

# A Guide To Executing NY Contracts While Working From Home

By **Martin Siegel and Ally Hack**

As restrictions imposed due to the COVID-19 pandemic begin to ease, New York's "nonessentials" (such as lawyers and our business clients) are becoming accustomed to our new normal, i.e., working from home or other remote locations.

Technology has allowed our business clients to continue to do deals and make contractual commitments through mobile phones and videoconferencing such as Zoom, BlueJeans or Skype For Business, and for lawyers to draft agreements remotely. However, many clients, especially those accustomed to making deals on paper with ink signatures and handshakes (or elbow bumps), remain challenged as to how those agreements must be executed to be binding.

This article discusses how to satisfy the New York Statute of Frauds while working from home.

## **Contract Formation**

All contracts are subject to the same fundamental rules and principles that have long governed contract law, including the following.

### ***Meeting of the Minds***

An "agreement is a manifestation of mutual assent on the part of two or more persons."<sup>[1]</sup> No contract is formed without such "meeting of the minds." In other words, the parties must agree on a set of promises laying out the rights and responsibilities of each party. Significantly, not all details need to be agreed upon, rather only the "essential" terms of the agreement.<sup>[2]</sup>

### ***Offer and Acceptance***

The "manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party or parties."<sup>[3]</sup> If the acceptance does not "mirror" the offer, i.e., has material terms that differ from the offer, or indicates rejection of any material terms contained in the offer, it is equivalent to a rejection of the offer and the making of a counteroffer.

### ***The Statute of Frauds***

Under the New York Statute of Frauds,<sup>[4]</sup> certain agreements require "some note or memorandum [of the contract] ... in writing ... subscribed by the party to be charged therewith." Thus, under the Statute of Frauds, even with a "meeting of the minds" and an "offer and acceptance," barring certain exceptions a contract is not formed until the agreement is "subscribed by the party to be charged."<sup>[5]</sup>

### ***Agreements Not Governed by Statute of Frauds***

In New York, "[a]n exchange of emails [whether or not "subscribed"] may constitute an



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enforceable agreement if the writings include all of the agreement's essential terms." [6] Critically, however, the types of "agreements" where courts find binding agreements by assembling multiple writings (or emails) to meet the elements of contract formation are those that fall outside of the constrictions of the Statute of Frauds and, thus, require no subscription in writing.

The types of agreements dealt with in this article are those governed by the Statute of Frauds and, thus, do require such a written subscription.

### ***Subscribing to Contract Using Electronic Signatures***

As with traditional paper-and-ink contracts, agreements formed through electronic means must be "subscribed by the party to be charged" to satisfy the Statute of Frauds (barring certain exceptions).

In 2000, the Electronic Signatures and Records Act, or ESRA, was enacted in New York. [7] Under ESRA, "unless specifically provided otherwise by law, an electronic signature may be used by a person in lieu of a signature affixed by hand. The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand." [8]

An electronic signature is defined as "an electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record." [9] An electronic record is defined as "information, evidencing any act, transaction, occurrence, event, or other activity, produced or stored by electronic means and capable of being accurately reproduced in forms perceptible by human sensory capabilities." [10]

However, in enacting ESRA, the New York Legislature provided no guidance on the circumstances under which electronic signatures can bind parties to a contract. For this, we must turn to the cases, which define how one signs, or subscribes to, an electronic message with the intent to bind.

### ***Subscribing by an Electronic Message***

Under New York case law, whether an electronic message acts as a binding agreement depends on the degree of volition involved in "signing" that electronic message. For example, did the sender manually type his or her name, or was the "signature" automatically generated?

Several courts have generally found that "e-mails ... constitute 'signed writings' within the meaning of the statute of frauds, since [the party's] name at the end of his e-mail signifie[s] his intent to authenticate the contents." [11] However, as Mark Bruce International Inc. v. Blank Rome LLP makes clear, [12] "[t]he act of identifying and sending a document to a particular destination does not, by itself, constitute a signing authenticating the contents of the document." Rather, "a subscription requires an act to authenticate the writing" and "[t]he intent to authenticate the particular writing at issue must be demonstrated." [13]

In this regard, signature blocks, and preprinted signatures specifically, may not be sufficient. For example, Rhodium Special Opportunity Fund LLC v. Life Trading Holdco LLC [14] provides that "[t]he act of typing the name matters as a pre-printed signature in an email footer has been held to be insufficient as a signature for an email to meet the statute of frauds."

