

SIGNING WITHOUT SIGNING

What Estate Planners Should Know About the Federal E-Sign Act and the Texas Uniform Electronic Transactions Act

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WHY ARE WE HERE?

Why not?

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Inspirations

- Online notary bill.
- ACTEC e-mail inquiry.
- Client inquiry.
- Legislative inquiry.

• We'll discuss the **basics** of when you can, and when you can't, use electronic or digital signatures.

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THE FEDERAL E-SIGN ACT

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Electronic Signatures in Global and National Commerce Act

- Enacted in 2000.
- Preempts state laws relating to electronic signatures and transactions.
- Establishes framework for recognizing and enforcing electronic commerce.
- Doesn't replace substantive contract law.
- Just allows electronic signatures to replace "wet" signatures.

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Electronic Signature

- An electronic sound, symbol, or process adopted by a person with the intent to sign a record.
- Actual "signature" not required.
- Could include checking a box, or clicking "Yes" button.

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Exemption to Preemption

- While E-Sign Act initially preempts state laws, it specifically authorizes states to enact the Uniform Electronic Transactions Act (or similar law) to preempt much of the E-Sign Act.
- UETA enacted in 47 states, plus D.C. and U.S. Virgin Islands.

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E-Sign Act Exceptions

- The E-Sign Act specifically does **not** apply to state laws governing:
 1. Wills, codicils, or other testamentary instruments.
 2. Adoption, divorce, or other family law matters.
 3. Most of UCC.
 4. Court orders or official documents.
 5. Notice of termination of utilities.
 6. Notice of default under credit or rental agreement for primary residence.
 7. Notice of termination of health or life insurance.
 8. Recall notice for dangerous product.
 9. Document required for hazardous materials.

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Transaction

- “An action or set of actions relating to the conduct of **business, consumer, or commercial affairs** between **two or more persons**.”
- Specifically includes:
 - Disposition of personal property or services.
 - Disposition of real property.
- By implication, excludes:
 - Actions unrelated to “business, consumer, or commercial affairs.”
 - Unilateral actions.
- Implied exclusions seem to encompass wills, powers of attorney, and advance directives.
- May encompass trusts.
 - If it’s a business trust among at least two persons.

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THE UNIFORM ELECTRONIC TRANSACTIONS ACT

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Uniform Electronic Transactions Act

- Adopted by Uniform Law Commission in 1999.
- Addresses legal requirements that raise barriers to effective use of electronic media.
- But it's not a general contracting or digital signature statute.
 - Substantive rules governing validity of contracts remain unaffected.
 - State law regarding validity of digital signatures is complimented, not supplanted.
- Enacted in Texas in 2001, effective January 1, 2002, without significant change.
 - Bus. & Comm. Code §322.019 preempts E-Sign Act.

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Definitions

- "Electronic" relates to "technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities."
- "Electronic signature" definition is identical to E-Sign Act – an electronic sound, symbol, or process adopted by a person with the intent to sign a record.
- "Record" is information inscribed on tangible medium or stored in retrievable electronic or other medium.
- "Electronic record" is a subset that does not include a paper record.

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Transaction

- Similar, but not identical, to E-Sign Act definition.
- "An action or set of actions occurring between **two or more persons** relating to the conduct of **business, commercial, or government affairs.**"
- Comments exclude unilateral actions, e.g., "execution of will, trust, or a health care power of attorney or similar health care designation [that] does not involve another person."



UETA Exceptions

- The Uniform Act specifically does not apply to state laws governing:
 1. Wills, codicils, or other testamentary instruments.
 2. Most of UCC.
- Comments exclude transactions with no relation to business, commercial, or governmental transactions.
- Implication is that estate planning transactions are excluded from application of the Uniform Act.
- Trusts used for business or commercial purposes might be included, although most substantive laws relating to trusts contain few, if any, requirements for paper or signatures.



Important Distinction

- Note that while the Uniform Act might not apply to the **execution** of a financial power of attorney, there's no reason it wouldn't apply to the **use** of the power of attorney by the agent in a business, commercial, or governmental transaction on behalf of the principal.



