

ELECTRONIC SETTLEMENT AGREEMENTS

Are They Enforceable In Texas?



THE USE OF ELECTRONIC MESSAGING TECHNOLOGIES such as email and instant messaging are transforming legal practice in Texas and throughout the country. Recent surveys have indicated that more than two-thirds of attorneys regularly use email to communicate with their clients and other lawyers.¹ Instant messaging technology, an adjunct to email, is now being used by a few law firms.² It is predicted that within five years, two-thirds of corporate email users will be using instant messaging.³ Lawyers and law firms will no doubt follow this trend.

Lawyers and law firms have embraced these electronic communication technologies because of their speed and flexibility in permitting the inclusion of information such as text and numerical data, computer programs, video, graphics, and sound and at a lower cost than paper-based records. Email and instant messaging allow for faster communication and access to information than is possible with other means of communication such as postal mail, overnight commercial delivery services, telegrams, telexes, and facsimiles. These electronic technologies have permitted lawyers to, among other things, expedite submission of settlement offers, acceptances, and agreements, to resolve pending litigation much more quickly than with other forms of "written" communication. The issue considered in this article is whether such electronic agreements are enforceable in Texas.

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ELECTRONIC SETTLEMENT AGREEMENTS

Rule 11

An agreement to settle pending litigation in Texas state and federal courts must comply with Tex. R. Civ. P. 11.⁴ Rule 11 provides, in its entirety:

Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record.⁵

Rule's Purpose

The purpose of Rule 11 is to ensure that such agreements do not become sources of controversy leading to litigation within litigation, which has always been viewed with disfavor

by Texas courts.⁶ In *Kennedy v. Hyde*, the Supreme Court reiterated the original rationale for the rule:

Agreements of counsel, respecting the disposition of causes, which are merely verbal, are very liable to be misconstrued or forgotten, and to beget misunderstandings and controversies; and hence there is great propriety in the rule which requires that all agreements of counsel respecting their causes shall be in writing, and if not, the court will not enforce them. They will then speak for themselves, and the court can judge of their import, and proceed to act upon them with safety. The rule is a salutary one, and ought to be adhered to whenever counsel disagree as to what has transpired between them.⁷

However, strict or literal compliance with Rule 11 is not an absolute requirement for enforcement.⁸ The Supreme Court has stated that "slavish" adherence to the rule is not required.⁹

To determine whether electronic communications can satisfy the requirements of Rule 11, the basic process involving electronic messaging must be understood.

The Technologies

Email: What is it?

Email is an electronic message sent to another individual or group of addressees over the Internet.¹⁰ The original message is stored on the sender's computer hard drive or local area network storage device. A copy of the message is generated by the sender's computer and sent to a "file server."¹¹ The file server, also called a "router," makes another copy of the message, stores a copy of the received message, and sends that copy across a wired or wireless network to another (and possibly a

number of) router(s) until reaching the recipient.¹²

To allow more efficient travel across a network, an email message is converted into a digital stream of databits. These databits are further disassembled or split into separate "packets" that are individually stamped with information concerning the content of the message, confidentiality levels, time, and the identity of the sender and receiver.¹³ Each separate "packet" is routed over the communications link to the recipient's mailbox or computer, where they are reassembled to digital form which is readable by the recipient's mail-reading application program.¹⁴

Email is usually written and distributed by one person for a specific person or group. Email users have "mailboxes" that store mail for the owner. Each email user has a "unique" address to direct messages to a designated mailbox. The sender's address is similar to a return address on a traditional postal envelope.

Email is considered asynchronous communication because sender and recipient do not need to be present at the same time to communicate.¹⁵ Messages are sent to a server that stores the items until they are downloaded by the recipient. Deletion of the email from the sender's computer eliminates the original message but not any subsequent copies made along the network.¹⁶ Email is usually stored by the sender and recipient on the computer hard drive or other semi-permanent storage device and any "file server" or "router" to which a copy was sent. Both recipient and sender have the ability to print the email onto paper.¹⁷

Email has many similarities to letters sent through the U.S. mail. It has been described as the evolutionary hybrid of traditional telephone line communications and regular postal service mail,¹⁸ and as a com-

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puter-to-computer version of the postal service.¹⁹

Some email programs provide the ability to receive "confirmation" when an email is successfully delivered and "read" or "opened" by the recipient, which is similar to certified mail. The contents generally are personal and communicated only to the recipient and sender. Emails can be signed and can "attach" enclosures as electronic files.²⁰ Email is protected by federal law from interception, copying, alterations, or unauthorized dissemination.²¹

Instant Messaging: Email on Steroids

Instant Messaging (IM) is real-time communication.²² It offers the convenience of email and the speed of a phone call. It allows receipt of messages, attachments, and other

data almost "instantaneously" after they are sent.²³

The IM process works by logging onto an IM service such as America Online Instant Messenger, Yahoo! Messenger, or MSN Messenger Services. The software lets the server know that you are available to receive messages. To send a message, the sender and recipient must be connected to that same IM server.²⁴ Presently, there is no standard instant messaging protocol.²⁵ You can send messages only to people who are logged onto the same IM service.

