A Checklist for Giving Legally Effective Notices

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To give notices that work—and don't create problems—do it more carefully than might seem necessary and get it right the first time.

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CLIENTS OFTEN ASK attorneys to help them give formal notices under leases, loan documents, or other agreements. Failure to give timely and correct notices can have devastating consequences for the client, hence for the attorneys who were supposed to be helping them. Once the notice deadline has passed, an erroneous notice cannot be repaired. You won't get a "do-over." If a notice relates to exercise of an option, failure to do it right can mean outright loss of the option. If a notice relates to a default and triggers a cure period, then a defective notice could cost a lender or landlord months of delay and create substantive leverage for the borrower or tenant. So the guiding principle for notices is the same one that applies to just about everything else that matters: Do it right the first time.

When a client asks attorneys to help give a notice, there are only two possible outcomes:

- The notice will be given correctly and no one will pay much attention to any issues relating to the actual giving of notice; or
- The attorneys will find a way to mess it up, taking advantage of one of the many available opportunities to make mistakes in giving even the most "trivial" notice.

This checklist seeks to help you achieve the first outcome and avoid the second.

Very little on this checklist is substantive or "legal." But the process demands the same level of care, precision, and attention to detail that you would bring to any legal problem. Practical and logistical exercises like giving notices can and do raise legal issues at any point along the way. The easiest way to screw up a formal notice is to assume that it doesn't require much "legal" attention and that it's impossible to screw up.

1. Context

Start by reviewing the document under which you are giving notice. Does it include any information about when and how to give notices? Make sure that it's the final signed document, not a near-final draft that might not be entirely accurate. Also look at any related amendments, assignments, assumptions, consents, estoppel certificates, and previous formal notices (e.g., change of address notices from the other party). Tracking down all the relevant documents may require some detective work. Once you've done it, organize what you've found and save it so the next person can easily find it.

Does any informal correspondence indicate that a notice recipient may have moved without giving formal notice of a change of address? Does the client know of any such relocation, even if not properly documented or not documented at all?

Understand why the client wants or needs to give the notice. It may affect how you approach the process and what you say. For example, if it's a notice of default, you may need to describe the default and the paragraph of the governing agreement under which it arises.

Any notice – but particularly a notice of default - must also consider the environment where the client may later need to enforce its rights. New York landlord-tenant courts, for instance, will seize any possible opportunity to invalidate a notice from a landlord, including alleged issues with corporate authority of whoever signed the notice. And, of course, if the contemplated notice recipient is in bankruptcy or similar proceedings, ask whether your client is even legally permitted to give the notice in the first place, or needs to proceed in some other way.

Do any related agreements exist that will require similar notices at the same time? Must your client satisfy any conditions – such as getting someone else's approval – before giving the notice? Does giving the notice create any unexpected consequences (e.g., a buyout right under a joint venture agreement or an obligation to remove important communications facilities from a floor that, pursuant to the notice, will be returned to the landlord)? Try to answer these questions before rather than after giving the notice.

Have you or anyone else involved given any similar notices in the past? Take a look at them. See if they suggest answers to any questions raised, or new concerns not mentioned here.

One question you shouldn't ask is whether the notice recipient will try to object to the validity or timeliness of the notice. This question should be utterly irrelevant, because its answer should not affect anything you do. Assume the notice recipient will object to the notice, even if the parties are on the best of terms. It's your job from the beginning to ensure that any such objections will be futile.

One exception to this rule might arise if the parties are on such good terms that they can sign a letter agreement waiving the notice requirement and deeming the notice given. In that case, get the letter agreement signed and exchanged long before the notice deadline. But don't run afoul of any agreement that requires notice to (or consent by) a third party regarding whatever's going on.

2. Timing

When must the notice be given? Everyone knows you shouldn't wait until the last minute to give a notice. But when is the last minute? Before you get too far down the road, figure out exactly when the client must give its notice. Ideally, the documents will identify a specific deadline date for giving notice.

Often, though, a document will define the notice deadline as a certain number of days before some date that is a certain number of years after a date that's not immediately obvious. You may need to do some detective work just to figure out the notice deadline.

That exact problem often arises in leases contemplating that the landlord will perform construction for the tenant, or for some other reason deliver the space at some undefined time after the parties sign their lease. Everything in the lease, including the notice deadline, refers back to the commencement date, but the commencement date depended on when the landlord delivered the space, or perhaps when the landlord gave notice of that delivery – if the landlord remembered to give that notice. The lease usually requires the parties to enter into a letter agreement to confirm the commencement date, but they tend to forget, making it tricky to figure out the lease renewal notice deadline lease or even when the lease expires.

Problems like these are best identified and solved well before the last minute. Clients can help avoid them by planning ahead and having a continuing relationship with a single attorney or law firm as opposed to engaging the cheapest, fastest attorney – usually at the last minute – every time some issue arises. Conversely, if you are the attorney with whom the client maintains a long-term relationship, help the client identify notice deadlines well in advance, as part of the "preventive practice of law" and a gentle reminder of the benefits of a long-term relationship with a single attorney or law firm, i.e., yourself.

