

**REAL ESTATE DEALS AND THE
TEXAS UNIFORM ELECTRONIC TRANSACTIONS ACT**

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Copying a Floor Plan Can Land You in Court, Austin Business Journal, September, 2004

Where to Turn When There Isn't D&O Liability Insurance Coverage, Professional Liability Underwriting Society, September, 1991

Conflict of Interest, Confidential Information and Rule 11, Attorney Sanctions Newsletter, December, 1990

Counseling the Client on Commercial Arbitration Clauses, The Practical Lawyer, January, 1990

How to Avoid Rule 11 Sanctions, The Practical Lawyer, March, 1988

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I. INTRODUCTION

Every practitioner knows the basic rule that in order for an agreement to convey real estate to be enforceable, it must generally contain the essential terms of the agreement, be in writing, and be signed by the party to be charged. Some lawyers and businesspersons may be surprised at just how easily the traditional formalities and requirements may be satisfied in a digital age under the Texas Uniform Electronic Transactions Act, codified as TEX. BUS. & COM. CODE § 322.001 (formerly § 43.001 *et seq.*) (the “UETA” or the “Act”).

This paper summarizes important provisions and identifies pitfalls and opportunities of the UETA in connection with steps typically involved in a real estate transaction. Key issues for the real estate lawyer include whether the parties negotiating a transaction have agreed, or may be deemed by their course of conduct to have agreed, to conduct the transaction by electronic means, and whether a document, or group of documents, has been signed, within the meaning of the Act.

A complete copy of the UETA is included in [Attachment 1](#). For additional analysis of the Act, there are several excellent papers discussing the UETA, including the following: Kevin M. Kerr and Kason D. Kerr, *The Texas Electronic Transactions Act Says What?*, State Bar of Texas 32nd Annual Advanced Real Estate Law Course (July 2010); James Ivy Wiedemer, *Drafting Disasters Regarding Electronic Documents*, State Bar of Texas 13th Annual Advanced Real Estate Drafting Course (March 2002).

II. TEXAS UNIFORM ELECTRONIC TRANSACTIONS ACT

A. The Basics

The model Act was drafted in 1999 by the National Conference of Commissioners on Uniform State Laws. The Act was enacted in Texas and made effective as to any electronic record or electronic signature created, sent, received or stored on or after January 1, 2002. TEX. BUS. & COM. CODE § 322.004. A version of the model Uniform Electronic Transactions Act promulgated by the Commissioners has been enacted in almost every state in the union as well as in the District of Columbia.¹

The UETA attempts to overcome obstacles to transactions conducted electronically. The stated purpose of the UETA is “to remove barriers to electronic commerce by validating and effectuating electronic records and signatures.” Preface to UETA (1999). The Act itself states that it “must be construed and applied... to facilitate electronic transactions consistent with other applicable law.” TEX. BUS. & COM. CODE § 322.006 (2009).

The Act broadly defines “electronic” to mean “relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities,” and defines “electronic record” to mean “a record created, generated, sent, communicated, received, or stored by electronic means.” TEX. BUS. & COM. CODE §§ 322.002(5), (7) (2009). A “transaction” is defined to mean an “action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs.” *Id.* § 322.002(15).

B. Procedural vs. Substantive Law

The Act is one of procedure rather than substance. That is to say, for example, the Act does not purport to change the substantive law of contracts. “A transaction subject to [the Act] is also subject to other applicable substantive law.” TEX. BUS. & COM. CODE § 322.003(d) (2009). Whether the statute of frauds, the law of agency, or other substantive law is, or is not, applicable to a transaction is not affected by the Act.

As the drafters themselves state, the UETA “is NOT a general contracting statute – the substantive rules of contracts remain unaffected by UETA.” Preface to UETA (1999) (emphasis in original). *See also* UETA § 7 cmt. 1 (describing the “fundamental premise” of the Act to be “that the medium in which a record, signature, or contract is created, presented or retained does not affect its legal significance.”).

Although it is true that the Act does not make substantive changes to the law of contracts, the practitioner must be aware that terms such as “record” and “signature” have been broadly defined to include electronic communications. In this day when communication by email, texts, tweets, internet postings, and voicemail is the norm, the practitioner may find that loose language in communications unintentionally gives rise to a binding agreement.

¹ A helpful reference for the law of electronic signatures and transactions in the United States of America and

international jurisdictions, see Stephen Mason, *Electronic Signatures in Law* (Tottel, 2nd edition, 2007).

C. Concerns of Scope of Application to Real Estate Transactions

Times have certainly changed from the old ceremony of physically handing a clump of earth or twig at the property to consummate a conveyance of real property. It is interesting to note that the drafters of the UETA expressed some concern about allowing real estate transactions to be conducted electronically under the Act. But their concerns were overcome. The drafters stated, “real estate transactions were considered potentially troublesome because of the need to file a deed or other instrument for protection against third parties. Since the efficacy of a real estate purchase contract, or even a deed, between the parties is not affected by any sort of filing, the question was raised why these transactions should not be validated by this Act if done via an electronic medium. No sound reason was found.” Preface to UETA (1999).

The comments to the UETA expand on this idea. “It is important to distinguish between the efficacy of paper documents involving real estate between the parties, as opposed to their effect on third parties. As between the parties it is unnecessary to maintain existing barriers to electronic contracting. There are no unique characteristics to contracts relating to real property as opposed to other business and commercial (including consumer) contracts. Consequently, the decision whether to use an electronic medium for their agreements should be a matter for the parties to determine.” UETA § 3 cmt. 3. The concern about the possible greater opportunity for fraud in electronic transactions was outweighed by the desire to prevent unreasonable barriers to electronic commerce.

The drafters of the UETA also state, “An exclusion of all real estate transactions would be particularly unwarranted in the event that a State chose to convert to an electronic recording system, as many have for Article 9 financing statement filings under the Uniform Commercial Code.” *Id.* Indeed, Texas adopted the Uniform Real Property Electronic Recording Act as TEX. PROP. CODE § 15.001 *et seq.*, as an important corollary to the Act.

D. Optional Law

The Act applies only to transactions between parties which have agreed to conduct transactions by electronic means. TEX. BUS. & COM. CODE § 322.005(b) (2009). Specifically, the Act states: “[t]his chapter applies only to transactions between parties each of which has agreed to conduct transactions by

electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties’ conduct.” *Id.*

Parties can expressly agree that, despite their use of emails or other electronic records, electronic signatures will not be deemed sufficient to bind parties. “A party that agrees to conduct a transaction by electronic means may refuse to conduct other transactions by electronic means. The right granted by this subsection may not be waived by agreement.” TEX. BUS. & COM. CODE § 322.005(c) (2009).

III. EXAMPLE CLAUSES FOR AGREEMENTS OR COMMUNICATIONS

Most lawyers would agree that the best practice is to clearly document whether, and perhaps to what extent, transactions are intended to be accomplished by electronic means under the UETA. Why give the other party and its creative litigator any credible argument that a course of conduct or communication should be construed or enforced in an unintended manner? A plausible argument of enforceability by an adverse party alone may lead to a detrimental change in negotiating power, or worse, litigation resulting in wasted time and attorneys fees that some may consider a loss regardless of the outcome. Examples of ways to document various intents regarding electronic transactions are provided below.

A. Express Agreement to Conduct Transactions by Electronic Means

In many cases, businesspersons may desire to conduct business, create binding agreements, and close agreements electronically. To avoid the need to search for intent in “surrounding circumstances,” an express provision may be included in contracts, emails, and other documents. An example of a unilateral expression of intent for the UETA to apply is included as Clause 1 in Attachment 2. If one party includes such a specific electronic intent provision in a communication, the failure of another party to object or disavow that intent (together with their conduct) could support an argument and finding that both parties agreed to conduct a transaction by electronic means pursuant to the UETA.

Consideration may also be given as to whether the agreement to transact electronically is applicable to a particular transaction or any transaction by a party or parties. An example of a mutual agreement to conduct

a particular transaction by electronic means is included as Clause 2 in Attachment 2. An example of a mutual agreement to conduct the current and future transactions by electronic means until notice is provided otherwise is included as Clause 3 in Attachment 2.

