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Creating Enforceable Electronic Contracts

Clients often ask whether there are any special legal issues they need to anticipate when creating or entering into contracts that exist entirely online and are signed by some means other than a traditional physical signature. Fortunately, due to federal and state laws, “electronic contracts” can be just as valid and enforceable as their paper counterparts as long as traditional rules of contract formation are followed.

This issue of *Dicta* provides a brief overview of the laws regarding electronic signatures on contracts, followed by a refresher as to the necessary elements of any valid and enforceable agreement, and ending with some best practices for drafting electronic contracts.

E-SIGN Act and Uniform Electronic Transactions Act

Under the federal E-SIGN Act, in contracts that deal with interstate commerce, electronic signatures and electronic contracts must be given the same legal effect, validity, and enforceability as handwritten signatures and paper contracts. This means that for those types of contracts covered by the E-SIGN Act, which includes nearly every type of contract dealing with interstate commerce

except for those pertaining to family law and estate planning, an electronic record can satisfy any law that requires that a contract be in writing. Importantly, however, the E-SIGN Act does not require any person to agree to use or accept electronic records or signatures, so the traditional paper contract is unlikely to become extinct anytime soon.

The law defines “electronic signature” as “an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.” Courts have broadly interpreted this definition to virtually any form of electronic assent, including but not limited to clicking an “I Agree” button, typing a name into a signature box, and inserting a scanned version of an actual signature.

The E-SIGN Act is based in part on the Uniform Electronic Transactions Act (UETA), which is a law that 47 states including the District of Columbia have adopted. The foundation of UETA is the same as

the E-SIGN Act: providing legal validity to electronic signatures and electronic contracts. UETA applies to business and government contracts and has some exceptions, such as many types of estate planning contracts.

Traditional Rules of Contract Formation Still Apply

While the law firmly supports the use of electronic contracts and signatures, the tenants of contract formation still must be followed in order for these contracts to be valid and enforceable. To be legally valid, all contracts must have an *agreement* (an offer by one party and an acceptance by the other) and *consideration* (something of legal value given in exchange for a promise). Additionally, the parties must have the legal capacity and authorization to enter into a contract, and, of course, the subject matter of the contract must be lawful. Enforceability of the contract not only depends on the above factors, but also on whether the terms of the contract are clear and consistent, whether a party was under duress or undue influence when entering into the contract, and whether a party signed by mistake or without knowledge of the contract's meaning.

Best Practices

In light of the above, here are some best practices to utilize when drafting electronic contracts:

Require that the person signing the electronic contract perform some action assenting to the terms, and do not allow the transaction to complete without that action being taken.

"Click wrap" agreements (where the party indicates agreement to terms and conditions by clicking an "I Agree" button or checkbox of some sort) are binding and enforceable, unlike "browse wrap" agreements that purport to bind a party without any manifestation of assent. In other words, with browse wrap agreements, a notice of terms and conditions usually appears on a web page, but the user is not required to click on an icon expressing agreement, nor is the user required to view the terms of an agreement.

If you choose to incorporate something other than a click-through procedure, consider using some form of signature authentication technology with built in security measures.

There are a number of companies that provide software for this purpose.

Put the person signing on notice that they are entering into a binding agreement so that there is no confusion.

Less sophisticated parties may not readily understand that an online contract with some form of electronic assent (whether it be a click-through or typing the party's name or otherwise) is just as legally binding as a traditional hand signed contract.

Provide the person signing with the ability to opt out of an electronic contract and use a paper version.

This may be an inconvenience if you are trying to maintain all electronic records, but the E-SIGN Act states that one cannot be required to use an electronic contract.

Maintain complete and accurate records of the electronic transaction.

Electronic records would include a copy of the electronically signed contract *as the terms existed at the time of assent*, as well as any identifying information you lawfully obtained from the party that signed (e.g., login information, IP Address, authentication code).