

“E-Commerce Law Update”

(E-Signature Act-Legal and Practical

Roadmap to Paperless Real Estate Transactions)

By

Kent Jay Levine, DREI

Kent@kjlpc.com

I. INTRODUCTION

Unlike the product real estate, which is famous for one of its chief characteristics, immobility, the real estate brokerage industry is in the forefront now of conducting business electronically.

The law typically takes substantial time to be created, and much more time for it to be understood and clarified. Like many other areas, real estate brokers are now to experience that business and industry is ahead of much of the well-defined laws. The first two entirely electronic conducted real estate transactions occurred in 2000, i.e. in Florida and Salt Lake City, Utah. These transactions involved electronically submitting the offer, acceptance, title work, appraisal, loan, recordation, and sale of the paper in the secondary market. With little hesitation, more are to come, in full or part.

Many states now afford to their licensees the ability to renew their real estate licenses electronically, through the respective Real Estate Commission's web site. Some states permit licensees to renew and pay for their Errors and Omissions Insurance electronically over the WWW as well.

Many benefits abound with the electronic developments. However, certain cautions are in order.

II. SELECT RULES, REQUIREMENTS AND SUGGESTIONS OF THE COLORADO REAL ESTATE COMMISSION

The following items were taken from the Colorado Real Estate Commission's web site, primarily in the Auditing area. They are worth your review. These are merely illustrative of what records, documents and the like many Real Estate Commissions allow to be retained electronically.

The CREC web site may be found by going to:

<http://www.dora.state.co.us/Real-Estate/>

A. Physical security for assets and records. Electronic files are key records of modern brokerages and must be carefully protected by access security codes, backup and hard copy output. Custody of on-going backup files must be secure from unauthorized destruction or misuse.

B. Question 4: What records must I maintain for the audit?

* Pursuant to C.R.S. ... brokers will need to retain the following records for 4 years. These records may be kept at any reasonably accessible location. Off-site storage is recommended for records older than three years. These records are the broker's journals, ledgers, escrow bank statements, checks, deposit slips, reconciliations, sales contracts, settlement statements, leases, management agreements and related transaction files for any party assisted or represented. **Electronic systems for record storage are acceptable if accurate hard copy documents can be reproduced in a timely manner.**

Note: increasing numbers of banks no longer return checks or deposit documents they process; it is therefore imperative to use checks and deposit slips which produce readable NCR copies of the original documents in such cases.

C. Question 5: Can computer software be used and which one is best for my needs?

* Yes. The choice of the best software must be based on the anticipated business environment. The Commission doesn't endorse, install, or recommend any specific program. The broker and any assistant must fully understand the capabilities, features, and operation of the software and the related computer system. **There must be a reliable backup and security system to prevent unauthorized manipulation, alteration or loss of data. The software documentation must enable the broker to maintain the system within the requirements of Rule** Some inexpensive retail

programs can be adapted to meet these needs by proper use of the classification and reporting functions. The most critical program features are: (1) the ability to separate and report transactional information pertaining to one account beneficiary from that of others, and (2) program controls to prevent overspending the beneficiary's available cash balance through normal processing of payables and bank account reconciliation routines.

D. Rule E-4. Partially reprinted, the rule provides:

* **E-4.** A real estate broker shall immediately deliver a duplicate of the original of any instrument (except deeds, notes and trust deeds or mortgages, prepared by and for the benefit of third party lenders) to all parties executing the same when such instrument has been prepared by the broker or the broker's employed licensee or closing entity and relates to the employment or engagement of the broker or pertains to the consummation of the leasing, purchase, sale or exchange of real property in which the broker may participate as a broker. For purposes of this rule, duplicate shall mean photocopy, carbon copy, **facsimile, or electronic copies which contain a digital or electronic signature as defined in 24-71-101(1) C.R.S.** Such broker shall retain a copy of the duplicate instruments for future use or inspection by an authorized representative of the Real Estate Commission.

III. E-SIGN LEGISLATION

A. Many states enacted their own laws relative to e-sign transactions. This laws, today, are less important to practitioners due to the enactment of the Federal E-Sign Act, discussed below.

Note: Discussed below following the Federal E-Sign Act are the more important aspects of the Uniform Law referred to as UETA, the Uniform Electronic Transactions Act.

B. FEDERAL

1. The U.S. Congress enacted S. 761 (106th Cong., 2nd Sess.) cited as the “**Electronic Signatures in Global and National Commerce Act**”, 15 U.S.C. §§ 7001, *et seq.* (referred to herein as **E-Sign**). The Act was signed into law by President Clinton on June 30, 2000. The law became **effective on October 1, 2000.**

2. E-Sign, in a nutshell, permits the parties to a contract or transaction to agree that the transaction, which could, but need not also include electronic signatures, may be conducted electronically, rather than using pen and paper. The law does not mandate electronic transactions (excepting Governmental transactions). A number of the concepts created

and codified by the Act will be reviewed in greater detail.

3. At this point in time, and for the near future we have only two or three authoritative sources: (1) the Federal Statute itself, (2) the Congressional Record – the legislative history from the House and Senate proceedings/speeches by the elected representatives, and (3) various articles and comments published explaining the Act and what it is suppose to mean and how the Act should be implemented. No one Agency (state or Federal) is given sole authority to provide guidance on how to interpret it, nor what it means. Rather, the governmental agencies may promulgate rules and regulations within their respective arena, so long as those rules are consistent with the Act.

4. Purpose of the E-Sign Act. Congress intended to promote commerce, remove barriers that could impede transactions conducted electronically.

The clear purpose of the Act is stated:

"To facilitate the use of electronic records and signatures in interstate or foreign commerce."

The Conference Report from Congress dated June 8, 2000, provides in its introduction:

CONFERENCE REPORT [To accompany S. 761]

"The committee of conference ... on the amendments of the House to the bill (S. 761), to regulate interstate commerce by electronic means by permitting and encouraging the continued expansion of electronic commerce through the operation of free market forces, and other purposes..."

The Congressional Record of June 14, 2000, reports from the House at page 4349 the impact on business from Mr. Dreier, Representative from California, noted:

Think of this: In 1999, there was \$3.4 trillion worth of electronic commerce in the United States, \$3.4 trillion. How much of that was online? Pick a number in your own minds of the \$3.4 trillion; \$20 billion, that is all, about 7/10ths of 1 percent. As each year goes by there is going to be a dramatic increase.

The following passage, in the same "debate" gives a sense of the impact of electronic contracting, and the need for addressing this area by Congress:

Mr. DAVIS of Virginia. Mr. Speaker, rise today to express my strong support for S. 761, the Electronic Signatures in Global and National Commerce Act. This legislation marks a critical positive step towards promoting the growth and development of electronic commerce which has emerged as the driving force in our Nation's economy. Today there are approximately 17 million households on-line and that number is expected to almost triple by 2004. **Revenue generated from the Internet increased by 62 percent and totaled \$524 billion in 1999. That figure is likely to reach \$850 billion by the end of 2000 and a staggering \$1.6 trillion by 2003.** Now what these figures demonstrate the seemingly boundless potential that electronic commerce has to offer our economy in terms of both economic prosperity and ease of communication. Our computers are windows to a diversion limitless electronic venue that mimics the traditional free market but which is still developing terms of the parameters under consumers and businesses interact each other. The E-Sign bill adopts one of most critical components of any successful market economy to the digital environment: The existence of the of law and the enforcement of written agreements and transactions that follow predetermined rules of notice, disclosure rights and obligations. other things being equal, when parties know that the signatures guarantee accountability, that they gain benefits, and at the same time undertake certain obligations in return, their behavior is necessarily shaped by the certainty which results when parties contractually bound. Of course, paradigm which has been rooted common law for centuries and dominates contracts course work during first year of law school, is the essence of paper-based contracts and trans-actions. Now, as we enter the digital age the dynamic electronic marketplace expands, the absence of a uniform mechanism for digital signatures records threatens to restrain the boom-in commerce that is taking place the Internet.

