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A Message from the Section Chair

As my birthday approaches, I was just required to file my biennial attorney registration form. In this age of mandatory continuing legal education, part of this new form is a sworn statement that I have completed 24 hours of legal education over the past two years. As I completed my solemn attestation, I reflected upon how easy and pleasant it has been for me to fulfill the mandate. Virtually all of my requirements have been met by attending the Annual and Summer Meetings of the Real Property Law Section.

If you attend our Annual Meeting in New York City on January 23, 2003, and our Summer Meeting in Florence, Italy, on August 6-9, 2003, you will fulfill all of your requirements for Mandatory Continuing Legal Education (MCLE) next year.

Our legal education programs offer excellent materials and fine scholarship. Matthew Leeds, our current First Vice-Chair, continued this great tradition and perhaps set a new benchmark during our recent, highly successful Annual Meeting in Newport, Rhode Island. Some of these program materials are featured in this edition of the *Journal.* You will also find some photographs of MCLE 'students,' spouses and family enjoying themselves after class.

The program crafted by Matthew Leeds for the January meeting looks just as exciting as the panels and presentations at Newport. We are also expecting some special awards at the luncheon during which the illustrious and always provocative former Mayor of New York City, Ed Koch, will round out the day as our luncheon speaker.

Please consider meeting all of your MCLE needs through the programs and meetings of the Real Property Law Section.

John J. Privitera

Inside

SPECIAL SUPPLEMENT: TENANT'S CHECKLIST OF SILENT LEASE ISSUES (SECOND EDITION)

Joshua Stein Wins 2002 Burton Award for Legal Writing

The Editors of your *Journal* were very pleased to learn that one of our most prolific and scholarly contributors, Joshua Stein, a partner in the New York office of Latham & Watkins, was one of 15 attorneys chosen nationwide from over 500 law firms to receive one of the coveted Burton Awards. The Burton Foundation Program is dedicated to the refinement and enrichment of writing in the legal profession. Every year, it honors those whose legal writing meets a high scholarly standard and yet is clear, concise, and free of legalese. Such a description fits Joshua's work to a "T."

Joshua Stein with his daughter Julia

Besides writing over 100 articles and other publications of timely interest to New York and national real estate practitioners, Joshua has just published a book on New York commercial mortgage practice. As Chair of a subcommittee of our Section's Committee on Commercial Leasing, he led a team that produced a report about Subordination, Non-Disturbance and Attornment Agreements, which included a model SNDA that has become a standard for such documents across the United States. Later, as Co-Chair of our Committee on Commercial Leasing, he undertook several ambitious projects, including development of extensive checklists for the "Silent Issues" facing commercial landlords and tenants.

Joshua won his Award for an article on usury published in the State Bar's *Journal* in 2001, which updated an earlier version published here in 1993. The article, as even further updated, appears as Chapter 2 in his book on commercial mortgage practice, and includes the very useful and frequently used intricate flowchart from the prior articles.

We congratulate Joshua for his professional accomplishments and wish to express our appreciation for the very fine support that his wife, Gloria; his daughters, Helaina and Julia; and his partners at Latham & Watkins have given him. All of you have bettered our profession!

William Colavito
Joe DeSalvo
Harry G. Meyer
Bob Zinman

How to Prevent Email Embarrassments, Control the Email Deluge, and Get People to Read the Email You Send

By Joshua Stein

"I emailed you the term sheet 10 minutes ago. Why can't we discuss it yet?"

"I didn't see any email from you. Maybe you didn't have the right address. Please send it again. I promise I'll look at it."

"They emailed me a copy of their internal agenda and strategy points for the meeting tomorrow. Someone used a mailing list for everyone on the deal, not just their side."

"I assumed your email message was intended for the whole committee. I didn't realize I wasn't supposed to send it to them."

"We already sent you the version of the loan agreement showing changes from 9:45 last night. This version shows the changes from 6:15 instead. We've also attached a clean version. Now we're attaching the closing checklist. Note A is in a file called xytx32.doc. The other Note, marked to show changes from version 3, is in a file called a37x01.doc. Please also see the other 17 attachments, which are various closing certificates and exhibits, some of them marked to show changes, generally from Tuesday mid-day. All the filenames start with yt but they're not numbered. Some of these are Excel spreadsheets; make sure you print out all 3 parts of each one and then tape together the pages where column H meets column I. Unfortunately, because of the timing needs of this transaction, we will need any comments on these documents in the next 37 minutes."

"It's a standard graphics format file. Why are you having so much trouble opening it?"

1. Introduction

Comments and questions like those quoted above have become part of every lawyer's routine, as one email[1] transmission after another drifts in and out, day and night.

Email has largely replaced regular mail, messenger deliveries, overnight couriers, and fax transmissions as the technique that lawyers and clients use to distribute all written material, except a few categories of items that can't (yet) be sent in machine-readable form, such as signed counterparts of final documents. Email may soon become the standard for those documents too, given recent legislation on electronic signatures and constant improvements in email technology.

How can you not embarrass yourself or create other problems through email? How can you control the email deluge and not spend hours processing traffic coming from or going into the Internet void? How can you get other people to notice the email you send, when they all receive a deluge as heavy as your own?

2. Avoid a Red Face

The perceived speed, informality, and ease of email create endless new opportunities for embarrassment. Email is written communication. It's not oral communication. Don't make the mistake of thinking it's just like a conversation or a phone call.

As if you sent a letter, when you start making a point in an email message, you can't soften or refocus your message, or backpedal or present your position differently, based on the recipient's reaction or the fact that the audience for the message changed. If someone misinterprets your message or takes it the wrong way, you can't change it. Nuances and subtleties vanish. Keep all that in mind when you choose which medium to use, particularly when you want to send a message that might be sensitive, difficult, or complicated.

"Email has largely replaced regular mail, messenger deliveries, overnight couriers, and fax transmissions as the technique that lawyers and clients use to distribute all written material . . ."

Moreover, emails last forever, even after you "delete" them. Any recipient can copy and redistribute them, quickly and widely. Even if everyone thinks they deleted your email message, numerous backup copies of it will remain at the various computers and servers through which it passed.

Therefore, when you write email, give it the same care and thought as a memo or letter. Email is just as likely as either of the latter to be scrutinized in litigation or in unscrambling the history of some problem or dispute. If you wouldn't say it in a memo or letter, don't say it in email.

Here are some suggestions to keep in mind along these lines,

together with some other suggestions for how to prevent email problems:

- *Calm down.* If you are angry, don't send an email message until you have cooled off. Then review your message. Consider whether to tone it down. Even mere sarcasm or snottiness or snittiness can take on more weight than you intended if you communicate it in an email. What you meant as a minor complaint or suggestion may be perceived as a serious criticism when the recipient reads it in black and white, without context, on his or her computer screen.
- *Just joking?* Humor often works badly in email, particularly from a lawyer. What seems funny to you might not seem funny to the recipient. Although little smiley faces might tell the reader you were joking, they create their own bad impressions.
- *Consider the circulation.* The more widely you circulate an email, the more likely someone will find it offensive, insensitive, careless or stupid, or will start an impassioned mass discussion about some left-field issue you didn't mean to raise, but did. Therefore, the more widely you plan to circulate an email, the more carefully you should write it. Ask someone else (anyone else) to review it. And are you sure you really need to send the message as widely as you think? When it comes to circulation of email messages, less is often more.
- *Slow down—with help from your software.* If your email is important or complicated, or will be widely circulated, write it in word processing software rather than email software, or write it with your email software and save it as an unaddressed "draft" so you can come back to it later and think about it some more before you send it, and you won't unintentionally send it before it's ready.

  If you use your word processing software to compose your email, this will slow you down, make you think harder, help you edit more, and protect you from clicking "Send" mistakenly, reflexively, or otherwise prematurely. Word processing software also lets you spell-check and more easily proofread your document, so it will look more credible. Clients often can't tell whether your legal advice is sound, but they can certainly tell if you made careless typos. And they will notice, even in an email message. When you know your message is right, convert it to the text of an email message, not an attachment.
- *Read a paper copy.* If your message justified careful editing and rethinking, then before you send it read a paper copy of it one last time as if you had never seen it before. Your eye will probably catch problems more readily on paper than on a screen. If it still looks good, send it.
- *Click the correct reply button.* When you reply to any email that originally went to more than one person, decide if your reply should go just to the original sender or to everyone who received the first email. The wrong choice could embarrass you. This problem is particularly prevalent in "emailing lists," where choosing the "reply" option usually means you will "reply" to the entire list, which might not be what you wanted. If you really want to communicate only with the one person who actually posted the message that appeared on the list, you should not "reply" at all, but instead "forward" that message and then address it only to the one intended recipient.
- *Unmark changes.* Your word processing software probably lets you record changes—"redlining" or "blacklining" as you work—with markings that stay invisible until someone makes them visible. If you use that feature ("Track Changes" in Microsoft Word), your document may include a hidden record of your thought process (e.g., compromises that you were willing to consider, nasty comments about the other side, or confidential information that you deleted from a previous transaction). You might not want everyone to see all that. Remove the hidden historical traces before you email the document. Depending on your own facility with the removal process, you might ask your assistant to do the removal for you, or at least check that you did it right. (This is one of many tedious clerical steps that email can require, but that are best delegated.)
- *Distribution lists.* If you send email transmissions repeatedly to the same groups of people—such as "our side" and "the other side" in a major transaction—you or your assistant can set up distribution lists to simplify the task. If you use Microsoft Outlook, you can also customize your software to save automatically a copy of each such transmission in a particular folder for the transaction, thus increasing the likelihood you will be able to find the transmission quickly when you need it again.

  If you set up distribution lists, though, don't send your email to the wrong list by mistake. For example, if you want to send to "our side," don't send to the "all hands" mailing list. Give each list a name that will decrease the likelihood of this kind of mistake.

  To simplify multiple mailing lists and prevent mistakes, combine and nest your lists. For example, in a two-party transaction, make one list "our side"; a second "the other side"; and a third "both

sides—all hands." The third list would actually consist of only two entries: cross-references to the first and second lists. Later, when players change, you will need to update only one list. It saves a bit of time, but dramatically reduces the likelihood of mistakes and inconsistencies by making your lists easier to maintain.