The sent packet contains address information for the recipient, the message, and data identifying the sender. The message is sent by the IM server directly to the recipient, or the server facilitates a direct connection.²⁶

IMs have a temporary quality. They must be deliberately saved before the IM window is closed. Instant messages, like email, can be printed if they have been saved or logged by sender or receiver. IMs differ from emails, which are automatically "saved" unless deleted by sender or receiver.²⁷

Against this background, the validity of electronic settlement agreements must be evaluated.

Electronic Messages as a "Writing"

Rule 11 requires a "writing." The Rules of Civil Procedure do not define this requirement.²⁸

In *Padilla v. LaFrance*, the Texas Supreme Court held that to satisfy the "in writing" provision of Rule 11, the same contract principles apply that are used to determine when a "writing" satisfies the Statute of Frauds.²⁹ "Writing" is not defined by the Statute of Frauds.³⁰ Texas courts have found that other forms of electrically transmitted information, such as telegrams³¹ or facsimiles,³² can constitute a "writing" sufficient to satisfy the Statute of Frauds.³³ However, no Texas court has yet determined whether an electronic message is a "writing."³⁴

Other statutes which define "writing" provide limited help in answering this question. For example, the Forgery Statute defines "writing" to include "printing or any other method of recording information [as well as] money, coins, tokens, stamps, seals, credit cards, badges, and trademarks; and symbols of value, right, privilege, or identification."³⁵ The Uniform Commercial Code defines "writing" as "printing, typewriting or any other intentional reduction to tangible form."³⁶ Black's Law Dictionary defines "writing" as "[t]he expression of ideas by letters visible to the eye."³⁷

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Applying the above definitions, a printout or physical copy of an email or instant message (and attached files) is a recording or intentional reduction to tangible form which constitutes a "writing" sufficient to satisfy the "writing" requirement of the Statute of Frauds. The emails and instant messages, when printed out, are similar to telegrams, telexes, and facsimiles, which Texas courts have determined can satisfy the "writing" requirement of the Statute of Frauds.³⁸ In fact, such a printout of an electronic Rule 11 agreement is required to be filed with the court.

The Supreme Court has moved toward "paperless" cases by authorizing, in designated district courts, the electronic filing of documents.³⁹ In cases where all documents are required to be filed electronically, it would seem logical that an "electronic agreement" would satisfy the "in writing" requirement of Rule 11. However, this result is far less certain than in cases where a "paper and ink" writing, such as an email printout, is involved. The uncertainty arises from the medium used to store emails and instant messages, which can be wiped clean. Unlike paper, electronic messages are not "etched" into a permanent medium. Electronic messages exist as a composite of electricity, computer code, and algorithms and can be deleted. It could be argued that these messages do not satisfy the "writing requirement."⁴⁰

The Texas Legislature has cast some doubt that email and instant messages are a "writing" by its recent amendments to Article 8 and 9 of the Uniform Commercial Code. Section 8.113 of the Texas Business and Commerce Code makes the Statute of Frauds inapplicable to securities.⁴¹ The Comment to Section 8.113, indicates that "with the increasing use of electronic means of communication, the Statute of

Frauds is unsuited to the realities of the securities business."⁴² Implicit in the Comment is that electronic communications are not a writing and do not satisfy the Statute of Frauds.⁴³ If electronic communications were a "writing" and could be "signed," then there would appear to be no reason to render the statute inapplicable. In UCC Article 9, the legislature replaced the term "writing" with "record" to include "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form."⁴⁴ The Comment to UCC Article 9 makes clear that a "record" includes any electronically stored information, including electronic mail.⁴⁵ The implication of this legislative amendment is also that electronic mail is not a "writing." Applying the above logic to electronic settlement agreements involving pending litigation could support the conclusion that electronic messaging does not satisfy the writing requirement of Rule 11.⁴⁶

Recently, the Texas Legislature has sought to cure the uncertainties involving electronic agreements by moving to enact the Uniform Electronic Transactions Act, SB 393 and HB 1201.⁴⁷ If enacted into law it would validate and authorize the use of electronic records and signatures in business, commercial, and governmental transactions occurring after Jan. 1, 2002. While the scope of the proposed law does not squarely encompass Rule 11 agreements, it does equate an "electronic record" with a "writing," which would clearly satisfy the requirement of the Statute of Frauds.⁴⁸ This result follows only if the parties had expressly agreed or by their conduct agreed to do "business," (*i.e.*, the Rule 11 agreement) electronically.⁴⁹ The proposed law does not require the "record" to be tangible, so long as it can be retrieved in "perceivable form."⁵⁰

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This is a departure from the traditional requirement of a "writing," which reflects the reality of electronic records. However, if the record is not retainable by the recipient then it is not a sufficient writing.⁵¹

There appears to be no valid justification for treating a printout or physical copy of an electronic message (or an electronic record in perceivable form) any differently than telegrams, telexes or facsimiles. Invalidation of email as a writing would far exceed the underlying purpose of the Rule where intent is not contested.⁵² Moreover, such a literal interpretation of the "in writing" requirement would effectively elevate form over substance, and therefore this argument should be rejected as an improper "slavish" adherence to the Rule. Likewise, the Texas Supreme Court's authorization requiring the electronic filing of documents should constitute a *de facto* approval that electronic Rule 11 agreements which are filed in electronic form satisfy the Rule's writing requirement.

