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A CONTRACTOR'S GUIDE TO THE INS AND OUTS OF MASSACHUSETTS' UNIFORM ELECTRONIC TRANSACTIONS ACT (PART ONE)

By Attorney Jonathan Sauer

I. INTRODUCTION.

In 2003, the Massachusetts Legislature enacted 'The Uniform Electronic Transactions Act', which I will refer to hereafter as the Act.

A 'Uniform Act' is a definitive statement on some kind of subject matter, a kind of 'model law' but one that is not actually any state's law until that state makes that 'Uniform Act' part of that state's statutory law by adopting it by an act of the legislature. Numerous examples of 'Uniform Acts' can be found. In Massachusetts, a great deal of the law surrounding retail sales and the negotiation or bank processing of checks is contained within the Massachusetts' Uniform Commercial Code. A great deal of law applicable to court-ordered support in divorce situations across state lines is contained in the Uniform Interstate Family Support Act, which is a Massachusetts variant of the Uniform Reciprocal Enforcement of Support Act.

The Act is simply a *massive* statute in length, containing eighteen separate sections. Statutes derived from 'Uniform Acts' are often longer because they are, after all, already written. Longer statutes, however, are not always *better* statutes, just as a forty page contract is not necessarily better – or *clearer* – than a four page contract. All those who are gluttons for punishment who would like to read this statute in its entirety can send me an email and I'll send you a copy. (Through another electronic transaction!)

In, 2014, the Massachusetts Rules of Civil Procedure, which govern the conduct of civil litigations from the filing of the complaint right up to the point of appeal, were significantly amended to deal with electronic information and transactions.

This *Squib* will discuss a few issues involved with electronic transactions, emails and this Act. Namely: (a) issues involved with the making of contracts electronically; (b) how this new technology has affected aspects of Massachusetts civil litigation, especially with regards to discovery; and, (c) some common sense suggestions and comments concerning the use, creation and retention of emails and emailed documents. Additional electronic transactions issues will be discussed in later parts of this series.

II. AN ELECTRONICALLY PREPARED AND SIGNED CONTRACT IS A 'WRITTEN' CONTRACT'. (OR, IS IT?)

This is provided for by M.G.L.A. 110G § § 7. Electronic signature; enforceability; satisfaction of legal requirements which provides that:

> " (a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
> (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
> (c) If a law requires a record to be in writing, an electronic record satisfies the law.
> (d) If a law requires a signature, an electronic signature satisfies the law."

Having said that, this Act also provides that one cannot be *forced* to deal with and accept electronic transactions. Section 5 of this Act provides:

> "(a) This chapter does not *require* a record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form.
> (b) This chapter applies only to transactions between parties each of which has *agreed* to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct . . ." (Emphasis added)

So, if one is attempting to get another party to participate in electronic transactions, better practice suggests that sufficient evidence be developed to be able to prove the other party's agreement to conduct business in this way. Conversely, for those parties *not* wishing to participate in electronic transactions, evidence of that desire and intention should be communicated to your potential contracting party. And, if that party's desires and attitudes in this regard are unknown, perhaps better practice would be that after one has attempted to create a contract electronically, that this is also followed up with a written confirmation in ink.
This may sound overly-cautious. But, anyone who has experienced lengthy and/or expensive and/or bruising litigation knows that trying to conduct oneself in ways likely to avoid such is a pretty good idea!

Okay. So, it looks like a contract can be created electronically, assuming the proponent of the contract can prove that the other side agreed to proceed in this manner.

Now, one needs a 'written contract' to be able to file a mechanic's lien. So, does that mean that where an electronic transaction may be sufficient to create a written contract, then one can use *that* 'written contract' to file a mechanic's lien?

Well, the answer – at present – is that this is not absolutely clear. That is because *another* section of this law (MGL C. 110G, s. 3) provides as follows:

". . . . (d) A transaction subject to this chapter shall **also** be subject to other applicable substantive law." (Emphasis added)

And, since MGL C. 254, s. 2 and s. 4 – the sections requiring a 'written contract' to file a general contractor lien or a subcontractor lien - are 'substantive law' then, conceivably, one could create a written contract through an electronic transaction that is not necessarily *enough* of a written contract to support a mechanic's lien.

Does that sound like double talk? Does that sound like double talk?

This is a good example about how inexact the law can be. So, this electronics statute was enacted in 2004. Fine. Well, in 2011, the subcontractor lien statute, MGLA C. 254, s. 4, received substantial modifications. But, these modifications primarily dealt with the lien rights of architects, engineers, land surveyors and site professionals.