B. Express Agreement Not to Conduct Transactions by Electronic Means

There are numerous reasons and instances in which a party would not desire to conduct transactions by electronic means. In complicated or high value transactions, it may be prudent to use care and require a physical signature to better confirm an intent to be bound. An organization may not desire to authorize its representatives to enter into agreements until one or more other persons have approved a particular deal. Some have legitimate concerns with the lack of security and susceptibility of fraud in conducting electronic transactions and desire to continue the traditional method of confirmation of an agreement by unique handwritten signature or even handwritten initials on each page of each agreement for a transaction. The case law discussed below includes several instances of unwitting parties held to agreements they didn't intend to be enforceable.

However, agreeing that only traditional paper agreements signed by pen in hand could operate to a party's disadvantage. For instance, a party could forget about or not understand a disclaimer of the effectiveness of electronic records and detrimentally rely on an email of the other party as a binding agreement.

If a party does not intend for a series of emails, voicemail messages or other electronic communications to constitute an enforceable agreement, or does not want to risk communications being misconstrued as an offer, acceptance or agreement, it would be prudent to specifically and expressly state that the UETA shall not apply to a communication, contract or transaction. A sample unilateral statement is included as Clause 4 in Attachment 2, and a sample mutual agreement is included as Clause 5 in Attachment 2.

C. Conditional Agreement to Conduct Transactions by Electronic Means

The UETA can be a safe and effective tool of business when used selectively and purposefully. A party may desire to retain the flexibility to conduct

some transactions or particular aspects of a transaction by electronic means. For instance, some email messages may be intended to be enforceable offers, acceptances, notices or agreements, but others may not be accompanied with such intent.

To help protect against unwanted claims of unintended agreements while preserving the ability to make efficient agreements by email, email account settings can be configured to include a provision at the bottom of each transmitted email (in the manner commonly used for confidentiality provisions and lawyer disclaimers of tax advice) noting an intent that the UETA not apply unless there is an additional specific clause or other evidence confirming purposeful intent to make an email communication a binding agreement or communication. That additional, specific, and verifiable evidence of intent to transact using electronic means can be specified in the automatic footer to each email in a number of ways, such as requiring the inclusion of (1) an image of the handwritten signature of the sender or party to be charged within the body of the email or in an attached document, or (2) a specific phrase in the body of an email, such as "This email is intended to be an enforceable agreement, record, notice or communication." Many email programs allow users to establish and easily click and select different email signatures for different purposes, so that one could be configured to include an image of a handwritten signature and/or the specific phrase establishing intent to make a binding agreement or communication.

An example of an automatic email footer intended to disavow the intent to conduct a transaction by electronic means unless the email contains an image of a handwritten signature or language specifically indicating an intent to make an enforceable agreement is included as Clause 6 in Attachment 2.

D. Agreement to Limited Application of UETA

The provisions of the UETA may be varied by agreement. TEX. BUS. & COM. CODE § 322.005(d) (2009). In many instances, a party may desire to conduct certain aspects of a transaction by limited electronic means, such as allowing scanned images of complete agreements, notices, amendments, etc. with scanned handwritten signatures to be transmitted by email. That limited application of the UETA allows parties to quickly reach binding agreements and establish enforceable and admissible evidence of such agreements while preserving the safeguards of requiring a traditional handwritten signature on a

document (and perhaps initials on each page of the agreement and exhibits) that can provide some reasonable evidence that the signature is properly attributable to the party. Fax clauses have been common for a number of years, and the use of email to quickly transmit documents executed by handwritten signatures and intended to be effective is now common.

An example of a contract clause allowing only scanned documents with handwritten signatures to be transmitted by email or facsimile and be effective (but not for the email or fax transmission to actually create the record of the agreement) is included as Clause 7 in Attachment 2.

IV. RELEVANT SUBSTANTIVE LAW

One of the primary pitfalls of the UETA examined in greater detail later in this paper is for a party not to have intended, but nonetheless be deemed to have agreed, to the UETA and be found to have entered into an enforceable agreement by a course of conduct. It is important to remember that the UETA is only procedural in nature, and that the substantive law of contracts and other issues is not affected.

A. Essential Terms of Contract

Practitioners should bear in mind that the essential terms of even a major and complicated transaction need not be numerous in order for an enforceable agreement to be found. “Binding and enforceable contracts are formed when an offer is made and accepted, when there is a meeting of the minds, and when the terms are sufficiently certain to define the parties’ obligations.” *Texas Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563, 589 (Tex. App.—Austin 2007, pet. denied). “A sale, in its most basic terms, includes the following elements: (1) the thing sold, which is the object of the contract; (2) the consideration or price to be paid for the thing sold; and (3) the consent of the parties to exchange the thing for the price.” *John Wood Group USA, Inc. v. ICO, Inc.*, 26 S.W.3d 12, 20 (Tex. App.—Hous. [1st Dist.] 2000, pet. denied) (regarding a letter agreement for the sale of millions of dollars worth of corporate assets).

B. Contemplation of More Formal, Comprehensive Contract

The Texas Supreme Court has made clear that as long as agreement is reached on the so-called “essential terms” of a contract, the fact that the parties contemplate preparation of a more formal document later will not necessarily prohibit a court from concluding that an enforceable contract was made. This was made clear in *Scott v. Ingle Bros. Pac., Inc.*, 489 S.W.2d 554, 555 (Tex. 1972).

“[P]arties may agree upon some of the terms of a contract, and understand them to be an agreement, and yet leave other portions of an agreement to be made later....Two persons may fully agree upon the terms of a contract, knowing that there are other matters on which they have not agreed and on which they expect further negotiation. Such an expectation does not prevent the agreement already made from being an enforceable contract. This may be true even though they expressly provide in their agreement that the new matters, when agreed upon, shall be incorporated into a written lease or other formal document along with the contract already made.” [quoting 1 Corbin on Contracts at 93-95 (1963)]

In *Foreca, S.A. v. GRD Dev. Co.*, 758 S.W.2d 744, 746 (Tex. 1988), for example, a handwritten document containing points of agreement concerning a two million dollar sale of amusement park rides which stated ‘SUBJECT TO LEGAL DOCUMENTATION CONTRACT TO BE DRAFTED BY [counsel]’ was found sufficiently definite to be enforceable, even though no later document was ever prepared or executed. Whether the parties possessed the requisite intent to form an enforceable contract was a fact issue for the jury. In this case, the jury determined that a contract had been formed.

The enforceability of proposed deal points, letter agreements, or letters of intent for real estate transactions may become subject to interpretation when loosely or improperly drafted. If a party desires a letter of intent or similar deal outline or summary to be non-binding, it is good practice to clearly state so. An example of a non-binding clause is included as Clause 8 in Attachment 2.

In many cases, lawyers do not even learn of a proposed transaction until a letter of intent or summary of business terms has been exchanged by the parties. If a letter agreement, term sheet, or email exchange does

not make clear that no binding agreement is intended without a more formal, comprehensive contract, it may be advisable to communicate in writing that the earlier communication is withdrawn, or clarify the intent of a party before additional facts develop which may be used to support an argument for the enforcement of an agreement a party may not desire.

C. Statute of Frauds

The Act does not affect the substantive provisions of the statute of frauds. The statute of frauds requires that certain transactions be memorialized in writing for them to be enforceable. For example, a contract for the sale of real property is subject to the statute of frauds. TEX. BUS. & COM. CODE § 26.01(b)(4) (2005); *Garrod Invs. v. Schlegel*, 139 S.W.3d 759, 763 (Tex. App.—Corpus Christi 2004, no pet.). Similarly, a contract to lease real estate for more than one year is subject to the statute of frauds. TEX. BUS. & COM. CODE § 26.01(b)(5) (2005); see TEX. PROP CODE § 5.021 (2003) (conveyance for more than a year must be written and signed). The purpose of the statute of frauds is to prevent fraud and perjury and to safeguard the integrity of contracts. *Haase v. Glazner*, 62 S.W.3d 795, 799 (Tex. 2001); *Moritz v. Bueche*, 980 S.W.2d 849, 856 (Tex. App.—San Antonio 1998, no pet.).

