THE TEXAS ELECTRONIC TRANSACTIONS ACT SAYS WHAT?

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THE TEXAS ELECTRONIC TRANSACTIONS ACT SAYS WHAT?

The Texas legislature adopted the Electronic Transactions Act ten years ago with little fanfare. The ETA governs electronic contracts, such as a signature on a card reader at a retail store or "point and click" online purchases. However, the ETA also applies to casual email exchanges between parties with surprising results.

The purpose of this article is to provide an overview of the ETA [Part I] and then examine the impact of the ETA on a transactional practice, including some potentially unintended consequences of its application [Part II].

As used in this paper, the Texas version of the Uniform Electronic Transactions Act will be cited as the "ETA" and it is currently codified at Chapter 322 of the Texas Business and Commerce Code. For the only other Texas article discussing the ETA, *see*, Wiedemer, "Drafting Disasters Regarding Electronic Documents," 2002 Advanced Real Estate Drafting Course [State Bar of Texas].

A valuable source for understanding the ETA is the official publication of the Uniform Electronic Transactions Act, as drafted by the National Conference of Commissioners on Uniform State Laws.

PART I: THE TEXAS ELECTRONIC TRANSACTIONS ACT

1. Why do we have the Texas Electronic Transactions Act?

Prior to the adoption of the ETA, many statues prohibited the use of electronic records and signatures. For example, recording original real estate documents with the county clerk or check retention statues. These restrictions not only inhibited the growth of e-commerce, in many cases they actually prohibited it.

In an effort to remove the barriers, President Clinton signed the Electronic Signatures in Global and National Commerce Act [15 U.S.C. Section 7000, et seq.] in June 2000. With a single stroke of an electronic pen, the Federal E-Signature Act pre-empted all State laws and imposed similar laws as set forth in the draft of the Uniform Electronic Transactions Act, as promulgated by the National Conference of Commissioners on Uniform State Laws. But there was a significant provision in the Federal E-Sign Act: if a State adopts the UETA, then it will over-ride the Federal Act.

In 1999, the National Conference of Commissioners on Uniform State Laws undertook the task of providing a legal framework that would promote efficient business transactions in a world of constantly evolving technology and methods of communication. The drafters correctly understood that putting pen to paper and signing on the dotted line — the traditional method of satisfying the statute of frauds — may become less frequently relied upon. With that goal in mind, the UETA was born and attempted to remove barriers to electronic commerce by providing clear standards for electronic records and signatures and putting them on par with their physical, conventional equivalents. To date, forty-seven states have adopted the UETA, including Texas which adopted it in 2001.

2. Scope of the ETA.

The scope of the ETA, according to its drafters, was intended to be clearly defined so as to avoid surprises for people using the new medium of email and the internet, while also applying to future innovative technology that facilitates electronic transactions. So, the gateway into the ETA is the concept of a "transaction", which TBCC §322.02(15) defines as "an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs."

A limitation in the definition is the "two or more persons" requirement. The ETA does not apply to unilateral [or non-transactional] situations. The definition is also limited to commercial or governmental activities. A transaction includes all interactions between people for business, commercial [including specifically consumers], or governmental purposes. See Comment 12, §322.02. Section 322.003 [discussed at paragraph 5, below] covers the scope of the ETA in greater detail.

The definition might seem to exclude the traditional "consumer transactions." However, Comment 12, §322.02 provides that "[i]t is essential that the term commerce and business be understood and construed broadly to include commercial and business transactions involving individuals who may qualify as "consumers" under other applicable law." It goes on to give an example of Bob and Alice agreeing to the terms of a car sale using an internet auction site. Even though the parties are consumers the transaction was in commerce.

3. Pen and Paper under the ETA.

Probably since the law began, we had an inviolate notion that using pen and paper brought a high level of legal significance to an agreement. It spurred the rule that a written contract could not be varied by prior oral discussions. The statute of frauds provides that real estate contracts are only enforceable if reduced to writing.

Our writing instruments have evolved from hammer/ chisel, plant dyes, charcoal, ink, and toner applied by a printer. The concept of paper has moved from stone tablets, to papyrus, to sheepskin, and finally to 20 pound bond 8x11.5" sheets of recycled fibers. But the ETA radically transforms our traditional notion of a physical object [paper] with a manually inscribed name [ink signature] to things that only virtually exist. To understand the ETA, you have to understand electronic records and electronic signatures.

a. Electronic.

"Electronic" means any technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities. §322.002(5). This definition is purposefully broad and should permit the ETA to remain relevant as new forms of technology develop in the future. Official Comment 4, §322.002, goes further in its discussion of "electronic" in the traditional sense:

> "While not all technologies listed [in the definition] are technically "electronic" in nature (e.g., optical fiber technology), the term "electronic" is the most descriptive term available to describe the majority of current technologies. For example, the development of biological and chemical processes for communication and storage of data, while not specifically mentioned in the definition, are included within the technical definition because such processes operate on electromagnetic impulses. However, whether a particular technology may be characterized as technically 'electronic,' i.e., operates on electromagnetic impulses, should not be determinative of whether records and signatures created, used and stored by means of a particular technology are covered by this Act. This Act is intended to apply to all records and signatures created, used and stored by any medium which permits the information to be retrieved in perceivable form."

b. Electronic Record.

We first have to understand the ETA's definition of the word "record." A record is any information captured on a tangible medium [i.e., traditional paper] or that is stored in an electronic medium [i.e., a hard drive, flash drive, or an audio recording] and is retrievable in a perceivable form. A record includes all examples of storing information, **except human memory**. *See* Official Comment 10, §322.002.

