MASSACHUSETTS LAWYERS WEEKLY

Email communications result in hard lessons for attorneys, clients

By: Brandon Gee January 9, 2014

While the speed and convenience of electronic mail are unquestioned, many still consider what they say in email unofficial until confirmed in a signed hard copy.

But if you or your clients are firing off first-impression responses to emails from a phone on a commuter train — believing you'll have a chance to talk to stakeholders and revise your response more formally the next morning — a host of rulings suggest that you're asking for trouble.

Decisions in Massachusetts state and federal courts in recent years have established that email conversations are weighty enough, for example, to satisfy the statute of frauds and make an unsigned purchase and sale agreement enforceable; bind parties to a settlement agreement that had yet to be formally executed; and fulfill the notice provision of a contract, even though the contract did not include email in a list of permitted methods for providing the notice.

On the flip side, a Superior Court judge in 2013 ruled than an email purporting to accept an offer was not binding because the offer stated that it needed to be signed and returned. So, attorneys and their clients also can make the opposite mistake of relying too heavily on email.

When navigating such fraught waters, experts say caution and exactitude are paramount.

"I try to make it a practice, when it comes to important emails, not to send it until I've thoroughly thought about it, written a draft and checked with the client," said Keith E. Glidden of Verrill Dana in Boston. "That's especially true since emails are the preferred communication of modern business as well as modern litigation. It seems like very rarely do we ever send written letters any more. I've had settlement discussions over email this month and last month."

Massachusetts' adoption of the Uniform Electronic Transactions Act in 2004 cemented the validity of electronic contracts and signatures, but gray areas still exist — for example, when judges try to draw lines between informal and binding email conversations or when additional final documentation is discussed over email but never executed.

Alan E. Lipkind of Burns & Levinson in Boston also advises a look-before-you-leap approach.

"I think people have always been cautious on paper, but need to get that way with emails and text messages," he said. "It's a difficult balance because you don't want to stifle [communication between] the people out there in the world of business, but when people are getting close to a transaction and they consult with us, we tell them to be very cautious about what they put in writing. … If you're not cautious, you're opening yourself up to a dispute."

Learning the hard way

It's a lesson several litigants — and even their lawyers — have learned the hard way.

Last June, U.S. District Court Judge Nathaniel M. Gorton ruled in *Hansen v. Rhode Island's Only 24 Hour Truck & Auto Plaza Inc., et al.* that an informal email exchange between the opposing parties was sufficient to constitute a binding settlement agreement. A receiver had been appointed for the defendant business after the email exchange and tried to back out of the deal before the agreement could be memorialized in a formal document.

"Both parties clearly expressed mutual assent to the terms when plaintiff's counsel wrote [in an email] that '[the plaintiff] will accept [the defendant's] settlement offer' and defendants' counsel responded 'Glad we were able to get it done,'" Gorton wrote.

Lipkind represented the plaintiffs in the Superior Court case *Feldberg, et al. v. Coxall.* His clients were the prospective buyers in a real estate transaction that went sideways after the parties had agreed to the deal via email.

While the defendant seller claimed the email exchange did not satisfy the statute of frauds — which requires real estate and certain other contracts to be in writing and signed — Judge Douglas H. Wilkins denied a motion to dismiss in 2012, reasoning that an email's "signature block" or "'from' portion" may have satisfied the signature requirement.

The case ultimately settled out of court.

"[T]he courts have not yet set forth rules of the road for the 'intersection between the seventeenth-century statute of frauds and the twenty-first century electronic mail,'" Wilkins wrote. "The parties' conduct here in using e-mail to conduct the negotiations in this case arguably constitutes an agreement to conduct transactions by electronic means."

While Wilkins painted the issue as one of first impression, Superior Court Judge Dennis J. Curran went a step further in 2013 on a motion for summary judgment in *Corporate Development Associates Inc. v. Staples Inc.*, ruling that the Uniform Electronic Transactions Act "made it clear that an electronic record may satisfy any law that requires a written memorandum."

"As a result of the adoption of the Uniform Act, courts have ruled that multiple emails between the parties, so long as they contain all the essential terms, may create a binding contract and satisfy the statute of frauds," Curran continued.

Nonetheless, Curran rejected the plaintiff's argument that a particular email exchange at issue in the case constituted a binding agreement because it did not evidence "a meeting of the minds on the essential terms of the transactions between the parties."

