

AN ALFN WEBINAR PRESENTATION



*Representing, defending and
educating America's mortgage
servicing industry.*

AMERICAN LEGAL & FINANCIAL NETWORK

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ALFN WEBINAR

Foreclosing eNotes and eMortgages, and Remote Notarization

*Wednesday, July 29, 2020
1:00 - 2:15 PM Central Time*

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AMERICA'S MORTGAGE SERVICING INDUSTRY.

Session Topic Overview

As more originations are being closed through eNotes and eMortgages, foreclosing on an electronically signed loan requires a full understanding of the rules, procedures and standards used in the eClosing process. This session will examine the statutes that govern electronic signatures, eRegistry of eNotes and eMortgages and Control of the Transferable Record. We will also discuss the impact that Remote Notarization could have on closings, document reviews, affidavits and litigation. Some of the legislative changes will also be reviewed and discussed.

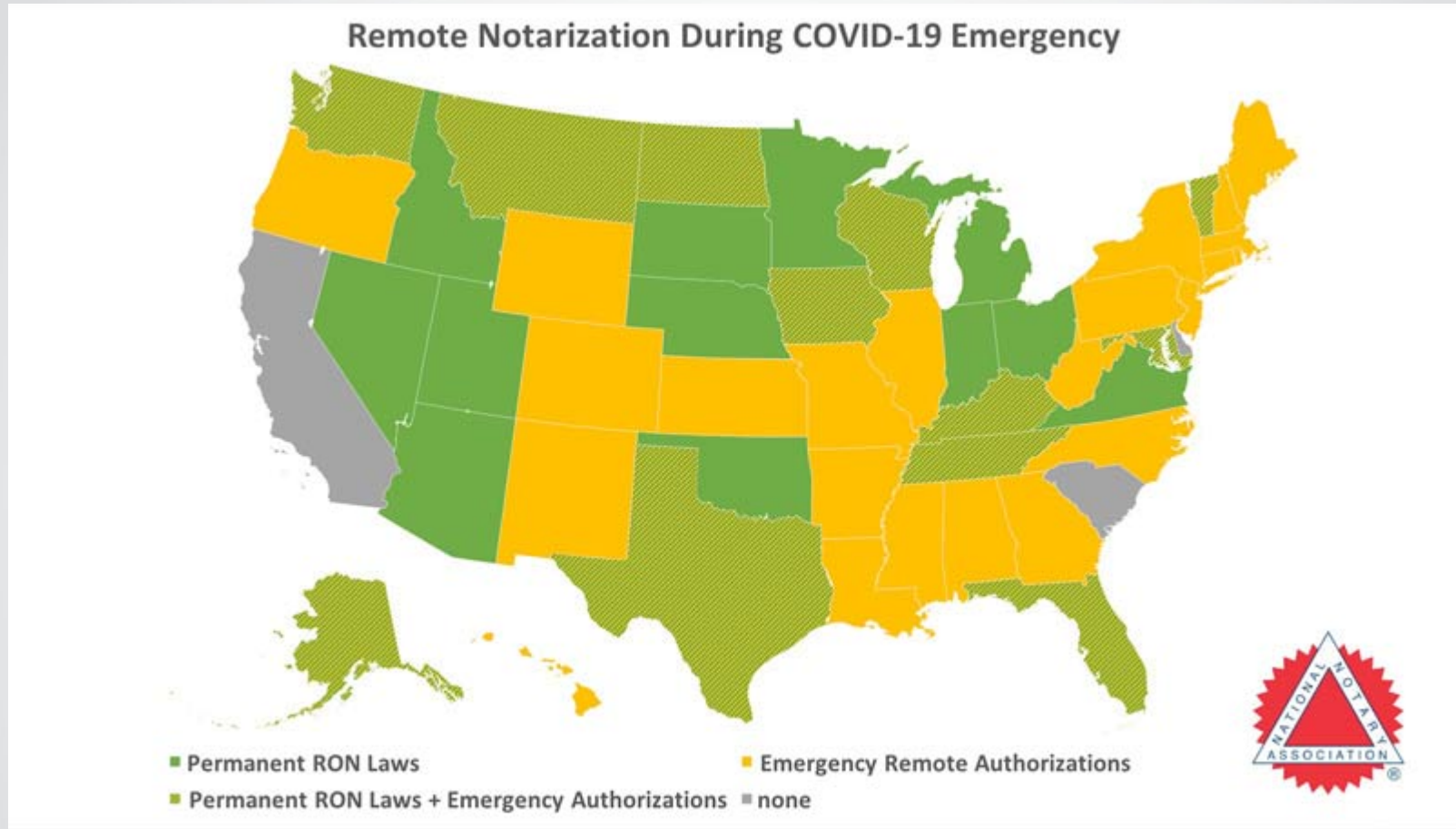


Will RON be around after the COVID emergency?

- Many states have enacted permanent RON laws.
- RON is the future.



