

# Legal Requirements for Electronic Records

## Legal Requirements for Electronic Records

### ECURE 2001

Mesa, Arizona  
October 12, 2001

Donald S. Skupsky, JD, CRM, FAI, MIT  
Information Requirements Clearinghouse  
Denver, Colorado  
dskupsky@irch.com  
www.irch.com

IRCH

---

---

---

---

---

---

---

---

### Uniform Laws

- Uniform Rules of Evidence \*
- Uniform Photographic Copies of Business and Public Records as Evidence Act
- Uniform Preservation of Private Business Records Act
- Uniform Electronic Transactions Act (UETA)\*

\* Adopted by Arizona

IRCH

---

---

---

---

---

---

---

---

### Evidence — Historical Perspective

- Records Historically NOT Admitted in Evidence
- Live testimony preferred
- Records are “Hearsay”

IRCH

---

---

---

---

---

---

---

---

# Legal Requirements for Electronic Records

## Hearsay

A statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

- *Uniform Rules of Evidence, Rule 801.*

IRCH

---

---

---

---

---

---

---

---

## Uniform Rules of Evidence

Definition: "Records" - Rule 1001(a)

- **Records:** . . . letters, words, sounds or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, chemical or electronic recording, or other form of data compilation.
- **Data compilation** = computer record

IRCH

---

---

---

---

---

---

---

---

## Uniform Rules of Evidence Hearsay Exception - Rule 803(6)

- Records in any form admissible in evidence, if
  - Records of act or event
  - Made at or near time of event
  - By or from person with knowledge
  - Kept in the course of regularly conducted business activity

IRCH

---

---

---

---

---

---

---

---

# Legal Requirements for Electronic Records

## Uniform Rules of Evidence Hearsay Exception - Rule 803(6)

- Regular practice of business activity to make these records
- Testimony provided showing compliance by custodian or other qualified person
- Unless source of information or method or circumstances of preparation lack *trustworthiness*

IRCH

---

---

---

---

---

---

---

---

## Uniform Rules of Evidence Authentication and Identification - Rule 901

- “Foundation” required before all records (and evidence) admitted into evidence
- Evidence sufficient to support a finding that the matter in question is what its proponents claim

IRCH

---

---

---

---

---

---

---

---

## Uniform Rules of Evidence Authentication and Identification - Rule 901

- Example: Rule 901(b)(9)
  - Evidence describing a process or system used to produce the result, and
  - Showing that the process or system produced an accurate result

IRCH

---

---

---

---

---

---

---

---

# Legal Requirements for Electronic Records

## System Components for Compliance with Rule 901

- Components
  - Procedures
  - Training
  - Audit
- Documentation

IRCH

---

---

---

---

---

---

---

---

## Authentication and Identification Certificate of Authenticity

- Not required for evidence
- Often required by law for government records

IRCH

---

---

---

---

---

---

---

---

## Uniform Rules of Evidence Original - Rule 1001(c)

- Writing and recording itself
- Counterpart intended to have the same effect as the original
- Computer printout or other output
  - Readable by sight
  - Shown to reflect the data accurately

IRCH

---

---

---

---

---

---

---

---

# Legal Requirements for Electronic Records

## Uniform Rules of Evidence Duplicate - Rule 1001(d)

- Counterpart produced from
  - Same impression as the original,
  - Same matrix as the original,

IRCH

---

---

---

---

---

---

---

---

## Uniform Rules of Evidence Duplicate - Rule 1001(d)

- By means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or
- By *other equivalent techniques which accurately reproduces the original.*

IRCH

---

---

---

---

---

---

---

---

## Uniform Rules of Evidence Other Evidence of Contents - Rule 1004

- Originals *not* required
  - Originals lost or destroyed, without bad faith
  - Originals not obtainable
  - Originals in the possession of another
  - Records collateral to controlling issues

IRCH

---

---

---

---

---

---

---

---

# Legal Requirements for Electronic Records

## Uniform Rules of Evidence Admissibility of Duplicates - Rule 1003

- Duplicates admissible to the same extent as originals, unless
  - Genuine question raised as to the authenticity or the continuing effectiveness of the originals, or
  - It would be unfair to admit the duplicates in place of the originals

IRCH

---

---

---

---

---

---

---

---

## Uniform Photographic Copies of Business and Public Records as Evidence Act (UPA)

- Reproductions made in regular course of business
- Reproductions by “any technique that accurately reproduces the originals”
- Originals can be destroyed after reproduction
- Reproductions admissible in evidence/administrative proceedings

IRCH

---

---

---

---

---

---

---

---

## Uniform Photographic Copies of Business and Public Records as Evidence Act (UPA)

- Explicit permission to destroy after reproduction
- Rule of “conduct” for federal transactions, including education
- Still in about 30 states and US Federal Government

IRCH

---

---

---

---

---

---

---

---

# Legal Requirements for Electronic Records

## Court Decisions - Computer Records

“Computer data compilation may constitute business records for purposes of Rule 803(6) and may be admitted at trial if a proper foundation is established.”

- *United States v. Croft*, 750 F.2d 1353.

IRCH

---

---

---

---

---

---

---

---

## Court Decisions - Computer Records

- “Computer business records are admissible if
  - kept pursuant to a routine procedure designed to assure their accuracy,
  - created for motives that tend to assure accuracy,
  - not themselves mere accumulation of hearsay.”

- *United States v. Sanders*, 749 F.2d 195.

