



Access[®]

GOING PAPERLESS?

Avoiding the Legal Pitfalls
of Digitization

Setting the Legal Framework

There are two model laws in the United States that govern both electronic signatures and electronic records: the Electronic Signatures in Global and National Commerce Act (ESIGN) and the Uniform Electronic Transaction Act (UETA). In Canada, the Personal Information Protection Electronic Document Act (PIPEDA) and the Uniform Electronic Commerce Act (UECA) mirror, in most ways, ESIGN and UETA in the U.S.

All four model laws are designed to provide guidance. States, provinces and territories have the latitude to either adopt the model law as a whole or tweak it to their particular needs on the more local level—or not to adopt the model laws at all and create their own version of the regulations. A number of states in the U.S. have chosen not to adopt ESIGN or UETA but have promulgated state-specific versions of those laws.

These model laws are all technology neutral. Recognizing that electronic systems come and go, the laws do not stipulate that electronic records must be kept in a specific format or process but leave room for changing technologies.

THE BASIC RULE OF ELECTRONIC RECORDS PERMISSIBILITY

The basic rule of ESIGN, UETA, PIPEDA and UECA is that a signature, contract, or other record relating to a transaction may not be denied legal effect, validity or enforceability solely because it is in electronic form or because an electronic record was used in its formation.

The basic rule of permissibility states that electronic records or electronic signatures have the same legal effect and validity as both paper documents and wet, or ink, signatures. The model laws are responding to the need to recognize electronic records and electronic signatures in commerce and give them the same legal weight as paper and wet signatures. All electronic technologies, past, present and future, are included in the laws.



UETA, ESIGN, PIPEDA, UECA



ESIGN: Electronic Signatures in Global and National Commerce Act

UETA: Uniform Electronic Transaction Act

States may comply with ESIGN either by adopting UETA or by harmonizing their laws with ESIGN. The regulations are technology neutral.



PIPEDA: Personal Information Protection Electronic Document Act

UECA: Uniform Electronic Commerce Act

Provinces and territories may adopt or write their own law. Canada gives more leeway to provinces and territories to enact specific technology guidance in relation to electronic signatures and records, but the regulations must be substantially similar to PIPEDA or functionally equivalent to UECA.

Definitions



What is a wet signature?

A wet signature is created when a person physically marks a document. It can be as simple as an X on a piece of paper. In some cultures wet signatures are in a stylized, cursive format.



What is an electronic record?

A contract or other record created, generated, sent, communicated, received or stored by electronic means. The definition is technologically neutral in order to allow for the inclusion of future technical developments. Information processing systems, computer equipment and programs, electronic data interchange, electronic mail, voice mail, facsimile, telex, scanning and similar technologies all qualify. *USCS § 7006 (4) and UETA §2 (7)*



What is an electronic signature?

According to ESIGN and UETA, 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. The definition intentionally allows for a broad interpretation. As with wet or ink signatures, “electronic signing” is a question of fact; and proof of that fact must be made under other applicable law. The acts follow their technological neutrality standard and do not establish any specific requirements in that regard. The form is less important than the intent to sign.

15 USCS § 7006 (5) and UETA §2 (8)

Wet and Electronic Signatures

Whether it is a wet or electronic signature, the form is less important than the intent to sign. For instance, you sign a contract thinking you’re getting a specific product but are subjected to a bait-and-switch and get something different, your intent to sign is key to making that contract valid. At the same time, you were misled into signing for something you didn’t want, which invalidates the contract. Signatures are questions of fact, and proof of that fact must be made under other applicable law.

Wet signatures are commonly required in family law and for any document that needs to be notarized, such as a will or codicil. Even in these areas, wet signatures are less and less commonly mandated, but there are certainly instances when they are required.

The interpretation of “electronic signature” is intentionally broad. For example voicemail is included in some instances. Often stockbrokers need a recorded confirmation of a trade, and in these cases a voicemail would constitute a legally valid electronic signature. Once again, the key is the intent to sign.

When Is a Wet Signature Absolutely Necessary?

Today most contracts can be executed in electronic form. It’s increasingly rare for any state, province or territory to mandate wet signatures for contracts, although some exceptions do remain.

You may think that client files must be kept in paper form, but this is not necessarily true. In most cases, and particularly in ethics opinions, it depends on how the documents were obtained and in what form they arrived at your organization. You are obligated to keep documents in their original form, whether paper or electronic. If you do have physical documents in a



client file, they must often be kept in paper—although, once again, there is some leeway, depending on state regulations.

The same applies to financial documents. Whether negotiable instruments need to be kept in paper form is subject to state regulation.

