

What Are the Rules Governing the Use of Electronic Signatures?

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In an era of remote meetings and contact-less engagements in the face of COVID-19, lawyers, judges, clients and businesses may be wondering:

- What are the rules or laws governing use of an electronic signature or e-signature?

WHAT IS AN E-SIGNATURE?

The Electronic Signatures in Global and National Commerce Act (ESIGN Act), passed in 2000, defines an e-signature as any "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." 15 U.S.C. § 7006. Examples of e-signatures include, but are not limited to: scanned copies of a "wet ink" signature; a signature created by hand on a device using a finger or stylus; a typed name; a video signature; or a record of an "I agree" box. Another type of e-signature is the digital signature, created using a mathematical algorithm, often provided by a commercial company such as DOCUSIGN, IDENTRUST or ADOBE SIGN. The ESIGN Act provided for the presumed validity of e-signatures by establishing that "a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form." 15 U.S.C. § 7001.

WHEN CAN E-SIGNATURES BE USED?

The Uniform Electronic Transactions Act, or UETA, aims to remove barriers to electronic commerce and validate the use of electronic records and signatures. Nearly all states—including Virginia—have passed UETA. Virginia Code Ann. §59.1-479-59.1-476. Unless explicitly stated otherwise or an exception applies, e-signatures are permissible. Before deploying use of e-signatures, there are important facets of Virginia's e-signature law to consider.

First, Virginia's UETA permits the use of e-signatures if each party "has agreed to conduct transactions by electronic means—an agreement to conduct a transaction electronically may not be contained in a

standard form contract unless that term is conspicuously displayed and separately consented to.? This means that electronic signatures may only be used if the parties agree to conduct the transaction by electronic means. Whether the parties agree to conduct a transaction electronically may be determined by: 1) the facts and circumstances of the transaction, including the parties? conduct; 2) a separate agreement authorizing the transaction to be conducted electronically; or 3) language contained within a contract that is conspicuously displayed and separately consented to. Va. Code. Ann. § 59.1-483. Furthermore, a party?s consent to conduct a transaction electronically may not be inferred solely from the fact that the party has utilized electronic means to submit payment to an account.

Second, an e-signature is only valid and enforceable if there is evidence of the signatory?s intent to execute or accept the agreement. Evidence may include actions such as affirmatively clicking ?I agree? in an agreement, or signing using a finger, or typing your name into an agreement. Thus, an e-signature is likely to be deemed enforceable as long as the signatory?s intent may be discerned from the circumstances, including email and text messages.

Third, Virginia?s UETA does not govern a transaction if it relates to the creation and execution of wills, codicils, or testamentary trusts.

IS ELECTRONIC AND REMOTE NOTARIZATION PERMISSIBLE IN VIRGINIA?

Yes?Virginia permits electronic notarization of signatures. Va. Code Ann. 59.1-489. Electronic notarization, or e-notarization, means that both the notary and signatory utilize electronic signatures. However, other elements of a traditional notary encounter still apply, most importantly, the requirement that a signatory appear before the notary.

Remote online notarization is different from e-notarization. In remote online notarization, a signatory appears before the notary using audio-visual technology. In this way, a notary may be present in a different room, building or state from the signatory. Virginia also permits remote online notarization.

E-SIGNATURE POLICIES

As the use of e-signatures becomes more prevalent among lawyers, judges, clients and businesses, it may be useful to memorialize a policy for the use of e-signatures. Such policies can elaborate issues such as:

- Who is authorized within the organization to utilize e-signatures?
- Limitations of such policies to entities based in the United States for domestic transactions, as cross-border transactions will likely implicate international law (with differing requirements).
- What types of transactions are appropriate for e-signature?
- What department within the company will oversee the administration of the e-signature policy?

While these issues are not exclusive, they are ones an organization should consider when developing and maintaining an e-signature policy.

Whether organizations adopt the use of e-signatures as a long-term undertaking, or as a short-term solution during COVID 19 restrictions, it is helpful to be aware of when e-signatures are valid and enforceable. Specific industries, jurisdictions, courts and areas of the law may still require "wet ink" signatures, so parties should confer with counsel or consult local rules prior to undertaking e-signatures for any transaction.

Please note: This alert contains general, condensed summaries of actual legal matters, statutes and opinions for information purposes. It is not meant to be and should not be construed as legal advice. Readers with particular needs on specific issues should retain the services of competent counsel.

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