Remote Online Notarization

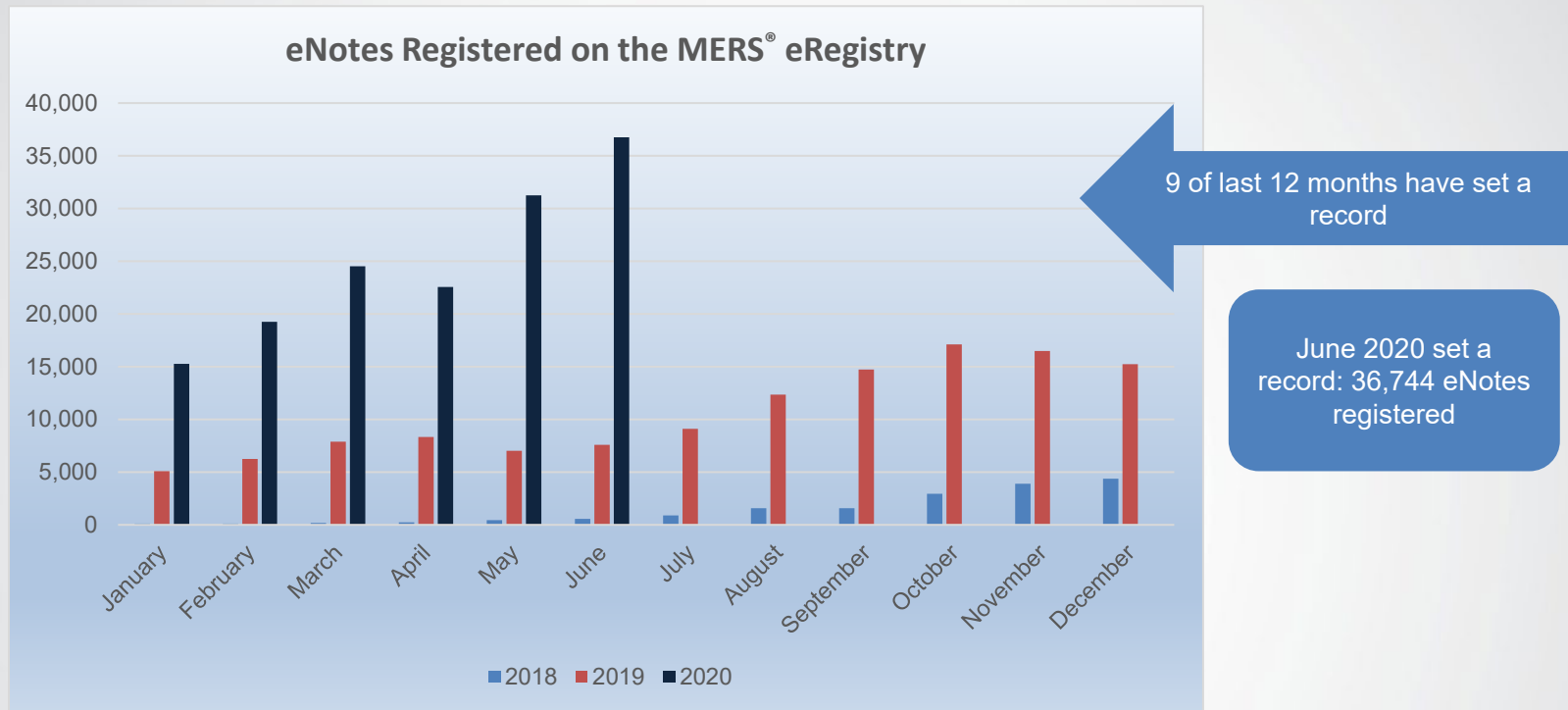


RON Basics

- What is Remote Online Notarization?
- What States are RON-eligible for delivery to Fannie Mae?
- Conditions for delivery of mortgages closed via RON
- Technical standards for RON
- Recordation of RON ceremony
- What loans are RON-ineligible for delivery to Fannie Mae?



eNote Data: Year-Over-Year Growth



Source: MERSCORP Holdings, Inc.



Paper Promissory Note v eNote

- Characteristics of a paper based negotiable promissory note
 - Written document, signed by maker, contains unconditional promise to pay a certain sum of money on delivery or at a definite time.
 - Transferred by indorsement, delivery and possession of the note
- Characteristics of a Transferrable Record (eNote)
 - Would be a note under Article 3 of the UCC if the electronic record were in writing.
 - The Issuer of the electronic record expressly has agreed is a transferrable record; and
 - As to eSign, relates to a loan secured by real property.



Legal Framework - eCommerce Laws

- Uniform Electronic Transactions Act (UETA)
 - Model law drafted by the National Conference of Commissioners on Uniform State Laws
 - Presented for adoption by individual states in 1999
- Electronic Signatures in Global and National Commerce Act (ESIGN)
 - 15 U.S.C. §§7001-31
 - Passed into Federal Law in 2000
- ESIGN pre-empts any state law which is not consistent with it except if state adopts UETA as reported by ULC without amendment.
- Designed to set forth standards that establish legal equivalency between paper based negotiable notes and electronic notes.



eNote Foundational Concepts

Paper World	Electronic World
Negotiable Instrument	Transferable Record ('eNote')
Original Note	Authoritative Copy of eNote
Possession	Control
Holder	Controller
Custodian	Location
Endorsement and Delivery	Transfer of Control
Chain of Endorsements	Transferable Record Audit Trail
Wet Signature	Electronic Signature

