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THE DISAPPEARING "INK" SIGNATURE

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Ink signatures have always had significance—student athletes sign college letters of intent; newly married couples sign marriage licenses; testators and their witnesses sign wills. The COVID-19 pandemic, however, has increased the need for and the desirability of completing transactions without the need for personal contact. Fortunately, California has adopted the Uniform Electronic Transactions Act (UETA), permitting parties to enter into binding transactions by electronic means, using electronic records and electronic signatures (e-signatures) instead of physical documents and "wet" signatures. (Civ. Code, § 1633.1 et seq.; further statutory citations are to the Civil Code.) And the pandemic has yielded some other alternatives.

The UETA

California's UETA, largely comprising language from the National Conference of Commissioners on Uniform State Laws, was enacted to facilitate and implement guidelines for "electronic commerce" in response to the growing use of "computer[s] and other electronic media." (Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 820 (1999-2000 Reg. Sess.).)

Although there are many exceptions and limitations (see § 1633.3, subd. (b); Cal. Code Regs., tit. 2, § 22001), the UETA can apply broadly to many everyday transactions.

Under the UETA, if a law requires a "writing," an electronic record satisfies this requirement. (§ 1633.7, subd. (c).) The UETA does not specify the types of technology that can be used to create a valid "electronic record." (§ 1633.2, subd. (g).) A "record" is simply "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." (§ 1633.2, subd. (m).) An *electronic* record is "a record created, generated, sent, communicated, received, or stored by electronic means." (§ 1633.2, subd. (g).) Email, fax, and online systems have been identified as the types of technology that create electronic records. (See, e.g., Directions for Use to CACI No. 380 (2020), p. 210 ["there would seem to be little doubt that e-mail and fax meet the definition" of an electronic record]; *Rickards v. United Parcel Service, Inc.* (2012) 206 Cal.App.4th 1523, 1529 [Department of Fair Employment and Housing's "automated system for online complaints" was sufficient to create an electronic record].)

The UETA also allows the use of an e-signature to comply with "a law [that] requires a signature." (Civ. Code, § 1633.7, subd. (d); see *Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836, 843 ["(A)n electronic signature has the same legal effect as a handwritten signature" under the UETA].) An e-signature is "an electronic sound, symbol, or process attached to . . . an electronic record and executed or adopted by a person with the intent to sign." (Civ. Code, § 1633.2, subd. (h).) In some instances, "a printed name or some other symbol" can be a valid e-signature. (*J.B.B. Investment Partners, Ltd. v. Fair* (2014) 232 Cal.App.4th 974, 988 (*J.B.B.*) [collecting cases from other jurisdictions].) Parties need not use e-signature software like Adobe Sign or DocuSign to comply with the UETA. (See *ibid.* ["Courts in other jurisdictions that have adopted a version of UETA have concluded that names typed at the end of e-mails *can* be electronic signatures," original italics].) *Who* signs the agreement also determines whether an e-signature is valid under the UETA. (See *Coleman v. Sagar* (Cal. Ct. App., Oct. 9, 2018, B283005) 2018 WL 4871142, at pp. *3-*4 [nonpub. opn.] [electronic settlement transaction was not enforceable even though the parties' attorneys had signed the agreement, because plaintiff had not signed].) (Note that while *Coleman* and other unpublished opinions cited in this article can provide useful background, they "must not be cited or relied on by a court or a party" in any California court. (Cal. Rules of

Court, rule 8.1115(a).)

Although the standards for an electronic record and an e-signature are flexible, the proponent of a transaction under the UETA must show that the parties "agreed to conduct the transaction by electronic means." (Civ. Code, § 1633.5, subd. (b).) A showing of an agreement is mandatory for the UETA to apply. (*J.B.B.*, *supra*, 232 Cal.App.4th at p. 988 ["UETA applies, however, only when the parties consent to conduct the transaction by electronic means"].) Parties do not need to execute a formalized agreement; an agreement to conduct an electronic transaction can be established "from the context and surrounding circumstances, including the parties' conduct." (Civ. Code, § 1633.5, subd. (b).) The standards for showing an agreement are flexible, and "[t]he most likely jury issue is whether the parties agreed to rely on electronic records to finalize their agreement." (Directions for Use to CACI No. 380, *supra*, p. 210.)

Let's consider, as an example, entering into a settlement agreement by electronic means. Code of Civil Procedure section 664.6 enables courts to enter a binding, final judgment pursuant to a settlement agreement captured in writing and signed by all of the parties to the litigation. (See *Levy v. Superior Court* (1995) 10 Cal.4th 578, 586.) As discussed above, where a law—here, section 664.6—requires a writing and signatures, an electronic record and e-signatures that comply with the UETA can satisfy that law. (Civ. Code, § 1633.7, subds. (c) & (d).)