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With the Internet as the marketplace of the 21st century, increasing its depends on developing and retaining consumer and business confidence the legal enforcement of digital signatures. S. 761 creates this necessary certainty. By allowing American businesses and individuals the ability engage in commerce, knowing their transactions are full and valid, I believe we will see enormous savings to business, greater efficiency in the market, and paperless transactions that will translate into lower costs for consumers. Another important objective in passing this legislation is the assurance that American principles on the and acceptance of electronic signatures and records will be emulated overseas, ensuring that American businesses not be put at a competitive disadvantage by restrictive foreign laws. Let me finish by thanking the gentleman from Virginia (Mr. BLILEY), who has worked very hard to bring well thought-out and critical measure to the

floor today. **S. 761 is an important step in reconciling our legal system with modern-day technology. essential to fostering the continued growth of electronic commerce that propelling America's economic prosperity in the Information Age.**

Representative Moran of Virginia had the following to say:

This legislation promotes the use electronic signatures by providing consistent and predictable national framework of rules governing the use of electronic signatures. It will provide consumers and companies doing businesses the Internet legal certainty over electronic signatures until all States pass their own legislation on the legality of electronic transactions under the Uniform Electronic Transaction Act. It is not an attempt to regulate electronic commerce. It merely declares the validity of electronically created contracts and records. But it retains individual choice and personal security. As the supportive statements the gentleman from Virginia (Chairman BLILEY) and the gentleman from Michigan (Mr. DINGELL), the ranking Democrat, have underscored, this balanced, bipartisan legislation that will allow the American people to utilize the Internet to its fullest potential. So I urge a unanimous vote on this conference report.

The Act was clearly intended to be platform neutral. Mr. TAUZIN. Clarified this purpose when he spoke:

Finally, this legislation before us technology neutral. Mr. Speaker, in developing this legislation, the Conference Committee recognizes that certain technologies are more secure than others. The Committee also recognizes that consumers and businesses must as well be free to select the technology that is most appropriate for their particular needs, taking into account the importance of a transaction, the special nature of a transaction, and the corresponding need for assurances. To this extent, S. 761 is consistent with the "Government Paperwork Elimination Act" that we passed last Congress.

The proceedings reported May 8, 2000 at page 2637 of the Congressional Record also show the major growth in the use of the internet and electronic transactions in the following words from Mr. Weller from Illinois:

The Internet economy today generates an estimated 301 billion U.S. dollars in revenue, and it is responsible for over 1.2 million jobs. And preliminary employment data shows that the technology industry in

America employed 4.8 million workers in 1998, making one of our Nation's largest industries. The average high-tech average wage

The same conclusion is stated in the Congressional Record of June 16, 2000 at page 5282 from the Senate's proceedings of that day:

The issue of online authentication is one of the most important issues to the development of electronic commerce. Electronic commerce holds great promise, in particular, for states like my home state of Montana, where businesses and consumers have to deal with vast distances. E-commerce is expected continue its upward surge to about \$1.6 trillion by 2003, up from \$500 billion last year. The explosion of information technology has created opportunities undreamed of by previous generations. Montana, companies such as Healthdirectory.com and Vanns.com are taking advantage of the global markets made possible by the stunning reach of the Internet. This bill allows for consumers to enter into binding contracts over the Internet and eliminates the need to engage in needless, burdensome exchanges of paper documents. This bill will create a uniform system where contracts have the same validity across all 50 states. The bill is also technology-neutral and does not impose government mandates on what formats or software businesses or consumers choose to use conduct online commerce.

The legislation also promotes the allowance of electronic transactions – internationally:

SEC. 301. PRINCIPLES GOVERNING THE USE OF ELECTRONIC SIGNATURES IN INTERNATIONAL TRANSACTIONS.

(a) PROMOTION OF ELECTRONIC SIGNATURES-

(1) REQUIRED ACTIONS- **The Secretary of Commerce shall promote the acceptance and use, on an international basis, of electronic signatures in accordance with the principles specified in paragraph (2) and in a manner consistent with section 101 of this Act. The Secretary of Commerce shall take all actions necessary in a manner consistent with such principles to eliminate or reduce, to the maximum extent possible, the impediments to commerce in electronic signatures, for the purpose of facilitating the development of interstate and foreign commerce.**

5. What does the E-Sign Act do? The Act merely states that, if otherwise valid, the fact that the transaction (read this to include the "contract" or "lease") is conducted electronically, will not adversely affect the enforceability of the transaction.

SEC. 101. GENERAL RULE OF VALIDITY.

(a) IN GENERAL.—**Notwithstanding any statute, regulation, or other rule of law** (other than this title and title II), with respect to any transaction in or affecting interstate or foreign commerce—

(1) **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; and**

(2) **a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.**

At the same time, Congress specifically decreed that one is **not** required to do business electronically, if the parties do not want to.

SEC. 101, subpart (b) states:

(b) PRESERVATION OF RIGHTS AND OBLIGATIONS.—**This title does not—**

(1) limit, alter, or otherwise affect any requirement imposed by a statute, regulation, or rule of law relating to the rights and obligations of persons under such statute, regulation, or rule of law other than a requirement that contracts or other records be written, signed, or in nonelectronic form; or

(2) **require any person to agree to use or accept electronic records or electronic signatures, other than a governmental agency with respect to a record other than a contract to which it is a party.**

As the laws vary from one state to another, Congress wanted to assure consistency throughout all of the states. The Congressional Record on June 15, 2000 from the Senate, at page S5217 provides this guidance from Senator Kerry, of Massachusetts.

The bipartisan legislation would be significant achievement for this Congress and the American people. Today America we are in the midst of phenomenal transformation from the industrial age to the information age. Even as we speak, Americans are on the Internet, browsing, researching, and experiencing in ever-

greater numbers. They are also buying. In fact, electronic commerce is one of the principle engines driving our Nation's unprecedented economic growth. For example, Forrester Research has estimated that consumer spending online will total \$185 billion by 2003. **During this past holiday season alone, online merchants transacted an estimated \$5-billion dollars worth of commerce—a 300% increase in business from 1998.** But one great barrier to the continued growth of Internet commerce is the **lack of consistent, national rules governing the use of electronic signatures. A majority of States have enacted electronic authentication laws, but no two these laws are the same. This inconsistency deters businesses and consumers from using electronic signature technologies to authorize contracts or transactions.**

6. No Federal Preemption – Congress had a major fight over this one. It concluded with the consensus of Congress that the Federal Bill would not preempt the entire area. The states can do their own thing-have their own law -sometimes - sort of - kinda. While there is no "general preemption" provision in the E-Sign law, the Act provides that it will control over any **inconsistent** state or other law. (Some authorities have suggested the lack of a general preemption provision was due to the Act not addressing the substantive contract law, which will continue to be in place and follow the respective state law for contracts. Accordingly, this requires reference to applicable state law. This approach is much different than in other areas of the law, for example the Federal Bankruptcy law which controls the entire field, and there is generally no need to look to state law.

Section 101 contains the starting point that precludes the affect of any statute, rule or law **not consistent** with the E-Sign Act.

SEC. 101. GENERAL RULE OF VALIDITY.

(a) **IN GENERAL- Notwithstanding any statute**, regulation, or other rule of law (other than this title and title II), with respect to any transaction in or affecting interstate or foreign commerce--

(1) 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**; and

(2) a **contract** relating to such transaction may **not** be denied legal effect, validity, or enforceability **solely** because an **electronic signature or electronic record** was used in its formation.