As a subset of the term record, an "electronic record" means any record created, generated, sent, communicated, received, or stored by electronic means. *See* §322.002(7). To dispel any doubt about the breadth of the definition, Official Comment 6, §322.002 provides:

> "Information processing systems, computer equipment and programs, electronic data interchange, electronic mail, voice mail, facsimile, telex, telecopying, scanning, and similar technologies all qualify as electronic under this act. Accordingly information stored on a computer hard drive or floppy disc, facsimiles, voice mail messages, messages on a telephone answering machine, audio and video tape recordings, among other records, all would be electronic records under this Act."

c. Electronic Signature.

Finally, an "electronic signature" includes electronic sounds, symbols, or processes, attached to or logically associated with a record and executed with an intent to sign the electronic record. §322.002(8).

As illustrated in the Commentary, the critical element in the definition of electronic signature is the signer's intent, which is a question of fact. As with any contract, the proof of intent must satisfy other applicable law. It is the intent of the ETA to confirm that the signature may be accomplished through an electronic means. The definition is intentionally broad and no specific technology is required to create a valid signature. The factual inquiry is whether a person purposefully adopted the act [a sound, symbol, or process] with the purpose of signing the record. For example, leaving a voicemail, sending a fax on letterhead, including a name at the conclusion of an email, or checking the "I accept" box when completing an online transaction, are all examples of symbols or processes that, if executed with intent, come under the ETA's definition of electronic signature.

The second critical element of an electronic signature is the necessity that it be associated with the electronic record. A manual signature on paper is easily verified, but in the virtual world of e-commerce, the transaction is typically a series of transmissions. The ETA does not have much guidance on the meaning, other than to say that the symbol must in some way be linked to, or connected with, the electronic record.

In re Marriage of Takusagawa, a case decided by the Kansas Court of Appeals, provides an example of the connection between an electronic signature and electronic record. In *Takusagawa*, the court was

confronted with an issue of first impression: may a party use the statute of frauds to avoid enforcement of an oral divorce settlement agreement involving the transfer of land title that was recited and acknowledged on the record in court. *Takusagawa*, 166 P.3d 440 (Kan. App. Ct. 2007). Essentially, the husband-plaintiff claimed that the agreement was unenforceable because there was no signed writing. The appellate court eventually determined that because the trial court record contained the terms of the agreement and included a clear oral assent by the husband to those terms a signature was not required. However, the court also looked to Kansas' Electronic Transactions Act to support the result. The court stated:

> Several additional considerations reinforce our conclusion that the statute of frauds is no bar to enforcement of this agreement. First, Kansas' adoption in 2000 of the Uniform Electronic Transactions Act (UETA), K.S.A. 2006 Supp. 16-1601 *et seq*., probably makes [the husband's] in-court statement the legal equivalent of a written signature for purposes of the statute of frauds. The record does not disclose the type of equipment used by the court reporter, but it would be quite rare today for a court reporter's equipment not to at least require electricity. The UETA deems records generated by electronic means, including the use of electrical or digital magnetic capabilities, to be electronic records. K.S.A. 2006 Supp. 16-1602(f), (h). The UETA also deems any electronic sound or symbol "adopted by a person with the intent to sign the record" to be an "electronic signature." K.S.A. 2006 Supp. 16-1602(i). The UETA then provides that when a law requires a record or a signature to be in writing, an electronic record or signature will satisfy the law. K.S.A. 2006 Supp. 16-1607(c), (d). Thus, assuming that the court reporter's equipment was consistent with modern practice, it would appear that the electronic capture of [the husband's] oral assent that this was the agreement would satisfy the statute of frauds. No more is needed to show that Mieko made or adopted the agreement.

4. Agreement.

Under the ETA, "*agreement* means the bargain of the parties in fact, as found in their language or inferred from other circumstances and from rules, regulations, and procedures given the effect of agreements under laws otherwise applicable to a particular transaction." §322.002(1).

While there may be an electronic record and an electronic signature, the ETA provides that whether the parties have reached an agreement is determined by the terms in the record and the surrounding circumstances. Furthermore, where the substantive law applicable to a transaction takes account of usage and the conduct of the other party, the "other circumstances" part of the definition becomes relevant.

5. Scope/ Exclusions.

The ETA applies to all electronic records and electronic signatures relating to a transaction, *see* §322.003. Remember, under the definition of "transaction" there must be at least two parties involved in a business relationship.

The drafters recognized that several areas of law needed to be excluded from the ETA. Wills and testamentary trusts are specifically excluded, but the Commentary states this is for clarity, as wills/ trusts do not fall under the definition of a transaction. The ETA excludes all of the UCC, except Articles 2 [Sales] and 2A [Leasing]. The rational is that the excluded sections already have provisions for e-commerce, but there has not been a significant update to the sales and leasing articles.

Section 322.003(c) seems confusing: the ETA *applies* to an electronic record or electronic signature otherwise excluded under subsection (b), to the extent it is governed by another law. The example from the Commentary relates to an electronic record of a check. For the purposes of Article 4 of the UCC, the ETA does not validate so-called electronic checks. But, a law that requires the retention of an electronic image/record of a check can be satisfied by electronic records under the ETA.

Finally, Section 322.003(d) makes a very important clarification for the scope of the ETA. The ETA will validate an electronic record and an electronic signature but, the transaction is still subject to other applicable substantive law. For example, a sales contract must contain both quantity and price terms in order to be enforceable and a real estate contract must have a valid legal description.

