

# Clients & Friends Memo

## COVID-19 Update: Practical Guide to Electronic Signatures

April 1, 2020

The COVID-19 pandemic has unexpectedly required lawyers and, in many circumstances, judges to attempt to operate in a remote work environment. This abrupt change has heightened the importance of relying on electronic signatures and notarization, in lieu of traditional “wet ink.” This article discusses the applicable laws and practical guidance for ensuring valid e-signatures and notarizations.

### **A. Laws Validating E-Signatures**

For a number of years, both federal and state laws have permitted the use of e-signatures. At the federal level, the **Electronic Signatures in Global and National Commerce Act (“ESIGN”)**, effective since 2000, “facilitate[s] the use of electronic records and signatures in interstate or foreign commerce.” 15 U.S.C. § 7001, *et seq.* It provides that a transaction or document “may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.” *Id.* Similarly, legislatures in nearly all the states and the District of Columbia have passed the **Uniform Electronic Transactions Act (“UETA”)**, which has substantially the same provisions regarding e-signatures as ESIGN. Although New York has adopted its own legislation, the **Electronic Signature and Records Act (“ESRA”)**, it similarly confers on electronic signatures the same validity and effect as a “signature affixed by hand.” *See* NYS Technology Law § 304(2) (2013). The net effect of these laws is that every jurisdiction in the United States has substantially the same rules for the use of electronic signatures.

### **B. How to Affix An E-Signature**

The e-signature laws do not specify any particular technology or method for affixing an electronic signature. The e-signature can be 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.” *See* 15 U.S.C. § 7006. The only other requirement is that the electronic record of the contract must be capable of being retained and reproduced. *See* 15 U.S.C. § 7001; UETA § 8. Accordingly, electronic signatures include signatures in emails, PDFs, and faxes and digital signatures<sup>1</sup> provided by processes offered by commercial firms, such as DocuSign and

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<sup>1</sup> Digital signatures are more secure versions of electronic signatures. A digital signature will usually contain algorithms or encryptions unique to both the document and the signor and will often be time-stamped. *See, e.g.*, Wash. Rev. Code Ann.

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Adobe Sign, so long as they are affixed to or associated with the relevant agreement with an intent to sign by the persons providing them.

**C. Types of Documents that Can Be Signed Electronically**

Contracts are creatures of state law, and therefore the legal sufficiency and enforceability of a signature – whether wet or electronic – depends on the laws governing the contract, as well as the signature specifications within the contract, and the transaction type (*e.g.*, state statutes of frauds relating to real estate transfers). In the absence of language specifically prohibiting e-signatures, or an express exception, e-signatures are presumptively valid when executing a contract, letter or email correspondence. Practically speaking, it is advisable when drafting a contract to specify in the agreements that e-signatures are valid, with reference to the statutes permitting their use.

The e-signature laws have various carve-outs worth noting. The Federal ESIGN Act includes a limited number of exceptions—*e.g.*, wills, certain non-Article 2 UCC transactions, divorce decrees and the transfer of real property—in which e-signatures are not valid. The federal ESIGN law also lists official court documents as an exception (*see* 15 USC § 7003(b)(1)), however, federal and state courts have well-established electronic filing and access systems. These systems use electronic signatures and documents allowing for the filing of briefs, pleadings and other papers. Practitioners should check the local rules of the court to confirm the validity of an e-signature on official court documents, including, in particular, affidavits and stipulations. The UETA similarly contains exceptions for non-Article 2 UCC transactions, testamentary matters, and transactions subject to the Uniform Computer Information Transaction Act. In New York, the ESRA excludes e-signatures on certain estate planning documents, appointments of fiduciaries, and certain health-care related consents.<sup>2</sup>

**D. Electronic Notarization**

The disruption caused by COVID-19 has prompted at least temporary measures allowing for electronic notarization in at least one state. In New York, effective March 22, 2020 until April 18, 2020, any notarial act that is required under New York state law is authorized to be performed utilizing audio-video technology provided that the following conditions are met:

- The person seeking the Notary's services, if not personally known to the Notary, must present valid photo ID to the Notary during the video conference, not merely transmit it prior to or after the conference;

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§ 19.34.020 (West). A valid digital signature will therefore authenticate the identity of the signor and ensure that the underlying document has not been altered.

<sup>2</sup> The ESIGN and UETA do not permit e-signatures for promissory notes governed by Article 3 of the UCC. The ESRA does not have the same broad exclusion for matters governed by the UCC. Local recording officers can elect to participate in the electronic recording of instruments affecting real property, which is referred to generally as e-Recording.

- The video conference must allow for direct interaction between the person and the Notary (*e.g.*, no pre-recorded videos of the person signing);
- The person must affirmatively represent that he or she is physically situated in the State of New York;
- The person must transmit by fax or electronic means a legible copy of the signed document directly to the Notary on the same date it was signed;
- The Notary may notarize the transmitted copy of the document and transmit the same back to the person; and
- The Notary may repeat the notarization of the original signed document as of the date of execution provided the Notary receives such original signed document together with the electronically notarized copy within thirty days after the date of execution.

*See* NY State Executive Order No. 202.7. According to guidance issued by the New York Department of State on March 25, 2020, if the notary and signatory are in different counties, the notary should indicate on the document the county in which each person is located. In addition, when performing remote notarization, the document should indicate that the notarization was made pursuant to Executive Order No. 202.7.

#### **E. Conclusion**

Although e-signature laws have been in effect for a number of years, they may not have been commonly used by workers in offices. With a drastic shift to a remote working environment, the use of e-signatures is just one way to enhance efficiency and simplify work.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

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