

COMPONENTS OF A DIGITAL CLOSING:

eNOTARY+

Part 2 of 5

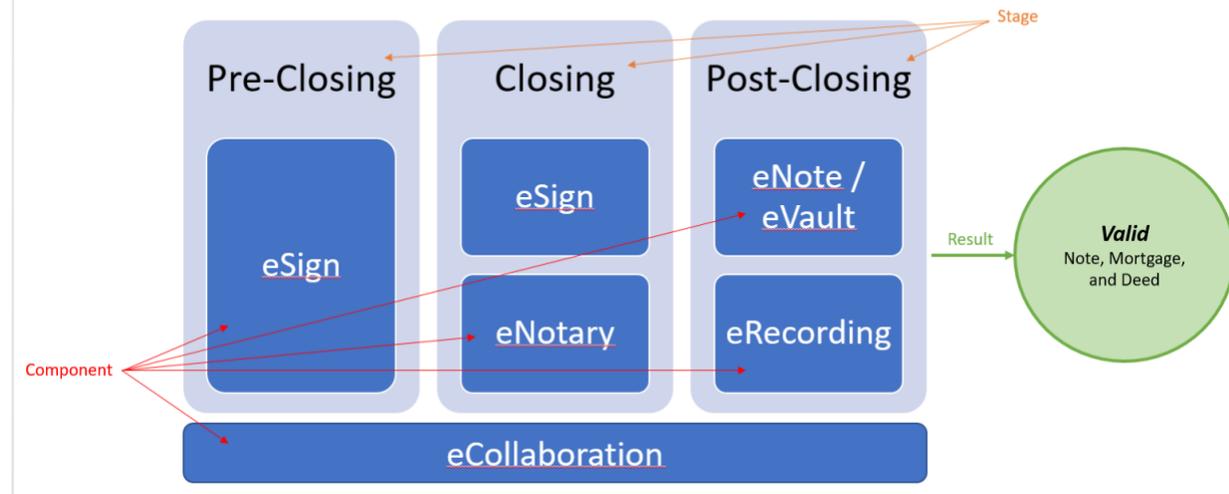


ALLIANT
NATIONAL
TITLE INSURANCE COMPANY



COMPONENTS OF A DIGITAL CLOSING

What does a Digital Closing actually involve?



This paper is one in a series of handbooks intended to familiarize Alliant National agents with the Digital Closing Process and its five major components: eSign, eNotary, eNote/eVault, eRecording and eCollaboration. Each handbook in this series explores one component. The purpose of the component is briefly described and placed within the context of the stages of the transaction (*i.e.* pre-closing, closing and post-closing) and within the context of the broader Digital Closing Process. Laws, regulations, technological requirements and specific technologies are discussed where appropriate.

It is our hope that you will find this collection of handbooks to be a comprehensive, ready reference as the industry transitions toward the digital closing environment.



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The information contained herein is not intended to serve as legal or financial advice and should not be relied upon for legal or financial decisions; consultation with a qualified professional for specific advice tailored to the user's situation is recommended.

Component: eNotary

Description: The Purpose of eNotary

The basic purpose of eNotarization and the role of the electronic notary (eNotary) is to create a legally effective electronic document (eDocument) that has the same validity as an equivalent paper document with a traditional notarization upon it. To create a legally effective deed, mortgage or deed of trust as an eDocument that is electronically signed and electronically notarized, it must also be recorded in the county land records in a manner that provides legal constructive notice; more information on electronic recording (eRecording) is available within the **Component: eRecording**. Therefore, before creating, executing and notarizing an electronic instrument intended to be recorded, it must first be confirmed that the county clerk or registrar – referred to herein as the “recorder” – will accept the eDocument for eRecording or allow “papering-out” to convert it into paper form for filing and recording.¹ Verifying the recorder’s willingness and ability to accept eDocuments or papered-out documents is an *essential* preliminary step.

