ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004 8672
10832 HOUSE JUDICIARY

HOUSE COMMITTEE REPORT

5-13-03

(7)

Date Referred to Committee: April 25, 2003 **FURTHER REFERRALS: Judiciary**

Date of Committee Action: _____

The LABOR AND COMMERCE Committee considered: **HB 285**

HOUSE BILL NO. 285 **ELECTRONIC TRANSACTIONS & SIGNATURES**

"An Act adopting the Uniform Electronic Transactions Act; repealing certain statutes relating to electronic records and electronic signatures; amending Rule 402, Alaska Rules of Evidence; and providing for an effective date."

Recommends it be replaced with [ ] HCS *or* [ ] CS *for* _____(_____)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW **FISCAL NOTES** *Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero
GOV/All Depts	1			✓

PREVIOUS **FISCAL NOTES**				
List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP (2)	DNP	NR (4)	AM
	LYNN	X			
	GATTO			X	
	CRAWFORD			X	
	GUTTENBERG			X	
	DAHLSTROM			X	
Chair:	ANDERSON	X			
Chair:					

Alaska State Legislature

Session
State Capitol Building, Room 118
Juneau, Alaska 99801-1182
Phone (907) 465-2995
Fax (907) 465-6592

Interim
716 West Fourth Avenue, Suite 430
Anchorage, Alaska 99501
Phone (907) 269-0250
Fax 9907) 269-0249

Chair, Judiciary Committee

Vice-Chair, House Committee on
Economic Development,
Trade and Tourism

Member
Oil & Gas Committee

Representative Lesil McGuire

House District 28

MEMORANDUM

To: Committee Members
House Judiciary Committee

From: Representative Lesil McGuire

Date: January 16, 2004

Re: HB 285, "Electronic Transactions & Signatures"

HB 285, Electronic Transactions & Signatures, is scheduled for a hearing in the House Judiciary Committee on Wednesday, January 21 at 1:00 p.m. I have included the following in the bill packet for your information:

1. CSHB 285 (JUD), Version D
   The only change from the original version of the bill is the addition of AS 45.02 in Section 1 (the scope section). AS 45.02 is the UCC chapter on Sales and its omission was a drafting oversight. UETA provides that UCC sales and lease transactions may be accomplished via electronic transactions.
2. HB 285
3. Background information
4. Letters of Support
5. Zero Fiscal Note

If you have any questions on this legislation please feel free to contact me personally, or my staff, Vanessa Tondini, at 4990.

23-LS0829\D
Bannister
10/6/03

CS FOR HOUSE BILL NO. 285(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVE MCGUIRE

A BILL

FOR AN ACT ENTITLED

"An Act adopting the Uniform Electronic Transactions Act; repealing certain statutes relating to electronic records and electronic signatures; amending Rule 402, Alaska Rules of Evidence; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* **Section 1.** AS 09 is amended by adding a new chapter to read:

Chapter 80. Uniform Electronic Transactions Act.

Sec. 09.80.010. Scope. (a) Except as otherwise provided in (b) and (c) of this section, this chapter applies to electronic records and electronic signatures relating to a transaction.

(b) This chapter does not apply to a transaction to the extent it is governed by

(1) a law governing the creation and execution of wills, codicils, or testamentary trusts;

(2) the Uniform Commercial Code other than AS 45.01.107, 45.01.206, AS 45.02, and AS 45.12.

(c) This chapter applies to a transaction governed by 15 U.S.C. 7001 - 7031 (Electronic Signatures in Global and National Commerce Act), but this chapter is not intended to limit, modify, or supersede 15 U.S.C. 7001(c). To the extent excluded from the scope of 15 U.S.C. 7001 - 7031 under 15 U.S.C. 7003, this chapter does not apply to a notice to the extent that it is governed by a law requiring the furnishing of

(1) any notice of

(A) the cancellation or termination of utility services, including water, heat, and power;

(B) default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual;

(C) the cancellation or termination of health insurance or benefits or life insurance benefits, excluding annuities; or

(D) recall of a product, or material failure of a product, that risks endangering health or safety; or

(2) a document to accompany any transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials.

(d) This chapter applies to an electronic record or electronic signature otherwise excluded from the application of this chapter under (b) or (c) of this section to the extent it is governed by a law other than those specified in (b) or (c) of this section.

(e) A transaction subject to this chapter is also subject to other applicable substantive law.

Sec. 09.80.020. Use of electronic records and electronic signatures; variation by agreement. (a) This chapter does not require a record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form.

(b) This chapter applies only to transactions between parties each of whom has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.

(c) A party who agrees to conduct a transaction by electronic means may refuse to conduct other transactions by electronic means. The right granted by this subsection may not be waived by agreement.

(d) Except as otherwise provided in this chapter, the effect of any of the provisions of this chapter may be varied by agreement. The presence in certain provisions of this chapter of the words "unless otherwise agreed," or words of similar meaning, does not imply that the effect of other provisions may not be varied by agreement.

(e) Whether an electronic record or electronic signature has legal consequences is determined by this chapter and other applicable law.

Sec. 09.80.030. Construction and application. This chapter shall be construed and applied to

(1) facilitate electronic transactions consistent with other applicable law;

(2) be consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices; and

(3) carry out its general purpose to make the law with respect to the subject of this chapter uniform among states enacting it.

Sec. 09.80.040. Legal recognition of electronic records, electronic signatures, and electronic contracts. (a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.

(c) If a law requires a record to be in writing, an electronic record satisfies the law.

(d) If a law requires a signature, an electronic signature satisfies the law.

Sec. 09.80.050. Provision of information in writing; presentation of records. (a) If parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the

time of receipt. An electronic record is not capable of retention by the recipient if the sender or its information processing system inhibits the ability of the recipient to print or store the electronic record.

(b) If a law other than this chapter requires a record to be posted or displayed in a certain manner, to be sent, communicated, or transmitted by a specified method, or to contain information that is formatted in a certain manner, the following rules apply:

(1) the record must be posted or displayed in the manner specified in the other law;

(2) except as otherwise provided in (d)(2) of this section, the record shall be sent, communicated, or transmitted by the method specified in the other law;

(3) the record must contain the information formatted in the manner specified in the other law.

(c) If a sender inhibits the ability of a recipient to store or print an electronic record, the electronic record is not enforceable against the recipient.

(d) The requirements of this section may not be varied by agreement, but

(1) to the extent a law other than this chapter requires information to be provided, sent, or delivered in writing but permits that requirement to be varied by agreement, the requirement under (a) of this section that the information be in the form of an electronic record capable of retention may also be varied by agreement; and

(2) a requirement under a law other than this chapter to send, communicate, or transmit a record by regular United States mail may be varied by agreement to the extent permitted by the other law.

Sec. 09.80.060. Attribution and effect of electronic record and electronic signature. (a) An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to whom the electronic record or electronic signature was attributable.

(b) The effect of an electronic record or electronic signature attributed to a person under (a) of this section is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties'

agreement, if any, and otherwise as provided by law.

Sec. 09.80.070. Effect of change or error. If a change or an error in an electronic record occurs in a transmission between parties to a transaction, the following rules apply:

(1) if the parties have agreed to use a security procedure to detect changes or errors and one party has conformed to the procedure, but the other party has not, and the nonconforming party would have detected the change or error had that party also conformed, the conforming party may avoid the effect of the changed or erroneous electronic record;

(2) in an automated transaction involving an individual, the individual may avoid the effect of an electronic record that resulted from an error made by the individual in dealing with the electronic agent of another person if the electronic agent did not provide an opportunity for the prevention or correction of the error and, at the time the individual learns of the error, the individual

(A) promptly notifies the other person of the error and that the individual did not intend to be bound by the electronic record received by the other person;

(B) takes reasonable steps, including steps that conform to the other person's reasonable instructions, to return to the other person or, if instructed by the other person, to destroy the consideration received, if any, as a result of the erroneous electronic record; and

(C) has not used or received any benefit or value from the consideration, if any, received from the other person;

(3) if (1) and (2) of this section do not apply, the change or error has the effect provided by other law, including the law of mistake, and the parties' contract, if any;

(4) paragraphs (2) and (3) of this section may not be varied by agreement.

Sec. 09.80.080. Notarization and acknowledgment. If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform

those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.

Sec. 09.80.090. Retention of electronic records; originals. (a) If a law requires that a record be retained, the requirement is satisfied by retaining an electronic record of the information in the record that

(1) accurately reflects the information set out in the record after it was first generated in its final form as an electronic record or otherwise; and

(2) remains accessible for later reference.

(b) A requirement to retain a record under (a) of this section does not apply to any information the sole purpose of which is to enable the record to be sent, communicated, or received.

(c) A person may satisfy (a) of this section by using the services of another person if the requirements of that subsection are satisfied.

(d) If a law requires a record to be presented or retained in its original form, or provides consequences if the record is not presented or retained in its original form, that law is satisfied by an electronic record retained in accordance with (a) of this section.

(e) If a law requires retention of a check, that requirement is satisfied by retention of an electronic record of the information on the front and back of the check in accordance with (a) of this section.

(f) A record retained as an electronic record in accordance with (a) of this section satisfies a law requiring a person to retain a record for evidentiary, audit, or like purposes, unless a law enacted after the effective date of this Act specifically prohibits the use of an electronic record for the specified purpose.

(g) This section does not preclude a governmental agency of this state from specifying additional requirements for the retention of a record subject to the agency's jurisdiction.

Sec. 09.80.100. Admissibility in evidence. In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form.

Sec. 09.80.110. Automated transaction. In an automated transaction, the following rules apply:

(1) a contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements;

(2) a contract may be formed by the interaction of an electronic agent and an individual, acting on the individual's own behalf or for another person, including by an interaction in which the individual performs actions that the individual is free to refuse to perform and that the individual knows or has reason to know will cause the electronic agent to complete the transaction or performance;

(3) the terms of the contract are determined by the substantive law applicable to it.

Sec. 09.80.120. Time and place of sending and receipt. (a) Unless otherwise agreed between the sender and the recipient, an electronic record is sent when it

(1) is addressed properly or otherwise directed properly to an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record;

(2) is in a form capable of being processed by that system; and

(3) enters an information processing system outside the control of the sender or of a person who sent the electronic record on behalf of the sender or enters a region of the information processing system designated or used by the recipient that is under the control of the recipient.

(b) Unless otherwise agreed between a sender and the recipient, an electronic record is received when it

(1) enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; and

(2) is in a form capable of being processed by that system.

(c) Subsection (b) of this section applies even if the place the information processing system is located is different from the place the electronic record is considered to be received under (d) of this section.

(d) Unless otherwise expressly provided in the electronic record or agreed between the sender and the recipient, an electronic record is considered to be sent from the sender's place of business and to be received at the recipient's place of business. For purposes of this subsection, the following rules apply:

(1) if the sender or recipient has more than one place of business, the place of business of that person is the place having the closest relationship to the underlying transaction;

(2) if the sender or the recipient does not have a place of business, the place of business is the sender's or recipient's residence, as the case may be.

(e) An electronic record is received under (b) of this section even if no individual is aware of its receipt.

(f) Receipt of an electronic acknowledgment from an information processing system described in (b) of this section establishes that a record was received but, by itself, does not establish that the content sent corresponds to the content received.

(g) If a person is aware that an electronic record purportedly sent under (a) of this section, or purportedly received under (b) of this section, was not actually sent or received, the legal effect of the sending or receipt is determined by other applicable law. Except to the extent permitted by the other law, the requirements of this subsection may not be varied by agreement.

Sec. 09.80.130. Transferable records. (a) A person has control of a transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to whom the transferable record was issued or transferred.

(b) A system satisfies (a) of this section, and a person is considered to have control of a transferable record, if the transferable record is created, stored, and assigned in such a manner that

(1) a single authoritative copy of the transferable record exists that is unique, identifiable, and, except as otherwise provided in (4) - (6) of this subsection, unalterable;

(2) the authoritative copy identifies the person asserting control as

(A) the person to whom the transferable record was issued; or

(B) the person to whom the transferable record was most recently transferred if the authoritative copy indicates that the transferable record has been transferred;

(3) the authoritative copy is communicated to and maintained by the person asserting control or the person's designated custodian;

(4) copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control;

(5) each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

(6) any revision of the authoritative copy is readily identifiable as authorized or unauthorized.

(c) Except as otherwise agreed, a person having control of a transferable record is the holder, as defined in AS 45.01.201, of the transferable record and has the same rights and defenses as a holder of an equivalent record or writing under the Uniform Commercial Code, including, if the applicable statutory requirements under AS 45.03.302(a), AS 45.07.501, or AS 45.29.308 are satisfied, the rights and defenses of a holder in due course, a holder to which a negotiable document of title has been duly negotiated, or a purchaser, respectively. Delivery, possession, and endorsement are not required to obtain or exercise any of the rights under this subsection.

(d) Except as otherwise agreed, an obligor under a transferable record has the same rights and defenses as an equivalent obligor under equivalent records or writings under the Uniform Commercial Code.

(e) If requested by a person against whom enforcement is sought, the person seeking to enforce the transferable record shall provide reasonable proof that the person is in control of the transferable record. Proof may include access to the authoritative copy of the transferable record and related business records sufficient to review the terms of the transferable record and to establish the identity of the person having control of the transferable record.

(f) In this section, "transferable record" means an electronic record that

(1) would be a note under AS 45.03 or a document under AS 45.07 if the electronic record were in writing; and

(2) the issuer of the electronic record expressly has agreed is a transferable record.

Sec. 09.80.140. Creation and retention of electronic records and conversion of written records by governmental agencies. Each governmental agency of this state shall determine whether, and the extent to which, the governmental agency will create and retain electronic records and convert written records to electronic records.

Sec. 09.80.150. Acceptance and distribution of electronic records by governmental agencies. (a) Except as otherwise provided in AS 09.80.090(f), each governmental agency of this state shall determine whether, and the extent to which, the governmental agency will send and accept electronic records and electronic signatures to and from other persons and otherwise create, generate, communicate, store, process, use, and rely upon electronic records and electronic signatures.

(b) To the extent that a governmental agency uses electronic records and electronic signatures under (a) of this section, the governmental agency, giving due consideration to security, may specify

(1) the manner and format in which the electronic records must be created, generated, sent, communicated, received, and stored and the systems established for those purposes;

(2) if electronic records must be signed by electronic means, the type of electronic signature required, the manner and format in which the electronic signature must be affixed to the electronic record, and the identity of, or criteria that must be met by, a third party used by a person filing a document to facilitate the process;

(3) control processes and procedures as appropriate to ensure adequate preservation, disposition, integrity, security, confidentiality, and auditability of electronic records; and

(4) any other required attributes for electronic records that are specified for corresponding nonelectronic records or that are reasonably necessary under the circumstances.

(c) Except as otherwise provided in AS 09.80.090(f), this chapter does not

require a governmental agency of this state to use or permit the use of electronic records or electronic signatures.

Sec. 09.80.160. Interoperability. A governmental agency of this state that adopts standards under AS 09.80.150 may encourage and promote consistency and interoperability with similar requirements adopted by other governmental agencies of this and other states and the federal government and nongovernmental persons interacting with governmental agencies of this state. If appropriate, those standards may specify differing levels of standards from which governmental agencies of this state may choose in implementing the most appropriate standard for a particular application.