Of particular interest to real estate attorneys, the Official Comment 3, §322.003 provides:

> "It is important to distinguish between the efficacy of paper documents involving real estate between the parties, as opposed to their effect on third parties. The latter consideration relates to the necessity of governmental filing. As between the parties, it is unnecessary to maintain existing barriers

> to electronic contracting. There are no unique characteristics to contracts relating to real property as opposed to other business and commercial (including consumer) contracts. Consequently, the decision whether to use an electronic medium for their agreements should be a matter for the parties to determine. In the event notarization and acknowledgment are required under other laws, Section 11 [now TBCC §322.011] provides a means for such actions to be accomplished electronically.

6. Use of Records.

The ETA does not require parties to use electronic records/ signatures. [§322.005(a)]. The ETA only applies to transactions where the parties have agreed to use electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct [§322.005(b)]. The ETA assumes there are two willing parties doing business electronically and it allows a party the right to refuse electronic transactions. But, the Commentary specifically states that in order to facilitate electronic transactions, the circumstances cannot be limited to a "full fledged" contract to use electronics. *See*, Official Comment 3, §322.005.

In one example, a person hands out his business card with his business e-mail address. The Comment concludes that it would be reasonable to infer that he had agreed to communicate electronically for business purposes. But in a limitation, the Commentary cautioned that, in the absence of additional facts, it would not necessarily be reasonable to infer an agreement to communicate electronically for purposes outside the scope of the business indicated by use of the business card. *See*, Official Comment 4, §322.005.

A recent decision from the North Carolina Supreme Court provides an illustration of how a court may examine conduct of the parties to determine whether there has been an agreement to conduct a transaction by electronic means. In *Powell v. City of Newton*, 684 S.E.2d 55 (N.C. App. 2009), plaintiff filed suit alleging that the city had improperly cut and removed timber from his land. Before the trial concluded, the parties informed the court that they had agreed to a settlement. The attorneys dictated the agreed terms into the court record. The plaintiff stated "[y]es, that's my agreement" when asked if he agreed. The attorneys later circulated a settlement agreement and form of deed by email among the parties. Plaintiff then subsequently refused to sign the settlement agreement and claimed that enforcement would violate the statute of frauds. In its analysis, the court noted that North Carolina law states that a "writing . . . is 'signed' in accordance with the statute of frauds if it is signed by the person to be charged" and that the person "to be charged" includes "some other person by him thereto lawfully authorized." The court then stated that "the parties, by their conduct [presumably the exchange of emails containing the terms of the settlement], impliedly agreed to conduct themselves via electronic means, subjecting themselves to the provisions of the Uniform Electronic Transactions Act" and "[p]ursuant to that Act, plaintiff's counsel affixed his electronic signature to emails concerning the transaction."

This section also provides that a party may refuse to conduct other transactions by electronic means, after previously doing so. The right granted by this subsection may not be waived by agreement. The legal effectiveness of a decision to stop doing business electronically will be determined by applicable law and based on the circumstances. [§322.005(c)].

One important provision of the ETA is contained in [§322.005(d)]:

> "Except as otherwise provided in [the ETA], the effect of any of its provisions may be varied by agreement. The presence in certain provisions of [the ETA] of the words "unless otherwise agreed," or words of similar import, does not imply that the effect of other provisions may not be varied by agreement."

There are several sections of the ETA that cannot be waived, such as §322.005(c). But if the parties agree that notwithstanding the use of emails and electronic business, the ETA does not apply to signatures, then only manually signed documents will suffice.

Part (e) is an *essential* provision of the ETA. It clarifies that while the ETA validates an electronic record [i.e., a paper contract] and an electronic signature [i.e., a blue ink manually signed name], you still have to meet the underlying legal requirements for the contract formation. For example, a real estate contract must contain a legal description.

7. Construction of the ETA.

Section §322.006 requires that the ETA **must** be construed and applied to: (1) facilitate electronic transactions consistent with other applicable law; (2) be consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices; and (3) effectuate its general purpose to make the law consistent with all states.

The Official Comment 1 expands the purposes of the ETA with these examples:

(a) facilitate and promote e-commerce by validating and authorizing the use of electronic records and electronic signatures;
(b) eliminate barriers to e-commerce resulting from uncertainties relating to writing and signature requirements;
(c) simplify and modernize the law governing commerce and governmental transactions through the use of electronic means;
(d) permit the continued expansion of e-commerce through custom, usage and agreement of the parties;
(e) promote uniform laws among the states (and worldwide) relating to the use of electronic and similar technological means of effecting and performing commercial and governmental transactions;
(f) promote public confidence in the validity, integrity and reliability of e-commerce; and
(g) promote the development of the legal and business infrastructure necessary to implement electronic commerce and governmental transactions.

Official Comment 2 gives an admonition that the courts should apply the same principals to new and unforeseen technologies and practices. The ETA is intended to be a model for electronic systems developed in the future.

8. Legal Recognition.

Section 322.007 is the cornerstone of the ETA. It says "electronic" is paper and over-rides the statute of frauds:

"(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation."

In the words of Official Comment 1, "[t]his section sets forth the fundamental premise of this Act: namely that the medium in which a record, signature, or contract is created, presented or retained does not affect it's legal significance."

It is important to recognize that the language of §322.007 above includes the word "solely" in both (a) and (b). While the ETA validates the electronic record and signature as paper and ink, it does not mean that the contract is enforceable. For example, if the parties did not agree to conduct business electronically, then the ETA would not apply to the transaction and the ETA would not validate the electronic record. Official Comment 2, §322.007.

The subsections (c) and (d) of §322.007 seem redundant but are included to give a positive statement of subsections (a) and (b):

"(c) If a law requires a record to be in writing, an electronic record satisfies the law.
(d) If a law requires a signature, an electronic signature satisfies the law."

