

Memo

Prosecuting Electronic Registration Fraud

By Charlie Hendrix, Legal Clerk

Synopsis

Many jurisdictions are prosecuting individuals for fraud associated with utilization of invalid electronic signatures. Where electronic signatures are directly referenced in statute, jurisdictions will sometimes establish additional security requirements. However, whether or not these requirements are met, there seems to be no prohibition against using the common law default rules associated with manual signatures.

Manual Signatures

The commonly accepted definition of a signature is “a person’s name or mark written by that person or at the person’s direction”. *Black’s Law Dictionary*, 1415 (eighth ed. 2007), *Maricopa County v. Osborn*, 136 P.2d 270, 270-301 (Ariz. 1943). UCC 1-201(b) further defines a signature as “any mark or writing used with the intention of authenticating a document.” It is slightly misleading to say that an individual is prosecuted for falsely signing a document. It might be more accurate to think of the signature as a vehicle for proving intent, either to defraud or to be bound by the terms of an agreement. *Pilcher v. Pilcher*, 84 S.E. 667, 667-671 (Va. 1915); *State v. Harrison*, 505 So. 2d 783, 783-796 (La. 1987); *Anderson v. Bell*, 2010 WL 2485545 (Utah). Governmental bodies regularly prosecute cases based on the intent to defraud. See *Commonwealth v. O’Brien*, 40 Va. Cir 400, 400-403 (Va. 1996); *State v. Wasson*, 964 P.2d 820, 820-825 (N.M. 1996) (finding that actual success in fraudulent activity is irrelevant where intent is present); *Green v. State*, 761 S.W.2d 824, 824-827 (Tex. App.1988) (even with an interest in the account , fraud exists where intent to defraud is present). See also *Reid v. Commonwealth*, 16 Va. App. 468, 468-471 (Va. App. 1993).

The manner of affixing a signature as well as the exact form of the signature is usually of less importance. *O’Brien*, 40 Va. Cir. at 403; *Pilcher*, 84 S.E. at 667; *Anderson*, 2010 WL 2485545 (Utah). For more than 100 years, alternative means of affixing signatures have been recognized as valid. *Estate v. State*, 484 S.W. 2d, 711, 711-715 (Tex. Crim. App. 1972) (rubber stamp is valid); *People v. Berman*, 197 N.Y.S. 2d. 346, 346-347(N.Y.) (typewritten signature qualifies as fraud); *Pardue v. Webb*, 70 S.W. 2d 665, 665-667 (Ky. 1934) (adopted signature of another is valid); *Selma Savings Bank v. Webster County Bank*, 206 S.W. 870, 870-876 (Ky. 1918) (telegram is sufficient). “Facsimile signatures” are those that have been “prepared and reproduced by mechanical or photographic means.” *Black’s Law Dictionary*, 1415 (eighth ed. 2007). These have been traditionally acceptable as long as the individual whose name was affixed to the document was the same individual that placed it there or gave permission for it to be placed there. *E.g. Osborne*, 136 P.2d at 270. Whether or not the signature has been altered from its original form is also a relevant factor. It may be more difficult to detect whether a signature has been altered when a manual signature is not used. Cases involving checks where the bank no longer archives the original check have also run into difficulty.

Disputes arise when the authenticity of a signature is in question. There is a presumption in the law that a signature is valid. The burden of proof rests on the party contesting the claim to show that the signature is not. The Federal Rules of Evidence establish certain methods of acceptable proof, such as comparisons, distinctive characters, handwriting experts and/or non-

experts. Fed. R. Evid. 901. States will often articulate in law which sorts of evidence will be automatically acceptable as well.

Electronic Signatures

Electronic signatures are typically defined as “an electronic symbol, sound or process that is either attached to or logically associated with a document. . . and executed or adopted by a person with the intent to sign the document.” *Black’s Law Dictionary*, 1415 (eighth ed. 2007); e.g. Kansas Statutes Annotated § 16-1602(i). Just as there are many forms of manual signatures, there are also many forms of electronic signatures. These include an s/ followed by a typed name and a ‘click wrap’ (click on the “I accept” button). A handwritten signature, captured and affixed by electronic means, might be defined as a manual signature. It does not appear that this theory has been tested in case law.

