

# MAKING YOUR TECHNOLOGIST AN ELECTRONIC RECORD BUILDER

## GOOD RECORDS AREN'T BORN, THEY'RE MADE

In the face of the passage of the Electronic Signatures in Global and National Commerce Act ("E-SIGN") at the federal level and the Uniform Electronic Transactions Act ("UETA") (in numerous states), the law is more settled than ever before: e-records are on par with their paper counterparts for most purposes and in most jurisdictions.<sup>1</sup> With ubiquitous use of electronic technologies for all facets of business, the output of such devices, usually a "compilation of electronic data," is the record that companies will have to rely on for business as well as legal purposes. This is particularly true in the context of e-business where much of the process is electronic and the only records are in electronic form. In any event, this confluence of events; namely greater use of and reliance on e-records, combined with greater legal recognition, is undoubtedly a good thing for business.

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### THE LAWS ARE NOT ENOUGH

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Laws such as E-SIGN and UETA have been accommodating indeed. However, such accommodation may have inadvertently and unsuspectingly created evidentiary hurdles for e-records. E-SIGN indicates that when a record is required to be retained, the law is satisfied by retaining the "information contained in the record," instead of requiring the retention of a "complete copy of THE record." Arguably, all that is required to be retained is the content of the record. So, in a typical web-based transaction, the law would appear to not require the form (or template) that was used to effectuate the transaction. Thus by providing a license to keep the lowest common denominator of e-record, E-SIGN may be inviting the retention of data in a way that fails to make good evidence and therefore fails to protect company interests, but is nonetheless "legally acceptable." Failing to have the template or form contract may be fatal in defending the transaction because the content alone will be of little utility without the context embodied in the form. For example, the number 225 could relate to my birthday (FEBRUARY 25), my weight, a product code, etc. Unless you have the field or box to which the number "225" relates and can prove the same, the retained data is a weak e-business record.

Additionally, UETA states that there is no need to retain "any information for which the sole purpose is to transmit the record." Failing to retain the information, whose purpose is to allow the transmission of the record (a form of meta data) which is apparently allowed by UETA, similarly creates evidentiary hurdles. Without the transmission data, issues of repudiation and authentication will be tougher to resolve. Without the meta data proving the telephone number from which the message was sent, from what computer the data was generated, with whom the deal was consummated and the time of acceptance becomes challenging at best. While the transmission data may not be technically required under UETA, failing to retain it severely limits one's ability to prove what happened, by whom and when.

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## CONTEXT IS KEY IN E-RECORDS

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In a typical e-business transaction what is retained might be nothing more the inputted data (sometimes referred as flat-line data, because it is merely a string of letters). Unless directed otherwise, the e-business process owner may not retain the meta data connecting the content with the form the purchaser saw or not may not retain the template at all. Thus, what the purchaser saw when doing business through the company website, such as presentation, notices (privacy, choice of law, disclaimers, etc.), fields; font size, etc. may not be retained. Unlike the paper world where everything is contained within the “four corners” of the document, it is not uncommon to have an e-record that consists of several packets of data stored in separate computers in separate locations. Making sure all the pieces that make up the digital “four corners” is retained takes effort.

Simply put, not all e-records are created equally. Some e-records are better. Better in the sense that they are more secure, more trustworthy, have greater integrity, are more complete and are just simply better evidence of business transactions. While useable paper records just happened, building good e-evidence takes effort. Good e-records require a proactive technologist, but the typical technologist is not trained in “evidence building.” Technologists are overwhelmed buying and implementing technology, minimizing storage costs and addressing burdens to computers systems. Therefore, if left to the technologists, the type of evidence retained will likely be the cheapest and easiest though not necessarily the best. Determining what kind of record to retain may require a cost/benefit analysis. If the risk is small, value of the transaction marginal, little likelihood of disputes, then the type of e-record probably does not matter. However, if the money or risk at issue is substantial or the industry is heavily regulated, then the type of the record retained will matter. (Certain regulators, such as the FDA mandate that more secure and trustworthy records than E-Sign are retained.)

Having good e-evidence of e-business transactions requires that sound business decisions be made. Good e-records do not just happen. There will be times when any e-record will be sufficient. However, when functioning within a regulated environment, or in a world where there is a lot at stake, there are ample business and legal reasons to build the right evidence and build it up front. Technology is available to deliver trust within a digital world. Committing valuable resources to the retention of data that fails to protect and promote institutional interests is bad business.

### ENDNOTES

<sup>1</sup> No doubt the EU has had their hands full on the information front dealing with privacy and security issues related to the European Data Directive. That being said, most advanced countries understand the need to have good e-records documenting business transactions and government activities and have sought to codify such requirements. In that regard, it is not surprising to find countries such as Australia, Canada, and Great Britain with laws on the books that seek to legislate good e-records in much the same way as the US. Building good e-records has been evident with governmental implementations of electronic filing applications or providing a secure transactions infrastructure for the citizenry to transact the business of government with agencies in an electronic age with the same level of trust brought from the paper-based world.

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