TEXAS LAWYER

An ALM Publication

texaslawyer.com | April 24, 2020

Best Practices for Texas Lawyers Negotiating Over Email

Texas lawyers should be acutely aware of legal developments in our state applying the familiar themes of contract law—such as offer and acceptance—to this digital landscape.

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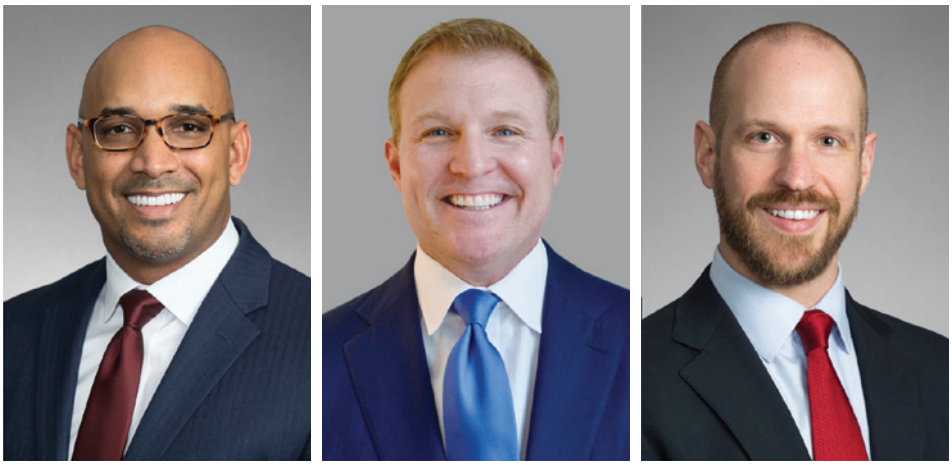
With many companies and law firms implementing work-from-home policies to cope with and help contain COVID-19, the digital trend in the practice of law has only accelerated. Especially now, an increasing number of settlement and contract negotiations are occurring over email. Texas lawyers should be acutely aware of legal developments in our state applying the familiar themes of contract law—such as offer and acceptance—to this digital landscape.



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The Texas Supreme Court recently examined when settlement negotiations by email can shade into a binding contract in *Chalker Energy Partners III LLC v. Le Norman Operating LLC*, No. 18-0352, at *1 (Tex. Feb. 28, 2020).

The Supreme Court began in *Chalker* by noting that its task was to apply common-law principles to the "brave new world" of email. To begin with, email could be the type of "multiple writings exchanged between the parties" necessary to demonstrate contractual agreement. But the court also had to decide whether the nature of the particular transaction at issue and the parties' expressed intent reflected a contractual meeting of the minds. The court noted that "many of today's most sophisticated transactions are conducted, in part, through email," and "parties often protect themselves through agreements stipulating the conditions upon which they will be bound."

The alleged agreement in *Chalker* concerned a sale of roughly 70 oil-and-gas leases. Although the plaintiff initially sought to purchase 100% of the oil-and-gas assets, the deal fell through and the defendants later offered to sell 67% of the assets to the plaintiff. In response to the defendants' offer, the plaintiff sent an email, captioned "RE: Counter Proposal," listing seven "base deal" terms that the defendants had to accept by the close of the next business day. Later that night, the

defendants responded by email, saying they were "on board" subject to a mutually agreeable purchase sale agreement (PSA), and they "w[ould] be turning a PSA tonight to respond to your last draft." In the meantime, a third party presented a new offer to the defendants, and the defendants accepted. That same day, the plaintiff, unaware of the development, returned a redlined PSA to the defendants. After learning about the third-party deal, the plaintiff demanded that the defendants honor the email negotiations, and apparent agreement on the seven "base deal" terms, as a binding contract.

Before the plaintiff and defendants began negotiating, however, they agreed that "unless and until a definitive agreement has been executed and delivered, no contract or agreement providing for a transaction between the parties shall be deemed to exist. … [And] [f]or purposes of this agreement, the term 'definitive agreement' does not include an executed letter of intent or any other preliminary written agreement or offer, unless specifically so designated in writing and executed by both parties." The court thus had to determine whether the parties' email communications resembled preliminary negotiations or a definitive agreement.

The court held that this contractual provision meant the parties "agreed that a definitive agreement was a condition precedent to contract formation." Texas courts routinely enforce such conditions precedent, and the burden is on the party seeking to recover under the contract that all such conditions precedent have been fulfilled. Moreover, looking to the nature of the emails, the court found that the email exchanges "d[id] not form a definitive agreement," and were "more akin to a preliminary agreement." Thus, even the defendants' acceptance of the "base deal" terms was made "subject to a mutually agreeable PSA." The court went on to reject the plaintiff's contention that a fact issue existed regarding whether the parties reached a definitive agreement, holding instead that the "exchange falls short of an agreement as a matter of law."

Chalker is instructive for Texas practitioners who are being forced—now more than ever given the ongoing public health crisis—to negotiate deal terms or settlement agreements by email. The court's opinion suggests two best practices that every Texas practitioner should adopt.

First, practitioners (and clients) not wishing to be bound by such preliminary discussions over email should consider expressly stating, in writing and at the outset of the negotiations, like the parties did in *Chalker*, that any sale, settlement or other agreement is contingent on a fully executed final contract. Second, practitioners (and clients) should ensure that their course of dealings reflect that all email negotiations are preliminary in nature, without giving the appearance of a definitive agreement. One simple suggestion would be to expressly state, as part of any exchange of terms, proposals or counter-proposals, that an offer is being made as part of the ongoing negotiations necessary to facilitate a final contract.

Absent some explicit contractual provision requiring a final contract and a course of dealing that reflects negotiations, practitioners and their clients might find themselves bearing the expense of litigating fact issues regarding whether there was actual agreement. COVID-19 has changed the world dramatically in the short run, and it likely will have long-terms residual effects on our society, including in the practice of law. As both voluntary and mandatory work-from-home measures proliferate, practitioners should make sure to do their part to protect their and their clients' interests by adopting the best practices in preliminary negotiations displayed in *Chalker*.

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