As for HIPAA, an electronic signature is compliant if security regulations have been met. There are guidelines in place for a secure and safe process and signature.

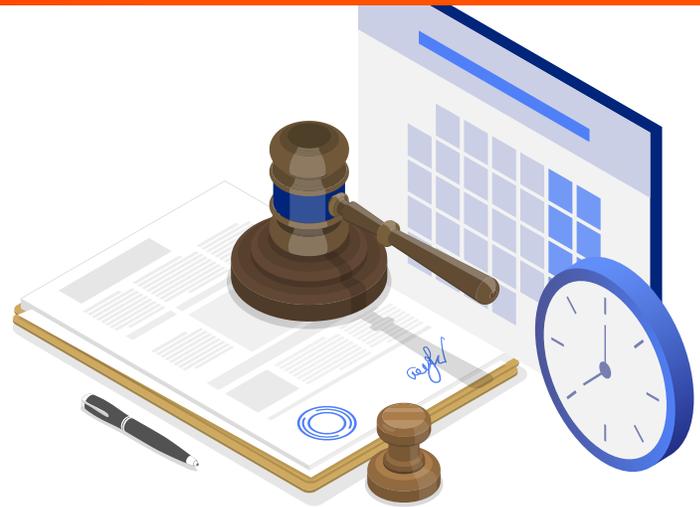
What Are the Key Considerations When Creating a Retention Schedule?

Often when you're creating a retention schedule, you have legal rules and regulations to consider as well as your own processes. An added concern is your electronic system's capabilities: can you slice and dice electronic records within your systems in the same way that you've put together your retention schedule? In other words, can you take out this certain document type and dispose of it within your electronic system the way you have stated in your schedule?

As we get more and more electronic records, privacy is an increasing concern. If you're retaining, creating and maybe converting certain types of documents with private information, are you able to keep them secure and private within your electronic systems?

The federal framework is setting some exceptions to electronic records retention for certain consumer notifications and transactions, such as utility power shutoffs, product recalls and similar types of communications.

Exceptions to the federal models can be bafflingly complex when you're exploring whether you want to be paperless or not. States, territories and provinces often have requirements buried in their codes that specifically state when a wet signature is required or if electronic records are allowed. Paper retention requirements may be buried throughout other state or provincial laws. While federal models form the baseline, some states have their own version of UETA. California, New York and Illinois are the big three as far as the number of laws



promulgated through time. Washington State has some extra requirements regarding electronic signatures and their security.

When it comes to exceptions, California's are the most intimidating. The state has around 33 diverse paper and wet signature requirements buried throughout its codes, from mobile home residency notices to an innkeeper's sale of a guest's abandoned laundry. Besides consumer notifications, safety recall corrections must be recorded and kept in paper, as must all Medicare information that is disseminated or collected. Like a lot of other states, California requires insurance agents to put a wet signature on all policy issues, especially before sending them out, and on all common carrier liabilities.

Generally, however, most electronic records are acceptable under the model laws. Newfoundland, for example, is fairly straightforward. The province has an Electronic Commerce Act, which specifically states that you cannot have electronic records for wills, codicils and trusts. Some powers of attorney, as well as a few real estate transactions, need to be in paper. Newfoundland also leaves the door wide open to cover any existing acts or regulations that specifically state the form of a document.

It's very important to find these items buried in acts and regulations. When it comes to electronic record and wet signature permissibility, you might think that you're home free by following the federal guidelines, but a thorough research process is necessary to find the regulatory needles in the legal haystack.

Should This Record Be in Paper or No?

As we just saw, going paperless and assuring compliance is a bit more complex than just deciding that you're going to go ahead and do it. More is involved than simply determining which documents you deal with that require a wet signature, or what you can store electronically. It's important to develop a strategy on how to proceed if you want to go paperless.

Suppose you're transporting hazardous materials or dangerous goods across U.S. state lines. Fourteen states as well as Puerto Rico require paper: paper itineraries, paper manifests, a physical paper trail to track those hazardous materials as they are moved around. Transporters have to decide if their default is keeping paper records, if they're going to keep everything electronically except for the states where they do business, or if they're going to keep everything in paper for all of their transportation needs. It adds to the complexity of deciding whether to go electronic.

Sometimes even figuring out what a record is becomes an issue of research. In the Alberta Mines and Minerals Act, for example, the definition of "record" is specified in a completely different law, the Financial Administration Act, which defines a record as an account book, return statement report or financial document in written or electronic form.



