

A Reprint from *Tierra Grande*


# Virtual Signatures

[sign here]

by Judon Fambrough

**R**eal estate agent Linda has a listing on the Internet. She receives a call from a prospective buyer. After some discussion, Linda inserts all the seller's and buyer's proposed terms and conditions in an electronic version of a TREC contract and e-mails it to the buyer. The buyer accepts by typing his name in the appropriate space and returns the document electronically to Linda.

Linda forwards the offer to the seller electronically. He types his name in the appropriate space signifying acceptance of the offer. The completed contract is e-mailed to Linda. None of the signatures are encrypted.

Do the parties have a binding contract? Specifically, have they done enough to satisfy the statute of frauds found in the Texas Business and Commerce Code? The code requires enforceable promises or agreements for the sale of real estate to be in writing and signed by the persons charged with the promises or agreements.

## Electronic Transactions Gain Status

Little attention was given to the Uniform Electronic Transactions Act (UETA) when it was passed by the Texas Legislature in 2002. However, if used properly this new law could significantly impact

the way real estate professionals negotiate and consummate contracts.

Simply stated, the UETA gives electronic contracts and signatures the same legal status as paper signatures and contracts, as long as certain requirements are met.

The question is whether the UETA satisfies the statute of frauds. The answer is obscured among its many definitions of terms.

## Terms Defined

According to the act, a *contract* means the total legal obligation resulting from the parties' agreement. An *agreement* is the bargain of the parties as found in their language or inferred from other circumstances.

The term *electronic contract* is not defined, but *electronic* is. It relates to technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities.

So far, the TREC contract used by the agent in this example satisfies the definitions. The act does not put real estate contracts on a different footing than other contracts or documents. But what about the unencrypted signatures? Are they valid and enforceable?

The act defines an *electronic signature* as an electronic sound, symbol or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record. While most people associate the typing of their names with an electronic signature, the law allows a sound, symbol or process to be used. The act literally permits the use of bells and whistles.

Encrypted signatures are not mentioned or required, but certainly they can be used. Encrypted or digital signatures are beyond the scope of this article. It is sufficient to say that unless a computer has had the proper software installed, it is unencrypted.

UETA states, "If a law (such as the statute of frauds) requires a signature, an electronic signature satisfies the law."

**T**he statute refers frequently to a *record*. According to the act, a record means information inscribed on a tangible medium or stored in an electronic or other medium and retrievable in perceivable form. An electronic contract satisfies this definition.

The statute goes on to say, "If a law requires a record to be in writing (such as the requirement of a written agreement

by the statute of frauds), an electronic record satisfies the law." Clearly, UETA satisfies the statute of frauds.

## Formal Agreement Required

Based on the broad definition of an electronic record and an electronic signature, contracts entered via facsimile transmission (FAXs) appeared to be validated by the act — assuming the other requirements are met.

The agent in the example, however, may not have fulfilled all of the requirements of the act.

The act applies only to transactions between parties who have agreed to conduct transactions by electronic means. In this situation, the buyer and seller did not formally agree to an electronic transaction. The act goes on to say, however, that the agreement to an electronic transaction may be determined from the context and surrounding circumstances, including the parties' conduct.

The proof of an agreement to conduct the transaction by electronic means presents the greatest impediment to use of the procedure.

It could be argued in the example that the buyer and seller agreed to the electronic transaction by typing their names in the appropriate spaces. But this is not an iron-clad argument.

In the scenario, Linda could conduct a conference call and ask the parties to consent to the electronic transaction. Later, however, the phone conversation would be difficult to prove if one party wants out of the contract.

Another possibility would be to send an e-mail to each party, getting their consent to an electronic transaction. But again, one party could later allege forgery of his or her e-mail signature. A formal written agreement signed by both parties may be the only solution.

## Security Procedures

The entire concept introduced by UETA appears to invite fraud and counter traditional pen-and-ink contracts. Anticipating these problems, drafters of

the statute provided for the use of *security procedures*. These procedures verify that an electronic signature, record or performance is that of a specific person and detect changes or errors in the information in an electronic record. Security procedures include the use of algorithms or other codes, identifying words or numbers, encryption, callback or other acknowledgment.

The methods or means of implementing a security procedure are left to the parties' discretion and imagination. This again raises the issue of how and when the parties agree on the security procedures without a face-to-face meeting.

Perhaps a face-to-face meeting is inevitable for an enforceable, no-questions-asked electronic contract. In most transactions, the buyer and seller meet personally before a pen-and-ink contract is consummated. The issue of whether the transaction can be conducted electronically and the implementation of

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security procedures may be discussed at this meeting. If the parties agree, a formal written document outlining the agreement and describing security procedures should be drafted and signed by the respective parties.

The parties may require that the final document be notarized. According to the act, if a law requires a signature or record to be notarized, acknowledged, verified or made under oath, the requirement is satisfied if the electronic signature meets certain conditions. The person authorized to perform those acts, together with all other information required to be included by other applicable law, must

be attached to or logically associated with the signature or record. The act elaborates no further on the procedure.

John A Niemoeller, a partner with the Stolar Partnership in St. Louis, Mo., writing on the topic, states, "A forged electronic signature is no more valid than a forged pen-and-ink one. An altered electronic contract is not more enforceable than an altered paper one. The legal system (especially the courts) will need to develop practices for establishing and accepting the reliability of electronic records and signatures submitted as evidence, just as it did for hard copies, carbon copies, photocopies, and faxes in years past. UETA does not solve these problems."

## Changes and Errors

To some degree, the act addresses the effect of changes and errors to electronic contracts. Here are the conditions.

First, the parties (the buyer and seller in this example) must agree to implement security procedures to detect changes and errors. Second, one party (the buyer, for example) does not conform to the security procedures, but the other party (the seller) does. Third, an error occurs that the buyer (the nonconforming party) would have detected had he or she followed the procedures. Under these conditions, the seller (the conforming party) may avoid the effect of the change or error.

In other circumstances, the change or error has the effect provided by the contract or by existing law, including the law of mistake.

Because UETA is relatively new, title companies and mortgage lenders may insist on pen-and-ink signed contracts before issuing a title commitment or processing a loan application. Even if they do not accept electronic contracts and signatures, UETA will speed negotiations and may be sufficient to earn the commission. ➤

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