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STEVENS V. PUBLICIS: THE RISE OF “NO E-MAIL MODIFICATION” CLAUSES?

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ABSTRACT

E-mails occupy an ambiguous space between informal oral conversation and formal written documents. Their legal significance in contract modification is, however, becoming increasingly clear. In April 2008, the Supreme Court of New York, Appellate Division, decided Stevens v. Publicis, S.A. and in the process, raised the legal status of e-mail exchanges in the context of contract modification. Before Stevens v. Publicis, S.A., an e-mail could constitute a “signed writing” under New York law, thus satisfying the statute of frauds. An e-mail exchange could also amend a contract if, for instance, it had been validated by the parties’ reliance on it. After Stevens v. Publicis, S.A., e-mails may also satisfy a “no-oral-modification” (NOM) clause—the contractual obligation to memorialize contract modifications in written and signed documents—without requiring additional contractual validation. This Article discusses the legal underpinnings of this decision and offers practical guidance for attorneys attempting to avoid contract modification by e-mail.

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INTRODUCTION

Law and society have diverged in their respective perceptions of electronic correspondence. For most people, e-mail is an everyday form of communication, and a proliferation of e-mails has flooded inboxes everywhere. Such volume, coupled with the ability to send, receive, and delete e-mail instantaneously, perpetuates an aura of informality akin to oral conversation. However, in the legal system, and particularly in the context of contract law, e-mails increasingly can and do satisfy formal requirements.

In fact, both state and federal legislatures have legitimized the ability of parties to form contracts electronically. In 2000, the Federal Electronic Signatures in Global and National Commerce Act (E-SIGN)\(^1\) made electronic and paper-and-ink transactions equally enforceable for interstate and foreign contracts.\(^2\) Many states have also adopted the Uniform Electronic Transactions Act (UETA),\(^3\) which

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\(^3\) ALA. CODE §§ 8-1A-1 to -20 (LexisNexis Supp. 2002); ALASKA STAT. §§ 09.80.010-.195 (2008); ARIZ. REV. STAT. ANN. §§ 44-7001 to -7051 (2003 & Supp. 2009); ARK. CODE ANN. §§ 25-32-101 to -121 (2002 & Supp. 2001); WEST'S ANN. CAL. CIV. CODE §§ 1633.1-.17 (West Supp. 2010); COLO. REV. STAT. ANN. §§ 24-
establishes that electronic and non-electronic records are equal. Unlike E-SIGN, however, under UETA parties must first agree to contract electronically before this equivalency will be effective. When the parties are silent on the issue, such an agreement will be implied by their use of e-mail to conduct the transaction.


5 Towle, supra note 2, at 81.

Courts seem to follow the lead of these statutes when parties attempt to form or modify a contract by e-mail: the parties’ intent governs, regardless of medium. Under common law, parties generally may form or modify contracts by e-mail—even if there is a statutory or contractually imposed writing requirement—so long as all the requisite elements of contract formation are present in the e-mail exchange.\(^7\)

Despite the statutory and common law authority for electronic transactions, most jurisdictions have yet to address the ability of electronic correspondence to effectively modify a contract when the parties’ initial transaction is not electronic and the parties expressly include a clause that requires all modifications be memorialized in a written and signed document. Such a clause is often called a “no-oral-modification” (NOM) clause because it includes a provision prohibiting oral modification in addition to requiring a signed writing.\(^8\) In

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\(^7\) Whether or not a statute of frauds has been satisfied requires inquiry into contract formation or modification, which in turn hinges on the parties’ intent. The inquiry is therefore fact-specific. Statutes of frauds generally do not require merely writing, but rather a writing that memorializes the contract. Thus many cases find that an e-mail satisfies a statute of frauds writing requirement, but not the statute of frauds. *Compare Lamle v. Mattel, Inc.* 394 F.3d 1355, 1362 (Fed. Cir. 2005) (applying California law to hold that an e-mail constitutes a writing and signature to satisfy California’s statute of frauds if the e-mail includes all material terms) with *Toghiyany v. AmeriGas Propane, Inc.* 309 F.3d 1088, 1091 (8th Cir. 2002) (holding that e-mails and a draft agreement did not satisfy Missouri’s statute of frauds because they were not signed and did not include a durational term, which is an essential element) with *Smith v. Int’l Paper Co.*, 87 F.3d 245, 247 (8th Cir. 1996) (holding an e-mail that does not contain an offer or acceptance does not satisfy the statute of frauds); and *Illinois Light Co. v. Consolidation Coal Co.*, 235 F. Supp. 2d 916, 921 (C.D. Ill. 2002) (holding a series of e-mails did not satisfy the statute of frauds because they clearly indicated the parties were negotiating). For a more comprehensive discussion of cases, see John E. Theuman, *Satisfaction of Statute of Frauds by E-Mail*, 110 A.L.R.5th 277 (West 2003 & Supp. 2008) (collecting cases finding e-mails either sufficient or insufficient to satisfy the statute of frauds writing and signature requirements).

