the signer's physical appearance before the notary somehow reduces or deters fraud, evidence such as this simply does not support this contention. In fact, notary fraud is easily perpetrated under the current system because the only evidence that the signer actually did appear before a notary is a rubber stamp on the page. For a few dollars, anyone can order a fake notary stamp online and

⁹ David Fleck. *Los Angeles County District Attorney's Office Legislative Proposal*. 2007.

begin notarizing tomorrow – for himself or for anyone else. In the paper world, the signer’s physical appearance before a notary is not a deterrent to fraud at all.

Little Identification Tools or Training

While many states require notary training prior to commissioning, notaries often do not receive adequate training on proper identification checks, and typically lack technological tools to assist them. Notaries may be personally familiar enough with their own state driver’s license to determine a poorly made fake ID, but more than likely can conduct only a surface-level check of a person’s identity and rarely have any knowledge of other forms of ID or IDs from other states. Traditional notaries are not known to currently leverage technology-based identification systems such as knowledge-based authentication. Most traditional identification cards are easily forged in ways undetectable to untrained eyes and without technological assistance. Perhaps most importantly, notaries are ministerial officials and thus have no authority to exercise discretion when an identification document is presented; if the identification document looks official (and most forged ID documents are incredibly difficult to detect), the notary must accept it.

Near Zero Data Integrity Protection

Pen-and-ink notarizations offer essentially no ability for people to determine if items were changed after signing. If a notary keeps a journal, the notary might know who the signed the document, when he or she signed it, and the name of the document signed. With diligence and a well kept journal, the notary could possibly identify major changes in any of those three items. However, even the most diligent notary would be unable to identify word changes, inserted pages, or altered contracts after the notarization. Notary journal requirements, while well intentioned, also often fail – the penalties for failing to keep an accurate and up to date notary journal and to archive it with appropriate government officials are minimal, if such penalties exist at all.

Weak Authentication Procedures

The ability to authenticate a signature or determine whether the notary and notarization is valid is difficult and manually intensive. For a pen-and-ink notarization, this consists of looking at the stamp, attempting to find this person’s contact information and reaching out. If a person is difficult to find, a private investigator or similar service may be employed. Once the individual is found, the quality of the notary will determine the quality of the authentication received. Many do not legally need to keep journals, making this process extremely difficult. Often, a notary will be able to provide little more than a recollection of events, which is a

flawed, error-prone methodology. If the notary was complicit in the fraud, he or she is able to “plead the fifth” and avoid testifying at all.

Conflict of Interest Problems

The concept of a notary public was created in a time before IDs. It was the notary’s personal knowledge of an individual that identified the person. Personal knowledge has remained in the language of the law to this day. While it may be a sufficient form of identification, it opens up huge conflict of interest problems.

Many notaries are therefore biased in the current system simply by the nature of the notaries’ relationship to the signing party. The employee at work who acts as a notary for a superior is not impartial as he or she is paid to work for his or her boss, not to act as an unbiased witness, and has more to lose by saying “no” than a true third party. Most alleged robo-signers were such employees. Many notaries do not conduct notarizations as a full-time business and have little incentive to keep their commission or build a reputation as a good notary.

Little Accountability

If a notary commits a felony, he or she will likely be held accountable for his or her actions. As the severity of a notary’s misconduct decreases, so does the likelihood that he or she will be caught or punished under the current system. A managing authority, such as a sizeable notary company, would have a vested stake in actively policing the quality of its notaries for both high and low levels of misconduct. However, the current system does not apply a high incentive of accountability.

Environmentally Irresponsible

The environmental cost to print on paper, employ a mobile notary to drive to and from a location, and ship an original document is enormous. In today’s global economy, transactions need to occur over larger distances and the current system unnecessarily leaves an enormous environmental burden.

