Mind Your Business

Serve it Right: The Perils of Perfecting Service of Notice

Follow the rules and win every time – ignore the rules and you can lose big

By Tia Politi, ROA President

I staff five landlord helplines around the state and invariably most calls, especially now, are about terminating tenancy. The process is always fraught with peril, but even more so now, during a pandemic. The challenges are many. First you must select the correct notice, then you must prepare the notice just right, calculate your timing with precision, and finally, serve the notice perfectly. If the resident does not perform according to the direction in the notice, your notice will become the basis for a court action, and the resident can defend against your notice in court. If the termination is for-cause, in most cases you must provide an adequate cure period and you must be able to prove that the violation(s) occurred. The civil standard of proof is by a preponderance of the evidence.

The Rules of Evidence are found in ORS Chapter 40, and basically, include written documentation, contemporaneous notes, photos, videos, texts or emails, and witness testimony. If your termination is contested, you must prove that your allegations are true – more likely than not. Always look at your situation with a critical eye and ask yourself: What would a judge think? Does your evidence prove your case? Did you act in good faith? Were you reasonable? Is your notice perfect in every way? If the answer to any of these questions is "maybe" you best rethink your strategy. Since the passage of Senate Bill 608 in February of 2019, termination rules have changed dramatically. Pile on pandemic restrictions under HB 4401, and you'd better be even more careful.

The easiest slam-dunk win for a tenant in eviction court is to prove "the notice is wrong." That can include problems with your selection and preparation of the notice itself – called a defective notice – or by serving the notice incorrectly – called imperfect service, so proper service is essential. There are three ways and ONLY three ways that you can deliver legal notice to terminate tenancy under statute. The methods of service and the calculation of time for notice periods are found in ORS 90.150, 90.155 and 90.160. It's a small section of statute, but it often causes the most problems for the unwary landlord. My comments in each section of statute are bold and italicized.

SERVICE OR DELIVERY OF NOTICES

90.150 Service or delivery of actual notice. When this chapter requires actual notice, service or delivery of that notice shall be executed by one or more of the following methods:

(1) Verbal notice that is given personally to the landlord or tenant or left on the landlord's or tenant's telephone answering device. ***Actual notice is allowed by landlords only for notice of entry (unless serving by mail only per section (3) below) for notice of termination of tenancy.***

(2) Written notice that is personally delivered to the landlord or tenant, left at the landlord's rental office, sent by facsimile to the landlord's residence or rental office or to the tenant's dwelling unit, or attached in a secure manner to the main entrance of the landlord's residence or tenant's dwelling unit. ***Remember, this is actual notice, and cannot be used to terminate tenancy by the landlord, but can be used to terminate tenancy by the tenant.***

(3) Written notice that is delivered by first class mail to the landlord or tenant. If the notice is mailed, the notice shall be considered served three days after the date the notice was mailed. ***This type of actual notice is allowed to terminate tenancy by either party.***

(4) Any other method reasonably calculated to achieve actual receipt of notice, as agreed to and described in a written rental agreement. [1995 c.559 §3; 1997 c.577 §5; 1999 c.603 §9; 2003 c.14 §33] ***This section is what allows landlords and tenants to agree to email or text notice, for example, for notice to enter or maintenance requests, but NEVER for termination of tenancy or rent increases either.***

90.155 Service or delivery of written notice. (1) Except as provided in ORS 90.300, 90.315, 90.425 and 90.675, where this chapter requires written notice, service or delivery of that written notice shall be executed by one or more of the following methods:

(a) Personal delivery to the landlord or tenant; ***This method is fraught with peril. I've had callers claim to have served notice personally, but when I dig deeper and ask, "Did you hand the notice to the tenant, or drop it at their feet if they refused to take it from your hand? Did you serve each named party?" I often get a no in response. One lady told me she personally served notice by posting it on the door. That's not personal service. Personal service means I make eye contact with you and PERSONALLY hand you the notice or drop it at your feet.***

There was a case out of Portland where a manager went to a unit to serve notice on a tenant. The tenant's 9-year-old son opened the door, the manager made eye contact with dad (the tenant) who was lying on the couch and told the man he had a notice to serve him. The dad told his son to shut the door and then the manager slid the notice under the door. The action went to court and the landlord won the case as the manager had made eye contact with dad (who was the sole tenant) and told him he had a notice to serve him. Unless you have no other means of serving notice, most attorneys do not recommend this type of service. The most common errors with personal service are not serving the notice personally or not serving each named party.

