

## **ELECTRONIC TRANSACTIONS**

Almost all states, including Michigan, have passed the Uniform Electronic Transactions Act (“UETA”). UETA provides that if the law requires an agreement to be in writing (such as with a real estate purchase agreement or commission agreement) an electronic record satisfies that law. Additionally, UETA provides that if the law requires signatures (again, as with a real estate agreement or commission agreement), electronic signatures satisfy that law.

MCL 450.837.

### **A. Voluntary Agreement to Conduct Business Electronically**

UETA does not require parties to conduct transactions electronically or permit one party to the transaction to impose such a requirement on the other party. UETA simply permits persons to voluntarily agree to conduct business utilizing “electronic records” and electronic signatures. MCL 450.835.

Whenever the question as to the enforceability of an electronic agreement is raised, the first inquiry is whether or not it can be established that both parties agreed to conduct business electronically. Ideally, the parties’ contract would include a provision expressly stating that the parties agree to conduct business electronically. Where there is no specific provision in the contract, under UETA, the parties’ intent to conduct business electronically must be “determined from the context and surrounding circumstances, including the parties’ conduct.”

MCL 450.835(2).

MAR's new forms will include language whereby the parties agree to conduct business electronically. For example, MAR's new buy and sell agreement form will include the following provision:

**ELECTRONIC COMMUNICATION:** As an alternative to physical delivery, the parties agree that this Agreement, any amendment or modification of this Agreement and/or any written notice or communication in connection with this Agreement may be delivered to the Seller in care of the Listing REALTOR® and the Buyer in care of the Selling REALTOR® via electronic mail or by facsimile via the contact information set forth above. Any such communication shall be deemed delivered at the time it is sent or transmitted. Seller represents and warrants that an electronic email address has been provided to Listing REALTOR® from which Seller may receive electronic mail. Buyer represents and warrants that an electronic email address has been provided to Selling REALTOR® from which Buyer may receive electronic mail. The parties agree that the electronic signatures and initials shall be deemed to be valid and binding upon the parties as if the original signatures or initials were present in the documents in the handwriting of each party.

Parties using this form will evidence their intent to conduct business electronically by signing the contract and inserting their email address and/or their facsimile number in the form where indicated. If a buyer or seller does not wish to conduct business electronically, he can simply cross out this paragraph and/or not provide an email address or facsimile number.

#### **B. Electronic Signatures**

Once it has been established that the parties agreed to conduct business electronically, the next inquiry is whether the parties actually reached an agreement. Often, particularly in the case of a real estate transaction, that inquiry depends on whether or not the agreement was signed by both parties. UETA provides that the term "electronic signature" includes any method by which

an “electronic sound, symbol or process” is “logically associated” with a contract and adopted by a person “with an intent to sign.” An “electronic signature” would include, for example, a scanned copy of a handwritten signature. There is also software that can capture a person’s handwritten signature and embed it into a document. The term “electronic signature” also includes a digital signature which typically does not involve any type of replication of a person’s handwritten signature.

Questions have come up as to whether the typed name at the end of an email message qualifies as an “electronic signature.” One court in Texas has suggested that it may depend on whether the typed name was “typed purposefully” or “generated automatically.” *Cunningham v Zurich American Ins Co*, 352 SW3d 519 (Tex App – Fort Worth, 2011). Another court in Texas expressly rejected this distinction finding that “a signature block at the bottom of an email has come to represent what a handwritten signature once represented: a means of identifying the sender, signaling that he or she adopts or stands behind the contents . . . .” *Williamson v Bank of New York Mellon*, 2013 WL 2359577, (Tex App – Dallas, 2013). A New York court found that the phrase “With kind regards, Michael” typed at the end of an email qualified as an electronic signature because “the sender’s act of typing his name at the bottom of the e-mail manifested his intention to authenticate.” *Rosenfeld v Zerneck*, 776 NYS2d 458 (2004). To avoid any uncertainty, if a party wishes to enter into an agreement via email, the email should clearly evidence an intent to sign, for example, by typing the word “signature” next to the party’s name.

A recent Arizona case involved a buyer’s broker contract which had been signed by the buyers, scanned and emailed to the real estate agent. *Young v Rose*, 230 Ariz 433 (2013).