Text messages also can satisfy the Statute of Frauds. In *Grusd v. Arccos Golf LLC*,<sup>[15]</sup> "[t]hough [the parties] never executed a formal written agreement or incorporated, they exchanged numerous text messages that clearly evidence their partnership."

However, whether a text message contains an electronic signature is not always apparent. For example, in *Tayyib Bosque Corp. v. Emily Realty, LLC*,<sup>[16]</sup> the court held that the "Statute of Frauds requires Bosque to prove that LaFrieda signed [i.e., subscribed] the text messages. An electronic record can be considered an adequate writing but only if it is signed."

There, because "Bosque ... [did] not point to any text message signed by LaFrieda .... Bosque fail[ed] to establish a crucial element under the Statute of Frauds and did not have a valid commission contract."

Notwithstanding these cases, the First Department held in *Williamson v. Delsener*<sup>[17]</sup> that "the e-mails exchanged between counsel, which contained their printed names at the end, constitute signed writings ... within the meaning of the statute of frauds." The court did not define the term "printed names." By "printed names," did the First Department mean "preprinted names," as in an automatically generated signature block, or did it mean the act of a party volitionally typing, i.e. printing, its name at the end of the email?

A review of the record, to the limited extent available on the court's website, suggests the former.<sup>[18]</sup> It remains unclear if *Williamson* is an exception to the general rule that a volitional act is required to "subscribe" an agreement under the Statute of Frauds, or is it a relaxation or change to that general rule.

In sum, the case law, consistent with ESRA, almost uniformly holds that electronic signatures are acceptable, and a party who types its, his or her name to an electronic message, or otherwise authenticates it, is deemed to have signed that electronic message and entered into a binding contract.

Yet, as the U.S. Court of Appeals for the Second Circuit in *Rubinstein v. Clark & Green Inc.*<sup>[19]</sup> reminded us, there is no binding contract if, as evidenced by the electronic communications themselves, the parties contemplated (1) further negotiations and/or (2) the physical execution (signature in ink) of a formal instrument.

An interesting twist on this issue is found in *Solartech Renewables LLC v. Vitti*.<sup>[20]</sup> There, "the defendant provided a signature line for the plaintiff on a proposed side letter and requested that plaintiff's representative sign it to acknowledge acceptance of her conditions. The record demonstrates that plaintiff's representative ... printed a copy of the proposed side letter and endorsed it with his handwritten signature, then scanned and emailed the signed copy to defendant."

The Third Department found that such "ordinary letter did not transform into an electronic record simply by virtue of its attachment to an electronic record (i.e., defendant's email), [then] revert to a non-electronic record when printed and signed, then transform into an electronic record again when the signed copy was scanned and attached to a new email. In sum, the record does not demonstrate that the proposed side letter, itself, was an electronic record."

Because the side letter was not an electronic record, the defendant's typing of her name to the proposed side letter (but not signing in ink as the plaintiff had done — "although [the

defendant] affixing her signature would have been easy") — was insufficient to bind the defendant. Thus, the complaint based on the alleged contract was dismissed.

Accordingly, to ensure a writing is subscribed for purposes of forming a binding contract, the parties should manually and volitionally type their names to the electronic messages, or otherwise acknowledge it. But this execution-by-typing will not suffice where the document is not an electronic record, or where the parties manifest an intent that the document be subscribed by traditional means such as an ink signature.[21]

## **Conclusion and Caveat**

In sum, deal-making and contract formation continue even as working remotely has become more prevalent. However, a word of caution to clients before typing their names to the end of an electronic message: although relatively informal and commonly taken for granted, electronic signatures to contracts may be valid and enforceable and deemed to satisfy the Statute of Frauds.

Indeed, one party's casual banter may be another party's contract. Therefore, advise clients to pause and reflect before clicking send, or else they may be bound.

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[1] [In re: Bernard L. Madoff Inv. Sec. LLC](#), 773 F.3d 411 (2d Cir. 2014) citing Restatement (Second) of Contracts § 3 (1979).

[2] [Crabtree v. Elizabeth Arden Sales Corp.](#), 305 N.Y. 48 (1953).

[3] [Camrex Contractors \(Marine\) Ltd. v. Reliance Marine Applicators, Inc.](#), 579 F. Supp. 1420 (E.D.N.Y. 1984) citing Restatement (Second) of Contracts § 22(1), at 66 (1981). See also Restatement (Second) of Contracts, § 50.

