

Should Contracts Allow Formal Notices By Email?

by Joshua Stein, PLLC



Any lease, purchase and sale, loan, or other document will usually recognize that one party may need to give another party formal notice of something. Those notices often have significant consequences, so the document says exactly who needs to receive those notices and exactly how they must be given.

Often someone giving a notice will face an immediate deadline. They'll need to give the notice quickly, such as a notice to extend the due diligence period under a contract. But registered mail—a common but quaint option in many notice clauses—doesn't work so quickly. Overnight delivery might not be fast enough for a notice that's down to the wire either. And even personal delivery won't always work if the notice recipient is across the country.

So why not allow notices by email? We use email for practically all other business communications. In fact, it's starting to creep into legal documents as a way to give notice, the 21st century successor to notices by fax or registered mail.

However, notice by email may have some drawbacks. Everyone in today's world is overwhelmed by email. Every day we receive hundreds of emails and lose several hours of work time madly trying to delete inconsequential emails and to identify the handful that truly require attention. It's easy to miss something in that deluge, even something important.

Moreover, because formal notices under legal documents have legal consequences, they could later become the subject of a legal dispute. How do you prove to a judge that you properly gave an email notice? At a minimum it could create a sideshow. At worst it could result in a loss of substantive rights.

If a notice doesn't need to be given by a particular date or time or seems particularly likely to create issues about non-delivery, such as a notice of default, it probably makes sense to stick to traditional written notices on paper, sent only by some physical means.

That doesn't mean we should give up on giving notices by email altogether. The speed and simplicity of notice-by-email makes a lot of sense. Just ask anyone who has ever pulled their hair out trying to write, get signed and properly assemble an emergency notice by certified mail. Then, get it to the post office on time, on the last day it can validly be sent and without screwing anything up.

Great legal minds should be able to come up with a way to make email notices reliable and issue-free. As one solution, contracts sometimes allow notices by email but require the notice giver to send a paper copy of the email by overnight delivery.

In that case, the notice still must become effective when given by email, or else why bother? The next-day paper confirmation just assures that the notice recipient knows they received the notice, effective as of the previous day. So it's really a notice of a notice. The recipient probably won't miss an overnight delivery package.

That approach makes particular sense for notices that must be given by a particular date or time—an exercise of an option, a notice to cancel a contract or adjourn a closing. But the notice sender still needs to deal with the logistics of putting together a package and getting it to the delivery service on time. That sounds easy but often isn't, especially if it requires a signature by someone who isn't nearby. (One can mitigate that problem by letting the attorney sign the notice. The contract should allow that.)

Contract documents could include other mechanisms to resolve concerns on email notices. For example, one could require the sender to send multiple copies of the email notice to multiple addressees. One could also require the subject line for any notice-by-email to include certain conspicuous wording to make sure the recipient pays attention. One could have counsel give the email notices, follow-up by telephone to make sure they were received, and prove delivery (and confirmation of delivery) by signing an affidavit.

Some of those suggestions may sound a bit extreme, but they don't actually entail much extra work. They offer reasonable ways to make email notices reliable. If the contract provides for them and the parties follow the contract, they ought to work. Going a step further, there might be a small business opportunity for some third party to take responsibility to give and confirm email notices, just as one uses third-party process servers.

One way or another, it's about time for lawyers to figure out a way to make email notices work. We use email for all other communications. Smart people should be able to figure out how to make email work for formal legal notices too.

Joshua Stein
Joshua Stein PLLC
 501 Madison Avenue, Ste. 402
 New York, NY 10022
 212-688-3300
joshua@joshuastein.com www.joshuastein.com