Sec. 09.80.190. Definitions. In this chapter,

(1) "agreement" means the bargain of the parties in fact, as found in their language or inferred from other circumstances and from rules, regulations, and procedures given the effect of agreements under laws otherwise applicable to a particular transaction;

(2) "automated transaction" means a transaction conducted or performed, in whole or in part, by electronic means or electronic records, in which the acts or records of one or both parties are not reviewed by an individual in the ordinary course of affairs in forming a contract, performing under an existing contract, or fulfilling an obligation required by the transaction;

(3) "computer program" means a set of statements or instructions to be used directly or indirectly in an information processing system in order to bring about a certain result;

(4) "contract" means the total legal obligation resulting from the parties' agreement as affected by this chapter and other applicable law;

(5) "electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities;

(6) "electronic agent" means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual;

(7) "electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means;

(8) "electronic signature" means an 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;

(9) "governmental agency" means an executive, legislative, or judicial agency, department, board, commission, authority, institution, or instrumentality, of the federal government or of a state or of a county, municipality, or other political subdivision of a state;

(10) "information" means data, text, images, sounds, codes, computer programs, software, databases, or similar items;

(11) "information processing system" means an electronic system for creating, generating, sending, receiving, storing, displaying, or processing information;

(12) "person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation, or any other legal or commercial entity;

(13) "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form;

(14) "security procedure" means a procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person or for detecting changes or errors in the information in an electronic record; "security procedure" includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or call-backs or other acknowledgment procedures;

(15) "state" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States, and includes an Indian tribe or band or Alaska Native village that is recognized by federal law or formally acknowledged by a state;

(16) "transaction" means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs;

(17) "Uniform Commercial Code" means AS 45.01 - AS 45.08, AS 45.12, AS 45.14, and AS 45.29.

Sec. 09.80.195. Short title. This chapter may be cited as the Uniform Electronic Transactions Act.

* **Sec. 2.** AS 09.25.500, 09.25.510, and 09.25.520 are repealed.

* **Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE AMENDMENT. AS 09.80.100, enacted by sec. 1 of this Act, has the effect of changing Rule 402, Alaska Rules of Evidence, by adding a provision that prevents electronic evidence of a record or signature from being inadmissible as evidence just because it is in electronic form.

* **Sec. 4.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. This Act applies to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after the effective date of this Act. In this section, "electronic record" and "electronic signature" have the meanings given in AS 09.80.190, enacted by sec. 1 of this Act.

* **Sec. 5.** The uncodified law of the State of Alaska is amended by adding a new subsection to read:

SAVING CLAUSE. A rule of law that is satisfied under AS 09.25.510(a), repealed by sec. 2 of this Act, before the effective date of this Act by an electronic record executed or adopted with an electronic signature remains satisfied on and after the effective date of this Act notwithstanding the repeal of AS 09.25.510 by sec. 2 of this Act. In this section, "electronic signature" and "record" have the meanings given in AS 09.25.520, repealed by sec. 2 of this Act.

* **Sec. 6.** This Act takes effect July 1, 2004.

THE UNIFORM ELECTRONIC TRANSACTIONS ACT

The Uniform Electronic Transactions Act (UETA) allows the use of electronic records and electronic signatures in any transaction, except transactions subject to the Uniform Commercial Code. The fundamental purpose of this act is to remove perceived barriers to electronic commerce.

The UETA is a procedural statute. It does not mandate either electronic signatures or records, but provides a means to effectuate transactions when they are used. The primary objective is to establish the legal equivalence of electronic records and signatures with paper writings and manually-signed signatures.

There are many reasons why every state should adopt the Uniform Electronic Transactions Act.

- UETA defines and validates electronic signatures. 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 electronic record."
- UETA removes writing and signature requirements which create barriers to electronic transactions.
- UETA insures that contracts and transactions are not denied enforcement because electronic media are used.
- UETA insures that courts accept electronic records into evidence.
- UETA protects against errors by providing appropriate standards for the use of technology to assure party identification.
- UETA avoids having the selection of medium (paper vs. electronic) govern the outcome of any disputes or disagreements, and it assures that parties have the freedom to select the media for their transactions by agreement.
- UETA authorizes state governmental entities to create, communicate, receive and store records electronically, and encourages state governmental entities to move to electronic media.

211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611
(312) 915-0195 ~ fax
(312)915-0187
e-mail the office - click here
SITE MAP

THE UNIFORM ELECTRONIC TRANSACTIONS ACT

PURPOSE:
The Uniform Electronic Transactions Act is designed to support the use of electronic commerce. The primary objective of this act is to establish the legal equivalence of electronic records and signatures with paper writings and manually-signed signatures, removing barriers to electronic commerce.

ORIGIN:
Completed by the Uniform Law Commissioners in 1999.

ENDORSED BY:
American Council of Life Insurance
Equipment Leasing Association of America

STATE ADOPTIONS:

Alabama
Arizona
Arkansas
California
Delaware
District of Columbia
Florida
Hawaii
Idaho
Indiana
Iowa
Kansas
Kentucky
Louisiana
Maine
Maryland
Michigan
Minnesota
Mississippi
Montana
Nebraska
Nevada
New Hampshire
New Mexico
North Carolina
North Dakota
Ohio
Oklahoma
Pennsylvania
Rhode Island
South Dakota
Tennessee
Texas
Utah
Virginia
West Virginia
Wyoming

2001 INTRODUCTIONS:

California	Massachusetts	Oregon
Colorado	Missouri	Vermont
Connecticut	New Jersey	Wisconsin
Illinois		

For any further information regarding the Uniform Electronic Transactions Act, please contact John McCabe or Katie Robinson at 312-915-0195

211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611
(312) 915-0195 ~ fax (312)915-0187
e-mail the office - click here
SITE MAP

UNIFORM ELECTRONIC TRANSACTIONS ACT

- A Summary -

The Uniform Law Commissioners promulgated the Uniform Electronic Transactions Act (UETA) in 1999. It is the first comprehensive effort to prepare state law for the electronic commerce era. Many states have already adopted legislation pertaining to such matters as digital signatures, but UETA represents the first national effort at providing some uniform rules to govern transactions in electronic commerce that should serve in every state. Although related to the Uniform Commercial Code, the rules of UETA are primarily for "electronic records and electronic signatures relating to a transaction" that is not subject to any article of the Uniform Commercial Code, except for Articles 2 and 2A. A "transaction" means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs. Much is excluded in this definition, including required notices, disclosures or communications by courts and governmental agencies.

UETA applies only to transactions in which each party has agreed by some means to conduct them by electronically. Agreement is essential. Nobody is forced to conduct to electronic transactions. Parties to electronic transactions come under UETA, but they may also opt out. They may vary, waive or disclaim most of the provisions of UETA by agreement, even if it is agreed that business will be transacted by electronic means. The rules in UETA are almost all default rules that apply only in the event the terms of an agreement do not govern.

Electronic commerce means, of course, persons doing business with other persons with computers and telephone or television cable lines. The Internet is the great marketplace for these kinds of transactions; a marketplace developing almost daily in 1999 (and presumably into the foreseeable future). The outlines and boundaries for this marketplace are still unknown and developments are not predictable. It is not possible to predict with any certainty how new law should develop to serve that marketplace or any other electronic marketplace that might develop in the future.

However, a few things are known about the existing electronic marketplace and there are some assumptions about the law that governs transactions within it that can be made with reasonable certainty in 1999, and that will continue to be reasonably certain into the future.

Electronic transactions are conducted by communicating digitized information from one person to another. That digitized information can be communicated and stored without the use of paper, and the basic language of electronic transactions is fully and inherently paperless. In fact, relying on paper for the memorialization of transactions and upon manual signatures for verifying them are most likely to impede electronic transactions, adding to their costs. And there is no benefit to any party to an electronic transaction, with very few exceptions, in requiring that they be memorialized on paper with signatures that are manual. The need to expand requirements in the law for writings and manual signatures so that electronic records and electronic signatures will satisfy those requirements, is the one thing that is reasonably certain with respect to electronic transactions.

UETA does not attempt to create a whole new system of legal rules for the electronic marketplace. The objective of UETA is to make sure that transactions in the electronic marketplace are as enforceable as transactions memorialized on paper and with manual signatures, but without changing any of the substantive rules of law that apply. This is a very limited objective—that an electronic record of a transaction is the equivalent of a paper record, and that an electronic signature will be given the same legal effect, whatever that might be, as a manual signature. The basic rules in UETA serve this single purpose.

The basic rules are in Section 7 of UETA. The most fundamental rule in Section 7 provides that a "record or signature may not be denied legal effect or enforceability solely because it is in electronic form." The second most fundamental rule says that "a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation." The third most fundamental rule states that any law that requires a writing will be satisfied by an electronic record. And the fourth basic rule provides that any signature requirement in the law will be met if there is an electronic signature.

Almost all of the other rules in UETA serve the fundamental principles set out in Section 7, and tend to answer basic legal questions about the use of electronic records and signatures. Thus, Section 15 determines when information is legally sent or delivered in electronic form. It establishes when electronic delivery occurs—when an electronic record capable of retention by the recipient is legally sent and received. The traditional and statutory rules that govern mail

delivery of the paper memorializing a transaction can't be applied to electronic transactions. Electronic rules have to be devised., and UETA provides the rule.

Another rule that supports the general validity of electronic records and signatures in transactions is the rule on attribution in Section 9. Electronic transactions are mostly faceless transactions between strangers. UETA states that a signature is attributable to a person if it is an act of that person, and that act may be shown in any manner. If a security procedure is used, its efficacy in establishing the attribution may be shown. In the faceless environment of electronic transactions, the obvious difficulties of identification and attribution must be overcome. UETA, Section 9 gives guidance in that endeavor.

Much has been much written about digital signatures in electronic commerce. What is a digital signature? It is really a method of encryption that utilizes specific technology. In the faceless environment of the electronic marketplace and particularly the Internet, such technologies are highly useful.

It is not wholly certain what the legal impact of these technologies should be. For that reason UETA may not be characterized as a digital signature statute. It does facilitate the use of digital signatures and other security procedures in rules such as the one in Section 9 on attribution. Section 10 provides some rules on errors and changes in messages. It favors the party who conforms to the security procedure used in the specific transaction against the party who does not, in the event there is a dispute over the content of the message.

But nothing in UETA requires the use of a digital signature or any security procedure. It is technologically neutral. Persons can use the most up-to-date digital signature technology, or less sophisticated security procedures such as passwords or pin numbers. Whatever parties to transactions use for attribution or assuring message integrity may be offered in evidence if there is a dispute.

UETA is procedural, not substantive. It does not require anybody to use electronic transactions or to rely upon electronic records and signatures. It does not prohibit paper records and manual signatures. Basic rules of law, like the general and statutory law of contracts, continue to apply as they have always applied.

There are three provisions in UETA that need special attention, and that are not directly in support of the basic rules in Section 7. First, UETA excludes transactions subject to the Uniform Commercial Code, except for those under Articles 2 and 2A, the Uniform Computer Information Transactions Act, laws governing estates and trusts, and any other specific laws that a state wants to exempt from the rules applied in UETA. Some writing and signature requirements in state law do not impact the enforceability of transactions, and have objectives that should not be affected by adoption of a statute like UETA. The limitation of UETA to agreed electronic transactions will eliminate any conflict with other writing requirements for the most part. However, there is some room for jurisdiction-specific tailoring of UETA permitted in each state, to assure no conflict. Exclusions should be carefully and conservatively selected. Most law relating to contracts and transactions between persons will serve the public better if electronic records and signatures are recognized.

Second, UETA provides for "transferable records" in Section 16. Notes under Article 3 and documents under Article 7 of the Uniform Commercial Code are "transferable records" when in electronic form. Notes and documents are negotiable instruments. The quality of negotiation relies upon the note or document as the single, unique token of the obligations and rights embodied in the note or document. Maintaining that quality as a unique token for electronic records is the subject of Section 16. A transferable record exists when there is a single authoritative copy of that record existing and unalterable in the "control" of a person. A person in "control" is a "holder" for the purposes of transferring or negotiating that record under the Uniform Commercial Code. Section 16 is essentially a supplement to the Uniform Commercial Code, until its relevant articles can be fully amended or revised to accommodate electronic instruments.

Third, UETA clearly validates contracts formed by electronic agents. Electronic agents are computer programs that are implemented by their principals to do business in electronic form. They operate automatically, without immediate human supervision, though they are certainly not autonomous agents. They are a kind of tool that parties use to communicate. Section 14 provides that a person may form a contract by using an electronic agent. That means that the

principal, which is the person or entity which provides the program to do business, is bound by the contract that its agent makes.

When somebody buys something on the Internet, therefore, that person will be assured that the agreement is valid, even though the transaction is conducted automatically by a computer that solicits orders and payment information. Did anyone really think that every order on the Internet involves a direct communication with a human being?

Three sections of UETA deal with electronic records that state governmental agencies create and retain. Section 17 allows a state to designate one agency or officer as the authority on creation and retention of governmental records. Section 18 allows a state to designate which agency or officer regulates the communication of electronic records and use of electronic signatures between agencies and other persons. Section 19 allows a state to designate an agency or officer to set standards that promote consistency and interoperability between state agencies with respect to the use of electronic records and signatures. All three sections are optional sections, there for the state that needs them, but not mandatory for all states in order to implement uniformity. These are very important provisions, however, because they provide a state with some root law for organizing the electronic business of the state. They should be given very serious consideration in every state.

It is not possible to cover every aspect of UETA in a short summary. This summary highlights some important aspects. The adoption of these rules will be a boon to electronic commerce. They will not artificially skew any market or make any substantive law relating to contracts any different from that governing transactions memorialized on paper. Every state should adopt them as quickly as possible.

Founded in 1892, the National Conference of Commissioners on Uniform State Laws is a confederation of state commissioners on uniform laws. Its membership comprises more than 300 attorneys, judges, and law professors, who are appointed by each of the 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, to draft uniform and model state laws and work toward their enactment.

LAYING FOUNDATIONS FOR ELECTRONIC COMMERCE

THE UNIFORM ELECTRONIC TRANSACTIONS ACT

©Patricia Brumfield Fry
Professor of Law
Chair, Uniform Electronic Transactions Act
Drafting Committee

1. Electronic Commerce and the Law. Electronic commerce refers to the new world of economic activity created by advances in information technology and communication. This economy is generating opportunities across all sectors; it is a source of new jobs and new wealth, and is dramatically reducing the cost of communication, information and transactions.

While electronic commerce has existed for many years, with the earliest uses of EDI dating back into the 1970s, the public emergence of the Internet and the World Wide Web have revolutionized this young and vibrant economic sector. On all levels of government in the United States, efforts are underway to take advantage of these economic opportunities and realize the efficiencies made possible by the technologies.

Taken literally, electronic commerce ranges from old-fashioned telephone conversations, through the use of facsimiles, electronic mail and electronic data interchange, to establishing a presence on and conducting retail transactions

through the use of Internet websites. In each manifestation, electronic commerce presents challenges for the legal system, but these challenges are brought to their fullest, most obvious manifestations with commercial transactions based on Internet websites.

Electronic commerce poses a number of challenges for the law. The first and most fundamental challenge is presented by the simple fact that transactions may be memorialized on electronic communications, rather than solely on paper. It is no longer accurate to say that paper is required in order to assure that there will be a record of a transaction, in order to assure that a party receives a copy of terms and conditions, in order to assure that notice is given to a counter party. It is not accurate to say that paper is required in order to assure that someone has "signed" a communication. Yet most of our laws were written during an era when paper was the only realistic medium for communicating and storing information and when our mental constructs for such concepts as notice, communication, sending and delivering information, recording the terms of final agreements, etc. depended on paper.

The first step toward laying a legal foundation for electronic commerce is to clear away the barriers to electronic commerce. Each state law or regulation, each local or national law or regulation that requires a writing or signature, delivery or production of an original record impairs electronic commerce. The efficiencies are lost if the law requires the production of paper copies. A recent study on behalf of the Federal Reserve Bank of Boston discovered more than

2,500 different state law rules requiring that cancelled checks be stored by drawers. These statutes appear to be designed to assure that records of financial transactions will be available upon subsequent audit. Such records can be made available electronically, but not if the statute says only the paper cancelled check will suffice. And this does not only impose a burden on those who draw and are required to store the cancelled checks. It also means that the check collection system cannot short-circuit the physical travels of the check. If a bank's customers are required by law to store the physical, cancelled checks, the bank cannot store them or authorize anyone earlier in the collection chain to do so.

