

Real Estate Conveyances from Livery of Seisin to Electronic Transfer:

Real Estate Transactions Enter the Digital/Electronic World

BY JOHN A. GOSE, CRE

THE AGE OF “STICKS AND STONES:” MANUAL TRANSFER

Prior to 1500, most real estate conveyances¹ were by livery of seisin: “livery” meaning delivery and “seisin” meaning possession. Ownership followed possession at that time: “Historically, the doctrine of **livery of seisin** referred to the ceremony by which the transferor conveyed property to the recipient. To successfully convey a fee interest in the property, the doctrine requires the physical transfer of a piece of ground, twig, key, or other symbol on the premises in the presence of witnesses.”²

Livery of seisin could refer to either:

- *livery of deed*, whereby the parties actually went onto the land, and the transferor symbolically delivered possession of the land by handing over a twig or a clump of earth to the recipient; or
- *livery of law*, whereby the parties went within sight of the land and the transferor telling the recipient that possession was being given, followed by the recipient entering the land.”³

Beginning in the early 1500s, the method of conveyance began to change. Through pressure from Henry VIII, and aided by the common law lawyers, “It came about that in the Parliament of 1535–1536, perhaps the most significant piece of real property legislation in the history of English Law—namely, The Statute of Uses—was enacted.”⁴ The statute converted all English equitable estates created through “use” into legal estates.

This was followed by the Statute of Wills⁵ in 1540, which allowed the testamentary disposition of most English land. After the statute of uses, a simple bargain and sale deed would effectively transfer the beneficial interest to the grantee, and by the mandate of the statute of uses, the legal interest would follow. Hence, deeds replaced livery of seisin.⁶

With the passage of the statute of frauds in 1677,⁷ writing was necessary to transfer a freehold interest in land and real estate. The effect of these three statutes was to solidify written transfers. Real estate closing transactions entered the era of parchment and paper.

II. THE WRITTEN ERA: 450-PLUS YEARS OF PARCHMENT AND PAPER

Since the mid-1500s, the deed has been the normal form of conveyance. Parchment gave way to paper, but



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the written deed was now the norm. Property may be conveyed by devise or will,⁸ court order, or adverse possession, but by far the most prevalent method is by a written deed.

From the inception, the United States adopted English common law. The history of the title to various state lands is as varied as the states.⁹ The real estate conveyance laws are usually governed by the state where the real estate is located. Thus, real estate conveyances are governed by 50 separate state laws, together with Native American laws and federal laws. Diversity is the word. All of these jurisdictions recognize the written deed. Each state has developed its own real estate law concerning conveyancing and deeds. One need only look at the index to deeds in the *American Law of Property*¹⁰ to see the myriad of subjects covered by state law on deeds. Every facet of conveyancing law is covered from acknowledgments through warranties and words of conveyance. Indeed, the form of deed is specifically a state law creation. Most states have the basic form of deed from the release or quit claim deed¹¹ to the warranty deed. The implications, covenants and warranties from the various deed forms are again state dependent.

The effect of the various state recording statutes varies with the state. The recording statutes are varied and “Distinguishing among the types of recording acts can be tricky...”¹²

One is ill-advised to generalize about deeds. They are state-specific. Over the life of the specific state, the state courts have developed the law peculiar to that state. Though one might see certain similarities in state interpretations, the law of conveyancing remains particularly state-dependent.

The states have developed their own interpretations of deeds, and it is presumed that those interpretations will carry over to electronic instruments in the next cycle of conveyancing. It would be foolish to throw out the years of interpretation of deeds simply because the document has been changed from paper to a digital electronic form, which is denominated an electronic record.¹³ Changing the document to digital form without changing the substance of the document should not change the legal interpretation of the electronic record.