IRCH

---

---

---

---

---

---

---

---

## Court Decisions - Electronic Imaging

- No reported court decisions -- from appeals
- No reported problems from users admitting paper prints from electronic imaging systems into evidence

IRCH

---

---

---

---

---

---

---

---

# Legal Requirements for Electronic Records

## Arizona Government Requirements: ARS 41-1348

- Applied to “production” or “reproduction” of public records
- Permits microfilm and electronic media
- Permission from Department of Library, Archives and Public Records
- Records admissible in evidence

IRCH

---

---

---

---

---

---

---

---

## Uniform Electronic Transactions Act (UETA: 1999) – (adopted by AZ)

- Adopted as Uniform Law by over 11 states
- Similar to “E-Sign” – Electronic records law adopted by U.S. Federal Government.

IRCH

---

---

---

---

---

---

---

---

## UETA: Applicability

- Does not require electronic record or signature
- Applies to parties who “agree to conduct transactions by electronic means”
  - Prior agreement
  - Previous conduct – e.g., exchange of e-mail forming contracts

IRCH

---

---

---

---

---

---

---

---



# Legal Requirements for Electronic Records

## UETA: Conclusions

- Just because Record, signature or contract is electronic
  - Cannot be denied legal effect
  - Cannot be excluded from evidence
- If law requires Record/Signature, electronic record meets requirements

IRCH

---

---

---

---

---

---

---

---

## UETA: Time/Location of Transaction

- Record sent: When transmitted out of control of sender
- Record received:
  - When sent to receivers correct address, and
  - When received by receiver's electronic records system.
- Receiver does not have to read

IRCH

---

---

---

---

---

---

---

---

## UETA: Special Issues

- Receiver does not have to read for record to be received
- Electronic record not enforceable against recipient if sender inhibits the recipients ability to file and print

IRCH

---

---

---

---

---

---

---

---

# Legal Requirements for Electronic Records

## UETA: Signature Validation

- Electronic signature is attributable to a person if it is an “act” of that person
- Look to circumstances regarding creation, execution, security, etc.

IRCH

---

---

---

---

---

---

---

---

## UETA: Retention

- Retain electronic record for required period
- Maintenance of electronic record for required period meets requirements to retain record
- Note: “Retention of record” does NOT include information whose sole purpose is to enable record to be sent, communicated or received.

IRCH

---

---

---

---

---

---

---

---

## Problem With E-mail

- Replacement for telephone or face-to-face conversation
- Authors believe their E-mail is private
- Authors don’t believe they are making “records”
  - E-mail is a “tool” to communicate
  - Authors don’t go through a formal process to create E-mail

IRCH

---

---

---

---

---

---

---

---

# Legal Requirements for Electronic Records

## Problem With E-mail

- E-mail language not to the same standard as formal letter or memo
  - Loose language
  - Incomplete thoughts
- Authors/recipients “selectively” destroy E-mail records
- E-mail subject to litigation as an “admission”
- Restrictions of E-mail reduce efficiency

IRCH

---

---

---

---

---

---

---

---

## A New Definition

- **Record.** The result of recording or preserving information on any media with the intent to preserve information that reflects the position or official business of an organization.
- Record = Official Record

IRCH

---

---

---

---

---

---

---

---

## Skupsky Recommendations for E-Mail

- E-Mail should be defined as “non-record material”
- E-Mail should self-destruct in 30 days
- Procedures to convert selected E-Mail to “records”
  - Assign record series code plus retention period and store in electronic filing system, or
  - Print and store in paper file

IRCH

---

---

---

---

---

---

---

---

# Legal Requirements for Electronic Records

## Electronic Records - Backup Strategy

- **Problem: Cannot destroy records with different retention periods from backup tapes**
- **Distinguish “backups” from Off-Line storage**
  - **Backup: Disaster recovery / vital records**
  - **Off-Line Storage: Long-term, low access information**

IRCH

---

---

---

---

---

---

---

---

## Electronic Records - Retention Strategy

- **Off-Line Storage**
  - **Treat separate from back-up**
  - **Segregate records with different retention periods**
- **Backups**
  - **Segregate backup for records with very short-term retention -- e-mail**
  - **Recycle tape after short period**

IRCH

---

---

---

---

---

---

---

---

## Migration Strategy for Long Term Retention

- **Media migration**
- **Software / Format migration**
- **Technology migration**
  - **Active: electronic**
  - **Inactive: microfilm**

IRCH

---

---

---

---

---

---

---

---

# Legal Requirements for Electronic Records

## Distribution / Storage Methodology

- Goal: "Central Files"
  - Records in one location
  - Central control and management
  - Trained people implement company policy
- Permit distributed creation and use

IRCH

---

---

---

---

---

---

---

---

## Distribution / Storage Methodology

- Examples:
  - E-mail
    - Current: Download to workstation
    - Better: Maintain on server
  - Distribution
    - Current: Send files to everyone
    - Better: Send links to everyone and store files in one place

IRCH

---

---

---

---

---

---

---

---

## Retention of Original Records After Imaging

- Original records required by law
- Records with intrinsic value: stock certificates, bonds, cash, negotiable instruments
- Documents for which the original signature or handwriting may be significant -- e.g., wills
- Notes, mortgages, and debt instruments that will be stamped "paid" and returned to owner

IRCH

---

---

---

---

---

---

---

---

# Legal Requirements for Electronic Records

## Absence of Legal Guidance - "The Void"

- Skupsky's Basic Principle of American Law
  - You may do anything you want, unless the act is
    - Prohibited, or
    - Regulated

IRCH

---

---

---

---

---

---

---

---

## Absence of Legal Guidance - "The Void"

- You may use any system of records, unless the system is
  - Prohibited, or
  - Regulated

IRCH

---

---

---

---

---

---

---

---

The End

IRCH

---

---

---

---

---

---

---

---