Section 102, while it is really an "exception" to the Federal Preemption, permits state law to be effective **only** if it is consistent with the Act (UETA is consistent – in its model form).

SEC. 102. EXEMPTION TO PREEMPTION.

(a) IN GENERAL- **A State statute, regulation, or other rule of law may modify, limit, or supersede the provisions of section 101 with respect to State law only if such statute, regulation, or rule of law--**

(1) constitutes an enactment or adoption of the **Uniform Electronic Transactions Act** as approved and recommended for enactment in all the States by the National Conference of Commissioners on Uniform State Laws in 1999, except that any exception to the scope of such Act enacted by a State under section 3(b)(4) of such Act **shall be preempted to the extent such exception is inconsistent with this title** or title II, or would not be permitted under paragraph (2)(A)(ii) of this subsection; or

(2) (A) specifies the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish the legal effect, validity, or enforceability of contracts or other records, if--

(i) such alternative procedures or requirements are consistent with this title and title II; and

(ii) such alternative procedures or requirements do not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures; and

(B) if enacted or adopted after the date of the enactment of this Act, makes specific reference to this Act.

(b) EXCEPTIONS FOR ACTIONS BY STATES AS MARKET PARTICIPANTS- Subsection (a)(2)(A)(ii) shall not apply to the statutes, regulations, or other rules of law governing procurement by any State, or any agency or instrumentality thereof.

(c) PREVENTION OF CIRCUMVENTION- Subsection (a) does **not permit a State to circumvent this title** or title II through the **imposition of nonelectronic delivery** methods under section 8(b)(2) of the Uniform Electronic Transactions Act.

An excellent article written by Professor Nimmer discusses in depth the potential affect (preemption- in part) of E-Sign and state law. See, Electronic Signatures in Global and National Commerce Act of 2000: Effect on State Laws (August 11, 2000) (Raymond T. Nimmer, University of Houston, Law Center, 4800 Calhoun, Houston, TX 77204). The article or memorandum may be found at: <http://www.bmck.com/ecommerce/topic-esignatures.htm>

According to Professor Nimmer the Federal E-Sign Act will supplant or restrict state law in the following area:

1. 101(a) (1) 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; and
2. 101(a) (2) ... electronic signature or electronic record was used in its formation.
3. "Section 101(h): a state cannot deny effect to contracts involving electronic agents solely because of electronic character.
4. Section 101(d): certain electronic records meet any rule that requires retention of a record or production of an original.
5. Section 101(g): changes rules on use of electronic signatures in notarization and the like.
6. Section 101(j): places limits under other law on the liability risk for insurance agents from use of electronic procedures."

7. Does the E-Sign Act apply to real estate transactions?

Answer – **Yes.**

The Act (Section 106) contains various definitions, including that of "transaction", which clearly includes real estate:

(13) TRANSACTION- The term `transaction' means an action or set of actions relating to **the conduct of business, consumer, or commercial affairs between two or more persons**, including any of the following types of conduct--

(A) **the sale, lease, exchange, licensing**, or other disposition of **(i) personal property**, including goods and intangibles, **(ii) services**, and (iii) any combination thereof; and

(B) **the sale, lease**, exchange, or other disposition of **any interest in real property**, or any combination thereof.

Mr. Don Lampe, Esq., attorney from North Carolina, in his material provides the following guidance:

"Real estate transactions *are covered* by E-Sign .

The definition of “**transaction**” in E-Sign includes “the sale, lease, exchange or other disposition of any interest in real property, or any combination thereof” (Section 106(13)(B) – E-Sign Act)

As to UETA (**Uniform Electronic Transactions Act**), NCCUSL (**National Conference of Commissioners on Uniform State Laws**) recognized potential difficulty of including real estate transactions within the model statute

- a. There is no exception or qualification to the definition of “transaction” which refers to real property
- b. The Prefatory Note to UETA (as promulgated by NCCUSL) recognizes that real estate-related transactions may pose special problems:

“[R]eal estate transactions were considered potentially troublesome because of the need to file a deed or other instrument for protection against third parties. Since the efficacy of a real estate purchase contract, or even a deed, between the parties is not affected by any sort of filing, the question was raised why these transactions should not be validated by this Act if done via an electronic medium. No sound reason was found.”

- c. NCCUSL gave serious consideration to arguments that real property transactions should be excluded from the scope of UETA. In Comment 3 to Section 3 of UETA (governing “Scope”..., NCCUSL set forth its reasoning behind the conclusion that real estate transactions should not be excluded from UETA. This Comment is quoted in its full length, as follows:

“3. **Real Estate Transactions.** 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. 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. Of course, to be effective against third parties state law generally requires filing with a governmental office. Pending adoption of electronic filing systems by States, the need for a piece of paper to file to perfect rights against third parties, will be a consideration for the parties. In the event notarization and acknowledgment are required under other laws, Section 11 provides a means for such actions to be accomplished electronically.

With respect to the requirements of government filing, those are left to the individual States in the decision of whether to

adopt and implement electronic filing systems. (See optional Sections 17-19). However, government recording systems currently require paper deeds including notarized, manual signatures. Although California and Illinois are experimenting with electronic filing systems, until such systems become widespread, the parties likely will choose to use, at the least, a paper deed for filing purposes. Nothing in this Act 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.”

Thanks goes to Mr. Don Lampe, Esq., of Smith Helms Mulliss & Moore, LLP in Greensboro, NC (don_lampe@shmm.com) who was generous in furnishing to me a paper he prepared addressing North Carolina's version of UETA and E-Sign. Mr. Lampe provided comments on behalf of the Real Property Section of the North Carolina Bar Association, in presenting UETA to the N.C. Legislature.

8. Does the Act (E-Sign) or State law govern the requirements for the formation of a contract. Answer – State Law. (Caveat: special rules for "consumer transactions").

Section 101(b) of the Act holds that it does not override state law.

This title does not--

(1) limit, alter, or otherwise affect any requirement imposed by a ... rule of law relating to the rights and obligations of persons under such ... rule of law other than a requirement that contracts or other records be written, signed, or in nonelectronic form;

9. Elements of a Contract. The usual requirements for the formation of a contract in Colorado, and most other states, consists of: (1) Mutual Assent (offer and acceptance) (2) Capacity (at least 2 competent parties) (3) Consideration and (4) Legality. Mestas v. Martini 155 P.2d 161 (Colo. 1944); (C.J.I. 4th §§30:3–30:7)

10. Statute of Frauds. The Colorado version of Statute of Frauds dealing with real estate states:

§ 38-10-108. Contracts for interests in land--must be written

Every contract for the leasing for a longer period than one year or for the **sale of any lands or any interest in lands** is void **unless** the contract or some note or memorandum thereof expressing the consideration **is in writing and subscribed by the party** by whom the lease or sale is to be made.

The following annotation, is supplied at no additional charge: The Statute of Frauds does not apply to oral agreement to extend time for performance in a real estate contract. [Poznik v. Urton & Co., 496 P.2d 1073, 30 Colo.App. 475 \(Colo. App.1972\)](#), affirmed [506 P.2d 741, 181 Colo. 15 \(Colo.\)](#)

11. Compliance. How can we comply with the requirement that the agreement be (1) in writing and (2) subscribed or signed by the Seller, but still contract electronically? Answer – very carefully. Discussed below.

12. Facsimile. Is a Fax or an electronically transmitted Facsimile of the Offer, Acceptance, or Contract within the coverage of the E-Sign Act? While there was a suggestion or debate among various practitioners, the author believes the answer is Yes. While it is quite apparent that the major thrust, and thus testimony was addressing the web and on-line activities, primarily through the use of one's browser, Internet Explorer, Netscape, etc., other methods and technologies, by virtue of the language in the Statute, may very well be within the Act's coverage.