III. THE DIGITAL/ELECTRONIC ERA

The ability to reduce records and documents to digital form and transfer them electronically, when coupled with the Internet, is transforming the commercial world in general, including the real estate world.¹⁴ This new, electronic tide is washing over every aspect of our lives.¹⁵

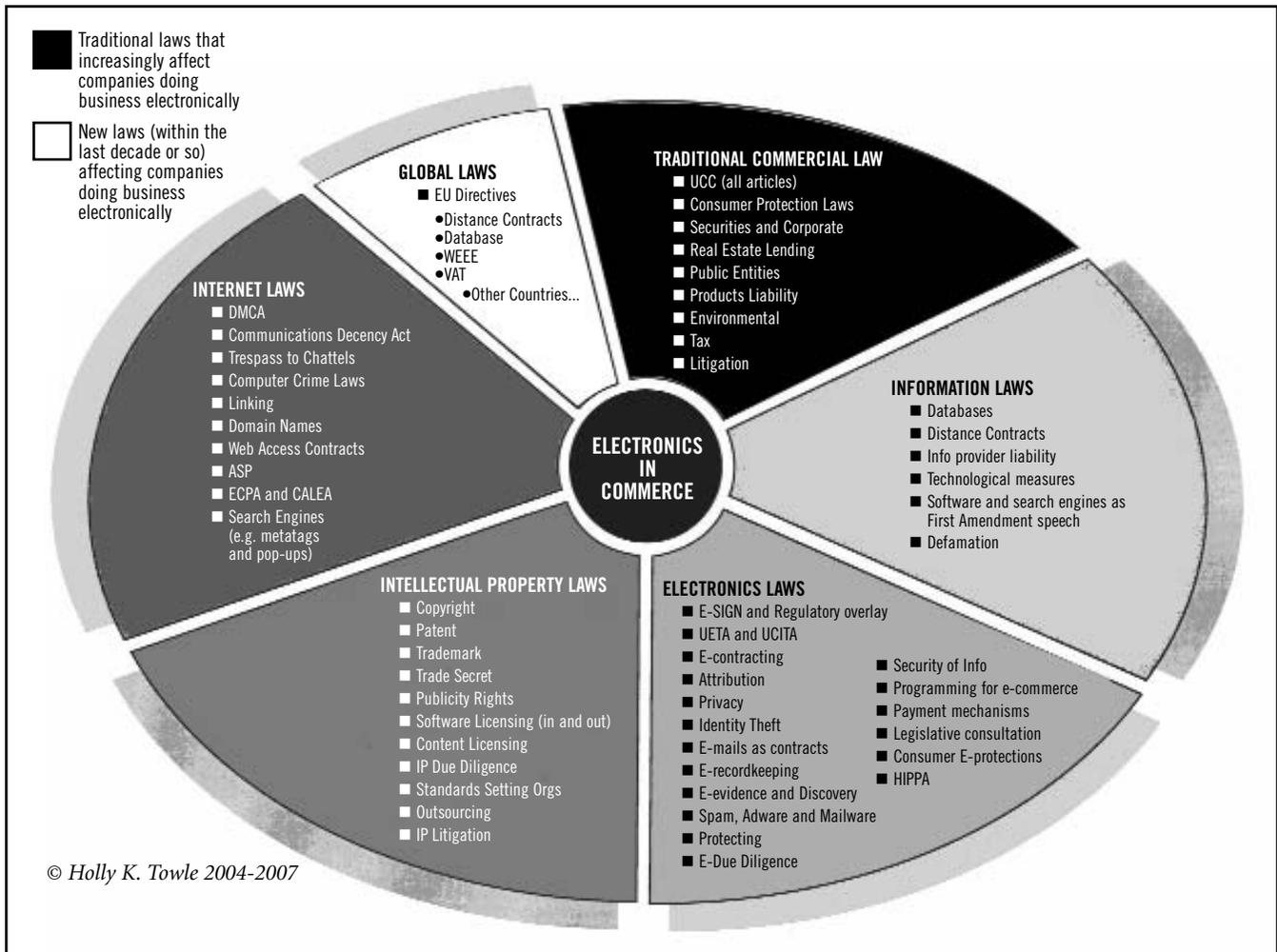
Feeding this electronic tide is a myriad of new laws in the rivers of commerce. This is reflected in the E-Merging Commerce Wheel, which indicates the types of laws that are changing and overlaying the commercial world—including electronics law, global laws, Internet laws, information laws and intellectual property laws, all of which combine to transform the commercial world.¹⁶