The use of nested mailing lists is a minor example of how you can strategically structure a small detail—eliminating any need to make the same change in two places—and thereby make an entire system work more easily, more reliably, and with fewer mistakes and surprises.

- *It will be forwarded.* Assume that any email you write will—especially if you are not careful enough about it—be forwarded to addressees you cannot control. If you write an email that you don't want a particular person to see, you should assume that it will be forwarded to that particular person, either intentionally or because someone wasn't thinking.

  You could, of course, solve this problem by never sending sensitive emails, but the prevalence of email means you need to use it for communications about practically everything. (But is that really true? Don't be so sure.) Therefore, if you write an email that you don't want forwarded, at least say so—both in the subject matter line and at the beginning of the message. Such a warning will, at least, mean that if the recipient does forward it, then it's more their fault than yours. Some email software may let you flag a message as "private," meaning that the recipient cannot forward it.

  When you receive an email, don't forward it without checking with the sender, unless it's totally clear the sender won't mind.

- *Who knows what.* Whether you use a distribution list or simply address your message to multiple recipients at once, think about how visible you want to make your address list. For example, if you are sending bidding instructions to 50 bidders, each of whom should not know anything about the other 49 bidders, don't send out the message in a way that lets each recipient see the names and email addresses of all the other recipients.

  In Microsoft Word, you can prevent this problem by sending all copies of your sensitive email transmission as "bcc" copies. (Send it "to" yourself as the only identified recipient, and enter all the real recipients as "bcc" recipients.) The name of any "bcc" recipient will normally not appear in any copy of the transmission sent to any other recipient, including another "bcc" recipient. Therefore, the multiple recipients will not know about one another. This system works for individual email recipients as well as for distribution lists.

- *Personnel matters.* When you write an email with comments about someone else in the office (someone who isn't supposed to see that particular email message), you need to turn off your mental "autopilot" system when you send the message. Specifically, because you were thinking about the person who is the subject of the email message, you may reflexively send your email to that person because it is one of the names that comes to mind when you address the email. Don't let that happen. Stop. Send your email message only to the people who should see it.

  More generally, proceed with extra care whenever you use email for anything relating to personnel matters. If you know someone in a client's organization is looking for a new job, think twice before you send them email at their usual business address to give them suggestions for people to talk with, or to ask about the job search. Even if it's very unlikely, you should assume until advised otherwise that (a) senior management at the company reads all incoming email, and (b) your friend would not want senior management to know about his or her job search activities. At least ask first, before sending.

  And if you are the talkative job seeker, when you talk to people about your job search, also tell them whether they can or cannot send you email about it. (A clandestine quality to the exercise, whether or not justified, often lends credibility to the proposition that the job switch is voluntary and not forced.)

  The cautionary notes in the last two paragraphs are simply just a variation on similar cautions that apply when communicating about the same subject areas in more old-fashioned ways.

- *Locked documents.* Some email users hesitate to send documents by email for fear of "losing control" of the drafting. In the author's experience, this is a concern that is not justified. When other attorneys have edited and sent back document files the author has sent out by email, the process has typically saved time and not led to "out of control" editing. (The more common problems relate to keeping track of which is the "master" version of the document and who's doing what, plus inconsistencies and imperfections in formatting.) Collaborative drafting of this type may actually be the next big thing in the world of email. If you want to prevent it, though

(for example, when you send out final execution documents, or just because you don't like it as a matter of taste), you have two options.

First, you can "protect" your entire document using the "protect document" or equivalent command in your word processing software. This option is much like placing a sheet of glass over your document, so no one can touch it.

Second, you can convert the document to the Adobe Acrobat "pdf" format. With "pdf" you can, if you wish, prevent the recipient from even printing or saving your document.[2]

Either way, the recipient can look at the document but not edit it. Unless you choose the no-print option in "pdf," though, you still can't prevent them from scanning the document into their system.

- *Virus problems.* As a final technique to prevent problems, try not to propagate viruses in your email traffic. Use anti-virus software for your incoming and outgoing email, and update that software regularly so it can recognize the latest viruses. Email viruses usually activate when you "open" a message. If you merely "preview" an incoming message, you should be able to prevent the virus from activating.

3. Get a Handle on Attachments

You probably receive dozens of email messages every day. Many arrive with attachments that demand some review or response. Many lawyers, including the author, print every significant attachment, because they like to read legal documents on paper and not on a computer screen. But can you review a document on a computer screen and never transfer it to paper?

Try it. You may find that documents—particularly shorter or simpler ones—are easier to deal with on the screen than you expect, particularly if you learn how to use some of the options the software offers. For example, in "pdf" format you can set up "thumbnail" images of each page, which make it easier to browse through the document. In Microsoft Word, you can type comments into the text of documents you are reviewing, either directly (for example, in brackets), or through the "Comment" feature of the software.

Weren't computers supposed to create a paperless office and make paper obsolete? That question goes beyond the narrow one of how to control your email. (For some thoughts, see section 9.)

"As is true with so much else in the world of email (and outside that world), the right approach often depends on all the circumstances, and rigid rules make no sense."

Although you may find it easy to read some documents on a screen, many attorneys (including the author) find that they can read more carefully, thoroughly, and thoughtfully by printing a document out on paper. It may take longer, but paper helps attorneys actually stop and think for at least a moment in the course of trying to close each transaction at breakneck speed to meet the deadline of the moment.[3] As is true with so much else in the world of email (and outside that world), the right approach often depends on all the circumstances, and rigid rules make no sense.

To the extent that you decide to print attachments, don't do it yourself. A few attachments, particularly unusual graphics files, still have problems with software or formatting. Others need clerical attention. If an email message has an attachment, forward it to your assistant for printing. Either tell your assistant to print out the cover note and attachment in every case, or type in some specific instructions every time you forward an email message for printing. Don't forget to indicate how quickly you need the printouts.

If you are not a fast typist, you can establish a code system so you can easily ask your assistant to print the cover note ("pc"), all the attachments ("pa"), only the attachments that are marked to show changes ("pm"), or everything ("pe"). Other codes might mean your assistant should copy attachments into your own computer system.

With a broader set of codes, you may also find that email becomes an ideal channel to communicate all sorts of routine instructions to your assistant. For example, "db" might mean "add this person to our contacts database" and "nttt X" might mean "I need to talk to X if he calls, so if I am on the phone please bring me a note, or if I am out of my office please try to find me, and let X know that I asked you to do that."

Your email software can automatically forward to your assistant any incoming email with an attachment. Like many special features and options in any software package, when you first learn how to use this feature, the instructions sound complicated. They aren't really, though, if you just follow each instruction and then go on to the next. Once you set up a system like this, you will still need to tell your assistant how to recognize what merits printing.

This system works well, unless you receive email your assistant shouldn't see, such as embarrassing or politically incorrect materials. But you shouldn't receive these through your office email system anyway. You should assume your managing partner and any applicable sensitivity committee read all your email, incoming and outgoing. Control your email accordingly. That may be the most important advice about email in this entire discussion.

Forwarding all attachments automatically to your assistant may or may not be practical, depending on the nature and volume of what you receive and how it changes over time. You may find it makes more sense to forward selectively, but train your assistant to know that any time you forward an email with an attachment, you always need your assistant to print both the email cover note and the attachment. If you use a service that converts incoming faxes into email messages (such as www.efax.com), you can set up a "rule" to forward those particular email messages to your assistant in all cases.

Even when you feel overwhelmed by the volume of attached documents you receive, recognize that they give you a benefit that would have been unthinkable a few years ago. When other lawyers email you documents as word processing files, they freely hand out word processing files for documents that you may want to refer to or reuse for future transactions, at least if you trust the source and the documents. By systematically saving and indexing these word processing files as you receive them, you can develop a wide-ranging "form file" of documents ready for selective reference or reuse. They would still, of course, need appropriate editing and cross-checking against other precedents.

Train your assistant to save those "precedent" attachments systematically into your document management system or other computer files, labeling them in such a way that you can find them later. You may even want to maintain a separate "precedent" index of these resources.

Be careful, though. As you receive draft after draft after draft of the same document via email, if you save each draft as a new document when you receive it, you will convert email overload into document management overload. If you want to save all those drafts in your document management system (not necessarily a good idea unless you intend to use the document later as precedent), then make each one a separate version of the same document, each with an appropriate version label. You are probably better off, though, if you store incoming email drafts of routine documents (not destined to be used as precedent) solely in well-named folders within your email software.

If the use of email gives everyone access to an ever-expanding free form file, that may raise its own issues. When you send out a document, are you implicitly consenting to its copying and reuse? Should you include a copyright notice? Will someone else blame you if the document they copied turned out to be inappropriate for their transaction? Shouldn't you have been able to foresee that someone would copy your document and use it, and suffer damage if your document was wrong? When you receive a document, when and how is it proper to reuse that work product? Does reuse violate the author's intellectual property rights? What level of reuse would be permissible?

4. Reduce the Volume

After attachments, probably the second leading cause of email overload is the sheer volume of messages. As email drifts into your inbox, handle it. Don't just add it to your list of burdens. Respond to it, delete it, or move it into a folder or subfolder where you will be able to find it. Perhaps customize your inbox to show the first few lines of every incoming message, so you can quickly see what it's about (and delete most messages even more quickly than otherwise).

If you will need to refer to an email later or if it is urgent or important and you want to respond but can't immediately, move it to an appropriate folder and save it there. For example, you might want to establish a folder for "Inbox Items Requiring Action" directly next to your "Inbox," and use this new folder to hold messages that you know you want to act upon but haven't yet.

Otherwise, your urgent or important message will soon fall to the bottom of your inbox screen and beyond, never to be seen or remembered. A day later, if you remember this message exists, you may have trouble finding it in the accumulated morass of incoming messages.

More suggestions follow.