The Act provides the following guidance in its Definitions Section, § 106:

(2) ELECTRONIC- The term 'electronic' means relating to **technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.**

(4) ELECTRONIC RECORD- The term '**electronic record**' means **a contract or other record created, generated, sent, communicated, received, or stored by electronic means.**

A variety of Colorado Statutes recognize the electronic transmission of facsimile or copies of documents.

One of the better examples is the Business Records Act which is part of the Rules of Evidence):

§ 13-26-102. Business and public records as evidence

If any business, institution, or member of a profession or calling or any department or agency of government in the regular course of business or activity keeps or records any memorandum, writing, entry, print, or representation, or combination thereof, of any act, transaction, occurrence, or event and in the regular course of business has caused any of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, optical disk, or other form of mass storage, electronic imaging, electronic data processing, **electronically transmitted facsimile**, printout, or other reproduction of electronically stored data, or other process which accurately reproduces or forms a durable medium for reproducing the original, the original may be destroyed in the regular course of business unless held in a custodial or fiduciary capacity or unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not, and an enlargement or **facsimile** of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement, or **facsimile** does not preclude admission of the original. This shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence.

To assure the reader tracks the requirements or triggering items of the Act, Section 101 will be repeated, in part.

(a) **IN GENERAL- Notwithstanding any statute**, regulation, or other rule of law (other than this title and title II), with respect to any transaction in or affecting interstate or foreign commerce--

(1) 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**; and

(2) a **contract** relating to such **transaction** may **not** be denied legal effect, validity, or enforceability **solely** because an **electronic signature or electronic record** was used in its formation.

As observed above, the term "transaction" includes real property. The term "electronic record" includes a document **created, generated, sent, communicated, received, or stored by electronic means**.

I recently discovered that a fax cannot be sent if there is no electric power available. I surmise that a contract electronically transmitted needs to be treated as within the purview of the Act until there is some proper clarification otherwise.

Congress, in the Congressional Record at page S 5216 on June 15, 2000 discussed the use of electronically transmitted facsimiles where the Senator Wyden of Oregon reported as follows:

Consumer rights are not virtual rights. Consumers must enjoy the same basic rights in the online world as they have in the off-line world. Through the electronic consumer consent provision in Section 101(c) that I authored with Senators LEAHY, HOLLINGS and SAR-BANES, I believe we have adequately translated offline consumer protections into online consumer protections. Let me just spend a minute describing this key provision of the conference agreement. This provision requires that consumer consent must be meaningful. We all know of cases where someone said, "Just e-mail me that document," only to have that person call later, saying "**Gee, I couldn't open the document, can you fax it to me?**" can't recall how many times this exact thing happened to our own staff during the negotiation of this agreement.

If the above quote does not convince you, how about the following testimony at page 1115 from the Congressional Record, H4348 June 14, 2000 by Representative Tauzin from Louisiana.

I am the first to tell Members it is not perfect in that regard. It literally goes overboard to make sure that when people consent to be part of the electronic age, that they really consent. It even has language in it that says that we have to prove that we are capable of receiving all the documents and notices and information that we are consenting to be part of in the electronic age; not just giving our e-mail address as we would give our phone number and address in the paper age, but actually proving that our computer is capable of handling all the information that is going to be **faxed** or **e-mailed** to us as part of the **electronic transaction**.

Furthermore, the following dialogue occurred in a recent exchange on Dirt (dirt@listserv.umkc.edu or its Web Page at <http://www.umkc.edu/dirt/>)

Patrick A. Randolph, Jr., Professor of Law, UMKC School of Law started the discussion off with:

"The language of ESign basically states that anything electronically affixed to a message may be deemed to be an electronic signature if the parties so intend. Some people have asked me whether this would apply to fax signatures, since they are transmitted electronically, but not inserted or affixed to the message electronically. I asked Pat Fry, who

was the reporter for the Uniform Electronic Transactions Act, on which much of the ESign language was based. "

Pat Randolph asked:

"People are asking me about the application of ESign to fax signatures. Do you have thoughts on this? I'm sure that you do.

Pat Fry responded:

Sure. We believed that a fax signature fell within the definition of electronic signature. I believe the comments to UETA so state. Since ESIGN uses our definition, the same should be true in cases where ESIGN applies. Pat"

Professor Patricia Brumfield Fry of the University of Missouri School of Law (previously of University of North Dakota School of Law) was referencing the following Official Comments to the Definitions Section, § 2 (also referenced as Section 102), item (5), "Electronic", which definition states:

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

The Official Comments, confirms this with the following language:

"6. **"Electronic record."** An electronic record is a subset of the broader defined term "record." Unlike the term "electronic message" used in UCITA, the definition is not limited to records intended for communication, but extends to any information contained or transferred in an electronic medium. It is also used in this Act as a limiting definition in those provisions in which it is used.

Electronic means for creating, storing, generating, receiving or communicating electronic records include information processing systems, computer equipment and programs, electronic data interchange, electronic mail, or voice

mail, **facsimile, telex, telecopying**, scanning, and similar technologies." (emphasis supplied).

Many states and brokers have a provision in their purchase contracts similar to the following:

26. FACSIMILE. Signatures **May** **May Not** be evidenced by facsimile. Documents with original signatures shall be provided to the other party at Closing, or earlier upon request of any party.

Likewise a sample Seller Listing Contract reads:

26. FACSIMILE AND ELECTRONIC SIGNATURES.
Signatures **May** **May Not** be evidenced by facsimile, and **May** **May Not** be evidenced by electronic signatures. Documents with original signatures shall be provided upon request of any party.

These sample clauses raise several issues: (1) Is the clause all that is required to be inserted to allow Fax transmissions to evidence a contract? (Discussed subsequently are the special "consumer rules" which would answer the question in the negative. Also, is it permissible to mandate that a hard copy/paper copy of the contract form be supplied when the parties have agreed to have electronic communication. That is, what was the extent of their consent.

See: Section 104 of the Act –

(B) PAPER OR PRINTED FORM- Notwithstanding subsection (c)(1), a Federal regulatory agency **or State regulatory agency may interpret section 101(d) to require retention of a record in a tangible printed or paper form if--**

(i) there is a **compelling governmental interest relating to law enforcement or national security** for imposing such requirement; and

(ii) imposing such requirement is **essential to attaining such** interest.

One can not sustain the straight face rule to suggest that it was required for national security to have a paper copy when the parties agreed to receive electronic.

13. E-Sign requirements for an electronic transaction.

a. Need to satisfy the state law requirements for the formation of a "contract" (4 elements satisfied).

b. Fulfill the requirement under E-Sign to be able to "retain and accurately reproduce" at the time of entering into the contract. 101 (d).

(d) RETENTION OF CONTRACTS AND RECORDS-

(1) ACCURACY AND ACCESSIBILITY- If a statute, regulation, or other rule of law requires that a contract or other record relating to a transaction in or affecting interstate or foreign commerce be retained, **that requirement is met by retaining an electronic record of the information in the contract or other record that--**

(A) **accurately** reflects the information set forth in the contract or other record; and

(B) **remains accessible to all persons who are entitled to access by statute**, regulation, or rule of law, for the period required by such statute, regulation, or rule of law, **in a form that is capable of being accurately reproduced for later reference, whether by transmission, printing, or otherwise.**

[Query – Palm, Visor, other wireless handheld PDA – satisfy this requirement?]

c. Satisfy the Statute of Frauds. It must be "signed".
The Act, in its definitions notes that a "signature" is sufficient provided the signer (1) **intended** it as the signature and (2) is attached or "logically associated" with the contract.

(5) ELECTRONIC SIGNATURE- The term '**electronic signature**' means 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.**

d. Fulfill E-Sign's Consumer Requirements if dealing with a "consumer".