D. No Single Document Required

The “writing” requirement in the statute of frauds need not be met by a single document; it can be satisfied through the combination of several separate documents or records. *Cent. Power & Light Co. v. Del Mar Conserv. Dist.*, 594 S.W.2d 782, 789 (Tex. App.—San Antonio 1980, writ ref’d n.r.e.). In *Adams v. Abbott*, 254 S.W.2d 78 (Tex. 1952), for example, defendant sent a letter to a friend asking for assistance in selling a farm for a price of \$3,000. The Texas Supreme Court treated this as an offer. The friend responded in writing that he had obtained a \$2,500 bid from a prospective purchaser, which the Court treated as a counteroffer. When defendant wrote back that she would take \$2,500 for the property if the prospect was still interested, the Court determined the counteroffer had been accepted. The Court held that, together, these three letters gave rise to a contract between the defendant, her friend and the prospective purchaser for the sale of defendant’s property. This same logic permits the “writing” requirement to be satisfied by a series of emails or other electronic records.

V. WHEN DOES THE UETA APPLY?

A. Agreement to Conduct Transaction by Electronic Means

The Act is voluntary in nature and can be easily made applicable, inapplicable or partially applicable as provided above. When the parties have not clearly communicated an agreement to conduct a transaction by electronic means within the context of TEX. BUS. & COM. CODE § 322.005(b) (2009), courts may be called upon to interpret a course of conduct to determine whether parties have agreed to use electronic means in the transaction.

The comments to the UETA shed light on the drafters’ thought underlying this requirement. “If this Act is to serve to facilitate electronic transactions,” they state, “it must be applicable under circumstances not rising to a full fledged contract to use electronics.” Indeed, they say, requiring an explicit contract “would itself be an unreasonable barrier to electronic commerce, at odds with the fundamental purpose of this Act. Accordingly the requisite agreement, express or implied, must be determined from all available circumstances and evidence.” UETA § 5 cmt. 3.

The comments make the breadth of the “all available circumstances” standard clear when they state that “it is essential that the parties’ actions and words be broadly construed in determining whether the requisite agreement exists. Accordingly, the Act expressly provides that the party’s agreement is to be found from all circumstances, including the parties’ conduct. The critical element is the intent of a party to conduct a transaction electronically.” UETA § 5 cmt. 4.

The fact that an express agreement to conduct a transaction by electronic means is not necessary for the UETA to be applicable is consistent with Texas law concerning the creation of a contract. Although a contract can be express, and its terms specifically set out by the parties, a contract may also be implied in fact from facts and circumstances indicating that the parties mutually intended to form a contract. *Haws & Garrett Gen. Contractors, Inc. v. Gorbett Bros. Welding Co.*, 480 S.W.2d 607, 609 (Tex. 1972); *Wal-Mart Stores v. Lopez*, 93 S.W.3d 548, 557-58 (Tex. App.—Hous. [14th Dist.] 2002, no pet.). Whether there was the necessary meeting of the minds can be inferred and determined from the parties’ conduct, their prior course of dealing, industry practices, and other circumstances. See e.g., *City of Houston v. First City*,

827 S.W.2d 462, 473 (Tex. App.—Hous. [1st Dist.] 1992, writ denied).

B. Preliminary Conduct

The drafters of the UETA provide insight into the circumstances and evidence which they considered potentially important in determining whether parties intended to conduct a transaction electronically. They offer the example of a person *handing out his business card* which includes his business email address as constituting circumstances from which it might be found that parties had reached an agreement to conduct transactions electronically. The Comment states that “[i]t may be reasonable, under the circumstances, for a recipient of the card to infer that [this person] has agreed to communicate electronically for business purposes [although] it would not necessarily be reasonable to infer [this person’s] agreement to communicate electronically for purposes outside the scope of the business indicated by use of the business card.” UETA § 5 cmt. 4(B).

One might reasonably ask, in light of this comment, if this means that mere use of email and engaging in electronic communications might be found to constitute consent to conduct all transactions electronically. Might a listing of a property for sale by an owner on an internet website with price and other basic contract terms be deemed an offer that could be accepted?

C. Email Course of Conduct

How have courts gone about determining whether parties have agreed to conduct transactions by electronic means within the meaning of the UETA? If there is a dispute as to whether the parties agreed to conduct a transaction electronically (which is not always the case, as evidenced in cases such as *Jefferson v. Best Buy Co.*, No. 2:08cv121, 2010 WL 1533107, *4 (M.D. Ala. Mar. 18, 2010)), how have the courts gone about this analysis? The relevant case law predominately focuses on the course of conduct of the parties in the use of email.

One of the issues in *Crestwood Shops, LLC v. Hilken*, 197 SW3d 641 (Mo. Ct. App. 2006) was whether an email offer to rescind a lease complied with the statute of frauds. The question arose as to whether the parties had agreed to conduct transactions by electronic means under the UETA. The subject lease provided that no surrender of the premises was binding on landlord or tenant “unless reduced to writing and

signed by them.” *Id.* at 651-52. The tenant emailed landlord stating “I wish to release myself from the lease by March 24th,” and added, “I will be on email only.” *Id.* at 645-46. Landlord responded by letter to tenant stating that it “hereby honors and accepts your request and both parties shall be released from any and all obligations to the other as of March 24, 2005.” *Id.* at 646. The appellate court determined that the parties had, in fact, agreed to conduct transactions by electronic means, and explained its reasoning as follows:

“[T]he parties communicated primarily through email. They explicitly agreed to communicate only in writing. Further, [Tenant’s owner] complained when [Landlord] communicated with her via a certified letter because the letter took two days to reach her. She demonstrated a preference for email because of its speed. Moreover, she conveyed her offer to terminate the contract via email and stated that she could only be reached through the use of email. The trial court found that this evidence was the manifestation of an intent to conduct business through email. Deference is given to a trial court’s findings of fact. [citation omitted] The trial court’s findings and conclusions are not error.” *Id.* at 653.

The question of whether the parties had agreed to conduct transactions by electronic means also arose in *Brantley v. Wilson*, No. Civ. 05-5093, 2006 WL 436121 (W.D. Ark. Feb. 22, 2006). In that case, plaintiff telephoned defendant owner of thirty-seven acres and asked if the property was for sale. The prospective purchaser and owner “began communicating about the property, exclusively by e-mail.” *Id.* at *2. Thereafter the prospective purchaser sued for specific performance of what he claimed was an enforceable sales contract. Material fact issues were found to preclude summary judgment, and to require a trial, including whether, under the UETA, and despite the fact that the parties had communicated about the property “exclusively by e-mail,” the owner “agreed to conduct a land sale transaction involving the property by electronic means, and whether she intended her typed name on her emails to be her signature.” *Id.* at *5. If this and other hurdles were overcome, the court determined that a jury could reasonably conclude that agreement had been reached concerning sufficient essential terms to constitute an enforceable contract to sell the property.

In *Dalos v. Novaheadinc*, No. 1CA-CV07-0459, 2008 WL 4182996 (Ariz. Ct. App. Mar. 18, 2008), the question of whether a claim for wages was barred by a one year statute of limitations was raised. More specifically, the issue was whether there had been compliance with a statute which provided that an action barred by limitations could be avoided if there was an “acknowledgment of the justness of the claim” which was “in writing and signed by the party to be charged.” *Id.* at *2. Employer sent an email to employee in which it acknowledged that monies were owed and implied that payment would be made. The court found that the parties *had* agreed to conduct transactions electronically, because “a person may be deemed to have consented to electronic communications by on-going participation in such communications [citation omitted] or by primary use of that medium.” *Id.* at *4. In this case, the court apparently looked to surrounding circumstances to shed light on the parties’ intent, and noted that it would be particularly anomalous to suggest that the parties did not consent to conduct the transaction electronically as they were both employed by a software company. *Id.*

Not every instance of email use is found to constitute an agreement to conduct transactions electronically. In *Powell v. City of Newton*, No. 482A09, 2010 WL 5248780 (N.C. Sup. Ct. Dec. 10, 2010), the court concluded that the parties had not agreed to conduct transactions electronically. Although the parties’ attorneys exchanged draft documents by email, and “used e-mails and other electronic means to exchange documents and resolve details of the settlement agreement, their conduct indicated an understanding that the signature required by the statute of frauds for this conveyance of land would be plaintiff’s physical signature.” *Id.* at *5. The court reached this conclusion after carefully parsing the language of the emails themselves. For example, one email stated “Have [plaintiff] sign the agreement and send me back an executed copy.” The court determined that “[i]n light of the express indication by the city’s attorney that plaintiff should sign and forward the settlement documents, we conclude that the parties did not agree to the use of electronic signatures in lieu of physical signatures in this transaction.” *Id.* at *5.