Illustrations 1 and 2 in Comment 3 are particularly illustrative of §322.007. In the first example, an exchange of emails for the sale of widgets fails, not because the documents are not signed records, but because the price term is not included and under UCC §2-201(1), the contract is not enforceable. But the second illustration includes the price and the result is included. Therefore, the contract is valid – even though it is electronic.

9. Notice by Electronic Means.

The purpose of Section 322.008 is to reconcile the ETA's creation of electronic records with other laws that require notice or delivery of information in writing. Section 322.008(a) provides that the statutory requirement is satisfied if the information is sent in an electronic record capable of retention by the recipient at the time of receipt. For example, if a condominium developer is required to deliver a Condominium Information Statement with copies of the Declaration, budgets, etc., then the ETA authorizes the information to be in electronic format.

However, if another law requires the information to be posted or displayed in a certain manner; sent by a specified method; or be formatted in a certain manner:

"(1) the record must be posted or displayed in the manner specified in the other law;
(2) except as otherwise provided in Subsection (d)(2), the record must be sent, communicated, or transmitted by the method specified in the other law; and
(3) the record must contain the information formatted in the manner specified in the other law." §322.008(b).

Official Comment 4 provides:

> if a law requires delivery of notice by first class US mail, that means of delivery would not be affected by this Act. The information to be delivered may be provided on a disc, i.e., in electronic form, but the particular means of delivery must still be via the US postal service. Display, delivery and formatting requirements will continue to be applicable to electronic records and signatures. If those legal requirements can be satisfied in an electronic medium, e.g., the information can be presented in 20 point bold type as required by other law, this Act will validate the use of the medium, leaving to the other applicable law the question of whether the particular electronic record meets the other legal requirements.

10. Attribution to a Person.

Under §322.009 of the ETA, an electronic signature is attributable to the person sending or signing the record. Proof of the person's act may be shown in any manner of attribution at law. The purpose of this section is to assure that the law of attribution will be applied in the electronic environment. The Official Comment 1 provides several examples of attribution:

a. the sender types his name on an e-mail purchase order;
b. the sender's employee, pursuant to authority, types the sender's name on an e-mail purchase order; and
c. the sender programs a computer to order goods automatically when inventory parameters are satisfied, to issue a purchase order with his name, or other identifying information, as part of the order.

11. Effect of Change or Error.

In any contractual situation, and especially with computerized transactions, changes or errors can occur. Under Official Comment 1, an example of a change in the documentation is the buyer's order of 100 widgets that is received as 1,000 on the seller's system. An example of an error is the buyer's transmission of an order for 1,000 widgets, but the buyer only intending to order 100. If a change or error occurs, the provisions of §322.010 will apply.

The specific rules are very fact specific and beyond the scope of this paper. However, the ETA preserves [and incorporates] the law of error and mistake to the resolution of the problem. §322.010(d).

12. Notarization and Acknowledgement.

Section 322.011 provides as follows:

> If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.

According to the Official Comment, the ETA "permits a notary public and other authorized officers to act electronically, effectively removing the stamp/seal requirements." The example from the Official Comment says that a buyer may send a notarized Real Estate Purchase Agreement via e-mail. The ETA requires the notary to be in the room with the buyer, verify the buyer's identity, and complete the notary statement. So long as all of the steps are reflected as part of the electronic Purchase Agreement with the notary's electronic signature notarization is valid.

13. Retention of Electronic Records; Original.

One of the sweeping goals for the ETA was to eliminate any restrictions on the use of electronic records. As noted in the Official Comment 6, "a Report compiled by the Federal Reserve Bank of Boston identifies hundreds of state laws which require the retention or production of original canceled checks. Such requirements preclude banks and their customers from realizing the benefits and efficiencies related to truncation processes otherwise validated under current law. The benefits to banks and their customers from electronic check retention are effectuated by this provision."

§322.012(a) states: "[i]f a law requires that a record be retained, the requirement is satisfied by retaining an electronic record of the information in the record which: (1) accurately reflects the information set forth in the record after it was first generated in its final form as an electronic record or otherwise; and (2) remains accessible for later reference."

There are two requirements in this provision. The information must be accurately recorded, in accordance with the requirements of the Federal Rules of Evidence. Second, the information must remain accessible. As technology changes, the information must be converted to the current format in order to remain usable.

Section 322.012 provides that electronically stored information is valid for all purposes, including audit, evidentiary, and archival. Under this Section, original written records may be converted to electronic records and, in the absence of specific requirements to retain written records, the original records may be destroyed.

14. Admissibility.

An electronic record or signature may not be excluded from evidence, solely because it is in electronic form. However, the admissibility of the evidence is subject to the other rules of evidence. *See* §322.013.

15. Transferable Records.

Section 322.016 contains rigorous requirements for the so-called paperless promissory notes. It requires a storage/ retrieval system that protects the record and assures that any transfers are securely registered. A special requirement is that the document must provide that it is a "transferable record." When the requirements are satisfied, the transferable record can be negotiated to a holder in course, as provided in Article 3 of the UCC. *See* §322.016

PART II: SPECIAL CONSIDERATIONS.

This paper started as a discussion topic with the Dallas Bar Association's Real Property Discussion Group [a/k/a the Wallenstein Breakfast Group]. The purpose was to consider the impact of the ETA on attorneys and clients. The following scenarios illustrate circumstances where the ETA can have an unintended consequence.