Note: A consumer is one who is involved in the transaction for personal, family, or household purposes:

(1) CONSUMER- The term '**consumer**' means **an individual** who obtains, through a transaction, products or services which are

used **primarily for** personal, family, or household purposes, and also means the legal representative of such an individual.

[Caveat – if the courts interpret this subsection as the FTC and some courts have interpreted the FCRA (Credit Reporting Act), 15 U.S.C. 1681, et seq. The coverage or interpretation of the term "consumer" may have become enlarged. For example, see in the appendix the informal opinion letter from the FTC responding to the following request:

"This responds to your letter asking for the staff's opinion on the application of the Fair Credit Reporting Act ("FCRA") to the extension of credit for commercial purposes. Specifically, you inquire whether a permissible purpose exists under the FCRA for a business credit grantor to obtain a consumer report on an individual who is a principal, owner, or officer of a commercial loan applicant...

For the reasons discussed hereafter, we answer in the negative."

The letter also notes that the "user's" purpose is not relevant. "Emphasizing only the user's purpose emasculates the statute." Accordingly, it would appear that if you are dealing with an individual a transaction (i.e., purchase of an industrial site, apartment complex, office building, etc.) will be ignored, if the Courts or the FTC follow the same reasoning as set forth in the FTC informal opinion.

The FCRA's definition of consumer is different than that of E-Sign. § 1681a of FCRA states:

"(c) The term "consumer" means an **individual**."

"(d) Consumer Report. -

* (1) In general. - The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general

reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for -

- * (A) **credit or insurance to be used primarily for personal, family, or household purposes;**
- * (B) employment purposes; or
- * (C) any other purpose authorized under section [1681b](#) ..."

Because of the uncertainty, differences in decisions, and the failure of the Rule and Act to clearly specify how to implement the test, caution would appear to be the best course.]

1. Prior to consenting, the consumer is provided with a clear and conspicuous statement that the Consumer has:

[The words "**PRIOR TO** consenting" need to be reemphasized !!]

- a. right or option of the consumer **to have the record provided or made available on paper or in nonelectronic form**
 - b. **right of the consumer to withdraw the consent to contract electronically** (and of any conditions, consequences which may include termination of the parties' relationship), or fees in the event of such withdrawal;
 - c. **whether the consent applies** (I) only to the **particular transaction**, or (II) to **identified categories** of records during the course of the parties' relationship;
 - d. of the **procedures the consumer must use to withdraw consent** and to update information needed to contact the consumer electronically; and
 - e. **how, after the consent, the consumer may, upon request, obtain a paper copy of an electronic record**, and whether any fee will be charged for such copy;
 - f. **consumer is provided with a statement of the hardware and software requirements for access to and retention of the electronic records; and**
-

g. CONSENTS ELECTRONICALLY,
or confirms his or her consent electronically, in a **manner that reasonably demonstrates** that the **consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent;**
and

h. after the consent of a consumer... **if a change in the hardware or software requirements** (needed to access or retain electronic records) - **provide the consumer with a statement of the revised hardware and software requirements** for access to and retention of the electronic records, and

2. [AFTER fulfilling the above a-h]

***** the consumer has affirmatively consented to use electronic means and has Not Withdrawn such consent; *****

The following summary appeared in the June, 2000 issue of *Baker & McKenzie E-Law Alert: June 2000*

Consumer Consent Requirements

The E-SIGN Act provides that a consumer may elect to receive an electronic record in substitution of a required written record if: "(1) the consumer affirmatively consents to receive an electronic record and has not withdrawn such consent; and (2) the consumer, prior to consenting, is provided with a clear and conspicuous statement informing the consumer of rights or options to have the record provided or made available on paper, and the right of the consumer to withdraw the consent to electronic records and of any conditions, consequences (which may include termination of the parties' relationships), or fees in the event of withdrawal of consent." In order to satisfy the consumer's affirmative consent requirement, a "reasonable demonstration" must show that the consumer will be able to access the electronic records to which the consent applies." This is met, for example, if the consumer confirms electronically that he or she can access the electronic records in the specified formats, or the consumer acknowledges or responds affirmatively to an electronic query that asks whether the consumer can access the electronic record, or proof that the consumer actually accessed the electronic record in the relevant format. However, the consent of a consumer only applies to the particular transaction that gave rise to the obligation to provide the record. A consumer still retains the right to receive all future documents on paper.

The E-Sign Act, in Section 101 (c) provides:

(c) CONSUMER DISCLOSURES.—

(1) CONSENT TO ELECTRONIC RECORDS.—Notwithstanding subsection (a), if a statute, regulation, or other rule of law requires ... in writing, the use of an electronic record to provide or make available is required) such information satisfies the requirement that such information be in writing if—

(A) the **consumer has affirmatively consented** to such use and has not withdrawn such consent;

(B) the **consumer, prior to consenting, is provided with a clear and conspicuous statement—**

(i) informing the consumer of

(I) any right or option of the consumer **to have the record provided or made available on paper or in nonelectronic form**, and

(II) the **right of the consumer to withdraw the consent to have the record provided or made available in an electronic form** and of any conditions, consequences (which may include termination of the parties' relationship), or fees in the event of such withdrawal;

(ii) **informing the consumer of whether the consent applies**

(I) only to the **particular transaction** which gave rise to the obligation to provide the record, or

(II) to **identified categories** of records that may be provided or made available during the course of the parties' relationship;

(iii) describing the **procedures the consumer must use to withdraw consent** as provided in clause (i) and to update information needed to contact the consumer electronically; and

(iv) **informing the consumer**

(I) **how, after the consent, the consumer may, upon request, obtain a paper copy of an electronic record**, and

(II) whether any fee will be charged for such copy;

(C) the consumer—

(i) **prior to consenting, is provided with a statement of the hardware and software requirements for access to and retention of the electronic records; and**

(ii) consents electronically, or confirms his or her consent electronically, in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent;
and

(D) after the consent of a consumer... **if a change in the hardware or software requirements** needed to access or retain electronic records creates a material risk that the consumer will not be able to access or retain a subsequent electronic record that was the subject of the consent, the person providing the electronic record—

(i) **provides the consumer with a statement of (I) the revised hardware and software requirements** for access to and retention of the electronic records, and

14. Other. The E-Sign Act addresses other areas, not detailed in this paper. For example, rules on Notarization (electronically), limitations and ability of the states and Federal government to enact rules interpreting electronic transactions, record keeping and the like.

There still remains certain matters not yet clarified. The electronic discussion group of Dirt has some very talented writers and contributors. It is directed by: Patrick A. Randolph, Jr., Professor of Law, UMKC School of Law Of Counsel: Blackwell Sanders Peper Martin, Kansas City, Missouri, prandolph@cctr.umkc.edu

The Dirt site may be found by going to DIRT's WebPage at:
<http://cctr.umkc.edu/dept/dirt/>

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TIP OF THE DAY: ARE ELECTRONIC SIGNATURES SAFE?

PROBLEM: You've been asked to sign an online contract using an electronic signature, but you're not convinced that it's safe.

SOLUTION: The Consumers Union, the nonprofit publisher of Consumer Reports, has issued a press release about electronic signatures. The release includes a checklist-style set of tips for anyone getting ready to sign a contract with a digital signature.

