GIVING YOUR "NOTICE"

PROPER NOTICE IS **ESSENTIAL** TO A **SUCCESSFUL REAL ESTATE** TRANSACTION

Proper notice is one of the thorny issues in real estate contracts that Buyers and Sellers rarely focus on until a question arises. At that point, everyone rushes to review the contract to see if notice was properly was given. Notice is critically important in situations where one of the parties is sending notice to terminate a contract, withdraw an offer, or argue that a contract remains in effect because improper notice was given. The main issues parties fight about in the notice area include the following:

(1) Was notice sent using a permissible means of notice set forth in the contact?
(2) Was notice timely delivered and received?
(3) Was the notice given by the right party?
(4) Was the notice received by the right party?
(5) Was the notice sent to the correct address or facsimile number of the party receiving the notice?

This article will discuss the approach to notice set forth in the GAR Contract and answer the questions referenced above.

NOTICE UNDER THE GAR CONTRACT

The GAR Contract requires all notices to be in writing and signed by the party giving the notice. Therefore, if the buyer is sending a written notice to withdraw an offer, the notice must be signed by the buyer. The signature can be an electronic or facsimile signature of the party giving the notice or be signed with an original, handwritten signature of the buyer. So, for example, an e-mail notice which ends with "Sincerely, Joe Smith" where Joe Smith is the buyer and the signature is typed from the keyboard of a computer would be a valid electronic signature of the buyer. Written notice under the GAR Contract can then

be delivered in a variety of different ways including by: 1) facsimile, 2) e-mail; 3) by overnight delivery service, prepaid; 4) registered or certified U.S. mail, prepaid, return receipt requested; or 5) in person. Where the GAR Contract is different from many other contracts is that notice by e-mail or by facsimile to a broker, a licensee of the broker, or a party to the contract is only valid if the broker, a licensee of the broker, or the party provides, in the contract, an e-mail address or facsimile number at which to receive notice. If no e-mail address or facsimile number is provided, notice by this means to the broker, a licensee of the broker, or the party is not permitted. (There is one exception to this rule dealing with unrepresented parties discussed later in this article). If an e-mail address or facsimile number of a broker, a licensee of a broker, or a party is provided on the signature page of the contract, notice may only be sent to the facsimile number or e-mail address provided in the contract.

There are two reasons why the GAR notice provision was written this way. The first is that the GAR Forms Committee did not want to impose a requirement on REALTORS® to receive notice in a way with which they might not be comfortable. So, for example, if a REALTOR® wants to receive notice by facsimile but not by e-mail, the GAR Forms Committee felt that this decision should be left to the REALTOR®. Second, GAR wanted to avoid disputes over whether a notice was sent to the correct e-mail address or facsimile number by having the licensee, broker, or party specify the number or address in the contract.

The GAR Contract, and most often other real estate contracts, provide that a notice "shall not be deemed to be given, delivered or received until it is actually received by the party to whom the notice was intended or their authorized agent". As a general rule, this places the burden on the party giving the notice to prove that notice was received. However, the GAR Contract has two means of preferred notice where the GAR Forms Committee tried to make it easier for the sender of the notice to prove receipt of notice. The first is notice sent by facsimile where the sending facsimile machine produces a written confirmation showing that the facsimile was delivered successfully and the accurate date, time and telephone number to which the notice was sent. A notice sent in this fashion is deemed to have been received as of the time it was sent. This is very beneficial to the party sending the notice because the party only has to prove that notice meeting these requirements was sent rather than actually received. The GAR Forms Committee gave facsimile notice this lofty status of having being deemed to be received at the time of the sending because the GAR Forms Committee was unaware of a circumstance where a notice sent by facsimile in the manner prescribed in the GAR Contract was ever not received by the person to whom the notice was sent.

The second form of preferred notice is notice sent by e-mail where the sender of the notice receives a "read receipt" response upon the e-mail being opened by the person to whom the notice was sent. In this instance, the notice is deemed received when the sender of the notice receives a read receipt response on the sender's computer indicating that the e-mail was opened. While the opening of an e-mail is not necessarily proof that the e-mail was actually opened by the party to whom the notice was sent (as opposed to someone else with access to the computer), it is still nevertheless deemed to be good notice under the GAR Contract since a person typically only gives others access to their personal e-mails who are close business associates or family members and who would then pass the notice on to the person to whom it was intended.

Does this mean that notice sent by e-mail without a read receipt is invalid? Similarly, what if the facsimile machine does not produce the confirmation sheet specified in the GAR notice section? Does this make the notice invalid? The answer to both of these two questions is no. Such e-mail or facsimile notices can still be valid. However, in these situations, the burden is on the sender of the notice to prove that it was actually received. In other words, notice is not deemed to have been received at the time it is sent. Let's look at the following example to better understand how this works.