[4] N.Y. Gen. Obl. Law § 5-701. See also UCC § 2-207. As noted, however, agreements under the Uniform Commercial Code are outside the scope of this Article.

[5] See New York's Statute of Frauds, N.Y. Gen. Obl. L. § 5-701, for those agreements that are required to be "in writing" and "subscribed," and those that are not so required.

[6] See, e.g., [Kasowitz, Benson, Torres & Friedman, LLP v. Duane Reade](#), 20 N.Y.3d 1082 (2013).

[7] Many states, as well as the United States, have passed similar laws to facilitate electronic signatures. See, e.g., Del. Uniform Electronic Transactions Act; U.S. Electronic Signatures in Global and National Commerce Act (the "E-Sign Act").

[8] See State Technology Law § 304(2); 9 N.Y.C.R.R. § 540.4.

[9] See *id.* at § 302(3).

[10] *Id.* at § 302(2).

[11] [Stevens v. Publicis S.A.](#), 50 A.D.3d 253 (1st Dep't 2008), lv dismissed 10 N.Y.3d 930 (2008). See also [Naldi v. Grunberg](#), 80 A.D.3d 1 (1st Dep't 2010); [European Sch. of Econs. Found. v. Teknoloji Holdings A.S.](#), 2011 U.S. Dist. Lexis 47691 (S.D.N.Y.); [Williamson v. Delsener](#), 59 A.D.3d 291 (1st Dep't 2009).

[12] 19 Misc. 3d 1140(A) (Sup. Ct. N.Y. Co. 2008), *aff'd* 60 A.D.3d 550 (1st Dep't 2009).

[13] *Id.* (comparing pre-printed signature blocks in emails to "automatic imprinting, by a fax machine, of the sender's name at the top of each page transmitted," which the Court of Appeals held did not satisfy the requirement for a signed writing).

[14] 2014 N.Y. Misc. Lexis 1525 (Sup. Ct. N.Y. Co.) citing [Bayerische Landesbank v. 45 John St. LLC](#), 102 A.D.3d 587 (1st Dep't 2013). See also [Forcelli v. Gelco Corp.](#), 109 A.D.3d 244 (2d Dep't 2013) (holding that ending an email by typing "Thanks Brenda Greene" indicated that the author had "purposefully added her name to this particular email message, rather than a situation where the sender's email software has been programmed to automatically generate the name of the email sender, along with other identifying information, every time an email message is sent.").

[15] 2014 N.Y. Slip Op. 31471(U) (Sup. Ct. N.Y. Co.).

[16] 2019 U.S. Dist. Lexis 100900 (S.D.N.Y. 2019) (internal citations omitted).

[17] 59 A.D.3d 291 (1st Dep't 2009).

[18] See *id.*, citing [Stevens v. Publics SA](#), 50 A.D.3d 253 (1st Dep't 2008) (similarly referring ambiguously to a "printed" signature). But see [Rosenfeld v. Zerneck](#), 4 Misc.3d 193 (Sup. Ct. Kings Co. 2004) relying upon [Parma Tile Mosaic & Marble Co. v. Estate of Short](#), 87 N.Y.2d 524 (1996) as follows: "[i]n *Parma Tile*, the Court of Appeals decided that 'the automatic imprinting, by a fax machine, of the sender's name at the top of each page transmitted' (*id.* at 526) did not 'constitute a signing authenticating the contents of the document for Statute of Frauds purposes' because the fax machine 'after being programmed to do so, automatically imprinted [the sender's name] on every page transmitted, without regard to the applicability of the Statute of Frauds to a particular document.' (*Id.* at 528) Nor does the intentional programming of the fax machine suffice to demonstrate the sender's 'intention to authenticate every document subsequently faxed.'" (*Id.*)

[19] 395 Fed. Appx. 786 (2d Cir. 2010).

[20] 156 A.D. 3d 995 (3d Dep't 2017).

[21] It should be noted that various companies provide a secure means of affixing authenticated electronic signatures to documents, including [DocuSign, Inc.](#) and other similar services. Such services must utilize a rigorous pre-authentication process and may not be available to all contracting parties working remotely. See [Alliant Credit Union v. Abrego](#), 2018 Wash. App. Lexis 2964 (1st Div.) Cf. [Matter of ADHY Invs. Props. LLC v. Garrison Lifestyle Pierce Hill LLC](#), 41 Misc. 3d 1211(A), (Sup. Ct. N.Y. Co. 2013) (upholding use of

DocuSign in New York). A meaningful discussion of such services is beyond the scope of this article.