MGL C. 254, s. 2A defines written contract as: " "Written contract", any written contract enforceable under the laws of the commonwealth." This statute was also amended in 2010. And, although in 2010 changes were made in the definitions of 'design professional' and 'professional service', the definition of a 'written contract' was not changed.

Of course lawyers are expensive! This is because our psychiatric bills are *much* higher than those of most other professions. Good drugs *cost money.* Because, the study of and the practice of law can simply drive you *crazy*!

Here's another example to show how truly obtuse the law can be.

In law school, they teach about a certain wills/trusts principle of law called the 'Rule Against Perpetuities'. It's exactly thirty-one words long. Yet, if the professor was correct, only one person has ever *truly* understood it and that individual wrote an explanation six thick volumes in length! It almost makes me want to study architecture. . . . . Well, *almost.* (I kind of lost my head there for a moment.)

Going back to mechanics liens, in 2010, a variety of other aspects of the mechanic lien process were modified by new legislation. But, nothing that I can find having to do with the definition or modification of the definition of a 'written contract'.

Now, one might think that six years after the electronic transactions statute was enacted, if the Legislature intended for an electronically-created contract to be a 'written contract' for lien purposes, that change would be made in the lien law, especially where that statute was receiving significant modifications any ways. But, they weren't.

My observations of the law-creation process are that statutes are created piecemeal, with different parts of a statute often created or amended at different times. But, when sections of a law are added or amended, quite often those drafters don't look at the rest of that statute to see what ramifications that amendment or modification will have on existing law. And, it seems that frequently the impetus for statutory change is through the urging of or political importance of a

particular trade group or association. There is no one in the Legislature watching the store to make sure that the various statutes are playing nicely together and consistent.

So, the lien law might be legislatively modified through a statutory amendment somewhere down the road to further define 'written contract'. Or, one of our two senior appellate courts might interpret or define these words as meaning a contract created by an electronic transaction, even though the statute is silent on this point. The United States Supreme Court often ascertains what the 'Founding Fathers' intent' was in writing the Constitution as applied to today's social mores and technologies that simply didn't exist back then. Go figure.

The German politician Otto von Bismarck is claimed to have said: "Laws are like sausages. It's better not to see them being made."

III. ELECTRONIC RECORDS ARE 'DISCOVERABLE'.

What does that mean?

In litigation, there are various ways for one party to obtain another party's information/documents/pretrial testimony though depositions. These procedures – and others – are called 'discovery'.

For a 'party' (someone who is a named participant in a court case), one does a request for production of documents, generally meaning that the person receiving such a request has to respond to such a request in thirty days, producing them shortly thereafter.

For a 'non-party' (someone who is *not* a named participant in a court case), a party can serve a subpoena on that person/company and he/she/it may have to produce such records in as little as seven days.

What records are 'discoverable'? What is 'discoverable' is any document that is 'reasonably calculated to lead to the discovery of admissible evidence'. This is interpreted *very* broadly and very liberally, the thinking behind this being that if all parties to a litigation are aware of all pertinent facts and documents, they are more likely to settle the case short of trial. (One has to keep in mind that in Massachusetts by the last statistics I am aware of, only about one percent of all civil cases goes through a complete trial. And, the court system has extreme trouble in even handling that level of business!)

The basic framework for the conduct of civil matters in Massachusetts is the Massachusetts Rules of Civil Procedure. In 2014, there were extensive amendments to these Rules to provide for electronic discovery. As contained within the Reporter's Notes to Rule 26 – which is the Rule generally describing discovery - are excerpts from a note that accompanied the Uniform Rules:

> "With very few exceptions, when the state rules and statutes concerning discovery in civil cases were promulgated and adopted, information was contained in documents in

> paper form. Those documents were kept in file folders, filing cabinets, and in boxes placed in warehouses. When a person, business or governmental entity decided that a document was no longer needed and could be destroyed, the document was burned or shredded and that was the end of the matter. There was rarely an argument about sifting through the ashes or shredded material to reconstruct a memo that had been sent.
>
> In today's business and governmental world, paper is a thing long past. By some estimates, 93 percent or more of corporate information is being stored in some sort of digital or electronic format. This difference in storage medium for information creates enormous problems for a discovery process created when there was only paper. Principal among these differences is the sheer volume of information in electronic form, the virtually unlimited places where the information may appear, and the dynamic nature of the information. These differences are well documented in the report of the Advisory Committee on the Federal Rules of Civil Procedure (Civil Rules Advisory Committee). The Civil Rules Advisory Committee recommended adoption of new Federal Rules to accommodate the differences . . ."

