

Moving Towards an Electronic Real Estate Transaction

The Electronic Signature – Legal Overview (U.S.)

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Introduction

Every real estate transaction involves the parties to the transaction putting their signature on at least one document and more likely several documents. While the reasons behind requiring that signature have remained the same since the first time the law required that signature, the form of that signature has evolved from pen and ink through telegraphic and facsimile transmissions until today when documents can be executed electronically.

The purpose of requiring a signature in a real estate transaction has at its core the purpose of rooting out uncertainty or fraud in connection with contracts, but the traditional requirement of a “writing” also served to provide assurances that the person purporting to sign the agreement was the person whose signature appeared there, that the person signing the document intended to sign it and that both parties to the transaction were agreeing to the same transaction. It also served a psychological purpose of encouraging parties to understand that each was entering into a serious agreement whose terms each had to understand by imposing the formality of a signature.

An electronic signature is a legal tool intended to accomplish these same purposes. It performs a significant legal function in connection with these documents, which are often referred to as electronic records and transactions. In many instances, if a document isn’t signed, it cannot be used for its intended purpose. For example, real estate purchase and sale contracts are not enforceable if they are not signed. So, electronic signatures are critical to electronic real estate applications.

Part 1. The E-Signature Laws

While the acceptance of other forms of signatures, facsimile copies for example, occurred over a period of time through judicial interpretation of the requirement for a written signature, the acceptance of electronic signatures came about through the adoption of statutory provisions. With the adoption of the Uniform Electronic Transactions Act (“UETA”) in most states and the passage of Electronic Signatures in Global and National Commerce Act (“ESIGN”) at the federal level in 2000¹, the legal landscape for use of electronic records and electronic signatures in real estate was firmly settled.

Rule of General Validity

Both ESIGN and UETA establish a legal framework based on the principle that electronic records and signatures carry the same weight and legal effect as traditional paper documents and handwritten signatures.

Both laws accomplish this legal equivalency by establishing a procedural approach to meeting “writing” and “signature” requirements, stating:

1. A document or signature cannot be denied legal effect or enforceability solely because it is in electronic form;
2. a contract cannot be denied legal effect or enforceability solely because an electronic record was used in its formation;

¹ 15 U.S.C. §§ 7001 *et seq.*

3. if a law requires that a record be in writing, then an electronic record satisfies the law; and
4. if a law requires a signature, then an electronic signature satisfies the law.

ESIGN and UETA define an electronic signature as 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 the intent to sign the record.”² In e-commerce generally, electronic signatures have taken on many forms, ranging from a simple “I Agree” button on a web page, up to biometric scans using sophisticated infrared equipment. The laws do not specify the form an electronic signature should take, but rather allow the parties to determine the format based upon the specifics of the transaction and any surrounding circumstances. In real estate transactions, the process for electronically signing and preserving documents must be selected with care.

Intent to Sign

The electronic signature laws retain the logical common law rule that a signature is only valid if the signer intends to sign something. In the paper world, a number of conventions are used to establish evidence of intent to sign. The most common of these is the placement of a signature at the end of a document, often directly under a block of text that confirms that the parties intend to be bound. Similar considerations should be made when adopting an electronic signature process. One method of establishing a reasonableness argument in support of a signer’s intent to be bound is the creation of a signing “ceremony” that closely resembles the paper signing process.

Another factor that must be considered is the issue of consent. While in the paper world there is no formality required if the parties are using a pen and ink signature, the different circumstances associated with electronic signatures require a different approach. The parties must separately agree to use electronic signatures. The consent process differs based upon whether one or more of the parties is a “consumer”³, which will almost always be the case when working with a client who is either buying or selling a home, but it is always present. If the consumer will be provided with information that a law or regulation (*e.g.*, agency disclosure, property condition report) requires to be provided in writing (“Required Information”), there are additional requirements.

Electronic delivery and acknowledgement of documents to consumers containing Required Information may be used only if the consumer (a) receives certain disclosures (“UETA Consumer Consent Disclosures”), (b) has affirmatively consented to use electronic delivery of documents for the transaction, and (c) has not withdrawn such consent.⁴

While consent is required before a consumer transaction may take place such consent can be captured immediately prior to the transaction (for example, in the same online session), and must be captured electronically (*i.e.* not on paper).

² 15 U.S.C. § 7006(5); UETA § 2(7).

³ A consumer is an individual who obtains, through a transaction, products or services which are used for personal, family and household purposes. 15 U.S.C. § 7006(1).

⁴ 15 U.S.C. § 7001(c)(1).

Signature Associated with the Record

In a paper world the signature on a document becomes a part of the document and can not be separated from it. The same requirement exists for electronic signatures but again must be accomplished in a different way. The electronic signature must be attached to or logically associated with the record being signed. The system that is used to capture the electronic transaction must either (a) keep an associated record reflecting the process by which the signature was created, or (b) make a textual or graphic statement that is added to the signed record, reflecting the fact that it was executed with an electronic signature.⁵

Electronic signatures should also provide some method of verifying that the purported signer did in fact create the electronic signature. This process is called “attribution” and although it is not specifically required by the e-signature statutes, it has been recognized as a best practice for the establishment of an electronic transaction system.⁶ In the electronic context, attribution is closely related to the process of confirming the identity of a party (“authentication”).

