New Jersey Law Journal
statewide legal authority since 1111
An ALM Publication
MONDAY, JUNE 27, 2016 NJLJ.COM

LEGAL TECH

The Use (and Misuse) of Emails in the Construction Industry

By Loryn P. Riggiola
and Alana T. Sliwinski

Few, if any, new construction projects can transition from concept, design, build and deliver without technology propelling it forward. Digital communication happens at every level with various devices. From building information modeling, AutoCAD drawings and, increasingly, drones, the modern construction site is infused with digital accessories gathering information, monitoring sites and reporting progress in a manner not envisioned 20 years ago.

While the technology utilized may differ amongst companies, their employees all likely fully integrate technology into their personal lives, through email, text messages, Facebook, Instagram and other social media communications. Indeed, in 2013, the U.S. Census Bureau estimated 83.8 percent of U.S. households owned computers. Simply put, technology is everywhere and is enmeshed into our daily living from waking up to a cellphone chime to food shopping online for direct delivery.

These convenient media facilitate sharing not only of personal, but also, just as easily, confidential work information. Even the New Jersey Supreme Court recognized that, with technological advancements in the personal and professional spheres, "the line separating business from personal activities can easily blur." *Stengart v. Loving Care Agency*, 201 N.J. 300 (App. Div. 2010).

To preserve the professional from the personal on the construction site, it is imperative that design professionals ensure their employees and consultants follow guidelines and protocols on the use (and misuse) of these communications or information. While an employer cannot review each email or photograph before it is sent, it can combat harmful emails and reduce improper social media uploads from being transmitted by educating employees and adopting and enforcing workplace policies. This article presents practical tips and best practices for employers to follow.

Treat Email Communications Like Paper

Emails have all but supplanted fax machines and formal letters as the primary workplace communication mode. The speed of construction projects coupled with the informality of emails can beget a series of legal challenges unearthed only

after a dispute arises. For example, it is not uncommon for construction projects to commence without a formal contract and instead the parties agree through terms outlined in emails, purchase orders or verbal understandings. Oncein the field, emails capture daily site changes and interactions between trades, and can identify potential defects. The ability to enforce an informal contract or establish cause for delay may rest upon the quality of the email, i.e., whether it is precise and unambiguous.

Employers must train employees to treat emails as like formal letters that include salient terms, are error free, unmistakable to the reader, and include a reservation of rights where appropriate. This avoids a trier of fact misinterpreting the email. A clear email could be the deciding factor granting a dispositive motion or finding that a question of fact exists to prolong the litigation and forcing more legal fees.

Emails Are Discoverable and Will Be Requested

All project personnel must understand that their emails are subject to disclosure in both state and federal actions. Indeed, New Jersey R.4:18-1 and the FRCP 34 specifically contemplates disclosing "electronically stored information" (ESI) as accessible by an opponent, unless otherwise exempt. Therefore, all internal and external project communications are ripe for release absent an exception. In practice, construction project emails frequently include personal information, inflammatory comments about others and criticisms of the employer. Employees must be made aware that these communications are likely not private, which is further reason to treat all emails like formal correspondence.

Loryn P. Riggiola
Partner
Zetlin & De Chiara LLP

Emails Exchanged Today, Last Forever

Aware that emails are ripe for discovery, employers must combat an individual user's false assumption that deleting a message from one's inbox actually destroys it. The misconception that deleted emails are irretrievable causes employees to draft informal emails they incorrectly presume will never again been seen. As any litigator knows, rarely are emails actually gone. Most companies link email accounts to automatically back-up to a server. Messages can be retrieved, also, on local hard drives in files accessible by information technology specialists, and forensic experts. *See, e.g. Steingart*, 201 N.J. at 325. It is imperative to start projects with an established communication protocol, and certainly after a claim arises, to remind employees that all messages must be preserved and produced.