This requires jumping from one regulation, one rule, one law, or one code to another to clarify how records function. Of course, all this research contributes to the time and complexity of going paperless, remaining in compliance and covering all the bases. Be sure to check if there are specific requirements for keeping track of your information online, keeping your information available online or keeping the information in specific ways according to the regulations and software. And don't forget any media requirements that may have existed in the past, like telex.

To reiterate, the default is that records can be electronic—but it also depends on your industry. There are more requirements in certain businesses around paper records than in others. Certainly law firms are facing more of a challenge in converting from paper to electronic. As with hazardous transportation manifests, some environmentally sensitive operations, contrary to the desire to go green, often require more paper and more wet signatures.

While the model laws state that, yes indeed, you can keep things in electronic form, there are some exceptions. It can get quite complicated trying to find the regulatory needle in the haystack. Sometimes you almost have to prove a negative. Do any of these regulations exist? Well, we're just not sure. We hunted for them, but didn't find any. Does that 100 percent confirm that they don't exist? Probably not. Since it's a bit of a gray area, the courts are a little forgiving on this front, particularly in situations where a paragraph is buried in another act, and buried in another regulation, and so forth.

Once an organization decides that yes, we are able to keep documentation in electronic form, it doesn't end there. Particularly with a big conversion process, does it really make sense to digitize records from paper? If you're going to touch a record once a month, then digitizing it is a good idea. But if you're only going to touch it once every three years, maybe it's better to keep it in paper form and just pull it out of storage when needed.

And let's not forget our Records Management 101 when digitizing and scanning. What's the good of having electronic records if you can't find them once they are in the system? Make sure the correct metadata is in place so you can retrieve documents, understand them and use them. Metadata is the information you attach to a record to be able to retrieve it: record title, creation date, department if necessary, retention requirement, description of the record, and so forth.

The National Archives and the Library of Congress have good metadata standards if you don't have any of your own. They're a bit complex, but you can certainly get the point of what's needed as far as metadata goes.

ELECTRONIC RECORDS TRENDS

An important trend is the increasing rarity of cash transactions. Very few airlines, for instance, take cash these days. Businesses are increasingly dealing with protecting credit card information in an electronic form and managing it going forwards.

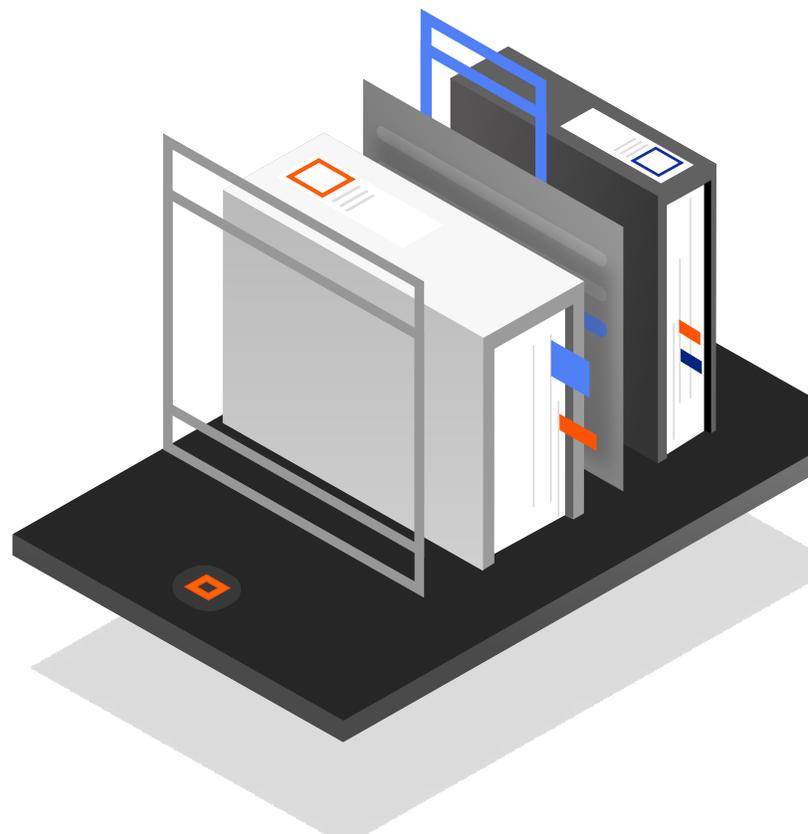
There is also a general trend by states and provinces to encourage electronic records and mandates. Not just the courts but also general legislation are recognizing that, as technology expands, more processes are becoming electronic.

