



Lead Committee: Transaction and Regulatory Committee

Level of Government Committee: Legislative Committee

12/13/2013

ELECTRONIC TRANSACTION DOCUMENTS

THE QUESTION

Should C.A.R. sponsor legislation to respond to concerns about preserving short-lived electronic "documents" as transactional documents?

ACTION REQUIRED?

Optional.

POSSIBLE POSITIONS

1. Sponsor legislation to prohibit short-lived communication like tweets or text messages from being considered "contract documents" that must be retained in a broker's file.
2. Explore pursuing new mechanisms, like changes in zipform®, that would allow REALTOR® members to capture and preserve short-lived electronic documents used in a sales transaction.
3. Train REALTOR® members not to use electronic communications in real estate transactions unless they are adequately preserved and sufficiently accessible to respond to a BRE audit.
4. Other.
5. Take no action.

DISCUSSION

In the Spring 2013 Real Estate Bulletin, the BRE caused considerable consternation among licensees by observing that transactional documents in electronic form must be preserved for the same period as paper documents, and that they must be produced to a BRE auditor upon demand.

BRE staff asserts that the suggestion in the Bulletin is nothing new, but simply an explanation of the general rule that already applies to transaction documents. Namely, that the broker must preserve in his or her file any document that is a part of the transaction. The BRE observed that if a principal to a transaction was comfortable enough with text messaging (and foolish enough to use an ephemeral communication) to accept a contract with one, then the agent would be required to retain the communication – just like a letter, fax or e-mail.

A Policy Crossroads. The BRE Bulletin article creates a policy decision point for C.A.R., whose members may be called to account for their documentary or "paper trail." If items like text messages are a legal way to enter a contract, then should C.A.R. help create a way to preserve the electronic record; or should C.A.R. instead disapprove their use?

The preservation option would require exploring the creation of a mechanism to capture and preserve electronic messages like social media postings. Conceivably, such an improvement could be made a function of zipform®, and could become a new option for users. The disapproval option would be a legislative update (and change) to the statute of frauds so that the text message cannot be an enforceable contract. The theory is that a communication that by operation of law cannot be enforced as an electronic contract would not have to be retained by the licensee. It might require a parallel tweak to the real estate law as well in order to ensure that such e-documents need not be retained.

Non-contract Documents. California has an extremely broad definition of the kinds of electronic communications that can constitute a "document" and be sufficient to create a contract. Indeed, the definition is so broad that almost any communication, even a phone call, can conceivably constitute a "document." The mechanism that has been of particular concern (but not the only one) is the use of text messages by clients to communicate acceptance to a principal on the other side of the real estate. Especially younger buyers and "early adopters" of technology are increasingly comfortable with online purchases, and so may be prepared to communicate acceptance or rejection of a contract term via "social media" (e.g., Facebook, Twitter, etc.). They might attempt to communicate acceptance of a contract via Twitter, thinking that they had bound themselves and the other side to a contract. However, because of the statute of frauds, while they might have a "contract," it is not one that is legally enforceable to convey real property.

The Statute of Frauds. The statute of frauds is a longstanding legal provision that, among other things, requires that a contract to convey real property must be in writing and signed by the party to be charged. The statute does not specifically speak to whether one can enter a contract, but instead speaks to whether that "contract" can be enforced. If the statute of frauds were changed to treat text

messages as oral conversations rather than as written contracts, and thus not enforceable for real estate transfers, they would then not be records that must be preserved.

The down side of the preservation approach is that it requires new improvements in document systems, and new training of REALTORS® with no guarantee of success, but probably increased costs. It does, however, accommodate the expectations of those that have become comfortable with electronic transactions.

The down side of eliminating ephemeral or social media as contract documents is that it requires legislation to make the change, and may disappoint people that would expand the use of e-documents.

What position should C.A.R. take on the use of ephemeral electronic documents as part of a real estate contract?