Unsuited for the Modern Era

Transactions of all kinds, including personal bank account access and large corporate payment processing, occur online with secure systemic integrity. Notarizations in many US states require people to use 18th century tools for 21st century problems. This likely means hundreds of thousands of hours of productivity are lost annually to an ineffective notarization process.

A Model of Online Notarization

There are likely different models that may offer an improvement over the pen-and-ink, traditional notarizations. This is one proposed model of such a system:

- 1) User creates an account online, similar to many ecommerce and financial sites
- 2) User identifies himself or herself using a variety of secure third party tools and/or government identification
- 3) User is paired randomly to a notary online, ensuring impartiality
- 4) User and notary are recorded in an online video and audio session
- 5) User makes verbal oaths as necessary, depending on the document and form of notarization
- 6) User signs on the page with the notary as witness, with both parties able to see and affect the same digital document (to avoid discrepancies between the two parties)
- 7) After the user finishes, the notary adds appropriate signature and seal in a manner that looks similar to a traditional pen-and-ink signature
- 8) A digital certificate is applied to the final document, which prevents any changes to the document and provides rigid data integrity
- 9) The original document can be downloaded and sent to parties that require it
- 10) The document can be validated by any of those parties electronically, including reviewing video recordings

Benefits of Online Notarization

A system such as the one proposed, solves many of the problems identified above with traditional pen-and-ink notarizations.

Better Identification

Notarizing online provides numerous ways of identifying a person: knowledge-based assessments, credit card verification, phone testing, email verification, social networks confirmation, and the traditional government ID check all provide methodologies by which to verify identities. Online notarizations can more effectively utilize multiple forms of identification in a smooth fashion.

Superior Data Integrity

Effective digital certificates are well known to be cryptographically unbreakable. These certificates provide a way to be sure exactly when the certificate was applied and whether any modifications were made. If a single change is made to document, the seal will be rendered invalid. This can practically eliminate concerns whether someone altered the notarized document after the notarization.

More Reliable Authentication

Authenticating notarization signatures through a central, electronic repository would make authentication easy, instant, and effective. The signatures and signings can be authenticated by the digital certificate and the electronic records kept by the online signing service. In addition, if parties with a need to know are unable to get access through that repository, they still have all the tools of a pen-and-ink as a backup. This would only add a layer of authentication, not replace anything.

Audio and Video Evidence of Signing

Recorded audio-video evidence of the signing is a catch-all method for any kind of document dispute. Video recording of the signing provides a way to check the identification, awareness, and integrity of the transaction. It can be shown in a court of law, and forensic experts can be used to determine if elements of the signing seem amiss. All parties with a need to know could have access to it permanently, reducing the need to rely on memory.

Reduction of Conflict of Interest

Notaries through an online system would be randomly paired to clients and are paid through the centralized repository to ensure they are truly independent. This significantly reduces concerns of notary bias.

Standardized Quality of Process

Notaries are required by law to follow a distinct protocol each time they perform a notarization, but many cut corners. An online notarization model can force each notary who uses the system to individually mark every step in order to ensure a thorough legal notarization is completed.

Reduction of Environmental Impact

Reducing the need for physical transportation would allow notarization to be conducted in a low impact fashion. The need for printing and shipping of documents is an unnecessary burden on the environment given modern technology.

Easier for the Disabled or the Remote

Those who have trouble getting to a notary would be the first to benefit from the convenience of online notarizations. This would likely include people in remote parts of the country and the disabled, many of whom face real struggles each time they leave their homes.

Common Counter Arguments

A Computer Crashes

A proper online model does not complete a notarization until a definitive point at the end of the signing. This means that any crash will not leave a document partially notarized or leave room for fraud.

It is Difficult to Determine if a Gun is Pointed at the Signer

This is a rare event and impacts a negligible amount of notarizations annually. More importantly, this argument misses the point. Notaries do not detect, deter or prevent fraud; notaries provide evidence of fraud. As a ministerial officer, notaries are not empowered to question a signer's intent or identity, as long as the signer's intent and identity are reasonably self-evident. The value of a notary is the integrity of the record the notary makes of the transaction.