Record Retention

UETA provides that legal effect, enforceability or validity of the delivery of any Required Information (or any contract that is required to be “in writing”) may be denied if the electronic record is not in a format that is (a) capable of being retained, and (b) capable of being accurately reproduced for later reference by all of the parties any other persons who are entitled to obtain access to the contract or other record.⁷ The record of the electronic transaction and the electronic signatures must remain accessible the entire time required by any statute, regulation or rule of law.

Part 2: Real Estate Transactions – compliance with substantive law

Real estate contracts can be executed electronically in all 50 states between buyers and sellers of any state. According to the UETA drafting committee,

There are no unique characteristics to contracts relating to real property as opposed to other business and commercial (including consumer) contracts [that would make it necessary].... to maintain existing barriers to electronic contracting.

Consequently, the decision whether to use an electronic medium for their agreements should be a matter for the parties to determine....[and] nothing in [the UETA] precludes the parties from selecting the medium best suited to the needs of the particular transaction. Parties may wish to consummate the transaction using electronic media in order to avoid expensive travel. Yet the actual deed may be in paper form to assure compliance with existing recording systems and requirements. The critical point is that nothing in this Act prevents the parties from selecting paper or electronic media for all or part of their transaction.⁸

⁵ See SPeRS § 4-4

⁶ See SPeRS § 4-5 and § 4-6

⁷ 15 U.S.C. § 7001(e); see also UETA § 8.

⁸ Comment, Uniform *Electronic Transactions Act* (1999), National Conference of Commissioners on Uniform State Laws

ESIGN and UETA explicitly state that they are not intended to alter the substantive law surrounding the transaction. So in addition to compliance with the electronic signature statutes (ESIGN and your state e-signature law), you must also use e-signatures in compliance with the rules and laws that govern your real estate transaction.

For example, under California's UETA you can use an electronic signature to agree to liquidated damages and arbitration in real estate purchase agreements.⁹ But under that state's consumer protection laws, the parties' consent to liquidated damages or arbitration must be indicated by separate signatures adjacent to the text of the disclosures.¹⁰

Part 3: Beyond Compliance – the evidentiary issues

Compliance with the e-signature laws is a very basic step in defining an electronic transaction system. Like their paper counterparts, electronically signed documents can become the subject of a dispute. In the event of repudiation of an electronically executed contract, merely complying with ESIGN is not enough; the facts surrounding the signature process must provide enough proof to uphold the transaction.

Intent to Sign

As discussed earlier, an electronic signature is only valid if the signer intends to sign something. For example, the signature's purpose may be to simply confirm receipt or review of a document, or it may be to confirm the accuracy of the document's contents, or in the case of an eContract, it may be to bind the signer contractually to the document's terms. ESIGN and UETA make no distinction between these purposes – the parties are responsible for adopting a method of electronically signing documents (*e.g.* required disclosures, level of authentication, security, storage, etc.) that is most appropriate for the intended use.

If disputed, the person attempting to enforce the signature will have the burden of proving the intent to sign the record. In addition to establishing the signature's purpose (see above), the party seeking to enforce the signature will want to offer evidence that a reasonable person would have believed he was signing the record.

Electronic Signature Solution Checklist

The decision to adopt an electronic signature solution is one which is up to each individual brokerage, but it is clear that at least the legal barriers to the adoption of this technology have fallen by the wayside. In removing those barriers, new processes and standards have been established which electronic signature users need to be aware of and carefully follow to

⁹ California UETA states that it does not apply to any “law that requires that specifically identifiable text or disclosures in a record ... be separately signed.” In standard CA real estate contracts, there are two such provisions: 1) the liquidated damages clause required under s.1677 and 2) the arbitration clause under s.1678. These clauses were specifically removed from the exclusion, thus allowing real estate contracts to be covered by the UETA.

¹⁰ Cal. Civ. Code §§ 1677 and 1678

assure successful and legally defensible transactions. In selecting a provider for electronic signatures you are going to want to consider these points:



The e-signature process should allow you to 1) designate specific places in the document to be signed, and to 2) require signers to specifically acknowledge (sign) parts of the document as needed.



The e-signature process should accommodate at least one reliable form of attribution, such that there is demonstrable evidence linking the individual to the signature. At a minimum, some form of unique identifier, such as an email address or user ID, should be used to authenticate the signer and should be captured and retained by the system.



The electronic signature solution must a) provide a means of capturing consumer consent in the prescribed manner, b) allow for withdrawal of consent, c) preserve evidence that the consumer did give consent in a manner that reasonably demonstrated the consumer's technical ability to engage in business electronically—and did not withdraw it—at the time of the transaction.



The e-signature process should make it obvious to a new user that the act of “signing” is taking place. This may be accomplished with a combination of written instructions (with an affirmative acknowledgement) and a user experience that visually simulates the familiar signing process, such as placement of a visible and distinctive graphic that resembles a handwritten signature.



The e-signature vendor should demonstrate its ability to preserve evidence of the transaction by providing assurance that its storage system includes ongoing training of personnel, a documented data security plan or policy, audited physical controls, working disaster recovery plan, proven and tested network, hardware and software controls.



The e-signature process should include a robust record of events that, in combination with high data security standards, will withstand scrutiny in court.



The e-signature process should be based on a historically reliable system, such that evidence of the transactional history may be gleaned from the operational reliability of the system used to manage the transaction.