



# Producing Persuasive Electronic Evidence: How to prevent and prepare for legal disputes involving electronic signatures and electronic transactions

Electronic signatures were given the same legal status as their wet ink counterparts with the passing of the federal E-Sign Act in 2000. For nearly 10 years, government and commercial organizations have been able to adopt a uniform e-signature process across all 50 states knowing that records cannot be refused by a court of law solely on the basis that they were signed electronically.

The question on most organizations' minds is no longer whether electronic signatures are legal. Rather, how reliable are electronic signatures? How can the risks associated with electronic transactions be minimized? How do businesses relying on electronic signatures fare in settlement negotiations? And failing settlement, do judges admit and enforce electronically signed records in courts when contested?

This article serves to answer these questions, as well as outline how organizations can leverage electronic signatures in settlement when contested, and, failing settlement, effectively prepare for court should a dispute reach that point. The article reflects the recommendations of Greg Casamento, Partner at Locke, Lord, Bissell & Liddell LLP, and Frank Zacherl, partner

at Shutts & Bowen LLP, as presented during a webcast hosted by Silanis Technology on February 18, 2010<sup>1</sup>.

## SAME CONTRACT AND EVIDENTIARY RULES APPLY

While the US Federal E-Sign Act leveled the playing field between electronic and wet ink signatures, it did not give electronic signatures any special status. "When legal disputes arise involving electronic transactions, the same evidentiary rules and contract principles apply as in the paper world, such as unconscionability, fraud and duress," said Greg Casamento of Locke, Lord, Bissell & Liddell LLP.

In both cases, producing convincing evidence entails more than just presenting an authentic signed record of an agreement. It also requires demonstrating that the process used to establish the signer's intent was fair, and complied with all applicable laws and regulations. Indeed, recent court cases illustrate the importance of a well-designed process, backed by comprehensive evidence of the electronic transaction.

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For example, in *Long v Time Insurance Company*, 572 F.Supp. 2d 907 (OH 2008), the court ruled in favor of Time Insurance Company, who had denied coverage to Mr. Long based on his failure to disclose a pre-existing health condition during the application process. Mr. Long claimed he verbally disclosed the condition to the agent, who then wrongly filled in the application and signed on Mr. Long’s behalf. However, Mr. Long was given the opportunity to correct any omissions before the application was submitted, and again later when he received the policy, but he failed to do so.

The *Labajo v Best Buy*, 478 F.Supp.2d 523 (SDNY 2007) case demonstrates how a flawed process can expose a company to a class action lawsuit. The courts ruled in favor of Labajo because Best Buy could not establish that it gave its customers proper notice on an electronic signature pad that a ‘free subscription’ would result in the customers’ credit cards being charged after the free period was over.

The *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534 (D.Md 2007) resulted in a 100+ page opinion on how to meet the admissibility threshold with electronic records and signatures. In *Markel*, the judge rejected emails and attachments into evidence on a motion for summary judgment because the parties failed to lay the proper foundation for the evidence.

### CREATING ADMISSIBLE AND PERSUASIVE ELECTRONIC EVIDENCE

The take-away lesson from these cases and others is that if the process is clear to the signer, and organizations can prove that its customers knowingly consented to the terms and conditions of the agreement, the courts will enforce the electronic transaction.

It is critical, therefore, that organizations leverage technology that can capture and reproduce as much process-related data as possible in order for the electronic evidence to be admissible and persuasive. This includes:

- ▶ The IP addresses of all parties involved in the transaction
- ▶ A date and time stamp of all events related to the transaction
- ▶ All Web pages, documents, disclosures and other information that were presented
- ▶ How long each party spent reviewing each item in the document package
- ▶ What each party acknowledged, agreed to, and signed
- ▶ Other actions taken by parties during the transaction

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“To meet FRE 901(a) requirements for authentication, the audit trail, signatures and documents must also be secured in a manner that renders the information unalterable without detection,” added Casamento. “Organizations must demonstrate to the Court’s satisfaction that they have maintained a secure retrieval process of the audit trail and signed records by which a credible witness can confidently testify.”

Ideally, the electronic evidence should also be easily retrievable with a click of a button. Otherwise, pulling data from a variety of systems and databases in an attempt to piece together the Web process used in a transaction that took place months or years earlier will result in a lengthy and costly e-discovery process and make it difficult to establish the authenticity of its electronically signed documents.

Indeed, the process and technology must be carefully thought out prior to launching electronic signatures and electronic transactions. Once live, regular reviews and audits should be scheduled to check for potential bugs in the system, verify the process, and address customer complaints in order to mitigate the risk of potential individual or class action lawsuits.

### AVOIDING LEGAL DISPUTES

While capturing persuasive electronic evidence of the entire process can significantly increase an organization’s chances of winning a lawsuit, there are a number of things that organizations can do in advance of a legal dispute to prevent going to court in the first place.

“Prior to rolling out electronic signatures and electronic transactions, organizations should consider putting a plan in place for responding to the concerns of customers and attorneys, and quickly resolving potential legal disputes,” said Frank Zacherl, partner at Shutts & Bowen LLP.

Representatives and agents should be trained and provided with scripts on how to field customer questions with regards to the use of electronic signatures in transactions. Customers can also be directed to a section on the organization’s Website that provides answers to the most frequently asked questions about the security, legality, and enforceability of electronic signatures.