One recent Kansas Appeals Court decision found that the email transmittal of a cover sheet with an attached offer to purchase real estate to a prospective purchaser’s agent did *not* constitute an agreement to conduct a transaction by electronic means. *Sigg v.*

Coltrane, No. 103,994, 2010 WL 5095831, *5 (Kan. Ct. App. Dec. 10, 2010). The court found that “[t]here is absolutely nothing in the record that indicates that [the parties] agreed to conduct their transactions by electronic means.” *Id.*

Finally, all of us who regularly rely on our Blackberry and smart phone in business can sympathize with the plaintiff in *CB Richard Ellis Real Estate Serv’s, Inc. v. Spitz*, 950 A.2d 704 (D.C. Ct. App. 2008), a case involving a commercial real estate company’s claim for fees for services rendered. During an exchange of emails, plaintiff received a version of an engagement letter which he did not read, assuming it was an executed copy of an earlier letter he had sent. As recited by the court:

“When questioned about his failure to read the March 5th letter, Paul Dougherty [CB Richard Ellis’s] agent, explained that he received Spitz’s email, with the letter attached as a document, on his *Blackberry*. He stated that he could read the email immediately but could not open, and thus could not read, the attached letter on his Blackberry. He further explained that Spitz’s email ‘did not lead [him] to believe that [Spitz] made any modifications to the agreement’ and thus he did not take the time to read the attachment later.” *Id.* at 709, n. 10.

The appellate court reversed and remanded to examine whether an enforceable agreement was reached in connection with a partially executed letter agreement sent by facsimile, later forwarded by email by the non-signatory party who claimed to accept the agreement without actually signing, thereafter unilaterally revised by the signatory party and forwarded by email, then later claimed to be accepted by the act of replying to an email. Attention to detail by a confirmation at the outset that an agent’s emails would not lead to a binding agreement could have saved considerable time and litigation fees in examining this complicated fact pattern.

Of course, a party who does not wish to be prematurely bound by a writing can simply include a provision clearly stating that the subject document is nonbinding. *Wood Group USA, Inc. v. ICO, Inc.*, 26 S.W.3d 12, 19 (Tex. App.—Hous. [1st Dist.] 2000, pet. denied). An example of a non-binding clause that can be adapted to many circumstances is included as [Clause 8](#) in [Attachment 2](#).

D. When Applicability of UETA Not Argued

Sometimes parties to litigation neglect to argue whether or not the UETA is applicable to a transaction, which makes the court's work somewhat easier. *E.g.*, *Sims v. Stapleton Realty, Ltd.*, 305 Wis.2d 655, 2007 WL 2386494, *4 n.4 (Wis. App.), review denied, 744 NW2d 296 (Wis. 2007) (in a dispute over the enforceability of an amendment to a real estate listing contract, the court noted that the property owner "does not argue that his emails are not writings signed by him for purposes of [the Wisconsin statute requiring contracts to pay real estate commissions be signed and in writing]. We take this as a concession that they are.").

VI. ELECTRONIC SIGNATURES

A. The Idea of a Signature

In order for an agreement subject to the statute of frauds to be enforceable, it must not only be in writing but must also be "signed" by the party to be charged. TEX. BUS. & COM. CODE § 26.01 (2005); *Welch v. Coca-Cola Enters.*, 36 S.W.3d 532, 538 (Tex. App.—Tyler 2000, no pet.). The UETA defines an electronic signature to mean "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." TEX. BUS. & COM. CODE § 322.002(8) (2009). The drafters state:

"The idea of a signature is broad and not specifically defined. Whether any particular record is 'signed' is a question of fact. Proof of that fact must be made under other applicable law... One's voice on an answering machine may suffice if the requisite intention is present. Similarly, including one's name as part of an electronic mail communication also may suffice, as may the firm name on a facsimile. It also may be shown that the requisite intent was not present and accordingly the symbol, sound or process did not amount to a signature... In any case the critical element is the intention to execute or adopt the sound or symbol or process for the purpose of signing the related record." UETA § 2 cmt. 7.

The UETA provides that "a record or signature may not be denied legal effect or enforceability solely because it is in electronic form." TEX. BUS. & COM. CODE § 322.007(a) (2009). Similarly, it provides that

"a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation." *Id.* § 322.007(b). Bear in mind, of course, that an electronic signature under the UETA only applies to transactions between parties which have agreed to conduct transactions by electronic means, although a party may unknowingly be deemed to have agreed to conduct transactions by electronic means by course of conduct.

The lack of a typewritten name of an offeror on an email has led a court to conclude there was *not* an agreement to conduct a transaction by electronic means. *Sigg v. Coltrane*, No. 103,994, 2010 WL 5095831, *5 (Kan. Ct. App. Dec. 10, 2010). In that case the court noted that the email did not include the typed name of either property owner, so that the signature element of the statute of frauds was not satisfied. Additionally, the court found that "[t]here is absolutely nothing in the record that indicates that [the parties] agreed to conduct their transactions by electronic means." *Id.*

The extremely broad definition of permitted electronic signatures can allow binding real property conveyance contracts to be satisfied by a number of ways without a traditional handwritten signature, such as a name placed in an email, checking the box on an internet webpage, or leaving a voice message. It may also be possible to document a transaction by recording a statement or conversation. Interestingly, Texas law does not prohibit the recording of private communication as long as one party consents. TEX. PENAL CODE § 16.02(c)(3)(A) (2009); *Seymour v. Gillespie*, 608 S.W.2d 897, 898 (Tex. 1980) (finding the recording of conversations by one party to a conversation is not an invasion of privacy or illegally obtained and may be admissible if a fair representation of a transaction or occurrence). Even though the case law is not developed in the context of a real estate transaction, it would seem prudent to avoid verbal statements of assent which may be found to result in an unintended agreement.

B. Attribution.

An important concern regarding enforceability is determining whether an electronic signature is actually attributable to a person. "An... electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied. . . ." TEX. BUS. & COM. CODE § 322.009 (2009). The Act doesn't specify a process for

attribution, but the comment to the foregoing section provides the following examples of when an electronic record and electronic signature would be attributable to a person: “The person types his/her name as part of an e-mail purchase order; The person’s employee, pursuant to authority, types the person’s name as part of an e-mail purchase order.” UETA § 9 cmt. 1. Depending on a case by case determination of a party’s intent, a letterhead on a facsimile transmission has also been found to constitute a signature because it was a symbol adopted by the sender with intent to authenticate the facsimile. UETA § 9 cmt. 3.

C. Name Placed in Email

Courts have concluded that merely placing one’s name in the body of an email *can* constitute an electronic signature if the requisite intent to sign is present.

In *Dalos v. Novaheadinc*, No. 1CA-CV07-0459, 2008 WL 4182996 (Ariz. Ct. App. Mar. 18, 2008), an issue was whether an employer’s email constituted a “signed” acknowledgment. The employer’s argument that the email’s failure to include a handwritten signature could not give rise to a binding agreement was found by the court to be inconsistent with the UETA and therefore unpersuasive. The court reasoned that an email header displaying the sender’s name qualifies as a signature, and that “[b]y hitting the ‘send’ button, the author authenticates an email message as his or her own writing.” *Id.* at *4.

In *Kloian v. Domino’s Pizza, LLC*, 733 NW2d 766 (Mich. Ct. App. 2006), the enforceability of a settlement agreement between a landlord and tenant was at issue. Through a series of e-mails between the parties’ attorneys, it was agreed that defendant would pay plaintiff \$48,000 in exchange for plaintiff’s release of claims. When defendant’s attorney sent plaintiff’s attorney a settlement agreement with a unilateral release, plaintiff’s attorney stated his client preferred a mutual release. Defendant moved to enforce the settlement with a unilateral release, and prevailed in the trial court. The appellate court affirmed, reasoning that the word “subscribe” in a local rule requiring a settlement agreement to be in writing, and “subscribed by the party against whom the agreement is offered or by that party’s attorney,” meant to sign at the bottom of a document. *Id.* at 457. Citing the UETA’s definition of “signature,” the court stated “The March 18, 2005 e-mail containing the terms of the settlement offer was subscribed by plaintiff’s attorney because he typed, or appended, his name at the end of the e-mail message.”