**CONSUMERS UNION'S
TIPS FOR CONSUMERS
WHEN USING "ELECTRONIC" SIGNATURES
TO SIGN ONLINE CONTRACTS**

- * Do not consent to an electronic contract or to receive electronic notices if you are uncomfortable using a computer or do not understand how to use e-mail.
- * Do not consent to an electronic contract or to receive electronic documents until you are certain that your computer's software and hardware are compatible with the business' computer system.
- * Remember that you can opt to receive documents on paper instead of electronically if you prefer.
- * As with any contract, read the fine print. Don't agree to a contract that you don't understand.
- * Keep back-up paper copies of the electronic documents you receive, and keep a list of the businesses with which you agree to receive electronic documents.
- * Notify the businesses of any changes that may affect your ability to receive e-mail, such as changing your e-mail address, your hardware, or your software.
- * Close any unused email accounts.
- * Don't give out your email address to any business if you don't want to receive email notices from that business.
- * Be sure to notify the business if you have any problems receiving its e-mails or opening its documents.

Consumers Union, publisher of Consumer Reports magazine, is an independent nonprofit

15. TIME OF FORMATION OF CONTRACT.

a. Basic Contract Law provides that a contract will be formed at the time the Offer has been accepted. While most of contract law requires "receipt" for matters dealing with contract formation, an exception is well established in the law that an **Acceptance can be effective upon Dispatch**.

Union Interchange, Inc. v. Sierota, 355 P.2d 1089 (Colo. 1960)

'* * * If the offer requires an **acceptance** to be made in writing, no other form of **acceptance** can be made. Page on **Contracts** (2d Ed.) § 185.'

[Shortridge v. Ohio, \(Mo.App.\), 253 S.W.2d 838, 845:](#)

"**Acceptance** of an offer is an expression of assent to the terms thereof made by the offeree in a manner requested or authorized by the offeror.' Restatement, **Contracts**, Vol. 1, sec. 52, p. 58. Sec. 61 of the same Restatement reads: 'If an offer prescribes the place, time or manner of **acceptance** its terms in this respect must be complied with in order to create a **contract**. If an offer merely suggests a permitted place, time or manner of **acceptance**, another method of **acceptance** is not precluded.' In [Hunt v. Jeffries, 236 Mo.App. 476, 484, 156 S.W.2d 23, 27](#), the court said: 'The general rule * * * is stated in Lawson on **Contracts**, 3d Ed., Section 23, page 38, as follows: 'The offerer has the right to prescribe the time, place, form or other condition of **acceptance**, in which case *the offer can be **accepted only in the way prescribed by the offer.***" See Williston on **Contracts**, Rev.Ed., Vol. 1, sec. 76, p. 218. ...

Notice of acceptance of the offer to the "agent" is notice to the principal. Stortroen v. Beneficial Finance Co. of Colorado, 736 P.2d 391 (Colo. 1987).

Werne v. Brown, 955 P.2d 1053 (Colo.App. 1998) supports the mail box rule:

When use of the mail has been directed or authorized, the vast majority of courts, acknowledging the risk inherent in using the mail, have allocated that risk to the party in control of the transaction. These courts have done so in a variety of circumstances. See [\(cites omitted\)](#) Cf. 1 A. Corbin, *Contracts* § 3.24 at 436 (1993) (discussing "**mail** box" or "deposit

acceptance" rule used in formation of contracts); [*Jameson v. Foster, 646 P.2d 955 \(Colo.App.1982\)*](#) ("deposit **acceptance**" rule).

However, as discussed below, this rule may be out the window if contracting electronically.

b. When is Acceptance Effective. The question posed in electronic contracting – when is the Contract formed, or effective? Normal Contract law (absent a provision in the contract) concludes it is effective when it leaves the control of the sender (normally the Seller, accepting the Buyer's Offer). See, Restatement of Contracts, 2nd § 63, provided it is properly addressed and postage is prepaid as noted in Restatement of Contracts, 2nd § 66. When has the document been "sent" or "received"? We have various choices:

1. When the Buyer retrieves it (receives) at his computer the email/attachment.
2. When the Email/attachment hits the Buyer's POP email server.
3. When the Email/attachment is received by the Seller's SMTP email server.
4. When the Email/attachment is sent from the Seller's CPU.

These choices are unanswered by the Federal E-Sign Act. UETA, Uniform Electronic Transactions Act, which many states have enacted does address the solution.

SECTION 15. Time And Place Of Sending and Receipt.

(a) Unless otherwise agreed between the sender and the recipient, an electronic record is **SENT when it:**

(1) is addressed properly or otherwise directed properly to an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record;

(2) is in a form capable of being processed by that system; and

(3) **enters an information processing system outside the control of the sender** or of a person that sent the electronic record on behalf of the sender **or enters a**

region of the information processing system **designated or used by the recipient which is under the control of the recipient.**

(b) **Unless otherwise agreed** between a sender and the recipient, an **electronic record is received** when:

(1) it enters an **information processing system that the recipient has designated or uses for the purpose of receiving electronic records** or information of the type sent and from which the recipient is able to retrieve the electronic record; and

(2) it is in a form capable of being processed by that system.

(c) Subsection (b) applies even if the place the information processing system is located is different from the place the electronic record is deemed to be received under subsection (d).

...
(e) An electronic record is received under subsection (b) **even if no individual is aware of its receipt.**

(f) Receipt of an electronic acknowledgment from an information processing system described in subsection (b) establishes that a record was received but, by itself, does not establish that the content sent corresponds to the content received.

(g) If a person is aware that an electronic record purportedly sent under subsection (a), or purportedly received under subsection (b), was not actually sent or received, the legal effect of the sending or receipt is determined by other applicable law. Except to the extent permitted by the other law, the requirements of this subsection may not be varied by agreement.

Some contracts define when the Acceptance will be effective:

28. NOTICE OF ACCEPTANCE; COUNTERPARTS. This proposal shall expire unless accepted in writing, by Buyer and Seller, as evidenced by their signatures below, **and the offering party receives notice of acceptance pursuant to § 27 on or before Acceptance Deadline Date and Acceptance Deadline Time (§ 2c).** If accepted, this document shall become a contract between Seller and Buyer. A copy of this document may be executed by each party, separately, and when each party has executed a copy thereof, such copies taken together shall be deemed to be a full and complete contract between the parties.

CAVEAT: If the state has not adopted UETA – it would appear necessary to CLEARLY set forth (i) WHEN the document is treated as having been Received, and (ii) WHAT Email Address or URL is to be used.

For example, language similar to § 15 of UETA could be set forth in the Contract Addendum or Additional Provisions.

Although you, and perhaps your clients decide that currently you do not believe it would be wise to get into the "electronic signatures", email, etc. and want to keep things simple merely by "faxing" – if the transaction involves "individuals", from a conservative approach, you are now conducting an "electronic" transaction, which will require compliance with ALL of the requirements noted above, PLUS, if you desire clarity as to whether and when a contract has been formed, it appears necessary and prudent to set forth a definition of what "receives" means.

[As a side bar, while UETA was adopted in 2002 by Colorado, at least 22 states have already adopted it, and others are considering or introducing it. The states are enumerated to give an alert to the practioner who may be involved in a transaction (electronic? – again, think "fax") with parties from one of these states.]

STATE	ADOPTIONS:	2001 INTRO
Alabama	Mississippi	California
Arizona	Montana	Colorado
Arkansas	Nebraska	Connecticut
California	Nevada	District of Columbia
Delaware	New Mexico	Illinois
Florida	North Carolina	Massachusetts
Hawaii	North Dakota	Missouri
Idaho	Ohio	New Hampshire
Indiana	Oklahoma	New Jersey
Iowa	Pennsylvania	Oregon
Kansas	Rhode Island	Vermont
Kentucky	South Dakota	Wisconsin
Louisiana	Tennessee	
Maine	Texas	
Maryland	Utah	
Michigan	Virginia	
Minnesota	West Virginia	
	Wyoming	
35	Adopted	12

The Official Comments to UETA, § 14 (or §114), entitled Section 114. Time and Place of Sending and Receipt further elaborate the void present due to no statutory clarity of either defining or reversing common law:

2. Subsection (a) requires that information be properly addressed or otherwise directed to the recipient before it will be considered sent. The record will be considered sent once it leaves the control of the sender, or comes under the control of the recipient. The structure of many message delivery systems is such that electronic records may actually never leave the control of the sender. For example, at my university, e-mail sent within the system to another faculty member is technically not out of my control since it never leaves my server. Accordingly, to qualify as a sending, my e-mail must arrive at a point where the recipient has control. The effect of an electronic record that is thereafter “pulled back,” e.g., removed from a mailbox, is not addressed by this section. The parallel would be removing a letter from a person’s mailbox.

