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Think Before You Send—Impact on Design Professionals of Ill-Conceived Emails

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Email has become, perhaps, the most common form of business communication. What in years past would be discussed over a phone call or face-to-face meeting is now memorialized in emails. While email has the benefits of creating a written record (thus avoiding differing recollections of a phone call or meeting) and simplifying communication with multiple parties, the fact is many are too quick to “shoot off” an email, sometimes as an emotional response, without properly considering the content, audience or impact. The effect of a rushed email can be substantial and long-lasting.

In the context of litigation, email communications more and more frequently become critical evidence in construction and professional liability disputes involving architects, engineers, and other project professionals. What may begin as an informal project update, internal discussion, or hastily written comment can later be scrutinized by opposing counsel, experts, judges, and juries to establish contract formation, evaluate notice, assess project decision-making, determine whether the applicable standard of care was met, or determine ultimate liability. Once created, the email becomes a business record that must be maintained.

Courts and opposing litigants increasingly rely on emails and other electronically stored information (ESI) to establish material facts in a dispute. Internal emails have shown the capability to undermine defenses, expose inconsistent positions, and reveal contemporaneous knowledge of project risks or defects. At the same time, parties have faced sanctions for failing to preserve electronic communications once litigation became reasonably anticipated.

This article examines how emails and other electronic communications have shaped construction and design litigation, highlighting key case law and practical lessons.

When Your Email Becomes Your Contract

In disputes involving design professionals, emails can be used as extrinsic evidence to determine whether an enforceable contract existed and/or to interpret the terms and scope of a contractual agreement. Emails may be particularly helpful in this regard, as the primary goal of any court when interpreting a contract is to give effect to parties' intent in entering the contractual agreement. This is effectively demonstrated in the case of *Veolia Water Technologies, Inc. v. Antero Treatment LLC*.

In *Veolia*, defendant Antero approached Veolia to design and build a fracking wastewater treatment facility in West Virginia.[1] The project used Veolia's proprietary process to crystallize waste salt for landfilling and produce reusable or dischargeable water.[2] The parties executed a Design/Build Agreement (DBA) on August 18, 2015, and later executed Change Order 1 (CO-1).[3]

The DBA included power consumption guarantees of 505,500 kWh/day with chillers on and 340,000 kWh/day with chillers off.[4] Veolia proposed splitting the fourth effect of the crystallizer into 4A and 4B after the DBA to reduce chiller use, and its Project Director emailed that the 4B salt would remain suitable and stable for Antero's landfill strategy.[5] Internal Veolia communications before CO-1 warned the 4B salt could liquefy and that splitting was being pursued to meet power limits, but these risks were not disclosed to Antero before execution.[6] Antero approved CO-1 on December 16, 2015, relying on assurances that salt stability and performance guarantees would not change.[7]

When the facility began treating wastewater and producing waste salt in 2017, Antero found that the 4B waste salt was consistently "soupy."[8] Because the 4B salt was so wet and unstable, Antero was unable to landfill waste salt from the 4B effect without mixing in significant and expensive amounts of fly ash.[9] The 4B salt issue was never resolved and Antero canceled the DBA on September 12, 2019, after Veolia informed Antero that the salt issue could not be resolved and disclaimed responsibility.[10]

The district court found that Veolia breached the DBA and CO-1 by failing to provide compliant 4B waste salt.[11] It further held that a September 1, 2015 email from Veolia's Project Director, attached to CO-1, was incorporated by reference and created specific stability requirements for the 4B salt that Veolia failed to meet.[12] The Court of Appeals affirmed the judgment against Veolia, finding that "[t]he September 1 email reiterated a specific requirement for the 4B waste salt that was clearly and expressly detailed in CO-1—incorporating this requirement effectuates the intent of the parties."[13]

Beware of Spoliation

"Spoliation" is the destruction, alteration, or failure to preserve evidence relevant to a legal proceeding. It can be intentional or negligent and often leads to severe penalties in court. It is imperative that design professionals understand the concept and are mindful of spoliation when working on a construction project. Once created, the email must be preserved.