\(^8\) See *BLACK’S LAW DICTIONARY* 1159 (9th ed. 2009). For a discussion of NOM clauses in private contracts see Richard A. Lord, 10 WILLISTON ON CONTRACTS § 29:42 (4th ed. 2009); E. Allan Farnsworth, 2 FARNSWORTH ON CONTRACTS § 7.6 (3d ed. 2004). NOM clauses have often been termed private statutes of frauds, and
general, a NOM clause reflects the parties’ intent to be bound by modifications only after a final formalized document has been executed, and not by the informal communications that may precede it, such as those that occur during negotiations. Yet even when there is a NOM clause, circumstances may dictate that the contract can be amended, regardless of the medium or the medium’s formality. Moreover, even a NOM clause may be modified orally if the parties intended to do so.\footnote{9}

A few states have implemented statutes requiring that courts disallow such oral modification and give effect to NOM clauses.\footnote{10} For example, New York has enacted a law stating that where a contract “contains a provision to the effect that it cannot be changed orally,” the contract cannot be modified by an executory agreement unless it is in a signed writing.\footnote{12} This statute places New York courts in a position to address whether, in the context of contract modification, an electronic correspondence can constitute a signed writing sufficient to satisfy a NOM clause. The Supreme Court of New York, Appellate Division, decided this very issue in Stevens v. Publicis, S.A., and held that a series of e-mails between the contracting parties satisfied the...
NOM clause in the parties’ employment agreement. This Article will first explore the context of the Stevens decision by comparing contract modification under New York law to the common law of contract modification. It will then discuss the Stevens case and decision. Finally, this Article will explore the implications of Stevens for preventing contract modification by e-mail.

I. CONTRACT MODIFICATION IN NEW YORK

Under the common law rule, a contract subject to a statute of frauds writing requirement generally could not be modified by an oral, executory agreement absent consideration unless certain exceptions apply, such as reliance on the modification. However, New York has modified the traditional common law rule by implementing three statutes in chapter 24-A of its General Obligations Law: sections 15-301, 5-1103 and 5-701. Section 5-1103 allows a contract to be modified, even without consideration, as long as there is a signed writing. Thus, this statute is implicated in contracts that contain


14 See RICHARD A. LORD, 3 WILLISTON ON CONTRACTS § 7:8 (4th ed. 2009) (“It is therefore generally true that promises, in order to be enforceable, need consideration.”). See also RESTATEMENT (SECOND) OF CONTRACTS § 79 (1981) (setting forth the general rule that “If the requirement of consideration is met, there is no additional requirement of (a) a gain, advantage, or benefit to the promisor or a loss, disadvantage, or detriment to the promisee; or (b) equivalence in the values exchanged; or (c) ‘mutuality of obligation.’”)

15 RESTATEMENT (SECOND) OF CONTRACTS § 89 (1981) (allowing for three instances when modification of a contract that has not been fully performed becomes binding: (1) if it would be “fair and equitable” in light of changed circumstances; (2) if authorized by statute; and (3) if justice would so require because of a “material change of position in reliance.”). See also RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. a (1981); RESTATEMENT (SECOND) OF CONTRACTS § 149(2) (1981) (“The Statute of Frauds may prevent enforcement in the absence of reliance.”); RESTATEMENT (SECOND) OF CONTRACTS § 150 (1981) (stating that even if the statute of frauds is applicable, the contract may be modified orally if there has been “a material change of position in reliance” on the oral modification).

