Affidavits, electronic signatures

Number: INFORMAL

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The Honorable Lawson Lamar
State Attorney, Ninth Judicial Circuit
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Mr. Thomas B. Drage, Jr.
Orange County Attorney
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Dear Mr. Lamar and Mr. Drage:

You have asked whether a law enforcement officer may electronically transmit an arrest (booking) affidavit that is signed electronically from a remote computer to be used to book the arrestee into jail. If so, you also ask whether the officer, pursuant to Chapter 117, Florida Statutes, may electronically make a certificate of an administered oath (notarize an affidavit) from a remote location to be sent to the booking location. A further question is whether the electronically transmitted certificate of an administered oath (notarization of an affidavit) may be executed at a remote location different from where the officer is located if the affiant officer electronically identified himself or herself and the certificate of oath is signed electronically. Finally, if the foregoing may be done, are the requirements of Florida Rule of Criminal Procedure 3.140(g), fulfilled.

You state that Orange County has developed an Integrated Criminal Justice Information System that potentially will streamline the entry of data into the county's criminal justice system and will speed the flow of data from investigating officers to the jail, the clerk and other participating agencies. An important component of the system will be the process of electronically inputting arrest affidavits. You are concerned, however, about the legal sufficiency of electronically transmitted signatures and notarizations to support the booking of individuals into jail and as the legal basis for a charging document.

Part I of Chapter 668, Florida Statutes, is the "Electronic Signature Act of 1996."[1] Section 668.004, Florida Statutes, states, "Unless otherwise provided by law, an electronic signature may be used to sign a writing and shall have the same force and effect as a written signature." It is the responsibility of each agency head to adopt and implement control procedures to ensure adequate integrity, security, confidentiality, and auditability of business transactions conducted using electronic commerce.[2]

Part II of Chapter 668, Florida Statutes, section 668.50, Florida Statutes, is the "Uniform Electronic Transaction Act."[3] Section 668.50(17), Florida Statutes, provides that each governmental agency shall determine whether, and the extent to which, such agency will create

and retain electronic records and convert written records to electronic records. Pursuant to subsection (18)(a) of the statute,

"Except as otherwise provided in paragraph (12)(f), each governmental agency shall determine whether, and the extent to which, such 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."[4] (e.s.)

Section 668.50(7), Florida Statutes, sets forth the legal recognition of electronic records and signatures:

"(a) A record or signature may not be denied legal effect or enforceability solely because the record or signature is in electronic form.
(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in the formation of the contract.
(c) If a provision of law requires a record to be in writing, an electronic record satisfies such provision.
(d) If a provision of law requires a signature, an electronic signature satisfies such provision."

If a law requires that a record be retained, that requirement is satisfied by retaining an electronic form of the information. Such electronic form must accurately reflect the information set forth in the record after the record was first generated in final form as an electronic record or otherwise and must remain accessible for later reference.[5]

The use of electronic signatures to execute warrants has been judicially recognized to be within the discretion of the issuing magistrate, based upon the reasoning that when a judge issuing a warrant directs that an electronic signature be used, it is clear that the judge is attesting to the act of issuing the warrant.[6] This reasoning was found to be consistent with the general rule that absent a statute or rule prescribing the method of affixing a signature, a signature may be affixed validly by a number of different means. The court further recognized that the Legislature's enactment of the "Electronic Signature Act of 1996" indicates an increasing acceptance of this alternative signature form.[7]

In Attorney General Opinion 2005-34 this office recognized the authority of a property appraiser to accept electronic records, including those for which a signature is required, and store such information electronically. Clearly, the statutory provisions in Parts I and II of Chapter 668, contemplate the valid use of electronic signatures. As noted above, however, each governmental agency is responsible for making the determination of whether electronic signatures will be used in particular circumstances.

I would note that any consideration of the use of an electronic signature procedure must take into account the requirements of Florida Rule of Criminal Procedure 3.120. Although section 92.525, Florida Statutes, authorizes verification of documents by signing the statutorily proscribed written declaration set forth in section 95.525(2),Florida Statutes,[8] a Florida district court has concluded that such a written declaration would not be in compliance with the requirement in Rule 3.120 that a complaint be in writing and sworn to before a person authorized to administer oaths.[9]

Section 668.50(11)(a), Florida Statutes, states:

"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 by applicable law 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. Neither a rubber stamp nor an impression type seal is required for an electronic notarization."