In *J.B.B.*, the Court of Appeal addressed whether a typed name at the end of an email was a valid e-signature under the UETA enabling the trial court to grant a section 664.6 motion. There, plaintiffs' attorney emailed a settlement offer to one of the defendants in an effort to end a fraud dispute. (*J.B.B.*, *supra*, 232 Cal.App.4th at p. 978.) Defendant then emailed a response from his cell phone that included the words "'I agree'" and his printed name at the bottom of the message, but also expressed defendant's belief that "'the facts [would] not in any way support the theory in [plaintiff's settlement offer] e-mail.'" (*Id*. at p. 979.) Plaintiffs' attorneys responded that they were unsure whether defendant was in fact rejecting or accepting the settlement offer. (*Ibid*.) Despite their uncertainty, plaintiffs filed a section 664.6 motion to enforce the settlement agreement. (*Id*. at p. 980.) The trial court granted the motion, finding that defendant had accepted the settlement offer with his emailed response. (*Id*. at pp. 982-983.)

The Court of Appeal reversed, finding that defendant had not electronically signed the settlement agreement. (*J.B.B., supra,* 232 Cal.App.4th at pp. 990, 994.) Although the parties had agreed to use electronic means—namely, emails and text messages—to discuss the settlement offer, the court concluded this was only an agreement to negotiate the terms electronically. (*Id.* at p. 989.) The emailed settlement offer contained no language about entering into a "final settlement" by electronic means, and plaintiffs offered no other evidence supporting such a finding. (*Ibid.*) Even though defendant admitted in deposition that he "deliberately" typed his name into the email, this was not sufficient to demonstrate defendant's intent to enter into the settlement or "formalize an electronic transaction." (*Id*. at pp. 989, 992-993.) (In a later opinion, in which the Court of Appeal revisited the facts of this case, the court reemphasized its prior holding that "the settlement agreement was not enforceable under section 664.6 because [defendant's] typed name" at the end of an email "did not constitute an electronic signature." (*J.B.B. Investment Partners Ltd. v. Fair* (2019) 37 Cal.App.5th 1, 13).)

Like *J.B.B.*, the following cases—some not published, and therefore not citable—illustrate the importance of an agreement to conduct a transaction by electronic means for the UETA to apply.

In a recent unpublished opinion, the Court of Appeal addressed whether a voicemail can create an agreement to conduct an electronic transaction. (*Dilonell v. Chandler* (Cal. Ct. App., Oct. 24, 2018, B282634) 2018 WL 5275217 (*Dilonell*) [nonpub. opn.].) A property owner hired a real estate services company to manage the property and later discussed selling it with the company's agent. (*Id*. at p. *1.) After fielding several offers, the agent asked the owner to approve a time-sensitive offer without review. (*Id.* at pp. *1-*2.) The agent said she would sign the owner's name on the offer for her, and the owner "reluctantly agreed," thinking she would otherwise lose the sale. (*Ibid.*) To effect the transaction, the agent told the owner to leave her a voicemail authorizing her to sign on her behalf. (*Ibid.*) The owner left the voicemail but then refused to sell, leading the buyer to argue that the voicemail from the owner to the agent created an agreement to purchase and sell the property under the UETA. (*Id.* at pp. *2-*3.) The court rejected this argument, finding the UETA did not apply because there was no evidence the buyer and seller agreed to conduct a transaction for the sale of real estate "by electronic means." (*Id.* at p. *5.) The voicemail from the seller to the agent showed only the seller's intent to start the sale process, not an intent to create "an intentional 'electronic signature'" on a real estate sale contract. (*Id*. at p. *6.)

A federal district court interpreting California law and the UETA found a valid agreement between an employer and employee to enter into an arbitration agreement through electronic means. (*Rosas v. Macy's Inc.* (C.D.Cal., Aug. 24, 2012, No. CV-11-7318 PSG(PLAx)) 2012 WL 3656274, at p. *6 (*Rosas*) [nonpub. opn.].) The "express language" of the arbitration form indicated that "the parties agreed to contract electronically." (*Ibid*.) Moreover, the arbitration form "was presented in the context of a series of forms with legal import," including IRS and direct deposit forms, which would "reasonably suggest[ ]" to the employees that the forms would be in some way binding. (*Ibid.*) Finally, the employees had to enter information like their "social security number, month and day of birth and zip code" in order to complete the forms, which also indicated the forms had legal significance. (*Id*. at pp. *2, *6.)

