

DOES AN EMAIL SATISFY THE REQUIREMENT OF A WRITING?

By James Goldsmith

Pennsylvania's statute of frauds, like that found in all other jurisdictions, provides that a contract for the sale of real estate is unenforceable unless it is in writing. Appellate decisions from many jurisdictions, provide that an agreement of sale negotiated and confirmed via email may satisfy the statute and therefore create a binding obligation. While Pennsylvania's Supreme Court has yet to rule on the issue, we anticipate its decision would be in accord with the others.

Forming contracts by email is hardly exemplary and is discouraged for many reasons beyond the scope of this article. Suffice it to say that agreements for the sale of real estate are complex and should be detailed to cover the contingencies as well as the expectations of the parties. This is rarely accomplished in an email exchange.

But if contracts can be found in an exchange of email, what about subsequent tweaks to a written agreement, such as the extension of a settlement date? Can that modification be made via email? Surely if a contract can be established by email, then certainly a minor modification to that contract could be established by email as well. Yet there seems to be great uncertainty between offices, MLS providers and others as to whether an extension or a term modification established by an exchange of email, suffices. Clearly to be binding, the email must clearly establish mutual ascent. Email must clearly emanate from both sides to the contract indicating that all parties have agreed to specific terms. There should be no equivocation or uncertainty of any sort. And while the exchange may satisfy law, it is also more susceptible to being rejected by law than a paper-based writing. By that I mean the proof that the email embodies a mutual ascent is elusive. Were the parties purporting to transmit the email truly at the keyboard? Was there fraud? Was the transmission sent and received by the other party? Did all sellers and buyers give their assent? Was the email written but stored after reflection, not intended to be sent? As you can see, what may have started out as binding amendment to an agreement of sale may be done in by the evidence.

The practicality and advantages of email cannot be denied. Last minute amendments by distant parties favor its use. A good practice to make universal part of your protocol, however, is to have your client sign a printout of the email at your next meeting. Documenting your file in this manner can save you a lot of heartache should a dispute later arise.

Preserving all email transmissions sent and received by you is also critical. I cannot begin to relate the number of disciplinary cases reviewed by the Commission where critical evidence is found in the form of an electronic transmission. As with any writing, these exchanges must be preserved as part of the file. Not only must these be maintained by the agent, they should be in the company file as well. We all know that as a practical matter, there are company and there are agent files. Unfortunately, the law does not distinguish writing to be maintained by the company from that held by the involved

licensee. Because the broker has the responsibility of maintaining the file, every broker should assure that the company file includes every document and email transmission sent or received.

We can anticipate that rules will be modernized to make clear that email transmissions are recognized. Observing the E-Signature Act better protects the parties and assures that transmissions are binding. We can anticipate additional case law that will undoubtedly recognize communication devices made possible by emerging technologies.

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