1. Exchange of Documents.

A casual exchange of emails between clients can create an accidental contract. Suppose Sam, a vice president of Seller, LLC, sends an email Barbra, as the Manager of Buyer, LLC. The email has a contract proposal in Word and Sam intends it as a draft [in his mind] but without any limitation in the email. The email has a standard footer that includes Sam's name and the Company name. Is it a signed offer? Assume that the contract contains all of the elements of a real estate contract. Further assume that, after reviewing the draft, Barbra replies, this looks good, I am glad we have a deal. Barbra." Has she accepted the contract? Here is analysis under the ETA:

a. **Is it a Transaction?** The ETA applies to the example because there is a set of actions between two parties relating to a business or commercial transaction. §322.002(15).
b. **Did the parties agree to an Electronic Transaction?** The parties certainly appear to have agreed to do business electronically, based on the exchange of emails. §322.005(b).
c. **Is this an Electronic Record?** Yes, the emails are part of an electronic storage system. §322.002(7).
d. **Is there an Electronic Signature?** Yes, the emails includes the names of the parties. §322.002(15).
e. **Is this an Agreement?** According to the ETA, an agreement means "the bargain of the parties in fact, as found in their language or inferred from other circumstances and from rules, regulations, and procedures given the effect of agreements under laws otherwise applicable to a particular transaction." §322.002(1). While the seller did not intend for the email to be a contract offer, the language of the email does not give any indication that the contract was a draft for discussion.
f. **Do the emails satisfy the statute of frauds?** Yes, an electronic record and signature will satisfy the statue of frauds. §322.007(c) and (d).

To avoid the possibility of the email being interpreted as an offer or an acceptance, consider adding "draft" as a watermark to e-documents.

2. Email Footers.

We have all seen a growing number of auto-generated footers on emails: consider the environment before printing, disclaimer of tax advice, support [insert your favorite charity], etc. The following disclaimers were pulled from email footers:

> Example 1: "The Sender disavows any intention to create an agreement or an electronic signature by means of this transmission."

> Example 2: "This communication does not constitute an intention by the sender to conduct a transaction or make any agreement or contract by electronic means. Nothing contained herein or in any attached electronic file shall satisfy the requirements for a writing, nor constitute a contract or electronic signature, as those terms are defined in or contemplated by the Electronic Signatures In Global And National Commerce, 15 U. S. C. Section 7000 et seq. or any version of the Uniform Electronic Transaction Act adopted by any state or any other statute governing electronic transactions."

> Example 3: "Neither this e-mail communication nor any attachment to this e-mail will be contractual in any manner; provided, however, that if this message or an attached legal document contains the word "contract," "agreement," "agreed" or a similar word or words in its title and clearly states its contractual nature, then this message or such legal document will be deemed contractual to the extent so clearly stated."
>
> Example 4: "This communication does not reflect an intention by the sender to conduct a transaction or make any agreement by electronic means. Nothing contained in this message or in any attachment shall satisfy the requirements for a writing, and nothing contained herein shall constitute a contract or an electronic signature under the electronic Signature in Global and National Commerce Act, any version of the Uniform Electronic Transmissions Act or any other statute governing electronic transactions."

How effective are these messages to deny electronic signature or record? Clearly number three only establishes that notwithstanding the message, the "other circumstances" will control. But in light of the ETA, as discussed above, would number 1 really over-ride a clear message saying "I offer the sell 10 widgets for $1,000 each to be delivered to your office"?

3. Notice Clauses.

Practically every contract has a notice clause. For example:

> Section *. Notices. All notices under this Contract must be in ***writing*** and will be deemed effective either (a) on the date personally delivered to the address indicated herein, as evidenced by written receipt therefore, whether or not actually received by the person to whom addressed; (b) upon the fourth (4th) day after deposit in the United States mail if by certified or registered mail, return receipt requested, addressed to the intended recipient at the address indicated herein; or (c) on the first business day after deposit into the custody of a nationally recognized overnight delivery service such as Federal Express, addressed to such party at the address indicated herein (unless changed by similar notice in writing given by the particular person whose address is to be changed). ***Notices may also be given by fax or email if a fax number or email address is specified below***. Any such notices shall be effective upon receipt of the same by the party to whom the notice is directed.

a. In light of the ETA, assuming the buyer/ seller have used emails, do we now agree that an email exchange is in fact a signed writing?
b. In light of the ETA, assuming the buyer/ seller have used emails, does the contract need to include the express authorization of email/ fax to be a valid form of delivery?
c. If the intent is to limit the delivery of notice to hand delivery, certified mail, or over-night delivery service, the contract needs an express limitation in accordance with §322.005(d).

4. Electronic Amendments.

Most contracts also include standard clauses regarding amendments, for example:

> Section * Amendments. This Contract may not be modified or amended, except by an agreement ***in writing signed by Seller and Buyer***. The parties may waive any of the conditions contained herein or any of the obligations of the other party hereunder, but any such waiver will be effective only if in writing and signed by the party waiving such conditions or obligations.

a. In light of the ETA, assuming the buyer/ seller have used emails, do we now agree that an email exchange is in fact a signed writing?
b. Does this leave open a possibility that the parties can casually exchange emails and amend the contract?
c. If the intent is to prevent electronic amendments, the contract needs an express limitation in accordance with §322.005(d).
d. Following the discussion presentation to the Wallenstein Group, a participant sent this email: "I have one client that includes a provision in its contracts that expressly states it may not be executed electronically nor may it be amended by email or electronically."
e. One consideration would be to add a negation of electronic signatures, except

for an actual signed paper that is scanned as an image.

f. California Contract. A California unimproved land contract form contains a definition of "Electronic Copy" and "Electronic Signature" incorporating the California statutory definitions. The Contract specifically negates the application of the California Electronic Transactions Act "without the knowledge and consent of the other." This clause seems to add more confusion than clarity to the issue of the applicability of the ETA. The State Bar of Texas forms do not address the ETA.

g. Negotiation Agreement. The author was preparing a Negotiation Agreement for a lender client to meet with the borrowers. In looking at the "standard" amendment clause in the Negotiation Agreement, in light of the ETA, I was concerned that there could be unintentional amendments as parties exchanged emails [i.e. written signed records]. Here is an alternate clause:

> "We anticipate that the discussions will be lengthy and complex and will involve proposals and offers back and forth between the parties. Such discussions will be deemed to be conditional only until such time as the final agreement of the parties, if any, is reduced to writing and signed by all parties. For the purpose of this agreement, the parties expressly agree that the provisions of the Electronic Transactions Act do not apply to the exchange of emails or voicemails in connection with this agreement, except a PDF image of a signed final agreement."