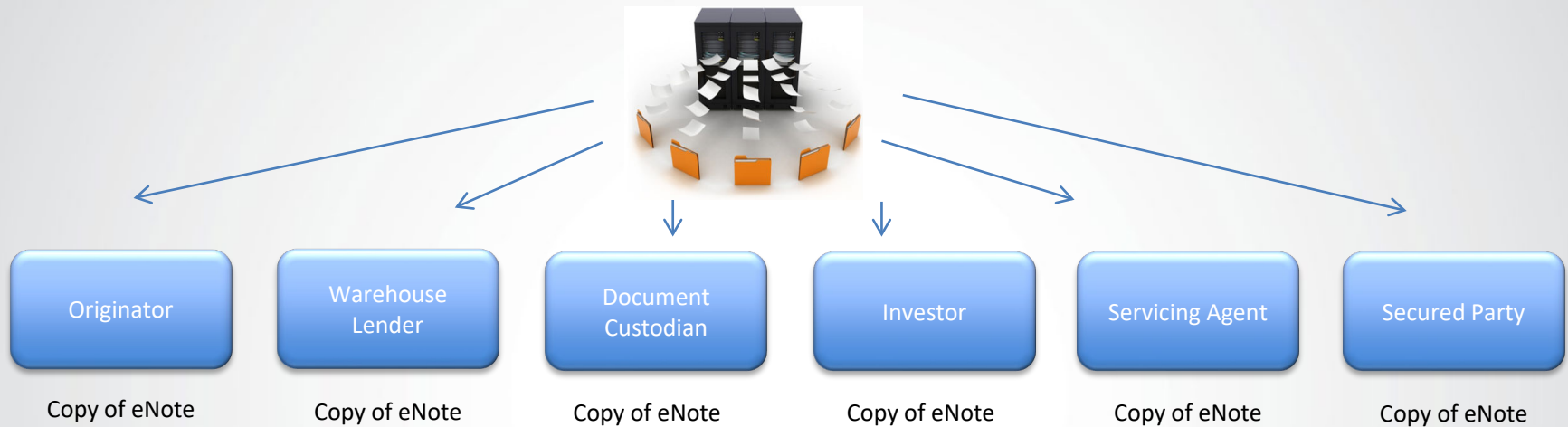
Legal Framework – Control

- The eCommerce Laws provide a safe harbor for satisfying the rules establishing “Control”. Under the Safe Harbor provisions, the Transferable Record must be created, stored, and assigned so that the following conditions are met:
 - A single authoritative copy of the record exists that is unique, identifiable, and (except for permitted revisions under UETA), unalterable;
 - The authoritative copy identifies the person asserting control as either the person to whom the Transferable Record was issued or the person to whom the Transferable Record was most recently transferred;
 - The authoritative copy is communicated to and maintained by the person asserting control or his designated custodian;