In any event, if someone is holding a gun to a signer's head, that person will not be tied to the contract. Physically threatening a person negates the effect of having a notary present. Notaries using pen-and-ink are trained to actually complete a document in this situation, as it is not worth risking a person's life. This means that a notarization is generally not a good indication of a lack of extreme duress. If a notary fails to pick up on duress such as this, it would only impact the enforcement of the document if the victim ultimately never reported the crime, which seems unlikely.

This risk cannot be eliminated by physical presence. A traditional pen-and-ink notary could fail to notice duress if the person with the gun is simply in the other room – or if the person with the gun was threatening some member of the signer's family and was not even present with the signer at the time of notarization. However, as a final check against threats, having the sessions recorded on video with an online system enables solid evidence in subsequent criminal investigations. The simple presence of video acts as a further deterrent against foul play. Indeed, it is safe to say that fraud is perhaps best deterred when the party committing the

fraud knows he or she is being recorded for posterity.

An ID is Forged

Holding a physical ID is one way to try to ensure that a person's identity is valid, but there are many others. In addition to checking uploaded IDs, an online system can use multiple forms of identity verification, including knowledge-based authentication to provide supplementary protection against forgery. This technique gathers information from the public records and forms questions that only that individual would likely be able to answer. This service is called out-of-wallet verification, because even stealing a wallet wouldn't give you the information necessary to pass this test. It is far harder to pass this verification system (used by banks and other highly secure companies) than to forge an ID. The rampant use of fake IDs by US college students is a clear example of the ease in which quality fake IDs can be obtained. In some US college populations, the percentage of students with fake IDs exceeds 55%.¹⁰

The video recording of sessions provides an additional layer of protection. In the unlikely event that a signer could fool the system and fool an online notary (still harder than fooling a traditional notary), the use of a video file is powerful evidence that can be used to later confirm who actually signed a document. The video also serves as a powerful deterrent, as the logical question can be asked: "If one were to forge a signature, why pick a notary with video evidence of the fraud?"

Conclusion

Notarizations have existed for millennia, and have been a staple of modern society and enforceable contracts in an age without technology. Pen-and-ink notarizations have failed to keep pace with societal change and the digital revolution. Technology can supplement human notaries in a way that improves on the existing systemic weaknesses. Notary fraud and notary inconsistency will likely remain a major problem until electronic solutions such as online notarization become thoroughly adopted.

Future technologies have the potential to banish doubt in issues of authentication and data integrity. Legislatures and businesses will need to take the lead in addressing this societal weakness. Online notarization is implicitly legal in accordance with current law in some states

¹⁰ Martinez, Julia A., Patricia C. Rutledge, and Kenneth J. Sher. *Fake ID Ownership and Heavy Drinking in Underage College Students: Prospective Findings*. June 21, 2007. <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2711502>.

at the time of this paper's publication, and legislatures can help by working to make it explicitly legal in the remaining states. Virginia has paved the way with its March 2011 enactment of Bill SB 827 explicitly allowing online notarization.

Businesses can secure themselves and protect consumers by leveraging technologies like online notarization to improve the efficacy of signings. Everyone wins when ambiguity is lessened. Online notarizations provide a glimpse into the future of highly secured signings.

About the Authors

Chris Hawkins and Andrew Ellis are Co-Founders of SignNow, Inc.—the company behind NotaryNow.com. NotaryNow seeks to bring the millennia-old practice of using hardcopy signatures into the digital age through user-friendly, consumer-oriented Web applications. Designed to meet or exceed the security provided by long-standing handwritten practices, NotaryNow offers the most secure and easy to use online notary service. Chris Hawkins is also the author of *A History of Signatures: From Cave Paintings to Robo-Signings*, the first comprehensive book on signature history. Learn more or contact the authors at NotaryNow.com.

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