Signature Requirement

To satisfy the signature requirement of Rule 11 and the Statute of Frauds, Texas courts have long followed the Restatement (First) of Contracts⁵³ which provides:

§210. Requisite of Signature to a Memorandum.

The signature to a memorandum under the Statute may be written or printed and need not be subscribed at the foot of the memorandum, but must be made or adopted with the declared or apparent intent of authenticating the memorandum as that of the signer.⁵⁴

The Texas Business & Commerce Code defines "signed" as including "any symbol ... with present intention to authenticate a writing."⁵⁵ The signature is the act of authenticating

the document as to the signer's agreement to the transaction.⁵⁶ Whether the signature requirement has been satisfied will generally turn on the question of the signer's intent.⁵⁷

Texas courts have already found

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the signature requirement of the Statute of Frauds satisfied by typed names in telegrams⁵⁸ and facsimiles of signatures.⁵⁹ The courts have also admitted facsimile signatures of documents at trial and authorized use of such signatures on dismissal orders.⁶⁰ In fact, digital signatures on electronic documents issued or received by a court are admissible in criminal matters.⁶¹

With regard to electronic messages, there are several ways that the signature requirement may be satisfied, including (1) custom electronic letterhead; (2) digital signature;⁶² (3) the "from:" line on an email or instant message;⁶³ and (4) facsimiles of signatures inserted in the email. The above methods are illustrative but not exhaustive of "signatures" which could be sufficient to satisfy Rule 11.⁶⁴

Authentication

Unencrypted electronic communications are a sufficiently secure form of communication that integrity and security of the communications involving Rule 11 agreements should rarely be an issue.⁶⁵ The authenticity of electronic communications between lawyers should not be required to be established unless it is disputed by the attorney or party against whom

it is offered. Where the authenticity of an email is disputed, the other party must then establish a foundation for its receipt.⁶⁶ Electronic documents, such as computer records, are admissible upon establishing

the basic requirements for admissibility of business records.⁶⁷

Another method of admitting electronic messages is by the reply letter doctrine, which permits admission in evidence without proof of execution where a communication is received relevant to the controversy and purported to have been written by a litigant in reply to a communication. In *Western Union Telegraph Co. v. Sharp*,⁶⁸ the court recognized application of the reply letter doctrine in connection with the transmission of a telegram. The court of appeals in *Sharp* held that a letter from the defendant's division general manager was admissible without proof of signature pursuant to the reply letter doctrine.⁶⁹ The header information on an email or instant message or custom letterhead which shows the name of the sender, time of the message, and method of travel, coupled with the reply letter doctrine, should be deemed adequate to authenticate an electronic communication.⁷⁰

However, there is one situation where the proponent of the electronic agreement should not have the burden to authenticate the electronic messages — namely where a digital signature is on the email. The use of digital signatures promotes authentication because it utilizes encryption

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and algorithms to encode a document. This uniquely identifies the individual who uses the process. Use of a digital signature also demonstrates it is unlikely that the contents of the message have been altered.⁷¹ The use of a digital signature on a Rule 11 agreement should establish a rebuttable presumption that the electronic communication is authentic. To overcome the presumption, the challenger should have to prove a forgery, counterfeiting, or unauthorized use.⁷²

Contract Formation

Under Rule 11 an agreement is not enforceable unless it is complete as to every material detail and contains all the essential elements of the agreement so the contract can be ascertained from the writing without resort to oral testimony.⁷³ Where the electronic Rule 11 agreement is contained in a single electronic communication, then the material terms must be found within the document without resort to parol or extrinsic evidence.⁷⁴ When the agreement is contained in several electronic messages that refer to the same subject matter and are proved to be part of an entire transaction, they will be read as a single contract.⁷⁵

The law of contracts is applicable to settlement agreements.⁷⁶ Common law contract principles of offer and acceptance apply. The electronic acceptance must be identical to the offer in order to make a binding contract. If it changes the terms of the offer, then it constitutes a rejection and counteroffer.⁷⁷

Where an offer prescribes the time and manner of acceptance, those terms must ordinarily be complied with to create a contract.⁷⁸ If the offeror "required" a written acceptance, would email satisfy this condition? Yes, only under a strict or formalistic construction of "writing" would email not comply.⁷⁹