Thus, the notarization of electronic signatures is authorized by law, as long as the notary's signature is attached to or logically associated with the signature or record. When notarizing a signature, however, a notary public must complete a jurat or notarial certificate that must contain, among other elements, a statement "[t]hat the signer personally appeared before the notary public at the time of the notarization."[10] Section 117.107(9), Florida Statutes, provides:

"A notary public may not notarize a signature on a document if the person whose signature is being notarized is not in the presence of the notary public at the time the signature is notarized. Any notary public who violates this subsection is guilty of a civil infraction, punishable by penalty not exceeding $5,000, and such violation constitutes malfeasance and misfeasance in the conduct of official duties. It is no defense to the civil infraction specified in this subsection that the notary public acted without intent to defraud. A notary public who violates this subsection with the intent to defraud is guilty of violating s. 117.105."

While the Legislature has authorized the notarization of electronic signatures, the notary public may notarize such signatures only if they are signed in the physical presence of the notary. Accordingly, it would not appear that a notary public may notarize a document at a different remote location or at the booking office outside the physical presence of the officer who is signing the affidavit. It may be advisable to bring this to the attention of your legislative delegation to determine whether changes should be made to accommodate changing technologies.

Finally, in regards to whether the above would fulfill the requirements of Florida Rule of Criminal Procedure 3.140(g), it would be advisable to seek direction from the chief judge of your judicial circuit. Such determinations must necessarily be made by the judiciary and not by this office.

Sincerely,

Joslyn Wilson
Division Director
Opinions Division

JW/als/tfl
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[1] Section 668.002, Fla. Stat.

[2] Section 668.006, Fla. Stat.

[3] Section 668.50(1), Fla. Stat. Cf. s. 668.50(3)(b), Fla. Stat., providing that this section does not apply to a transaction to the extent the transaction is governed by a provision of law governing the creation and execution of wills, codicils, or testamentary trusts; the Uniform Commercial Code other than ss. 671.107 and 671.206 and chapters 672 and 680; the Uniform Computer Information Transactions Act; or rules relating to judicial procedure.

[4] *See* s. 668.50(18)(c), Fla. Stat., providing that "[e]xcept as otherwise provided in paragraph (12)(f), this section does not require a governmental agency of this state to use or permit the use of electronic records or electronic signatures." *And see* s. 668.50(2)(g), (h), and (i), Fla. Stat., respectively defining "Electronic record," "Electronic signature," and "Governmental agency":

"(g) 'Electronic record' means a record created, generated, sent, communicated, received, or stored by electronic means.
(h) '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.
(i) 'Governmental agency' means an executive, legislative, or judicial agency, department, board, commission, authority, institution, or instrumentality of this state, including a county, municipality, or other political subdivision of this state and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency."

[5] Section 668.50(12), Fla. Stat.

[6] *See Haire v. Fla. Dep't of Agric. & Consumer Servs.*, 870 So. 2d 774, 789 (Fla. 2004), quoting *Florida Department of Agriculture and Consumer Services v. Haire*, 836 So. 2d 1040, 1059-60 (Fla. 4th DCA 2003). *See also Amendments to the Rules of Judicial Administration--Rule 2.090*, 681 So. 2d 698, 700 (Fla. 1996) (Supreme Court stating its intention to "cooperate with the Secretary of State in implementing any electronic signature processes and procedures in the court system"). *Cf. State v. Hickman*, 189 So. 2d 254, 259 (Fla. 2nd DCA 1966) (warrant may be validly issued with a rubber stamp signature as long as the issuance of the warrant was the act of the judge, i.e., the signature was the attestation of the judicial act).

[7] 870 So. 2d 774, 790 (Fla. 2004).

[8] Section 92.525(1) permits verification

"(a) Under oath or affirmation taken or administered before an officer authorized under s. 92.50 to administer oaths; or
(b) By the signing of the written declaration prescribed in subsection (2)."

Section 92.525(2), Fla. Stat., states:

"A written declaration means the following statement: 'Under penalties of perjury, I declare that I have read the foregoing [document] and that the facts stated in it are true,' followed by the signature of the person making the declaration, except when a verification on information or belief is permitted by law, in which case the words 'to the best of my knowledge and belief' may be added. The written declaration shall be printed or typed at the end of or immediately below the document being verified and above the signature of the person making the declaration."

[9] *Crain v. State*, 914 So. 2d 1015 (Fla. 5th DCA 2005) (absent a valid exception to the provisions of Florida Rule of Criminal Procedure 3.120, the specific requirement that the affidavit be sworn to before an individual authorized to administer oaths must be strictly complied with). *Cf., State v. Shearer*, 628 So. 2d 1102 (Fla. 1993) (verification under section 92.525, Fla. Stat., is sufficient to comply with the oath requirement under Fla. R. Crim. P. 3.850). *See Crain* at 1021, noting that district courts have not extended the scope and application of Shearer beyond postconviction motions.

[10] Section 117.05(4)(c), Fla. Stat.