

The Perils of E-mail

by

**Richard C. Gagliuso
Gagliuso & Gagliuso Professional Association**

Electronic mail is a part of our personal and professional lives that is here to stay. The preparation and delivery of mail and other documents electronically has become commonplace, and few of us could conceive of doing without this means of communication. Yet, far less well known are the legal pitfalls associated with the use and exchange of e-mail and other project documentation in electronic format, including plans and specifications, correspondence, job cost records, financial spreadsheets and other documents in routine use among contractors.

E-mail and other information in electronic form have become the focus of the phase of litigation, known as “discovery,” in which information is exchanged between the parties. Particularly in construction disputes, where so much of the record of a project is now in electronic form, attorneys are zeroing in on electronic documents in their search for harmful admissions and other evidence relevant to the claims and issues at hand. As the focus of discovery shifts from paper records to those in electronic form, the perils of e-mail are becoming apparent.

One of the reasons why discovery of electronic records is so attractive to attorneys representing parties in construction disputes is that contractors, among others, have not yet come to appreciate the permanent nature of e-mail. For some reason, we still tend to think of e-mail as having an ethereal existence in cyberspace, as opposed to the more tangible hard copy of a document. We also tend to believe that e-mail and other documents, once deleted, no longer exist at all. Documents created in electronic format, however, have a far more permanent existence on the hard drive of a computer than the paper records we once used. Such records are almost always recoverable, with the use of widely available software, regardless of whether they

have been deleted. And of course, in the case of e-mail, all such exchanges take up permanent residence on more than one hard drive, and we rarely have any control over more than one.

Nevertheless, attorneys know that these misconceptions about the permanent nature of documents in electronic format lead many of us to exercise less caution with respect to e-mail than we would in memorializing our thoughts on paper. This casual approach is particularly prevalent in the case of internal communications within a company. Unfortunately, all e-mail stored in, or recoverable from, any computer in your office is subject (assuming its relevance) to production in discovery, regardless of whether the communication was merely internal.

Another attractive feature of e-mail and other electronic records, from the point of view of the construction litigator, is that drafts are often available. This means that the letter you wrote in frustration or in anger, but had the good sense to edit before sending, comes back to haunt you when the hard drive of the computer on which the letter was written is subjected to examination by your opponent's computer expert. It means that the earliest versions of plans and specs, intended for use by no one, are now available for comparison with those ultimately issued by the design professional. A series of drafts of any document creates a trail and reveals far more of the thought process of the drafter than the finished version will ever reveal.

Still another reason why e-mail is a fertile source of damaging information is the ease with which e-mail is copied, and then forwarded, to third parties. This means, for example, that the e-mail you intended for your own attorney but copied to your project manager, who then forwarded it to the architect on the project, who then forwarded it to the owner, is no longer protected by the attorney-client privilege and is subject to discovery, and use against you, in litigation. It also means that an e-mail intended for narrow circulation has been distributed to countless third parties, some with interests adverse to yours.

Contractors need to understand that these concerns are not merely hypothetical. Indeed, the first salvo in any construction dispute today is likely to consist of a letter from your opponent's counsel advising you that all documents, including those in electronic form, must be preserved in contemplation of litigation. From that point forward, the destruction or deletion of

electronic records, whether intentional or inadvertent, may subject you to subsequent sanctions for “spoliation” of evidence.

Moreover, once litigation is commenced, you are likely to find yourself on the receiving end of discovery requests which seek, in the most intrusive and comprehensive manner possible, the production of all documents related to the project out of which the dispute arises. Such requests may require you to produce not only documents that exist in either hard copy or electronic format, but all of the hardware that may house such items. In other words, you are increasingly likely to find yourself producing, for examination by your opponent’s expert, your computer hard drives (both desktop and laptop), your handheld devices, your cellular telephones, and any other equipment on which relevant information may be stored.

As you might suspect, apart from the practical burdens associated with this kind of discovery, the cost of discovery in the electronic age can be substantial. One of the many issues with which the courts are still struggling is how to allocate the costs associated with the production of electronic records between the parties. Based on the early decisions in this area, the party producing such records appears likely to be held responsible for all or a substantial share of such costs.

The question is how, if at all, contractors and other business people should modify their behavior to address these concerns. Clearly, the train carrying e-mail and other electronic document systems has left the station, so to speak, and it is impractical to curtail their use to any significant degree. Simply put, the benefits of using these tools outweigh the risks. Contractors must never lose sight, however, of the fact that virtually every time they (or someone in their office) sits down to send e-mail or create a document using a computer, a record is being created which is subject to disclosure in the context of any subsequent dispute. Accordingly, caution -- to a degree even greater than that which once guided putting pen to paper -- must be exercised at all times. In generating communications or other documents, contractors must remain mindful of the possibility that what they are saying and doing may be exposed, to a greater extent than ever, to scrutiny by those with whom they are at odds. And perhaps most importantly, all those

individuals within the company who are in a position to make potentially damaging admissions must be alerted to these concerns and trained to respond to them.