If the recorder does not eRecord or permit papering-out, then the real property instruments must be prepared and executed in the manner required (*i.e.* pen and paper) for filing and recording. Therefore, there are times when a “*hybrid*” Digital Closing must be conducted in lieu of a “*full*” Digital Closing. A *hybrid* closing, as opposed to a *full* Digital Closing, is one where certain documents are generated electronically and eSigned, but others are printed and executed with wet-ink signatures so that they can be recorded in counties that require pen and paper submissions.

There are two broad types of eNotarization, which may be distinguished based upon the intent of the parties involved. These types of eNotarization include:

- **Face to Face eNotarization.** If the purpose is simply to create efficiencies or enjoy a better consumer experience, then the eNotarization may be a face to face transaction with the principal signer physically present before the eNotary – that is, in the same location and near enough to touch, similar to a “traditional notarization.” Throughout this series of papers, all references to “face to face eNotarization” will have the same meaning ascribed to it here, as distinguished from remote online notarization, which is described below. This type of digital closing involving In-Person Electronic Notarization is also referred to as an “IPEN” closing.
- **Remote Online Notarization (RON).** If the purpose is to enable the principal signer to be in a different location than the eNotary and still be able to close the real estate transaction by executing the required documents, then a special type of eNotarization called Remote Online Notarization (RON) is required.

eNotary as a component of the Digital Closing Process

The eNotary is a critical component of the Digital Closing Process because the essential transactional documents – the deed, mortgage and deed of trust – all require notarization. The eNotary has all the

¹ See **Component: eRecording**, which explains “papering-out” in greater detail.

responsibilities of a traditional notary, along with the heightened concern of maintaining the authenticity of electronic instruments (see the [Technology](#) section below).

Rules: Federal and State Statutes and Regulations

Federal Law

[E-SIGN](#) (from which the state Uniform Electronic Transactions Acts (UETA) derive their authority) is discussed in the **Component: eSign**.

State Law

Interplay of State UETAs and Other State eNotarization Laws

The state UETAs give legal effect to electronic signatures as discussed in detail in **Component: eSign**. Most importantly, they also authorize a notary public to act electronically – although, many states also have their own specific eNotary laws that prescribe *how* eNotarization must be implemented in the jurisdiction (discussed below in greater detail).

The Model UETA, Section 11, states:

If a law requires a signature or record to be *notarized, acknowledged, verified or made under oath*, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record. *(emphasis added)*

Secretaries of State Enact Regulations

Many states have developed regulations to implement their eNotarization laws and to provide consumer transaction safeguards in an electronic environment. The influence of the National Electronic Notarization Standards, as originally developed by the National E-Notarization Commission and later (as amended) endorsed and promoted by the National Association of Secretaries of State (NASS), is evident.

The [NASS standards](#) aim to be technologically neutral and include the following safeguards:

- A physical appearance and a method for identifying the eSigner.
- Registration for an eNotary, including formal identification of the technology to be used, a sample of the electronic signature and official electronic seal, and any necessary instructions or techniques provided by the technology vendor.
- Application of an electronic notarial certificate and attachment of the notary's electronic signature and seal to electronically notarized eDocuments in a manner such that tampering with the eDocument would be evident.
- Reliability of the eNotary's electronic signature and electronic seal (*i.e.* it must be unique, capable of independent verification, retained under the notary's sole control, and attached to the eDocument in a tamper-evident manner).
- Restriction of the use of the electronic signature in combination with the electronic seal for the sole purpose of performing eNotary acts.