A leading case directly addressing email spoliation in a construction project dispute is *GenOn Mid-Atlantic, LLC v. Stone & Webster, Inc*. In that case, GenOn sought a declaratory judgment that it owed no additional payments under a construction contract with defendant Shaw for the design and build of air quality control systems at three power plants. Shaw moved for sanctions based on the spoliation of ESI belonging to FTI Consulting, GenOn's third-party audit and litigation consultant.[15]

The US District Court for the Southern District of New York found that GenOn's duty to preserve arose in mid-2009 when it "began to anticipate elements of this very litigation."[16] Despite that duty, GenOn failed to issue a litigation hold[17] until May 2011—nearly two years later—and never specifically instructed FTI to preserve its materials.[18] The court further found that GenOn acted with culpability (at minimum, negligence), and that FTI's audit-related communications were within GenOn's "practical control" due to FTI's ongoing litigation consulting relationship with GenOn.[19] Sanctions were ultimately denied only because Shaw could not demonstrate actual prejudice from the lost emails.[20] Rather, the restored backup tapes confirmed the consultant's testimony that he did not use email for substantive audit communications, and the few emails recovered were administrative in nature.[21]

Reconsider That Internal Email Before Sending

It is easy for all of us in this technological age to forget that originally private communications, such as internal emails, do not necessarily *stay* private. The below case from the United States District Court for the Middle District of Alabama demonstrates that perhaps the most powerful use of email evidence in design professional cases is when internal corporate communications are used as evidence to reveal a party's intent.

In *Glenn Construction Company, LLC v. Bell Aerospace Services, Inc.,* a federal district court applying Alabama law considered a dispute arising from the construction of a helicopter hangar, in which the general contractor brought claims against the engineer, BWSC, for breach of contract, fraud, and related claims.[22] A key piece of evidence involved was an internal July 23, 2007 email exchange between BWSC employees, Mott and Perin.[23] In the correspondence, Mott expressed concern about preparing a three-dimensional drawing because, "up until this point, [BWSC] had told [Glenn] that it is not [BWSC's] responsibility to do this" and feared that the contractor would argue "if BWSC had done this four weeks ago, there would not [have been] any delays with the rebar placement."[24] Petrin responded that the drawings were "intended for internal use" and not for issuance to

Glenn.[25] The court agreed with Glenn that "a jury could reasonably infer that BWSC did not want to provide Glenn with these drawings because they could potentially demonstrate that BWSC's designs for the foundation were incorrect and that Glenn was not at fault for the delay in placing reinforcement bars."[26] The court ultimately concluded that BWSC's internal emails created a genuine issue of material fact regarding the contractor's promissory fraud claims as to whether BWSC had the intent to deceive, thereby precluding summary judgment.[27]

Conclusion

In today's construction and design environment, where projects are increasingly collaborative, fast-moving, and digitally driven, email communications have become both indispensable tools and significant sources of litigation risk. Casual remarks, incomplete explanations, emotional reactions, or poorly documented decisions preserved in email chains can later be scrutinized by opposing counsel, experts, judges, and juries—often outside the context in which they were written.

The cases discussed here provide only a minute glimpse into the power that emails can have as evidence used in design professional disputes and litigation. It is critical to understand that, while emails can provide valuable project records and support legitimate claims or defenses, they can just as easily undermine positions when used carelessly. In construction and design disputes, where timelines, responsibilities, and decision-making are frequently contested, the written word often becomes one of the most persuasive forms of evidence. Organizations that recognize this reality and implement proactive communication practices will be better positioned to manage risk, preserve credibility, and protect their interests when disputes arise.

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[1] *Veolia Water Technologies, Inc. v. Antero Treatment LLC*, 564 P.3d 1089, 1095 (Colo. 2024).

[2] Id. at 1096.

[3] Id.

[4] Id. at 1098.

[5] Id. at 1102.

[6] Id. at 1097.

[7] Id.

[8] Id.

[9] Id.

[10] Id.

[11] Id. at 1099.

[12] Id. at 1096.

[13] Id. at 1103.

[14] *GenOn Mid-Atlantic, LLC v. Stone & Webster, Inc.*, 282 F.R.D. 346, 347 (S.D.N.Y. 2012).

[15] Id.

[16] Id. at 356.

[17] A litigation hold is a directive given to those who maintain files that all files (hard copy and electronic) must be maintained exactly as they exist, as a litigation has begun or one can be anticipated.

[18] Id. at 357.

[19] Id. at 355.

[20] Id. at 360.

[21] Id. at 359.

[22] *Glenn Const. Co., LLC v. Bell Aerospace Services, Inc.*, 785 F. Supp. 2d 1258, 1262-3 (M.D. Ala. 2011).

[23] Id. at 1270.

[24] Id.

[25] Id.

[26] Id. at 1278.

[27] Id. at 1276.

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