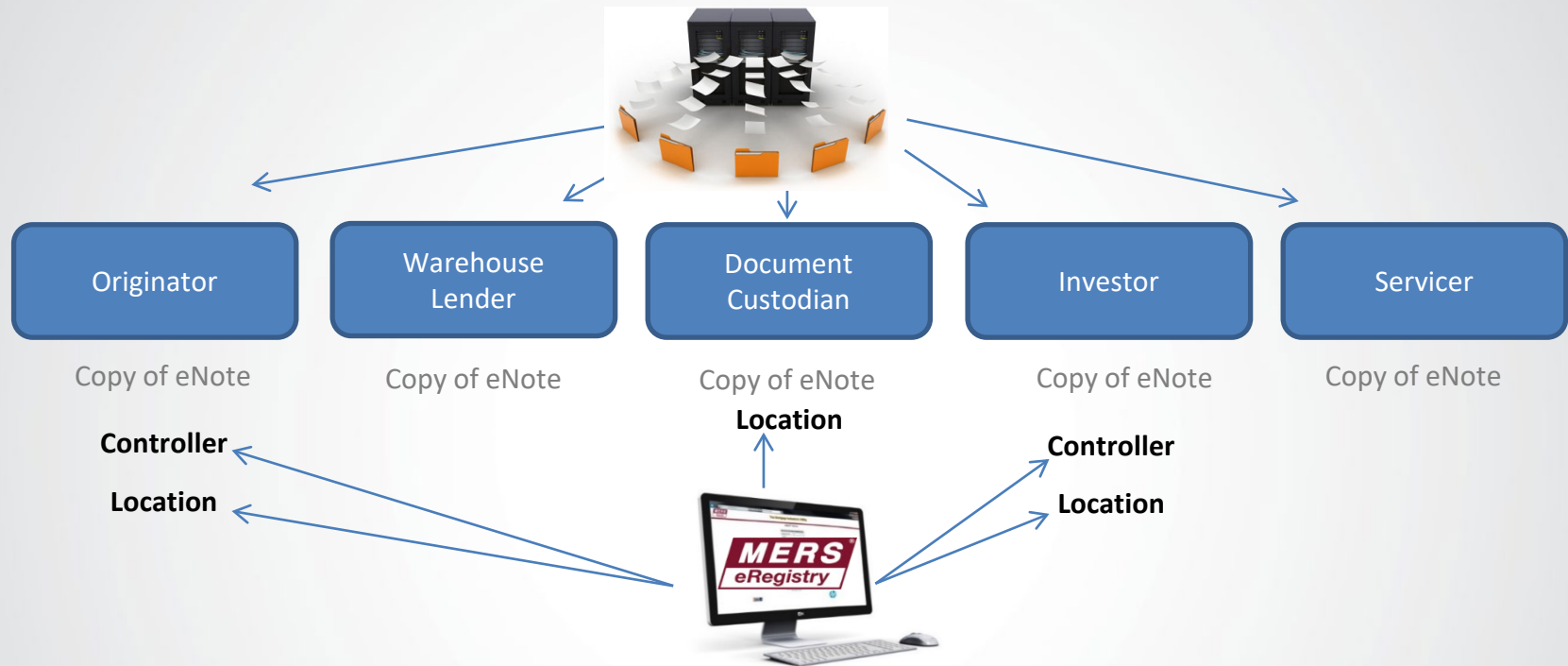
Legal Framework – Control Continued

- Safe Harbor provisions continued:
 - Copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control;
 - Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and
 - Any revision of the authoritative copy is readily identifiable as an authorized or unauthorized revision.

eNotes are Electronic Files and Can be Duplicated



The Role of the MERS® eRegistry



The Record at Registration

eNote INFORMATION

[Return to Search Results](#)

Summary

9999999-999999999999-9	Active		
748 Tester		Reg Date:	02/23/2018
Test Town, NC 27549	County: Tester	First Lien	
Borrower	Test, Joe	SSN	XXX-XX-4321
Controller	1006700 – Acme Best Mortgage		
Servicing Agent	1006700 – Acme Best Mortgage		
Location	1006700 – Acme Best Mortgage		
<u>Delegatee</u> for Transfers			
Vault Identifier			
Registering Org ID	1006700 – Acme Best Mortgage		

eNote Pending Transfers

Transfer Type	Effective Date
No Transfer Pending	

eNote Other Information

Assumption	No	<u>Tamperseal</u> Date/Time	02/23/2018 19:33:56
Modification	No	SMART Doc Presented	Yes
Modifying MIN		SMART Doc Version	1.02
Previous MIN			

NOTE

(For Electronic Signature)

Lender Loan ID: TT2019111904

MIN: 101462120191119034

November 19, 2019
[Date]

Normal, Ohio
[City], [State]

2345 Franklin, Normal, OH 33333
[Property Address]

