

The profession of notary: The new stakes

Nicolas Tissot,

director of information systems, Conseil Supérieur du Notariat

Abstract:

Over the past fifteen years, notaries have undertaken projects involving dematerialization, electronic signatures and the electronic storage of archives. They are also using a very effective tool for producing certified acts that heavily relies on electronic exchanges. During the passage from paper to an electronic format however, the client was lost from sight. Given the digital tidal wave and the proliferation of startups in the law field, we must place the client at the center of our thoughts about digital technology. Since 2017, a strategy has been devised that recognizes the need to deal with an ecosystem that, by nature, is beyond control. It relies on a platform with the goal of interconnecting all notarial offices while complying with standards on interoperability and using application programming interfaces (APIs) for exchanging data between platforms. Besides being a way to optimize the tools for producing official notarial acts while staving off reductions in the regulated schedule of fees, digital technology has become a prime means for notaries to make clients loyal and win new markets, thus anticipating any legislative changes.

During the discussion on a bill of law that would become the act of 25 Ventôse year XI under the calendar of the French Revolution, Réal defined the office of notary: *“Alongside the public officers who undertake conciliation and the judgement of disputes, tranquillity calls for other officers who, as disinterested advisors to the parties and as the impartial authors of what the parties want — by making the latter aware of the full extent of the obligations they are contracting, by drafting clearly the commitments they are making, by turning these commitments into a public instrument with the force of a judgment in last instance, by perpetuating the memory of these commitments and keeping them loyally in deposit — prevent disputes from arising between honest people and, with the hope of succeeding, deprive the greedy of the envy to undertake an unjust action. This disinterested counsel, these impartial authors, this type of conscientious judge who irrevocably obliges the contracting parties, are notaries.”* This profession turns into public instruments the contracts that notaries have drafted at the request of their clients and stores these documents.¹

We immediately realize that, like any intellectual profession, reckoning with digital technology is not a choice but a necessity — an urgent need if these professionals are to survive at a time when this technology has shifted more power toward clients. Fortunately, the profession did not wait for the “digital tidal wave” before turning its thoughts to this subject.

¹ This article, including quotations from French sources, has been translated from French by Noal Mellott (Omaha Beach, France).
NB: The term “notary” normally refers, in this article, to civil law notaries rather than public notaries under common law.

From the dematerialization of transactions to electronic notarial acts

Since the end of the 1990s, the notarial profession, spurred by Alain Lambert, chairman of the Conseil Supérieur du Notariat (CSN) from 1996 to 1998 and then of the Senate's Finance Committee, has benefitted from the transposition of the EU directive of 13 December 1999 on electronic signatures into the French Civil Code.² Article 1316-4 of this code now recognizes the validity of an electronic signature and the possibility of drawing up notarial acts in an electronic form (Article 1317). The intent is clear: establish the legal framework to eventually allow for electronic notarial acts. By setting the conditions to be met for deeming an electronic signature to be reliable, decree n° 2001-372 of 30 March 2001 signaled the start of dematerialized transactions.

The notary profession, now organized to manage electronic keys, has become its own certification authority; it equips all notary offices with a tool for electronic signatures. It has also set up a platform for exchanging data that connects, via a single point, all notary offices with their institutional partners and thus hides the complexity of this private network. As of 2006, computers can be used to query the Direction Générale des Finances Publiques (DGFIP) about the status of mortgaged properties and to enter information about transfers in the registry on mortgages. Furthermore, bank transfers via the Caisse des Dépôts et Consignations (CDC) can be made instantaneously via electronic data interchange (EDI).

