



## **E-MAILS IN THE WORKPLACE: BENEFITS & BURDENS**

By Steven R. Goldstein, Esq.\*

In a world not too long ago, businessmen and women communicated by written correspondence, copies of which generally remained in the possession of the author, recipient, and only those additional parties expressly provided copies of that document. Fast forward to the age of the internet and the creation of electronic mail, also known as e-mail. E-mails are used to communicate between individuals on both a personal and professional level.

With respect to the workplace, the advantages are clear: almost immediate communication between parties, as well as the ability to send and receive important information which, prior to the internet, was only available by regular mail and later by facsimile. E-mails permit individuals at work to conduct business at any hour of the day or night, anywhere in the world. Certainly, the expediency afforded the parties through electronic mail has benefitted corporations by reducing and, in some instances, eliminating downtime while awaiting receipt of important information.

E-mails are sent between parties, both internally within a company as well as to the outside world. As we are all now well aware, the greatest benefit afforded by e-mail has also proven to be one of its greatest burdens. That is, immediate dissemination, globally, with the inability to retract or “take back” that which has been circulated by simply pressing the “Send” button.

From a legal standpoint, e-mails have a profound impact on parties to an action. Specifically, the Courts have held that unless the communication is privileged, (i.e., strictly between a client and their legal counsel), the e-mail transmission may be discoverable during the discovery phase of litigation, as well as admissible at trial. With regard to discoverability, the Courts have gone as far as to permit parties to actually

clone an adversary's computer to obtain e-mails involving a particular project or transaction.

Now I know what some of you are probably thinking: So what if a communication between me and a party at a project is discoverable or admissible, as it is merely a communication with that party regarding the project. Under such circumstances, those communications often prove to be harmless. However, what happens when an internal or external e-mail, perhaps made in the heat of an argument, contains incriminating or disparaging statements. The answer is that, unless an argument can be made to prevent the production of such statements, those statements will be made readily available to all parties, including the adversaries in litigation.

In addition to being discoverable and admissible in litigation, such statements may also be actionable against the party who created the e-mail as being libelous or slanderous. Libel and slander involve the communication of false information about a person, group, or entity that is harmful to that person's, group's, or entity's reputation. Slander is defamation that is spoken and libel is defamation that is placed in writing. As such, e-mails would involve libel.

To recover for libel, or slander, the plaintiff must prove the following:

- (a) the conveyance of a defamatory statement by the defendant;
- (b) publication of the statement to a third party, other than the plaintiff;
- (c) the plaintiff is identifiable in the defamatory statement; and
- (d) plaintiff sustained injury to his or her reputation as a result of the defamation.

Defenses available to libel, or slander, include:

- (a) truth;
- (b) consent;
- (c) accident; and
- (d) privilege.

The truth of a statement is an absolute defense to defamation. Another defense involves the plaintiff consenting to the publication of the defamatory statement. Similarly, accidental publication of a defamatory statement is a defense. Lastly, a privilege afforded to, among others, attorneys, judges, jurors and witnesses often

protects their statements on public policy grounds. Also, since defamation is a false statement of fact, a statement of opinion is not defamatory.

## **CONCLUSION**

In the construction world, as well as in all other areas of business, and in our personal lives, e-mails play an important role by providing almost instant communication between and among parties 24 hours a day, 7 days a week. In the construction world, this has resulted in reduction, and in some instances, elimination of project delays and prompt resolution of on-site issues resulting in significant cost savings to all involved. However, as discussed, these e-mails do not exist in a vacuum, but rather are available for the world to see. Therefore, we cannot impress upon you enough the importance of carefully reviewing your e-mails, if necessary with your respective supervisors, prior to pressing the “send” button in order to protect yourself against potential liability exposure at a later date, should an issue arise with respect to the services performed by you and your company at a project.

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