A special team of representatives can also be assigned to answer more involved questions, and address the claims of customers and attorneys with additional questions, such as:

- ▶ “I didn’t sign the record.”
- ▶ “The electronic process is flawed / the technology doesn’t work.”
- ▶ “The process doesn’t comply, or is not authorized by law.”

Having responses prepared for each of these claims in advance can quickly deflect disagreements and address customer concerns. Further, a series of template letters should be prepared for any written inquiries the organization may receive.

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For example:

- ▶ “Enclosed is a copy of the contract that you signed electronically.”
- ▶ “Attached are copies of all the Web pages you viewed during the electronic transaction.”
- ▶ “Here is a copy of the law with regards to the use of electronic signatures in contracts.”

“This kind of up-front persuasion will convince customers and attorneys that it is not worth their time to try to disavow the contract because it was executed electronically,” added Zacherl.

### PREPARING FOR LEGAL DISPUTES

Earlier in this article, the importance of easily retrieving the electronic evidence in order to reduce the time and cost of e-discovery was discussed. In the event of a legal dispute, organizations would also be wise to have ready a file of legal memoranda and subject matter experts who can provide credible testimony.

Preparing notices of appearance, notices of removal, affidavits, motions for summary judgment, and discovery responses in advance will ensure organizations are in a position to quickly mount the strongest defense possible – even with limited in-house legal resources.

Subject matter experts within the organization, as well as from the vendor, must be identified and prepared in advance. They will serve to

persuade plaintiffs, regulators, opposing counsel, judges and juries that that the electronic transaction used a compliant process and was supported by reliable technology.

“When selecting a vendor, it is important to consider the vendor’s ability to meet solution requirements. However, in the electronic commerce arena, it is just as important to evaluate the vendor’s ability and willingness to assist in legal disputes, and the vendor’s financial stability,” said Frank Zacherl, partner at Shutts & Bowen LLP.

If a dispute proceeds to litigation, the vendor must be able to defend its client’s legal position and fend off disputes. To do that, the vendor must still be in business and their legal expert must be available to assist the client and their legal team during a court case.

“An important factor in successfully defending the position of one of our insurance clients, was the testimony of our client’s electronic signature provider,” added Zacherl. “Michael Laurie of Silanis Technology provided critical testimony with regards to the security and reliability of the technology in producing authentic records and accurately reproducing the process.”

Another factor to keep in mind when presenting the electronic evidence is that opposing counsel, judges and juries are not always interested in the details of the technology used to obtain the electronic signature. Instead, they will examine the process and workflow used to

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capture parties' signatures in electronic records. Expert witnesses must be able to convincingly present the electronic evidence in a manner that can be easily understood by a non-technical audience.

This can be accomplished by displaying all of the web pages that the parties were presented with as they reviewed, acknowledged, agreed to, and signed the document or contract in question.

### HOW E-SIGNATURES HAVE FARED IN COURT

The true test of any technology is how it performs in the call of duty. To this end, electronic signatures have not only proven to be secure and reliable. They have decreased the risk of legal disputes compared to the traditional pen and paper signing process.

Case in point: one of Mr. Zacherl's clients has only seen one case involving electronically signed records go to court, despite five years of capturing customer signatures electronically in applications.

"Despite more than 100,000 customer inquiries related to the electronic signing process, only 15 resulted in a lawsuit actually being filed," said Zacherl. "Twelve of these plaintiffs almost immediately dropped their cases due to the persuasive electronic evidence that was captured by the client's electronic signature system, and two of the other three are on the verge of dismissing their cases based on this evidence"

Adopting the protocols outlined in this article, the client was prepared to effectively respond to over 100,000 inquiries and disputes in a manner that prevented all but one out of 15 lawsuits from going to trial.

With the average lawsuit costing \$100,000 to \$300,000, adopting the protocols described herein will result in huge savings of legal fees, as the experience of Mr. Zacherl's client demonstrates. Indeed, by using Silanis' E-Signature Process Management solution and adopting the protocols described herein, the project has "paid for itself" many times over.

Moreover, since launching the system, the client has become self-sufficient in fending off legal disputes. Initially the carrier notified outside legal counsel of all inquiries related to electronic applications. Over time, the customer service team learned to field customer inquiries themselves and effectively address the concerns of its customers, resulting in further savings of legal fees and costs.

Further, while outside counsel is still on call for support, the insurer's inside counsel is now trained on litigation protocol to independently defend the organization's position.

### CONCLUSION

Legal disputes are an unfortunate reality for most businesses, whether engaged in wet ink or electronic signature processes. Having reliable business records helps to strengthen an organizations legal position if and when these

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disputes arise. On paper, missing or incomplete documentation puts organizations at risk.

Thankfully a new generation of technology, known as electronic signature process management, has emerged. This technology reduces an organization's risk by enforcing compliant processes and capturing the strongest possible electronic evidence.

This has allowed Greg Casamento, of Locke Lord, to conclude that:

"... a reasonably well designed process, which includes making sure the correct version of the mandated forms and state versions are used, supported by technology such as the Silanis solution, can reduce the authentication, repudiation, admissibility and compliance risk below the levels of traditional paper and wet ink process where there is not a reliable record of the entire transaction."

1 Locke, Lord, Bissell & Liddell LLP is a full service law firm that has guided insurance and financial institutions to design and implement electronic signature processes. Shutts & Bowen LLP is a legal firm that has defended a leading property and casualty insurance provider's position using electronically signed records.

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