16 N.Y. GEN. OBLIG. LAW § 5-1103 (McKinney 2010).
NOM clauses insofar as they require a signed writing to effect modification. As mentioned, section 15-301 mandates court enforcement of NOM clauses. Since section 15-301 reinforces a NOM’s signed writing requirement by requiring that courts give effect to NOM clauses, sections 5-1103 and 15-301, taken together, ensure that a signed writing may modify a contract with a NOM clause regardless of whether consideration is provided.

New York’s general statute of frauds, codified in section 5-701, also plays a role in the enforcement of NOM clauses in New York. The purpose of the signature requirement in section 15-301 is to authenticate assent to proposed modifications. In a similar vein, section 5-701, as a statute of frauds, requires that certain contracts be memorialized in a signed writing and shares this authentication purpose, albeit at contract formation. Courts in New York have drawn on precedent construing section 5-701 by analogy when interpreting the signature requirement in section 15-301. Thus,

17 N.Y. GEN. OBLIG. LAW § 15-301 (McKinney 2010).
18 Id.
19 N.Y. GEN. OBLIG. LAW § 5-701 (McKinney 2010).
20 See Israel v. Chabra, 537 F.3d 86, 100 (2nd Cir. 2008), certified question answered, 906 N.E.2d 374 (N.Y. 2009), vacated to conform to answer to certified question, 601 F.3d 57 (2nd Cir. 2010) (noting the purpose of section 15-301(1) was “to assure the authenticity of an amendatory agreement; thus, the statute requires the dignity of a formal writing to insure the validity and genuineness of a contractual modification.” (citing DFI Commc’ns, Inc. v. Greenberg, 363 N.E.2d 312, 315 (N.Y. 1977))).
21 Id.
22 See Parma Tile Mosaic & Marble Co., Inc. v. Estate of Short, 663 N.E.2d 633, 634 (N.Y. 1996) (holding that a name automatically printed on a facsimile does not satisfy the statute of frauds requirement because doing so does not evince a present intent to authenticate the document’s contents).
section 15-301 coupled with the jurisprudence interpreting New York’s statute of frauds effectively prevents modification without a signed writing.  

There are, however, ways around a NOM’s writing requirement, even when such statutes mandate enforcement. Again, under common law, a contract without a NOM clause can be modified orally without consideration and without a signed writing if there is reliance.  

If the contract has a NOM clause, the parties must have both relied on the contract modification and waived the writing requirement. Generally, oral attempts to modify a contract may waive a statutorily imposed writing requirement such as the statute of frauds. However, even if the writing requirement is waived by oral attempts to modify, the contract will not be modified unless there is also reliance. Indeed, in construing 15-301, New York courts have added that, to waive the NOM clause, an attempt to orally modify must be accompanied by reliance. 

Often, attempts at contract modification are accompanied by reliance. In these situations, the issue of whether an e-mail exchange is a writing that satisfies a NOM clause is irrelevant because the writing requirement has been waived. In fact, courts in New York and

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24 N.Y. GEN. OBLIG. LAW § 5-701 (McKinney 2010).
25 See supra note 15.
26 RICHARD A. LORD, 10 WILLISTON ON CONTRACTS § 29:42 (4th ed. 2009) (discussing whether an attempt to modify alone is sufficient, or whether reliance is also necessary). Cf. RICHARD A. LORD, 3 WILLISTON ON CONTRACTS § 7:38 (4th ed. 2009) (discussing contract modification in the sale-of-goods context under the U.C.C.).
29 RICHARD A. LORD, 10 WILLISTON ON CONTRACTS § 29:42 (4th ed. 2009).
30 See, e.g., The Savage is Loose Co. v. United Artists Theatre Circuit, Inc., 413 F. Supp. 555, 559 (S.D.N.Y. 1976) (requiring reliance on oral statements to modify a contract, although the oral statements themselves waive the writing requirement); Canizaro v. Mobile Commc’ns Corp. of America, 655 So. 2d 25, 30 (Miss. 1995)
elsewhere allow modification—regardless of the medium—when an attempt to modify is accompanied by reliance. In New York, however, an attempt to modify alone, absent reliance, does not necessarily waive the NOM clause. To overcome a NOM clause and effectively modify the contract, an e-mail exchange must be deemed a writing with sufficient formality to satisfy section 15-301 and therefore the statute of frauds.