Dot the I's

"The question the court has to answer is, 'Did the email messages indicate an intent to be bound?'" said John R. Bauer of Birnbaum & Godkin in Boston. "As long as they show that they intended to be bound, it's enforceable."

Bauer said that can be true even in situations in which an email conversation references the pending execution of a more formal agreement, or when a contract states agreement or notice needs to be provided in a form other than email.

In the 2011 summary judgment decision in *Grimm, et al. v. Venezia*, Superior Court Judge Christopher J. Muse ruled that an email satisfied a notice provision in a purchase and sales agreement even though the provision stated that "all notices and mailings of any nature contemplated hereunder shall be sufficient if in writing and delivered in hand or if mailed, by certified mail, return receipt requested, postage prepaid, sent by facsimile, supported by printed receipt to noticed party or sent by overnight delivery service."

While Muse found that "there is no such limiting language to suggest that these methods were meant to be the only methods of notice permitted," he also ruled that "even in cases when a contract contains explicit limiting language, courts have upheld notice given in a way technically not allowed but in the spirit of the notice provision."

But while Bauer agrees that an email likely will satisfy as sufficient notice in such situations as long as there is "no

dispute about time or delivery," he still advises lawyers to accept offers and provide notice in the manner proscribed.

"As a best practice, you want to dot the 'I's and cross the 'T's," he said. "You don't want to have to litigate the issue of notice if you can avoid it."

That lesson is driven home by a 2013 Land Court decision in *Host v. Gray*, in which the plaintiff charged the defendant with breaching an agreement to sell real property. Judge Harry M. Grossman found that no valid enforceable contract had been proven by the plaintiff and granted the defendant's motion for summary judgment.

The plaintiff buyer made an offer, which the defendant seller conditionally accepted through an email from his broker before ultimately refusing to move forward with the deal. Grossman rejected the plaintiff's claims because the plaintiff "specified the precise manner in which defendant was to accept," namely, that the offer should be signed and returned.

"The plaintiff was entitled to specify the manner of acceptance, but once doing so, he is then bound by that requirement," Grossman wrote. "When the defendant failed [to] accept in the requisite manner prior to the deadline, the offer, by its own terms, was deemed rejected and no contract was thereafter formed."

Best practices

Framingham's Richard D. Vetstein said the enforceability of agreements reached electronically is an especially "hot area" in real estate and business transactions. Vetstein said he even gets questions from agents and brokers about whether they can hold someone to statements made via text message, and he suspects most judges will increasingly disregard delineations between different forms of written communication, as in some of the cases discussed above.

"We're going to be seeing more and more of these kinds of cases coming down the pipeline," Vetstein said. "Judges are certainly aware of how technology has changed in real estate. The reality is the vast majority of deals are negotiated via email now. … The courts are going to look less at the formality and more at what was said and the intention of the parties."

As such, Vetstein said he advises his clients that anything they put in writing could come back to bite them in one way or another. He also recommends that they consider appending a disclaimer to their emails that states: "Emails sent or received shall neither constitute acceptance of conducting transactions via electronic means nor shall create a binding contract in the absence of a fully signed written contract."

"The courts haven't decided whether or not that's really going to matter or mean anything," Vetstein said, "but my view is it can't hurt. The worst it can do is annoy someone when they see it. But the courts are going to look at what was said, when it was said, and how it was said. So it's really a case-by-case thing."

Bauer agreed and noted, for example, that when a lawyer has an automatic boilerplate disclaimer appended to every email stating that nothing in the email constitutes legal advice, but then proceeds to provide legal advice in the email, that attorney is not likely to receive a pass if the question comes up in court.

It's necessary to be cautious and explicit in each individual email communication if one doesn't want to be legally bound, he said.

"If a party is exchanging emails and it wants to make clear that it doesn't want to be bound, that needs to be made clear in the email," Bauer said. "If a lawyer is negotiating on behalf of a client and needs to get back to a client to go over the terms of the agreement, the lawyer needs to say so. Lawyers need to be very careful in email to say these are probably acceptable terms, but I need to run them by my client."

Recent email-related rulings

- U.S. District Court: *Hansen v. Rhode Island's Only 24 Hour Truck & Auto Plaza Inc., et al.*
- Superior Court: *Feldberg, et al. v. Coxall*

- Superior Court: *Corporate Development Associates Inc. v. Staples Inc.*
- Superior Court: *Grimm, et al. v. Venezia*
- Land Court: *Host v. Gray*

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