4(a). Minimize Email Groups

Mailing lists and discussion groups can be helpful, but they can also overwhelm incoming messages that truly require attention. Unless the benefits of a mailing list clearly outweigh its burdens, you can solve this problem by unsubscribing from as many mailing lists as possible, or you can automatically divert this kind of email into a folder. Skim it daily or weekly. Do the same for minor administrative reports and bad jokes from your cousin. (For the latter, try automatic deletion.)

4(b). Protect Your Address

At first it was "cool" to have an email address and to hand it out freely. Then, every organization great and small realized it could blanket its membership with email and never buy another stamp. Communications became too easy. Therefore, think twice before you give someone your email address. When asked for it, first ask yourself if you want unlimited email from that sender and anyone else with whom that sender might share your address.

4(c). Discourage Email

Encourage people to send less email, at least for communications best sent some other way or not at all. For example, you might be able to politely discourage people from sending everyone in the office an email about the set of car keys that someone found in the men's room. Maybe you can encourage people to deal with such issues the way they would have in the dark ages (i.e.,

1993), by maintaining a small "lost and found" box behind the main reception desk.

When someone thinks it is funny to send an idiotic "Reply to All" response to someone else's gratuitous email, can you politely stop the discussion—but without burdening everyone with another email? Such initiatives may change the attitude that says email is free and hence should be used as much as possible.

Before you send an "all-attorneys" email, consider whether you really need to do so. For example, the best way to quickly answer most legal questions remains spending a few minutes in the library or online, rather than burdening all your colleagues with yet another email query.

If your question is one where you really need to pick a number of brains at once, choose those brains selectively. Send your query to a handful of colleagues who might be particularly likely to know the answer. Don't waste everyone else's time with it.

If you target your queries in this way, you may also produce better results. When you send an "all-attorneys" email to all your colleagues, any one colleague feels no particular sense of ownership and no sense that you cared much about what that person thought. As a result, he or she may feel less responsibility, be more likely to ignore you, and be less likely to try to respond to your query. On the other hand, if the recipient knows that you specifically chose to send your message to that particular person, he or she may be more inclined to take the time to read it and respond to it. This is all part of the art of getting people to pay attention to your email.

Correspondingly, when you receive an email query that you know was sent to a short list rather than to everyone in the firm, try particularly hard to take the time to think about it and respond.

4(d). Internal Review

At some point in the recent past, email became so prevalent that attorneys began to use it to send drafts of documents to other attorneys in the office—potentially defeating the purpose of any document management system in the firm, and making it that much harder for two attorneys working together to sit down and really talk through the work product they were preparing.

If you are a supervisor, you may be in a position to discourage such emails altogether. You may be able to encourage the more junior attorneys who work with you to print out any such documents on paper and stop by to discuss them. There is still much to be said for communications that take place in person. Email isn't best for everything.

4(e). Filters

Your email software probably lets you set up rules ("filters") to delete or divert incoming "junk" email, also known as "spam." Learn how to use those filters, and then edit and update them as the composition of junk email changes from time to time. When a "spam" message shows up in your regular inbox despite your filters, ask yourself how you might edit your filters (add more words to watch out for), so the next time you receive a message from the same sender you will filter it out. By continuously improving your filters, you should be able to maintain an almost spam-free inbox without much trouble.

Filters are not always foolproof, though. They may mistakenly divert important and worthwhile email you want to see. Therefore, instead of having the filter mechanisms delete junk email, have the filters move it to a separate folder. Then take two seconds every day or two to check that folder. Make sure nothing you care about was unjustly tagged as "junk."[4]

4(f). Start Over?

As an extreme measure, if your volume of junk email is out of control, get a new email address. Give it out as selectively as an unlisted phone number. For a while, though, you will somehow need to watch for important messages sent to the old address.

As an alternative, you may want to establish multiple email addresses for different purposes, with strategic forwarding between addresses to try to capture all worthwhile email at one address and filter out junk (for occasional review) at other addresses. Free email addresses suitable for these purposes are available from a number of online services.

5. Make Your Email Easy to Understand

Senders of email often needlessly frustrate their recipients by failing to help them understand the purpose or content of an email from the beginning. For example, if a dozen players in a major transaction all distribute several emails a day captioned with simply the name of the transaction, the recipients have no easy way to know what is important and how to keep track of it. Thus, all parties suffer from email chaos.

If you regularly receive user-unfriendly emails, you might ask those senders to make their emails easier to handle. When you send an email, follow the same guidelines that you'd like others to follow. Here are some of those guidelines:

5(a). Write Every Subject-Matter Line Like a Highway Billboard

When you send an email message, don't just write "See attached" in the subject matter line, or mention the name of the transaction or the name of your client. Instead, recognize that your subject matter line

gives you your best opportunity to get your recipients to notice, read, and act on your message. It also helps your recipients control, sort, and track their email. Sometimes email software automatically displays the first few lines of each message. Use those lines, too, as another chance to grab your reader's attention.

Try to include in your subject matter line enough detail so that anyone who receives your email message will be able to distinguish it from other related email messages.

Sometimes, as an extreme example of applying this suggestion, you can start and finish your message in the subject matter line. This simplifies both your life and the recipient's.

5(b). Keep Email Messages Short

If you send an email message that exceeds one computer screen, your recipient is more likely to put it off and ultimately ignore it. If you must send a long message, start with important information, not disclosures, caveats, contact information, and recipient lists. Don't waste your first screenful of email text on administrative information.

5(c). When You Email Documents, Briefly Say What You Are Enclosing and Why

If you show you have thought about what you are sending, your recipient is more likely to read it. Therefore, say something about your attachment. If at all possible, add your explanation as message text, not as an attachment. You don't need a complete formal cover memo or letter, but write something more than "See attached file."

When you need to send an attachment, try to simplify your recipient's life by making the attachment easier to deal with. Here are some suggestions.

- *File names*. Give your attachments communicative file names. Some document management systems assign names like "3x$4i_02.doc" to attachments. Take three seconds to rename that file as, for example, "Joint Venture Agreement." Give it a unique logical name, different from other attachments for the same matter, including past and future versions of the same document. If you marked changes, you can say so in the file name. Your operating system may let you create file names as long as 255 characters. Do it. You might rename this file as "MARKED JV Agreement Feb 20 draft showing changes from Feb 17."
- *Multiple attachments*. If two attachments are tedious, a dozen may overwhelm. Can you combine them into a single file? If not, you particularly need to explain them and use good file names.

  You can simplify your email transmissions by omitting "clean" versions of documents for which you are also sending versions marked to show changes. If the recipient wants a "clean" version (which doesn't happen very often) under these circumstances, you can send it if they ask.

  If you do send both "clean" and "marked" versions of the same document, edit the file names so the first word or so of each one indicates whether it's "clean" or "marked."
- *Embedded text.* Instead of attaching a document, try converting its text into an email message. This method might not work well for heavily formatted or very long documents. When it does work, every recipient will thank you for it. (I realize this technique will produce long email messages, hence violating one of the principles suggested above. As in the law, though, every principle has its exceptions.)

  As a variation, if you are editing only a few paragraphs in a very long document, you might want to spare the recipients the trouble of dealing with the entire document as an attachment. Instead, copy the paragraphs you are editing and make them the text of an email message. Leave out the rest of the document. This technique will not, however, usually let you include formatting such as strikeouts and underlining, so the reader will not be able to identify what you changed.

"The notion of posting confidential documents on the web does, of course, sound rather scary. So did the notion of sending confidential documents by email when it began in the middle or late '90s."

Lawyers may soon make "attachments" easier to deal with by abandoning the technique altogether. Instead, we will post documents on the web—as web pages, not word processing files—so anyone with a browser and a security code can view them. As soon as a document is posted, the author (or a central Web site operator) will create a hypertext link to point to the document and automatically enter the right security code. That link can then be emailed immediately to everyone who needs to see the document. The same web site might also include all prior versions of the same document and a hyperlinked index to prevent chaos.

The notion of posting confidential documents on the web does, of course, sound rather scary. So did the notion of sending confidential documents by email when it began in the middle or late '90s. Now that lawyers routinely email confidential documents around the world many

times a day, has it ever compromised confidentiality, other than because of the sender's own mistakes? Does posting documents on the web create more risk? This new technique to distribute documents represents an easy programming project for anyone who designs web sites. It will probably soon be routine in word processing software and lawyers' daily lives.

5(d). Consolidate Your Shipments

Try to reduce the total number of email transmissions you send, thus making them easier for your recipients to handle. Instead of sending out a separate email transmission for each revised document, try to send them in a group (but well-identified, as suggested above). And if you have made only a few changes since the last draft, perhaps defer sending out a new distribution until you're sure you've collected everyone's comments on the current draft.

6. Encourage a Quick Response

Even if you have prepared the most user-friendly of emails, you may still have trouble getting your recipient to respond to it. As one unsubtle technique, you can request an automatic return receipt when you send your email message. That way, the recipients' software will tell them when they acknowledged your message. They lose "deniability." If you do this too much, though, it loses its effectiveness. And, it creates more incoming email for you to deal with. Some other techniques:

6(a). Tell Them

Call your recipients. Tell them you are sending (or have just sent) important email, and what it is. You may catch their attention, even with just a voice-mail message, and make them want to go out of their way to find and read your email before it vanishes into the email abyss.

6(b). Remind Them

If you need a response but don't get it in a day, don't wait. You can assume with confidence that your recipient is not elegantly polishing his or her response, trying day after day to achieve perfection before sending it back to you. To the contrary, your email has already been ignored. So send a reminder or pick up the phone. If you did not truly want a response, but just wanted to say you had told the recipient something, email might do the trick. But you may seem disingenuous later if you imply that you think an email sent is the same as an email received, read, and understood.

"Many people—and an increasing number of people—prefer email over any other communications medium. Others think they receive too much email. Some people are telephone people. Others prefer paper."

6(c). Anything But Email

If you want your recipient to notice your message, try sending it any way except email—particularly if it is a chore, burden, or decision. These latter messages often fall into a deep dark hole when emailed. It is not that the recipients are bad people or that they don't care. It is just that email makes your message too easy to ignore. If the recipient ignores it for a few hours, it will fall below the first screenful of his or her email inbox, and probably be forgotten forever. If you send it by fax, overnight delivery, or first-class mail, it's harder to forget about, and it may stand out just because it isn't email.

