



FINISHING CONTRACTORS ASSOCIATION  
**CONTRACT  
INSIGHT**

# WHEN “YOU’VE GOT MAIL” MEANS “YOU’VE GOT A DEAL!”

E-mails reduce transaction costs and expedite communications, but their ease of use and the tendency toward informality can lead to liability. This Contract Insight will focus on some of the hazards to avoid when using e-mail in your business.

The following is an e-mail exchange between a flooring installer and supplier:

**FLOORING INSTALLER**

*“Hey, buddy, how’s it going? Hope to see your awesome boat on the lake on Friday. Could you provide that new flooring you showed me yesterday by the end of the month? We’ve got a big project coming up and the GC is pushing hard. I know it’s pricey, but if it is at the price quoted yesterday, it’s worth it because it would make the job go a lot easier!!!”*

**FLOORING SUPPLIER**

*“Me too! Yeah, no problem. We’ve got plenty in stock, so I’ll deliver it on the 20th.”*

**FLOORING INSTALLER**

*“Great and see you.”*

- *Has a Contract Been Established Between the Installer and Supplier?*
- *Is the Contract Enforceable?*
- *What Are the Terms of the Contract?*
- *Does it Matter if Neither Person Signed His Name to the E–Mails?*
- *Can E–Mail Serve as Evidence of a Contract at a Trial?*

**The short answer is the exchange probably created a binding contract. Any “gaps” in the contract would not prevent enforcement. Regardless, the e-mails would certainly be admissible at trial, even though nobody “signed” the e-mails.**

### Terms of an E-mail Contract

The informal nature of e-mail exchanges may lead to a contract that is spread over numerous e-mails without any mention of provisions normally found in boilerplate contract language. These missing terms may be implied from past conduct, industry custom or practice, or from Article 2 of the Uniform Commercial Code (“UCC”) in the case of a contract for the sale of goods. Construction contracts often contain provisions both for goods and services, so a court will look to the general character of the contract to determine whether the UCC or common law applies.

The UCC provides that a contract between merchants (as opposed to individual consumers) still exists if a party accepts the offer but states additional or different terms. The new or different terms become part of the contract unless they materially change the contract.

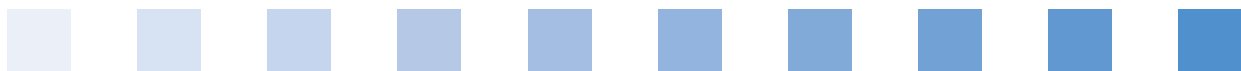
In a contract not involving the sale of goods (a/k/a supplies or materials), the common law provides that the parties must generally come to a “meeting of the minds” before a contract is formed, shown by an acceptance exactly matching the offer (known as “mirror image rule”). Parties contracting by e-mail should be cautious to expressly include the same terms they would include in a paper contract and to limit acceptance to the terms of the offer, if that is their intent. How strictly the mirror image rule will apply to e-mail contracts not covered by the UCC remains an issue for the courts to decide.

### Writing & Signature

As a general rule of contract law, a contract does not have to be in writing or signed to be enforceable, unless it falls under the Statute of Frauds. The Statute of Frauds varies from state to state, but usually requires that agreements be signed and in writing if they involve larger contracts that last over one year. Many state and local statutes and regulations also require a written signature for certain contracts like the sale of land.

In 2000, President Clinton signed the Electronic Signatures in Global and National Commerce Act (“E-SIGN”) (15 U.S.C. § 7001 et seq.), applying to interstate and foreign transactions. E-SIGN created no new substantive rules of contract law, but instead provides that signatures and contracts may be not denied legal effect solely because they are in electronic form. Essentially, if the law requires a record to be in writing or requires a signature, an electronic signature or record satisfies such law. Most states and the District of Columbia have adopted some version of the Uniform Electronic Transactions Act (“UETA”) statute, giving electronic records and signatures the same legal effect as ink signatures and paper records.

E-SIGN and UETA are “technology-neutral” and do not favor any form of electronic signature or contract over another. Nor does either E-SIGN or UETA require or force any party to use or accept an electronic contract or signature.