The Specifics of Face to Face eNotarization

Many states have statutes and regulations that specifically recognize, authorize, enable and govern face to face eNotarization. However, their approaches are remarkably inconsistent. For instance:

- **Some states** have enacted the Uniform Real Property Electronic Recording Act (URPERA), which states that if a law requires that a document be an original in writing or on paper in order to be recorded, then an electronic document satisfies that law. See **Component: eRecording** for an in-depth discussion about URPERA.
 - Thus, URPERA allows a deed, mortgage or deed of trust that is created as an electronic document (with eSignatures and an eNotarization) to be recorded (but practically speaking, the recorder must be willing and able to eRecord in order to realize the benefit of URPERA).
- **Some states** have enacted URPERA, or have enacted statutes that reference or permit eNotarization, but otherwise provide little or no framework for implementation.
- **Some states** require registration or a commission as an *eNotary* — in addition to having a traditional notary registration/commission — in order to conduct either a face to face or RON eNotarization. (See [The Specifics of Remote Online Notarization \(RON\)](#), below, for more information on the general requirements to become a registered eNotary.)
- **Some states**, aside from enacting UETA or URPERA, do not specifically address face to face eNotarization at all.

The Specifics of Remote Online Notarization (RON)

In the context of RON, the term “eNotary” is used throughout to signify that the notary performing the RON is properly credentialed as required by law to perform a RON notarization; the notary public may actually be registered or commissioned with a different formal title than that of “eNotary,” such as “remote online notary public,” or “online notary public,” or some similar name. A traditional notary is not authorized to conduct a RON. Although, normally one must be a traditional notary before he or she can apply to become an eNotary who is legally qualified to perform RONs.

Depending upon the state, the following *may* be required to become an eNotary:²

- A pre-qualifying course and/or pre-qualifying examination;
- Continuing education;
- Maintaining an electronic journal (with a backup);
- Obtaining a bond; and
- Registering the technology or device intended to be used to create the eSignature and seal, as well as registering the eNotary’s eSignature.

Some states specifically require the RON notary to be authorized under the laws of the state where the property is located, and to be physically located within that particular state when conducting the RON notarization – regardless of where the principal signer may be located. It is important to know if the state has such a restriction before undertaking a RON transaction and to consult with your title insurance underwriter for its specific requirements for insuring title.

² The bulleted list is a descriptive generalization of common state requirements when eNotary registration or commissioning is mandated in order to conduct face to face eNotarizations or RONs.

A RON applies all of the technological safeguards of a face to face eNotarization, but has additional requirements, standards and protocols to be followed. The eNotary in a RON transaction must ensure the integrity, security and authenticity of the RON notarization. The following are commonly required of a RON transaction, depending upon the state:

- An electronic notarial certificate must be placed on the notarized eDocument that contains the following:
 - An electronic seal containing information placed on the notarized eDocument confirming the eNotary's name, jurisdiction, identification number, commission expiration date, and any other information that would have been required in a traditional notary seal;
 - The date and place of the online notarization; and
 - Facts attested to or certified by the eNotary.
- An affirmative statement or other indication – as may be required by state law – that this is a RON transaction.
- A RON transaction must be captured (recorded) with audio-video technology sufficient to be clearly heard and seen.
- The internet connection must be sufficiently secure so that it cannot be accessed by those who are not authorized, and it must be reliable so that the transaction can be completed *without interruption*.
 - Note, some states specify that Non-public Personal Information (NPI) must *not* be captured in the audio-visual recording.
- Safe storage of the recording, with retention requirements, are prescribed by state law.

Note, a designated custodian of records is not a requirement, but is advisable in case the recording should ever need to be presented as evidence in a court of law.

Interstate Recognition of Remote Online Notarization

Every state has a full faith and recognition statute giving force to the notarizations of other states. When these interstate recognition statutes were first drafted, every state had similar notarization requirements and all notarizations were conducted face to face with the signer, and with paper and pen. Given the general uniformity, it made sense for one state to honor a paper and pen notarization conducted in another state.

While state legislators had not foreseen the application of the full faith and credit statutes with respect to interstate recognition of electronic and RON notarizations, today every state permits face to face electronic notarizations. So, the same kind of uniformity exists today in regard to face to face electronic notarizations as it did (and still does) in regard to paper and pen notarizations. However, this is not true for RON notarizations.