Rule 34 of the Massachusetts Rules of Civil Procedure, which has traditionally been a procedure to obtain production of documents from the other side, was amended in 2014 to include:

> "(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control: (A) any designated documents **or electronically stored information** -- including writings, drawings, graphs, charts, photographs, sound recordings, images and **other data or data compilations--stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form .** . ." (Emphasis added)

Much of the skullduggery involved with civil litigation involves the production – and *non*-production – of documents, things and information. Sometimes, key documents just seem to sort of *disappea*r. Please note that I do not myself necessarily advocate any of the following.

A very colorful lawyer once said that the key to success as a contractor was 'two failures and a fire'. The 'fire' would be used, presumably, to get rid of certain 'inconvenient' files and records the company would rather that it didn't have. A case I recently tried after eight years of litigation seemed to largely hinge on the content of one internal document, this one document being only one among many thousands of other documents involved with the project at issue.

But, in days gone by, those with paper records might have had a more productive way of moving their records from the file room by way of the shredder and into the conference room for the other side to examine. Because, with emails and other electronic transactions today, a company's 'records' are likely to exist as documents sent by one company to another or to a group of addressees through emails. And, since another entity has one's documents, control over who ultimately gets to see them is lessened. Put another way, the secrecy and confidentiality of documents is potentially lessened through the use of electronic transmissions. For, while a

party might be more than willing to make that stop between the file room and the conference room, some other recipient of that document *won't.*

There is an issue involved with evidence called 'spoliation'. Basically, what this means is that when one party has physical evidence that will be important also to the other side, allowing this evidence to be destroyed or physically modified can cause the party who allows this to happen to be subject to potentially serious court sanctions, including monetary sanctions.

So, a question may arise as to whether or not a party maintaining electronic information is doing so in a reasonable manner, consistent with that entity's business, to make sure that such electronic information is stored and maintained in such a way as to preserve it.

What happens when pertinent, relevant electronic information is destroyed, whether intentionally or otherwise? Can this cause that party to be subject to a variety of potential sanctions? Or, what happens when an important document is not present in a party's own documents but *is* available in some other company's records? Potentially, not good things.

IV. TWO THINGS TO WATCH FOR WITH EMAILS.

Some comments about things to watch for and avoid with emails from one who sits in front of a computer all day most days. Also, being one who receives and sends a great many emails on a daily basis, many of them containing sensitive information. One must always keep in mind that someday, your adversary in court might be looking at them. What do you want them to find?

(A) CARELESSNESS AND 'STREAM OF CONSCIOUSNESS' WRITING

There is a certain informality to emails. Look, we are all human** and human beings can be very messy and inconsistent animals, frequently swayed by emotions. Let's think about just one, for a moment. Anger.

You get a bill from someone you weren't expecting or higher than you were expecting. Someone doesn't show up on the jobsite when promised damaging your planned production. Someone is simply just pis**** you off.

An email is just so *available*. It's right there and doesn't require your dictating anything, waiting for some typist to type it. You can address the world, including the object of your scorn or anger. *Right now!*

A letter, on the other hand, is more measured. As many individuals lack themselves basic typing or computer skills, the actual production of a letter is often done by someone other than the writer.

A key protection built into the generation of a letter – not at all present with the generation of an email – is *delay*. In other words, there is a time period between the *idea* of a

written communication and that idea's being effectuated to the point that it can be sent. In some instances, this might be described as a 'cooling off' period. One can be angry in a certain situation on a Monday but indifferent to that same situation two days later on a Wednesday. But, one sending that angry email on a Monday can't take it back on a Wednesday.

Further, there probably is a greater tendency to organize one's thinking with a letter as compared with an email. Emails can be less organized, as one is literally making up the communication as one goes along. Sometimes, with disjointed ideas or thinking. Sometimes, with run-on sentences. Or, no sentences. In other words, 'stream of consciousness' writing.

Here's an example of stream of consciousness from James Joyce's novel "Ulysses":

Molly seeks sleep:

> "a quarter after what an unearthly hour I suppose they're just getting up in China now combing out their pigtails for the day we'll soon have the nuns ringing the angelus they've nobody coming in to spoil their sleep except an odd priest or two for his night office the alarmlock next door at cockshout clattering the brains out of itself let me see if I can doze off 1 2 3 4 5 what kind of flowers are those they invented like the stars the wallpaper in Lombard street was much nicer the apron he gave me was like that something only I only wore it twice better lower this lamp and try again so that I can get up early". *(Sic)*

Three things about this kind of writing. For one thing, it's messy. For another, it's hard to read and understand. And, composing thoughts in this fashion is more likely to create internal contradictions in a document.