A quick phone call can work even better. Don't underestimate the power of a phone call. It may be more work to initiate, but once you reach whomever you wanted to speak with, a quick two-way conversation is usually far more effective than days of email.

Even if you send email, you can call to say it's coming or check whether it got there. Telephone calls tend to build relationships better than email messages. And they catch the recipient's attention.

If you try to use email to set up a nonurgent meeting with someone, your appointment may become irrelevant before you actually schedule it. Routine reminders sent by email often meet the same fate.

These principles help explain why prospective authors don't submit unsolicited proposals or manuscripts by email, why smart headhunters don't send unsolicited resumes by email, and why creditors don't send many bills by email.

6(d). Know Your Recipient

Many people—and an increasing number of people—prefer email over any other communications medium. Others think they receive too much email. Some people are telephone people. Others prefer paper. For some messages, email isn't the best medium. For example, if you want to distribute a list of phone numbers that every recipient will simply print and file, wouldn't paper (or a web site) work better and save everyone time?

Ask which medium works best for each recipient and each situation. Communicate accordingly.

If you truly do prefer, at least with some people, to use email for messages that may be chores, burdens, or decisions, start by being extremely responsive to any such messages you receive from those people. It sets a tone and a precedent for the relationship.

7. Use Your Support System

Even if you follow all the suggestions above, you may still find that email requires too much time and effort. It can take an hour to email three documents to seven people, with copies marked to show changes, all with user-friendly file names and a good subject matter

line, and to create appropriate versions and version descriptions in your document management system. Let your assistant do it.

To streamline the process of sending out complicated email transmissions, use an instruction form, like those for word processing or photocopying. Such forms will not only reduce mistakes but also increase the likelihood that you will actually delegate the email tedium, because such delegation will be easier for you to do. You then need to see that your assistant handles these requests at Internet speed.

If you rely on your assistant to help you deal with incoming and outgoing email as suggested here, you may find that email increases—not decreases—the overall net demands you make on your assistant. He or she becomes the buffer between you and a communications medium that otherwise can force you to spend significant time and effort on nonsubstantive clerical work.

Firms need to understand these clerical burdens when they plan future staffing ratios and needs. But they may also recognize that the function of "email jockey" requires less skill than most legal secretaries bring to their work. Maybe firms should have a separate position for "email jockey," much like a file clerk.

8. What About the Files?

Email has largely replaced paper distributions for most correspondence in law offices. This is true for both incoming and outgoing distributions.

In the age of paper distributions, though, lawyers could be counted upon to keep file copies of whatever they sent out. They also took any distributions that they received and at some point (usually) sent them to the filing room to be kept in the same files.

Whether all this filing was necessary or not, it was common practice and there was presumably some reason for doing it. It created a history of the matter, and accessible raw data in case it was ever necessary to figure out who did what and when.

Today, are lawyers losing important information and records as the result of using email?

In today's usual best case, a lawyer who uses email will establish folders in his or her email software to keep separate all the email he or she receives for each particular transaction. But what about all the email messages that this particular lawyer (and any other lawyers working with him or her) might send about the same matter? Are all those outgoing email messages consistently being stored in the right folder?

"Today, are lawyers losing important information and records as the result of using email?"

Even if a lawyer stores both incoming and outgoing emails in appropriate "folders" in the email system, will any particular email message be retrievable if the need to find it ever arises? In practice, because most users of email don't follow the suggestions in this article, it will be difficult or even impossible to ever figure out what any particular email is about when it is one of hundreds in a large folder.

What happens when today's email software becomes obsolete? Will today's stored email messages all become as inaccessible as important model documents that were stored ten years ago in XyWrite format?

What happens when someone leaves the firm? Will their email records remain readily available in a way that gives you the level and organization of "institutional memory" you may want to maintain?

Should lawyers print out all their emails (and enclosures) and maintain paper copies of them in the file room? Is there some better way to keep track of emails sent and received?

On the assumption (or hope) that lawyers are using their email folders to keep records of incoming and outgoing email transmissions, here are some suggestions about how to make the best use of this technique.

8(a). Create Subfolders

Instead of creating a separate folder for each matter, try to set up a hierarchy of folders. Your "top" categories might include, for example: Active Client Matters; Active Nonclient Matters; Ecommerce; Firm Administration; Inactive Client Matters; Inactive Nonclient Matters; Pending Requests; Personal; and Precedent Documents.

The first folder could include a subfolder for each client. That subfolder would in turn include subfolders for each separate matter. Each of the other folders would include a comparable hierarchy of subfolders.

To travel easily between subfolders, try setting up your most frequently used folders as "favorites" in the Microsoft Outlook menu bar. As your activities change, delete favorites that are no longer favorites, replacing them with today's favorites.

As transactions close, you can move the corresponding folders to the inactive area.

8(b). What About Outgoing Mail?

You can, when you send an email message, tell your software to save a copy into a particular folder. If you don't do that, you may need to go through your "sent" messages periodically, and sort them into the

right folders, so you will be able to find them later.

8(c). Dealing with Faxes

Any electronic filing system will probably be more useful and complete if it includes incoming (and perhaps even outgoing) fax transmissions. To achieve this, you can use one of several techniques to send and receive faxes through your computer.

Some firms have installed fax servers that convert incoming fax messages into graphics files, which are attached to email messages. These messages can then be handled the same as any other email.

Outside services can perform the same function, by assigning you a private fax number and then converting all incoming faxes into email attachments. These attachments can then be handled the same as any other email message, and filed appropriately. At the time of writing, for example, www.efax.com still offers such a service on a limited basis without charge. For a small charge one can obtain an upgraded version of the service.

One problem with any of these services is that they do not necessarily create informative subject matter lines for fax transmissions. To solve that problem, you can forward the email message to yourself and change the subject matter line, then file it using your new and improved subject matter line.

8(d). Housekeeping

You may periodically need to clear out and perform "housekeeping" on your folders. When a deal closes, you may want to delete whatever emails were of transient or temporary interest. You can sort the email messages by size, to quickly delete copies of distributions if you do not want to keep them.

If you are going to try to keep your email folders in order like this, you should start and finish the job almost instantly after the transaction closes, before entropy begins to set in. If you do it quickly, the process of organizing your emails can be much easier than paper filing.

The mechanics of email filekeeping are of more than theoretical interest. Getting it right may spell the difference between chaos and emergencies on the one hand, and an ability to maintain useful files over the long term on the other hand.

Lawyers may want to think long and hard about whether the files they are maintaining in the age of email are adequate as a long-term, well-organized and accessible record of what happened.

9. The Paperless Office Filing System?

As the next generation in software development, perhaps some new company will come up with a single package that combines word processing, document management, and email in a single system, probably tied to the Internet, that helps lawyers manage their email better and gives them reliable long-term archival storage for everything they send, receive, or produce.

The system would maintain well-indexed and totally reliable records of each transmission, including memos, notes, and even informal email communications about issues or loose ends. Any such system would, of course, raise many new issues of its own.

One such issue already exists today: is it smart or not smart to maintain a complete permanent record of everything that happened in the course of negotiating and closing a transaction, full of notes and written communications that go beyond the final authoritative signed documents?

Some organizations have decided that exhaustive old files (whether paper or electronic) are more likely to hold bad things than good things. These organizations believe that exhaustive files are more likely to conceal "the smoking gun," just waiting to be uncovered by a class action plaintiff's lawyer who decides to sue about something and undertakes broad discovery, than to yield the "missing link" that will prove anyone's innocence.

If any organization's files are voluminous and extensive enough, then surely something in them will be embarrassing or worse. For example:

- *Spurious issues.* Some poorly thought-through item in the file may suggest issues or questions that didn't really exist.
- *Jokes and doodles.* Someone may have written down a comment that was intended as a joke or a doodle, but looks horrible in retrospect.
- *Culpable changes.* Differences from one draft to the next may establish a record of decisions and actions that might create embarrassment after the fact.
- *Mischaracterizations and admissions.* Someone's informal notes may characterize something in an inappropriate way, or admit the weakness of a particular position. Or it may show that someone might have had impure thoughts, motivations, or purposes, or might have known about a problem or concern, or should have known about it, but did nothing about it. In some other way, something in the file may just look bad in perfect hindsight.
- *Inconsistencies.* The sheer bulk of many files makes inconsistencies and inaccuracies inevitable.

Careless items in the file, like any of these, when examined under the magnifying glass and bright light of a future dispute or litigation, can become grains of sand around which a smart litigator can create a pearl of liability or at least enough of a theo-

ry to defeat a motion for summary judgment. Today, liability often depends not so much on what a defendant did or didn't do, or on facts that the plaintiff can demonstrate because the plaintiff already has them, but instead on what was in the defendant's mind as evidenced by what was in the defendant's files. In such a world, the mere existence of overly inclusive files may be dangerous.

Even if nothing in the files does any harm, the mere existence of voluminous files means their owner may spend time, money, and effort to (a) respond to future broad discovery requests, (b) search through the files, both on paper and electronically, (c) winnow out privileged material, (d) set up codes and categories, (e) stamp sequential numbers on thousands of pieces of paper, (f) keep track of which documents have been produced, (g) fight about protective orders, (h) pay lawyers (potentially on a nonreimbursible basis) to do all this, and (i) otherwise respond to the temptation these files can create.

Some organizations have decided not to take this risk. Instead, they prefer to be able to shrug their shoulders and say, with profuse apologies, that they don't keep any files for closed transactions, beyond final signed closing documents. These organizations have adopted a document retention policy saying that once a transaction has closed, no documents will be retained except the final signed documents from the closing and any documents that legally must be retained (such as those relating to any litigation already underway or even just on the horizon, or documents that the organization must retain by statute or regulation). This might be called a "zero-retention" document retention policy.

As a variation, some organizations destroy old documents (subject to similar exceptions) after a specified period has passed.