Where the offer is made in an electronic communication in the absence of a written condition to the contrary, an acceptance may be transmitted by email.⁸⁰ One who makes an offer through a particular channel impliedly authorizes an acceptance through the same channel or agency.⁸¹ Use of email or instant messaging to accept an offer made by fax or other electronic medium should be effective as soon as it leaves the offeree's possession. However, whether a written offer received by mail can be accepted by an electronic message or other electronically transmitted document will turn on whether it is reasonable under the circumstances. Absent a condition to the contrary, the manner of acceptance which differs from that impliedly authorized by the offeror is not effective until

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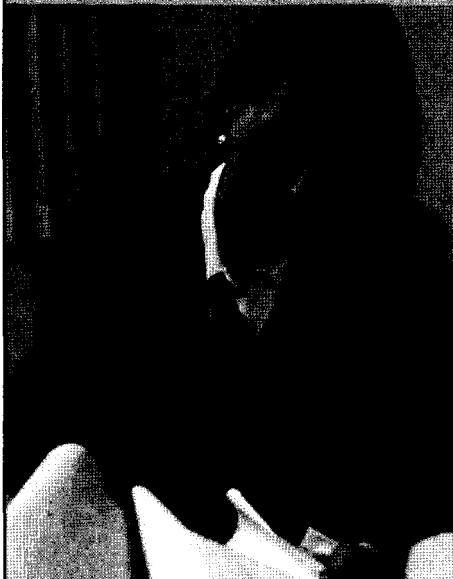
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receipt.⁸² Where email is an authorized manner of acceptance, the acceptance should be effective when sent if properly addressed. Acceptance is effective under the Mailbox Rule even if it never reaches the offeror.⁸³

Adhering to a strict and formalistic interpretation of Rule 11 would be counterproductive to the practice of law in this era of emerging technology and would be tantamount to "slavish" adherence to the Rule rejected by our Supreme Court in Padilla.

The proposed Texas UETA provides a series of default rules regarding when and where electronic records are sent and received.⁸⁴ Significantly, the proposed act adopts the "Mailbox Rule" and provides that an electronic record is received when it enters the designated information processing system of the recipient in a form capable of being processed by the computer system, even if no individual is aware of its receipt.⁸⁵

However, the Mailbox Rule should not apply where there is not a significant lapse in email communications. In the case of instant messaging, the exchange and communication is virtually instantaneous. Under such circumstances, the Restatement (Second) of Contracts requires application of delivery rules used in face-to-face negotiations. These rules require that an "offeree can accept without being in doubt as to whether the offeror has attempted to revoke his offer or whether the offeror has received the acceptance."⁸⁶

Conclusion

Electronic Rule 11 agreements should not be treated any differently than non-electronic Rule 11 agreements. This result is the natural

evolution of court decisions holding that telegrams and facsimiles can satisfy the rule's requirements. Adhering to a strict and formalistic interpretation of Rule 11 would be counterproductive to the practice of

law in this era of emerging technology and would be tantamount to "slavish" adherence to the Rule rejected by our Supreme Court in *Padilla*. To avoid any uncertainty in the application of Rule 11 to electronic agreements, the Supreme Court should amend the rule to equate an "electronic record" with a "writing," and "electronic signature" with a signature.

