

# So you've been sued?

Continuing our look at routinely encountered legal issues through the eyes of two fictitious electrical distribution companies. **by Daniel Goldberg**

**Alvin Amp, owner of** Distributor in a Rush, was experiencing a problem with a customer, Long Shot Electric. Amp wasn't getting paid what he was due for materials sold to Long Shot Electric. It appeared that Long Shot Electric was arguing with the general contractor, Sure We'll Get It Done, over Long Shot Electric's performance. Heated email exchanges between Distributor in a Rush and Long Shot Electric were taking place daily. Exchanges like this were regularly occurring:

**Amp:** "When are you paying us for our materials?"

**Long Shot Electric:** "I'll pay you when I get paid—and my general contractor, Sure We'll Get It Done, has not paid me yet."

**Amp:** "Our terms and conditions don't have a 'pay when paid' provision and you need to pay me now. If you don't pay, I'm calling the general contractor directly, and I'm telling him that you're not paying me and are in deep financial trouble and that he needs to pay me directly."

**Long Shot Electric:** "Don't you dare."

Never one to avoid a challenge, Amp called the general contractor and made a number of comments: "I think Long Shot Electric is in trouble," Amp said. "I hear he might close up. We haven't been paid anything; hold his money and pay me directly."

Ultimately, Amp didn't get paid and filed a lawsuit against Long Shot Electric for breach of contract to collect the \$45,000 he was due. (There were no payment bonds on the job and Amp had not filed any liens, so his claims were limited to the breach of contract claim. Had Amp filed a bond claim or a mechanic's lien, he would have asserted those rights in the same lawsuit.)

Once the lawsuit was served, Amp had a number of "gotcha" moments, thinking that he now had the upper hand and had found a surefire way to get paid. He waited the number of days required before Long Shot Electric formally answered the complaint.

Amp was sorely disappointed and quite surprised when Long Shot Electric filed a counterclaim against him, claiming that he had slandered the company with the general contractor when he made that phone call and that Long Shot Electric lost other business with the general contractor as a direct result of it.

Long Shot Electric also sent some "discovery" to Amp, asking for all of his emails involving communications between Distributor in a Rush and Long Shot Electric and between Distributor in a Rush and the general contractor.

Does Long Shot Electric have a good claim? Perhaps. If, in fact, Amp stated to the general contractor unrelated matters about Long Shot Electric's financial condition, he may in fact be liable for a slander or defamation claim. It would depend on what was said.

The takeaway is to keep conversations limited to the job at hand and avoid risking a claim by discussing unrelated issues. Think of each specific job as a silo. A supplier speaking to a general contractor needs to limit the conversation to the job "silo" (supplier to sub to general contractor) and not discuss unrelated jobs or other issues. If the general contractor expresses concern and starts asking questions, an appropriate response is: "Sorry, it's not appropriate for me to discuss anything other than this job."

So are the emails discoverable?

Generally, yes. Once a lawsuit is started, a "discovery" phase takes place, which may involve written questions

(interrogatories), written requests for documents, and depositions. The first item now generally requested in requests for documents is emails. Parties cannot just ask for everything out there and there are standards in every state that control what is or is not discoverable, including, for example, relevancy. As a general rule, though, emails are discoverable, and it's important to be careful what is and is not said in them.

## SOME BASIC EMAIL RULES

- Know who you are emailing; if you hit "reply to all" and don't recognize CCs, delete them.
  - Don't send angry emails; if you feel like you're saying something you shouldn't, you're probably right.
  - Emails are not confidential. Don't think of them as sealed letters; think of them as postcards that can—and will—be read by everyone who sees them.
  - Emails are not privileged unless they are direct communications between you and your attorney seeking or containing legal advice.
  - Emails can and do end up as exhibits in court documents.

The bottom line is that we're all in a rush, and it's easy to fire off emails without considering the consequences. Just be careful—and know when it's time to stop emailing and pick up the phone to have a conversation. ■

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