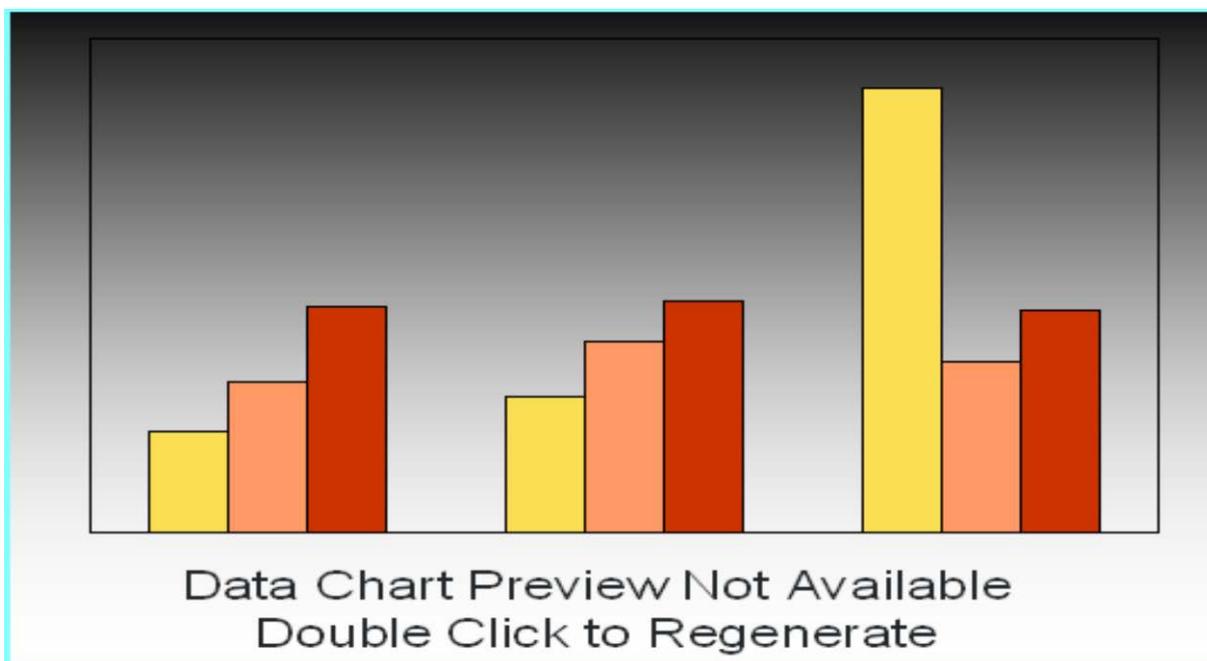
In parallel, the profession has worked with the Ministry of Justice. Decree n° 2005-973 of 10 August 2005 laid down the conditions for establishing and storing notarial acts electronically. As foreseen by this decree, an electronic archives (MICEN: Minutier Central Électronique) opened in 2006; and Rachida Dati, minister of Justice, signed the first electronic public instrument and filed it with MICEN on 28 October 2008. Since 1 January 2012, this archive is open to all notary offices in France; and electronic notarial acts are being made. At present, 75% of these offices are equipped, and more than three million electronic notarial acts will probably be registered in 2018.

It is worth pointing out that the notarial profession has settled on a solution to the problem of the original of an electronic act by applying a simple principle: the original is kept in a central registry in the profession's possession. The only original is the document recorded in MICEN. The electronic original of a notarial act never leaves MICEN; it is only copied in a simple or certified form depending on the formalities that the notary has to accomplish.

² Texts of European Union law are available at <http://eur-lex.europa.eu/browse/directories/legislation.html>; & texts of French law at: <https://www.legifrance.gouv.fr/Droit-francais>.

First used for exchanges with the DGFIP and CDC, this setup has been extended to exchanges with COMEDEC, a system connecting French communes (townships) for the certification of vital records. It meets the requirements of a 2016 law that requires consulting a client's criminal record before transferring goods, the purpose being to identify purchasers who have convictions as flophouse landlords. The graph depicts the increase, between 2015 and 2017, in the number of electronic notarial acts, vital records, and criminal records.