Notes

1. See *Silicon Valley/San Jose Business Journal*, "Lawyers Increasingly Rely on Email" (Dec. 21, 1999) (<http://www.bizjournals.com/sanjose/stories/1999/12/20/daily11.html>); Hon. Donald E. Shelton, *Courts on the Internet: Not Just Another Pretty Face*, 77 Mich. B.J. 398, 398 (1998). This trend will no doubt continue to grow and may eventually become the dominant interpersonal telecommunications medium. See generally, NICHOLAS NEGROPONTE, *BEING DIGITAL* (1995).
2. Ashby Jones, *Lawyers and Technology: When Email's Not Fast Enough*, THE NATIONAL LAW JOURNAL, Aug. 17, 2000, at B-11.
3. Dominique Deckmyn, *Corporate Sites Slow to Use Instant Messaging; Security issues seen holding back adoption*, COMPUTERWORLD, Aug. 2, 1999, at 4.
4. Although the Federal Rules of Civil Procedure do not contain an equivalent to Tex. R. Civ. P. 11, the enforcement of settlement agreements made in Texas federal courts in diversity cases is governed by Rule 11. *Lafevre v. Keaty*, 191 F.3d 596, 598 (5th Cir. 1999). However, where a valid and substantial federal interest on policy required application of federal law, then enforceability of settlement is governed by federal law. See *In re Omni Video, Inc.*, 60 F.3d 230, 232 (5th Cir. 1995) ("no strong federal interest in the issue of the validity of settlements entered into to resolve a bankruptcy suit" found). Under federal law, settlement agreements are not required to be in writing. *Center for Marine Conservation v. Brown*, 905 F. Supp. 383, 385 n.3 (S.D. Tex. 1995).
5. TEX. R. CIV. P. 11.
6. *Kennedy v. Hyde*, 682 S.W.2d 525, 529-30 (Tex. 1984).
7. *Id.* at 526-27 (quoting *Birdwell v. Cox*, 18 Tex. 535, 537 (1857)).
8. *Id.* at 529 (Tex. 1984). See *Padilla v. LaFrance*, 907 S.W.2d 454, 460 (Tex. 1995) (where the Supreme Court, applying statute of fraud principles, held that a series of letters among the parties' attorneys and an adjuster for one of the parties' insurers constituted a writing which satisfied Rule 11). See also *Kosowska v. Kahn*, 929 S.W.2d 505, 507 (Tex. App. — San Antonio 1996, writ denied) (enforcing an agreement in substantial compliance with Rule 11).
9. *Padilla*, 907 S.W.2d at 460.
10. *E.g.*, *Reno v. American Civil Liberties Union*, 521 U.S. 844, 851 (1997).
11. Mitchel L. Winick, Brian Burris and Y. Danae Bush, *Playing I Spy with Client Confidences: Confidentiality, Privilege and Electronic Communications*, 31 TEX. TECH. L. REV. 1225, 1245 (2000) (describing email technology).
12. *Id.*
13. Donnie L. Kidd, Jr. and William H. Daughtrey, Jr., *Adapting Contract Law to Accommodate Electronic Contracts: Overview and Suggestions*, 26 RUTGERS COMPUTER & TECH. L.J. 215, 223-224 (2000); Winick, et al., *supra* note 11, at 1245. The technology of email is a complex process. Email is accomplished over the Internet by use of the standard programming protocol, TCP/IP (Transmission Control Protocol/Internet Protocol). The Transmission Control Protocol has three functions — namely, (1) it divides messages into packets; (2) it marks each message with a sequence number and

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- the address of the recipient; and (3) it inserts error control information. The Internet Protocol controls the transport of packets from one location, *i.e.*, computer, to another. It is the TCP/IP programming protocol which permits intercomputer communications. Connection to the Internet is accomplished generally by either (1) a dedicated direct connection, (2) use of a mail gateway service, or (3) through an online service such as America Online, CompuServe, or MSN. See Richard Allan Horning, *Has Hal Signed a Contract: The Statute of Frauds in Cyberspace*, 12 SANTA CLARA COMPUTER & HIGH TECH. L.J. 253, 257 (1996) for an excellent discussion of the Internet and how email works.
