

Foreword to the First Edition

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The Commercial Lease Formbook is a collaborative effort of some of the most experienced and capable real estate lawyers in the country. They are members of the American Bar Association's Real Property, Trust and Estate Law Section, Commercial Leasing Committees. This contribution reflects real estate lawyers at their professional best.

While young attorneys and those who do not regularly practice in the leasing field will especially find this book valuable, even experienced practitioners will find forms that will save them time and perhaps facilitate lease negotiations.

Book Organization

The Commercial Lease Formbook is presented in two formats—text and CD-ROM. Each lease is preceded by a brief lease description, informing the reader of the lease type, landlord or tenant orientation, and general circumstance in which the lease will be of greatest value.

The text portion of the book includes narrative and ten lease forms, with commentary organized into four chapters: Office Leases, Retail Leases, Industrial and Warehouse Leases, and Specialty Leases. The CD-ROM portion of the book includes the same narrative and 19 lease forms, including the forms from the text portion of the book and an additional 9 forms. The lease forms that are included only on the CD-ROM are summarized in the print portion of the book. The CD-ROM uses Microsoft Word and includes the standard “Find” feature for locating particular phrases in a form lease. The intention is to make available to the practitioner a multitude of forms, with commentary, to assist the practitioner in selecting the best lease provisions or lease forms for his or her particular needs.

A Table of Contents of each lease is also provided as appropriate and within each lease there are significant editorial comments that will explain to the reader the purpose of particular lease provisions, landlord and tenant concerns, and, in many instances, alternative lease terms to accommodate the opposite party to which the lease is oriented. For each type of lease, one or more form leases with commentaries are offered in text, as well as an outline of the other form leases provided in the CD-ROM. The CD-ROM contains several leases for each category, including a lease from the landlord's standpoint, a lease from the tenant's standpoint, and negotiated lease provisions.

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Why Use Forms?

Two developments in commercial leasing suggest the special benefits of the organization of this work. First, national forms have come into their own. Tenants who have sites throughout the nation have significant bargaining power to dictate the lease terms and the lease form. National landlords, many a result of the commodification of real estate into real estate investment trusts, use national forms to gain efficiency and reduce legal fees. Both proceed from the assumption “use my form or else.” Second, leasing brokers, who often are also attorneys, are after the “deal” makers. The broker proposes and negotiates the lease terms. This book provides the user with a tool to evaluate the proposed terms and lease form, and the basis to determine if the proposed transaction is standard or within norms. Finally, attorneys are under pressure to reduce their legal fees for “routine” transactions. This book helps level the playing field so that smaller law firms can have the benefit of state-of-the-art lease forms without having to invest the time to create the forms for what may be occasional transactions. However, the forms in this publication could not, and are not intended to, constitute a definitive statement of what should or should not be included in a lease. In fact, there may well be state-specific requirements, like statutory disclosures or lease execution protocols, that must be included in the lease by state law. There will certainly be deal-specific requirements that necessitate a careful review of the form by an attorney who is licensed in the jurisdiction where the form will be used. Rather, the forms represent a structure on which the lawyer can tailor her or his particular transaction.

Because the dynamics of leasing transactions are continually changing in response to not only new legal developments but contemporary practical considerations as well, lease forms can be used only as a basic starting point. Therefore, when using the following forms, bear in mind that a variety of general factors (as well as the terms of the specific deal at hand) must be considered before modifying the form. Certain issues that were of marginal consideration in the past (if they even existed at all) have now taken on important dimensions. For example, the proliferation of environmental laws and regulations in recent years has increasingly affected environmental provisions in leases. ADA compliance is another example of a relatively recent development that necessitates additional attention by both landlords and tenants. And, of course, the downturn in the real estate economy in the early part of the 1990s resulted in an increased awareness in lender’s rights and remedies. This affected such lease issues as the disposition of insurance proceeds upon damage or destruction, and subordination, non-disturbance issues, among others.

Battle of the Forms

A comment must be made about the “battle of the forms,” which often occurs at the outset of a lease transaction; that is, the issue of whether lease negotiations start with the landlord’s proposed form or the tenant’s proposed form. The conventional wisdom is that it is generally better to start with “your” form. One obvious advantage is that the form you have selected is probably substantively better for your side of the transaction. Another advantage of using your form of lease is that you simply know the document

better and, therefore, negotiating that form will probably be easier and more efficient for you. For example, you will quickly know how a change in one particular provision might affect other provisions in your form. Moreover, many lawyers believe that it takes less time to prepare their form of lease than it takes to review, comment on, and revise someone else's form of lease, thereby saving the client fees. Finally, it is often important for landlords that all leases for a particular project be somewhat uniform in both structure and substance.