As a third option, an organization might try to retain only final serious documents or other serious work product of any kind, such as final reports and substantial internal memos. Such documents may be likely to be well-written, well-considered, or exculpatory. Drafts, notes, and other materials likely to be poorly thought through and embarrassing, including perhaps all email, would all be systematically destroyed. (Drawing lines of this type sounds like a great idea in theory. In practice, though, the task is probably monumental and never-ending—and hence almost certain never to be performed adequately.)

"Someone once said that legislation is much like the manufacturing of sausages: the end result may be perfectly tolerable, but you don't necessarily want to watch the process."

The author expresses no opinion on the legal, practical, or ethical implications of a zero-retention policy or an extremely "limited" retention policy, but merely notes that some organizations have found them attractive. In a law firm environment, considerations of malpractice prevention, risk management, and defense planning may dictate the long-term maintenance of complete files. (If so, are today's email users doing what they need to do?) Legal ethics may also play a role, depending on the specific circumstances and jurisdiction.

Someone once said that legislation is much like the manufacturing of sausages: the end result may be perfectly tolerable, but you don't necessarily want to watch the process. The same might be said about all business transactions and negotiations generally. Perhaps a zero-retention policy is much like the decision of the owners of a sausage factory to systematically discard all byproducts and remnants of the sausage-making process beyond the sausages themselves. The sausage factory owners have learned from experience that the byproducts and remnants of sausage-making merely attract flies.

To make a zero-retention or limited-retention policy work, an organization must systematically purge (beyond any possibility of restoration) all computer files, backup copies of emails, and other machine-readable shadows of documents that the organization does not intend to retain. Without such a measure, the organization will unintentionally retain the very documents and history that it thought were not being kept. At the same time, the organization should not destroy anything that it legally or strategically must preserve. And, as a major accounting firm demonstrated after the Enron bankruptcy, one cannot suddenly implement a long-dormant "document retention policy" whenever serious problems seem to be on the horizon.

Any organization's attempt to control (limit) its files will also depend on the organization's control over its own people. In a law firm, for example, each attorney may have his or her own organization (or quasi-organization) technique to keep track of old emails and documents. Attorneys who are "pack rats" may also maintain their own quixotic backup copies of this entire collection. In discovery, the firm would be required to understand, capture, and organize all this information and hand it over, upon pain of sanctions.

An organization with a zero-retention or limited-retention policy must recognize that any business transaction involves more than one organization. If other parties keep traditional complete files, then a zero-retention or limited-retention

policy might increase risk rather than decrease it. An organization might expose itself to the risk of incriminatory documents based on selective document retention by other organizations without the potential (perhaps) to establish innocence based on exculpatory documents that once existed in the organization's own files, but were discarded because of the document retention policy.

In the law firm context, for example, one would probably want to preserve forever a memo that clearly warns the client of certain risks in a transaction or proposed course of action.

Although the risk that an organization with a zero-retention policy might lose the benefit of "good" documents seems perfectly identifiable and real, it may also merely demonstrate that risks always exist with any course of action. Moreover, any effort to chase down, identify, and preserve "good documents" might at best be impractical and at worst taint the "document retention" plan by being too selective and inconsistent.

Organizations that are serious about a zero-retention or limited-retention policy might want to try to require the counterparties to their transactions, and counsel and other advisers to all parties, to agree to adopt a similar policy themselves. Whether any organization can do this depends in part on its leverage and other circumstances.

Any shift away from paper filing to electronic filing (with or without complete files and with or without an aggressive "document retention policy") requires attorneys to revisit and rethink some of the traditional procedures they follow in doing their job. Such a shift may simply convert into electronic form certain parts of an old-fashioned well-structured paper filing system. Or it may perpetrate new forms of chaos. And the change may present an opportunity to cut back on unnecessary filing.

The decision of what to file and how to do it represents a larger question linked to the smaller question of how lawyers can handle the onslaught of email they now receive and send. The preceding discussion does not purport to be complete or to provide an answer or recommendation. It merely raises and discusses the issue.

Endnotes

1. Four out of five spelling experts would probably say the correct spelling is "e-mail," with a hyphen. The author prefers the shorter variation, "email," with no hyphen, whether or not the dictionaries accept it yet. Not too many years ago, we called it "electronic mail." More than a few people already just call it "e." The word "email" seems a reasonable compromise for the time being. New computer terms seem to change (and become shorter and simpler and lower-case) faster than new terms in any other area of the language. (As additional examples, consider the "web" and the "net.")
2. As noted later in this article, reading a document on a computer screen is usually not as effective as reading it on paper. The document is harder for the reader to think about and understand. (Of course, that may be part of the plan when sending an unprintable document!)
3. The numbers, expectations, and standards for performance seem to rise every year. Clients do not expect less from their attorneys simply because the transactions move faster. This makes it all the more important for attorneys to insist on taking the time they need to do the job right, even if that means taking a few extra minutes to print out a document rather than view it on the computer screen.
4. For a somewhat overwrought summary of why "spam" happens and what else you can do about it, see www.spamprimer.com.

Joshua Stein, a real estate and finance partner in the New York office of Latham & Watkins, has published extensively on real estate finance, leasing, and legal practice. These materials were updated and expanded from Chapter 10 of his 2001 book, *A Practical Guide to Real Estate Practice*, available from www.ali-aba.org. Earlier versions appeared in *Law Practice Management* magazine and the American College of Real Estate Lawyers Papers. To see more articles by the author, visit www.real-estate-law.com. **The author acknowledges with thanks the very helpful comments of Michael F. Jones, Baird & Jones L.C., Salt Lake City, Utah; Donald H. Oppenheim, executive director, Mayers Nave PC, San Leandro, California; and Robert P. Wright, Baker & Botts, L.L.P., Houston, Texas; as well as the editorial assistance of Marisa Fries (Tufts University 2004).**

Courtesy, Professionalism and Ethics: E-Mail, the Internet and Computers

By Nancy Ann Connery

The Internet poses challenges to ordinary standards of courtesy, ethics, and professional performance. The lack of face-to-face contact, the speed of the medium, the tendency of dancing fingers to outrace conscious thought—all these factors combine to create danger and disaster.

Here are a few guidelines to consider:

I. Multi-Tasking

Rule 1:

Do not work on your computer while talking on the telephone or while on conference calls.

Rule 2:

Do not work on your computer while talking face-to-face with a colleague, a client, or any other person. Conversations are meant to be two-sided, and it is extraordinarily rude to tap away at a computer while talking to another human being.

Reasons:

1. The other person on the telephone can hear you tapping on the keys.
2. The other person will be annoyed.
3. It is not wise to annoy people, especially clients.
4. You are telling the other person that he or she is not worth your undivided attention.
5. The work you perform on the computer while talking with the other person is likely to be sloppy.
6. Do not even try to bill, during the same minutes of time, the client on whose behalf you are conducting a conversation and the client you are working for on the computer. It's double-billing, and it's dishonest.[1]

"The lack of face-to-face contact, the speed of the medium, the tendency of dancing fingers to outrace conscious thought—all these factors combine to create danger and disaster."

II. Are You Sending Your E-Mail to the Right Person?

Rule 1:

When sending messages, *always* double-check the "To:" box of the message. The *BAAAD* stories are legion and include the following:

Reasons:

1. An associate at a well-respected law firm handling a national transaction accidentally sends all local counsel an e-mail obviously intended for a select group of male friends. The e-mail contains a derogatory statement about a female associate and includes a pornographic picture attachment.

Consequences and Possible Consequences:

—Offending local counsel, many of whom were women

—Getting fired

—Exposing the firm to a lawsuit for discrimination

—Destruction of the firm's reputation

—Destruction of the associate's reputation.

2. A company employee inadvertently sends a list of Jewish jokes to the person in charge of e-mail policies at the company, who happens to be Jewish.

Consequences and Possible Consequences:

—Loss of job

—Loss of reputation

—Exposure of company to lawsuits for religious discrimination.

3. An attorney inadvertently sends to the wrong person a highly confidential, sensitive and privileged communication relating to a client's lawsuit or transaction.

Consequences and Possible Consequences:

—Loss of privilege and disclosure of the communication to the other side

—Breach of confidentiality obligation[2]

—Loss of client

—Embarrassment

—Exposure to malpractice claim.

4. Many organizations have established a "listserv" under which any person who is a member of the organization can communicate with the

organization's entire membership by sending e-mail to the listserv address. In one memorable instance, a college graduate sent every member of his college class, through listserv, a message that he was going out that night to find himself a "***** boy with a big ****."

Consequence or Possible Consequence:

—Total humiliation.

"[T]he basic rule is: Do not send by e-mail anything you would not want your boss, friend, colleague, mother, or The New York Times *to read."*

Rule 2:

Reply Only to the Favored Few. Recipients of e-mail sent by one person to a group have a tendency to mindlessly respond to the group ("Reply to All"). THINK about to whom your reply should be directed (*especially* if you're saying something not nice about a member of the Reply group—see Section III below for related issue).

III. Be Careful What You Say

Rule 1:

Using business computer facilities for inappropriate personal purposes is dangerous. The computer belongs to the company, not to you. If the firm or company prohibits the use of its computers for personal purposes and/or has established policies with respect to e-mail communications, those rules and policies should be followed.

Rule 2:

Even if the firm has no such policies or rules, the basic rule is: *DO NOT SEND BY E-MAIL ANYTHING YOU WOULD NOT WANT YOUR BOSS, FRIEND, COLLEAGUE, MOTHER, OR* THE NEW YORK TIMES *TO READ*. The reason is simple—your mother, boss, friend, colleague, or *The New York Times* may read it. First, there is always the risk that you will accidentally send the message to the wrong person. Second, the world is full of computer hackers who may hack into your system. Third, office communications are not private. Most companies reserve the right to look at all e-mail correspondence sent from and received by their employees on company computers.

Communications to Avoid:

—Heated love letters to *inamorata.* In one notable case, a woman sent her date from the previous night a heated thank-you letter graphically describing the previous evening's activities. The "gentleman" forwarded the letter to all his friends at work (she worked at the same company) and the letter eventually ended up circling the globe many times over as it was forwarded along the Internet grapevine.