Unfortunately, it is not possible to simply wave a wand and redefine writings and signatures to include their electronic counterparts. In most instances such a redefinition would serve admirably. It certainly would suffice in all cases in which the purpose of the writing or signing requirement is to insure that there is a record of a transaction which preserves its terms or a record preserving evidence of the parties' assent to the transaction. Electronic records can serve those functions quite well. There is another body of law, however, that governing negotiable instruments, which would be badly disrupted by such a change. This body of law is one where the rights and liabilities of parties depend upon the physical delivery of a token of rights. The technologists tell us that they have not yet invented a technological scheme which would enable us to identify the single, unique and original electronic token. The rights and liabilities that now depend on or arise from negotiable instruments law can be managed in a

legal scheme, but not in one dependent upon the transfer of a single, unique token. Until that sort of technology is in place, however, a provision which merely changes the definition of writing and signature would disrupt the check collection system, the investment markets, commodity and other markets. In the meantime, electronic analogues to the existing paper worlds require a full and complete rethinking of the rights and obligations of parties in those markets, such as was done in the revision of Uniform Commercial Code Article 8. And the Article 8 experience has taught some valuable lessons to the law revisers about the wisdom of technology specific or business model specific statutes or of attempting to draft statutes to govern systems which we believe will come into being, rather than those which already exist.

2. Introduction to the Uniform Electronic Transactions Act. The Uniform Electronic Transactions Act is designed to set a solid legal foundation for the use of electronic communications in transactions. The goal of the draft is to facilitate and support the development of the information economy, and in particular its place in commercial transactions, throughout the States. If the States act in a uniform and constructive manner, the traditional role of the States in the law of commerce may be maintained. If they fail to do so, I believe the imperative need for commercial certainty may lead to a shift of a significant part of the authority of the States to the national government.

The UETA is designed to apply to any transaction where the parties have agreed to deal electronically, validating and supporting the use of electronic communications and records. It provides that parties may choose whether or not to use electronic communications in their transactions. It will put electronic commerce and paper-based commerce on the same legal footing and not discriminate between different forms of technology.

5. The Scope and Provisions of the UETA. The governing principles which have controlled the drafting are fairly simple to state, although not so simple to implement.

1. First, legal barriers to electronic commerce are to be eliminated.

2. Secondly, the barriers should be removed in a manner which assures that the parties' selection or choice of medium does not alter the outcome of disputes between the parties, i.e. whether the parties deal in the paper world or the electronic world, their relationship should be subject to the same legal principles.

3. The draft should maintain medium neutrality and technology neutrality. It should neither assume nor require any particular business model for transactions. The focus should be on the purpose of the legal requirement, rather than the form by which it is satisfied. This also should assure that the draft does not itself become a barrier to electronic commerce as technology and

business practices continue to shift and evolve. Markets and business people should be free to select technologies and business methods according to their needs.

Turning to the UETA, it provides that an electronic record, electronic signature and electronic contract shall not be denied validity on the sole ground that they are electronic. §106. It provides that electronic records shall not be denied admissibility into evidence on the sole ground that they are electronic or that it is not in its original form or is not an original. § 112. It provides that if an offer evokes an electronic response, a contract may be formed with the same effect as if the record was not electronic. §113. These are, I believe, the pivotal provisions of the draft.

A. *Scope*. One of the most difficult problems to resolve has been the question of the appropriate scope of the statute. Literally thousands, perhaps tens of thousands, of paper and signing requirements are buried in state law. These can range from the steps a legislature must follow to demand a special session, to how to execute a will, to rules for filing financing statements with the state, to rules for giving consumer notices, to contract formation rules. And some of the rules are tied to property and legal rights and obligations that cannot readily be translated into the electronic world, i.e. checks and other negotiable instruments.

Although there was some early sentiment favoring a statute which explicitly listed the provisions of state law which would be amended, pragmatists prevailed. They argued, with some merit, that the resources of the Drafting Committee would not permit such specific itemization and evaluation of writing and signing requirements, and that a demand that State legislatures do so prior to enactment would unduly delay enactment. Consensus emerged that the best approach is to provide that the UETA applies to electronic records and electronic signatures that "relate to any transaction." § 103. And then proceed to create appropriate exclusions. Section 103 excludes rules of law relating to the creation and execution of wills and codicils, and testamentary trusts. It excludes existing Article 1 of the Uniform Commercial Code, except §§ 1-107 and 1-206, Articles 3 through 9 of the Code as currently approved, and revised Articles 2 and 2A and UCITA, except as those statutes may provide. It recognizes that some States may choose to specifically exclude particular statutes, although the comments will urge caution in selecting additional exclusions.

In addition, §103 explicitly states that the Act will apply to electronic records or signatures otherwise excluded when used for transactions subject to a law other than the ones specified as excluded. Thus, for example, while UCC Articles 9 applies generally to a transaction creating a security interest in personal property, it excludes landlord's liens. Thus this Act would apply to the creation of a landlord's lien if the law otherwise applicable to such liens did not provide otherwise.

To sum up the discussions on the scope of the UETA, and the conclusions which have been reached, the UETA will apply to "any transaction" unless the law governing it is specifically excluded. Exclusions will include testamentary documents, generally the revised UCC, and any other statutes specifically excluded. All other transactions in which the parties have agreed to deal electronically will be included..

However, the UETA only applies to the procedural aspects of the transaction, i.e. the use of electronic communications and records. A transaction subject to the Act also will be subject to applicable substantive rules of law. The UETA is designed to interact with, not supplant, the bodies of law which otherwise govern contract formation, record-retention, the performance of obligations and rights and liabilities of the parties. The UETA will not, except as is specifically stated, affect requirements relating to a specific mode of delivery or display of information. If a rule of law requires that information be provided in writing, § 107 requires that the information may be furnished in a record that is under the control of the person to which it is provided and capable of retention. This is in accord with the Federal Reserve Board's interim rule for electronic funds transfers. As to notarization, §110 provides that that if the law requires a notarization it is satisfied if an electronic record includes, in addition to the electronic signature to be notarized, the electronic signature of a notary public together with all other information required to be included by other applicable

law. Whether an electronic record or electronic signature will have legal consequences is determined by a combination of UETA and other applicable law

B. *Security Procedures*. Turning to security procedures, the UETA defines a security procedure as:

> a procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person or for detecting changes or errors in the information in an electronic record. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or callback or other acknowledgment procedures.

The UETA does not provide that a security procedure has any particular legal effect. Rather it provides, in § 108, that an electronic record or electronic signature is attributable to a person if it was the act of the person. This may be proven in any manner, including a showing of the efficacy of a security procedure which has been applied. The effect of an electronic record or signature on the responsibility of a person is then determined from the context and surrounding circumstances, including any agreement of the parties. In other words, the effect of the use of the technology is left to the ordinary, garden variety rules of evidence, contracts, etc.

C. *Electronic Agents*. Although the use of automated programs for the conduct of transactions has been possible for a couple of decades, with the emergence of the Internet automation of transactions has become common. Yet most of the law of principal and agent assumes the existence of human actors. From one perspective, electronic agents or 'bots and automated transactions are

merely tools used by individuals or other actors. From another, there is concern that pre-programmed operations of computers or other devices will not be regarded as sufficient "manifestations of assent" in the eyes of some courts. To allay such concerns, the UETA explicitly provides that a contract may be formed by the interaction of electronic agents, whether with other electronic agents or with individuals. § 113.

D. *Automated Transactions.* In addition, concerns have been expressed that in automated transactions an inadvertent pressing of a computer button may result in a party being bound without intending to contract. This might be called the "finger twitching" issue. These concerns have been so pervasive that a special right to avoid a transaction is provided for inadvertent error in automated transactions in cases where the electronic agent did not allow for the prevention or correction of the error. In such a case, a party may avoid a transaction caused by an inadvertent error provided that, on learning that the other party believed a transaction had occurred, the individual gives prompt notice of the error, has not used or received the benefit of the transaction, and complies with any instructions for return or destruction of the consideration received. § 109.

E. *Time and Place of Sending and Receipt.* One of the most difficult issues for any drafters attempting to deal with electronic commerce, and one on which there does not seem to be any developing consensus, relates to issues arising from the irrelevance of geography in electronic commerce. There is a cluster of

issues which are being debated on local, national and international venues. There is plenty of noise, but precious little consensus..

The UETA has taken the position that it should lay foundations. Whatever rules may evolve in the future, they may be applied against Section 114 of the UETA, which specifies both the time and place of sending and receipt of communications. The focus in terms of geography is on the location of the respective parties, i.e. their places of business or residences. The focus in temporal terms is on when messages leave the sender's information system or enter the recipient's system, or one accessible by the recipient.

F. *Transferable Records.* Section 115 explicitly provides that parties may obtain the benefits of negotiability in an electronic environment. It provides that, if the issuer of a record explicitly agrees it is subject to this Act, a person in control of the record may have the rights, and an obligor may have the liabilities, which would exist for an equivalent paper note or document of title under the Uniform Commercial Code. These provisions are designed to permit commercial interests to proceed with the development of appropriate systems for establishing control of such transferable records without hampering expedited review of negotiability in an electronic environment.

G. *Government Records.* Part 2 of the UETA authorizes governmental entities, at all levels of the State, to create and retain electronic records and to convert written records into electronic databases. We have been urged by many to include such provisions, and of course any governmental rules concerning

commercial interactions with governmental agencies will have a major impact on the adoption of technologies, methods of record-keeping, and business models selected by commerce. The Drafting Committee has not felt at liberty to do more than authorize government agencies. We are convinced that a mandate would harm enactment, due to the price tag which could accompany such a bill in many states. Instead, Part 2 authorizes agencies to create and retain records, to accept and distribute electronic records, and to write the regulations which necessarily must govern their use of electronic technologies. Finally, it encourages and urges all such regulations to encourage and promote interoperability of their systems.

FEDERAL PREEMPTION AND ELECTRONIC COMMERCE

by Patricia Brumfield Fry[1]

President Clinton signed the Electronic Signatures in Global and National Commerce Act (E-Sign) on June 30, 2000. Nineteen States have enacted the Uniform Electronic Transactions Act (UETA); it is pending in several others. Both acts validate the use of electronic records and signatures; they overlap significantly. Each statute provides that electronic contracts and signatures shall not be denied legal effect or enforceability because they are electronic. Nevertheless, the two acts are not identical, either in scope or substance. This memorandum considers the extent to which E-Sign preempts UETA.

E-Sign §102 Preemption: E-Sign § 102(a) states that States may modify, limit or supersede the electronic contracting provisions of E-Sign under limited conditions. If the State has enacted UETA *as approved and recommended by NCCUSL in 1999,* the State law will govern. This provision is subject to two important caveats. First, if a State has accepted the invitation in UETA §3(b)(4) to exclude State laws not listed by the drafters, the added exclusions are preempted to the extent inconsistent with E-Sign.

E-Sign permits States to enact the uniform version of UETA without fear of preemption. The second caveat relates to the effect of non-uniform enactment. The best interpretation, consistent with general preemption principles, is that any non-uniform provisions of such an enactment are to be evaluated under §102(a)(2), which states that State law may modify, limit or supersede the federal legislation only if it "specifies the alternative procedures or requirements for the use or acceptance of electronic records or electronic signatures, provided:

(a) any alternative procedures or requirements are consistent with Titles I and II and

(b) the alternative procedures do not require, or give greater legal status or effect to use or application of a specific technology or technological specification." [Note, however, that there is an exclusion from this provision for the procurement regulations or laws of the States.]

In addition, any State law, if enacted after E-Sign, must refer specifically to the federal legislation.

Under the preferred interpretation, inconsistent non-uniform provisions are ineffective but the balance would survive. There are other possible readings of the preemption language. Under one, if a State includes any non-uniform provision, the entire enactment is ineffective and federal law governs. This reading is consistent with the literal language of subsection (a)(1) and would force every provision to be evaluated under subsection (a)(2). Under the second alternative reading, non-uniform provisions do not survive, whether or not acceptable under subsection (a)(2).

The preemption provision of E-Sign §102 may be unique in its drafting style. It does not follow the models found in other legislation, such as the Consumer Credit Protection Act, or in federal regulations, such as the Federal Reserve Board's Regulation CC. To the extent that State law is not an enactment of the uniform language of UETA, it may not be possible to determine whether the effect of E-Sign has been avoided until there has been judicial review.

Additional Preemption Issues in E-Sign:

- UETA §8(b) provides that if a State law requires records to be posted or displayed, sent or communicated, or provides for specific formatting for stated information, the method provided in that State law must be followed. E-Sign §102(c) states explicitly that this provision may not be used by any State to "circumvent" the federal law by imposing "nonelectronic delivery methods" which would be enforced under UETA §8(b).

- UETA §§12(f) and (g) permit States to impose requirements, in addition to the use of electronic media, for records retained for evidentiary, audit or like purposes or for records within the jurisdiction of a state agency. The provisions of E-Sign §104 limit that power by stating it may not be exercised in a manner inconsistent with the federal Act.

- E-Sign §104 specifies that State regulations or orders may not impose requirements in addition to those found in E-Sign §101 and may not require, or accord greater legal status to implementation of specific technologies. As a condition to any such regulation or order, the State agency must find that the regulations or orders are substantially justified, are substantially equivalent to requirements imposed on paper records, and will not impose unreasonable costs on the acceptance use of electronic records.

Limits on State Power to Supersede. The savings provisions of E-Sign §102 apply only to the electronic contracting provisions of the statute. They do not apply to the other titles of E-Sign, i.e. the exclusions found in §103, the provisions governing the powers of State and Federal agencies in §104, the studies required by §105, the provisions on transferable records in Title II or the provisions on promotion of international electronic commerce in Title III. This fact does not automatically render other State law ineffective, but it does mean that to the extent the federal legislation overlaps such laws, the federal legislation will prevail.

WHY ENACT UETA?

THE ROLE OF UETA AFTER E-SIGN

by Patricia Brumfield Fry[1]

President Clinton signed the Electronic Signatures in Global and National Commerce Act (E-Sign) on June 30, 2000. Nineteen States have enacted the Uniform Electronic Transactions Act (UETA); it is pending in several others. Both acts validate the use of electronic records and signatures; they overlap significantly. Each statute provides that electronic contracts and signatures shall not be denied legal effect or enforceability because they are electronic. In some cases the federal legislation uses the language of UETA without change. Nevertheless, the two are not identical, either in scope or substance. UETA is more comprehensive than the federal legislation, including subjects not addressed by E-Sign. Other issues are addressed differently. This memorandum discusses the role of UETA after E-Sign.

How is UETA more comprehensive than E-Sign?

A. Attribution. Often the issue is not whether a record has been signed, but rather whose signature appears. Even if Patricia B. Fry appears on a record, I cannot be bound if the name was not placed by me, ratified by me, or inserted by someone acting on my authority. UETA §9 states that an electronic record or signature is attributed to a person if it was the act of the person. This can be proved by any relevant evidence, including the fact some technology or password was used to establish who attached the signature. Section 9 clarifies that the effect of a record or signature on the person to whom it is attributed is determined from the context and surrounding circumstances at the time of the creation, execution or adoption of the record. E-Sign does not address attribution.

B. Effect of Party Agreement. UETA provides that parties may enter into agreements concerning their use of electronic media. For example, UETA §9 refers to the parties' agreement as a factor in determining the effect of an electronic record and §10 refers to the parties' agreement to use security procedures. E-Sign contains no provisions on variation by agreement.

C. Send and receive. UETA §15 ties the determination of whether something has been sent or received to the communication systems used by the parties and specifies that, unless otherwise agreed, they are sent or received from the parties' principal place of business or residence. E-Sign does not deal with the question of when an electronic record is sent or received.

D. Effect of Change or Error. UETA §10 contains provisions governing the effect of failure to use an agreed security procedure and the impact of mistakes made by an individual while dealing with an electronic agent. It specifies that the rules of mistake otherwise apply. E-Sign has no provisions dealing with mistakes or errors in electronic communications.

F. Admissibility. UETA §13 specifies that electronic records are not to be denied admissibility into

---

evidence solely because the records are in electronic format. There is no parallel provision in E-Sign.

G. Transferable Records. E-Sign Title II provides for electronic analogs to paper negotiable notes in transactions secured by real property, and does so in language which is in material part directly imported from UETA §16. The provisions of the UETA are broader in scope, applying to all documents which would, if on paper, be either a promissory note under UCC Article 3 or a document of title under UCC Article 7.

