
FAXED TRANSMISSIONS OF AGREEMENTS AND NOTICES

The statute of frauds requires agreements for a conveyance or an encumbrance of real property to be in writing and signed by the party to be charged in order to be enforceable. For many years, there has been a statute in effect in Washington, which expressly provides that a telegram satisfies the statute of frauds requirement for a written agreement, so long as it is signed by the sender. As yet, there is no statute, regulation, or case law in Washington specifically concerning the effect of faxed transmissions of agreements or notices given under an agreement. However, the Court of Appeals has held that a faxed transmission of a certified copy of the defendant's driving record does qualify as an "original" document, *State v. Smith*, 66 Wn. App. 825 (1992), and a new court rule provides that "[a] fax copy [of a document] shall constitute an original for all court purposes." GR 17 (effective September 1, 1993).

Most modern earnest money agreement forms expressly authorize the acceptance of an offer or counteroffer, and the giving of notices via faxed transmission. However, even in the absence of such express authorization, a faxed transmission of an agreement or notice should satisfy the statute of frauds, which requires only that the written agreement *exist* and that it has been *signed* by the party against whom enforcement is sought. The statute of frauds does not require actual delivery of the written agreement to the other party. Contract law merely requires that notice of acceptance of an offer or counteroffer be communicated to the offeror. Under general contract law, such notice may even be oral, so long as the acceptance itself is in writing.

However, to reduce the uncertainty of relying upon oral notices, most modern earnest money agreement forms require, as a matter of contract, the actual receipt of the signed agreement or notice, in order for the acceptance or notice to be effective. Because the requirement for actual receipt of the signed agreement or notice arises out of the contract, and not by operation of law, that same contract can authorize a faxed transmission of the acceptance or notice.

It is not necessary, or even desirable, to require the parties to re-sign the original agreement to conform to a previously faxed agreement. Requesting second signatures simply misleads the parties into believing that the agreement or notice transmitted by fax was not effective, and that it is not too late to change the terms of the agreement or the content of the notice. Instead, the sender should simply return to the broker the faxed copy of the agreement or notice bearing the sender's original signature, after transmitting the agreement or notice via fax machine and making a photocopy for the sender's records.

This article contains general information only, and should not be used or relied upon as a substitute for competent legal advice in specific situations.