—Bad jokes

—Offensive jokes

—Offensive pictures

—Offensive correspondence

—Criticism of partners, associates, colleagues, and others. In one notable case a communication from a committee member to his chairman contained, buried in it, a heated diatribe against another committee member. The chair, not focusing on the embarrassing content, forwarded the message to all committee members.

—Insults.

Rule 3:

Be careful what you say in general. People seem to more easily misconstrue e-mail communications than live communications, and to sometimes take offense where none is intended. It is generally a good idea to proofread your correspondence with a view toward how the recipient will react to it.

IV. Do Not Send Any E-Mail You Would Not Want to Be Introduced Into Evidence, and Advise Your Clients to Do the Same

Rule:

Use discretion in drafting documents, correspondence, and e-mail. Assume that anything you type into your PC or laptop will be disclosed in court.

Reason:

1. Litigators, seeking evidence of misconduct, look at e-mail correspondence and they've found the mother lode. The term "delete" is misleading when used with reference to e-mail correspondence. When e-mail correspondence is deleted, it remains in the computer's hard drive (although renamed or written over), where it usually can be retrieved. Forensic computer experts have stated that they can recover e-mail correspondence 90 percent of the time (even when, as in one case, the computer operator throws the laptop into the pool and jumps up and down on it).[3] Damaging cases have been, or are being, built against major corporations on the basis of e-mail correspondence (e.g., the Microsoft anti-trust action; message from Arthur Anderson partner: "Stop the shredding."; inter-office message from investment banking firm employee describing stock he

was touting as "crap" or "junk").[4]

2. Searching computers for all documents related to a matter can be expensive and time-consuming.

Solutions:

1. Use discretion in drafting all correspondence, including e-mail.

2. Institute electronic management systems and retention protocols that provide for systematic purging of old e-mail and documents; *but first*, make sure that there are no legal impediments to instituting such protocols (e.g., broker-dealers are required to archive all business-related e-mails).[5] Also, clients and their attorneys should remember that if a party to an impending litigation destroys evidence, the destroying party may be precluded from defending itself under the case law relating to spoliation of evidence.[6]

V. Forward Jokes and Stories Only to Those Who Enjoy Receiving Them

Rule 1:

If you send joke after joke to a friend and the friend never responds in kind, stop sending jokes to that friend.

Reason:

Although some people find it hard to conceive, there are those who do not enjoy receiving jokes via e-mail—especially at the office. These people, who may in all other respects have a good sense of humor, simply do not want to receive joke list after joke list from friend after friend. They find it tiresome. They may find many of the jokes pedestrian, stupid, or offensive. They may have (*gasp!*) work to do.

Solutions:

1. It is easy to identify those to whom you should NOT send jokes. People who do not want to receive jokes never (or almost never) send jokes back to other people. That is how you can detect them—they never send you jokes.

2. If you send jokes to a person who responds with one joke list to your twenty joke lists, that's a hint either that (a) your friend is discriminating and you are not, or (b) your jokes are not very funny. The appropriate response: either stop sending jokes to that person or limit your transmissions to the most roll-in-the-aisle-laughing materials.

Rule 2:

On a related matter, it is generally best to avoid sending religious or uplifting stories to others, unless you are sure they will welcome such communications.

Rule 3:

Offensive or tasteless jokes should not be sent by e-mail. See Section III above.

VI. Proof Your Work

Rule 1:

ALWAYS spell check. Spell check your documents, spell check your letters and spell check your e-mail (there's a spell check program incorporated in most e-mail programs—it only needs to be turned on). One of the computer's greatest gifts, especially to the functionally illiterate, is the spell checker (however, see Rule 2 below). There is no reason to send a letter that reads:

Dear Mrs. Smith,

I had hopid to riech you last nighht, but you were'nt in. Pliss give me a call ais soon ais possibel so we can continoe our discussion of intellectuel praperty rights with respict to yur book "The Philosphy and Theorey of Fonctional Illeteracy in America".

Yours twuly,

John Howard
Van Cleever III, Esq.

Rule 2:

PROOF your work. Spell checking does not always work.

Reasons:

1. The spell checker does not pick up words that are correctly spelled but misused, e.g.:

   —"Fallow me boys to the bare for a drink!"

   —"This new peace of evidence is likely to have an adverse affect on hour case."

2. The spell checker dictionary does not include many legitimate words and abbreviations, e.g.: submeter, subpar., sublessee, eponymy, mesic, roriferous. Note that you may enlarge your spell checker's vocabulary by adding words to it (select Tools/Spell Checker/Add).

3. The spell checker does not tell you what language is inappropriate (as opposed to misspelled), e.g.: "Get out of my face, you moron!" (which should never be used in a business or any other letter).

4. The spell checker does recognize many words that are best avoided in business correspondence, e.g.: doohickey, moron, idiot, boobs, penis envy, your mother!

Example:

For readers' edification, the following poem is submitted for review:[7]

SPELLBOUND

I have a spelling checker,
It came with my PC;
It plainly marks four my revue
Mistakes I cannot see.
I've run this poem threw it,
I'm sure your please too no,
Its letter perfect in its's weigh,
My checker tolled me sew.

VII. Stealing Other Lawyers' Documents: You're About to Get Caught!

Discussion:

Stealing other attorneys' work product is an honorable tradition in the legal field (subject to a few limitations)—at least when it comes to drafting form documents. How else can you improve or create your documents? Also, how else could the legal profession have clasped so universally to its bosom such immortal expressions as:

> —including, but not limited to . . . (Does anyone know what the word "redundant" means? Judges in particular?)
>
> —whereas, the party of the first part
>
> —in the event that (rather than "if")
>
> —theretofore.

Although form theft is a venerable tradition, bear in mind that many computer-generated documents contain secret codes that identify the original drafter. If you steal the entire document, or even copy a portion of the document into your form, you may also be incorporating in your form an acknowledgment of the source of your genius (and your client may go to the source!).[8]

VIII. The Metadata Menace

Discussion:

Metadata is information embedded within a Word document that may not be visible to the casual observer (either on the screen or even in the printed version). It becomes embedded as a result of the application of various Word functions to a document (e.g., Versions/Track Changes/Headers and Footers). Although Word is the biggest culprit, Word Perfect is said to also create metadata problems.

A document with metadata may appear entirely innocent on the screen and even on the printed page. For example, you may receive from another attorney a proposed contract of sale and decide that you'd like to use it as a form for another sale transaction. However, the document may contain metadata, which may become visible to your client if you're unlucky (and some firms have been unlucky). The most common metadata culprits are the following:

Headers and Footers. Headers and footers may be embedded in the document identifying the author, date of draft, etc. Headers and footers also are sometimes used to identify transactions (e.g., 5501 West 28th Street, New York, New York). Headers and footers are not visible on the screen (unless you take affirmative action to display them), but they will be visible in the printed document. How do you check for them? Either print the document or, when the document is on screen, go to View/Headers and Footers. You should see any headers and footers embedded in the document.

Internal Changes in Style. If your documents are formatted in Times New Roman and you copy a clause from another attorney's document and his or her document is formatted in Courier, your modified document will contain 2 different fonts. This is a clue to your client that you're using materials lifted from another attorney.

Track Changes. Track Changes is a function included in the Word program (under Tools) that marks changes as you make them in a document (Tools/Track Changes/Highlight Changes). You can send the document, with the changes marked, to your client or opposing counsel for review. You can remove the markings either by (a) accepting or rejecting the changes and saving as a new document, or (b) turning off the Highlight Changes function. If you do the latter, the marked changes remain embedded in the document. They just aren't visible until someone subsequently decides to use the Track Changes function in the document. At that point all the prior changes will become visible. Why is this a problem? In one memorable case, a document for one transaction that had been marked to show revisions using Track Changes was forwarded to another person in the same company for use in another transaction. The document was modified and resaved for the new transaction, and e-mailed to the new customer for review. The new customer went to use Track Changes on the document, and then saw all changes made in the document with respect to the original transaction (because the author of the original document had only turned off the Track Changes feature before he sent the document to his colleague for use in the new transaction, rather than accepting the changes and saving the document as a new document). The customer then proceeded to compare the terms of its transaction to the terms offered to the prior customer and negotiated accordingly. Track Changes can also be a problem for a lawyer who converts another lawyer's form to his own use without checking for Track Changes information. If you take a document prepared by another attorney, make changes and send it to your client without realizing that the document you copied contains Track Changes metadata, you may be disclosing to your client the other attorney's work product. That may create a problem for the other attorney as well as for you. How do you eliminate Track Changes metadata? Click on Tools/Track Changes, either accept

or reject the changes, and resave the document. It will permanently eliminate the markings. In addition, an attorney sending a document which he or she does not wish to be modified by another attorney, should consider converting the document into PDF format for transmission.

Versions. Word contains a function which allows you to save multiple versions of a document in a single file (go to File/Versions, and then save as Rider 1, Rider 2, etc.). When you open the document, you can see all prior versions by simply clicking File/Versions. If a lawyer using the Versions function sends you a document and you modify that document for use in another transaction, anyone using the Versions function will be able to see all prior versions of the document (i.e., the prior transaction versions). What's the solution? Go to File/Versions and delete all prior versions.

Hidden Text. It is possible to insert text in a document and then hide it (to block language you wish to hide, click Format/Font/Effects/Hidden). To display it click Tools/Options/Nonprinting Characters/Hidden Text). The procedure is cumbersome and it's difficult to understand why you would use this function, even if you desired to send comments on a document draft to an associate. Nevertheless, there is a risk that documents received from other attorneys contain hidden text that can be uncovered by the recipient.

Importation of Excel Materials. If you copy a section of an Excel spreadsheet into a document, the entire spreadsheet (or a significant portion of it) may be imported and attached to the document, even if the screen only shows the copied portion.

Rule 1:

Before sending any document to a client, always review the printed version.

Rule 2:

If you adopt another lawyer's form, search the document for headers/footers, differences in font style, Track Changes, Versions, and Hidden Text. Alternatively, purchase a system designed to either eliminate or reveal metadata (such as Metadata Assistant, DocXamine, or DocXtools).