E-mails can be electronically or digitally signed. Courts have even held a typed name in the closing at the end of an e-mail message to constitute a signature for purposes of the Statute of Frauds. Hence, one particular hazard to watch out for is the default “signature block” many people have set their e-mail program to include automatically at the end of their e-mails when they hit “Send” or “Reply.” It is important to consider eliminating the automatic use of such signatures and to protect against the forgery or misuse of electronic or digital signatures in your e-mail account. It is equally important to remember to include a signature on an e-mail if you wish to form a contract.

Another hazard to watch for when using e-mail is that some contracts require a paper document and ink signature. Both E-SIGN and state enactments of the UETA contain numerous exceptions, such as for notices of default or where other statutes require that specific text or disclosures be signed or initialed.

Therefore, you should ask your attorney to check the relevant statute to determine its applicability to a particular transaction.

### **Recordkeeping & Evidence**

You wouldn’t sign a paper contract then throw it in the trash, would you? Well then, you shouldn’t simply delete every e-mail that comes into your inbox and put it in the “trash” either.

If you are in a dispute with another party, you have an obligation to preserve relevant information, including electronic information and data. For that reason, and because an e-mail must be authenticated if you wish to use it in court, it is important to establish and follow a policy of preserving electronic records, including e-mail messages. Your routine policy of preserving electronic records and data should extend to all records and data, not only e-mails establishing contracts. Improper destruction of any business record can lead a court to an inference of tampering ruling.

Minimizing paperwork is one of the benefits of using computer technology. Instead of printing every e-mail, it may be more convenient to set up a separate electronic mailbox into which incoming and outgoing e-mails are copied and regularly archived. Saving electronic copies of e-mails, rather than printing paper copies, also preserves transmission and reception information that often is not included when e-mails are printed – which can prove useful in attempting to authenticate an e-mail for use in court. Under E-SIGN, an electronic record may satisfy a law requiring the retention of a record or contract. However, that record must accurately reflect the information set forth in the contract and remain accessible to all persons who are legally entitled to access the record, in a form capable of later accurate reproduction, whether by transmission, printing or otherwise. Some laws may require a contract to be retained in its original form and E-SIGN provides that an electronic record, satisfying the above-mentioned requirements suffices.

The question of whether e-mail messages you have sent or received may be used in court depends on whether they can be authenticated. Courts have relied upon e-mails sent by a party, and produced by that party from its files, to satisfy the authentication requirement.

## Basic Rules for Using E-mail

- **Tactful Language.** Don't write anything you would be embarrassed about next week or next year. Don't disparage co-workers or competitors. Remember, e-mails can become evidence in litigation, and besides, you never know to whom that e-mail will be forwarded.
- **Authenticate.** Determine how you will authenticate the other party's electronic signature to make sure it hasn't been used fraudulently.
- **Signature Block.** Consider changing the settings on your e-mail program so that a signature block is not automatically included at the end of each message sent. Also consider including a disclaimer addressing your privacy and confidentiality policies.
- **Document Retention.** Establish and maintain a document retention policy which allows you to archive and retrieve your e-mail exchanges.
- **Careful Writing/Reading.** If you intend your e-mail to form a contract, proofread the e-mail as carefully as you would a traditional contract and consider adding language indicating that you have the specific intent to bind the other party, should they accept. Make sure you have conveyed your intentions clearly. Read the other party's e-mail equally carefully. Consider having your attorney review the e-mail exchange, just as you would with any other contract.

## Conclusion

Because of the ease of its use, many people tend to forget that e-mail messages can last a long time – even longer than a letter written on paper. The potential for an informal and perhaps inappropriate message to get into the hands of a jury, competing business, or reporter, should always be kept in mind. Likewise, binding contracts can be made without formal signatures or a detailed listing of terms.

Deliberate and considered e-mail messages can lower transaction costs and increase the speed of business. At the same time, care must be used to lower the risk of liability that could accompany an informal, thoughtlessly written and quickly sent e-mail.

(It is important to keep in mind that this Contract Insight is only a general overview of the law in this area. Because laws in individual states may vary, it is recommended that you seek independent legal advice.)

*The Finishing Contractors Association wants the Contract Insight articles to serve its members. Your feedback or topic suggestions are welcomed by contacting Steve Yoch at [syoch@felhaber.com](mailto:syoch@felhaber.com), or 1.800.989.6321, or Kristin Bromberg at [kbromberg@finishingcontractors.org](mailto:kbromberg@finishingcontractors.org), or 301.215.7026.*