With enough lead time, you might be able to obtain an estoppel certificate to confirm any unknown or certain dates. Or an earlier estoppel certificate in the file may resolve the mystery.

In any case, always try to give your notice early enough that you have time to fix it and give it again if you realize it was somehow defective.

3. Signature Mechanics

Who will sign your notice? Identify the right officer or authorized signer in advance. It seems to be an immutable law of the universe that the signer will always be traveling when you most need him or her. And don't assume just anyone can sign. Use a corporate officer or someone else with actual authority to bind the giver of the notice. You don't want to give the notice recipient the chance to argue that the notice was invalid because it didn't really bind the notice giver, i.e., that whoever gave it was just an interloper having some fun. New York courts have sometimes invalidated notices on grounds like these.

Prepare an appropriate signature block, including name of entity, by some other entity, by some other entity, by some signer, and anything else the circumstances dictate. Don't fudge the signature block or assume someone else will fill in the blanks. If you do that, you create a significant risk that when the signer finally pulls out a pen and gets ready to sign, they just won't be able to proceed. Getting the signature block right is part of the job of preparing a notice.

To prevent last-minute problems with signing, you might want to have the notice signed before you've even figured out its final substance and worked through all the necessary details. You can break the signature block for your notice into a stand-alone signature page, with just a few straggling lines of text followed by the signature block. Have the signature block signed (get enough originals!) as soon as you can.

This type of signature page has, however, created opportunities for fraud – it might end up attached to the wrong document. Thus, some careful attorneys and clients now like to include a legend at the top of the signature page identifying the document to which it belongs.

4. Consents, Joinders, and Confirmations

Does anyone else need to confirm, consent to, or join in the notice you are giving? For example, to give a notice of termination of a ground lease, you may need the leasehold mortgagee's consent, which might first require a formal notice to the leasehold mortgagee, raising once again most of the issues in this article.

If you identify any third parties who will need to be involved, let them know as early as possible. If your client is an entity with significant internal approval procedures, think about whether you need to obtain your own internal approvals in order to give the notice. What will those internal approval procedures require from you? How long will they take? You don't want the recipient to be able to argue that the notice was invalid because it violated internal approval procedures.

Do any statutory or regulatory requirements control whether and how your client can give this particular notice or take the action the notice contemplates? What must your client do to satisfy those requirements?

5. Sender

Who should give the notice? Look at the underlying document. But also consider the effect of any transfers. Did the notice sender change its name? Change its signature block? Transfer its position to someone else? If the party giving the notice was not originally a party to the agreement, how should you explain the change? Should the client have given any notice of that change—perhaps joined in by the original party to the agreement? Problems with the authority and identity of the party giving the notice can be difficult to solve, especially at the last minute, if they involve third parties. Therefore, ask the questions as early as possible.

6. Notice by Attorney

The New York Court of Appeals has invalidated notices given by attorneys on behalf of their clients. Some attorneys treat this as a non-issue and do it anyway. Don't be tempted. Do you want your client to become the test case giving the state's highest court an opportunity to overrule the (in)famous *Siegel v Kentucky Fried Chicken* case?

Likewise, don't assume some other agent can sign the notice on behalf of the party giving it. If you cut corners, you create very convenient opportunities for a hypertechnical court to throw out your notice and force you to start all over again.

7. Recipient

The documents will tell you who must receive the notice: a particular party, their attorney, perhaps a guarantor. But do you know whether any notice recipient has transferred their rights? If so, you should probably to give the notice to both the original notice recipient and their successor. If you received a formal notice of the assignment, though, don't worry about the original recipient. Just deal with the assignee or transferee.

Should any other parties receive the notice, even if not listed in the primary document? Guarantors? Lenders? For a lease or hotel management agreement, think about nondisturbance agreements and leasehold mortgagees. Did your client agree to give any third parties copies of any notices? Does your client have any reporting obligations within its own investor group? Third-party notice requirements often won't appear in whatever "main" document is the basis for the notice. You have to figure out what other documents exist out in the world and might require third-party notices.

Can you identify any third parties who you simply think should know about notice, perhaps because you want them know about a budding problem or concern? Before you give copies of notices to any extra parties, though, ask yourself if that's a precedent you want to set. For a one-time notice it might not matter. But for a continuing relationship where you will give similar notices regularly, you may want to state that you are giving the additional notices only as a courtesy, and don't intend to give them every time.

8. Letterhead

If the client will use its own letterhead, set up the notice so it can easily be transferred to letterhead. If the client won't use its own letterhead, or doesn't care, create simple letterhead for the client, built into the notice. Either way, the notice should include the client's letterhead, whether real or computer-generated for this particular occasion. It helps prevent the notice recipient from claiming that the notice was overly mysterious or they had no way to know what it was or from where it came.