What does UETA do differently from E-Sign? To the extent a State has enacted the uniform version of UETA, the UETA treatment of these matters should prevail.

A. Consumer Protection. The federal legislation focuses on regulating the manner of consumer assent to deal electronically, while UETA emphasizes how parties are to comply with State consumer protection rules. The federal provisions call for a study of the extent to which the regulation benefits or burdens electronic commerce and recommendations from the Department of Commerce and Federal Trade Commission on whether they should be modified.

B. Record-keeping. E-Sign §101(d) follows, in material part, UETA §12(a), (b), (d) and (e). The federal legislation requires that the record remain accessible "to all persons who are entitled to access by statute, regulation, or rule of law" for the time specified, as a condition to enforceability. Query whether it is sufficient that the record is subject to discovery. UETA requires accessibility for later reference.

UETA §12(c) specifies that persons may satisfy their record-keeping obligations through the use of third parties. E-Sign is silent. UETA states that retained electronic records satisfy evidentiary, audit and similar requirements. There is no specific parallel in the federal legislation. UETA permits the States to impose restrictions on the use of electronic records for audit or like purposes. E-Sign, in provisions which are not displaced in a State which enacted UETA [*See* §104], provides that states may not impose paper requirements through their rule-making power.

C. Automated transactions. E-Sign §101(h) states that the fact an electronic agent was involved in contract formation does not affect enforceability, provided that the agent's activity is attributable "to the person to be bound." UETA §14 states that the use of electronic agents will not defeat contract formation. UETA also has provisions governing changes or errors during the transmission of electronic records. UETA §10 provides rules on the effect of records when a party fails to use an available security procedure to detect the change or error and a provision for unwinding mistakes made by individuals dealing with electronic agents. It specifies that in all other cases, other State law governing mistake is applicable. There are no parallel provisions in E-Sign.

D. Effect of Other State Law. UETA defers explicitly to the provisions of other State law for most substantive determinations. Questions of authority, agency, forgery, contract formation, etc., are determined by other State law. E-Sign states in §101(b) that it does not affect any legal requirement beyond requirements for writings, signatures, and the like.

E. Powers of State governments. UETA bracketed §§17-19 authorize State governments to migrate, in an orderly fashion, to electronic technologies. Some States are far along in the process of migration, others have much work to do. The provisions of UETA are permissive and authorizing; they contain no mandatory provisions. E-Sign restrains the States by limiting their powers.

STATE OF ALASKA

FRANK H. MURKOWSKI, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 465-2075

May 14, 2003

The Hon. Lesil McGuire, Chair
House Judiciary Committee
State Capitol, Room 118
Juneau, Alaska 99801-1182

Vanessa

Re: HB 285

Dear Representative McGuire:

On behalf of the Alaska Uniform Law Commissioners, we would appreciate early scheduling of a hearing on HB 285 (Uniform Electronic Transactions Act). The bill is important to keep Alaska as a business friendly climate by making law changes to facilitate businesses using electronic records and signatures.

The Uniform Act has been passed into law by over 42 states (see attachment). Also, we have included a fact sheet explaining the advantages of the Uniform Electronic Transactions Act.

We appreciate your consideration of this request.

Sincerely,

GREGG D. RENKES
ATTORNEY GENERAL

By: Deborah E. Behr
Deborah E. Behr
Assistant Attorney General

DEB:pvp

cc: Mike Tibbles, Legislative Director, Office of the Governor
Dave Marquez, Legislative Contact, Dept. of Law
Alaska Uniform Law Commissioner
Dave Jones, AAG, Governmental Affairs/Anchorage
Nico Bus, Div. of Support Services, Dept. of Natural Resources
Sharon Young, State Recorder, Dept. of Natural Resources

State Recorder's Office
Department of Natural Resources

White Paper:
The Uniform Electronic Transactions Act

Introduction to the Issue

The Uniform Electronic Transactions Act (UETA) is a uniform law that fosters and supports the use of electronic commerce. According to the National Conference of Commissioners on Uniform State Laws (NCCUSL), **the primary objective of this act is "to establish the legal equivalence of electronic records and signatures with paper writings and manually-signed signatures, removing barriers to electronic commerce."**

On its web site, NCCUSL sets forth the following significant reasons why every state should adopt UETA:

- UETA defines and validates electronic signatures. 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 electronic record."
- UETA removes writing and signature requirements that create barriers to electronic transactions.
- UETA insures that contracts and transactions are not denied enforcement because electronic media are used.
- UETA insures that courts accept electronic records into evidence.
- UETA protects against errors by providing appropriate standards for the use of technology to assure party identification.
- UETA avoids having the selection of medium (paper vs. electronic) govern the outcome of any disputes or disagreements, and it assures that parties have the freedom to select the media for their transactions by agreement.
- UETA authorizes state governmental entities to create, communicate, receive and store records electronically, and encourages state governmental entities to move to electronic media.

On the federal side, the Electronic Signatures in Global and National Commerce Act (also called "E-Sign") was approved by Congress and signed by the President on June 30, 2000. Although the federal E-Sign law and UETA overlap in many areas, the two acts are not identical. Because UETA is broader and more comprehensive, NCCUSL strongly recommends that states adopt UETA in its entirety, notwithstanding the existence of E-Sign.

Without UETA, the federal E-Sign law is controlling on states. However, UETA is much more comprehensive than the federal law, and addresses some subjects not included in E-

Sign. **The E-Sign law specifically addresses UETA and provides that state UETA will govern if the state has enacted the uniform law in its entirety.** Thus, in general E-Sign does not preempt a state's UETA enactment, but the results could differ if a state inserts non-uniform language into the state's UETA law. Some of the major differences between the federal law and UETA relate to the handling of consumer protection issues, record keeping and automated transactions.

The handling of consumer protection issues has been a concern to a number of states who have considered UETA. The federal E-Sign law strictly regulates the manner of consenting to receive electronic notices and disclosures electronically. If UETA is considered in Alaska, a full review of these consumer protections must be done. Whether UETA would preempt those federal consumer protections is beyond the scope of this paper but is an important consideration in the analysis.

Another factor that comes into play is Alaska's digital signature law, which took effect in 1998, pre-dating both E-Sign and UETA. One of the underlying forces behind the federal E-Sign law was the fact that individual states were moving forward with digital signature legislation in an inconsistent manner and the differing state requirements were becoming a barrier to electronic commerce rather than serving to promote it. Many of these state digital signature laws are at odds with the federal law and are effectively preempted by E-Sign. Whether or not this is the case with Alaska's digital signature law is a matter that must be reviewed, regardless of whether or not UETA is adopted in Alaska.

The principle behind UETA is to make sure that electronic transactions are as enforceable as paper transactions with manual signatures. UETA does not change any of the substantive rules of law that apply. It is a procedural law, not a substantive law, and does not change the substantive rules of contracts in any way. UETA simply authorizes electronic signatures and the replacement of writings with electronic records. Further, UETA is not a digital signature statute, but if a state has such a statute, UETA merely supports that law, and acts as a complement to it.

The Prefatory Note to UETA clarifies that it does not apply to all writings and signatures, but only to electronic records and signatures relating to a transaction. A transaction is defined as an action or set of actions occurring between two or more persons relating to the conduct of business, commercial and governmental affairs. Transactions that do not involve business, commercial or governmental purposes are not covered by UETA. Further, UETA does not apply to laws governing wills and trusts or to most of the Uniform Commercial Code. In adopting UETA, a state can also identify other state laws that would be excluded. States are given options within UETA of whether to adopt electronic filing systems (Sections 17 through 19 of the Act). See Discussion below.

The parties to a transaction must agree that it will be conducted electronically, but that "agreement" can be derived from the circumstances and other substantive law. For example, the circumstances surrounding a transaction and other law would determine whether an electronic signature has any effect, or whether a party actually intended to be a party to a particular document. The Act validates electronic records, signatures and

contracts and specifies standards for sending and receiving electronic records. For government entities, the Act also allows use of electronic records for retention purposes. While UETA serves to make electronic signatures the equivalent of manual signatures, it requires no specific technology to create a valid signature. The Act provides broad flexibility to the parties to determine the procedures for electronic transactions and the level of security that will be imposed.

State of the States

As of August 2002, forty (40) states and the District of Columbia have adopted UETA, and it has been introduced in five additional states and the U.S. Virgin Islands. UETA has not yet been introduced in Alaska, and it is readily apparent that Alaska will be one of the last states to even consider it, if it can be introduced in the upcoming 23rd legislative session in January. Compare this activity with the last major uniform law that was submitted to the states for adoption - the Uniform Commercial Code Revised Article Nine. In that case, Alaska was one of the early states to introduce the measure and was the 18th state to adopt it. This gave the State Recorder's Office ample time to prepare for changes in its operations and for the nationwide targeted implementation date of July 2001. While there is no similar target date for UETA, the goal of achieving uniformity in electronic commerce will be lost if it is not enacted in all states.

The Impact of UETA For Alaska's Recording System

The Recording System in Alaska is the repository for millions of records affecting real property throughout the state. In today's business world, with E-Sign and UETA laws, it is possible to complete a real estate transaction entirely without paper because these laws give an electronic transaction the same force and effect as a paper transaction. In Salt Lake County, Utah, which has been offering electronic recording for some time now, documents being recorded are available within seconds on the index for public review and access. Counties allowing electronic recording of real estate transactions have documented cost savings and increases in productivity.

The Mortgage Industry Standards Maintenance Organization (MISMO) and the Property Records Industry Joint Task Force are working together to standardize the electronic recording process nationwide. The backbone of this effort is uniformity throughout the states in terms of adopting UETA. The Property Records Industry Joint Task Force is a national standard setting public/private sector task force sponsored by the National Association of County Recorders, Election Officials and Clerks (NACRC) and the International Association of Clerks, Recorders, Election Officials and Treasurers (IACREOT). All of these organizations strongly support UETA in order to provide a uniform framework for electronic recording throughout the nation.

A high percentage of mortgage transactions in Alaska today involve out of state lenders. Standardizing the electronic recording process within the framework of a uniform law like UETA will benefit commerce in those states with a uniform approach. The handful

of states with non-uniform laws may find themselves at a disadvantage in the future world of electronic commerce and recordation.

Both E-Sign and UETA permit state and federal agencies to allow and control electronic filing but E-Sign does not provide any authority for establishing filing standards; this must be derived only from UETA or other state law. UETA encourages government filing offices to promote consistency and interoperability.

Discussion

As noted above, UETA gives states the option (in Sections 17 through 19) of determining whether to adopt and implement electronic filing systems. [Note: The Revised Article Nine of the Uniform Commercial Code gave states this authorization with regard to UCC transactions. UETA's provision would expand this to allow states to implement electronic systems for recorded documents.]

The inclusion of Sections 17-19 in a state's adoption of UETA will, according to the commentary, provide authorization for intra-governmental uses of electronic media, and further will provide a broader authorization for the State to develop systems and procedures for the use of electronic media in its relations with non-governmental entitles and persons. While the impact of these provisions is beneficial to the state's recording system in general, it will also benefit other agencies whose work involves electronic transactions of any kind, including internet transactions. Impact on other agencies is outside of the scope of this paper.

Section 17 authorizes state agencies to use electronic records and electronic signatures generally for intra-governmental purposes, and to convert written records and manual signatures to electronic records and electronic signatures. It also authorizes the destruction of written records after conversion to electronic form. This provision impacts the state's retention requirements and provisions.

Section 18 authorizes state agencies to send and receive electronic records and signatures in dealing with non-governmental persons.

Section 19 is a directive to agencies to provide consistent applications and promote interoperability when developing standards for electronic systems.

Together Sections 17 through 19 provide broader authorization for a state to develop electronic systems and processes in its interactions with non-governmental entities and persons. Land recording systems have historically evolved around written records and processes based on paper documents. UETA's fundamental premise is that electronic media should be treated as the equal of written media and it recognizes and effectuates records and signatures that are generated electronically. This is the future world of recording systems in America.

Recommendation

The State Recorder's Office and the Department of Natural Resources strongly recommend introduction and adoption of UETA in Alaska at the earliest possible time. In order to promote commerce in Alaska and ensure that the state's recording system is in a position to take advantage of electronic recording capabilities in the future, it is also recommended that the state adopt the optional provisions for electronic filing systems as contained in Sections 17 through 19. The commentary to UETA indicates that inclusion of 17-19 will not have a detrimental import on the uniformity of adoption of the Act, so long as Section 1-16 are adopted uniformly as presented. It is highly important to maintain the uniformity of this Act, so it is further recommended that Sections 1-16 be adopted without change.

Conclusion

Alaska's recording system has made many significant advances in the past two years, including a premiere role as the first state in the nation to image all incoming recorded documents on a statewide basis, as well as the first state to make statewide document images available for public access in any recording office in the state. Other U.S. recording systems are county-based and unable to achieve the statewide coverage that our image base provides. Our web site contains ten different search options for researching nearly thirty years of index records and is accessible by the public on a 24/7 basis. No other state can make that claim. The web site garners more than 400,000 hits per month and is the most heavily accessed site in the Department of Natural Resources. A number of the title companies, financial institutions and other larger users of recording services have discussed forming a task force to explore electronic recording with a eye toward its implementation in Alaska. Because so many users of the recording system are out of state lenders, electronic recording processes will put Alaska on a par with the Lower 48 states in terms of instantaneous recording operations. This will serve to facilitate commerce.

Ultimate benefits of electronic recording systems include reduced recording times, reduced costs to all parties, improved productivity at recording offices and for major users, standardized processes and technologies, and improved customer service. UETA is the framework for achieving these benefits in Alaska's land recording system.

The State Recorder's Office appeals to all members of the legislature, all government agencies, and all members of the real estate recording industry to consider and support the passage of UETA in this state at the earliest possible time. In today's global economy with increasingly technological advances, a united effort for more efficient and effective land recording systems should be of paramount concern. UETA is the basic framework that will bring Alaska in synch with the vast majority of all other states vis-à-vis electronic recordation.

A single unified approach to electronic transactions is desirable from many points of view. White this white paper only addresses the view from one agency perspective - that of the State Recorder's Office - other agencies will also benefit from the passage of UETA. Increasingly, government work and services are being performed electronically and UETA is the means by which consistent procedures for such transactions can be assured. Failure to enact UETA could be detrimental to fostering electronic commerce in Alaska.

UNWIN SCHEBEN KORYNTA HUETTL INC.

ARCHITECTURE • ENGINEERING • LAND SURVEYING • PLANNING

USKH

PRINCIPALS
Leo von Scheben
Earl D. Korynta
James A. Huettl
Gary H. Pohl
Theodore R. Kruth
Kenneth D. Maynard
Gregory A. Ingham
Timothy J. Vig
D. Lance Maring
Daryl D. Sorenson
Zane W. Shanklin
W. Wright Alcorn

ASSOCIATES
Donna L. Marks
Steven M. Tjaden
Scott V. Bell
Bruce E. Hopper
John M. Stadum
Howard A. Partch
Joann C. Mitchell
Marshall L. Hertel
Arthur J. Johnson
Steven M. Karl
Lori A. Kropidlowski
Frederick J. Schwaderer
Dean E. Syta
Jeffrey N. Logan
Sara Marks
Daniel Hayhurst
Jeff Hagge
Michael N. Anderson
Gerald V. Neubert
Gregory A. Uebl

May 7, 2003

The Honorable Tom Anderson, Chairman
Legislature of the State of Alaska
Labor and Commerce Committee
716 W. 4th Avenue, 2nd Floor
Anchorage, Alaska 99501
Sent via facimile: (907) 465-2418

Subject: Written Testimony in Support of House Bill (HB) No. 285
Uniform Electronic Transactions Act

Dear Mr. Anderson and Members of the Labor and Commerce Committee:

As President of USKH, Inc. (USKH), I am providing you with this written testimony stating our strong support of HB No. 285. This bill authorizes the use of electronic records and electronic signatures relating to transactions. USKH is an employee-owned multidisciplined professional services firm providing consulting architectural, engineering, land surveying, and planning services. We have been in business in Alaska for over 31 years and have networked offices in Anchorage, Juneau, Wasilla, and Fairbanks. USKH has successfully completed numerous projects, both large and small, for a variety of public and private clients throughout the state.