"E-mail is an informal mode of communication. People tend to talk to one another via e-mail in the same manner that they converse with one another in person . . ."

Disaster Scenario:

An associate works on one real estate sale transaction, and then copies the documents for use in another transaction. The original forms contain footers referring to the address of the property involved in the first transaction. The associate, in a hurry, quickly checks the document on the computer screen to confirm that all addresses have been changed; and sends the document to the client for review. The documents, when printed out by the client, refer in footers to properties that are not part of the client's transaction.

Consequences and Possible Consequences:

—Embarrassment

—Client decides that associate has very careless work habits and asks for another associate to work on his or her matter

—Possible violation of confidentiality requirements of the Code of Professional Responsibility.

IX. Don't Zip Attachments

Rule:

Confirm that your Internet service provider sends documents intact. Some of the services automatically zip (in English—compress) documents if more than one document is attached to an e-mail. Recipients of zipped documents are often not familiar with the Winzip program (which unzips the zipped document) and do not want to spend the time required to unzip the document.

X. Don't Use Computer Speak/Emoticons in Business Correspondence

Discussion:

E-mail is an informal mode of communication. People tend to talk to one another via e-mail in the same manner that they converse with one another in person: there's a statement, a response, a counter-response, and so on; with the entire conversation conducted at high speed. Consistent with that informality, the computer world has developed its own dialect, much of which is inappropriate for business correspondence. A sampling of computer lingo and "emoticons" is set forth below. For a more complete listing of the latest in computerese, visit the following Web site: http://www.wendytech.com/humor.htm.

:-) = happy/also indicates humorous comment

:-(= unhappy

:-\ = undecided

:-@ = screaming

BBL = Be back later

BTW = By the way

TTYL = Talk to you later

ROTFL = Rolling on the floor laughing (obviously crafted by those who send a zillion joke lists a year).

Rule 1:

Avoid informality in business correspondence, unless you are completely sure that the sender will not be offended.

Rule 2:

Don't start a message with, "Hi Matt" if you're a stranger to Matt and this is your first contact—particularly if you're sending a resume.

Rule 3:

Don't use emoticons in business correspondence.

Reason:

Anyone receiving an emoticon may shoot the sender without penalty or jail time, particularly if there's a high school English teacher on the jury (and ESPECIALLY if MY high school English teacher is on the jury).

XI. Don't Send Resumes by E-Mail Unless Invited

Discussion:

People are concerned about viruses. Therefore they are concerned about e-mail arriving from unknown sources. They also don't want their mailboxes clogged up with resumes. Many recipients simply delete correspondence from unknown sources, including resumes.

Rule:

Send resumes by snail mail (with a short, grammatical, and proofread letter).

XII. Don't Plagiarize

Reason 1:

It's dishonest and it's cheating.

Reason 2:

Web searches (i.e., Google) allow anyone to easily trace plagiarized materials.

XIII. Advertising

For anyone thinking of mass-mailing advertisements for his or her law firm—DON'T.

Laurence Canter is credited by some as being the father of "spam." He was an attorney in Tennessee who was suspended for, among other things, sending an unsolicited advertisement over the Internet to more than 5,000 Internet users noting an approaching deadline for the 1994 Green Card Lottery. The content of the mailing (and its unsolicited nature) allegedly violated a number of Tennessee's disciplinary rules. He was disbarred for other matters.[9] The moral of this decision is that the disciplinary rules governing advertising have applicability to a law firm's efforts to publicize itself through the Internet, including the establishment of Web sites.

"Anyone receiving an emoticon [in a business correspondence] may shoot the sender without penalty or jail time, particularly if there's a high school English teacher on the jury . . ."

XIV. Hark, I Hear the Canons Roar!

A. Confidentiality

From a lawyer's standpoint, the greatest concern posed by the Internet is the possibility of the lawyer's inadvertent disclosure of confidential client information to the wrong person. Virtually everyone who has used a computer has sent a message to the wrong person. Such an error can result in a violation of the lawyer's ethical duties, and a possible malpractice claim.

Canon 4 of the Code of Professional Responsibility provides that "A lawyer should preserve the confidences and secrets of a client." The ethical canon represents an aspirational goal. The disciplinary rules, violation of which can result in sanctions or disbarment, similarly mandate confidentiality (subject to specific exceptions). Although DR 4-101(a) explicitly prohibits only *knowing* disclosures of confidences and secrets, it has been interpreted to require attorneys to avoid *negligent* disclosure of information.[10] DR 4-101(d) specifically requires the lawyer to use "reasonable care" to prevent his or her employees from revealing a confidence or secret.

Bar associations have begun to consider Internet and related issues. The Association of the Bar of the City of New York has published an ethics opinion concerning confidentiality issues with respect to cellular and cordless telephone transmissions. The concern is that both cellular and cordless phone transmissions are subject to interception. Lawyers are warned that confidentiality may be at risk in such transmissions; that lawyers should be sensitive to such risks; that a number of courts have held that there is no reasonable expectation of privacy in the context of such conversations (potentially jeopardizing attorney-client privilege); that lawyers should warn the called party that the lawyer is speaking on a cellular or cordless phone; and that lawyers should consider taking measures sufficient to ensure with a reasonable degree of certainty that such transmissions are no more susceptible to interception than landline telephone calls (for example, by adopting scrambling or encryption technology).[11]

Internet transmissions have been the subject of a New York State Bar Association opinion,[12] which notes the lawyer's duty to protect client confidences and secrets, and a New York statute, which provides that the use of the Internet to communicate with a client will not, in and of itself, result in a loss of the attorney-client privilege.[13] The opinion and statute indicate that lawyers may in ordinary circumstances utilize unencrypted Internet e-mail to transmit confidential information without breaching their duty of confidentiality or losing attorney-client privilege. However, the opinion further states

that, given the lack of security with respect to Internet transmissions, lawyers must use reasonable care in deciding whether or not to use e-mail for confidential communications. Therefore, if a lawyer is on notice that an e-mail transmission may be at risk of interception, or if the material is extraordinarily sensitive, the lawyer may be required to use a more secure form of communication.

The long and the short of it is that lawyers should not send highly confidential materials by e-mail without first discussing confidentiality issues with the client. Super-confidential materials probably should not be stored on a computer connected to the Web.

B. Standards of Professional Conduct

EC 1-5 provides: "A lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. He should be temperate and dignified, and he should refrain from all illegal and morally reprehensible conduct. . . ."

Those who send e-mails that slur, insult or attack people do not maintain the high standards of professional conduct that the Canons seek to promote.

C. Discrimination

Those who send e-mail and other correspondence that evidence gender, racial or other bias should also bear in mind that DR 1-102(A)(6) provides: "A lawyer shall not . . . [u]nlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment, on the basis of age, race, creed, color, national origin, sex, disability, or marital status."

Conclusion

Professionalism and courtesy are always in style and always appreciated. Be professional, be courteous, and check for metadata.

Endnotes

1. *Cf.* Ethics Consideration 2-17 (EC), which provides: "The determination of a proper fee requires consideration of the interests of both client and lawyer. A lawyer should not charge more than a reasonable fee . . ."
2. *See* Section XIV *infra*.
3. Loomis, Tamara, "Electronic Mail," N.Y.L.J., May 16, 2002, p. 5, col. 2.
4. *Id.*
5. *Id.*
6. *Id.*
7. This poem was first published in the Bulletin of the Missouri Council of Teachers of Mathematics for May 1995, and was republished in *The New York Times* in a letter, dated June 6, 1995, submitted by Sam Zaslavsky.
8. *See* Section VIII *infra*.
9. *See In Re Laurence A. Canter*, Docket Nos. 95-831-O-H, 96-868-O-H, 96-907-O-H, and 96-910-O-H. The *Canter* decision may be found at: http://www .legalethics.com/states/disbar.htm.
10. Connors, Patrick M., "Practice Commentaries to DR 4-101 of the Code of Professional Responsibility," N.Y. 709 (1998).
11. The Association of the Bar of the City of New York, Formal Op. 1994-11 (Oct. 21, 1994).
12. NYSBA Op. 709-9/16/98 (55-97).
13. N.Y. Civil Practice Law & Rules 4548.

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New York's Green Building Credit: Tax Relief For a Greener New York

By Christopher L. Doyle, Andrew B. Sabol and Samantha A. Fong

The New York State Tax Department is working hand-in-hand with the Department of Environmental Conservation (DEC) to administer the Green Building Tax Credit, which provides a powerful financial incentive to build or rehabilitate buildings with at least 20,000 square feet of interior space in an environmentally conscious manner. The credit may be claimed for five years, and is limited to the dollar amount specified in the initial qualification certification. More importantly, New York has capped the total amount of credit available at $25 million. New York enacted the green building credit to promote high environmental standards and energy efficiency, along with the use of energy technologies that are both renewable and clean.[1] The credit has six components, three of which are for the actual construction or rehabilitation of the green building. These "building credit components" are the **tenant space** component, the **base building** component, and the **whole building** component. The remaining three "energy components" are for costs associated with implementing clean and renewable energy technologies, namely, the **fuel cell** component, the **photovoltaic module** component, and the **green refrigerant** component.[2] This article focuses on the building credit components of the green building credit.

Energy Use

The green building credit is focused on rewarding those taxpayers that place substantial emphasis on saving energy, as outlined below:

Tenant Space—is defined as that portion of the building intended for occupancy by a tenant or occupying owner.[3] For new construction, energy use of a *green tenant space* must be less than or equal to 65% of the energy use permitted under the energy code. For rehabilitated space, the threshold is 75%.[4]

Office Tenant Space—is defined as a tenant space that has offices in at least 90% of its occupiable space exclusive of corridors, lobbies, restrooms, mechanical rooms, janitorial rooms, storage rooms and conference rooms.[5]

"The green building credit anticipates substantial energy savings, which should provide an additional financial incentive for owners, developers and tenants to make use of the credit."