14. Kidd and Daughtrey, *supra* note 13, at 224.
 15. Christian Dreke, *Introduction to Personal Communication on the Internet*, Intel Technology Journal (3rd Quarter 1999) (http://developer.intel.com/technology/itj/q31999/articles/art_2.htm).
 16. Winick, et al. *supra* note 11, at 1245.
 17. Horning, *supra* note 13, at 259.
 18. Lunney v. Prodigy Services Co., 723 N.E.2d 539, 541-42 (N.Y. 1999).
 19. SSI Medical Services, Inc. v. State of N.J., Dept. of Human Services, 685 A.2d 1, 6 n.1 (N.J. 1996).
 20. Kidd and Daughtrey, *supra* note 13, at 224; Winick, et al., *supra* note 11, at 1244.
 21. Electronic Communications Privacy Act of 1986, 18 U.S.C.A. §§2517(4), 2701(a) (West 2000).
 22. "Real-time" refers to computer — related operations that occur within the time frame imposed by external conditions. Real-time operations happen in a human's perceptions of the normal passage of time. See, e.g., Kyle Schurman, *IM Interceptions*, PC PRIVACY (Smart Computing Guide Series, Vol. 8, Issue 4), April 2000, available at <http://www.smartcomputing.com> (free site registration required).
 23. Michael Gowan, *How it Works: Instant Messaging*, PCWorld.com, at <http://www.cnn.com/2000/TECH/computing/05/25/how.messaging.works.idg/index.html> (May 25, 2000).
 24. *Id.*
 25. See, e.g., Aaron Pressman, *Corporations embrace IM, hope for streamlining*, THE INDUSTRY STANDARD, at http://www.cnn.com/2001/TECH/industry/02/21/IM_standards.idg/index.html.
 26. Gowan, *supra* note 23.
 27. *Id.*
 28. The Rules only recognize electronic media as a "document" subject to discovery. TEX. R. CIV. P. 192.3(b). It would seem logical that email as a "document" should be equated with a "writing."
 29. *Padilla*, 907 S.W.2d at 460.
 30. The Texas Statute of Frauds requires an agreement to be (1) in writing, and (2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him. TEX. BUS. & COM. CODE ANN. §26.01 (Vernon 1987). This article does not address exceptions to the statute including estoppel and past performance.
 31. A telegram is generally defined to include "a message transmitted by radio, teletype, cable, any mechanical method of transmission or the like." TEX. BUS. & COM. CODE ANN. §1.201(41) (Vernon 1994 & Supp. 2001).
 32. Facsimile transmission is the process of electronically sending an exact copy of an image through telecommunications between copying machines (or computer fax machines). It is not the same as email. See *Salley v. Board of Governors, Univ. of N.C.*, 136 F.R.D. 417, 419 (M.D.N.C. 1991).
 33. *Padilla*, 907 S.W.2d 454, 460; *Den Norske Stats Oljeselskap v. Hydrocarbon Processing, Inc.*, 992 F. Supp. 913, 915 (S.D. Tex. 1998), *aff'd*, 161 F.3d 8 (5th Cir. 1998) (faxes prepared, signed, and delivered to both parties confirming their contract satisfied Statute of Frauds under Texas law).
 34. A search of Westlaw's Texas and allfeds databases on April 24, 2001, using search terms "email," "electronic message!," "electronic mail," /p "writing," and "written" failed to disclose any Texas cases relevant to the issue. However, other courts have found emails to constitute a writing in analogous contexts. See *Armstrong v. Executive Office of President*, 877 F. Supp. 690, 706 (D.D.C. 1995), *rev'd on other grounds*, 90 F.3d 553 (D.C. Cir. 1996) (holding email is a writing under Federal Records Act); *People v. Munn*, 688 N.Y.S.2d 384, 385 (N.Y. City Crim. Ct. 1999) (holding "newsgroup" electronic message generated by a computer over the Internet