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. \$198,633.00 (this amount is called "Principal"), plus interest, to the order of the Lender. The Lender is ABC Mortgage Lending. I will make all payments under this Note in the form of cash, check or money order.

I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

2. INTEREST

Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of 3.500%.

Org ID: 1014621 eVault Doc ID: 6072446-6072447

Sample eNote Continued

11. ISSUANCE OF TRANSFERABLE RECORD; IDENTIFICATION OF NOTE HOLDER; CONVERSION FROM ELECTRONIC NOTE TO PAPER-BASED NOTE

(A) I expressly state that I have signed this electronically created Note (the "Electronic Note") using an Electronic Signature. By doing this, I am indicating that I agree to the terms of this Electronic Note. I also agree that this Electronic Note may be Authenticated, Stored and Transmitted by Electronic Means (as defined in Section 11(F)), and will be valid for all legal purposes, as set forth in the Uniform Electronic Transactions Act, as enacted in the jurisdiction where the Property is located ("UETA"), the Electronic Signatures in Global and National Commerce Act ("E-SIGN"), or both, as applicable. In addition, I agree that this Electronic Note will be an effective, enforceable and valid Transferable Record (as defined in Section 11(F)) and may be created, authenticated, stored, transmitted and transferred in a manner consistent with and permitted by the Transferable Records sections of UETA or E-SIGN.