In our business, the production process of designing a project has become completely electronic. That is, minus the present requirement of having a "wet" signature. The days of completing design work at a drafting table has been replaced with completing our work at a computer using computer aided drafting (CAD) software. This trend has made our designs more accurate and more efficient, and the passage of this bill will just add to that efficiency. For example, one of our recent projects for the Anchorage School District (A.J. Dimond High School Replacement) is a $50 million-plus project that required the completion of over 400 drawings, all electronically, but the final completion of stamping and signing the drawings must be completed by "wet" signature. In this era, this process is cumbersome, chaotic, and inefficient. There is no benefit to the client or the consultant in requiring this manual signature.

ADDRESS
2515 A Street
Anchorage, Alaska 99503
Phone (907) 276-4246
FAX (907) 258-4653
http://www.uskh.com

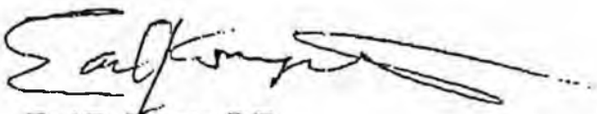
1-888-705-USKH (8754)

OFFICE LOCATIONS
Anchorage, Alaska
Fairbanks, Alaska
Juneau, Alaska
Wasilla, Alaska
Lewiston, Idaho
Spokane, Washington
Ferndale, Washington

I am not an electronic wizard or a computer guru, but I do know this industry. This law needs to be enacted so we can do this part of our business production better and more efficiently. This will not only better serve consultants such as USKH, but also our clients and the general public at large. I am confident that the industry and government will be able to find acceptable means and methods to adequately protect the public's interest against electronic fraud and I strongly support HB 285.

Very truly yours,

USKH, Inc.



Earl D. Koynta, P.E.
President

cc: The Honorable Loren Leman
Lieutenant Governor of Alaska

ELA
Equipment
Leasing
Association
of America

December 1, 1999

National Conference of Commissioners
On Uniform State Laws
211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611

Re: Uniform Electronic Transactions Act

Dear Commissioners:

I am writing on behalf of the Equipment Leasing Association of America (ELA) to voice our enthusiastic support for the new Uniform Electronic Transactions Act (UETA). Our ELA members have a vital interest in UETA to facilitate internet commerce as a way to conduct the more than $200 billion in equipment leasing transactions that occur each year in this country.

I. Overview of the UETA Statute

The statute is minimalist and "procedural." It facilitates internet commerce by replacing the current hodge-podge of state laws[1] with a fair and predictable set of uniform rules on electronic commerce.

A. Central Provisions. Essentially, UETA provides that electronic records, signatures and contracts are just as effective and enforceable (and admissible in evidence) as their old-fashioned paper counterparts. UETA section 7 thus provides that:

---

[1] Over the past several years, a number of States have enacted statutes giving legal effect to certain types of electronic contracts and electronic signatures. But these new statutes are not uniform: Some of them are limited to electronic contracts and signatures that are authenticated with digital certificates and public key/private key cryptography meeting specified criteria. Other state laws validate a broader class of electronic signatures and contracts. Some state statutes recognize electronic signatures and contracts only in the context of government transactions, while others apply more broadly to both government and commercial transactions.

o A record or signature may not be denied legal effect solely because it is in electronic form.

o A contract may not be denied legal effect solely because an electronic record was used in its formation.

o If a law requires a record to be in writing, an electronic record satisfies the law.

o If a law requires a signature, an electronic signature satisfies the law.

Two other sections of UETA also provide critical support for e-commerce: Section 13 provides that evidence of a record or signature may not be excluded solely because it is in electronic form. Section 12 provides that if a law requires that a record be retained, the requirement is satisfied by retaining an electronic record of the information in the record.[2]

B. Scope. The scope of the UETA statute is generally limited to "transactions between parties each of which has agreed to conduct transactions by electronic means." Wills and testimentary trusts are excluded from the coverage of UETA, as are transactions subject to UCC laws that already contain specific provisions for electronic signatures and/or electronic records. The older pre-internet UCC rules on the commercial law of sales and leases would be subject to UETA's new procedural rules for conducting electronic commerce.[3]

Writing requirements in federal law are not affected by UETA, which is only a state law. However, there are a number of federal statutes, such as the

---

[2] To be able to take advantage of Section 12, the retained electronic record must: (a) accurately reflect the information in the record as first generated in its final form; and (b) remain accessible for later reference.

[3] UETA section 3(b) provides that the statute does not apply to a transaction "to the extent it is governed by" the following laws: (1) A law governing the creation or execution of wills, codicils or testimentary trusts; (2) the UCC other than Sections 1-107 (written waiver of rights after breach) and 1-206 (residual statute of frauds for kinds of personal property not otherwise within the statute of frauds), Article 2 (sales) and Article 2A (leases); (3) UCC Articles 3,4,4A,5,6,7,8, or 9; and (4) the new Uniform Computer Information Transactions Act (UCITA).

federal Truth in Lending Act, that defer to state law on the issue of whether there is an agreement, or whether a consumer has authorized a transaction. UETA would apply in this context.

C. Other provisions. To come to grips with consumer protection writing requirements, UETA section 8(a) provides that, if a state law "requires a person to provide, send, or deliver information in writing to another person," that requirement is satisfied if the information is provided "in an electronic record capable of retention" – that is, capable of retention by printing or storing the electronic record– "by the recipient at the time of receipt." More generally, UETA section 8(c) imposes a penalty on a sender of a record that is not retainable: It provides that if a sender "inhibits the ability of a recipient to store or print an electronic record, the electronic record is not enforceable against the recipient." Section 8(c) seems to apply to all electronic records, not just those electronic records that substitute for a legally required written disclosure or written record. Though some have questioned this aspect of section 8(c), we think it is reasonable. We see no harm in ensuring that legally enforceable records be reasonably "capable of retention." The scope of section 8(c) may be clarified by Reporter's comments issued in the future.

CONCLUSION

The member companies of ELA are leaders in the commercial use of innovative new technologies. ELA strongly supports the central provisions of UETA, which provide in section 7 for legal recognition and enforcement of electronic records, electronic signatures, and electronic contracts. Already the law in California, UETA embodies a mainstream approach to electronic commerce. It should be speedily enacted throughout the Nation.

Thank you for promulgating this much-needed set of uniform state laws to facilitate e commerce.

Sincerely,

Michael Fleming

Michael Fleming
President

American Council of Life Insurance

Carroll A. Campbell, Jr.
President & Chief Executive Officer

November 24, 1999

Mr. John L. McClaugherty
President
National Conference of Commissioners on Uniform State Laws
211 East Ontario Street, Suite 1300
Chicago, Illinois 60611

Re: The Uniform Electronic Transactions Act

Dear Mr. McClaugherty:

I am writing on behalf of the American Council of Life Insurance ("ACLI") to express our organization's strong support for the Uniform Electronic Transactions Act ("UETA"), as adopted by the National Conference of Commissioners on Uniform State Laws ("NCCUSL").

ACLI is a national trade association comprised of almost 500 member legal reserve life insurance companies. ACLI staff had Observer status during the UETA Drafting Committee deliberations, and we appreciate the ability to participate in NCCUSL's drafting process. Our member companies view authentication legislation as vital to the continued growth of electronic commerce, and I commend NCCUSL for accepting the challenge of drafting a model act that will help all businesses and consumers by providing legal certainty to electronic signatures and electronic records.

Our member companies believe that UETA is a well written, balanced law that will facilitate electronic commerce while preserving substantive state law. UETA is technology and industry neutral, taking into account the dynamic nature of the Internet. We believe UETA's recognition of electronic records is particularly critical to providers of financial services, including life insurers.

Thank you again for the excellent work your organization has provided. ACLI will be actively supporting enactment of UETA in the states this upcoming legislative season. Please let me know if there is any specific assistance ACLI can provide as UETA is introduced in the various states.

Sincerely,

Carroll A. Campbell, Jr.

1001 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004-2599
202/624-2000 • FACSIMILE 202/624-2319

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB285-DNR-REC-01-20-04
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Natural Resources
Title: Electronic Transactions & Signatures
RDU: Resource Development
Component: Recorder's Office/UCC
Sponsor: Representative McGuire
Requester: (H) JUD
Component No.: 802

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type–Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2004) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time	0					
Part-time	0					
Temporary	0					

ANALYSIS: *(Attach a separate page if necessary)*

There is no fiscal impact anticipated with implementation of this legislation.

Prepared by: Vicky Backus, State Recorder
Phone 269-8882
Division: Support Services - Recorder's Office
Date/Time 1/20/04
Approved by: Thomas Irwin, Commissioner
Date 1/20/04
Agency: Natural Resources

(Revised 7/2003 OMB)

HB

292

carolyn V. Brown, M.D., MPH
PO Box 240289
1640 Second Street
Douglas, Alaska
99824-0289

obstetrics-gynecology
preventive medicine
women's health

907-364-2726
fax 907-364-2727
cvbrown@ptialaska.net

MEMORANDUM

DATE: February 11, 2004

TO: House Judiciary Committee

FROM: carolyn V. Brown

SUBJECT: Hearing – House Bill 292

Having read through HB 292 and considered its contents for legislation that might address the issues of women's reproductive health, pregnancy, abortion, and contraception, I have attached questions and comments for your consideration as you deliberate these concerns for women.

Please let me know if I can answer questions or provide additional information or evidence-based support for your discussions. There is ample evidence-based medicine information to support our discussion with you all.

Thank you for these considerations.

House Bill 292

Questions and Considerations

- The bill speaks of pregnant women, abortion, contraception, full term pregnancy, and informed consent. What is the bill actually addressing? Please clarify for the public in Alaska.
- The bill appears to be discriminatory in that the informed consent mandated for women who elect abortions is not also mandated for all pregnant women. It has been my professional experience as an obstetrician-gynecologist of some 40 years in practice that there are women who anticipate carrying a pregnancy to term and elect a different

plan when they understand the risks/benefits of that decision. There are women who anticipate an abortion but elect a different plan when they understand the risks/benefits. Please be clear on equality for all pregnant women or change the language of the legislation. Women deserve this.

- The state indicates an interest in protecting the life and health of pregnant women. Does health include <u>both</u> physical and mental health in Alaska? Please clarify.
- In as much as the information about obstetrics is extremely dynamic (not static), a one-time web site will not suffice or be accurate. How will the intervals of update be established? Who will pay for this? Who will the ongoing experts be to provide protection of the public's health?
- Any language that proposes information <u>must</u> include the risks/benefits and potential consequencies of full term pregnancy. How will this be assured? We know that full term pregnancy carries a far greater risk to death and morbidity to women than does an abortion. If you need more information on this, please let me know.
- Please clarify for Alaskans just what is "judicial economy and resources".
- Please clarify for Alaskans just what has been the "costly and undue litigation". Where has the money gone? Data is invaluable in decision - making.
- If information is to be provided, virtually ever practice, site, agency, service, clinic, individual, and facility would be required to be listed on the web site. Who will keep up with this "dynamic" (and it will be dynamic) so that Alaskan women have the information intended in the legislation?
- If all agencies, services, clinics, and facilities that provide contraceptive options (and how did that get here?), that would - of course include all pharmacies and outlets where condoms and spermacides are provided. Is the web site prepared to deal with this in a responsible way for appropriate patient care? Who will do this work? Who will pay for this?
- It would seem appropriate and prudent to use correct terminology when dealing with health and medical issues. Philosophical and personal

definitions have no place in legislation. There are enormous differences among definitions for embryo, blastocyst, propositus, fetus, and child. Use of correct terminology in the development of parlance is appropriate for Alaska legislation.

- Would suggest that the language of the "sperm donor" for the pregnancy be changed to "the male involved with the pregnancy" or "sperm donor". Please call it what it is. We do "anonymize" the woman involved with "pregnant women (female)", don't we?
- How long will it take to view this information on the internet? There is a limit to just how much the average person can take in addresses, names, pictures, disclaimers, printed forms, and a detailed presentation of risks/benefits in the midst of a pregnancy that may be wanted or unwanted. Please – come, let us be fair...
- At what reading level will this information be? Who will provide the oversight? At what cost to the state of Alaska?
- Would this law mandate that all physicians' offices where pregnancy termination is done must be registered? What are the criteria? What are the medical and surgical mandates? Who will oversee this?
- What is the reason for the 30 day waiting period? It is clear that there are more risks as pregnancy continues – both for abortion and for pregnancy to term. What is the reason for this mandate? This makes no practical sense to physicians who provide care for women.
- Who will pay for this paper work, forms to be printed, record keeping, transmission and update of the web site?
- All pregnant women need informed consent – whether they elect abortion or carry a pregnancy to term. To do otherwise is to discriminate. Women must have informed, accurate, scientific and appropriate information.

GREGG D. RENKES
ATTORNEY GENERAL OF ALASKA

February 11, 2004

The Honorable Lesil McGuire
Chair, House Judiciary Committee
Alaska Legislature
State Capitol - Room 118
Juneau, AK 99801-1182

The Honorable Tom Anderson
Vice-Chair, House Judiciary Committee
Alaska State Legislature
State Capitol - Room 432
Juneau, AK 99801-1182

Re: Legal Analysis of CS HB 292(HES)

Dear Representatives McGuire and Anderson:

CS HB 292(HES) proposes to establish particular information, to be prepared by the Department of Health and Social Services (DHSS), to be provided to a patient that is seeking an abortion. The bill further proposes that a physician who fails to obtain the "informed consent" of a patient prior to providing abortion services is liable for both compensatory and punitive damages. Finally, the bill seeks to establish a 24-hour waiting period from the time the patient is provided the information to the time that a patient may receive the abortion.

This is well intentioned and necessary legislation that attempts to address the State's compelling interest in ensuring that no abortion is performed in our state without informed consent. However, as proposed, this bill will likely not survive a constitutional challenge under the privacy provision of the Alaska Constitution, Art. I, Sec. 22 and the equal protection provision of the Alaska Constitution, Art. I, Sec. 1.

We provide the following background and suggested changes in an effort to assist your committee in preparing a bill that will survive constitutional challenge. Alaska's courts have consistently found our constitution provides greater protections than the

123 4th Street • Suite 450 • Dimond Courthouse • P.O. Box 110300 • Juneau, AK 99811-0300
(907) 465-2133 • Fax • (907) 465-2075 • Gregg_Renkes@law.state.ak.us

federal constitution or those of many other states. *See* e.g., *Valley Hospital Association, Inc. v. Mat-Su Coalition for Choice*, 948 P.2d 963 (Alaska 1997), *State v. Planned Parenthood*, 28 P.3d 904 (Alaska 2001), *State v. Planned Parenthood*, 35 P.3d 30 (Alaska 2001). This is critical to understanding how our courts would address legislation that would purport to restrict abortion rights. In *Valley Hospital Association v. Mat-Su Coalition*, *infra*, the Alaska Supreme Court explicitly rejected the lessening of protections of the right to an abortion that were articulated in the plurality opinion in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Instead, the Alaska Supreme Court established a test similar to that expressed in *Roe v. Wade*, 410 U.S. 113 (1973), affirming the right to an abortion as a fundamental right that can be legally constrained only when the constraints are justified by a compelling state interest and no less restrictive means could advance this interest. The challenge faced by the proposed legislation is that the application of this test to specified information requirements, a 24-hour waiting period, and the physician liability provision could result in a determination that one or more of these provisions are unconstitutional if they employ excessive means to accomplish the ends of assuring that a patient is informed and has given her consent before receiving an abortion. Any evaluation of whether the least restrictive means are being employed is necessarily subjective. What we provide is our best guess at how the court might read the provisions included in the proposed bill. In our view, the bill as presently written raises the following potential legal problems:

Section 1 (Legislative Findings): The Senate sponsors of the bill drafted legislative findings to help establish the status of "compelling interest" in legislating in this area. The House substitute of the bill refined those findings. Although, the findings do not have any legal effect, they do outline the purpose of the legislation. The one problem with this section is found on page 2, lines 9 and 10. The findings mention the availability of immunity for physicians who use the information on the Internet site outlined in Section 2 of the bill. However, there is no corresponding immunity language in the bill. If there is a desire to provide for immunity, then that should be clearly set forth in the body of the bill.