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Rancho Santa Margarita, CA— Why do some lawyers get rich while others struggle to pay their bills? The answer, according to California lawyer David M. Ward, has nothing to do with talent, education, hard work, or even luck. "The lawyers who make the big money are not necessarily better lawyers," Ward says. "They have simply learned how to market their services." A successful sole practitioner who at one time struggled to attract clients, Ward credits his turnaround to a referral marketing system he developed six years ago. "I went from dead broke and drowning in debt to earning \$300,000 a year, practically overnight." Ward says that while most lawyers depend on referrals, not one in 100 has a referral system. "Without a system, referrals are unpredictable. You may get new business this month, you may not," he says, noting that a referral system can bring in a steady stream of new clients, month after month, year after year. "It feels great to come to the office every day knowing the phone will ring and new business will be on the line," he says. Ward has taught his referral system to more than 2,500 lawyers worldwide, and says that any lawyer can learn how to get more referrals. He has written a report, "How To Get More Clients In A Month Than You Now Get All Year!" which shows lawyers how to use this marketing system to get more clients, increase their income, and develop a successful law practice. Texas lawyers can get a FREE copy of this report by calling 1-800-562-4627 (a 24-hour recorded message), or by visiting Ward's web site at www.davidward.com

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- is a written communication within criminal harassment statute). *Tiberino v. Spokane County*, 13 P.3d. 1104, 1108 (2000) (holding that emails are "writings" within scope of public records act).
35. TEX. PEN. CODE ANN. §32.21 (Vernon 1994 & Supp. 2001).
36. TEX. BUS. & COM. CODE ANN. §§1.201 (46) (Vernon 1994 & Supp. 2001).
37. Black's Law Dictionary 1609 (6th Ed. 1990).
38. See note 32, *supra*, and accompanying text.
39. The Texas Supreme Court, pursuant to TEX. GOV'T CODE ANN. §51.803 (Vernon 1998), has authorized fax filing and electronic filing pursuant to local rule in many counties. See also JEFFERSON COUNTY (TEXAS) LOC. R. 7 (Electronic Filing and Service of Pleadings) (permitting fax filing and in certain designated cases the electronic filing of pleadings and other documents); CAMERON COUNTY (TEXAS) LOC. R. 5, 9, 19, 11, 12, 14, 15 (permitting electronic filing in certain cases). See also TEX. R. APP. P. 9.2(c), authorizing electronic filing, signing and service of documents when provided for by local rule and pursuant to standards to be established by the Texas Supreme Court.
40. Kidd and Daughtrey, *supra* note 13, at 248-249.
41. TEX. BUS. & COM. CODE ANN. §8.113 (Vernon Supp. 2001).
42. TEX. BUS. & COM. CODE ANN. §8.113 cmt.(Vernon Supp. 2001).
43. See *Id.*
44. TEX. BUS. & COM. CODE ANN. §9.102 (70) (Vernon Supp. 2001) (effective July 1, 2001).
45. TEX. BUS. & COM. CODE ANN. §9.102, cmt. 9 (Vernon Supp. 2001).
46. See the Uniform Computer Information Transactions Act, which similarly references "record" in place of "writing" and "that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." Uniform Computer Information Transactions Act §102(a)(55) (amended 2000).
47. SB 393, 2001 Leg., 77th Sess. (Tex. 2001), passed the Senate on April 4, 2001, and passed the House on May 18, 2001 Leg., 77th Sess. (Tex. 2001). If enacted it will amend Business & Commerce Code Chapter 43. The primary objective of the Texas Uniform Electronic Transaction Act ("Texas UETA") (SB 393 and HB 1201) is to permit electronic records and electronic signatures in electronic transactions to be enforceable. See 77(R) SB 393 Senate Committee Report — Bill Analysis (SRC-TBR C.S.S.B. 393 77(R) Bill Analysis). It establishes the equivalence of electronic records to pen and paper writings. Its ostensible purpose is to validate an electronic record to satisfy the Statute of Frauds. It applies only to electronic records and signatures relating to transactions in a business, commercial, or governmental affairs context. State Bar of Texas, Business Law Legislative Subcommittee, *Bill Analysis: Uniform Electronic Transactions Act*, available at http://www.texasbusinesslaw.org/ueta_combined_bill_analysis_12012000.html. The scope of the proposed law does not appear to encompass transactions involving court filings or agreements, even though such "transactions" are not specifically exempted. This interpretation is consistent with the Electronic Signatures in Global and National Commerce Act (E-Sign), 15 U.S.C.A. § 7001-7031 (West Supp. 2001), which gives legal force and effect to electronic signatures and records where any federal or state statute, regulation, or other rule require a signature, contract, or other record, relating to any transaction in or affecting interstate commerce. However, E-Sign does not apply to court orders, notices, or official court documents. 15 U.S.C.A. §7003(b) (West Supp. 2001). An in-depth discussion of the proposed TEXAS UETA and E-Sign is beyond the scope of the article. However, significant provisions of the proposed law will be noted to illustrate its potential effect on existing law.
48. See SB 393 §§ 43.002(7), 2001 Leg., 77th Sess. (Tex. 2001).
49. See SB 393 §§ 43.005(b), 2001 Leg., 77th Sess. (Tex. 2001).
50. See SB 393 §§ 43.002(12), 2001 Leg., 77th Sess. (Tex. 2001).
51. See SB 393 § 43.008, 2001 Leg., 77th Sess. (Tex. 2001).
52. See Adam White Scoville, *Clear Signatures, Obscure Signs*, 17 CARDOZO ARTS & ENT. L.J. 345, 356-58 (1999).
53. *Foster v. Mutual Savings Association*, 602 S.W.2d 98, 100 (Tex. Civ. App. 1980, no writ) (expressly adopting the text of the Restatement). See also *Mondragon v. Mondragon*, 113 Tex. 404, 409, 257 S.W. 215, 217 (1923) ("[A] signature made by a rubber stamp, type-writer, or printing, or one made during the absence of the grantor and without his authority, or which may have been forged, becomes valid and binding when adopted.").
54. RESTATEMENT (FIRST) OF CONTRACTS § 210 (1932). The Restatement (Second) of Contracts retains the idea that the signature indicates intent: "The signature of a memorandum may be any symbol made or adopted with an intention, actual or apparent, to authenticate the writing as that of the signer." RESTATEMENT (SECOND) OF CONTRACTS § 134 (1981).
55. TEX. BUS. & COM. CODE ANN. §1.201(39) (Vernon 1994 & Supp. 2001). Note that this language mirrors that of the Restatement (Second) of Contracts.
56. See *Capitol Bank v. American Eyewear Inc.*, 597 S.W.2d 17, 19 (Tex. Civ. App. — Dallas 1980, no writ).
57. See *Birenbaum, M.D. v. Option Care, Inc.*, 971 S.W.2d 497, 502 (Tex. App.— Dallas 1997, pet. denied) (court found signature requirement was not satisfied by signature on "post it" note fax transmittal memo affixed to agreement); Fos-