In the real estate world, one other very important river must be added to the digital and Internet tide—electronic access to Public Records.¹⁷ All real estate documents are now available online in digital form. No longer are the facts surrounding real estate sales within the sole purview of those who had the time and resources to venture to the recorder’s office. The information is available to anyone with a computer and access to the Internet. In Washington, electronic access to public records is mandated by statute (RCW 43.105, 250, 270) and is creating a whole new electronic world. In most states, public records are open and easily accessible. However, in some states, real property records, including sales prices, are not available to the public.¹⁸ Though this limitation is often justified on privacy grounds,¹⁹ in the real world, the purpose of this lack of transparency of public records appears to be to limit the knowledge of real estate value to those with access to Multiple Listing Services (MLS). The end result is to deprive the consumer of knowledge of sales prices and hence the value of real property. The public consequences of sales price nondisclosure is property tax inequities, tax revenue leakage and administrative inefficiencies.²⁰ This all leads to a push for more transparency, so that real estate records are available to the consumer.

Couple this digital/electronic world with the Internet²¹ and the real estate world is being rapidly reshaped.²² As one appraiser stated, “I no longer spend hours driving to city and county offices to acquire the information I need... I sit in my office and let it come to me. It has changed everything I do in my assignments. The Internet

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E-Merging Commerce Wheel



is our lifeline to our clients and our data.”²³

All of this has led to a plethora of sites dealing with various aspects of residential property.²⁴ These sites and many more are available on the Internet. One need only “Google” residential real estate or home value to see the number of websites available. Most of these sites target one segment of the industry—buyer, seller, real estate broker,²⁵ appraiser, and mortgage broker. One of these sites, *Zillow.com*, seems to be the most controversial, and so it is well to see what it attempts to do and why it is controversial.

Zillow.com attempts to consolidate all residential real estate information and is designed to be used by all members of the industry, including the consumer. It modestly bills itself as “Your Edge in Real Estate.” Zillow

is free and anonymous. Given its high profile²⁶ and ready accessibility on the Internet, some members of the real estate industry felt threatened by this site.

Zillow was launched in February 2006 by Rich Barton and Loyd Frink, the creators of Expedia. They were prescient and recognized that a house purchase was probably the largest single expenditure most Americans make. They also recognized that there is no independent source of residential data for the consumer. Finally, they well recognized the digital revolution and the Internet and that these tools could and would be used by the consumer. It clocked 2.8 million visitors to its site in the first three weeks of operation.²⁷ Currently, it is surpassing four million unique visitors a month.²⁸

The Zillow site, though aimed at the consumer, has places

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for all of the players in the real estate world—buyers, sellers, owners and professionals, including real estate professionals, appraisers and lenders.

One of the challenges Zillow faces in attempting to consolidate all residential real estate information in the United States is diversity. This country has 50 states and approximately 320 recording jurisdictions. There is no uniformity. The laws on what is a public record and what is not vary among the jurisdictions. Some jurisdictions provide public access to the sales tax records, others do not.²⁹ Some jurisdictions provide a short description of the physical characteristics of the property—i.e., number of bedrooms and baths, square footage, etc.; others do not. Likewise, the availability of data from MLS and title companies is just as varied. In addition, some states attempt to prevent commercial use of public records.³⁰

Based on the public records and the other sources, Zillow provides what it calls “Zestimates” of the property. These Zestimates are not appraisals; rather they are Zillow’s estimates of the market value of the residence based on the data it has acquired and its Automated Valuation Model (AVM). In addition, consumers can access satellite and aerial pictures for both a specific residence and the neighborhood.

