

Electronic Documents and Signatures: A “How To” Guide

By Paul H. Arne
Morris, Manning & Martin, LLP

1600 Atlanta Financial Center
3343 Peachtree Road, NE
Atlanta, Georgia 30326
404.233.7000



www.mmmlaw.com

Atlanta, GA Charlotte, NC Washington, DC

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Generally speaking, as long as certain requirements are met, electronic documents and electronic signatures are now as legally valid and binding as their paper counterparts. This “How To” guide describes the basic process for using electronic documents and signatures in commerce and provides some best practices for helping to ensure that these electronic means of commerce are given the legal treatment that you intend.

Hopefully, you will see from this guide that, while there are requirements for transacting business in an electronic world, those requirements are relatively straightforward, even mechanical. This means that there are few legal barriers to obtaining the efficiencies of doing business online.

I. The Landscape of Doing Business Online

In the late 90’s and early 2000’s, most states adopted legislation that has put electronic documents and signatures on par with their paper counterparts. Most of these new laws were modeled after one of two laws: the Uniform Electronic Transactions Act (UETA, pronounced you-EAT-ah) and the Electronic Signatures in Global and National Commerce Act (E-SIGN). UETA is a model state law, developed to allow the states to adopt consistent legislation. E-SIGN is a federal law that is a specific implementation of UETA. Basically, E-SIGN is UETA with the blanks filled in and certain specifics added, especially specifics involving consumers.

The federal E-SIGN legislation also provides that any state not adopting its own form of UETA will be governed by E-SIGN. E-SIGN’s enactment means that all 50 states now have very similar laws related to the legal enforceability of electronic signatures and documents. About 40 states have adopted a form of UETA. These states tend to have adopted a form that closely resembles UETA or closely resembles E-SIGN. The remaining 10 or so states are, of course, governed by E-SIGN.

The fundamental principles of this legislation are consistent across the state laws. The first principle is that an electronic record or signature may not be denied legal effect or enforceability solely because it is in electronic form. The second principle is that a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation. The basic rule is that whether a document or signature is electronic or on paper has no legal significance.

II. It’s Not Just About Contracts

Much of what has been written about electronic documents and signatures has focused on electronic contracts. The legislation goes further than just contracts, however. Other writings can have legal effect. They include consents, authorizations, legal notices and the like. Many of these documents can also be implemented online, even when legislation related to these consents and authorizations originally required the documents to be “in writing.” Under the right circumstances, and with some advance planning, the following kinds of documents may be legally valid even if they are never in paper form:

- Authorizations to release medical records for insurance underwriting.



- Authorizations to release credit records for insurance underwriting.
- Notices of default under contracts.
- Informed consents to medical procedures.

Using electronic communications for these kinds of consents, authorizations and notices also opens up additional possibilities for achieving efficiencies by replacing paper processes with electronic communication and automated workflow.

III. The Process

Below is a process to consider as you prepare to implement a business relationship using online documents and signatures.

A. Assessment

Think about what you are trying to accomplish and how that task is accomplished in a non-electronic world. Among the items to consider are the following:

- Is this a notice, consent, authorization or other communication?
- Are you trying to create a contract?
- What are the laws and regulations that govern these activities in a paper world? Moving to electronic communications does not eliminate those laws. Electronic document and signature laws also allow other laws to specifically opt out, so it is important to be aware of specific requirements of laws that would otherwise regulate these activities in a paper world.
- Who are you dealing with? The requirements of electronic record and signature laws vary depending on the nature of the person or entity with whom you communicate. Specifically, there are special rules for interactions with consumers and governments.
- What is the geographic scope of these transactions? It is important to determine whether your activities will be limited to one or a few states and whether your activities will cross national borders.

B. Get Subject Matter Help

Electronic record and signature laws only address the differences between paper and electronic documents. All other legal requirements still apply. It is therefore important to examine the legal landscape of the activity involved by an attorney with knowledge in the subject matter. The law in the area may require that a notice be delivered within a specified period of time or be provided in conspicuous text. The law may require that delivery of the notice be confirmed or verified or that the records be retained for a specific period of time. These requirements will still exist for electronic communications.



C. Determine Whether Specific Exclusions Apply

Electronic record and signature laws contain specific exclusions from their scope. Accordingly, it is important to determine whether your activity falls within an activity that is excepted out of these laws. UETA has fewer restrictions than E-SIGN. However, the exclusions for E-SIGN apply to the 10 or so states that have not adopted UETA. In addition, some states that have adopted UETA have specifically adopted the exclusions set forth in E-SIGN. Most of these exclusions relate to consumers, so the exclusions are less likely to exist in electronic communications between businesses.