Irrespective of which of the party's preferred forms is used to start with, counsel should be cautioned that the old adage "more is better" is not necessarily true when it comes to leasing. This is because, by proposing a particularly onerous form of lease, the negotiation process is expanded, resulting in more time, effort, and expense by all parties, but without any corresponding benefit to any party. Remember that the goal of both the landlord and the tenant is to get the proper job done as quickly and inexpensively as possible. This goal must also be seen within the backdrop of what has already transpired before the lawyer is even brought in. In many (if not most) instances, counsel is first introduced to the proposed lease transaction after a letter of intent has been negotiated and signed. At that point, many clients feel that they have already "cut their deal" and all that is left to do is merely a matter of the lawyer "wordsmithing" a document that will effectuate the terms of the deal. The clients—sometimes even the most sophisticated ones—are impatient and easily frustrated if lease negotiations become protracted.

Therefore, try to get a sense of what is truly important to your client and what isn't before you start the negotiations. This will not only make your negotiating task easier (by knowing what issues to concede and what issues you need to hold firm on), but it will make the process easier for your client. Otherwise, your client may need to address multiple issues for which he or she has little time or patience.

Knowing what is important to your client means knowing as much about the property as is feasible. For example:

- Understand the physical configuration of the project, including the parking areas/structures and pedestrian and vehicular access routes to and from the project;
- Review recorded covenants, conditions, and restrictions (and other recorded documents that encumber the property);
- Understand what kinds of signage might be available on the exterior of the building, the main lobby, in the floor or elevator lobby, and the like;
- Familiarize yourself with building Rules and Regulations;
- Understand the financing on the property, since a secured lender may require that all leases be approved by it and/or that new tenants sign a subordination, non-disturbance agreement;
- Familiarize yourself with insurance requirements—know what insurance will be required of the tenant and what insurance the landlord intends to carry;
- To the extent possible, determine if the project is in compliance with the law;

- Familiarize yourself with special concessions given to other tenants—for example, the exclusive right to sell certain items;
- Understand the terms of the tenant and landlord work letters;
- Familiarize yourself with how your client likes to do business and how much flexibility there is in negotiations; bluntly put, understand the client’s “hot buttons” so you can prioritize the issues and save time during negotiations.

Failure to have a strong understanding of your own documents and your client’s views on certain lease issues will only increase the time and energy you need to devote to negotiating the lease, while at the same time detract from your effectiveness and ability to speedily resolve issues.

Consistency in Lease Provisions

Consideration should be given to consistency in the use of a particular form as well as in certain substantive provisions. For example, many tenants (particularly retail chain tenants) insist that certain provisions be included in all of their leases. However, the desire for consistency is generally more important for landlords in multi-tenant projects. It is simply easier for a landlord to deal with a real estate asset involving multi-tenants if certain of the provisions are consistent.

Common Area Expenses

In multi-tenant buildings in which each tenant is required to pay a share of so-called “common area expenses,” provisions relating to common area expenses should be identical. In particular, those expenses that are included in (and those expenses that are excluded from) the calculation of common area expenses should be consistent. Otherwise, determining common area expenses for each tenant can become an accounting nightmare.

Damage/Destruction and Condemnation Provisions

It is also advisable for the damage/destruction and condemnation provisions to be consistent for all tenants. In this fashion, the landlord can deal with all tenants in the same manner in the event of damage/destruction or condemnation. Generally speaking, it probably makes little sense for one tenant to have greater rights than other tenants, to remain in possession of a project, or to require the landlord to restore the project following damage/destruction or condemnation.

Property Management Issues

Remember that the signed lease will usually end up in a property manager’s file. When a question arises, a staff member at the property manager’s office might be called upon to determine what the lease says about a particular question. Therefore, it is advisable to have a lease form that is identical for each tenant, so that the property manager does not have to wade through the lease and determine which provisions are applicable. Many attorneys find that the preferable way of structuring the lease is to keep the basic form of the lease unchanged and attach an addendum that covers any tenant’s specific changes to the basic lease form. In this fashion, the property man-

ager (or counsel) can correctly assume that the terms in the basic lease are applicable to any particular issue unless there is a provision in the addendum that provides to the contrary.

Negotiations

Irrespective of the “form” of lease, consistency in negotiations is also important. For example, consistency in lease form often justifies the landlord’s refusal to modify a particular provision. This is because, for some inexplicable reason, tenants will frequently back off of an issue when they hear the words “the landlord has never changed that provision.” Therefore, it is sometimes important that a landlord not concede a particular issue for a prospective tenant when the landlord has refused to concede the same issue for existing tenants. Tenants do tend to be jealous of each other and a tenant is often willing to accept an unfavorable provision so long as other tenants have to accept it as well.

Other Considerations

When using any of the lease forms included in this lease publication, bear in mind that there are often other parties to the transaction who need to be considered. For example, lenders must be approached to obtain subordination, non-disturbance agreements; space planners, architects, designers and contractors may need to be retained if there is tenant improvement work; broker commission issues must be addressed; building and zoning restrictions must be considered; the landlord’s property manager might be required to assist with leasing administration issues; and so on. The sooner you consider how all of these parties affect the lease negotiations and the lease drafting, and the sooner you garner their input, the more efficiently the lease negotiations will proceed and the sooner a lease will be signed.