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Real Estate Law: Disappearing ink: Electronic vs. Handwritten Signatures



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Just as with our personal lives, technology has propelled its way into our professional lives as well. Technology allows information to be exchanged with the complete elimination of paper documents. Frequently, parties will not even touch ink to paper when closing a business deal, as electronically signed documents have substantially replaced manually signed documents in traditional face-to-face closings.

In commercial transactions, a signature on a document shows intent, authenticates a document, and puts the party who signed the document on notice that he or she has made a binding and enforceable legal commitment. While it still provides many practitioners comfort to get manually signed original documents, especially in the context of real estate transactions, this practice is no longer legally necessary in all situations. Today, an electronic signature on a document is not treated any differently than a handwritten signature on a document.

Both federal and state statutes endorse the legal enforceability of an electronic signature. In 1999, the New York State Legislature enacted the Electronic Signatures and Records Act ("ESRA"). Likewise, the Electronic Signatures in Global and National Commerce Act ("E-Sign"), enacted by the federal government in

2000, governs transactions affecting interstate and foreign commerce. In 2002, the New York State Legislature amended ESRA to ensure that both laws complement each other.

There are certain exceptions. For example, ESRA will not apply to "any document providing for the disposition of an individual's person or property upon death or incompetence, or appointing a fiduciary of an individual's person or property, including, without limitation, wills, trusts, decisions consenting to orders not to resuscitate, powers of attorney, and health care proxies." In addition, among other excepted requirements, E-Sign will not apply to certain sections of the Uniform Commercial Code, or to a contract or other record "to the extent it is governed by a State statute, regulation, or other rule of law governing adoption, divorce, or other matters of family law."

Until the fall of 2012, ESRA required a manually-signed original document in any real property conveyance or other instrument recordable under Article IX of the New York State Real Property Law. In September of 2012, the New York State Legislature amended both the Real Property Law and ESRA to provide that real estate transactions under Article IX of the Real Property Law would no longer be excluded from ESRA and declared that electronic signatures for such conveyances recordable under Article IX would be allowed. Accordingly, the terms "electronic," "electronic record," "electronic signature," "wet signature," and "digitized paper document" were added as definitions to the Real Property Law.

In New York, ESRA provides that the "use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand." Both ESRA and E-Sign define an electronic signature with near identical terms. Under ESRA, an electronic signature means "an electronic sound, symbol, or process, attached

to or logically associated with an electronic record, and executed or adopted by a person with the intent to sign the record." Both laws allow an electronic signature to be used in place of a handwritten signature, and declare that an electronic signature "cannot be denied legal effect, validity, or enforceability solely because it is in electronic form." If the parties to a transaction intend to transact business electronically, the agreement between them should state that intent.

Many find it not only good practice, but legally necessary to have manually signed original documents. However, as ESRA and E-Sign point out, the possession of a manually signed original is only required in certain circumstances. Under ESRA and E-Sign, the use of an electronic signature is purely voluntary, and the statutes do not force a person or entity to complete a transaction electronically. The statutes simply say that when an electronic signature is used, it is an acceptable substitute for a handwritten signature. To that end, if the parties to a transaction intend to transact business electronically, it would be prudent for them to memorialize that intent in writing to avoid any uncertainty. Include a simple and explicit provision stating that the agreement may be executed by means of an electronic or digital signature or provide in the agreement that the parties agree that an executed signature page to the agreement that is sent or delivered via pdf copy or by any other electronic means will be as legally binding and enforceable as a signed original.

As technology continues to become more prevalent in our professional lives, we should nevertheless avoid ambiguity when it comes to transacting business electronically. Be clear and spell it out.

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