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- ter, 602 S.W.2d at 102 (memorandum to title company with typewritten name of loan officers did not satisfy the statute); see also *Parma Tile Mosaic & Marble Co., Inc. v. Short*, 663 N.E.2d 633, 634 (1996) (where New York Court of Appeals held that automatic imprinting by fax machine of sender's name on top of each page sent does not satisfy Statute of Frauds).
58. *Hulme et al. v. Levis-Zuloski Mercantile Co.*, 149 S.W. 781, 783-784 (Tex. Civ. App. 1912, no writ).
59. *Den Norske Stats Oljeselskap*, 992 F. Supp. at 915.
60. *State v. Englund*, 946 S.W.2d 64, 71 (Tex. Crim. App. 1997); *In re Wal-Mart Stores Inc.*, 20 S.W.3d 734, 739 (Tex. App. — El Paso 2000, no pet.) (authorizing use of facsimile signature on dismissal order).
61. See TEX. CODE CRIM. PROC. ANN. art. 2.26 (Vernon Supp. 2001).
62. Digital signature refers to an electronic identifier, created by a computer, intended by the parties using it to have the same force and effect as the use of a manual signature. See, e.g., TEX. BUS. & COM. CODE ANN. §2.108 (Vernon Supp. 2001); TEX. CODE CRIM. PROC. ANN. art. 2.26(a) (Vernon Supp. 2001).
63. Electronic mail usually contains a unique or distinct electronic address identifying the party from whom it was sent.
64. The proposed Texas UETA broadly defines "electronic signatures" to mean "any 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." SB 393 § 43.002(8), 2001 Leg., 77th Sess. (Tex. 2001). Significantly, if the Texas UETA is enacted, TEX. BUS. & COM. CODE ANN. §2.108 (Vernon Supp. 2001), defining "Digital signature" will be repealed. See SB 393, Section 5, 2001 Leg., 77th Sess. (Tex. 2001). However, digital signatures using public key encryption technology, the addition of one's name at the end of an email message, or a signature transmitted by facsimile will no doubt qualify as an "electronic signature." See C. Robert Beattie, *Facilitating Electronic Commerce — The Uniform Electronic Transactions Act*, at <http://oppenheimer.com/internet/ueta.shtml>.
65. See Winick, *supra* note 11, at 1249-1250.
66. See, e.g., *Longoria v. Greyhound Lines, Inc.*, 699 S.W.2d 298, 302 (Tex. App. — San Antonio 1985, no pet.) (stating the authenticity requirements for electronically produced records). See also TEX. R. EVID. 803(6) (Records of Regularly Conducted Activity); TEX. CODE CRIM. PROC. ANN. art. 2.26 (Vernon Supp. 2001) (electronically transmitted document issued or received by court in criminal matter considered signed if a digital signature is transmitted with document).
67. *Longoria*, 699 S.W.2d at 302-303.
68. 5 S.W.2d 567 (Tex. Civ. App. — Texarkana 1928, no pet.).
69. *Sharp*, 5 S.W.2d 567, 569.
70. See *Horning*, *supra* note 13, at 295; *Scoville*, *supra* note 45, at 365.
71. *Kidd and Daughtrey*, *supra* note 13, at 256.
72. The proposed Texas UETA does not provide a rule of attribution under any particular circumstance for electronic records or electronic signatures. See SB 393, § 43.009, 2001 Leg., 77th Sess. (Tex. 2001). Attribution is a collateral to authentication. It refers to a procedure to verify electronic authentication, display, message, record, or performance is that of a particular person or to detect errors in information. The proposed act permits the use of various security procedures, such as algorithms or other codes, identifying words or numbers, encryption, or call back or other acknowledgment procedures as a method of proving content or source of an electronic record or signature. SB 393 § 43.002(13), 2001 Leg., 77th Sess. (Tex. 2001). The use of a "security procedure," like a digital signature, should likewise shift the burden of proof to the challenger.
73. *Padilla*, 907 S.W.2d at 460. See also *CherCo Properties, Inc. v. Law, Snakard & Gambill, P.C.*, 985 S.W.2d 262, 266 (Tex. App. — Ft. Worth 1999, no pet.) (holding a settlement agreement that includes the terms of payment, and a statement that the parties would execute mutual release, contained all material terms).
74. See *Padilla*, 907 S.W.2d at 460 (terms of agreement should be ascertainable from the communication without resort to oral testimony).
75. *Massey v. Galvan*, 822 S.W.2d 309, 315 (Tex. App. — Houston [14th Dist.] 1992, writ denied); see also *Restatement (Second) of the Law of Contracts* §132 (1981); *Corbin, Contracts* at 508-526.
76. *Stewart v. Mathes*, 528 S.W.2d 116, 118 (Tex. Civ. App. — Beaumont 1975, no writ).
77. See *Antonini v. Harris County Appraisal Dist.*, 999 S.W.2d 608, 610-611 (Tex. App. — Houston [14th Dist.] 1999, no pet.).
78. *Massey v. Galvan*, 822 S.W.2d 309, 313.
79. See *Padilla*, 907 S.W.2d at 160.
80. See *Jatoi, M.D. v. Park Center, Inc.*, 616 S.W.2d 399, 400-01 (Tex. App. — Ft. Worth 1981, writ ref'd n.r.e.) (citing *RESTATEMENT (FIRST) OF CONTRACTS* § 64 (1932); acceptance may be transmitted by any means authorized by offeree).
81. *Lonestar Gas Co. v. Coastal States Producing Co.*, 388 S.W.2d 251, 255 (Tex. Civ. App. — Corpus Christi 1965, no writ).
82. See *RESTATEMENT (FIRST) OF CONTRACTS* §§ 42, 68 (acceptance by unauthorized means is effective if received by offeree).
83. See *B & B Developers v. Ego Res. Corp.*, 613 S.W.2d 797, 799 (Tex. Civ. App. — Waco 1981, no writ) (where court explained mailbox rule).
84. SB 393 § 43.015, Section 5, 2001 Leg., 77th Sess. (Tex. 2001).
85. SB 393 § 43.015(b), (e), Section 5, 2001 Leg., 77th Sess. (Tex. 2001).
86. *RESTATEMENT (SECOND) OF CONTRACTS* § 64 cmt. a (1981).



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