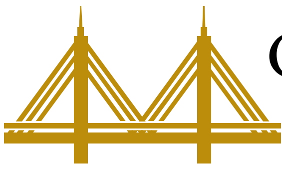

Gregory S. Martin & Associates, P.A.
ATTORNEYS AT LAW

Law Update June 2015

Can an Email serve as "Written Notice?"

Contracts often require "written notice" to advise the other party of a claim for additional compensation or time. With the routine use of electronic mail, the question has arisen whether an email can suffice. Many states now recognize the enforceability of electronic signatures and several courts now require nothing but electronic filings. Thus, it would seem natural that an email should constitute "written notice." However, as with most things in the Law – it depends.

The starting point for answering this question begins with the contract itself. Clearly, if email "written notice" is expressly allowed or prohibited, determining the answer is easy – follow the contract. Often, though, the contract is silent as to the form and substance of the written notice to be provided. In that situation, the answer is not so clear cut, but a broad trend appears to be emerging through various courts. First, the sender must have some way of confirming that the email was "received." Attempted delivery does not suffice. Of course, a reply by the other party (whether by email, letter or some other form) proves receipt. But when no reply is received, the sender will need to demonstrate that the intended recipient actually received the email. No case has yet been found addressing whether the "delivery" and "read" receipt options in Microsoft Outlook will satisfy proof of receipt, but it is only a matter of time before a court does.

Second, the intent and substance of the email should be clear to the recipient. Again, a reply which directly addresses the substance of the email would appear to be the "proof" required. Several courts have declined to find that an email satisfied the written notice requirements in a contract; not because an email cannot constitute a "writing," but rather the email was vague, unclear or did not truly place the other party on notice. Had the emails in those cases clearly set forth their intended purpose, the courts likely would have come to a different conclusion. Thus, "best practices" would say, "title the email as 'Written Notice of __'."

Third, courts look to the practices of the parties during the contract. Was email communication routinely used or was it a rarity? If used, did the recipient act on the email as though it received a formal letter? While not dispositive, courts are comforted when they make rulings consistent with how the parties guided themselves. Thus, if all other "written notices" are in the form of hard paper, a court may not take the lone email seriously.

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What This Means For You

Read and understand your contract. If the use of emails is not addressed in the contract, but you intend to use them, seek formal agreement with the other party to do so. Further, treat the email like a formal letter. Be professional. Be clear and concise. Be certain of receipt by the intended recipient, not just delivery by you.

SIDE BAR

*Martin & Associates recently secured a **$20 million settlement** avoiding years of costly litigation.*

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