Section 2 (The contents of the pamphlet): Section 2 of the bill provides the substances of what should be included in the pamphlet developed by DHSS. The following are legal issues that we believe would be raised in a challenge to the bill.

Page 2, line 31 and page 3, lines 1-4 (eligibility for public benefits): Under *Karlin v. Faust*, 975 F. Supp. 1177 (W.D.Wisc. 1997) (aff'd 188 F.3d. 446 (7th Cir. 1999)), rehearing and rehearing en banc denied, 198 F.3d 620 (7th Cir. 1999), the court held that it was not constitutional to require this type of information to be provided to women who were pregnant as a result of rape or incest, since such information would likely cause

psychological harm and serve no medical purpose. Therefore at a minimum, changes should be made for those circumstances where the pregnancy is the result of rape or incest, where a woman is carrying a child with a lethal anomaly, or where the information would serve no legitimate purpose.

Page 3, lines 7-9 (child support): Although the policy of the State of Alaska may be that fathers are liable for child support, there are legal issues with respect to the establishment of paternity and support orders in civil actions. This statement may lead a woman to believe that she will indeed get child support and it is not always that easy. Thus, we recommend that the reference to child support by fathers be changed to more fully describe the processes available for establishing paternity and liability for child support.

Page 3, lines 11-21 (photos of unborn children in two-week gestational increments): Although tailored to be unbiased and accurate, the graphic nature of such photos may be found burdensome or used to create an undue interference in a woman's right to make a reproductive choice. As articulated in the pamphlet, there would be at least 18 photos of "unborn children" in two-week gestational increments, along with other information, such as viability. The photos would comprise a large portion, if not most of the pamphlet itself. Any legal challenge brought would argue that the pictures were not intended to provide information but to shock and burden a woman's reproductive choice. This argument would most likely state that these pictures were not in proportion to the remainder of the pamphlet. Based upon the recent decisions by the Alaska Supreme Court, this argument would be difficult to overcome and therefore we recommend that some attention be given to the make up of the pamphlet as a whole and the proportion of the pamphlet that includes pictures.

Page 3, lines 22-31 and page 4, lines 1-9 (information regarding risks and benefits of abortion, carrying to term and contraceptives): Despite requiring the submission of information in an objective, unbiased way, these three provisions might be found to be unconstitutionally vague. Specifically, by using both the pamphlet for the purpose of providing information that would be considered informed consent, there is also an express provision in the bill that is entitled informed consent. However, the two provisions do not require the same information. Therefore, a legal challenge would be that a physician who was trying to comply with the legal requirement could not be sure whether they were in compliance or were violating the law. A similar problem arises with respect to the liability provision. Since there is different information being imparted, a physician would not know when they would be liable under the bill.

Since some of the specific information requirements will likely be found unconstitutional in their application to certain circumstances, the clear application of the law is going to be compromised. Even with the severability provision included in this bill, a physician will face potential civil liability for guessing incorrectly about which information is required or whether some information can be omitted because it serves no medical purpose. Generally, physicians are required, both by sound medical practice and by their malpractice insurance providers, to assure that informed consent is obtained from their patients. They are also required to obtain informed consent under AS 09.55.556. To the extent that there is reasonable confusion about the specific information requirements, the civil liability provision is likely to have a chilling effect on the availability of abortions.

Sections 3 and 4 (Require informed consent from abortion and provide for civil liability for the failure to obtain informed consent): It should be noted that the court in *Valley Hospital Association v. Mat-Su Coalition* explicitly found AS 18.16.010(b) to be unconstitutional to the extent it applies to quasi-public institutions. In addition, the parental consent provision and judicial bypass provision were found to be unconstitutional by the superior court in Anchorage. *See Planned Parenthood of Alaska v. State,* 3AN-97-6014 CI (decision on remand from 35 P.3d 30 (Alaska 2001)). To the extent that the above issues are corrected, and the changes to Section 2 of the bill are addressed, the amendment proposed in Section 3 is not problematic.

Section 4 has two problems. First, this is the section that purports to provide immunity from civil liability; however, in the committee substitute there is no mention of immunity. Second, this section appears to impose a 24-hour waiting period. This requirement could be challenged on equal protection grounds. Specifically, the argument would be that the equal protection rights of women are violated because only abortion requires a specific level of informed consent not any other procedure. Although there is a general informed consent provision under Title 9, there is no other informed consent provision in state law that deals with other specific types of medical procedures. In addition, since abortion is a medical procedure only sought by women, the argument would be that in so legislating, we would be violating women's equal protection rights. In addition, under this section there would be a required 24-hour waiting period. Therefore, abortion would be the only medical procedure that had a 24-hour waiting requirement. To survive an equal protection challenge the state would have to show that the 24-hour waiting period was justified by a compelling state interest and no less restrictive means could advance that interest.

In addition, there could be problems with this waiting period because of the rural nature of Alaska. Many women who would seek an abortion will have to travel

from rural communities at great expense. Depending upon how it is implemented a 24-hour waiting requirement could result in time and expense to these women and may result in delays. Under these circumstances a 24-hour delay may not meet the requirement of being the least restrictive means to accomplish the purpose of assuring a woman is informed and has consented to an abortion.

Section 5 (Informed consent requirements): There are four problems with this section. The first relates to the requirement from which informed consent is required. As noted previously, parental consent and judicial bypass provisions have been found unconstitutional by the superior court as recently as August of 2003, although we are arguing for appeal to overturn this ruling. There are also express prohibitions under Title 13 stating that a guardian does not have the authority to consent to an abortion for a ward. Therefore, these sections are either unconstitutional or do not accurately state the law.

The second problem is the 24-hour waiting period, which was discussed above. The same concerns and legal issues arise with the existence of the 24-hour waiting period in this section as do in Section 4. However, there is one change to this section that was not stated in the previous section. Specifically, this section allows for the distribution of the information required under this section or on the Internet to be done by mail, telephone or by facsimile. The availability of these options would provide a defense to the legal arguments that would be raised with respect to the 24-hour waiting period. However, it is not clear whether these options would satisfy the court with respect to the equal protection challenges raised. In addition, these options should be clearly stated so as to apply to any 24-hour waiting requirement in the bill.

The third problem with this section is the provision that authorizes that these protections are not required in a medical emergency. The definition of medical emergency will be challenged as being vague. For example, it does not address the ability to dispense with the formalities in order to avoid a medical emergency. In fact, if the definition is not met, one must wait for a medical emergency to manifest before obtaining an abortion, thereby putting the mother's life in jeopardy. This will be challenged, and it is difficult to predict the success of such a challenge; however, it should be noted that almost identical language was found unconstitutional by the superior court in the parental consent and judicial bypass bill litigation currently being appealed by the state.

The final problem is the same as stated with respect to Section 2 of the bill and the vagueness on what actually constitutes informed consent so that a physician would clearly know what information was required to be dispensed to meet the requirements of the bill. Since this section purports to require different information than that outlined in

the pamphlet, there are vagueness arguments that could be raised and which need to be addressed.

In summary, it is most likely that if this bill passes, a legal challenge will be brought. In light of the foregoing analysis, you see there remain a number of legal problems with the bill that need to be addressed in order to defend any lawsuit that would be filed. We stand ready to assist you in drafting an informed consent bill that will accomplish the critically important objectives pursued by the sponsors of this legislation while at the same time having the best possible chance of surviving judicial scrutiny.

Sincerely,

Gregg D. Renkes
Attorney General

23-LS0867\S
Mischel
2/5/04

CS FOR HOUSE BILL NO. 292(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES DAHLSTROM, Lynn, Coghill, Wilson, Seaton, Gatto

A BILL

FOR AN ACT ENTITLED

"An Act relating to information and services available to pregnant women and other persons; and ensuring informed consent before an abortion may be performed, except in cases of medical emergency."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

LEGISLATIVE FINDINGS. The legislature finds that

(1) duties of the state include regulating medical practice and fostering the development of standards of professional conduct;

(2) the state is interested in protecting the life and health of pregnant women;

(3) women have a right to know the medical risks associated with their reproductive options.

*** Sec. 2.** AS 18.05 is amended by adding a new section to read:

Sec. 18.05.032. Information relating to pregnancy and pregnancy

maintain on the Internet & the printable

alternatives. (a) The department shall produce, in printable form, standard information that

(1) contains geographically indexed material designed to inform a person of public and private agencies and services that are available to assist a pregnant woman with the woman's reproductive choices; the department should include information about at least the following types of agencies and services:

(A) agencies, services, clinics, and facilities designed to assist a woman through pregnancy, including adoption agencies and counseling services;

(B) agencies, services, clinics, and facilities that provide abortion options and counseling and post-abortion counseling and services; and

(C) agencies, services, clinics, and facilities designed to assist with or provide contraceptive options and counseling to help prevent future unwanted pregnancies;

(2) includes a comprehensive regional directory of the agencies and clinics identified by the department under (1) of this subsection, a description of the services they offer, and the manner in which the agencies and clinics may be contacted, including telephone numbers;

(3) provides information concerning the circumstantial criteria for the availability of medical assistance benefits for prenatal care, childbirth, and neonatal care, the circumstantial criteria for the availability of medical assistance benefits for abortion services, and the circumstantial criteria for the availability of medical assistance benefits for contraception;

(4) states that informed and voluntary consent is required under AS 18.16.060 for an abortion;

(5) states that the father of a child is liable to assist in the support of the child even in instances where the father has offered to pay for an abortion, and that the law permits adoptive parents to pay costs of prenatal care, childbirth, and neonatal care;

(6) describes the fetal development of a typical unborn child at two-week gestational increments from fertilization to full-term, including photographs

depicting the anatomical characteristics of a typical unborn child at two-week gestational increments, and relevant information about the possibility of an unborn child's survival at the various gestational ages; the fetal dimensions in the photographs must be accurately represented and shall be realistic and appropriate for the woman's state of pregnancy; the information must be objective, nonjudgmental information that is reviewed and approved for medical accuracy and appropriateness by recognized obstetrics and gynecological specialists designated by the department and designed to convey only accurate scientific information about unborn children at various gestational ages;

(7) contains objective, unbiased information that is reviewed and approved for medical accuracy and appropriateness by recognized obstetrics and gynecological specialists designated by the department and that describes the methods of abortion procedures and treatments commonly employed and the medical risks and possible complications commonly associated with each procedure and treatment, as well as the possible psychological effects that have been associated with having an abortion;

(8) contains objective, unbiased information that is reviewed and approved for medical accuracy and appropriateness by recognized obstetrics and gynecological specialists designated by the department and describing the possible medical risks and complications commonly associated with pregnancy and childbirth, as well as the possible psychological effects that have been associated with carrying a child to term.

(b) The information required under (a) of this section must be written in easily comprehensible language and must be displayed in a typeface that is large enough to be clearly legible.

(c) In this section,

(1) "fertilization" means the fusion of a human spermatozoon with a human ovum;

(2) "gestational age" means the age of the unborn child as calculated from the first day of the last menstrual period of a pregnant woman;

(3) "informed consent" is consent that would be considered voluntary

and informed under AS 18.16.060(b);

(4) "unborn child" means the offspring of a human being in utero at various stages of biological development.

* **Sec. 3.** AS 18.16.010(a) is amended to read:

(a) An abortion may not be performed in this state unless

(1) the abortion is performed by a physician or surgeon licensed by the State Medical Board under AS 08.64.200;

(2) the abortion is performed in a hospital or other facility approved for the purpose by the Department of Health and Social Services or a hospital operated by the federal government or an agency of the federal government;

(3) before an abortion is knowingly performed or induced on an unmarried, unemancipated woman under 17 years of age, consent has been given as required under AS 18.16.020 or a court has authorized the minor to consent to the abortion under AS 18.16.030 and the minor consents; for purposes of enforcing this paragraph, there is a rebuttable presumption that a woman who is unmarried and under 17 years of age is unemancipated; [AND]

(4) the woman is domiciled or physically present in the state for 30 days before the abortion**; and**

(5) the applicable requirements of AS 18.16.060 have been satisfied.

* **Sec. 4.** AS 18.16 is amended by adding a new section to read:

Sec. 18.16.060. Informed consent requirements. (a) Except in the case of a medical emergency, a person may not knowingly perform or induce an abortion without the voluntary and informed consent of

(1) a woman on whom an abortion is to be performed or induced;

(2) the parent, guardian, or custodian of a pregnant, unemancipated minor if required under AS 18.16.020;

(3) a pregnant, unemancipated minor if authorized by a court under AS 18.60.030; or

(4) the parent or guardian of a pregnant woman legally determined to be mentally incompetent.

(b) Consent to an abortion is voluntary and informed when all of the following are true:

(1) at least 24 hours before the abortion procedure, the physician who is to perform the abortion, a member of the physician's staff who is a licensed health care provider, or the referring physician has verbally informed the woman or another person whose consent is required of the

(A) name of the physician who will perform the procedure;

(B) gestational estimation of the pregnancy at the time the abortion is to be performed;

(C) nature and risks of undergoing or not undergoing the proposed procedure that a reasonable patient would consider material to making a voluntary and informed decision of whether to undergo the procedure; and

(D) availability of the information required to be produced under AS 18.05.032; the requirement of this subparagraph may also be satisfied by a member of the physician's staff who is a licensed health care provider performing the required activities if the licensed person offers the person an opportunity to consult a physician; and

(2) before the abortion, the woman or another person whose consent is required certifies in writing that the information required to be given under (1) of this subsection has been provided.

(c) The information required in (b)(1)(A) - (C) of this section shall be provided individually and in a private setting to protect privacy, maintain the confidentiality of the decision, ensure that the information focuses on the individual circumstances, and ensure an adequate opportunity to ask questions. Provision of the information telephonically or by electronic mail or regular mail at least 24 hours before the person's appointment satisfies the requirements of this subsection as long as the person whose consent is required under (a) of this section has an opportunity to ask questions after receiving the information.

(d) In this section, "medical emergency" means a condition that, on the basis of a physician's good faith clinical judgment, so complicates the medical condition of

a pregnant woman that

(1) the immediate termination of the woman's pregnancy is necessary to avert the woman's death; or

(2) a delay in providing an abortion will create serious risk of substantial and irreversible impairment of a major bodily function of the woman.

* **Sec. 5.** AS 18.50.245(e) is amended to read:

(e) The state registrar shall adopt regulations to implement this section. The regulations that establish the information that will be required in a report of an induced termination of pregnancy

(1) must require information substantially similar to the information required under the United States Standard Report of Induced Termination of Pregnancy, as published by the National Center for Health Statistics, Centers for Disease Control and Prevention, United States Department of Health and Human Services, in April 1998, as part of DHHS Publication No. (PHS) 98-1117;

(2) must require, if known, whether the unidentified patient requested and received a written copy of the information required to be produced under AS 18.05.032; and

(3) may not include provisions that would violate a woman's privacy by requiring the woman's name or any identifying information in the report.

* **Sec. 6.** The uncodified law of the State of Alaska is amended by adding a new section to read:

SEVERABILITY. Under AS 01.10.030, the provisions of this Act are severable.

LEGISLATIVE RESEARCH REPORT

FEBRUARY 4, 2004

REPORT NUMBER 04.093

ABORTION LAWS IN THE UNITED STATES AND ALASKA

PREPARED FOR REPRESENTATIVE LESIL MCGUIRE

BY ROGER WITHINGTON, LEGISLATIVE ANALYST

ABORTION LAWS IN THE UNITED STATES 1

ABORTION LAWS IN ALASKA 2

LIST OF ATTACHMENTS 5

You asked for information concerning abortion laws. Specifically, you asked for a summary of abortion laws in the United States and a summary of the current abortion laws in Alaska. You also asked that we include any noteworthy court cases in our summaries.