3. Subsection (b) provides simply that when a record enters the system **which the recipient has designated or uses** and to which it has access, in a form capable of being processed by that system, it is received. By keying receipt to a system which is accessible by the recipient, the issue of a recipient leaving messages with a server or other service to avoid receipt, is removed. **However, the issue of how the sender proves the time of receipt is not resolved by this section.**

...The fact that many people have multiple e-mails for different purposes led to the need for this clarification. The purpose is to assure that recipients can designate the e-mail address or system to be used in a particular transaction. For example, the recipient retains the ability to designate a home e-mail for personal matters, work e-mail for official business, or a separate organizational e-mail solely for the business purposes of that organization. If A sends B a notice at his home which relates to business, it may not be deemed received if B designated his business address as the sole address for business purposes unless actual knowledge upon seeing it at home would qualify as receipt under the otherwise applicable substantive law.

5. Subsection (e) **rejects the mailbox rule and provides that electronic records are effective on receipt.** This approach is consistent with Article 4A and, as to electronic records, UCITA.

6. Subsection (f) ... only addresses the fact of receipt, not the quality of the content, nor whether the electronic record was read or "opened."

The following examples found in the Official Comments from UETA, §104, are supplied to further amplify the fairly common practice today of supplying one's email address(s):

Examples:

A. If Joe gives out his business card with his business e-mail address, it is then reasonable for a recipient of the card to communicate electronically with Joe for business purposes using the e-mail address on the card, unless Joe affirmatively indicates to the contrary, or an unreasonable period of time has elapsed under the circumstances (See example D below). However, it would not necessarily be reasonable to infer Joe's agreement to communicate electronically for purposes outside the scope of the business indicated by use of the business card.

B. Sally may have several e-mail addresses— home, main office, office of a non-profit organization on whose board Sally sits. In each case, it would be reasonable to communicate via e-mail with Sally with respect to business related to the business/purpose associated with the respective e-mail addresses. However, depending on the circumstances, it likely would not be reasonable to communicate with Sally for purposes other than those related to the purpose for which she maintained the e-mail account. Similarly, if a person's e-mail address is listed in a directory for a particular organization, it would be reasonable to communicate with that person, for purposes related to that organization, through the e-mail listed in the directory.

**IV. COLORADO REAL ESTATE TRANSACTIONS
and "E-MAIL"**

The Colorado Real Estate Commission held a substantial and lively debate/discussion whether the new Seller and Buyer Listing Contract forms should include a line for the parties (Broker) and (Buyer or Seller) E-mail address. The final conclusion was "yes". To assure the Florida Supreme Court cannot top participants out west, the simple line can have substantial affect. To illustrate, I am reproducing a copy of the letter, slightly modified, as was submitted to the Commission for their consideration.

KENT JAY LEVINE, P.C.

Attorney and Counselor at Law
Englewood Law Building
3780 South Broadway

Phone: (303) 783-0222 Englewood, Colorado 80110-3612 Fax - 783-0997

October 5, 2000

EMAIL AND HAND DELIVERED

Colorado Real Estate Commission
1900 Grant Street
Suite 600
Denver, Colorado 80203,

RE: Rule Making - Seller Listing Contracts and Buyer
Contracts

Dear Commissioners:

This letter and attachments are submitted on behalf of the "Forms Committee" of the Colorado Real Estate Commission.

I. Email Addresses.

The topic of inserting into both the Seller and Buyer "Listing" contract forms was briefly discussed. This topic was reviewed in depth by the Forms Committee, both prior to, as well as subsequent to the Rule Making Hearing held on September 7, 2000. At the commencement of our drafting of the revisions for the listing contracts it was suggested that a "blank" for email addresses be inserted. This suggestion was made to recognize the growing trend of electronic communications, including that of email. After the insertion of the email blank, the topic was raised again at one of our subsequent monthly meetings. The decision of the committee was to remove the preprinted blank for email addresses. I would like to share a number of our concerns which led to the final conclusion that it would not be in the best interest of the public to include email address blanks, **at this time.**

- a. We have conducted many inquiries to conclude that the current practice is that many (if not most) Real Estate Brokers do not use, know how, nor obtain confirmation whether documents have been emailed to them on a regular daily basis. This will eventually change, but it is not the standard today.
-

- b. The technology and its usage, while of fairly recent origin, and although its use has increased exponentially, it would be most accurate to classify email communication as less than "stable." There is no question that many of the stability issues and problems currently in existence should subside.
- c. There exists difficulties and incompatibility issues, not only with cross platforms, but also with the individual programs or applications in use today, but even with users on the same platform, same product manufacturer or software developer, but if there are different versions of the same application, the recipient may be precluded from opening the particular document.
- d. Legal concerns, based on many of the above items, can readily be pictured. The following example reviewed with the Forms Committee we felt was important to also share with the Commissioners:

Facts:

Seller	John Homeowner
Listing Company	A-1 Listful Realty LLC
Listing Agent	Lou Lister, Broker Associate
Buyer	Betty Da Byer
Selling Company	BBB Real-A-Tore, Inc.
Buyer's Agent	P.C. Tek, Broker Associate
Property	123 Main Street

The Seller, John, enters into an Exclusive Right-To-Sell Listing Contract with A-1 Listful Realty LLC, the Listing Company. Lou Lister completes the form **including his email address at his home office.**

The Buyer, Betty, enters into an Exclusive Right-To-Buy Contract with BBB Real-A-Tore, Inc., the Selling Company. P.C. Tek, Broker Associate, completes the form **including the general email address at the office.**

Betty, the Buyer, submits an offer on October 4, 2000, through the Buyer's Broker, BBB Real-A-Tore, Inc., to the Seller, John via the Listing Company, A-1 Listful Realty LLC. The contract form, CBS-1, has an **Acceptance Deadline Date of October 4, 2000, Acceptance Deadline Time of 9:00 p.m., MST.**

On October 4, 2000, at 8:00 p.m., 15 minutes after the Seller signed the contract, Lou Lister scanned the contract into his CPU and clicks the send button, emailing it to the POP account of the email address set forth in the Right to Buy Contract, and on the Business Card of P.C. Tek, Broker Associate. Unfortunately, even though P.C. tried to check his email at 9:02 p.m. on the 4th, a contractor severed the fiber optic line at 8:35 p.m. which precluded P.C. from accessing his email. P.C. tells Betty Da Byer, that he did not receive the Seller's acceptance, so she is free to waive the contingency in another contract she entered into to purchase 999 Paradise Lane. Obviously Betty desires to buy only 1 house, not two.

It is quite clear, under the law, and in the contract forms, that "notice" to the Selling Company is notice to the Buyer. Notice of Acceptance was timely sent and received at the email address (which, between the Buyer and her Broker was authorized). Courts have already recognized email as a legitimate basis for notice purposes.

While many of use email very extensively, we concluded that for the basic points noted above, and others, that it would not be in the best interest of the public to include it at this time in the state mandated form.

We would respectfully request that further consideration be given prior to a casual adoption of this provision, based on the very serious adverse impact inclusion would have on the public and the industry, at this moment in the evolution of email usage.

I am also emailing a sample contract form as an attachment as well. I am hopeful that this exercise will further illustrate the problems addressed above.