Jurisdictional Practices

How an electronic signature is treated varies by jurisdiction. Bradley J. Willis, *Patents, Copyright, Trademarks, and Literary Property Course Handbook Series, Practicing Law Inst.* PLI order no. 60-00N1, Feb. 2001. Every state has authorized the use of the electronic signature for at least one purpose. *Id.* The Federal E-Sign act asserted that a signature should not be denied in a commercial context simply because it is in electronic form. U.S.C.A. § 7001-7006. However, the law also dictated that the use of electronic signatures was based on the mutual consent of the parties involved in the transaction. *Id.* At least one state prohibits the rejection of a signature solely because the signature is in electronic form. Utah Stat. Ann. § 46-4-201 (Lexis through 2010).

New York State has enabled public servants to adopt preprogrammed signatures and recognizes them as having the “same validity and effect as the use of a signature affixed by hand” as long as there is adequate supporting testimony, under the penalty of perjury, from the signor. *People v. Patanian*, NY Slip Op 28172 (2008); *People v. Rose*, 2005 NY Slip Op 25526 (2005). The IRS instructions for a W-9 filing simply require a “reasonable certainty” as to the person’s identity. Willis, *supra*.

Simply because a statute in a particular area of the law is silent on the issue of electronic signatures, it does not necessarily mean that the signature is unenforceable. *Haywood Secs, Inc. v. Ehrlich*, 149 P.3d 738, 738-742 (2007). The signature can also be construed to meet the requirements under the manual signature definition. E.g. *Anderson*, 2010 WL 2485545; see *Haywood*, 149 P.3d at 738. In these circumstances the court will concentrate on whether the signor intended to authenticate the document with their mark. E.g. *Anderson*, 2010 WL 2485545. The courts will also determine whether the legislature intended to prohibit the use of electronic signatures by its silence. *Anderson*, 2010 WL 2485545. Under such an assumption governmental jurisdictions would be able to prosecute fraudulent electronic signatures in the same manner as any manual signature.

In West Virginia individuals have been prosecuted for the fraud associated with obtaining a driver’s license via a false electronic signature. *Bennett v. Commonwealth*, 631 S.E. 2d 332, 332-334 (Va. App 2006). In *Bennett*, the court did not appear to distinguish between an electronic signature and a manual signature. *Id.* The court instead focused on the individual’s intent to defraud. *Id.*

Validating the Electronic Signature

Although a court may choose not to distinguish between manual and electronic signatures, meeting the required burden of proving the authenticity (or fraudulent making) of an electronic signature might be more difficult than a manual signature. Generally, a signature is prima facie evidence. Therefore, the burden of proof rests on the party contesting a signature to prove that it is invalid.

The ethereal nature of electronic signatures can make it more difficult to establish fraudulent utilization of a signature. It is likely that for this purpose, states have codified certain security measures that are able to speak to the question of whether or not the signor is genuine

and whether or not they intended to authenticate the document in question. Many jurisdictions have adopted certain methods for proving that an electronic signature is authentic and unaltered.

These methods include the “Public Key” certification method. In this method a two step process is used to secure an electronic signature. The signor uses a “hashing” process to condense information into a “message digest.” Once this is done, it is impossible to change the data back into its original form. Software applications then enable the signor to encrypt the information with a “private key.” The user on the other side of the transaction then utilizes a “public key” to decrypt the signature. A certificate process enables the signor to verify the other party’s identity. David Youd, *What is a Digital Signature?*, www.youdzone.com/signature.html. This sort of process enables fraudulent signature tampering to be more easily identified and prosecuted.

Nebraska Revised Statute § 86-611 authorizes the use of electronic signatures and delegates to the Secretary of State the responsibility for promulgating rules and regulations that are associated with the authorization. In addition to this, the statute expresses the legislature’s wish to promote the usage of electronic signatures in the community as well as within state government. *Id.* The Nebraska Department of Health and Human Services plans to operate an electronic signature based model for welfare benefit applicants. Nancy Hicks, *State switching to online call centers for welfare applicants*, Lincoln Journal Star, July 2, 2010 at http://journalstar.com/news/state-and-regional/nebraska/article_c56a6fb2-8623-11df-a741-001cc4c002e0.html.