ABORTION LAWS IN THE UNITED STATES

In response to your request, we attach two resources from the website of the Henry J. Kaiser Family Foundation.[1] One of the resources, which we include as Attachment A, is an *Issue Update* entitled "Abortion Policy and Politics." This update provides a history of abortion laws in the United States, a summary of the nine most important U.S. Supreme Court cases regarding abortion, and an overview of current abortion policies in the U.S. The other resource, which we include as Attachment B, is a Fact Sheet that provides abortion related statistics in the U.S.

We also include a more comprehensive summary of significant United States Supreme Court decisions regarding abortion in the United States. This document, compiled by NARAL,

[1] The Henry J. Kaiser Family Foundation is a private non-profit foundation that focuses on the major health care issues facing the United States. The URL for the Henry J. Kaiser Family Foundation is *www.kff.org/*.

465-3991
907-465-3908 (fax)

Alaska Legislature
Legislative Research Services
w3.legis.state.ak.us/Research/research_home.htm

State Capitol
Juneau, AK 99801

summarizes 36 of the most significant United States Supreme Court decisions that have impacted abortion laws in the United States.[2] We include NARAL's list as Attachment C.

We include two cases, the seminal *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southern Pennsylvania v. Casey*, 505 U.S. 833 (1992), cited by both the Henry J. Kaiser Family Foundation and by NARAL as playing a significant role in the evolution of abortion law in the U.S.[3]

In *Roe v. Wade*, which we include as Attachment D, the court ruled that the fundamental right to privacy extends to a woman's decision whether or not to have an abortion. In *Planned Parenthood of Southern Pennsylvania v. Casey*, which we include as Attachment E, the court upheld several restrictions to abortion. These restrictions include a 24-hour waiting period (sometimes referred to as mandatory delay) and specific counseling requirements, provisions similar to elements contained in Senate Bill 30 and House Bill 292 that are currently before the Alaska State Legislature. According to the Henry J. Kaiser Family Foundation, *Planned Parenthood of Southern Pennsylvania v. Casey* is the most important abortion ruling since 1973.

As an additional resource, we located an article in *The Journal of the American Medical Association* that analyzes the impact of Mississippi's 1992 mandatory delay law on abortions and births. We include "The Impact of Mississippi's Mandatory Delay Law on Abortions and Births" as Attachment F.

ABORTION LAWS IN ALASKA

Alaska lawmakers first legalized abortion in 1970 (Chapter 103 SLA 1970), three years prior to the two U.S. Supreme Court decisions that made abortions legal under certain conditions in the United States, *Roe v. Wade* and *Doe v. Bolton*. Alaska Statute 18.16 sets forth the conditions under which abortions may occur in Alaska. Alaska Statute 8.64.105 assigns the Alaska State Medical Board the responsibility of adopting regulations necessary to carry into effect the provisions of the law (AS 18.16), as well as defining ethical, unprofessional, or dishonorable conduct related to abortions, setting standards of professional competency in the performance of abortions, and establishing procedures and standards for facilities, equipment, and care of patients in the performance of an abortion. Over the years there have been challenges to various aspects of Alaska's abortion laws and regulations. These challenges can be categorized into areas related to state constitutional protection, abortion procedures, mandatory hospitalization, physician-only restrictions, public funding, refusal clause, and minors' access to abortion. We provide a summary of each of these categories, with relevant court cases, as follows.

State Constitutional Protection: The right to privacy guaranteed under Article 1, Section 22 of the Alaska Constitution protects a women's right to reproductive choice as a fundamental right, and to a greater extent than does the U.S. Constitution. In 1997, the Alaska Supreme Court

---

[2] The NARAL Pro-Choice America (formerly The National Abortion and Reproductive Rights Action League) is the political arm of the pro-choice movement and an advocate of reproductive freedom and choice. The URL for the NARAL is *www.naral.org*. We also queried the websites of several pro-life organizations; however, none of these organizations compile such information.

[3] If you would like copies of any of the other court decision noted by the Henry J. Kaiser Family Foundation or NARAL, please let us know.

struck down a "quasi-public" hospital's policy that barred abortion procedures at the facility. This decision also declared a state statute immunizing persons and hospitals from liability for refusing to participate in abortion invalid as applied to "quasi-public" institutions (*Valley Hospital Association v. Mat-Su Coalition for Choice*, 948 P.2d 963, 1997).

Ban on Abortion Procedures: The superior court held that Alaska's ban on abortion procedures (AS 18.16.050, Partial-birth Abortions) is "vague and imprecise" and therefore unconstitutional under the state constitution. The court issued a permanent injunction prohibiting enforcement of the law (*Planned Parenthood of Alaska, Inc. v. State*, No. 3AN-97 6019 CIV (Alaska Superior Court, March 13, 1998). An appeal was withdrawn (No. S-08610, July 17, 2000).[4]

Mandatory Hospitalization: Alaska Statute 18.16.010 requires that all abortions must be performed in a hospital, in a facility approved for that purpose by the state, or in a hospital operated by the federal government or one of its agencies. Regulations further state that ambulatory surgical facilities (the only non-hospital facilities receiving state-approval to perform abortions) may not perform abortions after the first trimester, affectively requiring that post-first trimester abortions be performed in a hospital.[5]

In 1981, the Alaska Attorney General concluded that the requirement that all abortions be performed in a hospital or other approved facility is invalid since it does not exclude the first trimester of pregnancy (Opinion of the Attorney General, No. J-66-816-81, October 7, 1981, citing *Sendak v. Arnold*, 429 U.S. 968, 1976). In 1984, the Alaska Attorney General further stated that the regulation of other aspects of first trimester abortions is "obviously problematic" (Opinion of the Attorney General, No. 366-028-85, July 24, 1984).

Physician-Only Restriction: Alaska Statute 18.16.010 requires that only a physician or surgeon licensed by the state may perform an abortion. In 1976, the Alaska Attorney General issued an opinion stating that this law is constitutional (Informal Opinion of the Attorney General, Oct. 21, 1976).

Public Funding: Alaska Administrative Code 7.47.200(a) and 7.47.210(a) define the circumstances under which women eligible for state medical assistance for general health care may obtain an abortion. In 2001, the Alaska Supreme Court found the regulation that limited state medical assistance for abortions to cases of life endangerment, rape, or incest to be in violation of the state constitution. The Court issued a permanent injunction prohibiting its enforcement (*State v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, Alaska 2001).[6]

In 2002, the Alaska Legislature enacted a FY2003 budget bill that did not provide any state funds for medical assistance to pay for abortions that were not considered a mandatory service under federal law (federal law mandates Medicaid abortion coverage in cases of life endangerment, rape, or incest). The superior court issued an order finding that this budget restriction is without

---

[4] The State withdrew its appeal of the superior court's decision following the decision in *Stenberg v. Carhart*, 530 U.S. 914, 2000, in which the U.S. Supreme Court held that a ban on "partial-birth" abortion that lacks an exception to protect a woman's health, and that prohibits more than one procedure places an undue burden on a woman's right to choose and is therefore unconstitutional.

[5] 7 AAC 12.370.

[6] The U.S. Supreme Court has upheld a similar restriction under the federal Constitution (*Williams v. Zbaraz*, 448 U.S. 358, 1980).

effect and ordered the state to continue to pay for medically necessary abortions (*Planned Parenthood of Alaska, Inc. v. Livey*, No. 3-AN-98-07004, August 13, 2002).[7]

Refusal Clause: Alaska Statute 18.16.010 states that no person or hospital may be required to participate in an abortion and that no person or hospital may be liable for refusing to participate in an abortion. In 1978, the Alaska Attorney General issued two opinions stating that under the state constitution, non-sectarian hospitals built or operated with public funds may not refuse to offer abortion services (Opinion of the Attorney General, No. 15, March 31, 1978; Opinion of the Attorney General, No. 8, February 10, 1978).[8]

Minors' Access to Abortion: Alaska Statutes 18.16.010, 18.16.020, and 18.16.030 state that an unemancipated minor under age 17 may not obtain an abortion without the written consent of one parent. A minor may obtain an abortion without parental consent if a court finds, by clear and convincing evidence, that she is mature and well informed enough to make an intelligent decision (also referred to as judicial bypass), that there is evidence that she has been subject to physical or sexual abuse or to a pattern of emotional abuse by one or both parents, or that parental consent is not in her best interest.

A state superior court ruled that this law violates the state constitution. The state Supreme Court reversed this ruling and sent the case back to the lower court for an evidentiary hearing to determine the law's constitutionality (*Planned Parenthood of Alaska, Inc. v. State*, No. 3AN-97-6014, February 25, 1998, summary judgment), (Alaska Superior Court, Oct. 5, 1998, final amended judgment). As a result of the evidentiary hearing, the superior court once again found the law unconstitutional and unenforceable (*Planned Parenthood v. State*, 3AN-97-6014 C1, Alaska Superior Court, October 13, 2003, Decision on Remand).

I hope you find this information to be useful. Please do not hesitate to contact us if you have questions or need additional information.

---

[7] In 2003 the Alaska Legislature attempted to limit funding to mandatory abortion services under federal law in the FY2004 budget bill. However, the Alaska Attorney General stated that such restriction is unconstitutional and that the state must continue to func medically necessary abortions in accordance with the 2002 court order (Opinion of the Attorney General, No. 883-03-0044, November 18, 2003).

[8] *Valley Hospital Association v. Mat-Su Coalition for Choice*, 948 P.2d 963, Alaska 1997 can also be applied to this law.

List of Attachments

Attachment A

"Abortion Policy and Politics," *Issue Update*, The Henry K. Kaiser Family Foundation, October 2002, *www.kff.org/womenshealth/3270-index.cfm*

Attachment B

"Abortion in the U.S.," *Fact Sheet*, The Henry K. Kaiser Family Foundation, January 2003, *www.kff.org/womenshealth/326902-index.cfm*

Attachment C

U.S. Supreme Court Decisions Concerning Reproductive Rights, 1965-2003, NARAL Pro-Choice America, *www.prochoiceamerica.org/facts/scotus_decsions_choice.cfm*

Attachment D

Roe et al. v. Wade, 410 U.S. 113, 1973

Attachment E

Planned Parenthood of Southeaster Pennsylvania, et al., Petitioners 91--744 v. Robert P. Casey, et al., 505 U.S. 833, 1992

Attachment F

T. Joyce, S.K. Henshaw, J.D. Skatrud, "The Impact of Mississippi's Mandatory Delay Law on Abortions and Births," *The Journal of the American Medical Association*, Volume 278, Number 8, August 27, 1997

Attachment A

"Abortion Policy and Politics," *Issue Update*, The Henry K. Kaiser Family Foundation, October 2002,
www.kff.org/womenshealth/3270-index.cfm

THE HENRY J. KAISER FAMILY FOUNDATION

Update Issue Update

Abortion Policy and Politics

October 2002

Since the landmark U.S. Supreme Court decision *Roe v. Wade* legalized abortion in 1973, debate has continued over how and when abortions are provided. Every state has laws regulating some aspect of the provision of abortion, and many have passed restrictions that are now in effect, such as parental consent or notification requirements; mandated counseling and waiting periods; and limits on funding for abortion. In Congress, the primary focus of legislation has historically been on limiting use of public funds for abortions.

In more recent years, public debate has centered on methods of abortion, particularly those performed later in pregnancy. Congress and most state legislatures have considered whether certain procedures—labeled by opponents as "partial-birth abortions"—should be outlawed. To date, the U.S. Supreme Court and other lower courts have struck down or significantly curtailed enforcement of these bans. Most recently, in August 2002, President Bush signed the "Born-Alive Infants Protection Act," which grants federal rights to human fetuses "born alive" at any stage of development, specifically including those that might occur during an attempted abortion procedure. Meanwhile, new medical developments—most notably the Food and Drug Administration's (FDA) September 2000 approval of mifepristone (RU-486), the first non-surgical "medical abortion" drug—is drawing increased attention to early abortions. Federal and state legislators have discussed whether to adopt restrictions specific to medical abortions, and anti-abortion groups filed a petition to the FDA in August 2002 urging the agency to reverse approval of mifepristone.

While the debate over abortion has not abated, the abortion rate—the number of induced abortions per 1,000 women aged 15-44—in the U.S. is at an historic low. In 1998, the most current year for which data is available, there were 17 abortions per 1,000 women of reproductive age, the lowest level in two decades.[1] Even with these declines, abortion remains one of the most commonly performed surgical procedures in the U.S.: Based on 1992 rates, an estimated 43 percent of women will have had an abortion by age 45.[2]

History and Overview of Abortion

Individual states began restricting or outright outlawing abortion beginning in the mid-1800s. By 1880, the procedure was criminalized in every state with exceptions often allowed in cases where a woman's life was at risk. In spite of these bans, many women sought out illegal means of terminating unwanted pregnancies, leading to high rates of maternal mortality and reproductive complications.

Beginning in 1970, a handful of states started considering legislation to allow abortion in certain circumstances. The U.S. Supreme Court decriminalized abortion nationwide in 1973 in two companion cases, *Roe v. Wade* and *Doe v. Bolton* (see box on Key Supreme Court Cases on Abortion). The Court asserted that the fundamental constitutional right to privacy encompasses a woman's decision to terminate a pregnancy before the point of viability, that is, when the fetus can survive outside of the woman's body. As a result, legislation regulating abortion during the first two trimesters of pregnancy had to satisfy a "compelling" state interest—a tough legal standard that many restrictions passed after *Roe* did not meet. Abortions could still be banned after viability—with exceptions to protect a woman's life and health.

Immediately after the Supreme Court's ruling, abortion opponents introduced legislation at the state and federal level aimed at overturning *Roe*—or at least limiting access to abortion. As a result, the Supreme Court heard several cases challenging abortion regulations during the 1970s, typically rejecting the state laws as violations of the right to choose abortion. The exception was limitations on the use of public funds or public facilities, several of which were found constitutional during this period.

During the 1970s and early 1980s, Congressional attempts to pass a constitutional amendment banning abortion failed. However, in 1980, the U.S. Supreme Court upheld Congress's first significant national abortion restriction. The justices found constitutional a 1977 appropriations bill rider known as the Hyde Amendment, which forbid the use of federal Medicaid funds for abortions unless a woman's life is threatened by pregnancy. (Medicaid is the federal-state health insurance program for the poor, including 9.5 million women of reproductive age.) Congress also passed similar restrictions on public funding of abortion in a range of federal agencies and programs.

A series of Supreme Court cases in the 1980s and 1990s considered the constitutionality of various state abortion restrictions and regulations, such as waiting periods or directed counseling. Although most were struck down, the Court did find that states could require girls under age 18 to notify or receive permission from a parent for an abortion, as long as a judicial bypass procedure was available that also allowed for this permission to be granted by a local court.

Public Supports Legal Abortion, With Restrictions

According to recent national surveys, a majority of Americans—58 percent—think that abortion laws should remain as they are or be loosened, rather than tightened.[3] However, half favor some restrictions on abortion. Overall, 28 percent of Americans say abortion should be *legal under all circumstances;* 19 percent say abortion should be *illegal under all circumstances,* and a slim majority (51 percent) say abortion should be *legal under certain circumstances.* Further reflecting the public's mixed views on abortion, the nation is now divided in the percentage of people who identify as "pro-choice" versus "pro-life." The percentage of Americans who say they are "pro-choice" has *decreased* from 56 percent in 1995 to 47 percent in 2000; likewise, those calling themselves "pro-life" *increased* from 33 percent to 45 percent during the same time period.[3]

Key Supreme Court Cases on Abortion

January 22, 1973. In *Roe v. Wade*, the Court legalized abortion. The Court based its 7-2 ruling on a woman's constitutional right to privacy. This case established the "trimester framework" to determine when and how abortion services could be regulated. During the first trimester of pregnancy, the Court reserved for the pregnant woman and her physician the right to decide whether or not to terminate a pregnancy, generally without interference from the state. In the second trimester, states were allowed to regulate abortion procedures and services, but only in ways that could be reasonably related to protecting the health of the woman. In the third trimester, the government's interest in potential life became "compelling" at the point of viability, meaning that abortion could be regulated, limited, or even prohibited. States were not allowed, however, to prohibit abortion if it affected the life or health of the pregnant woman.

