

NEW YORK STATE CHIEF INFORMATION OFFICER
CIO/OFT
NEW YORK STATE OFFICE FOR TECHNOLOGY

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MELODIE MAYBERRY-STEWART, Ph.D.
CHIEF INFORMATION OFFICER
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April 1, 2009

Dr. Mohammed Shaikh
President
Image X
6144 Calle Real #200
Santa Barbara, CA 93117

Re: **ClerkePass Software System**

Dear Dr. Shaikh:

This is in response to your question to the New York State Chief Information Officer/Office for Technology (CIO/OFT), concerning whether the New York State Electronic Signatures and Records Act (State Technology Law, Article III; hereinafter ESRA) supports the use of certain electronic signature technology incorporated in your company's ClerkePass software system. Our response to your question is strictly based on our understanding of the electronic signature component that is used in your ClerkePass system as described in your company's literature that appears on the ClerkePass website. In particular, our response relies on the information contained in your company's whitepaper entitled "ClerkePass, Creating a Digitally Certified Document Space."

From our review of this documentation, it appears to us that the digital signature solution that is employed in your ClerkePass system is an electronic signature as defined in ESRA. Therefore, a person who attaches or logically associates such a signature component to an electronic record, with the intent to sign that record, would be electronically signing such a record under ESRA. In this regard, and unless specifically provided otherwise by another law, ESRA allows a person in New York State to use and accept an electronic signature and record in lieu of a signature affixed by hand or a paper record. Where persons agree to use or accept the same, electronic signatures and records have the same force and effect as signatures affixed by hand and records produced in paper format. ESRA does not force any person or entity to use or accept electronic signatures or records.

Additionally, ESRA excepts certain documents from its applicability. Section 307 of ESRA lists those documents that are excepted to include wills, trusts, DNR orders, powers of attorney,

health care proxies and any other document providing for the disposition of an individual's person or property upon death or incompetence or that appoints a fiduciary of an individual's person or property. ESRA also excepts most negotiable instruments and other instruments of title, as well as any conveyance or other instrument recordable under Article 9 of the Real Property Law. I suggest that you confer with your own attorney in deciding what, if any, documents to be generated by your ClerkePass system would fall within these exceptions.

Since ESRA recognizes that other laws can specifically except the use of electronic signatures and records with certain documents or in certain transactions, you also should check with other State and local authorities on whether other laws or regulations administered by those government entities would preclude the use of electronically signed records like the documents you envision being generated through ClerkePass. For instance, birth, death, marriage and other vital statistic certificates in this State are governed by the Public Health Law and subject to the authority of the Commissioner of the Department of Health. I suggest that you contact that State agency about whether its laws or regulations have any implications on the use of the ClerkePass system with such documents.

Finally, it appears to us that your company, through its role in the ClerkePass system, may be acting as a certificate authority (CA) as that term is defined in the ESRA regulation at 9 NYCRR § 540.2(c). CIO/OFT adopted the ESRA regulation to establish standards and procedures to govern the use and acceptance of electronic signatures and records in accordance with that Law. The regulation, at § 540.4(d), provides that when a governmental entity uses or accepts an electronic signature involving the services of a CA, the CA must meet certain standards and operating practices. You and your attorney should review the definition of a CA, and those CA standards and operating practices that appear in the regulation, prior to marketing the ClerkePass system in New York State so as to ensure compliance with any applicable regulation.

This letter reflects CIO/OFT's informal advice and opinion on this matter, and is only meant to assist you with respect to the matters specifically addressed herein. No other person or entity is entitled to rely on the opinion and advice provided herein. This letter represents the view of CIO/OFT at the time it was written and is based on ESRA as it exists at this time. Nor is this letter intended to endorse the ClerkePass product for sale or use in New York State or in any other jurisdiction. I hope that this information is of assistance to you. Please contact me should you or your attorney have any questions with any of the matters addressed herein.

Sincerely,



John J. Aveni, Esq.

cc: Dr. Melodie Mayberry-Stewart
Susan Beaudoin, Esq.