II. STEVENS V. PUBLICIS: E-MAIL CAN SATISFY A NOM CLAUSE

In Stevens, the New York Supreme Court, Appellate Division, in a succinct slip opinion, held that a series of e-mails between contracting parties satisfied the requirements of an enforceable NOM clause, even without waiver or reliance. The result dispels the aura of informality surrounding e-mails and presumes they are signed writings. The Stevens decision suggests that to avoid modification by e-mail, contracting parties should include “no e-mail modification” (NEM) clauses in their contracts.

The events that precipitated Stevens v. Publicis, S.A. began when Publicis, S.A. (Publicis) purchased Arthur Stevens’ public relations firm, Lobsenz-Stevens. The parties entered into both an employment contract and a stock purchase agreement (SPA). Under the employment contract, Stevens was to remain as CEO for three years. The

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31 RICHARD A. LORD, 10 WILLISTON ON CONTRACTS § 29:42 (4th ed. 2009).
32 Stevens, 50 A.D.3d at 256.
33 See Towle, supra note 2, at 78-79 (suggesting that parties wishing to avoid contract modification by e-mail may be well advised to include a notice to that effect in the contract and possibly in their e-mails).
34 Stevens, 50 A.D.3d at 254.
35 Id.
36 Id.
SPA correspondingly provided Stevens with performance incentives via an earn-out provision that increased the purchase price of the stocks that Publicis would buy from Stevens based upon the firm’s success over those three years. The employment contract had a NOM clause expressly stating that any amendments had to be memorialized in a written and signed document.

After six months, the company’s business stalled and Stevens was relieved of his position as CEO. Pending his removal, Stevens exchanged a series of e-mails with an executive at Publicis. The e-mails proposed that Stevens continue to work at the firm, but detailed a new job description, which Stevens clarified and then accepted by e-mail. Stevens later sued Publicis for breaching the employment contract by removing him from his position as CEO before the three-year earn-out period had ended.

Stevens asserted that the e-mail exchange did not effectively modify his employment contract because the e-mails neither explicitly referred to the contract, nor declared that they would constitute a modification to the employment contract. He argued that absent unequivocal expressions of both parties’ intent to contract by e-mail, the exchange could not overcome the contractual requirement that modifications be formalized in a signed writing. The court disagreed and, without clarifying its rationale in detail, stated that an e-mail constitutes a signed writing sufficient to satisfy both the statute of frauds and the employment contract’s clause requiring a signed writing for modification.

37 Id.
39 Id.
40 Stevens, 50 A.D.3d at 254-55.
41 Id.
42 Id. at 254.
44 Id.
45 Stevens, 50 A.D.3d at 255-56.
The court relied on the New York case Rosenfeld v. Zerneck,\(^{46}\) which interprets the statute of frauds requirements under section 5-701.\(^ {47}\) In Rosenfeld, the New York Supreme Court held that the statute of frauds’ “signed writing” requirement may be satisfied by e-mail.\(^ {48}\) In Rosenfeld, the defendant used e-mail to accept an oral offer to sell real property and indicate that his attorney would “prepare a contract of sale.”\(^ {49}\) Although this language suggests intent to contract, it also implies a subjective belief that the parties would not be bound until a formal written contract had been drafted and signed. Nonetheless, the court in Rosenfeld stated that if the e-mail exchange had included all vital contract terms, it would have enforced the e-mail contract.\(^ {50}\) The Stevens Court used the Rosenfeld decision to support the proposition that an e-mail is a writing sufficient to satisfy the statute of frauds.\(^ {51}\) Therefore, an e-mail may also satisfy the writing requirement of the NOM as enforced by section 15-301.

