

Effective E-Signatures: Tips on Navigating the UETA

A key statute controls the enforceability of documents that are signed electronically.

Attorneys must be savvy when it comes to the use of electronic signatures. Getting it right may well mean the difference between a done deal and a return trip to the negotiating table.

Consider three scenarios:

Scenario 1: Electronic Negotiations. You have been negotiating in person, by phone, by e-mail, text message and instant messaging. You finally have come to terms, and you indicate agreement with the other side by e-mail. The other side responds in kind. The history of communications clearly show that the parties have reached an agreement.

Do you have an enforceable deal?

Scenario 2: Document Circulation. You have a document that is circulated electronically to a group of people in their workplace. They are required to log in to a system accessible only by using their work IDs and thereafter affirm with electronic signatures in various key points in the document. They do so.

Can you can enforce the provisions of that

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document?

Scenario 3: Mediation. You have been mediating a dispute, but not all participants are present at the mediation. As an offshoot of this scenario, the matter did not settle during a mediation session and

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the mediator is continuing to mediate by phone and other modes of communication. The mediator sends an e-mail confirming that you have a deal. The email in question sets out the agreed terms and asks that the attorneys confirm by reply e-mail that the deal as set forth has been agreed to by their clients. All attorneys confirm by way of a "reply all" email.

There is an enforceable settlement, right?

CALIFORNIA'S UETA

Be careful how you answer, as the validity (read: enforceability) of each of these

"agreements" will depend on the California's Uniform Electronic Transactions Act ("UETA", Cal. Civ. Code §§ 1633.1-1633.17 [unless otherwise indicated, all further section references in this article are to the California Civil Code]). UETA governs the first two fact patterns and, assuming that the mediation was pursuant to the California evidence code, both the UETA and the evidence code govern the third scenario.

Pertinent provisions of the UETA include:

- Definition of electronic signature as "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 electronic record." § 1633.2(h).
- Before an electronically executed agreement can be enforceable the parties need to have "agreed to conduct the transaction by electronic means." § 1633.5(b). And, whether such agreement exists is "determined from the context and surrounding circumstances, including the parties' conduct." Section 1633.5(b) further requires that agreement for the transaction to be electronic may not be in a standard form contract unless the standard form contract is "separate and optional" with its "primary purpose" being "to authorize a transaction to be conducted by electronic means."
- An "electronic record or electronic signature" must be "attributable to a per-

son.” It is so attributable “if it was the act of the person” which “may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.” § 1633.9(a).

RECENT UETA CASES

Now let’s go back and review the above scenarios with reference to the appellate decision from which they sprang.

In the first circumstance, the parties appeared to have reached an agreement by e-mail, including voicemail confirmation by the party who ultimately contested the agreement. The party supporting the agreement contended it was enforceable under the California settlement enforcement statute (Cal. Code Civ. Proc. § 664.6). However, the Court of Appeal ruled that absent execution, either by “wet signature” or execution compliant with the UETA, a settlement agreement whose terms are memorialized in e-mail or text—and even affirmed in a voicemail—is not enforceable because there was nothing in the course of dealing between the parties to indicate an agreement for the transaction to be electronic. Moreover, the typed name in an e-mail by the party against whom the agreement was asserted did not constitute an “electronic signature” under the UETA. (See *J.B.B. Inv. Partners, Ltd. v. Fair*, 232 Cal. App. 4th 974 (2014).)

In the second circumstance, an employer sought to enforce an arbitration clause to which all employees agreed by logging into the company’s HR system using a unique login and password and then electronically executed the acknowledgement form, including the agreement to arbitrate. The Court of Appeal found that the employer failed to prove that electronic execution of the agreement was “the act of” the party to whom it was attributed. (See *Ruiz v. Moss Bros. Auto Group, Inc.*, 232 Cal. App. 4th 836 (2014).)

No California appellate decision has yet dealt with the third scenario. Given the foregoing, we can reasonably assume e-mail confirmation that all parties agree to the terms of a mediated agreement is insufficient under the UETA. Thus, the agreement would not be admissible for enforcement because it would not be “signed by the settling parties” as required by California Evidence Code section 1123.

WHAT SHOULD YOU DO?

Given the current state of the legal landscape, consider doing the following:

- Confirm agreement electronically (likely by e-mail) and request that each party provide a wet signature with witness attestation (it is not necessary that it be notarized) within a defined (short) period of time.

- Confirm agreement electronically (likely by e-mail) and request that each party agree to execute the transaction electronically. Provide a separate agreement to have the transaction be electronic that complies with section 1633.5(b) and if continuing a mediation, include language making the agreement admissible pursuant to California Evidence Code section 1123.
- Determine which electronic transaction vendor you will use and consider what kind of safeguards you will need in order to verify that the “electronic signature” is the “act of” a given party, possibly including third-party administration of the execution of the agreement, including third-party witnessing or verification of the signer’s identity at the time of login or video-conferencing where the execution occurs. And note, if all of this occurs in the context of a mediated agreement, the requirements of Evidence Code section 1123 should be considered in order to ensure admissibility.

After all, the reason we have courts is that sometimes a “sure deal” becomes just another “litigated deal.” When using electronic communication, an effective working knowledge of the UETA is vital. Pre-planning will go a long way toward making sure that an agreement stands up in court after it purportedly has been executed.