

New Legislation for Digital Age Creates Challenges

by J. T. Tokarz

Note: This is the first of a series of columns on technology issues prepared by members of the VSB Committee on Technology and the Law.

As we evolve from a paper-based society to a digital economy, the General Assembly's passage of the Uniform Electronic Transactions Act (the "Act") is an important milestone. Though simple on its face, full implementation of the Act will require resolution of a number of difficult issues.

With certain exceptions, the Act applies to electronic records and signatures and is intended to provide that the medium in which a record, signature or contract is created, presented or retained does not affect its legal significance. It also deals with requirements outside the Act for written documents and signatures. For example, it provides that if a law requires a signature or for a record to be in writing, an electronic signature or record satisfies the law. Thus, the fact that the information is set out in an electronic format instead of on paper is irrelevant.

However, these straightforward concepts pose some formidable challenges. Many of the time-tested rules for using and authenticating paper documents do not work well for electronic documents and signatures. For example, how do we deal with notice and delivery issues when documents and signatures are transmitted across the Internet? Or how do we insure that an electronic record is the contract finally agreed to by the parties? The Act establishes a basic framework for answering such questions, but lawyers and judges will have to grapple with multitudinous details.

Furthermore, electronic records and signatures are subject to the same proof of issues as any other evidence. One of the emerging issues in digital litigation is proving the authenticity of electronic documents. Spoofing e-mail or altering digital images with digital photo editors is amazingly simple. These proof issues will have to be resolved for electronic records and signatures to achieve widespread acceptance.

Significantly, the Act does not require parties to change their business practices if they do not choose to do so. It only applies to transactions in which both parties have agreed to conduct transactions by electronic means. Furthermore, the Act does not require a record or signature to be created, generated, sent, communicated, received or stored by electronic means or in electronic form. Thus, parties remain free to rely on paper or oral communications as long as they recognize that the Act also covers faxes and telephone calls.

It will be important for attorneys to weigh the issues as they advise their clients on how and when to use electronic records. In some situations, electronic records and signatures will be used because the marketplace demands it. In others, the answer will not be so clear because of the risks created by hardware failures, ill-trained personnel and the rapid obsolescence of data formats. We have some interesting times ahead. ☺



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2001 Professional Guidelines

The new edition of the *Professional Guidelines* was mailed to all members of the bar, with active, in good standing status, at the end of November. It is also available at www.vsb.org/profguides.