The “signature” requirement of the NOM clause was deemed satisfied in Stevens by the parties’ typed names at the end of each e-mail.\(^ {52}\) The court did not cite any authority for this assertion, although it followed directly after a discussion of Rosenfeld, where the court did find that a typed signature on an e-mail satisfied the signature requirement of the statute of frauds.\(^ {53}\) The Rosenfeld Court

\(^{46}\) Rosenfeld, 4 Misc. 3d at 193 (N.Y. Sup. Ct. 2004).
\(^{47}\) Stevens, 50 A.D.3d at 255-56 (citing Rosenfeld, 4 Misc. 3d at 195). See also Bazak Int’l Corp. v. Tarrant Apparel Group, 378 F. Supp.2d at 377, 386 (S.D.N.Y. 2005) (finding that an e-mail exchange satisfies the statute of frauds for sections 2-201 and 2-209 of New York’s U.C.C.). But see Vista Developers Corp. v. VFP Realty, LLC, 17 Misc. 3d 914, 920-21 (N.Y. Sup. Ct. 2007) (holding that section 5-703 of New York’s General Obligations Law governs contracts for the sale of real property and under this provision an e-mail exchange is not sufficient to satisfy the statute of frauds’ writing requirement).  
\(^{48}\) Rosenfeld, 4 Misc. 3d at 194.  
\(^{49}\) Id.  
\(^{50}\) Id. at 196.  
\(^{51}\) Stevens, 50 A.D.3d at 255-56.  
\(^{52}\) Id.  
\(^{53}\) Rosenfeld, 4 Misc. 3d at 195 (distinguishing Parma Tile Mosaic & Marble Co. v. Estate of Short, 663 N.E.2d 633 (N.Y. Ct. App. 1996), where a fax transmission
decided that, since the name on the e-mail was intentionally typed, it clearly indicated intent to authenticate. The Stevens Court again seemed to extend the Rosenfeld holding on the statute of frauds to NOM clauses, and infer that the intent to authenticate for statute of fraud purposes was the same intent required to satisfy a NOM clause.

The Stevens Court did not explicitly extend the holding to contracts containing NOM clauses, although that is the effect of the decision. Moreover, the Stevens decision could be broader in that an e-mail can satisfy both statutorily imposed formal writing requirements and those imposed by contractual clauses. Further, the Stevens decision indicates that NOM clauses may not bar unintended contracting by e-mail. On the other hand, the effect of the holding may be limited to New York law. Still, the decision reflects a trend in favor of electronic contracting. Contract drafters must use particular care to avoid contract modification by e-mail—if that is their intent.

III. HOW TO PREVENT MODIFICATION BY E-MAIL

The most obvious lesson to be drawn from the Stevens decision is that a clause stating that all modifications to a contract must be in writing—or even a “signed” writing—does not necessarily preclude amendment via e-mail. A NOM clause may not be sufficient to prevent contract modification by e-mail unless the parties expressly state their intention to not be bound by e-mail amendments or expressly define the manner of contract modification.

that automatically put the sender’s name on each page did not meet the signature requirement for the statute of frauds).

54 Id. at 195-96.
55 Stevens, 50 A.D.3d at 256.
56 Stevens, 50 A.D.3d at 255-56.
THE RISE OF “NO E-MAIL MODIFICATION” CLAUSES?

A. Explicitly State Intent Not to be Bound by E-Mail Amendments

Courts in New York have enforced NOM clauses pursuant to section 15-301. Moreover, courts are likely to uphold NOM clauses if viewed as expressions of the parties’ intent not to contract orally. Therefore, Stevens illustrates the wisdom of including an explicit expression of intent not to contract by e-mail: in essence, a “no e-mail modification” (NEM) clause. Besides using a NEM clause, parties may use several other drafting techniques to prevent e-mail modification. For instance, the contract may also enumerate the procedures necessary to effectively amend it, and specifically exclude e-mails as an acceptable means of satisfying a NOM clause. The contract may also include a statement defining a signed writing as a “handwritten (not electronic) signature.”

Paradoxically, in the absence of a NEM clause, a court may actually be inclined to favor modification by e-mail. Courts prefer accurate manifestations of parties’ intent over the formalities of written contracts. Therefore, courts often favor handwritten or typed documents over pre-printed ones, since the former are more likely to reflect true intent, and less likely to contain boilerplate language. As a

58 See, e.g., Lewis v. Rahman, 147 F. Supp.2d 225, 235 (S.D.N.Y. 2001) (citing section 15-301 to assert that “[w]here, as here, the contract to be modified provides that all modifications must be in writing, a purported oral modification violates the Statute of Frauds.”). But see Rose v. Spa Realty Assocs., 366 N.E.2d 1279, 1282-83 (N.Y. 1977) (noting that when the only proof of modification is the oral exchange itself, the NOM will be enforced, but if the oral modification has been acted upon—in other words, if there is reliance—then the oral modification may be effective).