The exceptions under UETA, E-SIGN and some selected states are the following:

- The creation and execution of wills, codicils and testamentary trusts.
- The Uniform Commercial Code other than those provisions governing the sale of goods (Article 2) and leases (Article 2A). This means that the laws governing checks, promissory notes and other forms of commercial paper and the creation and perfection of security instruments are outside the scope of electronic document laws. Note, however, that there are developments in those areas to allow electronic documents to be used; those efforts are just not a part of UETA.
- Any transactions governed by the Uniform Computer Information Transactions Act (UCITA). UCITA is another uniform law, but as of this writing it has only been passed in 2 states, Virginia and Maryland. UCITA has its own rules related to electronic documents and signatures that are similar to UETA.
- Matters regarding adoption, divorce or family law.
- Official court documents (pleadings, orders, motions, etc.).
- Notices regarding cancellation or termination of utility services, such as water and electricity.
- Notices regarding default, acceleration, foreclosure or eviction, either under a credit agreement or rental agreement, for a primary residence.
- Notices regarding cancellation or termination of health insurance or benefits or life insurance benefits.
- Product recalls or notices of a material failure in a product.
- Documents regarding the transportation and handling of hazardous, toxic or dangerous materials.
- Documents related to corporate governance, such as articles of incorporation, corporate by-laws, and various other corporate-related documents involving corporations, partnerships, LLC's, LLP's, and statutory trusts. This is a Delaware-specific restriction. Because many companies are incorporated in Delaware, this is an important limitation related to documents associated with corporate governance.
- Laws governing state-incorporated bank and trust company regulations. This is also a Delaware-specific exclusion.



California has a host of exclusions, so much so that doing electronic business in California requires special attention to the exclusions to its electronic documents law. California exclusions include certain documents, notices and other aspects of the following: disclosures required by telemarketing companies; releases of certain medical records; notices involving mobile homes; notices related to subdivision sales or leases; activities regarding regulation, ownership, lease and operation of condominiums; notices of rights to rescind home solicitation offers or contracts; documents and notices regarding home equity sales contracts; documents and notices regarding consumer credit reporting agencies; documents and notices regarding credit service contracts; documents and notices regarding check cashers; consumer warranties; automobile lemon law buyback disclosures; documents and notices regarding retail installment sales and accounts; disclosures regarding innkeepers' deposits; documents and notices regarding shared appreciation loans for seniors; documents and notices regarding rental agreements for residential property; documents and notices regarding residential foreclosure consultants; provisions regarding automobile sales finance and leasing; notices regarding consumer loans; contracts for Medicare supplement contracts; documents and notices regarding health care service plans and Medicare supplement contracts; notices regarding foreclosure of a lien on a motor vehicle; disclosures regarding denial of motor vehicle liability insurance, including information relating to refusal of applications for good driver discounts; notices of cancellation or nonrenewal of various insurance policies, including various types of property damage insurance, disability insurance, long term care insurance, liability insurance, workers compensation insurance, life insurance, etc.; and notices and other documents related to summary court proceedings.

If an exception applies, then the electronic document and signature laws do not apply to those documents. However, despite the length of the list of exclusions above, you can see that the vast majority of commerce is not covered by the exclusions. Most of U.S. commerce can be implemented with electronic records and signatures.

D. Contracts

Just as not every piece of paper is a contract, every electronic communication isn't a contract, either. To be a contract, other requirements exist. In the paper world (very generally speaking), a contract typically exists when there is an offer made to contract on certain specific terms that is accepted by another. In order to have a contract in an electronic medium, the same requirements must exist.

For example, in order to have an electronic contract, someone has to make an offer that has terms. This means that the terms of the offer need to be available to the person who is supposed to accept them. In addition, once the person has received the offer, he or she has to accept it, usually in some affirmative way. Not surprisingly, the online, "click wrap" agreements that are becoming ubiquitous in the computer software industry have a contract displayed with the opportunity to review it, together with a button to click that says either "I Accept" or "I Agree."

In some situations, the offer and acceptance occurs after there has been an exchange of money and property. One example is purchasing software at retail. First you buy the software, pay money, and

take the software home with you. Then you open the box and install the software on your computer. It is only at installation that you are faced with an electronic agreement. In these situations, best practices suggest that there be a notice placed on the box that the use of the software will be subject to an electronic agreement. In addition, there should be a mechanism for unwinding the previous parts of the transaction. Usually this is accomplished by stating that if the user doesn't want to agree to the terms of the electronic agreement, he or she can return the software to the retail store for a refund.