Making this type of consolidated information on residential property available to consumers, though less than perfect, seems to have created fear and hostility among real estate professionals, as change often does. It generated ludicrous comments about Zillow and the accuracy of its Zestimates and AVM.³¹ This, despite the fact that Zillow expressly states that its Zestimates are not an appraisal³² and that the AVM concept was initially conceived and developed by appraisers using logic that is conventionally used by appraisers and has been around for more than a decade.³³

These attempts to hold the electronic tide is about as effective as King Canute’s efforts to hold back the tide in the 11th century. The electronic tide simply cannot be held back. The electronic world and the Internet are now part of our everyday life. Consumers don’t read real estate publications; they go to the Internet, as evidenced by the traffic on the Zillow site and other real estate sites.

Consumers are going online to check homes and neighborhoods.³⁴ Typical is a buyer from Cape Cod who was transferring to Seattle, mentioned in a recent issue of *Horizon*, an airline magazine.³⁵ He looked at more than 100 homes on the Internet. He was particularly fond of the process because it enabled him to check the neighborhood. He narrowed his search, contacted his real estate agent, and when he arrived in Seattle, because he had done his research online, the purchase went very smoothly. If the purchaser follows that path, the real estate professionals, to be prepared, must also be informed that online sites are a good source for keeping up with the consumer. These sites are not to be feared.

“As a Realtor today, you’d be foolish if you didn’t look up a home on Zillow before you went to see it,”³⁶ the *Horizon* article states. Or, as stated in the *Washington Realtor News*,³⁷ “Whatever your take on these sites may be, you cannot ignore them. Their popularity is booming and your clients are most likely using them.”

Not only are real estate professionals using online resources so they can be prepared to deal with their prospective clients, they are using these resources to enhance their listings. For example, on Nov. 7, 2007, Zillow announced a partnership with the real estate brokerage company RE/MAX Allegiance.

In the real estate world, not only have the electronic sources provided new, more timely data, but they are indicative of the push to reduce all documents to digital form. Currently, most real estate transaction documents are in electronic form and are exchanged and modified in that form over the Internet. There are some risks. One is the risk of forgery, which exists as well in the paper world. However, since the digital electronic world is “new,” there seems to be more of a fear that forgery will be easier. The second major risk is the adequacy of the technical programs to create the documents and to record them. This second risk is one that will surely diminish as electronic documentation gains use.

These risks can be reduced or eliminated.³⁸ Thus, in commercial real estate closings, paper exchanges are rapidly becoming a thing of the past. Negotiations using electronic documents and the Internet are faster and more accurate, and hence easier than exchanging paper drafts. True, currently, the final document is usually paper and signed manually. However, the first paperless closing

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was completed with much fanfare several years ago. The Milwaukee County Register of Deeds, on July 8, 2003, recorded the first electronic recording of documents via the Internet. As of the end of August 2007, ten percent of document in that office were received electronically.³⁹ Since then, the number of paperless closings is in the thousands and continues to increase.⁴⁰ As a practical matter, all of the major title companies have units dedicated to electronic closings. Paper won't completely disappear, but like the livery of seisin, it will fade and gradually be replaced by the documentation of the new electronic era.

The final step in this electronic tidal wave of electronic documents, electronic signatures and electronic closings will be electronic recording. The process from beginning through recording will all be done electronically.

Initially, some recorders opposed electronic recording either because they did not have adequate software to do so or because the recorder simply took a Luddite stance and opposed the introduction of new technology into the workplace. Many software companies are working on the problem of the technical software,⁴¹ and the rapidly diminishing number of Luddites will find themselves overwhelmed by the tidal wave of electronics. There are many advantages to this paperless real estate world, which culminates in electronic recording.⁴²

Electronic recording does more than simply eliminate paper. It automates document examination, fee collection, image retention and data processing. . . Electronic recording results in greater efficiency and better use of existing resources. Productivity increases by minimizing time requirements, reducing costs and increasing document acceptance and accuracy. . . Title companies, financial institutions, law firms and other businesses involved in real estate transactions recognize great benefits from electronic recording. Counties reduce the manual processing effort associated with paper processing from days and weeks to just minutes. The electronic process reduces risks for title companies and reduces post-closing costs for lenders.⁴³

