

## MODIFICATIONS TO CONTRACTS BY ELECTRONIC COMMUNICATIONS *The Consequences of Hitting “Send”*

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Email, text message, instant message, Twitter, Instagram...it goes without saying that it is becoming commonplace for business communications to take place through electronic means. Electronic communications facilitate an environment where the formalities of conventional written correspondence and telephone discussions are becoming the exception and near instantaneous electronic exchanges between parties, the norm. Despite its informalities, these electronic communications can form a contract or modify an existing contract.

### BASIC CONTRACTUAL REQUIREMENTS

At its most basic level, a contract requires an offer, acceptance and a meeting of the minds. There are certain classes of contracts that are subject to the statute of frauds and thus, must be in writing and signed by the party against whom the contract is being enforced. Such contracts typically contain a provision that prohibits oral modifications and specifically provides that any modification must be in writing and signed by all parties to the contract.

Courts considering the contractual consequences of an electronic communication have not stated a general rule and instead resolve the issue on a case-by-case basis. The analysis requires a determination as to whether the electronic communication contains the essential terms of the contract alleged, whether there is a final offer and acceptance, rather than continuing negotiations, and whether the communication is signed by the party against whom the contract is being enforced.

### CAN AN ELECTRONIC COMMUNICATION ALTER A CONTRACT?

On the issue of whether an electronic communication satisfies the statute of frauds, the Courts have typically taken the position that an electronic communication constitutes a “writing”. Instead the focus has been on whether such a “writing” has been signed by the parties against whom it is being enforced. Generally, the Courts consider whether the author engaged in some action to authenticate the electronic communication. Courts in California, Massachusetts, Missouri, New York and North Carolina, for instance, have concluded that the electronic signature of a sender that appears at the end of an email or other electronic communication constitutes a signature sufficient to satisfy the statute of frauds. Such a finding is consistent with the provisions of the Federal Electronic Signatures in Global and National Commerce Act and the Uniform Electronic Transaction Act, which has been adopted by several states. In the absence of an electronic signature, courts in New York, Illinois and Missouri, for example, have declined to hold that a signed writing exists and is an enforceable contract. Notwithstanding, the determination as to whether the electronic communication contains the required signature will be subject to the discretion of the Courts as they consider the intent of the parties and the scope of the definition of “signature” under the applicable state’s Uniform Commercial Code and related laws.



Beyond the question of whether the electronic communication satisfies the statute of frauds, the most common dispute centers on the intent of the parties and whether the electronic communication contains sufficient content to be an offer or an acceptance or to otherwise form a contract. Courts deciding this issue engage in an extensive factual analysis that considers the contents of the electronic communication and the conduct of the parties both prior to and after the exchange of the electronic communication at issues. The decisions have varied. For instance, one court held that an email proposing some terms of a contract left too much to be negotiated to be an offer and, thus, a purported acceptance by telephone was ineffective. In contrast, another court concluded that a chain of instant messages between the parties regarding new terms for an existing contract coupled with the parties conduct following those electronic communications demonstrated the existence of an enforceable modification to the contract. To provide some context to this latter decision, the parties were negotiating contract limits and the instant message exchange culminated in an offer to increase the limit to 2000 sales per day, a counteroffer of “NO LIMIT” and an acceptance evidenced by the response “awesome.” This “awesome” resulted in a one million dollar contractual obligation.

### HOW DO I PROTECT MY BUSINESS DEAL?

Because today’s technology and demands will not eliminate the use of electronic communications in the business setting, professionals must be aware of the consequences and impact of what is being communicated in informal exchanges. So, what does this mean for you? Hit send with caution. Determine whether persons in your organization who are engaging in electronic communications are authorized to negotiate or enter into contract terms. Implement procedures in the use of electronic communications and consider including a contractual provision specifically addressing whether contract modifications can occur through electronic communications. As technology becomes more advanced and even more engrained into daily business practice, electronic communications will likely also become more accepted by the Courts and the parameters of contracting through electronic means further defined.

**LOREN L. SPEZIALE** represents private and public corporations, privately held businesses, financial institutions, and individuals in transactional and litigation matters involving commercial and real property disputes, breach of contract claims, and employment-related actions. She is a speaker on various topics including the work product doctrine, the attorney-client privilege, and internet marketing and advertising.

**Gross McGinley’s Business Services Group** provides legal solutions to businesses of all sizes in and around the Lehigh Valley and throughout the United States. In addition to structuring, attorneys frequently assist in the legal aspects of daily business operations including contracting, regulatory compliance, governance, and human resources.