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February 9, 2010

Received

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Lieutenant Governor Greg Bell
State Capitol Building, Suite 200
Salt Lake City, UT 84114

Greg Bell
Lieutenant Governor

RE: USE OF ELECTRONIC SIGNATURES ON INITIATIVE PETITIONS

Dear Lieutenant Governor Bell:

You have requested an opinion with regard to the use of electronic signatures in connection with initiative petitions. As chief election officer, you are concerned since sponsors of some initiatives are currently soliciting electronic signatures through a website in support of their initiative, claiming that such electronic signatures are lawful and will be counted by the county clerks and Lieutenant Governor. Further, other sponsors are contemplating similar efforts with their initiatives. My review and analysis of the statutory provisions indicates that the laws governing initiatives do not contemplate or allow for the use of electronic signatures and the statutes concerning the use of electronic signatures do not require that they be accepted in the initiative process.

The legislative power of the state is vested in the Legislature and in the people (through the initiative and referendum¹ process). Utah Constitution art. VI, § 1. Art. VI, § 1(2)(a) allows the Legislature to prescribe the conditions and manner in which the citizens may exercise the power of initiative and referendum. The process and procedures for initiatives and referenda are set forth in Utah Code § 20A-7-101 et seq.

¹Initiative is a new law adopted directly by the people. A referendum means a law passed by the Legislature that is submitted to the people for their approval or rejection. Utah Code § 20A-7-101(6) and (15).

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In order for sponsors to get an initiative placed on the ballot, they must obtain legal signatures totaling ten percent of the votes cast for all candidates for governor in the prior general election and in at least 26 of the 29 state senate districts, Utah Code § 20A-7-201(2). Sponsors initially make application with the Lieutenant Governor to circulate their proposed law. Section 20A-7-202. The Lieutenant Governor furnishes to the sponsor a copy of the initiative petition/packet in the form required by § 20A-7-203, along with one signature sheet. Section 20A-7-204. That initiative petition/packet has an initial section explaining what it is, with a notice that each signer is certifying that he or she has personally signed the petition and is a registered voter or intends to become one. The initiative petition/packet also includes a copy of the proposed law and signature sheets. Section 20A-7-203. At the “final page” of the initiative petition/packet after the signature sheets, there is a verification to be signed by the circulator that the names were signed by persons who professed to be who they were and they were signed in the presence of the circulator.

After that initial packet is prepared, the sponsors of the petition arrange and pay for the printing of additional copies of the initiative petition/packet. Utah Code § 20A-7-204. The statute contemplates that after the sponsors have prepared sufficient initiative packets, they return them to the Lieutenant Governor who assigns a unique number to each of the individual packets and returns them to the sponsors for circulation. After the sponsors have circulated the initiative petitions and obtained the signatures, each packet is delivered to the county clerk in the county in which the petition was circulated for the county clerk to certify those signatures that are of a registered voter. Section 20A-7-206.

While the Legislature could have designed various ways for this process to occur, it is clear that the Legislature contemplated that this was a paper-based process, with the initiative petition/packets being bound sheets of paper. The “initiative packet” is defined as “a copy of initiative petition, a copy of the proposed law, and the signature sheets, all of which have been bound together as a unit.” Utah Code § 20A-7-101(7). The provision concerning the form of the initiative petition/packet indicates that it is to be “printed” and contain various items. Section 20A-7-203. Section 20A-7-204 calls for the creation of an initial initiative petition/packet, but the sponsors then pay for “the printing of all additional copies,” and that the creation of those separate packets are constructed by “binding a copy of the initiative petition, a copy of the proposed law, and no more than 50 signature sheets together at the top in such a way that the packets may be conveniently opened for signing.” Section 20A-7-204(4)(b).

Those bound individual packets are then individually numbered by the Lieutenant Governor. Section 20A-7-204(5). The statute mandates that each signature sheet, which is part of each of those packets, shall “be printed on sheets of paper 8 ½ inches long and 11 inches wide.” Section 20A-7-203(2)(a). Finally, each signed and verified packet is delivered to the county clerk. Section 20A-7-206. Each of these separate provisions contemplates these packets to be made

from paper, circulated as paper packets, and the signature applied to the paper signature sheet for final delivery and analysis by the clerk.

The initiative provisions not only appear to contemplate the obtaining of written signatures on paper but also appear to specifically not allow for electronic circulation and electronic signatures. The circulation process, i.e. the submitting of the petition to voter for his or her signature, is recognized as a critical moment of delivering political speech in the interaction between the circulator and the signer. Buckley v. American Constitutional Law Foundation, 525 U.S. 182, 197-202 (1999). Further, the circulator certifies that “the names that appear in this packet were signed by persons who profess to be the persons whose names appear in it, and each of them signed his name on it in my presence.” Section 20A-7-203(3). The processes of the signatures being signed “in the presence” of the circulator, along with obtaining the signature on the “sheets of paper” in the initiative packet, are difficult if not impossible to do electronically.