5. Rule 11 TRCP.

Rule 11 of the Texas Rules of Civil Procedure provides that an agreement between parties or clients, must be in writing [and filed with the Court] to be enforceable.

Can two emails between lawyers in litigation inadvertently constitute a Rule 11 agreement, binding on the clients?

6. E-Signature Agreement.

How can you capture an electronic signature for a real estate closing? Suppose a client is away from his office and cannot print, sign, and scan a signed document? However, as part of the closing, you need to deliver a signed consent to the title company in order to release funds. Consider an "E-Signature Agreement." For example, the title company can send an email to the client with the document attached as a pdf [or, an Electronic Record] with this message:

> "Big Title Company has attached a pdf image of [*Insert name of document, e.g. Release of Earnest Money*] for your signature. Pursuant to the Uniform Electronic Transactions Act as adopted by the State of Texas, you affirm to us that you agree with the terms thereof and by your affirmative response to this email, you are executing the document and intending to attach your Electronic Signature to it. Furthermore you acknowledge that we can rely on your email response as your signature. Your affirmative response will be a contract under Texas law."

As noted in the Article above [see, paragraph 12 and §322.011], if the document has to be notarized, you can include the notary's statement in the document and include the following for the notary to give a separate email response to the following:

> "[*Insert Notary's name*] certify to Big Title Company, pursuant to the Uniform Electronic Transactions Act as adopted by the State of Texas, that I am a notary public in and for the State of Texas, that my commission expires on _____. I was present with _____ [*insert signatory's name*] at the time that he sent his email confirming the Electronic Signature on the [*insert name of document*]. All necessary acts were taken to complete the notarization including the acknowledgment within the document. I affirm to you by my affirmative response to this email, I am executing the document as a notasry public and I am hereby attaching my official stamp and seal, intending this to be my Electronic Signature. Furthermore I acknowledge that you can rely on this email response as my signature."

7. Cases.

a. *Brooks v. Metiscan Technologies, Inc.*, 2009 WL 3087258 (Tex. App.-Dallas, 2009) (employment case where parties disputed whether there was a binding settlement).

> **Facts**: Brooks made a claim for deferred compensation against the company. The parties met with counsel and reached an oral

agreement. Following the meeting the company's lawyer sent a confirming email as a "summary term sheet" [court's words]. The employee's lawyer responded by email with some comments/ objections. Then the company's lawyer sent a settlement agreement, marked for "review and comment." In the end, the parties broke off the negotiations and the employee filed suit to enforce the email settlement agreement.

Trial Court's Ruling: The trial court granted the company's MSJ and found: (1) the agreement lacked material terms and was not a contract; (2) the subsequent actions showed the agreement did not contain the essential elements; (3) the email did not contain an electronic signature; and (4) the employee's attorney's email response was a counter-offer.

Dallas Appellate Court. The appellate court addressed the first point of appeal and concluded that the trial court correctly held that the memo/ email exchanges did not contain all essential terms and therefore was not a contract. The appellate court's finding precluded any further discussion of the appellate points, including the issue of whether an email contained an "electronic signature."

Issues.

1. Whether they hold up or not, any party can allege that two or more emails constitute an enforceable agreement.
2. We have no guidance regarding the trial court's reasoning regarding the "electronic signature."
3. The courts will look at all circumstances to determine whether the parties overall actions reflect a binding contract.

b. *In re Marriage of Takusagawa*, 166 P.3d 440 (Kan. App. Ct. 2007) (divorce case where the court was justifying its decision to enforce a divorce decree based on the husband's oral assent) [Citations/ footnotes omitted].

"Several additional considerations reinforce our conclusion that the statute of frauds is no bar to enforcement of this agreement. First, Kansas' adoption in 2000 of the Uniform Electronic Transactions Act, probably makes Mieko's in-court statement the legal equivalent of a written signature for purposes of the statute of frauds. The record does not disclose the type of equipment used by the court reporter, but it would be quite rare today for a court reporter's equipment not to at least require electricity. The UETA deems records generated by electronic means, including the use of electrical or digital magnetic capabilities, to be electronic records. The UETA also deems any electronic sound or symbol "adopted by a person with the intent to sign the record" to be an "electronic signature." The UETA then provides that when a law requires a record or a signature to be in writing, an electronic record or signature will satisfy the law. Thus, assuming that the court reporter's equipment was consistent with modern practice, it would appear that the electronic capture of Mieko's oral assent that this was the agreement would satisfy the statute of frauds. No more [evidence] is needed to show that Mieko made or adopted the agreement."

Issue. With the court's willingness to use a voice recorded court reporter's transcription as a valid record/ signature, suppose someone surreptitiously records a meeting, can that be a contract?

c. *Peruta v. Outback Steakhouse of Florida, Inc.*, 913 A.2d 1160 (Conn. Super. 2006) (employment case where waiters sued employers claiming they were underpaid) [Citations/ footnotes omitted].