59 See, e.g., CrossLand Fed. Sav. Bank by F.D.I.C. v. A. Suna & Co., Inc., 935 F. Supp. 184, 197 (E.D.N.Y. 1996) (stating that “[w]here the parties have demonstrated an intent not to be bound until they have executed a formal contract, they cannot be bound until the writing is complete.”).

60 See also Towle, supra note 2, at 91 (noting that “no one is forced to deal electronically if they do not want to, at least as to general contractual matters.”).


result, e-mails may potentially be given additional weight because they are perceived as less formal.\textsuperscript{63}

\textbf{B. Make the Manner of Modification Explicit}

If including NEM clauses in contracts and appending disclaimers to e-mails becomes routine, however, courts might eventually consider their language boilerplate as well.\textsuperscript{64} If this occurs, then courts are likely to treat NEM clauses and other disclaimers as they do NOM clauses: overlook them when the e-mails indicate intent to contract or when other special circumstances, such as reliance, are present. Such a result may be avoided with explicit statements of what will or will not effectively modify the contract, both at the outset of contract formation and during negotiations for a modification itself. At contract formation, this explicit statement could simply be a written statement in the contract describing the manner or procedures for modification. During contract amendment negotiations, the issue could be addressed in multiple ways. For instance, a disclaimer stating

\begin{itemize}
  \item a contract where there is apparent conflict, handwriting prevails over typewriting.” In footnote 3, the court also notes that handwritten terms are favored because “there is a presumption that the handwritten terms were more actively negotiated between the parties, and, therefore, that those terms best reflect the parties’ intent.” The court cites State v. Scott Constr. Co., 174 N.E. 429, 431 (Ind.Ct. App. 1931) and Sprague Elec. Co. v. Bd. Comm’rs Hennepin County, 86 N.W. 332, 333 (Minn. 1901) to support this assertion).
  \item See, e.g., Otto Interiors, Inc. v. Nestor, 196 Misc.2d 48, 50 (N.Y. Civ. Ct. 2003) (finding that a typewritten provision was preferable to a printed form because it was a truer reflection of the parties intentions) (citing Lanni v. Smith, 89 A.D.2d 782, 783 (N.Y. App. Div. 1982)); see also, Ganisin v. Noeth, 163 A.D.2d 828, 829 (N.Y. App. Div. 1990) (“By setting forth the method by which the contract may be amended, to wit, by a writing, it implies the preclusion of other less formal methods of amendment.”)
  \item Chicago Inv Corp. v. Dolins, 481 N.E.2d 712, 715 (Ill. 1985) (characterizing a provision in letters of intent exchanged by the parties, which provided that a formal document would be executed, as “mere recitation”— particularly when there was evidence that the parties intended to be bound by the terms of those letters. However, the court also noted that “parties may specifically provide that negotiations are not binding until a formal agreement is in fact executed.”).
\end{itemize}
the sender’s intent not to modify the contract could be included in the body of every e-mail. Since modifications are themselves specifically negotiated, such statements included within them are unlikely to be perceived as boilerplate.

**CONCLUSION**

Stevens v. Publicis, S.A. raises electronic correspondence to the level of a formal, signed writing in New York. The case signals that e-mails may be treated as written, signed documents—even when the parties’ do not express intent to treat them as such. In addition, statutory legitimization of electronic contracting, common law precedents allowing contract formation and modification by e-mail, and common law precedents upholding the sufficiency of an e-mail as a signed writing for statute of frauds purposes all suggest that Stevens is part of a trend towards making e-mails the formal equivalent to paper and ink. To avoid being bound by e-mailed conversations, it is important not only to exercise caution in e-mailing, but also in drafting and negotiating contracts at the outset to expressly deal with e-mail as a possible method of modification.

**PRACTICE POINTERS**

- Standard “no-oral-modification” (NOM) clauses may be insufficient to prevent contract modification via e-mail.
- Parties should explicitly state in their contract that amendments cannot be made by electronic correspondence or that a signed writing requires a handwritten—not electronic—signature.
- Where parties are discussing possible amendments to an existing contract via e-mail, disclaimers should be included in the text of such e-mails indicating that the correspondence does not satisfy the NOM clause or constitute an amendment to the contract.