Coupled with these advantages is strong support from county government, mortgage lenders, title companies, task forces, standard setting organizations, technology providers and system vendors.⁴⁴

All of this has led to pressure to secure statutory authority to implement electronic recording. Congress responded on the federal level, and validated "electronic signatures" in a new act (E-Sign).⁴⁵ As a federal law, it applied to each of the states, but in a rather complex manner and with several exceptions to preemption and coverage.⁴⁶ The act did not, however, require the various recorders to accept electronic documents for recording. Further, some state statutes either assume or require a paper world. Additional legislation was necessary to provide statutory authorization for recorders to record electronic documents.⁴⁷

To solve the authorization problem for county recorders, the National Commissioners on State Laws (NCCUSL) proposed the Uniform Electronic Transactions Act (UETA) for adoption by the states to facilitate electronic recording. As of the beginning of 2008, 46 states, the District of Columbia and the U.S. Virgin Islands have enacted UETA.⁴⁸ Only Georgia, Illinois, New York and Washington have not, but these states do have laws recognizing electronic signatures. Fidelity National Financial has opined that counties in states that have enacted sections 17, 18, and 19 of UETA intact may accept electronic documents without further legislation.⁴⁹

UETA did not solve all of the problems, however, because some states did not adopt UETA, and some of those states that did adopt UETA did not adopt sections 17, 18, and 19.

In those states, there was a serious legal question about whether recorders could, without additional legislation, record electronic documents.

Despite doubts on whether further legislation was necessary on the state level in all states, NCCUSL, with input from the Property Records Industry Association (PRIA) drafted the Uniform Real Property Electronic Recording Act (URPERA). "URPERA was drafted to remove any doubt that, in the context of land records, county and other recording officials have the authority, based on UETA, to receive record and retrieve documents and information in electronic form."⁵⁰ By early 2008, URPERA has been adopted by 14 states and the District of Columbia.⁵¹ In addition, a number of states have adopted specific electronic recording acts.⁵²

There is no doubt that this electronic tidal wave is the wave

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of the future. The practical and legal problems are being addressed and solved. Residential homes and commercial projects are closing electronically on the Internet.

While the quest continues for a uniform act throughout the United States, the more “forward” states are moving ahead with special legislation that allows for e-recording. PRIA maintains a list of counties that have implemented some form of e-recording on their websites.⁵³ These recorders are onboard and have solved the technology problems. For the balance of recorders, it is not a matter of *if* we e-record, but *when*.

The real estate conveyancing world has experienced more changes during the past 15 years than in the prior 300 years. After 450-plus years, the real estate conveyancing world is going through a major change brought on by a new electronic world—a world that could not be imagined by the creators of the parchment, paper world. Will this electronic conveyancing world last another 400 years, or will it be replaced by something beyond our imagination?

In their excellent historical overview of developments in recording of real property documents, including recent technological developments and legislation such as UETA, ESIGN and URPERA, David Ewan and Mark Ladd build a strong case for the fact that electronic recording of real documents is not, as they put it, “a ‘wouldn’t that be nice someday’ concept.”⁵⁴ Electronic recording has passed the decade milestone in the leading-edge jurisdictions that pioneered the practice. With rapid advances in the Internet and electronic technology, ten years represents a substantial period, making digital recording a proven, mature solution. Although it may appear, because the greater percentage of recording is still carried out via traditional paper, that we are still in the paper era, electronic recording is gaining momentum because it is more accurate, reduces costs and dramatically reduces turnaround time on time-sensitive transactions.⁵⁵ We have probably already reached the tipping point in the transition from paper to electronic recording of real estate documents. With the exception of probate or court orders, for more than a thousand years, conveyance of real property was accomplished by the manual delivery of real property or the manual delivery of a written deed. This is changing. Real property can now be conveyed by electronic transfer. This does not involve a manual

transfer of a tangible object. In a few scant years we will be looking back at the practice of applying ink to paper as a thing of our past, just as by the 17th century, people looked back at the practice of livery of seisin as a relic of a bygone era. ■