(b) First class mail to the landlord or tenant; ~~or~~ ***This is the way and usually the only way attorneys serve notice and is by far the most secure legally. Just mail a copy of the notice to the tenant(s) and All Others to their mailing address. If their mailing address is different than the physical address of the property, mail the notice there. Because mail does get lost, it's a good idea to perform a courtesy service of notice by email, text or by posting a courtesy copy of the notice on the door of the unit. I think we can all assume that most folks who go to law school and pass the bar are smarter than most of us (at least about the law), so I'm going to do what the smart people do and so should you.***

Does your resident have an alternate mailing address? It's important to ask the question at the outset of the tenancy, and our rental agreements require them to disclose that to you, but I had tenants in one of my rentals who did not tell me and I forgot to ask, but they did put their PO Box return address on their envelope every time they paid rent. I made note of that and had no problems, but I could foresee a possibility that a judge could rule in favor of a tenant who made a practice of that, claiming that you should have noticed or asked about it.

Another obstacle to mailed-only notices can be the lack of a mail receptacle. I once tried to serve a notice for a client, who had failed to provide a mail box or slot at the rental property and he had not gotten any alternate mailing address for them. By the time he came to me, the relationship between them had soured and they would not answer the door or return any of his calls or emails. So, how was he supposed to get them served? I went and attempted to personally serve them, but 15 minutes of sustained knocking failed to garner any response. He was forced to put the property under surveillance and wait for them to come out. After many hours, he was able to accomplish personal service, but what a pain. Make sure there's a mail box or mail slot at the property or get an alternate mailing address before you hand over keys.

(c) If a written rental agreement so provides, both first class mail and attachment to a designated location. In order for a written rental agreement to provide for mail and attachment service of written notices from the landlord to the tenant, the agreement must also provide for such service of written

notices from the tenant to the landlord. Mail and attachment service of written notices shall be executed as follows: ***Most landlords like to serve notice by post-and-mail because they don't have to add three days for mailing, but this method is also fraught with peril…***

(A) For written notices from the landlord to the tenant, the first-class mail notice copy shall be addressed to the tenant at the premises and the second notice copy shall be attached in a secure manner to the main entrance to that portion of the premises of which the tenant has possession; and ***What does it mean to attach a copy "in a secure manner"? Can it be argued that your notice wasn't securely affixed? Yep. Did you post it on the "main entrance"? What is the main entrance? What if the tenant uses the back door as their main entrance? This method of service can be a challenge as many the unwary landlord has discovered once they're in court facing a tenant attorney. The next section of the law showcases another reason why…***

(B) For written notices from the tenant to the landlord, the first class mail notice copy shall be addressed to the landlord at an address as designated in the written rental agreement and the second notice copy shall be attached in a secure manner to the landlord's designated location, which shall be described with particularity in the written rental agreement, reasonably located in relation to the tenant and available at all hours. ***Pay attention to this part of statute. Because reciprocity is integral to the right to post-and-mail notices, landlords have to have everything just right in the written rental agreement. First, you must designate a reciprocal, physical location in the written rental agreement. Second, that location must be "described with particularity," so not just an address, but a particular location at that address where the tenant may reciprocate and post and mail notices back to you. Third, that location must be reasonably located in relation to the tenant and available at all hours.***

So, what does "reasonably located" mean? I think it means that wherever that location is, it can't be too far away from the tenant's location. I don't think there's a specific definition and it may largely depend on the tenant, their capacity and their transportation options. Another thing to consider is whether or not there are barriers to access to your reciprocal location. Can the tenant actually get there? Are their stairs, and your tenant is physically limited? I once had a renter who lived close to my office, but she was morbidly obese and struggled to get up the few short steps to our office door. Because of this fact, I would never serve notice to her by post-and-mail because even though we met the criteria otherwise, reciprocity was a challenge for her.

In another matter, I once had a rental owner come to me wanting to evict their residents for non-payment of rent. The right to post-and-mail their notices was listed in the written rental agreement for posting notice on their front door, the address provided by the owner was located a reasonable distance from the dwelling unit, and the residents had appropriate transportation, were able-bodied and physically capable of providing reciprocal service to their landlord at that location. Believing all the criteria were met, the notice was served by post-and-mail, the residents failed to tender rent and the case ended up in court.

The residents requested a trial and the owner began to prepare. Looking at their case with a critical eye, we were discussing any possible weak spots. During the discussion, the landlord mentioned a gate at the property. What?!! A gate? Oh, yeah, they had forgotten to mention the very important fact that a locked gate prevented access to the main entrance of their stated physical address. The case ended up being settled without a trial, but this one tiny detail could have resulted in a spectacular loss for them even though the residents clearly owed the money specified in the notice, the notice was otherwise perfect, and they acknowledged receiving it.