On the same date, in *Doe v. Bolton*, the Court struck down, also by a 7-2 vote, restrictions on facilities and procedures that could be used to perform abortions. The Court noted that a doctor's judgment about the necessity of an abortion may include "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient."

July 1, 1976. In *Planned Parenthood v. Danforth*, the Court, by a 6-3 vote, said that states may not give a husband the power to overrule his pregnant wife's decision to have an abortion and that the state may not prohibit the most common second-trimester abortion method at that time (saline amniocentesis). By a 5-4 vote, the Court also said that parents of minor, unmarried girls may not be given an absolute veto over their daughter's abortion choice.

January 9, 1979. In *Colautti v. Franklin*, by a 6-3 vote, the Court reaffirmed its intention to give doctors broad discretion in determining the timing of "fetal viability"—when a fetus can live outside the mother's womb. The justices said states can seek to protect a fetus that has reached viability, but that the determination of when that occurs must be made by doctors, not courts or legislatures.

June 30, 1980. In *Harris v. McRae*, the Court decided, 5-4, that public health care programs for the poor, such as Medicaid, need not cover abortions. The Court noted that while the government may not place obstacles in front of a woman seeking an abortion, it does not have to remove obstacles—such as poverty—"not of its own creation."

June 15, 1983. In three decisions led by one called *City of Akron v. Akron Center for Reproductive Health*, the Court ruled, 6-3, that states and local communities may not require that all abortions after the first trimester of pregnancy be performed in a hospital. The Court also held that states *can* require girls under age 18 to notify a parent, so long as they establish an alternative mechanism—such as a judicial bypass procedure—for girls who could not involve their parents to demonstrate they were mature enough to make the decision or that an abortion was in their "best interests."

June 11, 1986. In *Thornburgh v. American College of Obstetricians and Gynecologists*, the Court struck down, 5-4, Pennsylvania abortion regulations that would have required women to delay their abortions for at least 24 hours and said that doctors must inform them about potential risks of abortion and available medical assistance benefits for prenatal care and childbirth.

July 3, 1989. In *Webster v. Reproductive Health Services*, the Court provided states with new authority to limit a woman's right to choose abortion, but stopped short of reversing *Roe v. Wade*. In fact, it was the first time since that ruling that only four justices—less than a majority—supported *Roe* as originally formulated. The High Court upheld Missouri's restrictions on use of public money, medical personnel, or facilities in performing abortion procedures. Also upheld was a requirement that doctors determine, when possible, whether a fetus at least 20 weeks old is capable of surviving outside the womb, by testing lung capacity and conducting other tests.

June 29, 1992. In its most important abortion ruling since 1973, *Planned Parenthood v. Casey*, the Court voted 5-4 to uphold the core of its *Roe v. Wade* decision and affirmed that states may not outlaw abortions before viability. But a plurality of the Court upheld several abortion restrictions—including a 24-hour "waiting period" and specific counseling requirement—and said states may impose limits on women seeking abortions as long as they do not create an "undue burden." Thus, the Court's decision in *Planned Parenthood v. Casey* abandoned the legal framework of its 1973 *Roe* ruling and adopted a new test—abortion regulations will only be struck down if they place a "substantial obstacle" in the path of a woman seeking to end her pregnancy.

June 28, 2000. In *Stenberg v. Carhart*, the Court voted 5-4 to strike down Nebraska's ban on "partial-birth abortions" because it imposed an "undue burden" on women's right to end their pregnancies. The Court said the law, versions of which were also passed in 30 other states, lacked an exemption to preserve women's health and was so broadly worded that it could have been used to ban some of the most common abortion methods used after the first trimester.

In 1992, the Supreme Court explicitly modified Roe v. Wade with its decision Planned Parenthood of Southeastern Pennsylvania v. Casey. While the Court affirmed the legal right for women to terminate a pregnancy, it also allowed states to restrict abortion services under a new standard: at any point in the pregnancy, including the first trimester, as long as an "undue burden" (defined as a "substantial obstacle") was not created for the woman. This "undue burden" standard has generally been easier for states to meet when attempting to regulate abortion services, but the interpretation of what constitutes an undue burden is ongoing. Waiting periods, counseling requirements, regulation of abortion providers, parental involvement laws, and bans on abortion methods are among the restrictions still being negotiated in state and federal courts and legislatures.

The Current Policy Framework of Abortion

Public Health Programs and Private Insurance

Restrictions on the use of public funds for abortion have been a part of the legislative landscape since the 1970s. At the federal level, the Hyde Amendment continues to ban abortion coverage under Medicaid, unless a woman's life is endangered or the pregnancy resulted from rape or incest. Similar limits apply to a range of other federal departments and programs, including the Federal Employee Health Benefits Program, the health insurance plan for federal employees, their dependents, and retirees. Military health care coverage does not include abortion except in cases of life endangerment. Military personnel and their dependents are prohibited from obtaining abortion services at military facilities overseas (even if they wish to use their own funds), except in cases of life endangerment, rape, or incest.

Since the 1970s, federal law has generally prohibited the use of foreign aid funds for abortion services. In the early 1980s, the federal government implemented additional regulations restricting the activities of organizations that receive U.S. foreign aid to provide family planning services. This so-called "global gag rule" was lifted during the Clinton Administration, but the Bush Administration implemented a new version of the policy in 2001, forbidding organizations receiving U.S. international family planning grants from using additional funds of their own to provide legal abortion services, lobby for abortion law reform, or counsel or refer clients for abortion.

As of July 2002, thirty-two states (AL, AZ, AR, CO, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MI, MO, NE, NV, NH, NC, ND, OH, OK, PA, RI, SC, TN, TX, UT, VA, WI, WY) and the District of Columbia fund abortions only under specific conditions, generally when a woman's life is endangered or the pregnancy results from rape or incest. Of these, three (IA, WI, VA) also provide funds for other exceptional circumstances, such as fetal anomaly, while two (MS, SD) only do so in cases of life endangerment – in theory violating federal Medicaid law.[4] Fourteen states (AK, CA, CT, IL, IN, MA, MN, MT, NJ, NM, OR, TX, VT, WV) were under court order to pay for medically necessary abortions sought by low-income women under Medicaid. An additional four (HI, MD, NY, WA) use their own funds for these abortions, with one (MD) placing limits on the health conditions that qualify.

Eleven states (CO, IL, KY, MA, MS, NE, ND, OH, PA, RI, VA) also prohibit insurance coverage of abortion services for all public employees or in cases when public funds are used; most have some exceptions, such as in cases where the woman's life is endangered.[4] In five states (ID, KY, MO, ND, RI), abortion can only be covered through private insurance if done so through an optional rider with an additional premium (ID, KY, MO, ND, RI), but one (RI) is not enforcing this law.[5]

Policies Affecting Patients

Forty-three states have passed requirements that a young woman notify or get the consent of one or both parents before an abortion. Of these, thirty-two were in effect as of August 2002: eighteen consent laws (AL, ID, IN, KY, LA, ME, MA, MI, MS, MO, NC, ND, PA, RI, SC, TN, WI, WY) and fourteen notification requirements (AR, DE, GA, IA, KS, MD, MN, NE, OH, SD, TX, UT, VA, WV). For the remaining eleven, consent (AK, AZ, CA, NM, OK) or notification (CO, FL, IL, MT, NV, NJ) were not in effect largely due to court orders.[6]

The U.S. House of Representatives has voted several times, most recently in April 2002, to pass the Child Custody Protection Act (H.R. 476), which would make it a federal crime for anyone other than a parent or legal guardian to "knowingly" transport a minor across state lines for her to obtain an abortion if she has not met a parental notification or consent requirement in her home state. As in previous years, it remains to be seen if this bill will see action in the Senate.

Twenty-two states have passed requirements that women delay set numbers of hours (typically at least a full day or more) and receive state-specified counseling before an abortion. Seventeen have policies that are in effect (AR, ID, IN, KS, KY, LA, MI, MS, NE, ND, OH, PA, SC, SD, UT, VA, WI). Four do not currently enforce the requirements (DE, MA, MT, TN), and one (AL) has a law that has not yet taken effect.

Policies Affecting Medical Practitioners

Recently, a number of state legislatures have considered whether to adopt additional, detailed regulations governing abortion providers' medical practices and facilities. These regulations, and to whom they apply, vary considerably from state to state. Some examples include permitting state health departments to copy and remove patient records; mandating specific structural details, such as doorway widths, of spaces where abortions are performed; or mandating comprehensive and unique administrative reporting or quality assurance programs and special training for staff procedures. Seventeen states (AL, AZ, AR, CT, FL, KY, MI, MS, MO, NE, NC, PA, RI, SC, TN, TX, WI) and Puerto Rico currently have enforceable laws regulating abortion providers and abortions at any stage of gestation, including the first trimester.[8] Of these, six (AR, MS, NC, PA, RI, SC) have enforceable provisions also regulating second-trimester abortions, while an additional nine states (AK, GA, HI, IN, MN, NJ, SD, UT, VA) have enforceable regulations specific to second-trimester procedures.[8] In early 2001, the U.S. Supreme Court refused to grant review in the first case challenging one of these laws, which was passed in South Carolina.

"Partial-birth Abortion" Bans

In the 1990s, the emphasis in legislative debate over abortion shifted to types of procedures used after the first trimester of pregnancy—which account for a small proportion of the total number of abortions performed in the United States. Some abortion opponents began to refer to one method—dilation and extraction (D&X), a variant of the more common second-trimester procedure, dilation and evacuation (D&E)—as "partial-birth abortion."

Between 1995 and 2000, the House and Senate passed a bill outlawing so-called "partial-birth abortions" three times. Former President Clinton vetoed the legislation twice—in 1995 and 1997. Both times, override attempts succeeded in the House, but the Senate fell short of the two-thirds majority needed to do so. During the 1999-2000 session, the House and Senate voted again to approve versions of the bill, but differences in the two measures did not get reconciled and sent to the President before the Congressional term ended.

In 2000, in Stenberg v. Carhart, a divided Supreme Court struck down a Nebraska law banning "partial-birth abortions." Voting 5-4,, the justices said that the law imposes an "undue burden" on a woman's constitutional right to decide to end her pregnancy. The Court found that the Nebraska law was written so broadly that it could criminalize the D&E method as well as the D&X method.[9]

The Court also took issue with the fact that the Nebraska law did not include an exception to preserve a woman's health, even in situations where doctors considered the banned method the best way to do so. Justice Sandra Day O'Connor, who was a crucial fifth vote for the majority, wrote a concurring opinion that said some version of a "partial-birth abortion" ban might be constitutional if it were crafted to only prohibit the D&X procedure and included an exception if the life or health of the pregnant woman was at risk.

Nebraska was one of thirty-one states that passed "partial-birth abortion" bans.[10] Some state legislators have begun crafting new bans in light of the Supreme Court decision, and Congress is likely to consider the issue again. Recently, the Judiciary Committee of the U.S House of Representatives approved a new version of a "partial-birth abortion" ban, which—unlike previous years—has the President's support.

"Born-Alive Infants Protection Act"

The debate over "partial-birth abortion" is believed to have helped pave the way for the "Born-Alive Infants Protection Act" (HR 2175). Passed in August 2002, the measure gives federal rights to a human fetus "born alive" at any stage of development. Any "live birth" that might occur during an attempted abortion is explicitly included. Essentially, the legislation amends the legal definition of a "person," "human being," "child," and "individual" in federal laws and regulations to include any "born alive infant," meaning that it is completely outside of the woman's body and has a beating heart or other signs of life. The law also states that it does not "affirm, deny, expand, or contract the legal status of a fetus." Abortion opponents strongly supported this legislation, while abortion rights advocates did not actively oppose it.

Medical Abortion

In September 2000, the FDA approved mifepristone (also known as "RU-486") for use as a medical abortion method. The FDA found the drug, when used with a second drug called misoprostol, to be safe and effective in terminating early pregnancies.[11] FDA approval was preceded by clinical trials conducted between 1994 and 1995 by the Population Council, the non-profit research organization that holds the U.S. patent for mifepristone.

Mifepristone is being marketed as *Mifeprex*, an early option pill, by Danco Laboratories, a New York-based company licensed by the Population Council. As distribution has gotten under way, questions remain as to whether insurance plans—both public and private—will cover this abortion method in a manner similar to surgical abortions. Some lawmakers, including members of Congress, are debating whether new laws should be adopted to specifically regulate these types of pregnancy terminations. Anti-abortion groups have filed a petition with the FDA calling for the agency to withdraw its approval of mifepristone.[12]

Clinic Violence

Many abortion facilities received threatening mail and hoax overnight packages during the fall of 2001, when the U.S. population was on heightened alert to the possibility of receiving anthrax in their mail.[13] These were the latest episodes in the ongoing harassment and violence experienced by abortion providers and their staff, which led abortion rights advocates to seek protection from legislatures and the courts. In response, states passed a myriad of laws in the 1990s, and Congress adopted the Freedom of Access to Clinic Entrances Act (FACE) in 1994, making it a federal crime to engage in certain violent, threatening, obstructive, and destructive conduct intended to injure, intimidate, or interfere with those seeking to obtain or provide reproductive health services.

The U.S. Supreme Court has refused appeals by abortion opponents who argue FACE violates the First Amendment. However, the justices have ruled in three other cases brought against abortion opponents for their actions at the workplaces and homes of abortion providers – lawsuits that were among the hundreds filed by physicians and clinics in the 1990s. Most recently, in 2000, a 6-3 majority of the Supreme Court upheld a Colorado law making it a crime to "knowingly obstruct" another person's entry to or exit from a health care facility. Hill v. Colorado found that it is constitutional to bar any person within 100 feet of a facility's entrance from coming within eight feet of another person—without their consent.

References

[1] CDC, Abortion Surveillance—United States, 1998. MMWR, 2002, 51(SS03);1-32 and CDC, Abortion surveillance: preliminary analysis—United States, 1997. MMWR, 2000, 48, No. 51 and 52.

[2] Henshaw SK, Unintended Pregnancy in the United States, Family Planning Perspectives, 1998, 30:24-29, 46.

[2] Gallup Surveys, January 2002, January 2001, March-April 2000, March 1996, and September 1995.

[4] Center for Reproductive Law and Policy, Fact Sheet: Portrait of Injustice: Abortion Coverage Under the Medicaid Program, July 2002.

[5] The Alan Guttmacher Institute, Restricting Insurance Coverage of Abortion, August 2002.

[6] Center for Reproductive Law and Policy, Fact Sheet: Young Women's Access to Abortion Services, June 2002; The Alan Guttmacher Institute, Parental Involvement in Minors' Abortions, August 2002.

[7] The Alan Guttmacher Institute, Mandatory Waiting Periods for Abortion, August 2002.

[8] Scott Jones Bonnie, Targeted Regulation of Abortion Providers: Avoiding the "TRAP," Center for Reproductive Law and Policy, May 2001.

[9] Annas GJ, Partial-birth abortion, congress, and the constitution, New England Journal of Medicine, 1998, 339:279-283.

[10] Center for Reproductive Law and Policy, Fact Sheet: "Partial-Birth Abortion" Ban Legislation: By State (December 2000); The Alan Guttmacher Institute, The Status of Major Abortion-Related Laws and Policies in the States, October 2000.

[11] Spitz I et al., Early pregnancy termination with mifepristone and misoprostol in the United States, New England Journal of Medicine 1998, 338:1241-7.

[12] Lueck S, "Antiabortion Groups Petition FDA to Withdraw Mifeprex Approval," Wall Street Journal, August 21, 2002.

[13] Lewin T, A Nation Challenged: The First Mailings; Anthrax is Familiar Threat At Nation's Abortion Clinics," New York Times, November 7, 2001.

For additional free copies of this publication (#3270), please contact our Publication Request Line at 1-800-656-4533.

The Henry J. Kaiser Family Foundation: 2400 Sand Hill Road, Menlo Park, CA 94025 (650) 854-9400 Facsimile: (650) 854-4800
Washington Offices: 1450 G Street, N.W., Suite 250, Washington, D.C. 20005 (202) 347-5270 Facsimile: (202) 347-5274
Request for Publications: (800) 656-4533 http://www.kff.org