Id. at 459. It was therefore ‘subscribed.’ However, the purported modification of the settlement agreement was not “subscribed by the party against whom the agreement [was] offered or by that party’s attorney,” under the statute, because, in the words of the court, “the March 21, 2005, e-mail from plaintiff’s attorney, requesting a mutual release, has plaintiff’s attorney’s name *at the top*, in the heading of the e-mail. Subscription requires a signature *at the bottom*.” *Id.* at 460 (emphasis in original).

In *Sigg v. Coltrane*, No. 103,994, 2010 WL 5095831 (Kan. Ct. App. Dec. 10, 2010), the issue was whether property owners, as the parties to be charged, had “signed” a contract of sale within the meaning of the statute of frauds. After the property owners emailed a prospective purchaser’s agent a cover sheet with an attached offer to purchase real estate, the prospective purchaser signed the offer and deposited 10% of the purchase price in the owner’s bank account. Thereafter, and even though the owner returned the 10% deposit, the prospective purchaser sued the property owners for specific performance. The “writings” at issue consisted of an email cover sheet, an attachment to the email denominated “Offer to Purchase Real Estate” later signed by purchaser, a check for earnest money, and an unsigned handwritten note. *Id.* at *3. With respect to whether the party to be charged had “signed” a contract of sale, the court noted that “the e-mail cover sheet states that it is ‘sent by Coltrane@cox.net.’ It does not contain the typed name of either [property owner] Daniel or Tanya Coltrane.” *Id.* at *3. The court stated that purchaser “cites no authority for her conclusion that the [owners’] electronically drafting and e-mailing a document constitutes an electronic signature as contemplated by the [Electronic Transactions] Act,” and that prospective purchaser’s position “would require us to endorse the proposition that because the ‘offer to purchase real estate’ was sent electronically to the daughter of [purchaser’s] agent that alone constitutes a signature.” *Id.* at *5. Conclusion? There was no signature.

D. Notarization

The Act addresses acknowledgements by notaries public. “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 of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically

associated with the signature or record.” TEX. BUS. & COM. CODE § 322.011 (2009).

The comment to this section provides the following example: “Buyer wishes to send a notarized Real Estate Purchase Agreement to Seller via e-mail. The notary must appear in the room with the Buyer, satisfy him/herself as to the identity of the Buyer, and swear to that identification. All that activity must be reflected as part of the electronic Purchase Agreement and the notary’s electronic signature must appear as a part of the electronic real estate purchase contract.” UETA § 11 cmt.

VII. NOTICES

If the agreement does not specify how notices may be received, electronic records containing notices may suffice even if a party doesn’t receive actual notice.

A. Notice Requirements of Other Substantive Law

Even if the parties clearly consent to the UETA and receipt of electronic notices, it is important to note the limitations of the UETA and its intent to not override substantive law. The Act generally does not affect other laws requiring a record to be posted or displayed in a certain matter, sent by a specified method, or contain information formatted in a certain matter. TEX. BUS. & COM. CODE § 322.008(b) (2009).

For example, foreclosure of real property under a contract or deed of trust lien requires service of notice on the debtor by certified mail. TEX. PROP. CODE § 51.002(b)(3). That requirement of certified mail could not be waived by consent to the UETA. However, comment 4 to such section indicates the medium in which the notice is delivered could be satisfied by an electronic record such as delivery of notice on a disc if the UETA is applicable to that transaction.

B. Notice Effectiveness

It may be prudent to specifically address notice provisions in agreements. Section 322.015 of the Act provides for when an electronic record is deemed sent and received, absent an agreement between the parties otherwise. An electronic record (such as a default notice, notice of termination, portion of an offer of agreement, etc.) may be deemed *sent* by means of a traditional email message that may include attachments in a form capable of being processed by the recipient’s system and *received* when it enters the email

processing system used by the recipient. There are no exceptions for spam filters or system processing errors that cause the electronic record to not actually appear in the email inbox used by the recipient.

Accordingly, if a party desires to use email for notices, amendments, and other agreements and wants to ensure it actually receives the email before it is deemed effective, it may be advisable to specify that an email transmission is effective only if an automatic email receipt or email read confirmation is generated from the recipient’s email server or if also given additionally by a method of delivery traditionally deemed reliable, such as confirmed facsimile transmission, personal delivery or certified mail.

VIII. ELECTRONIC RECORDING

In addition to contracting electronically, parties can record deeds and other agreements electronically in the official records. Texas adopted the Uniform Real Property Electronic Recording Act at TEX. PROP. CODE § 15.001 *et seq.* (the “Recording Act”), which is an important corollary to the UETA. The Recording Act allows counties to implement electronic recording and accept electronic documents pursuant to uniform standards and rules adopted by the Texas State Library and Archives Commission included to provide harmony with the standards and practices of recording offices in other jurisdictions.²

The Recording Act provides that laws requiring original documents, signatures and notary acknowledgements may be satisfied by electronic documents and signatures. The substantive law in TEX. PROP. CODE § 12.0011 requiring proper acknowledgement of the execution of certain documents by a notary or other authorized officer or two or more credible witnesses in the presence of the grantor is not affected. However, Section 15.004(c) of the Recording Act specifically provides that required notarization, acknowledgement, verification, witness or oath can be satisfied by an electronic signature included, attached to or logically associated with the applicable document or signature. TEX. PROP. CODE § 15.004(c). A physical or electronic image of a stamp, impression or seal is not necessary. *Id.*

Recording requirements are also set forth in TEX. PROP. CODE § 12.0011(c), which provides that original signatures on paper documents are required for recording certain instruments. That statute was

² The promulgated standards for electronic recording are set forth in 13 T.A.C. § 7.141 *et seq.*

similarly amended to specifically exclude electronic instruments or documents that comply with the requirements of the Act.

TEX. LOC. GOV'T CODE § 195.003 authorizes certain parties, including attorneys, title companies, banks and state agencies, to record documents electronically. Electronic recording has been very helpful in expediting the process of recording and obtaining recording references for documents within a matter of minutes or hours. One practical advantage is the ability to sequence the recording of documents from the office of an attorney or title company to allow the recording numbers of documents included in a single closing in other closing documents recorded the same day. Additionally, if consent to the use of the UETA by the parties of a transaction is uncertain, one original paper document with handwritten signatures may be used to record in multiple counties simultaneously. Electronic recording may also have a positive effect on mobility by decreasing the number of runner vehicle trips to the recording office and reducing emissions and gasoline consumption.

IX. RATIFICATION OF CLOSING DOCUMENTS

It is becoming more common to complete closings by parties in different locations, with revisions to documents occurring at closing by email transmission or otherwise, and with pages slip sheeted, so that confirming the intent of each of the parties as to the documents which a title company closer or attorney believes are final and agreed could be problematic.

After a closing in which the intent of the parties to revised and compiled documents could be an issue, a ratification of the closing documents may be appropriate. The Act provides an easy way to accomplish a ratification electronically. One practical way to confirm intent and avoid claims of a mistake or a fraudulent act of a party is to scan and save all documents electronically, transmit the complete set to the parties by one email or delivery of a disc, flash drive or jump drive, and include a ratification agreement which provides that (1) the UETA applies to the ratification agreement and electronically attached documents, and (2) the parties have reviewed and confirm their intent to agree to the matters in such documents and ratify each document. An example of a closing ratification agreement is included as Attachment 3.

X. OTHER APPLICATIONS OF UETA

The question has arisen as to whether a conveyance of real property, acknowledged on the record in court proceedings by the party to be charged, is enforceable. In *In re Marriage of Takusagawa*, 166 P.3d 440 (Kan. Ct. App. 2007), the court relied, in part, on the UETA, in addressing this question, and decided that the statute of frauds could not be relied on to avoid enforcement of an oral divorce settlement agreement acknowledged on the record in court, even though an agreement to transfer real property was a part of the agreement.

With respect to whether any agreement had been "signed," the *Takusagawa* court observed that the purpose of the signature requirement in the statute of frauds is to authenticate the writing. Here, the party to be charged had answered "yes," on the record, when asked by the judge if what had been stated was her understanding of the agreement. "That response was her sign or symbol authenticating the agreement that had just been recited to the court," the court concluded. *Id.* at 446. The court noted that Kansas' adoption of the UETA "probably makes [the party's] in-court statement the legal equivalent of a written signature for purposes of the statute of frauds," and that "it would appear that the electronic capture of [the party's] oral assent that this was the agreement would satisfy the statute of frauds. No more is needed to show that [this party] made or adopted the agreement." *Id.* at 447.

