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ELECTRONIC SIGNATURES 101



DISCLAIMER:

This is not intended nor should it be used as a substitute for legal advice or opinion, which can be rendered only when related to specific fact situations.



WHAT IS AN ELECTRONIC SIGNATURE?

- **An electronic sound, symbol, or process**
 - Attached to or logically associated with a contract or other record; and
 - Executed or adopted by a person with intent to sign the record

Draw your signature with your mouse



Clear





THE STATUTES

- **Overlay Statutes**
- **Authorize replacing written with electronic records**
- **Authorize electronic signatures**
- **Provide rules for determining presence of signature**





THE STATUTES (cont.)

- **Uniform Electronic Transaction Act (UETA)**
 - State law
 - Texas has TETA
 - 47 states
 - No specific consumer disclosures



FEDERAL AND STATE LAWS



- **Electronic Signatures in Global and National Commerce Act (ESIGN)**
 - Applies to a “transaction” conducted in interstate or foreign commerce
 - Contains specific consumer disclosures
 - Limited preemption of state laws if UETA enacted





EXCLUSIONS

- UCC (other than Sections 1-107, 1-206, and Articles 2 and 2A)
- Many “bad things are going to happen” notices (e.g., notice of foreclosures, acceleration, repossession, or right to are related to residence)
- Many “bad things have happened” notices (e.g., utility cutoffs)
- Wills, codicils and testamentary tracts
- Family law
- Termination of health insurance or life insurance
- Court Orders and documents related to court proceedings
- Hazardous waste/environmental
- Penal Code (Texas)
- Recall notices





PURPOSE OF THE STATUTES (aka the "3 Pillars")

1. A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
2. If a law requires a record to be in writing, an electronic record satisfies the law.
3. If a law requires a signature, an electronic signature satisfies the law.





OPT-IN

- **Steps to Establish an Electronic Signature**
 - Demonstrate “opt in”
 - Attribute “opt in” to person
 - Authenticate “opt in”
 - to person
 - to act





OPT-IN (cont.)

- **Commercial Transactions**
 - Any old agreement to use electronic record or signature will do (express or implied from the circumstances)





OPT-IN (cont.)

- **Consumer Transactions where same is entitled to receive information “in writing” (under both federal and state) –**
 - Consumer must affirmatively consent or confirm consent electronically that the consumer can access information in the electronic form used to provide information that is subject of consent
 - Other party must provide disclosures prior to consent in clear and conspicuous statement





GETTING THE OPT-IN

- **Reasonable demonstration**
 - Consumer consent must
 - Be electronic or be confirmed electronically
 - Include a “reasonable demonstration” of consumer’s ability to access information in the electronic forms provided
 - ESIGN attempts to set standard
 - Test is intended not to “burden commerce”
 - Email confirming receipt of test files is sufficient
 - Failure to include “reasonable demonstration” in consent process may not be used as basis to invalidate contract





GETTING THE OPT-IN (cont.)

- **Authentication**

- Both UETA and ESIGN require system used to capture transaction. Keep a record that reflects how signature was created.
- Neither UETA nor ESIGN specify technology.

Under UETA, authentication requires “attribution” to person that it was the “act of person”.





ELECTRONIC SIGNATURE: The Tricky Bits

- **Legal sufficiency vs. attribution**
 - UETA and ESIGN answer the question “is it a signature?”
 - Do NOT answer the question “is it your signature?”
- **Attribution must be proven**
 - May be proven by any means, including surrounding circumstances or efficacy of agreed-upon security procedure
 - Burden of proof is on person seeking to enforce signature
- **Intent must also be established – watch out for:**
 - Placement of the signature “call to action”
 - “Multi-signing” in consumer transactions



ATTRIBUTION

3 Step Process to Attribute an E-Signature to a specific individual:

1. Party Identification
2. Party Authentication
3. Act Authentication





ATTRIBUTION

1. Party Identification

- Personally Identifiable Information
- Photo/Document Upload
- Knowledge-Based Authentication ("KBA")
- Personal Appearance





ATTRIBUTION (cont.)

2. Party Authentication

- Email Authentication
- USER ID / PIN
- Shared Secret
- SMS Passcode
- Digital Certificates





ATTRIBUTION (cont.)

3. Act Authentication

- Clear notification to person creating an electronic signature
- A confirmation process
- Verifiable audit trail





COURTS

- **Cunningham case** found signature block in email was not “acceptance”
- **Williamson case** (2 years after Cunningham) found automatically attached signature block can constitute an electronic signature under UETA
- **Conflict in cases creates uncertainty**
- **Parties should add disclaimers** to emails stating that email signature blocks do not constitute electronic signatures under law unless email explicitly stated otherwise





TAKEAWAYS

- Consider an **express statement** in the agreement that performance is not a means of acceptance and that the agreement must be signed by both parties to be effective.
- If you do not believe the agreement is final and accepted, **do not begin to perform under the agreement** unless there is an express written (email is ok) agreement by the parties that performance has begun but the contract is still being negotiated.
- When exchanging emails relating to an agreement, **be prudent when using certain loaded terms** such as “offer,” “accept,” “amendment,” “promise,” or “signed” or phrases of assent (e.g., “I’m ok with that”, “Agreed”) without limitations or a clear explanation of intent.





TAKEAWAYS (cont.)

- **Terms of proposed agreements communicated via email should explicitly state that they are subject to any relevant conditions, as well as to the further review and comment of the sender's clients and/or colleagues. To avoid ambiguity, to the extent finalizing an agreement is subject to a contingency (e.g., upper management or outside approval, or a separate side document signed by both parties), be clear about that in any email exchange that contains near-final versions of the agreement.**
- **Parties wishing to close the deal with an attachment should mutually confirm their intent and verify assent when the terms of a final agreement come together.**





TAKEAWAYS (cont.)

- **While it is good practice to include standard email disclaimers** that say that the terms of an email are not an offer capable of acceptance and do not evidence an intention to enter into any contract, **do not rely on this disclaimer to prevent an email exchange** - which otherwise has all the indicia of a final agreement - from being considered binding.
- **Exercise extreme caution when using text messages for negotiation.** The increased informality as well as the inability to attach a final document to a text is likely to lead to disputes down the road.





DISCLAIMER

This communication does not reflect an intention by the sender or the sender's client to conduct a transaction or make any agreement by electronic means or to constitute an electronic signature.



A close-up photograph of a person's hands holding a white rectangular sign. The person is wearing a dark suit jacket and a light-colored shirt. The sign is held horizontally and has the word "QUESTIONS?" written on it in a large, bold, dark blue font. The background is a blurred office setting.

QUESTIONS?



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