(B) Except as indicated in Sections 11 (D) and (E) below, the identity of the Note Holder and any person to whom this Electronic Note is later transferred will be recorded in a registry maintained by MERSCORP Holdings, Inc., a Delaware corporation or in another registry to which the records are later transferred (the "Note Holder Registry"). The authoritative copy of this Electronic Note will be the copy identified by the Note Holder after loan closing but prior to registration in the Note Holder Registry. If this Electronic Note has been registered in the Note Holder Registry, then the authoritative copy will be the copy identified by the Note Holder of record in the Note Holder Registry or the Loan Servicer (as defined in the Security Instrument) acting at the direction of the Note Holder, as the authoritative copy. The current identity of the Note Holder and the location of the authoritative copy, as reflected in the Note Holder Registry, will be available from the Note Holder or Loan Servicer, as applicable. The only copy of this Electronic Note that is the authoritative copy is the copy that is within the control of the person identified as the Note Holder in the Note Holder Registry (or that person's designee). No other copy of this Electronic Note may be the authoritative copy.

0 12:09:56 PM EDT MERS Orig ID: 1014621 eVault Doc ID: 6072446-6

Polling Question #1

- Have you or your company/firm had any foreclosures on eNotes and eMortgages?
 - Yes
 - No
 - Not sure



What the Courts Have Said About eNotes

- *Good v. Wells Fargo - No. 20A03-1401-MF-14, Ind. Gov. Jud. Op. (Ind. Ct. App. Sept 1, 2014)*
 - The first reported decision to directly address ownership and enforcement of an eNote
- *New York Community Bank v. McClendon - 29 N.Y.S. 3d 507 (App. Div. 2016)*
 - The court concluded that the transfer history, together with eNote, were sufficient to establish that plaintiff mortgagee had control of the eNote under ESIGN and had standing to foreclose as the holder.
- *Rivera v. Wells Fargo Bank, N.A. - 189 So.3d 323 (Fla. Dist. Ct. App. 2016)*
 - The court applied the Florida UETA and relied on the evidence in the form of a certificate of authentication



Litigation Issues

- The industry needs to start with good case law.
- There is a lack of case law on E-Notes and the transfer process.
- Pleading correctly is important. (Pleading that the Plaintiff is the holder of the Note and in possession of the original Note will result in dismissal.)



Litigation Issues

- Strong education. It will be the industry's job to teach courts and Defense Counsel.
- The various state and federal electronic signature regarding what makes an electronic signature valid, and how to introduce that information into evidence.
- Proper documentation to establish right to enforce.



Litigation Issues

- Creating standard industry practices addressing the documentation to be presented to the Court to establish the right to enforce.
- In many instances, Servicers are not utilizing MERS to provide affidavits showing transfer of notes via the E-Registry.
- Proper documentation must be presented from the beginning of the case to avoid establishing bad law for the industry.



Polling Question #2

- Do you feel like the industry is trained appropriately for the use of eNotes and eMortgages?
 - Yes. The industry is prepared.
 - No. The industry is not prepared.
 - Servicers yes, but attorneys no.
 - Attorneys yes, but servicers no.



Litigation Issues

- Some of the items include:
 - MERS Affidavit establishing chain of transfer
 - Servicer Affidavit of Authentication
 - Power of Attorney between the investor and custodian of the Note specifically stating that the custodian has the ability to store the E-Note on behalf of the investor
 - Authoritative copy of the note, and documentation establishing who has possession of it
 - If not the servicer, Firms may need a document establishing the relationship between the third-party vendor and servicer.

Litigation Issues

- Witness training. Witnesses are not yet versed in the nuances of an E-Note and the relationship between the Investors, MERS and E-Vault vendors. There needs to be training on this or documents will not be admitted as business records.
- Challenges that may come up during foreclosure process
- Appellate case law review



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WEBINAR CONCLUSION

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