The breadth of the UETA is reflected in other areas of the law, as well. For example, *Anderson v. Bell*, 234 P.3d 1147 (Utah 2010) held that electronic signatures could be used by a political candidate to comply with a statutory requirement that he obtain one thousand signatures before he could run for governor without affiliating with a registered political party. Noting that Utah had adopted the UETA, the court stated, "We hold that electronic signatures may satisfy the Election Code's requirements... regarding unaffiliated candidates wishing to run for statewide office." *Id.* at 1155-56.

XI. CONCLUSION

The UETA can be an effective tool to expedite real estate agreements and closings. Due to the broad application of the Act to circumstances a party may not intend or desire, real estate businesspersons and attorneys should take extra care and diligence in all forms of communications and documents.

Attachment 1

BUSINESS AND COMMERCE CODE

TITLE 10. USE OF TELECOMMUNICATIONS

SUBTITLE B. ELECTRONIC COMMUNICATIONS

CHAPTER 322. UNIFORM ELECTRONIC TRANSACTIONS ACT

Sec. 322.001. SHORT TITLE. This chapter may be cited as the Uniform Electronic Transactions Act.
Added by Acts 2007, 80th Leg., R.S., Ch. 885, Sec. 2.01, eff. April 1, 2009.

Sec. 322.002. DEFINITIONS. In this chapter:

(1) "Agreement" means the bargain of the parties in fact, as found in their language or inferred from other circumstances and from rules, regulations, and procedures given the effect of agreements under laws otherwise applicable to a particular transaction.

(2) "Automated transaction" means a transaction conducted or performed, in whole or in part, by electronic means or electronic records, in which the acts or records of one or both parties are not reviewed by an individual in the ordinary course in forming a contract, performing under an existing contract, or fulfilling an obligation required by the transaction.

(3) "Computer program" means a set of statements or instructions to be used directly or indirectly in an information processing system in order to bring about a certain result.

(4) "Contract" means the total legal obligation resulting from the parties' agreement as affected by this chapter and other applicable law.

(5) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(6) "Electronic agent" means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual.

(7) "Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means.

(8) "Electronic signature" means 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.

(9) "Governmental agency" means an executive, legislative, or judicial agency, department, board, commission, authority, institution, or instrumentality of the federal government or of a state or of a county, municipality, or other political subdivision of a state.

(10) "Information" means data, text, images, sounds, codes, computer programs, software, databases, or the like.

(11) "Information processing system" means an electronic system for creating, generating, sending, receiving, storing, displaying, or processing information.

(12) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(13) "Security procedure" means a procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person or for detecting changes or errors in the information in an electronic record. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or callback or other acknowledgment procedures.

(14) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an

Indian tribe or band, or Alaskan native village, which is recognized by federal law or formally acknowledged by a state.

(15) "Transaction" means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs.

Added by Acts 2007, 80th Leg., R.S., Ch. 885, Sec. 2.01, eff. April 1, 2009.

Sec. 322.003. SCOPE.

(a) Except as otherwise provided in Subsection (b), this chapter applies to electronic records and electronic signatures relating to a transaction.

(b) This chapter does not apply to a transaction to the extent it is governed by:

(1) a law governing the creation and execution of wills, codicils, or testamentary trusts; or

(2) the Uniform Commercial Code, other than Sections 1.107 and 1.206 and Chapters 2 and 2A.

(c) This chapter applies to an electronic record or electronic signature otherwise excluded from the application of this chapter under Subsection (b) when used for a transaction subject to a law other than those specified in Subsection (b).

(d) A transaction subject to this chapter is also subject to other applicable substantive law.

Added by Acts 2007, 80th Leg., R.S., Ch. 885, Sec. 2.01, eff. April 1, 2009.

Sec. 322.004. PROSPECTIVE APPLICATION. This chapter applies to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after January 1, 2002.

Added by Acts 2007, 80th Leg., R.S., Ch. 885, Sec. 2.01, eff. April 1, 2009.

Sec. 322.005. USE OF ELECTRONIC RECORDS AND ELECTRONIC SIGNATURES; VARIATION BY AGREEMENT.

(a) This chapter does not require a record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form.

(b) This chapter applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.

(c) A party that agrees to conduct a transaction by electronic means may refuse to conduct other transactions by electronic means. The right granted by this subsection may not be waived by agreement.

(d) Except as otherwise provided in this chapter, the effect of any of its provisions may be varied by agreement. The presence in certain provisions of this chapter of the words "unless otherwise agreed," or words of similar import, does not imply that the effect of other provisions may not be varied by agreement.

(e) Whether an electronic record or electronic signature has legal consequences is determined by this chapter and other applicable law.

Added by Acts 2007, 80th Leg., R.S., Ch. 885, Sec. 2.01, eff. April 1, 2009.

Sec. 322.006. CONSTRUCTION AND APPLICATION. This chapter must be construed and applied: (1) to facilitate electronic transactions consistent with other applicable law; (2) to be consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices; and (3) to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.

Added by Acts 2007, 80th Leg., R.S., Ch. 885, Sec. 2.01, eff. April 1, 2009.

Sec. 322.007. LEGAL RECOGNITION OF ELECTRONIC RECORDS, ELECTRONIC SIGNATURES, AND ELECTRONIC CONTRACTS.

(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.

(c) If a law requires a record to be in writing, an electronic record satisfies the law.

(d) If a law requires a signature, an electronic signature satisfies the law.

Added by Acts 2007, 80th Leg., R.S., Ch. 885, Sec. 2.01, eff. April 1, 2009.

Sec. 322.008. PROVISION OF INFORMATION IN WRITING; PRESENTATION OF RECORDS.

(a) If parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt. An electronic record is not capable of retention by the recipient if the sender or its information processing system inhibits the ability of the recipient to print or store the electronic record.

(b) If a law other than this chapter requires a record (i) to be posted or displayed in a certain manner, (ii) to be sent, communicated, or transmitted by a specified method, or (iii) to contain information that is formatted in a certain manner, the following rules apply:

(1) the record must be posted or displayed in the manner specified in the other law;

(2) except as otherwise provided in Subsection (d)(2), the record must be sent, communicated, or transmitted by the method specified in the other law; and

(3) the record must contain the information formatted in the manner specified in the other law.

(c) If a sender inhibits the ability of a recipient to store or print an electronic record, the electronic record is not enforceable against the recipient.

(d) The requirements of this section may not be varied by agreement, but:

(1) to the extent a law other than this chapter requires information to be provided, sent, or delivered in writing but permits that requirement to be varied by agreement, the requirement under Subsection (a) that the information be in the form of an electronic record capable of retention may also be varied by agreement; and

(2) a requirement under a law other than this chapter to send, communicate, or transmit a record by first class mail may be varied by agreement to the extent permitted by the other law.

Added by Acts 2007, 80th Leg., R.S., Ch. 885, Sec. 2.01, eff. April 1, 2009.

Sec. 322.009. ATTRIBUTION AND EFFECT OF ELECTRONIC RECORD AND ELECTRONIC SIGNATURE.

(a) An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person 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.

(b) The effect of an electronic record or electronic signature attributed to a person under Subsection (a) is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law.

Added by Acts 2007, 80th Leg., R.S., Ch. 885, Sec. 2.01, eff. April 1, 2009.

Sec. 322.010. EFFECT OF CHANGE OR ERROR.

(a) If a change or error in an electronic record occurs in a transmission between parties to a transaction, the rules provided by this section apply.

(b) If the parties have agreed to use a security procedure to detect changes or errors and one party has conformed to the procedure, but the other party has not, and the nonconforming party would have detected the change or error had that party also conformed, the conforming party may avoid the effect of the changed or erroneous electronic record.

(c) In an automated transaction involving an individual, the individual may avoid the effect of an electronic record that resulted from an error made by the individual in dealing with the electronic agent of another person if the electronic agent did not provide an opportunity for the prevention or correction of the error and, at the time the individual learns of the error, the individual:

(1) promptly notifies the other person of the error and that the individual did not intend to be bound by the electronic record received by the other person;

(2) takes reasonable steps, including steps that conform to the other person's reasonable instructions, to return to the other person or, if instructed by the other person, to destroy the consideration received, if any, as a result of the erroneous electronic record; and

(3) has not used or received any benefit or value from the consideration, if any, received from the other person.