EXAMPLE

A seller makes a written counteroffer to Buyer A in which the seller states that he will sell the property to Buyer A at a price of $250,000 instead of the $240,000 offered by Buyer B in the contract. The listing agent sends the signed written counteroffer by e-mail to the selling agent representing the buyer in a client relationship. After making the counteroffer, the seller unexpectedly receives a better offer from Buyer B to purchase the property at $255,000. The listing agent sends a second e-mail to the selling agent representing Buyer A stating that the seller is withdrawing his counteroffer effective immediately. The listing agent does not send the notice with a read receipt request attached to it. The selling agent for Buyer A must have received the e-mail because the selling agent for Buyer A then

sends a reply e-mail to the listing agent asking if the seller will reconsider his decision to withdraw the counteroffer and reinstate his counteroffer. The listing agent replies in another e-mail that the decision is final and that the seller will be selling the property to Buyer B.

QUESTION

Is the e-mail notice without a read receipt attached to it good notice of the seller's decision to withdraw his offer?

ANSWER

The answer to this question is yes. Had the seller withdrawn his counteroffer in a notice sent with a read receipt attached to it and the seller received a read receipt notice from the buyer, the seller's notice of the withdrawal of the counteroffer would have been effective as of the date and time of the seller's receipt of the read receipt notification. However, even without a read receipt response, the seller's notice in this case would still be effective since the seller has written proof that the buyer actually received the e-mail and responded to it before the counteroffer was accepted.

Let's change the example, however, to one where Buyer A never replies to the seller's e-mail or simply sends the seller written notice of the acceptance of the seller's counteroffer. In such a case, the seller would have no obvious proof of the buyer's receipt of the e-mail in which the counteroffer was withdrawn or that the notice was received prior to the counteroffer being accepted by Buyer A. While, in litigation, the seller should be able to get access to the buyer's computer through the discovery process to try to determine if the notice of the withdrawal of the offer was actually received and when it was received, the seller would be going into the litigation unsure of whether he or she had a winning or losing case. If an inspection of the buyer's computer turns up nothing, the seller's notice of withdrawal would be ineffective and if the buyer accepted the counteroffer and delivered notice of the same to the seller, the buyer would have the right to purchase the property. If the inspection shows that the seller's e-mail notice of the withdrawal of the counteroffer was actually received before Buyer A accepted the counteroffer, the seller would prevail.

The preferred means of notice under the GAR Contract tries to avoid the types of uncertainty described above and make it easier for a party to prove the receipt of notice by creating limited scenarios in which receipt is deemed to have occurred regardless of whether there has been actual receipt of the notice.

THE DOWNSIDE OF THE READ RECEIPT APPROACH WITH E-MAIL NOTICES

While a read receipt response on the sender's e-mail is deemed to be good notice under the GAR Contract, it is much riskier than sending a notice by facsimile. This is because a read receipt response will normally only be generated on the sender's e-maill if both the sending and receiving computers are using a Microsoft operating system. If they are not, the sender of an e-mail can request a read receipt, the party receiving the e-mail can open it, but a read receipt response may never be generated on the sender's computer. With this being the case, REALTORS® wanting to ensure that they have proof of the delivery of notice should always send the notice by facsimile.

If there is a downside to sending notices by fax, it is that facsimile machines are increasingly viewed as older, if not outdated, technology. Some real estate brokerage firms are trying to give greater weight to e-mail notices by including special stipulations in their contracts which state that notice by e-mails is deemed received the moment the e-mail is sent. This is a dangerous approach because e-mail can be sent and, for any number of reasons, never received by the person to whom it was sent. Since this approach could result in a party being bound by a notice that the party never actually received, there is too great a likelihood for this type of notice to produce inequitable results. As a result, this approach should be discouraged.

WHO MAY RECIEVE NOTICE

The GAR Contract allows notice to be received by the party, the real estate licensee, the broker representing the party as a client (except in situations where the broker is practicing designated agency) and now, an employee of the broker. This latest change was made so that notice could be dropped off with the broker's receptionist (provided that he or she is an employee of the broker) or another employee of the broker. In hand-delivering notice to an employee of the broker, the person delivering the notice should always try to get the employee to sign a written receipt acknowledging that: 1) he or she is an employee of the broker; and 2) the employee has received whatever notice is being delivered to him or her.

If the employee refuses to sign such an acknowledgement, the licensee should either send the notice in a different

manner or possibly video the delivery of the notice to the employee. One issue that will certainly arise in allowing notices to be given to an employee is that the person receiving the notice may turn out not to actually be an employee of the broker creating an issue as to whether the notice was effective. Therefore, the person delivering personal notice to an apparent employee of the broker should always ask whether the person really is an employee. If the person sitting at the receptionist's desk of a brokerage office signs an acknowledgement that he or she is an employee of the broker, and it later turns out that he or she was not an employee, most courts will likely find that the person had apparent authority to receive the notice and the notice will likely be found to be sufficient.