9. Means of Delivery

Determine the correct means of delivery by carefully reviewing the “notices” clause of your document. State the delivery method immediately above the recipient’s address in the notice letter. For example, if a document says notices must be given by certified mail or Federal Express, include: “BY CERTIFIED MAIL AND FEDERAL EXPRESS.” If the document provides for multiple means of notice, seriously consider using at least two, for every notice recipient and every copy recipient.

Don’t try to improve on the method the document prescribes. If it says “regular mail,” then use regular mail. Don’t “upgrade” to certified mail. If you really want to, though, send a second copy by certified mail.

Once in a while, of course, lawyers who give formal notices also have to think about the law. Does any law govern how notice must be given? If so, comply.

10. Date

Any notice should be dated, reflecting the date it was sent. Don’t try to give a notice “as of” some other date, or date it a few days before you actually sent it. Use the actual date of sending. That’s true even if the terms of the notice clause dictate that the notice will only become effective later.

11. Reference to Agreement

In the opening paragraph of your notice, refer to the underlying agreement by its correct name and date. If amendments occurred, you may want to recite them, particularly if they affect the notice you are giving.

12. Contents of Notice

Review the provisions in the agreement for which you are giving the notice. But don’t just review the notices clause. Look for any other language in the agreement that might play a role. Does the notice need to say anything in particular? Specify any additional information? Remind the recipient of any response time? Include any enclosures? Include a check or a copy of something? Follow any particular format or template?

Comply with any and all requirements to the letter. Review any relevant provisions of the agreement and any related documents. The notice should say or include everything it needs to, but typically nothing more.

If you go beyond the literal requirements of the document, you’ll create opportunities for issues and arguments. Don’t do this lightly. If you absolutely must add something, say it with as much clarity and specificity as possible. Don't leave any opening for a court to accuse you of vagueness or decide the recipient could not understand what you said. Don’t give the recipient any excuse to not take your notice seriously.

For example, if the client wants to exercise a renewal option just in case some pending renewal negotiations break down, you may be tempted to refer to those negotiations and somehow say your notice is just a preventive measure. Don't. Keep it simple. Exercise the option and keep negotiating, but don't confuse the two of them. You are only asking for trouble.

If you anticipate arguments about the validity or contents of the notice, you'll usually find it doesn't make sense to cover those arguments preemptively in your notice. Just give a good, simple, effective notice first and argue later.

If you feel you absolutely must say something more than the bare minimum, consider sending a second notice to supplement the first. The second notice should make clear that it doesn't limit or vitiate the first, but instead just implements it or addresses uncertainties. For example, if your client intends to exercise a right of first offer or first refusal under a ground lease or joint venture agreement, the exercise notice should just exercise the right. If any uncertainties or further procedures exist, try to discuss them in a separate notice, making clear that the notice of exercise remains effective no matter what.

13. Contents and Clarity

Make the notice absolutely clear and unambiguous. You usually don't need to include copies of related documents, so don't. And don't ask the recipient to do anything that might vary from the documents. Variation will just confuse things and may even make the notice defective. For example, if the documents don't require the notice recipient to acknowledge receipt, think long and hard before asking them to do so. They might be able to argue that the request somehow made the notice "conditional" or took it beyond what the parties contemplated.

If you are concerned about acknowledgment of receipt, you can either establish a clear paper trail or request an appropriate estoppel certificate immediately after giving notice, if the document provides for estoppel certificates. But you don't want to complicate the notice in any way that might create an argument.

If you have any specific demands for the notice recipient, make them absolutely crystal clear. Leave no opening for the recipient to argue that the notice just looked like an interesting discussion of something without legal consequences or implications. Demand and inform and take action; don't ask or request or share ideas or discuss what you might decide to do later.

14. Proof of Mailing

If at all possible, obtain proof of dispatch and proof of delivery. Sometimes these items take a few days to come back. Make sure they do come back. Look at them when they come back. If the recipient refused delivery, what should you do next? Don't just file away the papers without thinking about them. Keep a copy of the notice as given. Prepare a certificate of mailing if necessary.

Think about who you might call as a witness if you had to prove any facts about the notice. If that person is a transient mailroom employee or someone else who might not be easy to locate, you may want to have them sign an appropriate affidavit now and include it in the file. Or consider whether to use someone who will be easier to track down later.

15. Copies

Distribute copies of the notice to anyone who should know about it, including the client. Include a cover note that mentions whether the notice was actually given, and when and how. If the date of effectiveness of the notice will matter, explain what the document says about that.

16. Filing

Keep an official file copy of the notice, with proof that it was given correctly and on time. When the return receipt arrives, file it with the copy of the notice letter. Distribute copies of the whole document set to everyone involved in seeing that the notice was properly given. Consider whether to record the notice, either because a statute requires it (e.g., California trustee's sale procedures) or for clarity and the historical record. When you circulate copies of the notice, include the proof of delivery.

CONCLUSION ● Notices aren't just bread-and-butter documents that you can throw together at the last minute without much thought. They must fully reflect the underlying relationship and all relevant documents, context, and history. Notices require clarity, precision, and absolute attention to detail, and a clear record of validity. The attorney needs to assure any notice does 100% of what the client wants it to do – not just 95% of it.

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