(d) If neither Subsection (b) nor Subsection (c) applies, the change or error has the effect provided by other law, including the law of mistake, and the parties' contract, if any.

(e) Subsections (c) and (d) may not be varied by agreement.

Added by Acts 2007, 80th Leg., R.S., Ch. 885, Sec. 2.01, eff. April 1, 2009.

Sec. 322.011. NOTARIZATION AND ACKNOWLEDGMENT. 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 of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.

Added by Acts 2007, 80th Leg., R.S., Ch. 885, Sec. 2.01, eff. April 1, 2009.

Sec. 322.012. RETENTION OF ELECTRONIC RECORDS; ORIGINALS.

(a) If a law requires that a record be retained, the requirement is satisfied by retaining an electronic record of the information in the record which:

(1) accurately reflects the information set forth in the record after it was first generated in its final form as an electronic record or otherwise; and

(2) remains accessible for later reference.

(b) A requirement to retain a record in accordance with Subsection (a) does not apply to any information the sole purpose of which is to enable the record to be sent, communicated, or received.

(c) A person may satisfy Subsection (a) by using the services of another person if the requirements of that subsection are satisfied.

(d) If a law requires a record to be presented or retained in its original form, or provides consequences if the record is not presented or retained in its original form, that law is satisfied by an electronic record retained in accordance with Subsection (a).

(e) If a law requires retention of a check, that requirement is satisfied by retention of an electronic record of the information on the front and back of the check in accordance with Subsection (a).

(f) A record retained as an electronic record in accordance with Subsection (a) satisfies a law requiring a person to retain a record for evidentiary, audit, or like purposes, unless a law enacted after January 1, 2002, specifically prohibits the use of an electronic record for the specified purpose.

(g) This section does not preclude a governmental agency of this state from specifying additional requirements for the retention of a record subject to the agency's jurisdiction.

Added by Acts 2007, 80th Leg., R.S., Ch. 885, Sec. 2.01, eff. April 1, 2009.

Sec. 322.013. ADMISSIBILITY IN EVIDENCE. In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form.

Added by Acts 2007, 80th Leg., R.S., Ch. 885, Sec. 2.01, eff. April 1, 2009.

Sec. 322.014. AUTOMATED TRANSACTION.

(a) In an automated transaction, the rules provided by this section apply.

(b) A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements.

(c) A contract may be formed by the interaction of an electronic agent and an individual, acting on the individual's own behalf or for another person, including by an interaction in which the individual performs actions that the individual is free to refuse to perform and which the individual knows or has reason to know will cause the electronic agent to complete the transaction or performance.

(d) The terms of the contract are determined by the substantive law applicable to it.

Added by Acts 2007, 80th Leg., R.S., Ch. 885, Sec. 2.01, eff. April 1, 2009.

Sec. 322.015. TIME AND PLACE OF SENDING AND RECEIPT.

(a) Unless otherwise agreed between the sender and the recipient, an electronic record is sent when it:

(1) is addressed properly or otherwise directed properly to an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record;

(2) is in a form capable of being processed by that system; and

(3) enters an information processing system outside the control of the sender or of a person that sent the electronic record on behalf of the sender or enters a region of the information processing system designated or used by the recipient which is under the control of the recipient.

(b) Unless otherwise agreed between the sender and the recipient, an electronic record is received when:

(1) it enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; and

(2) it is in a form capable of being processed by that system.

(c) Subsection (b) applies even if the place the information processing system is located is different from the place the electronic record is deemed to be received under Subsection (d).

(d) Unless otherwise expressly provided in the electronic record or agreed between the sender and the recipient, an electronic record is deemed to be sent from the sender's place of business and to be received at the recipient's place of business. For purposes of this subsection, the following rules apply:

(1) if the sender or the recipient has more than one place of business, the place of business of that person is the place having the closest relationship to the underlying transaction; and

(2) if the sender or the recipient does not have a place of business, the place of business is the sender's or the recipient's residence, as the case may be.

(e) An electronic record is received under Subsection (b) even if no individual is aware of its receipt.

(f) Receipt of an electronic acknowledgment from an information processing system described in Subsection (b) establishes that a record was received but, by itself, does not establish that the content sent corresponds to the content received.

(g) If a person is aware that an electronic record purportedly sent under Subsection (a), or purportedly received under Subsection (b), was not actually sent or received, the legal effect of the sending or receipt is determined by other applicable law. Except to the extent permitted by the other law, the requirements of this subsection may not be varied by agreement.

Added by Acts 2007, 80th Leg., R.S., Ch. 885, Sec. 2.01, eff. April 1, 2009.

Sec. 322.016. TRANSFERABLE RECORDS.

(a) In this section, "transferable record" means an electronic record that:

(1) would be a note under Chapter 3, or a document under Chapter 7, if the electronic record were in writing; and

(2) the issuer of the electronic record expressly has agreed is a transferable record.

(b) A person has control of a transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred.

(c) A system satisfies Subsection (b), and a person is deemed to have control of a transferable record, if the transferable record is created, stored, and assigned in such a manner that:

(1) a single authoritative copy of the transferable record exists which is unique, identifiable, and, except as otherwise provided in Subdivisions (4), (5), and (6), unalterable;

(2) the authoritative copy identifies the person asserting control as:

(A) the person to which the transferable record was issued; or

(B) if the authoritative copy indicates that the transferable record has been transferred, the person to which the transferable record was most recently transferred;

(3) the authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;

(4) copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control;

(5) each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

(6) any revision of the authoritative copy is readily identifiable as authorized or unauthorized.

(d) Except as otherwise agreed, a person having control of a transferable record is the holder, as defined in Section 1.201, of the transferable record and has the same rights and defenses as a holder of an equivalent record or writing under the Uniform Commercial Code, including, if the applicable statutory requirements under Section 3.302(a), 7.501, or 9.330 are satisfied, the rights and defenses of a holder in due course, a holder to which a negotiable document of title has been duly negotiated, or a purchaser, respectively. Delivery, possession, and endorsement are not required to obtain or exercise any of the rights under this subsection.

(e) Except as otherwise agreed, an obligor under a transferable record has the same rights and defenses as an equivalent obligor under equivalent records or writings under the Uniform Commercial Code.

(f) If requested by a person against which enforcement is sought, the person seeking to enforce the transferable record shall provide reasonable proof that the person is in control of the transferable record. Proof may include access to the authoritative copy of the transferable record and related business records sufficient to review the terms of the transferable record and to establish the identity of the person having control of the transferable record.

Added by Acts 2007, 80th Leg., R.S., Ch. 885, Sec. 2.01, eff. April 1, 2009.

Sec. 322.017. ACCEPTANCE AND DISTRIBUTION OF ELECTRONIC RECORDS BY GOVERNMENTAL AGENCIES.

(a) Except as otherwise provided by Section 322.012(f), each state agency shall determine whether, and the extent to which, the agency will send and accept electronic records and electronic signatures to and from other persons and otherwise create, generate, communicate, store, process, use, and rely upon electronic records and electronic signatures.

(b) To the extent that a state agency uses electronic records and electronic signatures under Subsection (a), the Department of Information Resources and Texas State Library and Archives Commission, pursuant to their rulemaking authority under other law and giving due consideration to security, may specify:

(1) the manner and format in which the electronic records must be created, generated, sent, communicated, received, and stored and the systems established for those purposes;

(2) if electronic records must be signed by electronic means, the type of electronic signature required, the manner and format in which the electronic signature must be affixed to the electronic record, and the identity of, or criteria that must be met by, any third party used by a person filing a document to facilitate the process;

(3) control processes and procedures as appropriate to ensure adequate preservation, disposition, integrity, security, confidentiality, and auditability of electronic records; and

(4) any other required attributes for electronic records which are specified for corresponding nonelectronic records or reasonably necessary under the circumstances.

(c) Except as otherwise provided in Section 322.012(f), this chapter does not require a governmental agency of this state to use or permit the use of electronic records or electronic signatures.

Added by Acts 2007, 80th Leg., R.S., Ch. 885, Sec. 2.01, eff. April 1, 2009.