Healthcare Records

Medical devices and certain robotics are creating healthcare data. There are some recent cases concerning such data: do they constitute treatment information direct from a medical device or robotic system, or does a physician have to confirm or somehow handle that information before it becomes a treatment record? This is a developing challenge.

Emojis

Emojis are showing up as evidence in court more and more frequently with each passing year. These cases are ever more common with the increasing use of instant messaging and other social media platforms. Consider contracts, for example. Courts are looking at the thumbs up, the fist bump, the big smile, to determine whether a contract was formed. In one case, the court ruled that emojis conveyed agreement to rent an apartment. The landlord relied on a smiley face and thumbs up as well as the statement that "Hey, we're ready to do it."



Proceed with Caution—Electronically

Many organizations want to do the environmentally right thing and go as paperless as possible. That makes it increasingly important to find out what is permissible and where to draw the lines around electronic and paper records. As a general rule of thumb, follow the model laws for electronic record and electronic signature permissibility—ESIGN and UETA in the U.S. and PIPEDA and UECA in Canada. There are similar frameworks in other countries.

States, provinces and territories have the leeway to create their own exceptions to the model laws. While the default is that records can be electronic, it is vitally important to know the exceptions for your geographic area and specific industry. Finally, review Records Management 101 to make sure that metadata is in place when digitizing paper—or you may never find that document again.

Frequently Asked Questions



Sometimes I get a poor-quality scan, a fax document so bad that the text can be illegible. Does the law stipulate clearly that all electronic documents must be 100% legible, or does it only pertain to the key sections?



There are two issues here.

First of all, is this contract, this document, permissible under your jurisdiction? That's fairly easy to figure out.

Second, is the validity of the document affected by its illegibility? If you can't read the document, the intent to sign and the intent to accept signature may be invalid and void the transaction. If a particular section is illegible, it depends on the intent of both parties. This is a situation that calls for legal counsel.



What are your recommendations for scanning?



The scanning decision tree is your first step in deciding what to scan and how much. Scanning costs money—and it could be quite a bit of money depending on the condition of your records. If there are a lot of staples, for example, the documents would not be considered to be in good shape. You really need to be clear as to what is a good candidate for scanning.

Some government standards require you to scan at a certain resolution. It also depends on your organization. If you're a municipality or a university, you have your own standards to meet. There are some great digitization scanning standards out there to follow as far as resolution.

Q What should we reference with wet vs. dry signatures?

A That's a difficult question to answer. Access has a comprehensive database of laws and regulations. We track not only the straightforward recordkeeping laws, but all of the electronic media and wet signature requirements. It's a full-time job and a complex challenge, because you have to look at all of the records that you produce and use and consider the decision tree. Then you need to actually start looking at what's available in your state or province, if you're state specific, or nationally, and explore exactly what they have listed in their acts and codes.

As we've tried to make clear, regulations can be completely buried, especially if you're looking at older laws—or even some of the newer laws hastily passed to cover whatever happened to be a politically expedient decision. You can end up with poorly conceived and written legislation with lots of gaps. Your best bet is always to begin by looking at what your state requires and the regulations that exist for your specific industry.

Once again, just to clarify, the default is that the record can be kept electronically, but you do have to dig a little deeper. Depending on your industry, you may not have much to worry about when it comes to paper retention or signature requirements, but you must do your homework.

Q How do we clearly determine which records require what signatures for legal and regulatory purposes?

A What are the best resources to use as a reference? A comprehensive resource is the General Data Protection Regulation (GDPR), recently enacted by the European Union. This model umbrella law leaves it up to the individual E.U. countries to fill in the details, so to speak.

In general, it depends on which jurisdictions you're operating in. Certain states, provinces and territories will have exceptions to the federal model law, most likely adding to it. They have a list of exceptions for particular document types that cannot be kept electronically.

There is really no way around digging into provincial, territorial and state acts and regulations to find out the details concerning electronic record permissibility.

Q Would you say the long-term storage cost of sending boxes of paper records to offsite storage has now been surpassed by the cost of scanning? Is it cheaper in the long term to scan?

A It really is situational. If you need to access a particular document monthly, maybe weekly, it does not make sense to keep it in paper and send it to storage because you'll end up paying, and repaying, retrieval fees. We all know that they can be quite costly. If, once again, that document type is only used for an occasional audit every three years, certainly it's going to be more efficient to keep it in paper, send it to offsite storage and access it occasionally.

Once again, a good place to start is the scanning decision tree. Also, look at your electronic systems as far as security and privacy goes. You may not be able to keep electronic records in certain circumstances. In other circumstances, if you are accessing a lot of records and using them for collaboration, scanning and digitization makes sense. It's really a process-oriented decision.



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