

DO WE HAVE A DEAL?

Consider the following common scenario:

Realtor® A, a buyers' agent, presents an offer on behalf of her buyer-clients to Listing Realtor®. Listing Realtor® contacts Realtor® A and advises her that the offered price is significantly lower than what the sellers will accept. The two agents continue negotiating via text, and eventually the Listing Realtor® sends Realtor® A the following text: "Good news. I have spoken to my clients and we have a deal." Realtor® A passes on the good news to her buyer-clients. The next day, the Listing Realtor® advises Realtor® A that the sellers have changed their minds and have accepted another offer. Can the sellers do this? Absolutely. Do Realtor® A's buyer-clients have any recourse? No.

Agents in a situation such as this must remember that there is no "deal" unless and until the buyers and sellers sign a purchase agreement. The fact that parties can now agree to conduct business electronically does not change the fact that contracts for the sale of real property must be in writing signed by the parties.

Under the Uniform Electronic Transaction Act ("UETA"), Realtors® can arrange to have their clients sign a purchase agreement electronically. Once signed, the Realtors® can then deliver that contract electronically (typically by email). But the UETA does not authorize Realtors® to enter into a binding contract on behalf of their respective clients via text or email (any more than they can do so verbally). And this is true even if the Realtors®' negotiations are done with the knowledge and consent of both clients.

What if the sellers and buyers exchange emails or texts directly (rather than through their agents)? If they reach an agreement, would such an agreement be enforceable, or would the parties need to incorporate the agreed-upon terms into a written contract? The answer depends on a number of factors aimed at determining whether the parties intended to be legally bound:

1. Did the parties agree to conduct business electronically?
2. Did the email/text exchange "contain the essential elements of a contract with sufficient certainty and definiteness regarding the parties, property, consideration, terms and time of performance."

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3. Did the exchange include the electronic signatures of both parties? The term, “electronic signature,” includes any method adopted by a person “with an intent to sign.” To avoid any uncertainty, if a party wishes to enter into an agreement via email, the email should clearly evidence an intent to sign, for example, by typing the word, “signature,” next to the party’s name.
4. From the language of the email/text exchange, does it appear that the parties anticipated that the terms would be incorporated into a subsequent agreement? If it appears from the substance of an electronic exchange that the parties anticipated that there would be a subsequent signed agreement, a court is unlikely to conclude that the email/text exchange created an enforceable agreement.

Needless to say, it would be a rare case where someone could assert with any degree of certainty that an email/text exchange between the seller and buyer created a binding contract. There are simply too many variables.

And it is always the case that an email/text exchange between the listing agent and the buyer’s agent does not create a binding purchase contract on behalf of the clients.

It is often the case that agents will – with the consent of their clients – discuss contract terms prior to responding to a written offer or counteroffer. Sometimes these discussions take place electronically via email or text. Negotiations between agents that take place electronically are no more binding than discussions that take place in person or on the phone. Until the “agreement” is reduced to writing and signed by both clients, there is no binding contract. Realtors® must keep this in mind and make certain that their clients understand this as well. Clients who were told that they had “a deal” prematurely are typically very unhappy clients.