Preserving the Attorney-Client Privilege

The speed of telecommunications lends itself to errors. And, at the push of the button, an employee can expose a company's attorney-client communications by adding an improper recipient. The attorney-client privilege applies to communications from a client to an attorney seeking legal advice and made in confidence. *Seacoast Builders Corp. v. Rutgers*, 358 N.J. Super. 524 (App. Div. 2003). The company owns the privilege, but it is effectuated through the corporate representatives, including officers and employees. *Macey v. Rollins Envtl. Services (N.J.)*, 179 N.J. Super. 535, 540 (App. Div. 1981).

• *Consultants, Independent Contractors and the Attorney-Client Privilege.* Preserving and protecting the attorney-client privilege on a construction site is complicated by the presence of consultants and independent contractors. The privilege applies unquestionably to a client communicating for the purpose of obtaining legal advice. A concern arises when emails involve the client, its consultants or independent contractors and counsel, as any privilege invoked could be subject to a challenge. *See, e.g., D&D Assoc. v. Bd. of Educ. of North Plainfield*, 2011 WL 1871110 (D.N.J. 2011). Within *D&D Assoc.*, emails between the owner, its counsel and consultants (general contractor and architect) were identified on a privilege log and challenged by waiver due to the presence of a third party, i.e., the consultants. The court preserved the privilege because the contractor and architect were contracted as the owner's representatives and

deemed to be agents facilitating the owner's legal representation.

The company bears the burden to establish that the privilege applies and that the third party's involvement was necessary to facilitate the legal relationship. No New Jersey case has specifically ruled whether the presence of the independent contractor destroys the privilege. Accordingly, emails with an independent contractor or consultant may potentially waive the privilege. To help preserve the privilege, a consulting agreement should include a provision that the contractor will assist legal representation for project claims.

• *Pre-claim Correspondence with Counsel.* Anticipating construction litigation is easy on projects with long delays and voluminous change orders. Often, counsel and experts are engaged before substantial completion to best position the company against potential litigation or arbitration claims. Communications with these attorneys, including emails, will be protected from disclosure if deemed privileged. *Hedden v. Kean University*, 434 N.J. Super. 1, (App. Div. 2013); N.J.S.A. 2A:84A-20(1); N.J.R.E. 504(1).

Once counsel is engaged, employees must take care to clearly delineate between project correspondence and privileged communications. This is of critical importance when a claim rises on a pending project. The discovery period likely will continue until project completion, which can be years into the lawsuit. To avoid co-mingling emails, litigation correspondence must diligently designate emails as "Privileged," "Attorney-Client Communication" or another clear designation to withhold from production. Moreover, emails must include in-house and outside counsel on litigation correspondence. Otherwise, privileged emails are susceptible to disclosure if it is not patently obvious the employees are discussing litigation, rather than a project-related issue.

Additionally, extreme caution must be used to keep privileged communications internal to the litigation team. It is all too easy to add project participants or forward them an email in a string of emails that should remain internal to the company and its attorneys. This is more likely to happen with mobile devices. If privileged emails are released, then the company must immediately demand the recipient delete all copies of the message or risk a court later determining the privilege was waived. Employees must also be instructed to not forward company emails to personal accounts and the company must determine if any employees used personal emails accounts to discuss project information with other participants. The same is true with social media when project participants friend one another; photographs, posts and instant messaging can all contain relevant and damaging information. While a company does not control these accounts for purposes of compelling disclosure, it must try to isolate its exposure.

Conclusion

The real-time transmission of project emails in the field offers a wealth of information in litigation. As a result, thousands of emails can be exchanged for each project, all of which may become discoverable evidence. Emails are a key source of information (both the good and the bad) that not only reveal the critical players, but often illuminate the disputed issues. Managing the use and misuse of personal and professional emails, social media accounts and photographs is necessary to avoid any surprise in litigation.

Establishing strict communication protocols now avoids later issues. Companies should consider designating an electronic information project leader responsible for electronic and digital project information. While these protocols may increase front-end project expenses, they will reduce exposure on the back end and ensure that these employees are properly trained regarding ESI for this project and many projects to come. ■