As of October 2019, 21 states had passed or enacted RON laws,³ but legislative approaches vary greatly. Roughly half of the states presently allow RON, although that ratio may change over time. Some

³ Map of states having RON legislation is tracked by the American Land Title Association (ALTA); see [ALTA's Digital Closings](#) webpage.

proponents of interstate recognition of RON argue that the Full Faith and Credit Clause of the United States Constitution provides the authority by which one state must recognize a RON conducted in another state that authorizes it. [Article IV, Section 1 of the United States Constitution](#) – the Full Faith and Credit Clause – “requires each state to recognize the laws, judicial decisions and public records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner which acts, records and proceedings shall be proved, and the effect thereof.”⁴ However, this theory has not yet been tried.

In the untested realm of RON notarizations, it is unknown whether states that do not authorize RON within their borders will recognize a RON conducted under the authority of those states that permit it. Similarly, when two states have their own laws authorizing RON, but do not have a specific “RON-reciprocity” law, it is unknown whether either of them will recognize a RON conducted in the other state. In fact, the recent proliferation of RON legislation may in part be due to each state’s desire to retain its autonomy over RON rather than to accept a RON from another state in who’s statutory and regulatory requirements it had no say. Due to the indeterminate reciprocity, agents should consult with their underwriters for guidance in transactions that may involve interstate RONs. See **Component: eCollaboration**.

RON is still undergoing a metamorphosis in the United States. State legislation continues to emerge with much discussion among stakeholders and involvement by industry associations (*i.e.* American Land Title Association, Mortgage Bankers Association, Property Records Industry Association, National Association of Secretaries of State). In July 2018, the U.S. Department of Treasury released a report, [A Financial System That Creates Economic Opportunities \(Nonbank Financials, Fintech, and Innovation\)](#), which includes commentary (*beginning on page 107 of the report*) on Remote Online Notarization, promoting standardization of notarization practices and recommending federal legislation to establish minimum uniform national standards. Efforts to create a sound legal and technological foundation have gained significant momentum.

Links: Relevant Sources and Articles

- [NASS eNotarization Implementation Guide \(“iGuide”\)](#), Version 1.0, Adopted February 18, 2017
- [NASS National Electronic Notarization Standards – Harmonizing Technology and the Fundamental Tenets of Notarial Acts](#) (created July 2015, and updated July 2016)
- National Notary Association’s [Notary Laws](#) (with search function for each state)
- National Notary Association’s [“The Enduring Benefits of Interstate Recognition of Notarial Acts”](#)
- Standards published by the [National Association of Secretaries of State \(NASS\) can be found in the NASS Resolution Reaffirming Support for the National Electronic Notarizations Standards](#) (Adopted July 12, 2006, reaffirmed on July 13, 2011, amended and reaffirmed on July 17, 2016)
- [The Notary Public Administrators Section of the National Association of Secretaries of State](#)
- [Youtube video demonstration by Signix of a Virginia Remote Online Notarization of a Power of Attorney](#) (c. 2016)

⁴ Interpretation of Full Faith and Credit Clause of the United States Constitution, and analysis of its applicability in the context of Remote Online Notarization provided by Hugh J. Fitzpatrick, III, [Examining Remote Notarization in the U.S.](#) (June 13, 2017).

Technology

Examining the Legal Demands Upon Technology

Since eNotarization requires the eNotary to also eSign the eDocument, it shares the same technical features as those described in **Component: eSign**. However, there are *additional* technical features which derive from the *electronic translation* of the additional duties that an eNotary must fulfill, including:

- Making the executed eDocument tamper-evident. This means the technology must provide sufficient security procedures and processes to accomplish the objective.
 - Methods include digital signing or “hashing” encryption technology. The [digital signature](#) (as opposed to a generic electronic signature), is sometimes referred to as an “encrypted signature,” and offers a greater measure of security – providing the benefits of authenticating the signer, enforcing non-repudiation by the signer, and ensuring the integrity, or non-alteration, of the eSignature.
 - An audit trail provides evidence of the sequence of activities that affect the executed eDocument, thereby delivering tamper-evidence in the event of a subsequent alteration.
- Laws prescribing the number of years for the retention of a RON recording means that provision must be made for secure electronic storage (This service is frequently offered by the RON technology platform vendor).
- Privacy laws providing for the protection of NPI means that technology must include security procedures and processes to prevent unauthorized access both during the transaction and in regard to the electronic storage of a RON recording.

