Caught in the Web?

Beware Your E-mail Becoming A Binding Contract

By TODD RATNER

E-mail is a method for exchanging text-messages and for sending other types of computer files over the Internet. The primary benefits of E-mail over traditional hard-copy correspondence are speed, convenience, and verification feedback. However, E-mail negotiations in a contractual setting can be a dangerous form of communication, yielding unexpected results for the unwary.

What one party believes is a casual exchange of E-mail correspondence may be interpreted as a binding agreement by the second party, and more importantly, by the courts.

Generally, an enforceable contract is formed when a party unequivocally manifests its assent to be bound by the terms outlined in the other party's offer. Specifically, there are three factors necessary to create a contract: 1) an offer, 2) acceptance, and 3) consideration. Moreover, Massachusetts has a "statute of frauds" that requires any contract for the sale of real estate to be in writing and signed by the party to be charged.

For the most part, the tried and true rules of contract law that make the traditional paper and ink communication enforceable make E-mail communication enforceable. This rule may be counterintuitive with what many people regard as the informal or casual nature of the E-mail medium. However, courts clearly indicate that E-mail correspondence may form an enforceable contract.

In The Massachusetts state court decision of *Shattuck v. Klotzbach,* the seller and buyer exchanged a series of E-mails agreeing on the basic terms of a residential real estate conveyance. Ultimately, the seller wished to terminate the negotiation. The seller argued that the E-mails were not signed documents, as required by the Massachusetts statute of frauds and, therefore, there were not a binding contract. The court refused to dismiss a complaint by the buyer alleging breach of a contract for the sale of a multi-million dollar home.

The court held that one party to a real estate transaction could not cancel the purchase and sale agreement simply because it had been negotiated and agreed upon by E-mail. The case turned on whether or not the E-mail contained the required signature. The court ruled that a "typewritten signature," as was the case here, could suffice to bind the parties to the transaction. The court found that a reasonable 'trier of fact' could conclude that the E-mails drafted and forwarded by the seller to the buyer contained the essential terms of the conveyance and were "intended to be authenticated by the defendant's [seller's] deliberate choice to type his name at the conclusion of the E-mails."

The Shattuck case above raises important issues for those individuals who communicate and negotiate by E-mail. Without question, there are advantages to negotiating via E-mail. However, the notable conveniences associated with E-mail communications can blind users to both its positive and negative consequences. Frequently, people erroneously believe that E-mail correspondence is just the precursor to a more thought-out comprehensive signed document. Therefore, great care should be exercised when using E-mail.

Most E-mail applications permit users to create and automatically attach an information block to the user's E-mail correspondence. Typically, this block includes the sender's name, address, and other contact information. Also, as a matter of habit, users often type their names at the end of the E-mails.

To avoid unintentionally creating an enforceable contract via E-mail correspondence a party may attempt to remove ambiguity about the meaning of typed names, signature blocks or other E-mail subject matter. It can be prudent to provide language that typewritten names contained within the E-mail document are for contact purposes only and are not the "signature" of the sender.

However, if the text of the E-mail sounds like an assent it will be an arduous task to argue that there was no intention to be bound. The language of the E-mail will most likely influence how the signature will be interpreted. Likewise, it may be beneficial for the E-mail correspondence to contain an express statement that the language contained therein is non-binding. But, E-mail disclaimers are often form language and the determination as to whether or not a party assented to the agreement is likely to include not only the party's language contained within the E-mail, but also the conduct and other language of the parties.

Due to the legal significance of E-mail communications, it is suggested that prior to commencing E-mail negotiations, a face-to-face meeting or a telephone discussion between the parties or, alternatively, their agents, is advantageous. In Massachusetts, it is traditional and often highly effective to use business brokers or agents to facilitate these initial discussions. A conversation between the parties or agents will oftentimes build substantial rapport between the negotiators. In the absence of prior traditional means of correspondence, E-mail communication may lead to unwarranted suspicion, confusion of terms, and misunderstanding of intentions, which may ultimately create disastrous consequences like unintentionally assenting to a binding agreement. Developing familiarity, outlining the basis of an agreement, and creating expectations between the parties prior to initiating E-mail negotiations, facilitates mutual assent and eliminates unexpected results.

People communicate differently in E-mails than in traditional writings and verbal communication. Although it has been argued that allowing people to make a legally binding contract with as much ease as the sending of an E-mail may not be in peoples' best interest, E-mail correspondence may create unintended contracts. A party should not casually enter into contractual negotiations without being appraised of the potential pitfalls of their E-mail negotiations.

E-mail misconceptions need to be corrected. Naturally, any questions regarding E-mail negotiations or any other type of negotiations should be referred to counsel with expertise in negotiating contracts.

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