Figure 1: The number of electronic notarial acts (MICEN) and of dematerialized queries of vital records and criminal records



Acceleration... and the need for a digital strategy

Notaries have, we can assume, a very efficient tool for producing notarial acts, since they perform in an electronic format most of the formalities to be accomplished. Nonetheless, we have to acknowledge that what is missing in this picture is the client. How to explain this?

Notaries use software as a means to produce acts and as an interface with the previously mentioned tools (electronic signatures, platforms, MICEN). The three usual software-makers have concentrated exclusively on the production of notarial acts for the purpose of improving the efficiency of the work done by notaries and their employees but without taking account of the client's viewpoint. Concerned only with dematerializing exchanges with its institutional partners, the CSN did not adopt a client-centered approach and did not push software-makers to be more imaginative.

Finally, in 2014, given the first startups in the legal field and, too, the proliferation of "unicorns" that have disrupted traditional businesses and the regulated professions, notaries became aware of how important it is to bring the client into the digital picture. Notaviz, a Web portal for the general public, was launched; and more thematic websites³ have been set up in a hurried attempt to counter these legaltechs. But this has all been done without taking the time to prepare the grounds for an overall strategy. It is no surprise that this dispersal of efforts, multiplication of actors (in- and outside the profession) and absence of a global strategy have led

³ Mon notaire, Ma Succession, BailMyself. For example: <https://monnotaire-masuccession.notaires.fr/> & <https://bailmyself.notaires.fr>.

to the mixed results obtained by Notaviz, which proposes questionnaires customized to fit the client's situation but does not offer any of the services with which consumers connected to the Internet are familiar (such as: making appointments on line, monitoring a query's progress, the possibility of interacting with a contact person).

Having come to clearly realize the need to work on client relations, one of the three major software-makers has set up online client accounts to make it easier for clients to follow up on their queries. A few notaries have also decided to invest in their own legaltechs in order to develop online client accounts or innovative tools for the phases of the production of the notarial activities that are not a professional monopoly (e.g., presales contracts, which the parties themselves can make).

In this context, the CSN decided to create the position of director of digital technology. I took office in September 2016.

The notary profession's digital strategy

A digital strategy is indispensable for: improving the coherency of what has been done or is being done, making these efforts more visible to notaries, identifying the efforts still to be made, and formalizing the guidelines for interactions with an ecosystem that is, in principle, uncontrollable.

First observation: software-makers have not waited for the notarial profession to set up online client accounts. Since notaries are both public officers and private professionals, the profession has given up the idea of opening such accounts (which would only concern the acts as a public officer). However it is very important for notaries as public officers to have their own online appointment system (instead of letting it in the hands of third parties). The purpose is not, in fact, to keep third parties from helping clients contact notaries but to reverse the trend by offering software developers access to the profession's online appointment system and persuading them to offer complementary services of value. Making an appointment is but a first step toward intermediation.

Second observation: the online itinerary of ever more clients starts out on third-party platforms. Since the notarial profession will never be capable of launching as many projects as startups, which are springing up day after day, it is necessary to imagine how to interact with this ecosystem.

The profession's digital strategy thus relies on a "platform" approach for interconnecting notarial offices and the digital ecosystem so that a notary can design the "menu" of services that he/she wants to provide, either directly or via third-party platforms. The groundwork is being laid for defining standards of interoperability so that the software normally used to draft documents can incorporate the data and documents retrieved from third-party platforms, thus paring the work of manually re-entering them and avoiding ruptures in the client's online itinerary. Another objective of these standards is to improve the interoperability between the software programs used to draft documents and to offer more flexibility to notaries for changing software.