Face to Face eNotarization

The eNotary who is conducting an eNotarization *within the physical presence of the signer* will generally need the following tools:

1. Electronic Signature
2. Electronic Seal
3. Electronic Journal

Remote Online Notarization (RON)

The eNotary who is conducting an eNotarization *outside of the physical presence of the signer – remotely (as enabled by the use of electronic communication technology)* – will generally need the tools required for a face to face eNotarization listed above, as well as the following *additional* tools:

4. Credential Analysis (ensuring the validity of the identification credential presented by the signer(s), typically provided by a third party vendor)
5. Identity Proofing (ensuring the valid identification of signers)⁵

⁵ There are various methods of authentication available to verify the identity of the eSigner(s), but at the time of this writing, the most common methods prescribed by statute or regulation are Knowledge-Based Authentication (KBA) (*e.g.* asking questions based upon personal history or identity data obtained from external sources – a service typically provided by a third party vendor) and Third-Party Authentication (*e.g.* information is confirmed by a third party).

6. Real-time two-way audio-video communication capability (secure from unauthorized interception)
7. Storage/Maintenance of Audio-Visual Communication Session Recordings

Closing With a Platform

The vendors referenced below provide technology platforms for use in Digital Closings. The technology platform creates a virtual “closing room” in which the lender and closing agent/eNotary can electronically share the digitally executable eDocuments with each other. Typically, all of the eDocuments to be executed at closing, except for the deed, are prepared by the lender and put into digitally executable form before entering the virtual “closing room.” The deed is then drafted by the closing agent (pursuant to the issuance of title insurance) or attorney and converted into an executable eDocument format — with fields for encrypted eSignatures — by the technology platform’s software capabilities.

Typically, the lender selects the technology platform to be used for a digital closing; however, be sure to also consult with your underwriter to determine which technology vendors are acceptable to it. When using a technology platform, usually all of the required consumer consents and disclosures are provided by the lender and sent to the virtual “closing room” for execution at the beginning of the closing. Once the closing agent/eNotary facilitates execution of the eDocuments, the eDocuments go directly back into the virtual “closing room” where they are immediately available to the lender. The need for the closing agent or attorney to take the additional step of emailing documents back to the lender is eliminated.

Some vendors offer the services of an eNotary in addition to the other technology support that they provide. Other vendors do not offer this service, and the closing agent or attorney must make arrangements to provide the eNotary.

“Platform” Vendors: Service Providers

The following are vendors that have been vetted by Alliant National Title Insurance Company, Inc.:

- [Notarize](#)
- [NotaryCam](#)
- [Pavaso](#)
- [Digital Delivery Inc.](#)
- [Nexsys Clear Sign](#)

Closing Without a Platform

A digital closing can be completed without a platform vendor, however this does not appear to be a common practice. When closing without a platform vendor, the closing agent or attorney takes on additional responsibilities, including the following:

- Converting the drafted deed into an executable eDocument by himself or herself. See **Component: eSign** for information regarding vendors that provide enabling software.
- Making sure that the required consumer consents and disclosures are timely provided and executed (keeping in mind that specific requirements vary among states for the method of presentation, access and consent).

- Timely and securely returning executed eDocuments to the lender via either encrypted email or an alternative secure portal into which the eDocuments must be uploaded (which would otherwise be exchanged through the platform vendor’s virtual “closing room,” as described above).