For example, in one place, one might use the number '4'. But, in another place, while not intending on changing the number, the number still somehow comes out as a'6'. This could be very important in discussing pricing information on a change order or with regard to a proposal.

Since communications between parties may be considered as evidentiary 'admissions' down the road in litigation, writing an ill-conceived or poorly-written email can have significant ramifications. Your adversary – the other side – might reference that portion of the email with the '4', while you would prefer the email to be interpreted with the number '6'.

(B) FAILURE TO PRINT OUT IMPORTANT EMAILS AND EMAILED DOCUMENTS OR OTHERWISE STORING THEM OFF-SITE

There are several issues at work here.

The first is that people often don't print out their emails because they are, after all, on their computers, which they treat like a file room. The computer is always there and you know where to find something if you need it.

I have observed in visiting with clients that an ex-employee's computer just kinds of sits there by itself and doesn't get re-purposed to a new user. After all, that computer was Jane's computer. And, Jack is not Jane. Other than having an unconscious desire to respect one's privacy, another person could have a hard time getting data, information and documents off of Jane's computer because that other person does not understand how Jane organized and retained this information. Some of the documents might be password-protected. And, Jack has no clue what those passwords might be.

Another unfortunate result is that when computers fail, the data they contain may no longer be available no matter how many 'levels' one goes through with our friends at the frequently feckless but always well-intentioned Geek Squad!

If no written file was created from that computer, a company might unknowingly and unintentionally put itself in a position where it may not be able to access that computer's information. Which might cause them to be unable to comply with various specific record retention requirements that a company is required to observe.

Here's an example. M.G.L.A. C. 66 § 8, whose title is 'Preservation and destruction of records, books and papers', requires as to public records that:

". . . . every report of an agent, officer or committee relative to bridges, public ways, sewers or other state, county or municipal interests not required to be recorded in a book and not so recorded, shall be preserved and safely kept; and every other paper belonging to such files shall be kept for seven years after the latest original entry therein or thereon . . ."

Here's another example. M.G.L.A. C. 149 § 27B requires that records concerning the payment of prevailing wages on a public project be kept for a period of time of three years 'from the date of completion of the contract'.

Various tax statutes require that records be kept for at least three years.

Every company, then, relying heavily upon electronic information storage, will have to take important steps to make sure that this information is stored and available to comply with these statutes. Printing out emails and other electronic documents assists in this process. Getting more familiar with resources such as the Cloud and Microsoft One Drive might be some other alternatives. Me? I still haven't figured out Linked-in!

V. CONCLUSION.

Like it or not, electronically-stored, created and maintained information and documents are things of the present and not of the future. Particularly with the use of scanned documents, I am increasingly finding that attorneys are not looking for actual, written- in- ink signatures on important legal documents, such as settlement agreements. It behooves all businesses to store and maintain these records in such a manner as to preserve them. It can be anticipated that within the next ten years or so, significant additional substantive and procedural rules will be promulgated to accomplish just that. And, to punish those failing to make the grade.

In many regards, from a legal standpoint, this subject is truly in its infancy. What this Act means will be fleshed out by subsequent amendments and by court cases interpreting it.

In the interim, in terms of protecting yourself and your company, being more proactive with this subject than reactive seems to make a lot of sense. Doing law work for a few years now, things often turn out better when one is motivated by caution, even by an abundance of caution.

So, while one can probably trust electronic transactions for most purposes, if it were me, I'd get it in ink, as well. (We dinosaurs *liked* the Neolithic era!) For, until specific 'substantive law' provisions are specifically modified to address electronic transmissions and/or until the various appellate courts have spoken, there will always be a certain amount of risk, however small, that an electronic transaction does not replace the written transaction in all regards.

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* A *'squib'* is defined as 'a short humorous or satiric writing or speech'. Wiktionary defines a '*squib'* as: "a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses." ** Modern genome mapping has conclusively proved that at least 34.1% of all known lawyers have at least some human characteristics. (Provided that the lawyers are not also architects, in which case this percentage plunges.) Rodents, by comparison, have at least 63.2% of all possible human characteristics.

Jonathan P. Sauer
Sally E. Sauer
Sauer & Sauer
Phone: 508-668-6020
jonsauer@verizon.net; jonsauer@sauerconstructionlaw.com
sallysauer@verizon.net; sallysauer@sauerconstructionlaw.coml

Main Office
15 Adrienne Rd.
E. Walpole, MA 02032

Conference Facility
284 Main Street (Route 1A)
Walpole, MA 02081

All correspondence should be sent to the Main Office only.

www.sauerconstructionlaw.com

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