Besides defining these standards, the notary profession has decided to draw on an initiative taken by ADIJ and OpenLaw. These two organizations have worked together on a code of ethics for an online law market and its stakeholders. Having adapted it to the notarial profession, we want to associate it with a label for guaranteeing that the code of ethics is upheld. The objective is to transpose the trust placed in notaries into the digital realm, since this label would be granted to the software editors and startups that uphold the code. Our assumption is that all stakeholders have something to gain from such a system. The firms granted the label will be able to access our profession's service platform (for APIs, appointments, contacts, etc.); and as a counterpart, they will promise to uphold a few major principles: the noncommercialization of the data collected from clients, the standards of interoperability, absolute neutrality in the client's choice of a

notary. The notary profession is wagering that this label will make a big difference for these firms and thus help develop a digital ecosystem in which clients will have full confidence.

This digital strategy recognizes the compelling need to be equipped with the means for constant monitoring, testing new solutions, and innovating in our activities as both public officers with a monopoly and private professionals exposed to competition.

This is the context in which the notarial profession has jumped on blockchains, a technology about which many an article has been published in recent months. Read without any critical distance, these articles apparently proclaim that blockchains will eliminate trusted third parties. Though initially designed to do away with trusted third parties in monetary transactions, this technology has limits. Not only is anonymity the rule; but also this technology requires, given its complexity, new trusted third parties to protect the keys to cryptocurrency wallets. A blockchain also brings up the question about how long it will last. When the multitude is responsible for storing data, no one in particular is liable; and no one will feel so if the charm of novelty wears off. To imagine transferring real estate via a blockchain without involving a notary is, at present, a utopian's utopia.

Nonetheless, blockchain technology might solve some very concrete problems related to electronic notarial acts. It is an ideal solution for guaranteeing the integrity, origin and authenticity of an electronic copy of the original public instrument. A hash value of the copy simply has to be registered and associated with the identity of the copy's sender. A consortium blockchain would even allow for emitting and tracking the endorsements of an enforceable electronic copy. This is impossible both with ordinary electronic files (in principle, duplicable) and certificates of signature (designed with a limited period of validity).

A source of opportunities but the need for a new business model

The preceding paragraphs have barely mentioned the specificity of civil law notaries as public officers with private practices. This characteristic complicates the profession's adoption of digital tools. Initially, this technology has been a means for producing notarial acts more efficiently (an assistance to notaries as public officers); but it has never been designed by taking into account the services that notaries offer to clients as private practitioners (who may set their own fees as financial advisers, negotiators in real estate transactions, etc.).

In business, digital technology has clearly had one indisputable, constant effect: clients are placed at the center of attention — the client is king. Firms now have to adapt to clients, who want to do everything from their sofa at any time of day or night and who will not fail to score the service delivered and post online comments about its quality. From this viewpoint, the digital revolution represents an opportunity at just the right time for notaries who are interested in their clients (finally, some will say...) and who want to develop their private practice. Given a situation wherein the notary's monopoly over the services performed as a public officer is grounded on legal texts that lawmakers may alter at any time, the notary business has to meet two conditions:

- on the one hand, the services subject to regulated fee schedules have to be done as efficiently as possible.
- on the other hand, clients have to feel that they have been shown consideration — they have to know why they turn to a notary, and return to benefit from additional services.

Meanwhile, the notarial activities that are not part of the profession's monopoly as a public office are increasingly overrun by startups that are wagering on the "user's experience" and the quality of their services in order to capture clients. Legaltechs, fintechs, proptechs, all of them are occupying a terrain where notaries can legitimately intervene. In fact, notaries must diversify their business activities in anticipation of legislative or regulatory changes. They must, therefore, cooperate with these other players, or set up their own platforms.

Digital technology is strategic to the notarial profession's evolution. It pushes notaries to realize that they head firms. Notaries cannot long remain in a state of dependence on fee schedules, which might be modified every two years, for official acts. They must optimize their tools for producing such acts if they do not want to fall victim to the lowering of fee schedules. But at the same time, in anticipation of changes in the law, they must build up a loyal client base and win new markets. Digital technology should help notaries perform this delicate balancing act between being a public officer and the head of a firm.