Contrast *Rosas* with the unpublished—and therefore not citable—California Court of Appeal opinion in *Gilgar v. Public Storage* (Cal. Ct. App., Feb. 20, 2019, B288270) 2019 WL 698052 (Gilgar) [nonpub. opn.]. In *Gilgar*, an employer moved to compel arbitration of an employment dispute, contending a former employee had signed an arbitration agreement by checking an "'I agree'" box as part of the employer's new hire forms. (*Id*. at p. *1.) The court found the employee "had not consented to contract electronically under the UETA." (*Id*. at p. *6.) The other materials presented to the employee with the arbitration agreement "were largely required notices that were informational in nature, and would not reasonably have put her on notice that by clicking 'I agree,' she had formed an enforceable contract" to arbitrate any claims. (*Ibid*.) Unlike in *Rosas*, where the employees had to enter personal identifying information in order to complete the forms, the employee here had not "exercised any discretion in selecting or declining her options, or interacted with the software in a way that would suggest an understanding of what she agreed to." (*Ibid*.)

These cases illustrate the importance of entering into an initial, separate agreement to conduct an electronic transaction for the UETA to apply. Although an agreement to enter into an electronic transaction can be established contextually, parties conducting important electronic transactions like settlement agreements can take steps to ensure enforceability, e.g., requiring parties to consent to providing an e-signature before allowing access to an online form, implementing authentication requirements, or opening a separate line of communications whereby the parties explicitly agree to enter into the transaction by digital means. (See Civ. Code, § 1633.5, subd. (b) ["an agreement to conduct a transaction by electronic means may not be contained in a standard form contract that is not an electronic record," but parties may use "a separate and optional agreement" with the primary purpose of "authoriz(ing) a transaction to be conducted by electronic means"].)

Other Approaches

Use of electronic signatures has also been adopted in emergency court rules enacted in response to the COVID-19 pandemic. (See Cal. Rules of Court, emergency rule 8(c)(2) [ex parte requests relating to temporary restraining or protective orders may be "filed using an electronic signature by a party or a party's attorney"].) Nonetheless, the use of electronic signatures is not universal. For example, estate planning documents, to be valid, "must [be] sign[ed] in front of a notary or two witnesses who are not involved in [the] estate." (California Courts, *Emergency Court Actions and COVID-19 (Coronavirus), Estate Planning* (2020) Judicial Council of Cal. <https://www.courts.ca.gov/43589.htm> [as of December 15, 2020].)

California does not currently permit remote notarizations, but one can use remote notaries from other states if their own laws permit it. (See *Notary Frequently Asked Questions, COVID-19 Question*s, Cal. Secretary of State <https://www.sos.ca.gov/notary/faqs/> [as of December 15, 2020] [California notaries cannot perform remote online notarizations, but "California continues to recognize notarial acts performed outside of California if it is taken in accordance with the law of the place where the acknowledgment is made. (California Civil Code 1189(b))"]; see Civ. Code, § 1189, subd. (b) ["Any certificate of acknowledgment taken in another place shall be sufficient in this state if it is taken in accordance with the laws of the place where the acknowledgment is made"].) There is pending legislation to permit remote online notarization in California, but its progress has been slow. (See Sen. Bill No. 1322 (2019-2020 Reg. Sess.); see also Vaz, *Obtaining Signatures on Documents in the Time of COVID-19* (2020) Cox, Castle, Nicholson LLP <https://bit.ly/2CwBKma> [as of December 15, 2020]; Oh & Fonté, *Using Electronic Signatures in the Age of COVID-19* (Mar. 26, 2020) Hunton Andrews Kurth <https://bit.ly/318fTvI> [as of December 15, 2020] [explaining how remote online notarization works].)

COVID-19 has also resulted in the temporary modification of California regulations relating to digital signatures. The list of "Acceptable Certification Authorities" in California Code of Regulations, title 2, section 22003, subdivision (a)(6), has been deleted and replaced with a list of three acceptable third-party certification programs. (Compare Cal. Code Regs., tit. 2, § 22000 et seq. with *Digital Signatures (Emergency Regulations)* (2020) Cal. Secretary of State <https://bit.ly/2V8FWPq> [as of December 15, 2020].)

The ability to use electronic signatures will likely increase during and after the COVID-19 pandemic. It is important to understand the statutes and evolving rules in order to make the most effective use of this technological advantage in the new and constantly changing legal landscape.

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