Sec. 322.018. INTEROPERABILITY. The Department of Information Resources may encourage and promote consistency and interoperability with similar requirements adopted by other governmental agencies of this and other states and the federal government and nongovernmental persons interacting with governmental agencies of this state. If appropriate, those standards may specify differing levels of standards from which governmental agencies of this state may choose in implementing the most appropriate standard for a particular application.

Added by Acts 2007, 80th Leg., R.S., Ch. 885, Sec. 2.01, eff. April 1, 2009.

Sec. 322.019. EXEMPTION TO PREEMPTION BY FEDERAL ELECTRONIC SIGNATURES ACT. This chapter modifies, limits, or supersedes the provisions of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7001 et seq.) as authorized by Section 102 of that Act (15 U.S.C. Section 7002).

Added by Acts 2007, 80th Leg., R.S., Ch. 885, Sec. 2.01, eff. April 1, 2009.

Sec. 322.020. APPLICABILITY OF PENAL CODE. This chapter does not authorize any activity that is prohibited by the Penal Code.

Added by Acts 2007, 80th Leg., R.S., Ch. 885, Sec. 2.01, eff. April 1, 2009.

Sec. 322.021. CERTAIN REQUIREMENTS CONSIDERED TO BE RECOMMENDATIONS. Any requirement of the Department of Information Resources or the Texas State Library and Archives Commission under this chapter that generally applies to one or more state agencies using electronic records or electronic signatures is considered to be a recommendation to the comptroller concerning the electronic records or electronic signatures used by the comptroller. The comptroller may adopt or decline to adopt the recommendation.

Added by Acts 2007, 80th Leg., R.S., Ch. 885, Sec. 2.01, eff. April 1, 2009.

Attachment 2**Clause 1. Unilateral expression of intent to conduct transaction by electronic means.**

The sender of this record or communication intends and agrees to conduct transactions by electronic means pursuant to the Uniform Electronic Transactions Act.

Clause 2. Mutual agreement to conduct a particular transaction by electronic means.

The parties to, or senders of, this record or agreement intend and agree to conduct the transaction evidenced by this record or agreement by electronic means pursuant to the Uniform Electronic Transactions Act.

Clause 3. Mutual agreement to conduct all transactions by electronic means.

The parties to, or senders of, this record or agreement intend and agree to conduct transactions by electronic means pursuant to the Uniform Electronic Transactions Act. Any party may withdraw its consent and agreement to continue to conduct this transaction or future transactions by electronic means by delivering electronic notice to all parties.

Clause 4. Unilateral disclaimer of agreement to conduct transaction by electronic means.

The sender of this record or communication does not intend or agree to conduct transactions by electronic means pursuant to the Uniform Electronic Transactions Act (TEX. BUS. & COM. CODE § 322.001 *et seq.*) or any similar law. No record or communication shall be binding or enforceable against the sender (1) except for an original paper document signed by hand and unconditionally delivered to the intended recipient, or (2) unless and until the sender expressly agrees in writing to conduct a specific transaction by electronic means.

Clause 5. Mutual disclaimer of agreement to conduct transaction by electronic means.

The parties to this agreement, record or communication do not intend or agree to conduct this transaction by electronic means pursuant to the Uniform Electronic Transactions Act (TEX. BUS. & COM. CODE § 322.001 *et seq.*) or any similar law. No agreement, notice, record or other communication shall be binding or enforceable against a party (1) except as evidenced by an original paper document signed by hand by the party to be charged and unconditionally delivered to the intended recipient, or (2) unless and until the party to be charged expressly agrees in writing to conduct this transaction or a specific aspect thereof by electronic means.

Clause 6. Email footer disclaiming enforceable communication unless image of handwritten signature or specific phrase of intent for agreement is included.

This communication is not intended, and shall not be construed, as (1) an effective or enforceable agreement or communication, (2) evidence of the intent or agreement of the sender to conduct any transaction by electronic means pursuant to the Uniform Electronic Transactions Act or any similar law, or (3) an electronic record or signature within the meaning of the Uniform Electronic Transactions Act or any similar law, unless [an image of the handwritten signature of the sender or party to be charged is included within the portion of the email thread created and transmitted by the sender of this communication] *or* [the phrase “This email is intended to be an enforceable agreement, record, notice or communication”] is included within the portion of the email thread created and transmitted by the sender of this communication.

Clause 7. Contract clause allowing transmittal of agreements by email and facsimile.

This Agreement shall be effective upon the execution by handwritten signature of each of the parties hereto in as many counterparts as may be convenient. It shall not be necessary that the signature of all persons required appear on each counterpart. All counterparts shall collectively constitute a single instrument. Any signature page to any counterpart may be detached from such counterpart without impairing the legal effect of the intent of the party or the signatures thereon and thereafter attached to another identical counterpart. Images of the handwritten signatures of any party on this Agreement evidenced and transmitted by electronic means (including email, facsimile, or similar transmission) shall be deemed effective for all purposes.

Clause 8. Non-binding agreement clause.

This document is not a legally binding or enforceable agreement. There are additional material and essential terms to be incorporated into a definitive agreement that are not addressed in this document. No party shall be bound or have the obligation to pursue negotiations or any other obligations of any kind unless and until a definitive written agreement is hereafter executed by the handwritten signature of each of the parties. No binding or enforceable agreement shall be entered into unless it is satisfactory to each party, in each party's sole discretion. The undersigned does not intend or consent to conduct any transaction by electronic means as provided in the Uniform Electronic Transactions Act or any similar law.

Attachment 3**RATIFICATION OF CLOSING DOCUMENTS**

This Ratification of Closing Documents (this "Ratification") is entered into effective as of, but not necessarily executed on, _____ (the "Effective Date"), and is by and among [*insert identification of Parties*] (collectively, the "Parties").

RECITALS:

- A. The Parties entered into that certain [*insert identification of Contract*] (the "Contract"), dated _____, relating to [*insert identification of property or transaction*].
- B. In connection with the closing of the Contract, the parties intended to enter into and execute the documents (the "Closing Documents") referenced on the closing index attached as **Exhibit A** to this Ratification to which they are parties.
- C. The closing of the Contract (the "Closing") was accomplished by the delivery of originals and electronic scanned versions of counterparts of some of the Closing Documents, originals and electronic scanned versions of signature pages intended to be attached to some of the Closing Documents, and authorizations of amendments to such Closing Documents at Closing by various means.
- D. Attached as **Exhibit B** to this Ratification is a disc or electronic file containing accurate electronic records of each of the Closing Documents.
- E. The Parties desire to enter into this Ratification in order to ratify each of the Closing Documents to which they are a party and confirm their mutual agreement to accomplish the Closing of the Contract and the agreements and transactions evidenced by the Closing Documents by electronic means.

AGREEMENTS:

NOW, THEREFORE, in consideration of the agreements set forth in this Ratification and good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the Parties, each of the Parties hereby agree as follows:

1. **Recitals.** The above Recitals are incorporated in this Ratification for all purposes.
2. **Ratification.** Each of the Parties hereby (i) ratifies each of the Closing Documents to which it is a party, and (ii) confirms that the electronic record of each of the Closing Documents to which it is a party attached to or incorporated by reference into this Ratification accurately reflects the agreement of such party, is admissible evidence of such agreement, and is enforceable against such party as provided in the Closing Documents.
3. **Execution.** This Ratification may be executed by handwritten signatures of the parties hereto in as many counterparts as may be convenient. It shall not be necessary that the signatures of all persons appear on each counterpart. All counterparts shall collectively constitute a single instrument. Any signature page to any counterpart may be detached from such counterpart without impairing the legal effect of the signatures thereon and thereafter attached to another counterpart identical thereto. Electronic scans or facsimiles of handwritten signatures shall be deemed the effective signatures of such party.
4. **No Other Agreements.** This Ratification and the Closing Documents represent the final agreement between the Parties as to the subject matter hereof and may not be contradicted by evidence of prior,

contemporaneous, or subsequent oral agreements of the parties. There are no unwritten oral agreements concerning the subject matter of this Ratification between the parties.

EXECUTED as of the dates set forth below to be EFFECTIVE as of the Effective Date.

[Insert signature blocks for Parties.]

By: _____

Name: _____

Title: _____

Date: _____

[Insert acknowledgment blocks for Parties.]

THE STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

This instrument was acknowledged before me on the _____ day of _____, 20____,
by _____, as _____ of _____
_____, a _____, on behalf of said _____.

Notary Public, State of Texas