ENDNOTES

1. “The word *conveyance* is generally used to denote any transfer or any method of transfer of title to real estate, whether by deed or otherwise and whether legal or equitable. *American Law of Property*, Vol. III, §12.35, p. 235.
2. Pollock & Maitland, *History of English Law*, Vol. II (2nd edition, 1898) § 2 Seisin, p. 29.
3. *Wikipedia*, Livery of Seisin.
4. Casner, *American Law of Property*, Vol. 1 § 1.24, p. 33.
5. 27 Hen. VIII Ch. 10.
6. Professor Charles Donahue, Jr., www.law.harvard.edu/library/collections/special/exhibitions/history_in_deed/.
7. 29 Car. II. C. 3.
8. *Thompson on Real Property*, Vol. 5 (1929).
9. “Origin and Title to Public Lands of the United States,” *Thompson on Real Property* (1978), Vol. 5B § 2710.
10. *American Law of Property*, Vol. VII, p. 656–669.
11. *Lawler & Lawler Historical Introduction to the Law of Real Property*, Sec. 73.
12. Nelson & Whitman, *Real Estate Transfer, Finance and Development* (6th ed.), p. 203.
13. Electronic Signatures in Global and National Commerce Act, 15 USC 7001, Sec. 101.
14. Stephan Swanepoel, “How the Internet is Reshaping Real Estate,” *RISMedia’s Real Estate*, May 2007, p. 77.
15. “A new system of communication does more than make us more knowledgeable or our institutions more efficient. It also leads to the creation of new relationships and more importantly, changes attitudes, expectations, and ways of thinking about the law.” M. Ethan Katsh, *The Electronic Media and the Transformation of the Law* (1989), p. 22.
16. Nimmer & Towle, *The Law of Electronic Commercial Transactions*, Chapter 1.01, Figure 1.1 (A.S. Pratte & Sons, 2003–2008). Also see Arias, “The Law of Electronic Contracts in the United States,” *IBLS Internet Law–News Portal*, November 21, 2007.
17. RCW 43.105, Washington State.

