ASK THE ADMINISTRATOR

QUESTION: ***A member asked me, "Why do I need to send notifications to my tenant in writing instead of verbally?"***

ANSWER: When faced with the task of enforcing your rights as an owner, notifying tenants of their responsibilities pursuant to their lease is paramount. The importance of giving written notification cannot be underestimated and will improve your likelihood of success should you need to enforce your rights in court while negotiating, and during trial.

Written notification is important because most claims become "ripe" from the date the notice is given. However, to trigger most claims, it is not enough to prove that actual notice was given; rather, you must also prove that proper procedures were followed. To do so, make sure you send the notice in the manner prescribed by the lease. If the lease requires notice be sent by certified mail, and you fail to serve the notice by certified mail, then it may be deemed improper notice, and the court may decline to accept it as evidence at trial. Failing to serve your notice in the manner prescribed by the lease defeats the purpose of putting the request into writing in the first place.

For instance, I recently was on trial in a commercial non-payment proceeding. The owner claimed that it was entitled to tens of thousands of dollars in real estate taxes for the past year, pursuant to the terms of the lease. On the stand, the owner's witness testified that he sent the tenant written notification of the charges pursuant to the lease. He testified he sent the tenant a cover letter with an invoice for the real estate charges via regular mail with proof of mailing. The lease, however, required that the owner send all notifications to the respondent via certified mail. Therefore, the judge denied the introduction of the letters and invoices into evidence, and denied the portion of the owner's claim for real state taxes since he could not prove that he had properly given notice to the tenant.

Providing proper written notice doesn't just apply to claims for real estate taxes, but to all claims for additional rent such as fee assessments, surcharges, late fees, legal fees and rent increases, to name a few, but can serve as defenses to claims for warranty of habitability and laches/stale rent claims as well.

The first thing an owner should do when drafting a written notice is refer to the lease governing the premises and read the clause addressing notice. The lease will usually dictate if a notice must be in writing, and if so, how and where it must be sent. Keep the notice as succinct as possible.

At most, on appropriate letterhead, you may consider including the following information:

A) State your request.
B) Refer to the section of the lease/law that allows you to make this request.
C) State the date the requested action and/or conduct is to occur, or stop.
D) State the consequences for failing to comply with the request.

Remember, every notice should be dated and have the name of the tenant as well as the tenant's address and apartment number clearly stated on the notice and envelope. And even if your lease does not require that the notice be sent in any particular manner you should, at the very least, send the notice using a Postal Certificate of Mailing. Refrain from including any personal, emotional, or derogatory statements in your notice. Similarly, statements based upon personal bias or belief should not be included. Simply reciting basic facts and issuing respectful requests will serve you best.

Also notices having to do with requests by an Owner required as a condition precedent to an eviction proceeding (e.g. Notice to Cure, Notice of Termination, Notice of Non-Renewal, etc.) require very specific language and recital of statutory language that should not be drafted without the assistance of your attorney. As always, contacting your attorney prior to any communication with an adverse party is the best course of action.

Written notification also serves another important function should you find yourself at trial. If you can provide proof of written notice at trial it takes away some of the mystery as to what transpired between the parties outside of court.

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If there no written documentation corroborating witness testimony, you force the judge to make decisions based solely upon the oral testimony. The weight given to this testimony will be determined by witnesses' credibility. Providing written notification serves to bolster witness credibility. It should become your normal course of business to draft and send written notices. In doing so, you may be able to introduce these notices at trial, in lieu of witness testimony, and thus avoid issues with hearsay as well.

A good example of how written notification can help bolster witness credibility surrounds the issue of repairs. Most owners and/or their agents speak to tenants to set up access dates in order to make repairs. But what happens when the tenants fail to provide access and stop paying rent? They are brought to Housing Court for non-payment of rent. Then the tenants claim that the owner never responded to their requests for repairs and claim that's why they stopped paying rent. Suddenly, what they alleged was wrong with their apartment when your agent spoke to them goes from a missing tile in the bathroom to needing new cabinets in the kitchen, broken doors, and a new stove, etc. And now they will not settle without the owner granting them an abatement, reducing the arrears owed. So you go to trial. At trial, it's all about the credibility of your witnesses and introduction of documentary evidence. Some judges are predisposed towards a particular party in a landlord-tenant case, so why leave your whole case up to interpretation? Don't rely on oral communications.

Instead, after you speak to a tenant regarding repairs, write a follow-up letter after the conversation, confirming access dates with the tenant and confirming the repairs are allegedly needed. If access is denied on the agreed upon access date, follow up with a letter informing the tenant that you appeared on the agreed upon access date and that no one was there to grant you access. Inform them in the letter that you will be returning on a specific date to gain access to their apartment to make the repairs listed. List the repairs you intend to make in the letter. Inform them that if the proposed date is not convenient for them, they must respond to you in writing with at least 48 hours' notice with new proposed access dates.

By doing this, you will improve your credibility should you find yourself at trial, and if your agent is unavailable to testify, you can introduce the letters into evidence in lieu of testimony to prove that the tenant only asked for certain repairs, access was denied, and new dates were scheduled.

In short, by giving proper written notification, you can avoid many of the pitfalls that await landlords during litigation and improve your chances for success during trial. ■

At the request of Howard Stern, Esq., the Administrator of the RSA Legal Plan, this material was provided by a Plan attorney, Carlos Perez-Hall, Esq. who is a partner at Borah, Goldstein, Altschuler, Nahins & Goidel.

Non-Payment Workshop at RSA

Wednesday, November 13, 2013
12:00-4:00PM

RSA's offices,
123 William Street, 14th Floor, Manhattan

With the many changes in Housing Court today, property owners who want to represent themselves or better understand this complex process can't afford to miss RSA's Non-Payment Workshops.

The workshops are open to all dues-paid RSA members, but reservations are required. Seating is limited so please call **(212) 214-9243** or email **LRichmond@rsanyc.org** as soon as possible.