(2) If a notice is served by mail, the minimum period for compliance or termination of tenancy, as appropriate, shall be extended by three days, and the notice shall include the extension in the period provided. ***This is another area where landlords mess up – they count their days wrong. We'll address that in Calculation of Notice Periods.***

(3) A landlord or tenant may utilize alternative methods of notifying the other so long as the alternative method is in addition to one of the service methods described in subsection (1) of this section. ***Yes, you can serve notice by certified or registered mail, or even carrier pigeon if you have one, but only if it's IN ADDITION to one of the legal methods of service.***

(4) After 30 days' written notice, a landlord may unilaterally amend a rental agreement for a manufactured dwelling or floating home that is subject to ORS 90.505 to 90.850 to provide for service or delivery of written notices by mail and attachment service as provided by subsection (1)(c) of this section. [Formerly 90.910; 1997 c.577 §6; 2001 c.596 §29a; 2015 c.388 §9; 2019 c.625 §50] ***This statute does not allow for a notice of change in terms for post-and-mail for regular tenancies, only for manufactured dwellings or floating homes that are subject to ORS 90.505 to 90.850. So, if you don't have the correct info in your rental agreement, it doesn't appear that you are allowed to change that. But that's okay, because you should ALWAYS serve notice by First-Class Mail only - if you want to be one of the smart people.***

90.160 Calculation of notice periods. (1) Notwithstanding ORCP 10 and not including the seven-day and four-day waiting periods provided in ORS 90.394, where there are references in this chapter to periods and notices based on a number of days, those days shall be calculated by consecutive calendar days, not including the initial day of service, but including the last day until 11:59 p.m. Where there are references in this chapter to periods or notices based on a number of hours, those hours shall be calculated in consecutive clock hours, beginning immediately upon service. ***Calculating your time correctly is another challenge of serving notices. Notices served personally are sometimes referred to as "hour notices," as the clock begins running as soon as the notice is served and expires however many hours later depending on the timeframe for performance or termination as the case may be. Notices served by first-class mail or post-and-mail are sometimes referred to as "day notices," as the clock does not begin running until 11:59 p.m. on the day of service and expires however many days later depending on the timeframe for performance or termination as the case may be. The day of service is often called a wasted day, or day zero.***

Take note that in 90.155(2) that notice periods are required to be extended by three days when serving notice by first-class mail. What often messes up the timing is when landlords count the day of mailing as day one, so you'll see on all notices produced by the Oregon Rental Housing Association, that it says to add four days for mailing. We've done this as too many private landlords were messing up their calculation of time and counting the day of service by first class mail or post-and-mail as day one. Remember, you can always give more time, you just can't give less.

(2) Notwithstanding subsection (1) of this section, for 72-hour or 144-hour nonpayment notices under ORS 90.394 that are served pursuant to ORS 90.155 (1)(c), the time period described in subsection (1) of this section begins at 11:59 p.m. the day the notice is both mailed and attached to the premises. The time period shall end 72 hours or 144 hours, as the case may be, after the time started to run at 11:59 p.m. [Formerly 90.402; 1997 c.577 §7; 2005 c.391 §14; 2013 c.294 §4; 2015 c.388 §1] ***This section reminds us that calculation of time must be perfect. Again, if you're unsure about how to count your days, you can always add a day or two to ensure perfection in timing.***

Other timing issues and notification requirements

<u>Legal Holidays – 187.010</u>

When your rent due date or notice 'pay by' date falls or expires on an 'official' holiday, you need to add time to your notice periods.

- ✓ Each time a holiday, other than Sunday, falls on Sunday, the succeeding Monday shall be a legal holiday.
- ✓ Each time a holiday falls on Saturday, the preceding Friday shall be a legal holiday.

The following days are legal holidays in this state:

- ✓ Each Sunday; New Year's Day on January 1; Martin Luther King, Jr.'s Birthday on the third Monday in January; Presidents Day, for the purpose of commemorating Presidents Washington and Lincoln, on the third Monday in February; Memorial Day on the last Monday in May; Independence Day on July 4; Labor Day on the first Monday in September; Veterans Day on November 11; Thanksgiving Day on the fourth Thursday in November; Christmas Day on December 25.

Any act authorized, required or permitted to be performed on a holiday as designated in this section may be performed on the next succeeding business day; and no liability or loss of rights of any kind shall result from such delay.

The easiest way to remember this rule is that your notice to pay money must expire on a banking day.

<u>Veterans disclosure required – ORS 90.391</u>

As of January 1, 2020, all notices of termination, whether for-cause or no-cause, must include a disclosure for veterans regardless of whether or not the tenant is a veteran. Use updated forms, or if you're using older forms, be sure to write in the required language:

- ✓ If you are a veteran of the armed forces, assistance may be available from a Veterans Services Officer or Community Action Agency. Call the 2-1-1 information service to learn about resources in your area.

Failure to include this language will result in the notice being materially defective.

The Takeaway

Notices to your residents are legal documents and they must meet legal requirements – don't let your tenant beat you on a technicality. Losing an eviction trial, paying for your tenant's attorney, and having a judgment against you that's on your record for 10 years, impacting your credit, has got to be one of the more frustrating and costly experiences for a rental owner. Know the rules and follow them exactly or you may experience a very painful outcome.

This column offers general suggestions only and is no substitute for professional legal counsel. Please consult an attorney for advice related to your specific situation.

Rev 5/2021