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18. This is not always the case. Alaska, Idaho, Kansas, Louisiana, Mississippi, Missouri (some counties), Montana, New Mexico, North Dakota, Texas, Utah and Wyoming are all non-disclosure states.
19. Nimmer & Towle, "On Line Informational Privacy and Data Protection," *The Law of Electronic Commercial Transaction*, Chapter 12. The Public Records Industry Association (PRIA) is well aware of the privacy issues and is developing rules to maintain the electronic public access and protect the individual's privacy.
20. Berrens & McKee, "What Price Nondisclosure? The Effect of Nondisclosure of Real Estate Prices," *Social Science Quarterly*, Vol. 85, No. 2 (June 2004), p. 509.
21. "The Internet is bringing about the greatest change in business since the industrial revolution..." Britt, "World Wide Window to Better Business," *Valuation*, 3rd Quarter 2007, p. 15; "Real Estate is the final frontier of e-commerce..." Glenn Keleman as quoted in *Horizon Air*, July 2007, p. R25.
22. "How the Internet Is Reshaping Real Estate," *RISMedia's Real Estate*, May 2007, p. 77.
23. Sheryl Andrus, *Valuation*, 1st Quarter 2007, p. 24.
24. Examples include: ActiveRain, BuyerHunt, Cyberhomes (by FidelityNational Financial), appraisal.com, ebay.com/realestate, HomeGain, Move.com (part of realtor.com), Real estate.com (a service of LendingTree), RealEstateABC, ReMax.com, Reply.com, Trulia, Viewr, Yahoo (realestate.yahoo.com), Zillow.com, and ZipRealty.com.
25. "ActiveRain ... is a website exclusively for the real estate industry. It is interactive and allows real estate agents to connect not only with other agent but also with clients..." *Washington Realtor News*, June 2007, p. 7.
26. Jeffrey M. O'Brien, "What Is Your House Worth?" *Fortune*, Feb. 19, 2007, p. 56.
27. *Valuations*, Vol. 11, No. 2, p. 12.
28. *RISMedia's Real Estate*, October 2007, p. 128.
29. Fn 12, *supra*. The nondisclosure states or counties can be divided into those that do not report the sales price to the recorders office and those who keep the sales record, but do not allow the records to be distributed to the public.
30. To see Zillow's most recent public record data coverage, go to www.zillow.com/howto/DataCoverageZestimateAccuracy.htm. On this page is a current "Data Coverage and Zestimate Accuracy Table," offering data for the top metro areas, by states and counties, and nationally overall.
31. Blanche Evans, "Agent News and Advice," *Realty Times*, Aug. 31, 2006.
32. Zillow's data is transparent. Further, there is a provision for an owner to change a property description with the resultant change of the Zestimate.
33. "Friend or Foe: Commandeering AVMs for Your Use," *Valuation*, 2nd Quarter 2007, p. 9.
34. Shelly Banjo, "Doing Your Home Work," *Wall Street Journal*, Dec. 11, 2007, p. R6.
35. Eric Lucas, "Real Estate Makes the Most of Modern Technology," *Horizon Air*, July 2007, p. R21.
36. *Ibid.*
37. *Washington Realtor News*, June 2007, p. 20.
38. William Freivogel, "Technology & the Lawyers Duty of Confidentiality," *The Practical Real Estate Lawyer*, Vol. 23, No. 6, November 2007, p. 9.
39. Milwaukee County, www.county.Milwaukee.gov/electronicrecording23346htm.
40. Cutter, *ALTA News*, June 2, 2007.
41. Hougaard, *ALTA News*, October 2007.
42. See the URL www.county.milwaukee.gov/ElectronicRecording23346.htm.
43. Milwaukee County, *Ibid.*
44. Hougaard, "Electronic Document Recording: The Time Is Now," *Title News* (an American Land Title Publication), October 6, 2007; also see Towle, "E-Signatures— Basics of the U.S. Structure," 38 *Houston Law Review* (2001–2002), pp. 921–1002.
45. Electronic Signatures in Global and National Commerce Act (E-SIGN), 15 USC 7001 (2000). Note that India has adopted a similar law, the Information Technology Act 2000 (CA Rules 2000).
46. Nimmer & Towle, *The Law of Electronic Transactions*, Chapter 4.
47. Whitman, "Are We There Yet? The Case for a Uniform Electronic Recording Act," 24 *Western New England Law Review* 245, 2002.
48. Uniform Electronic Transactions Act (UETA), website maintained by the National Conference of Commissioners of Uniform State Laws, www.ncsl.org/programs/lis/CIP/ueta-statutes.htm.
49. Footnote 46, *supra*.
50. "PRIA Position Statement," Uniform Real Property Electronic Recording Act, p. 2. Adopted by the PRIA Board on May 11, 2005. The act creates legislation authorizing land records officials to begin accepting records in electronic form, storing electronic records and setting up a system for retrieving these land records.
51. Uniform Real Property Recording Act (URPERA), website maintained by the National Conference of Commissioners on Uniform State Laws, www.electronicrecording.org. The 15 jurisdictions that have enacted URPERA as of the writing of this article are Arizona, Arkansas, Delaware, District of Columbia, Florida, Idaho, Illinois, Kansas, Nevada, New Mexico, North Carolina, Tennessee, Texas, Virginia and Wisconsin.
52. States that have adopted specific electronic recording acts include Texas, Massachusetts, Missouri, Colorado, and Florida. See Scott Wyman, "Broward Home Buyers Can Now Seal Their Deals on the Internet," *South Florida Sun-Sentinel*.