The real estate agent had responded to the buyers' email with her own email saying simply, "Thank you." This "thank you" email message, like all other email messages from the real estate agent, ended with an electronic business card consisting of the agent's name, business address, telephone numbers, website address and photograph.

In this case, the real estate agent had sued the client after the client had closed on a home without paying her a commission. The buyers pointed to the fact that under Arizona law, in order to have an enforceable right to a commission, there must be a written agreement signed by both parties. The buyers argued that because their commission agreement had never been signed by the real estate agent, there was no enforceable contract. The trial court agreed and threw out the real estate agent's case.

On appeal, the appellate court said that the question of whether the real estate agent's "thank you" email constituted an electronic signature was a factual question to be determined based on the context and surrounding circumstances. The appellate court found that the trial court should not have thrown out the case just because there was no "signature" by the real estate agent in the traditional sense and sent the case back to the trial court to determine whether the "thank you" email qualified as an electronic signature under UETA.

### **C. Method of Electronic Delivery**

From time to time, we have been asked whether parties must use email or facsimile delivery or whether other electronic delivery methods, such as the exchanging of text messages, can be used. UETA does not attempt to define or restrict the method of electronic transmission. UETA does require that the information be delivered "in an electronic record capable of

retention.” MCL 450.838(1). UETA also requires that an electronic record be delivered to the “information processing system that the recipient uses for the purpose of receiving electronic records.” MCL 450.845(1)(a) and (2)(a). Obviously, a party does not want to guess as to which “information processing system” is the one that the other party uses for the purpose of receiving “electronic records.” Nor does a party want to be in a position of trying to guess which “information processing system” the other party intends to use. For these reasons, parties should not simply agree to conduct business electronically, but should agree as to the specific method(s) of electronic delivery and the address(es) to be used.

#### **D. Time of Delivery**

The “electronic communication” provisions in MAR’s forms provide that an electronic communication shall be deemed delivered at the time that it is sent or transmitted (as opposed to the time it is “opened” by the recipient). This approach was developed by a MAR task force formed to look at the specific issue and is consistent with the practice in the other states that have enacted UETA.

#### **E. Validation of Signatures**

We are often asked about a REALTOR’s® obligation to verify an electronic signature. While there is no statute or case law addressing this question, it seems appropriate to examine how we handle documents that have been physically delivered with handwritten signatures. If a fellow REALTOR® hand delivers to you, as listing agent, an offer that has been signed by “Joseph Smith,” would you take any steps to verify that “Joseph Smith” signed the document or that “Joseph Smith” even exists? It is likely that you would not. Instead, you would assume that

your fellow REALTOR® had worked with a person who that member knew or reasonably believed to be “Joseph Smith” and that the REALTOR® either witnessed “Joseph Smith” sign the purchase offer or had reason to believe that “Joseph Smith” signed the document.

If you were the selling REALTOR® who had been working with “Joseph Smith” directly, even if you had not actually seen “Joseph Smith” sign the offer, you might rely on the circumstances surrounding the signature – *i.e.*, the fact that you faxed the prepared offer to him at his office, discussed it with him over the phone and then received via email a “pdf” of the document with “Joseph Smith’s” signature on it – to conclude that the signature was valid.

If, on the other hand, a REALTOR® arrives at her office one morning and finds a purchase offer in her mailbox from a person she has never dealt with or even heard of, it would seem logical that the REALTOR® should and would take additional steps to verify the identity of the offeror. The same would be true of a purchase offer that has been delivered electronically that showed up out of the blue.

In summary, whether the document is hand-delivered, faxed or emailed to you, whether the signature is a handwritten signature, a scanned copy of a handwritten signature or a digital signature, the extent of the “verification” required will depend on the circumstances. If a REALTOR® is expecting a signed contract from a person she is working with, no additional verification may be necessary. If she receives a contract unexpectedly from a person she had worked with previously, she may want to place a follow up telephone call or email. If, on the other hand, she receives an offer from a person she has never met or spoken with, it is likely that

she will want to investigate the situation further before presenting the offer to the listing REALTOR®.

## **F. CONCLUSION**

There are no hard and fast rules when it comes to electronic transactions. In the case of a dispute, whether or not the parties will be deemed to have an enforceable contract will depend on what the court determines was the intent of the parties. For this reason, when exchanging information electronically, it is extremely important that parties are very clear as to whether or not their intention is to enter into a binding contract.