The following is a partial checklist which I have used for some of my Broker clients. Many of the same considerations should be given for an attorney or law firm, as well as the parties – before jumping into the "electronic" contracting world.

V. BROKER POLICY AND IMPLEMENTATION

Assuming that there is compliance with the E-Sign Act, and its eventual interpretations, the Broker should consult with Broker's attorney to develop and implement a policy and practice which may include:

1. Should there be a provision in the respective Listing and Sales contract addressing E-mail (allowing it not allowing use of email notification and attachments to the Brokerage Company or its licensees)?
 2. Do the licensees and personal assistants know how (a) Send email (b) Send email with an attachment (c) Receive email (d) Receive email and attachments?
 3. Should there be ONLY ONE email address used?
 4. Who is responsible for Monitoring it?
 5. When? How often?
 6. Do you use a dial up account, DSL, T-1, cable, etc.
 7. How reliable is your ISP?
 8. How reliable is your connection?
 9. What platform are (a) you, (b) your recipients, (c) your senders using?
 10. What word processing/contract generation application/software are you using? Which Version? Is it compatible with the folks in # 9 above?
 11. What compression programs are you using? Is it compatible with the folks in # 9 above?
 12. What follow up steps are to be taken to assure the email and attachment came across and can be opened, etc.?
-

13. What encryption application are you using? Is it compatible with the folks in # 9 above?
14. Do you need to have a "secure" site used. SSL, etc. Which one? USPS, private provider? What is the cost, and who is to pay?
15. Do you "lock" your documents?
16. What "hard" copies should be retained in the file?
17. Does it matter what the "print date" footprint states?
18. Should you use yours or an ASP web site for access to the documents/contracts, etc.
19. How often does your "server" go down?
20. Does your "firewall" strip off or limit attachments?
21. Does your ISP allow/can it handle attachments? Size limits?
22. How long will it take to "download" the documents if you are receiving?
23. How long will it take to "download" the documents for the folks in # 9 above?
24. Do you have an E-mail "Privacy" or "No Privacy" policy in writing?
25. RESPA concerns may be present if (1) Residential transaction (1-4), other requirements are met, and (2) the cost is past onto the parties (Buyers or Sellers)
26. Others. – e.g. virus applications, updating service, etc.

VI. OTHER ELECTRONIC LAWS

- A. Dirt :** <http://ctr.umkc.edu/dept/dirt/>
Professor Patrick Randolph, UMKC Law School
 - B. Availability Of Funds And Collection Of Checks
(Regulation CC)12 CFR 229**
 - C. Fair Debt Collection Practices Act (FDCPA) and state law**
 - D. Fair Credit Reporting Regulations 12 CFR Part 222**
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[Notice Of Adverse Action To Rental/Employment Applicant]

E. S. 759 - Unsolicited commercial electronic mail on the Internet, and for other purposes.

F. Electronic Presentment

"Telephone Check" or "Fax Check"

§ 4-3-501. Presentment

(a) "Presentment" means a demand made by or on behalf of a person entitled to enforce an instrument (i) to pay the instrument made to the drawee or a party obliged to pay the instrument or, in the case of a note or accepted draft payable at a bank, to the bank, or (ii) to accept a draft made to the drawee.

(b) The following rules are subject to article 4 of this title, agreement of the parties, and clearing-house rules and the like:

(1) Presentment may be made at the place of payment of the instrument and must be made at the place of payment if the instrument is payable at a bank in the United States; may be made by any commercially reasonable means, including an oral, written, **or electronic communication**; is effective when the demand for payment or acceptance is received by the person to whom presentment is made; and is effective if made to any one of two or more makers, acceptors, drawees, or other payors.

§ 4-4-110. Electronic presentment

(a) "Agreement for **electronic presentment**" means an agreement, clearing-house rule, or federal reserve regulation or operating circular, providing that presentment of an item **may be made by transmission of an image of an item or information describing the item ("presentment notice") rather than delivery of the item itself.** The agreement may provide for procedures governing retention, presentment, payment, dishonor, and other matters concerning items subject to the agreement.

(b) Presentment of an item pursuant to an agreement for presentment is made when the presentment notice is received.

(c) If presentment is made by presentment notice, a reference to "item" or "check" in this article means the presentment notice unless the context otherwise indicates.

Post Dating is not a safe option today.

§ 4-4-401. When bank may charge customer's account

(a) A bank may charge against the account of a customer an item that is properly payable from that account even though the charge creates an overdraft. An item is properly payable if it is authorized by the customer and is in accordance with any agreement between the customer and bank.

(b) A customer is not liable for the amount of an overdraft if the customer neither signed the item nor benefited from the proceeds of the item.

(c) A bank may charge against the account of a customer a check that is otherwise properly payable from the account, **even though payment was made before the date of the check**, unless the customer has given notice to the bank of the postdating describing the check with reasonable certainty. The notice is effective for the period stated in section 4-4-403(b) for stop-payment orders, and must be received at such time and in such manner as to afford the bank reasonable opportunity to act on it before the bank takes any action with respect to the check described in section 4-4-303. If a bank charges against the account of a customer a check before the date stated in the notice of postdating, the bank is liable for damages for the loss resulting from its act. The loss may include damages for dishonor of subsequent items under section 4-4-402.

(d) A bank that in good faith makes payment to a holder may charge the indicated account of its customer according to:

(1) The original terms of the altered item; or

(2) The terms of the completed item, even though the bank knows the item has been completed unless the bank has notice that the completion was improper.

G. Other.

- a. **Electronic Platform. Email or Web based**
- b. Operate in house – contract out
- c. Stability of ASP (Application Service Provider)
- d. Where will the archives be kept – back up copies, preservation concerns. Will they be accessible if technology changes (5 1/4" disks – 3 1/2" floppies, program or application changes and inability to open prior versions, etc.)

The UETA may be found at
<http://www.law.upenn.edu/bll/ulc/uecicta/eta1299.htm>

An excellent source of legal e-commerce material is available from the law firm of Baker & McKenzie:

<http://www.bmck.com/ecommerce/home.htm>

Conclusion

Operating on the cutting edge well in advance of others is to be commended. However, with the assumption of such steps, especially if there is use of electronic commerce, including use of emails and the like, proper procedures and guidelines should be in place to avoid unwelcome visitors which will include the process server delivering the summons and complaint.

To assist in this process you may want to review with your counsel language which is part of your email messages (signature, etc.).

A sample to be reviewed by counsel could read:

Kent Jay Levine, Esq.
KENT JAY LEVINE, P.C.
Kent@kjlpc.com
Tele 303-783-0222
Fax 303-484-2621
3780 South Broadway
Suite 100
Englewood Law Bldg.
Englewood, CO 80110-3612

This e-mail transmission and all attachments and the contents thereof are confidential, are intended only for use of the named recipient and may be subject to attorney-client privilege, or attorney work product. If you are not the named recipient, please immediately "reply" by e-mail to the sender, and destroy all electronic (and paper, if any) copies of this transmission and the attachments. Unless previously formed, this document does not create an attorney-client relationship. Neither the sender nor the respective person represented by the sender, has agreed to enter into any contract, or to incur any obligation, by e-mail or other electronic means, without special written authorization.

Another provision to be reviewed by counsel could be the use of the "fax" clause - which may need to be clarified to avoid opening the electronic gate too far open:

FAX not E-MAIL

Consent to transmit documents and information by facsimile (fax) is strictly limited to fax transmissions only, and shall not include any other form of electronic transmission or contracting (including but not limited to e-mail, voice-mail or otherwise).

As we are now becoming more comfortable with adapting our business to the E-world, we must also adapt our policies, practices and procedures to

assure they are also current, if not, we may hear about it whether electronic or otherwise.