Use of Electronic Records or Signatures

- The Uniform Act does not require the use of electronic records or signatures.
- It merely authorizes their use between parties who have agreed to conduct a transaction electronically.
- No specific requirement as to how that agreement is evidenced.
- Context and circumstances, including conduct, may evidence agreement.
- Courts should broadly construe law to recognize new and unforeseen technologies.



Legal Recognition

- Record or signature not rendered unenforceable solely because it is electronic.
- Contract not rendered unenforceable solely because formation includes electronic record.
- Law requiring record to be written is satisfied by electronic record.
- Law requiring signature is satisfied by electronic signature.



Notarization

- Requirement that signature be notarized, acknowledged, verified, or made under oath is satisfied if record includes:
 - Electronic signature of person authorized to perform those acts (*i.e.*, the notary's signature).
 - All other information required by law (*e.g.*, notary's identification number, and commission expiration date).
- Section does not eliminate other requirements of notarial laws (*e.g.*, law requiring notary to be in same room as person signing document).



Other Rules

- Law requiring retention of record is satisfied by retention of electronic record.
- Evidence of record or signature may not be excluded in proceeding solely because of electronic form.
- Contracts may be formed by electronic agents without any person being aware of agreement.
- Electronic record is "sent" when sender hits "Send" and it enters system beyond control of sender.
- Electronic record is "received" when it enters recipient's designated system for receiving electronic records (whether or not recipient knows about it).



OTHER STUFF



Advance Directives

- 2009 amendment to Health & Safety Code authorized use of electronic signatures by principal and witnesses on most advance directives.
 - Also authorized use of notary in lieu of two witnesses
 - But didn't change notary law requirement that notary be in same room.
 - Nor did it change substantive requirement that witnesses be in same room.
- Nothing to do with the Uniform Act. Covers an area excluded from application of E-Sign and UETA.



Online Notarization

- Secretary of State has recognized electronic notarizations, but still required signer to **personally appear** before notary.
- 2017 bill adds new subchapter relating to “online notary publics.”
- “Personal appearance” requirement satisfied by either:
 - Physical appearance before notary, or
 - Two-way audio and video communication with notary meeting requirements to be promulgated by Secretary of State. Think Skype or Facetime.
- Not just any notary may perform online notarization.
 - Requires separate application by notary to be “online notary public.”



Electronic Wills

- Will of Javier Castro “written” on Samsung Galaxy tablet.
- Will of Steve Godfrey with computer-generated signature.
- Will of Duane Horton consisting of handwritten journal entry referring to typed electronic document.
- Nevada Electronic Will Statute.
 - Enacted in 2001, revised in 2017.
- Florida Electronic Wills Act.
 - Enacted in 2017.
 - Vetoed due to concerns over adequacy of identity authentication.
 - But governor encouraged legislature to give it another try.



More on Electronic Wills

- Arizona, California, Indiana, New Hampshire, Virginia, and the District of Columbia recently introduced electronic will legislation.
 - Only Arizona and Indiana proposals have passed to date.
- Australia.
 - Two iPhone wills admitted to probate.
 - But second was in unsent text. How do we know decedent had finalized it?
- Uniform Electronic Wills Act?
 - Working on proposal for final adoption in 2019.
 - Drafts available to view at uniformlaws.org.
 - Chances for passage in Texas?



Professor Langbein's Conclusion

"Let me conclude by repeating that I am of the generation that is not very comfortable with the new information technologies. I would be quite content if this intrusion into the accustomed patterns of testation were not happening. But it is, the cat is out of the bag, and the legal systems must respond. Should we try to devise specific ... criteria for electronic testation, and if so, what dimensions of the process should we seek to govern and how?"



CONCLUSION



Can You Sign It Electronically?

- Wills, codicils, and testamentary trusts?
 - **Nope.**
 - But you may be able to execute the self-proving affidavit using an online notary public soon.
- Inter vivos trusts?
 - **Probably not** unless it's related to some business or commercial purpose.
- Financial powers of attorney?
 - **Nope.**
 - But online notarization of principal's signature may be available soon.
- Advance directives?
 - **Yes, but...**
 - It will become more practical once online notarization becomes available soon.



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