Nebraska Revised Statute §86-611 and the Nebraska Administrative Code set out that a signature must be unique to the individual using it, capable of verification, under the sole control of the individual using it, and linked in a manner that would invalidate the signature if it is altered in anyway. *Id.*; Neb. Admin. Code §437 3-001.01. The administrative code seems to hint at a ‘public key’ security method. *Id.* at 00102. Although the electronic signature statutes in Nebraska do not appear to directly apply to election law statutes, other courts have attempted to read the entire body of a state’s law in harmony with other parts where possible. *E.g. Anderson*, 2010 WL 2485545. This might have the effect of validating UTEA statutes (like §86-611) for purposes of election law. *Id.*

Some states, such as Alaska and Oregon, require the use of a credit card to validate the identity of a signor. Willis, *supra*. When an attorney files a bankruptcy petition electronically, he or she attests to the fact that they have obtained a properly signed document from the client. *In Re Sandra F. Wenk*, 296 B.R. (Bankr. E. D. Va, 2002); see also 199 ALR Fed 729. The Federal Rules of Bankruptcy Procedure § 5005(a)(2) states that “a document filed by electronic means . . . constitutes a written paper for the purpose of applying (the bankruptcy procedure) rules.”

In one precedential bankruptcy case, an attorney submitted an affidavit electronically attesting to the fact that his client (and he) had manually signed the bankruptcy petition. It was then asserted by the client(s) that the attorney had fraudulently submitted the filing without the client’s signature. The court extended a rule originally crafted to apply to written filings to the electronic submission. This was based on the authorization of FRBP 5005(a)(2). It was the application of this logic that the attorney was found to have defrauded the court. *In re Wenk*, 296 B.R. at 719 (Bankr. E.D. Va. 2002).

Bankruptcy courts have also held attorneys responsible for failure to obtain an original (or in other words, new) signature after filing amended documents. *In re Brown*, 328 B.R. at 556. However, when an attorney filed a document electronically in the good faith belief that a client had actually signed the document, the attorney was not sanctioned. The case was not dismissed because neither the attorney nor the client intended to defraud the court. *In re Rose*, 422 B.R. at 896. Various states have similar electronic filing guidelines. See *In re admin. O.C.G.* §§ 10-12-1, Ark. 304 (2010), takes effect July 1, 2010.

The voter registration statutes in Nebraska require that “a signature shall mean the name of a person written with his or her own hand. . . .” It is silent on the method of capture or affixing the signature. Neb. Rev. Stat. § 32-118 (Lexis through 2010). It is possible that a court would read § 32-118 in harmony with the electronic signature requirements of § 86-611 and determine that a manual signature, affixed or captured by electronic methods, is valid. *Anderson*, 2010 WL 2485545. The issue does not appear to have been tested in a Nebraska court.

Recent Election Law Application

On June 22, 2010, the Utah State Supreme Court made a decision that directly applies the principles of electronic signature enforcement in an election law context. *Anderson*, 2010 WL 2485545. When an unaffiliated candidate for office gathered signatures to be placed on the ballot, he did so by collecting signatures in both manual and electronic forms. County clerks across the state verified enough signatures to qualify the candidate for the ballot. However, when the signatures were forwarded to the Lieutenant Governor’s office, the electronic signatures were disqualified from the petitions, thus making the candidate ineligible for the ballot. *Id.*

The court considered whether or not electronic signatures were valid, even though the state’s elections statutes were silent on the topic. The court found that although the legislature had been silent on the issue in terms of the election law context, it had expressed a commitment to the principle in other areas of law. The legislature had also taken the position that unaffiliated candidates be afforded deference. *Id.* The court found no other reason to believe that the legislature intended the signature requirement to exclude electronic signatures. It stated that UTEA modeled guidelines established by the state legislature were simply a codification of the common law. *Id.*, at 6.

In addition to considering the common law signature definition, the court considered the importance of the individual’s intent. The court reasoned that the key importance regarding signatures is the individual’s intent. The intent is more important than the form that the signature takes. The court chose to adopt the common law and qualify the signatures over the objections of the Lieutenant Governor.

Conclusion

Individuals have been prosecuted for fraud based on the utilization of electronic signatures. *Bennett* 631 S.E. 2d at 332; *Wenk*, 296 B.R. However, the courts reach these decisions based on the intent to defraud more so than the form the fraud takes. *E.g. Anderson*, 2010 WL 2485545.

Congress, as well as local legislatures (including Nebraska), have expressed a desire to encourage electronic signature transactions. *Id.*; Neb. Rev. Stat. § 86-611 (Lexis through 2010); U.S.C.A. § 7001-7006 (West through 2010). Legislatures have to some degree established protocols that can be relied on, such as the “public key” method. *Youd, supra*. These methods help to assist prosecutors in proving fraudulent intent. However, prosecutors do not appear to be limited to these methods when asserting fraud in court. The recent finding of the Utah Supreme Court suggests that the common law may already be in place to make electronic signatures enforceable in Nebraska election law. *E.g. Anderson*, 2010 WL 2485545; Neb. Rev. Stat. § 86-611 (Lexis through 2010).