The Utah Supreme Court discussed the circulation and form requirements for initiative packets in Page v. McKeachnie, 2004 UT 65, 97 P.3d 1290. The Court referenced that the overall structure of title 20A, Chapter 7, concerning initiatives “contains a number of built-in devices intended to ensure valid signatures.” *Id.* at ¶ 4. Those devices included the certification by the signer concerning who they are and their qualifications, the certification by the circulator of his or her observances of the persons who signed it and that the signer professed to be who they wrote they were, along with the reference to criminal penalties for falsely signing the petition or certification. The Court concluded “We believe that compliance with these requirements deserves some measure of deference from the county clerks” and that the “deference to the effectiveness of the precautions against fraud or mistake in the statute itself requires exercise of a presumption in favor of” the validity of the signatures. *Id.* at ¶ 4. The Court thus recognized that the process specified for preparation of the packets and their circulation, including being paper-based, were effective security measures designed to ensure the collection of valid signatures and to protect against fraud.

Some sponsors are arguing that the Uniform Electronic Transactions Act, Utah Code § 46-4-101 et seq., allows for utilization of electronic records and electronic signatures in connection with initiatives. While there are some provisions which, taken out of context, lend some facial support to the argument,² the provisions of that Act do not apply.

Utah Code § 46-4-103(1) states: “[T]his chapter applies to electronic records and electronic signatures relating to a transaction.” Section 46-4-105 goes on to provide:

²See, e.g., Utah Code § 46-4-201(3) and (4): “If a law requires a record to be in writing, an electronic record satisfies the law” and “If a law requires a signature, an electronic signature satisfies the law.”

- (1) 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.
- (a) This chapter applies only to transactions between parties each of which has agreed to conduct transaction by electronic means.

(Emphasis added). Thus, the Electronic Transactions Act applies generally to those situations where the parties to a transaction agree to allow electronic documents, records, or signatures. The consensual nature of the use of electronic records and signatures under the Act is highlighted by the provision that allows the parties to vary by agreement the use, applicability, and meaning of electronic records, signatures and actions. Section 46-4-105(4).

Utah Code § 46-4-501, concerning state governmental agencies, further clarifies that the Act only applies when the parties to the transaction agree to its application. Section 46-4-501(1)(a) and (b) authorize a state governmental agency to make rules to identify transactions that an agency is willing to conduct by electronic means and those that it will never conduct by electronic means. If the Act applied to all agencies and their transactions, such rule-making authority would not only not be necessary but would be contrary to the statute. Further, that section goes on to explicitly make electronic transactions not mandatory on state agencies,³

Except as provided in § 46-4-301(6)⁴ nothing in this chapter requires any state governmental agency to:

- (a) Conduct transactions by electronic means; or
(b) Use or permit the use of electronic records or electronic signatures.

§ 46-4-501(4) (Emphasis added) The Electronic Transactions Act by its terms is not mandatory on the state or applicable to initiatives or referenda.

There is no evidence or basis to conclude that the state has agreed to conduct transactions – meaning the solicitation, obtaining, and retention of signatures in connection with initiatives – by electronic means pursuant to Utah Code § 46-4-105. In addition, there are no rules, policies, or procedures of the state allowing or regulating the use of electronic signatures in initiatives. An agreement allowing the use of electronic signatures or web-based circulation of a petition in an initiative effort would have to contain specific security procedures and protocols to ensure the collection of valid signatures and to avoid the dangers of fraud. Those procedures should be as effective as those in the current paper based initiative process. There has been no discussion and

³Subject to certain exceptions none of which are relevant here. See Utah Code § 46-4-503.

⁴Concerning records retained as electronic records and their use or retention for evidentiary, audit or like purposes

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approval of any such security measures by the state and there is no agreement authorizing the use of electronic signatures in initiatives incorporating those security features.

The statutory provisions specifying the processes and procedures for the circulation of initiative petition/packets and the gathering of signatures do not contemplate or allow for the use of electronic signatures. Further, the Uniform Electronic Transaction Act does not require the acceptance of electronic signatures nor is there any agreement with the state authorizing or allowing their use in connection with initiatives. Therefore, electronic signatures that are gathered in connection with the pending initiatives do not comply with current statutory provisions and should not be allowed or counted toward satisfying the signature requirements of Utah Code § 20A-7-201(2).

Sincerely,

A handwritten signature in black ink, appearing to read "Mark L. Shurtleff", with a large, sweeping flourish at the end.

MARK L. SHURTLEFF
Attorney General

MLS/slc