"During his testimony, Scacca was shown what was there described as a "Connecticut Department of Labor Wage and Workplace Standards Division Tip Statement." As the defendant points out, this sample form, which the plaintiffs claim Outback Steakhouse should have been using, misstates the law. Scacca's testimony was that he had not seen the form before, which is not an admission of a violation. He then went on to testify that employees declared their tips in the computer when they clocked out daily and filled out a "checkout form" not otherwise there identified. The defendant asserts that this process of logging in constitutes a "signed statement" under the Connecticut Uniform Electronic Transactions Act. Whether such entries constitute a

"signature" under the Connecticut Uniform Electronic Transactions Act is a question of law to be decided by the court at trial since statutory interpretation is a court function. Nor is the testimony of either Kadow or Lancaster helpful to the plaintiffs on this point. The excerpted testimony from Kadow establishes only that the state department of labor website form (the so-called "tip credit statement") was not one he had seen before. That portion of Lancaster's testimony to which the plaintiffs direct the court establishes only that a "check-out form" was used by employees to acknowledge tips received. Thus, the court has not been provided with any "admission" which may be offered as generalized proof."

Issue. Can employee notes in a computer as part of the job become an electronic record/ signature and therefor an admission in a trial? What if someone makes an entry into their outlook calendar?

Appendix 1

Selected Provisions from
Chapter 322, Uniform Electronic Transactions Act

Sec. 322.002. DEFINITIONS. In this chapter:

(1) "Agreement" means the bargain of the parties in fact, as found in their language or inferred from other circumstances and from rules, regulations, and procedures given the effect of agreements under laws otherwise applicable to a particular transaction.

(2) "Automated transaction" means a transaction conducted or performed, in whole or in part, by electronic means or electronic records, in which the acts or records of one or both parties are not reviewed by an individual in the ordinary course in forming a contract, performing under an existing contract, or fulfilling an obligation required by the transaction.

(3) "Computer program" means a set of statements or instructions to be used directly or indirectly in an information processing system in order to bring about a certain result.

(4) "Contract" means the total legal obligation resulting from the parties' agreement as affected by this chapter and other applicable law.

(5) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(6) "Electronic agent" means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual.

(7) "Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means.

(8) "Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.

(9) "Governmental agency" means an executive, legislative, or judicial agency, department, board, commission, authority, institution, or instrumentality of the federal government or of a state or of a county, municipality, or other political subdivision of a state.

(10) "Information" means data, text, images, sounds, codes, computer programs, software, databases, or the like.

(11) "Information processing system" means an electronic system for creating, generating, sending, receiving, storing, displaying, or processing information.

(12) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(13) "Security procedure" means a procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person or for detecting changes or errors in the

information in an electronic record. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or callback or other acknowledgment procedures.

(14) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band, or Alaskan native village, which is recognized by federal law or formally acknowledged by a state.

(15) "Transaction" means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs.

Sec. 322.003. SCOPE.

(a) Except as otherwise provided in Subsection (b), this chapter applies to electronic records and electronic signatures relating to a transaction.

(b) This chapter does not apply to a transaction to the extent it is governed by:

(1) a law governing the creation and execution of wills, codicils, or testamentary trusts; or

(2) the Uniform Commercial Code, other than Sections 1.107 and 1.206 and Chapters 2 and 2A.

(c) This chapter applies to an electronic record or electronic signature otherwise excluded from the application of this chapter under Subsection (b) when used for a transaction subject to a law other than those specified in Subsection (b).

(d) A transaction subject to this chapter is also subject to other applicable substantive law.

Sec. 322.005. USE OF ELECTRONIC RECORDS AND ELECTRONIC SIGNATURES; VARIATION BY AGREEMENT.

(a) This chapter does not require a record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form.

(b) This chapter applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.

(c) A party that agrees to conduct a transaction by electronic means may refuse to conduct other transactions by electronic means. The right granted by this subsection may not be waived by agreement.

(d) Except as otherwise provided in this chapter, the effect of any of its provisions may be varied by agreement. The presence in certain provisions of this chapter of the words "unless otherwise agreed," or words of similar import, does not imply that the effect of other provisions may not be varied by agreement.

(e) Whether an electronic record or electronic signature has legal consequences is determined by this chapter and other applicable law.

Sec. 322.006. CONSTRUCTION AND APPLICATION. This chapter must be construed and applied:

(1) to facilitate electronic transactions consistent with other applicable law;

(2) to be consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices; and

(3) to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.

Sec. 322.007. LEGAL RECOGNITION OF ELECTRONIC RECORDS, ELECTRONIC SIGNATURES, AND ELECTRONIC CONTRACTS.

(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.

(c) If a law requires a record to be in writing, an electronic record satisfies the law.

(d) If a law requires a signature, an electronic signature satisfies the law.

Sec. 322.008. PROVISION OF INFORMATION IN WRITING; PRESENTATION OF RECORDS.

(a) If parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt. An electronic record is not capable of retention by the recipient if the sender or its information processing system inhibits the ability of the recipient to print or store the electronic record.

(b) If a law other than this chapter requires a record (i) to be posted or displayed in a certain manner, (ii) to be sent, communicated, or transmitted by a specified method, or (iii) to contain information that is formatted in a certain manner, the following rules apply:

(1) the record must be posted or displayed in the manner specified in the other law;

(2) except as otherwise provided in Subsection (d)(2), the record must be sent, communicated, or transmitted by the method specified in the other law; and

(3) the record must contain the information formatted in the manner specified in the other law.

(c) If a sender inhibits the ability of a recipient to store or print an electronic record, the electronic record is not enforceable against the recipient.