NOTICE TO AN UNREPRESENTED PARTY

The GAR Contract provides that a licensee can only accept notice for a party if the broker is representing the party as a client. Therefore, a licensee cannot accept notice for someone who the broker is merely working with as a customer. The GAR Contract was changed in 2013 so that unrepresented parties must provide at least one means of receiving notice. Licensees are well-advised to insist that an unrepresented party provide multiple means by which they can be contacted so that sending notice to an unrepresented party is as easy as possible.

Some real estate contracts include a provision allowing a real estate broker working with a party in a customer relationship to accept notices on behalf of the customer. The GAR Contract does not follow this approach on the theory that anyone receiving notice for a party should be in a closer relationship to that party than just a customer relationship. From a legal perspective, however, a party can designate in a contract that any person of their choosing can receive notice on behalf of the party. Having a broker accept notice on behalf of a customer should definitely be avoided in situations where the same broker is also representing a different party to the transaction in a client relationship. This is because in this situation, the broker could both give and receive the notice without the notice ever changing hands (since the broker can accept notice for both parties). As such, it puts the Broker in a potential conflict of interest situation in which everyone must simply accept the word of the Broker as to when notice was given and received.

WHO MAY SEND NOTICE

In the GAR Contract, notice must be signed by the person giving the notice. This was done intentionally to minimize claims of parties that their real estate licensee sent an unauthorized notice on their behalf. Therefore, while a party can include a special stipulation in a purchase and sale agreement that a real estate licensee is authorized to both receive and send notices on behalf of the party, this practice is discouraged. Let's look at the example below to better understand this risk.

EXAMPLE

A purchase and sale agreement provides that the real estate broker or the affiliated licensee of the broker can both receive and send notices on behalf of their respective clients. In reliance on this provision, a seller calls his or her real estate licensee and directs her to submit a new counteroffer in which the sales price is reduced by $25,000. The buyer immediately accepts the counteroffer. The seller then calls his or her licensee and says that he was only considering such a counteroffer and never directed the licensee to make the counteroffer on behalf of the seller. The seller then tells the licensee that he will be offsetting the price reduction against the listing broker's commission. Is the broker at risk? Clearly, the answer to this question is yes.

Without written proof that the listing agent was given authority to make a counteroffer, the licensee would be at risk of the seller later denying that he or she directed the licensee to make the lower offer. Absent some written directive which proves that the licensee acted with authorization, the licensee might have a hard time defending himself or herself since the seller could also argue that the licensee acted unilaterally to submit the lower offer to earn a commission. The thought in not allowing licensees to send notice on behalf of a party is that since the licensee must get written authorization from the client or customer anyway as to the substance of any notice, why not just have the client or customer sign the notice in the first instance?

BEFORE SENDING AN IMPORTANT NOTICE

Before sending an important notice, the party sending the notice should always review the contract to confirm what is required for there to be good notice under the contract. Some contracts limit how notice may be sent to a few specified options. Other contracts require that the notice be sent to a specific individual at a particular address. Still other contracts provide that notice must be

sent to multiple persons in order to constitute good notice. In some cases, the agreed upon form of notice may effectively require the notice be sent a day or so before the notice is actually due.

For example, if a notice must be received by a party on a Thursday and the only means of permitted notice is by overnight delivery, the notice must be sent on Wednesday in order to arrive by the Thursday deadline. While a court, in the interests of justice, may find that the parties waived the strict requirement for a particular form of notice if it can be proven that written notice was sent and received, the more likely result is for the court to enforce the terms of the contract and only find the notice to be effective if it was sent in accordance with the requirements of the contract.

NEVER GIVE A VERBAL NOTICE

One question that constantly arises in the notice area is whether verbal notice is ever good notice in a real estate contract where the contract itself requires the notice to be in writing. There are no reported appellate cases in Georgia where verbal notice was found to be sufficient in this situation. This is not a good sign. Moreover, since real estate contracts must generally be in writing to be enforceable, courts would likely impose the same requirement on notice sent under the contract to avoid situations where it is just one party's word against the other party as to whether notice was properly received. Additionally, giving verbal notice may prematurely tip off the party to whom the notice was sent and cause them to send their own written notice that they may not otherwise have sent. So, for example, let's say that a buyer telephones the seller and gives her verbal notice that she will be shortly sending over a notice to withdraw an offer that was made at an earlier time. Unless the contract is subject to a due diligence period, a smart seller may try to immediately send written notice accepting the buyer's written offer so as to lock the buyer into the contract.

CONCLUSION

Notice continues to be an area in which there is much litigation between buyers and sellers. Insisting on a reasonable notice provision in the contract and then strictly complying with it is the best way for REALTORS® to avoid legal problems in this area.

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