E. Dealing with State and Federal Governments

When you are doing business or communicating with the federal government and or a state government, there may be different rules. Accordingly, if you are doing electronic business with or providing notices or consents to a governmental entity, then you need to carefully check the applicable law for specific requirements.

F. Dealing with Consumers

Consumers are defined like you would think they would be: individuals who are buying products or services for personal, family or household use. When dealing with consumers, special rules apply.

1. Affirmative Consent

Consumers must affirmatively consent to do business electronically. Your notices and agreements with consumers should have language to this effect.

2. Pre-Consent Requirements

Before consumers give consent, you must tell them what hardware and software is needed to access or retain electronic records. In many situations, you can satisfy this by downloading a .txt file of the document to the consumer's personal computer, as virtually all personal computers can read .txt files. The almost universal ubiquity of Adobe Acrobat reader software has also made this requirement relatively easy.

3. Conspicuous Notice

You must provide a notice to a consumer describing the following:

- (a) any right or option to have an electronic record made available on paper;
- (b) the right to withdraw the consent to do business electronically and the consequences and fees associated with that withdrawal;
- (c) the procedures for withdrawing consent to do business electronically;
- (d) what the consent to do business electronically covers, such as whether it involves a specific transaction, an entire business relationship, etc.;
- (e) procedures to update consumer contact information; and
- (f) how to get a paper copy of the electronic document and the fees for such copy.



4. *Other Conditions*

If after the transaction you change technologies for how electronic documents can be viewed and stored, you must tell the consumer and give him or her the right to withdraw consent. While the law covers this possibility, current technology makes this an unlikely occurrence.

Also, the manner in which you receive the customer's consent must reasonably demonstrate that the consumer can access the information in electronic form.

5. *Implementing Consumer Transactions*

While there are a number of requirements for consumer transactions, note that they are not that hard to comply with. For example, the notices to the consumer described above can be implemented in a paragraph or two of text. The requirements are straightforward. Also, while there may be some differences across different implementations of electronic communications, such as how access to records is provided or how notices are provided, much of the way these kinds of communications are implemented will be the same.

G. Access to Records

There is an important difference between the legal treatment of electronic and paper documents. If you seek to prevent the other party to a transaction from making a copy or gaining access to the electronic document, then the law prevents you from enforcing the terms of that document against that person. Therefore, you need to make sure that you don't implement barriers to the storing and accessing of these records by those with whom you do business.

H. Recordkeeping

You need to make sure that all parties to the transaction have reasonable access to these documents. This is another task to consider in connection with implementing electronic commerce. This doesn't mean that you have to have an automated process to make this information available, but it does mean that you need to have some mechanism for providing copies of these documents.

In addition, you need to have a way to store and retrieve these documents. Just as a paper consent, authorization or contract is typically stored in a file somewhere, the electronic documents must be stored in a manner where you can actually show what the person consented or agreed to. Without being able to show what was signed, you won't be able to produce it in the event of a dispute. Under certain circumstances, this may require special recordkeeping. For example, if you have terms and conditions that are agreed by visitors to a Web site, you probably would need to show that access to certain things on the site require an agreement and what the agreement was on the date the access occurred. This means that you would have to keep track of what terms and conditions were on your Web site when.



I. International Issues

While this document does not attempt to summarize electronic signature legislation worldwide, note that many countries are as legally enabled to do electronic commerce as the United States. Most industrialized nations allow electronic records and signatures to have legal force. If you plan to transact electronic commerce overseas, it makes sense to check the laws of the applicable countries.

IV. Conclusion

This “how to” guide provides you with a roadmap to implementing electronic transactions. While specific implementations should be checked from a legal standpoint, this guide provides a basic legal process for accomplishing electronic commerce. As you can see, there are requirements for doing business in an electronic world. Fortunately, these requirements are generally consistent across all states and relatively easy to implement.

This document is a general guide to the creation of legally enforceable electronic documents and signatures. While we believe a general guide can be of use in planning to implement electronic transactions and commerce, the legal specifics of any particular implementation of electronic documents and signatures should be examined before use. This document cannot give you all the potential rules for every form of electronic document and signature, and it does not do so. It does not create an attorney/client relationship with you and does not provide specific legal advice to you or your company. It is provided for educational purposes only.