(d) The requirements of this section may not be varied by agreement, but:

(1) to the extent a law other than this chapter requires information to be provided, sent, or delivered in writing but permits that requirement to be varied by agreement, the requirement under Subsection (a) that the information be in the form of an electronic record capable of retention may also be varied by agreement; and

(2) a requirement under a law other than this chapter to send, communicate, or transmit a record by first class mail may be varied by agreement to the extent permitted by the other law.

Sec. 322.009. ATTRIBUTION AND EFFECT OF ELECTRONIC RECORD AND ELECTRONIC SIGNATURE.

(a) An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.

(b) The effect of an electronic record or electronic signature attributed to a person under Subsection (a) is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law.

Sec. 322.010. EFFECT OF CHANGE OR ERROR.

(a) If a change or error in an electronic record occurs in a transmission between parties to a transaction, the rules provided by this section apply.

(b) If the parties have agreed to use a security procedure to detect changes or errors and one party has conformed to the procedure, but the other party has not, and the nonconforming party would have detected the change or error had that party also conformed, the conforming party may avoid the effect of the changed or erroneous electronic record.

(c) In an automated transaction involving an individual, the individual may avoid the effect of an electronic record that resulted from an error made by the individual in dealing with the electronic agent of another person if the electronic agent did not provide an opportunity for the prevention or correction of the error and, at the time the individual learns of the error, the individual:

(1) promptly notifies the other person of the error and that the individual did not intend to be bound by the electronic record received by the other person;

(2) takes reasonable steps, including steps that conform to the other person's reasonable instructions, to return to the other person or, if instructed by the other person, to destroy the consideration received, if any, as a result of the erroneous electronic record; and

(3) has not used or received any benefit or value from the consideration, if any, received from the other person.

(d) If neither Subsection (b) nor Subsection (c) applies, the change or error has the effect provided by other law, including the law of mistake, and the parties' contract, if any.

(e) Subsections (c) and (d) may not be varied by agreement.

Sec. 322.011. NOTARIZATION AND ACKNOWLEDGMENT. If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.

Sec. 322.012. RETENTION OF ELECTRONIC RECORDS; ORIGINALS.

(a) If a law requires that a record be retained, the requirement is satisfied by retaining an electronic record of the information in the record which:

(1) accurately reflects the information set forth in the record after it was first generated in its final form as an electronic record or otherwise; and

(2) remains accessible for later reference.

(b) A requirement to retain a record in accordance with Subsection (a) does not apply to any information the sole purpose of which is to enable the record to be sent, communicated, or received.

(c) A person may satisfy Subsection (a) by using the services of another person if the requirements of that subsection are satisfied.

(d) If a law requires a record to be presented or retained in its original form, or provides consequences if the record is not presented or retained in its original form, that law is satisfied by an electronic record retained in accordance with Subsection (a).

(e) If a law requires retention of a check, that requirement is satisfied by retention of an electronic record of the information on the front and back of the check in accordance with Subsection (a).

(f) A record retained as an electronic record in accordance with Subsection (a) satisfies a law requiring a person to retain a record for evidentiary, audit, or like purposes, unless a law enacted after January 1, 2002, specifically prohibits the use of an electronic record for the specified purpose.

(g) This section does not preclude a governmental agency of this state from specifying additional requirements for the retention of a record subject to the agency's jurisdiction.

Sec. 322.013. ADMISSIBILITY IN EVIDENCE. In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form.

Sec. 322.014. AUTOMATED TRANSACTION.

(a) In an automated transaction, the rules provided by this section apply.

(b) A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements.

(c) A contract may be formed by the interaction of an electronic agent and an individual, acting on the individual's own behalf or for another person, including by an interaction in which the individual performs actions that the individual is free to refuse to perform and which the individual knows or has reason to know will cause the electronic agent to complete the transaction or performance.

(d) The terms of the contract are determined by the substantive law applicable to it.

Sec. 322.016. TRANSFERABLE RECORDS. (a) In this section, "transferable record" means an electronic record that:

(1) would be a note under Chapter 3, or a document under Chapter 7, if the electronic record were in writing; and

(2) the issuer of the electronic record expressly has agreed is a transferable record.

(b) A person has control of a transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred.

(c) A system satisfies Subsection (b), and a person is deemed to have control of a transferable record, if the transferable record is created, stored, and assigned in such a manner that:

(1) a single authoritative copy of the transferable record exists which is unique, identifiable, and, except as otherwise provided in Subdivisions (4), (5), and (6), unalterable;

(2) the authoritative copy identifies the person asserting control as:

(A) the person to which the transferable record was issued; or

(B) if the authoritative copy indicates that the transferable record has been transferred, the person to which the transferable record was most recently transferred;

(3) the authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;

(4) 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;

(5) 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

(6) any revision of the authoritative copy is readily identifiable as authorized or unauthorized.

(d) Except as otherwise agreed, a person having control of a transferable record is the holder, as defined in Section 1.201, of the transferable record and has the same rights and defenses as a holder of an equivalent record or writing under the Uniform Commercial Code, including, if the applicable statutory requirements under Section 3.302(a), 7.501, or 9.330 are satisfied, the rights and defenses of a holder in due course, a holder to which a negotiable document of title has been duly negotiated, or a purchaser, respectively. Delivery, possession, and indorsement are not required to obtain or exercise any of the rights under this subsection.

(e) Except as otherwise agreed, an obligor under a transferable record has the same rights and defenses as an equivalent obligor under equivalent records or writings under the Uniform Commercial Code.

(f) If requested by a person against which enforcement is sought, the person seeking to enforce the transferable record shall provide reasonable proof that the person is in control of the transferable record. Proof may include access to the authoritative copy of the transferable record and related business records sufficient to review the terms of the transferable record and to establish the identity of the person having control of the transferable record.