For new construction, energy use of *green tenant office space* must be less than or equal to 55% of the energy use permitted under the energy code. For rehabilitated space, the threshold is 65%.[6]

Base Building—is defined as those areas of a building not intended for occupancy by either the owner or the tenant. This includes the structural components of the building, exterior walls, floors, windows, roofs, foundations, chimneys and stacks, parking areas, mechanical rooms and mechanical systems, and owner-controlled and/or -operated service spaces, sidewalks, main lobby, shafts and vertical transportation mechanisms, stairways and corridors.[7] For new construction, energy use of a *green base building* must be less than or equal to 65% of the energy use permitted under the energy code. For rehabilitated space, the threshold is 75%.[8]

Whole Building—is defined as the entire building, including the base building and all tenant space.[9] For new construction where the floor area of office tenant space accounts for less than 90% of the floor area of all tenant spaces, energy use of a *green whole building* must be less than or equal to 65% of the energy use permitted under the energy code. For rehabilitated space, the threshold is 75%. For new construction where the floor area of office tenant space accounts for 90% or more of the floor area of all tenant spaces, energy use must not exceed 60% of the usage permitted under the energy code, or 70% for rehabilitated buildings.[10]

The green building credit anticipates substantial energy savings, which should provide an additional financial incentive for owners, developers and tenants to make use of the credit.

Initial Qualification

The green building credit is available to a wide spectrum of taxpayers, including individuals, partnerships, LLCs and S Corporations under Article 22, as well as corporations taxable under Articles 9, 9-A, 32 and 33.[11] Moreover, the credit is available to both owners and tenants. The first step in qualifying for the green building credit is to obtain a credit component certificate or

"initial" certificate from the DEC. To demonstrate eligibility for the credit, a taxpayer must submit an application form accompanied by:

- A letter of secured funding;
- A demonstration of the allowable costs, which will be used as the basis for determining the amount of tax credit;
- A written statement by the architect or engineer of record verifying that:
  (1) the plans and specifications for the building meet the green building standards set forth in the DEC regulations;[12]
  (2) the plans and specifications for the building have been certified by an architect or professional engineer licensed to practice in New York; and
  (3) the certified plans and specifications are consistent with those approved by the municipal government;
- A written statement by the building owner stating that all required permits from any local, state or federal government agency have been obtained; and
- A written statement signed by the architect or engineer of record confirming that all new air conditioning equipment meets DEC requirements[13] if the owner/operator of the green building, green base building or green tenant space is applying for the green refrigerant component of the credit.[14]

The taxpayer must further show that the property warranting the credit will be placed in service within a reasonable period of time before the DEC will issue the credit component certificate.[15] The initial credit component certificate identifies the first tax year for which the taxpayer may claim the credit and the maximum credit amount allowed to the taxpayer. It will also provide the credit's expiration date. The taxpayer may claim the credit for five tax years beginning with the first tax year indicated on the initial certificate, and extending to the four succeeding tax years. In addition to the initial certificate, a taxpayer must file an eligibility certificate issued by a licensed architect or engineer certifying that the project continues to meet the green building standards for each subsequent taxable year that the credit is claimed.[16]

"The real teeth of the green building credit are found in the base building component."

Specifications

But how does a taxpayer establish that a building will, in fact, warrant the credit? The state Environmental Management Board has issued regulations explaining the requirements that building owners and developers must meet. These regulations comprise Part 638 of the DEC's regulations.

Both the Tax Department and the DEC are empowered to adopt regulations to implement the green building credit. However, the DEC has the real power in that it, in consultation with the New York State Energy Research and Development Authority (NYSERDA), sets the applicable environmental standards.[17]

When the initial application is filed, maximum credit amounts for each of the building components are specified in the initial credit component certificate. The amount of each credit component cannot exceed the limit set forth in the initial credit component certificate.

So, what's the credit worth? The base building, tenant space and whole building components each have different percentage and dollar limitations.

Base Building Component

The real teeth of the green building credit are found in the base building component. A green "base building" is a base building that is part of an eligible building. An "eligible building" is a building located in New York that is:

- Classified B2, B3, B4, C1, C2, C5 or C6 for purposes of the New York State Uniform Fire Prevention and Building Code or similarly classified under any subsequent code, provided that any such building contains at least 20,000 square feet of interior space, provided that in any single phase of such project at least 10,000 of interior space is under construction or rehabilitation; or
- A residential multi-family building with at least 12 dwelling units that contains at least 20,000 square feet of interior space; or
- One or more residential multi-family buildings with at least two dwelling units that are part of a single or phased construction project that contains, in the aggregate, at least 20,000 square feet of interior space, provided that in any single phase of such project at least 10,000 square feet of interior space is under construction or rehabilitation; or
- Any combination of buildings described above, so long as the building is not located on freshwater wetlands requiring a permit under section 24-0701 or 25-0403 of the Environmental Conservation Law or on wetlands requiring a permit pursuant to section 404 of the Federal Clean Water Act.[18]

The heart of the credit is outlined in section 638.7 of the DEC reg-

ulations, entitled Standards and Methods for Determining Compliance. As its title suggests, this section provides the green building construction standards, along with methods for determining compliance. The regulation provides a baffling array of building code and construction terms, along with numerous technical methods for measuring and evaluating compliance. To qualify as a "green base building," a building must meet certain standards in the following areas:

- appliances;
- heating, cooling and service-water heating equipment;
- energy use;
- indoor air quality;
- ventilation and air exchange, with special requirements for buildings with smoking areas;
- air purging;
- fresh-air intakes;
- plumbing fixtures;
- sewerage;
- refrigerants;
- alternate energy sources (if applicable); and
- waste disposal.[19]

The green base building credit component is equal to the applicable percentage of allowable costs[20] paid or incurred in the construction or rehabilitation of a green building. The applicable percentage is 1%, unless the building is located in an economic development area, where the applicable percentage is 1.2%. The base building credit component may not exceed the maximum amount specified in the initial credit component certificate.[21] The base building component will be allowed for the credit allowance year[22] where:

- the taxpayer has obtained and filed both an initial credit component certificate and an eligibility certificate;
- a certificate of occupancy for the building has been issued; and
- the building or rehabilitation remains in service during the credit allowance year.[23]

The credit component will be allowed for each of the four following years so long as eligibility certificates continue to be filed. The allowable costs cannot exceed, in the aggregate, $150 per square foot.[24]

Green Tenant Space Component

"Green tenant space" means tenant space in an eligible building where the tenant space meets specified energy and energy efficiency criteria, along with various code, indoor air quality, building materials, finishes and furnishings requirements.[25]

The green tenant space credit component has the same essential mechanics as the base building component, and the applicable percentage is 1%, or 1.2% if the building is located in an economic development area. The tenant space component will be allowed for the credit allowance year where:

- the taxpayer has obtained and filed both an initial credit component certificate and an eligibility certificate; and
- the building or rehabilitation remains in service during the credit allowance year. [26]

The credit component will be allowed for each of the four following years so long as eligibility certificates continue to be filed. Allowable costs for tenant space cannot exceed, in the aggregate, $75 per square foot.[27]

Whole Building Component

The green whole building credit component is equal to the applicable percentage of allowable costs paid or incurred in the construction or rehabilitation of a green building. The applicable percentage is 1.4%, unless the building is located in an economic development area, where the applicable percentage would be 1.6%. The whole building credit component may not exceed the maximum amount specified in the initial credit component certificate. The whole building component will be allowed for the credit allowance year where:

- the taxpayer has obtained and filed both an initial credit component certificate and an eligibility certificate;
- a certificate of occupancy for the building has been issued; and
- the building or rehabilitation remains in service during the credit allowance year.[28]

The whole building credit component will be allowed for each of the next four succeeding years, but may not exceed, in the aggregate, $150 per square foot as to that portion of the building that comprises the base building, and $75 per square foot as to that part of the building that comprises the tenant space.[29]

Allowable Costs

Most charges to a building-related capital account (other than land) are allowable costs provided they are paid or incurred on or after June 1, 1999. Allowable costs include:

- Construction or rehabilitation costs;
- Commissioning costs;
- Interest paid or incurred during the construction or rehabilitation period;
- Legal, architectural, engineering and other professional fees allocable to construction or rehabilitation;

- Closing costs for construction, rehabilitation or mortgage loans;
- Recording taxes and filing fees incurred with respect to construction or rehabilitation;
- Site cost (such as temporary electrical wiring, scaffolding, demolition costs, and fencing and security); and
- Costs of furniture, carpeting, partitions, walls and wall coverings, ceilings, drapes, blinds, lighting, plumbing, electrical wiring and ventilation.[30]

"Anyone planning to take advantage of the green building credit is well advised to seek competent tax counsel familiar with all the rules and regulations."

Allowable costs will not include the cost of telephone systems and computers (other than wiring costs) and must not include the cost of fuel cells or photovoltaic modules or the cost of new air conditioning equipment.[31] The credit is not refundable, and may not be used to reduce the tax to less than the statutory minimums under Article 9, 32, or 33. Article 9-A taxpayers must pay the tax on minimum taxable income or the fixed-dollar minimum, whichever is larger. Unused portions of the credit may be carried over.[32]

Limitations

New York will not authorize more than $25 million in initial credit components. In addition to the $25 million credit cap, there is a limit on the maximum credit allowed in any one year. The amount is capped at $1 million in 2001, increasing by $1 million per year to $5 million in 2005. The credit then tapers off by $1 million per year to $1 million in 2009. Any unused credit will be permitted in the subsequent year.[33]

Conclusion

The new green building credit was enacted to encourage property owners and developers to construct or rehabilitate buildings that are energy efficient and environmentally friendly. Those who qualify will enjoy reduced taxes and energy costs. However, there is no escaping the fact that there is not a lot of credit to go around. With a $25 million aggregate cap, the credit is limited. Another point to consider is that the green building credit is jointly administered by two separate agencies, and that the credit has six separate components. With that much complexity, there are bound to be a few traffic jams. Anyone planning to take advantage of the green building credit is well advised to seek competent tax counsel familiar with all the rules and regulations.

Endnotes

1. TSB-M-00(4)I (Nov. 28, 2000); TSB-M-00(5)C (Dec. 27, 2000).
2. N.Y. Tax Law § 19(a)(1) ("Tax Law"); N.Y. Comp. Codes R. & Regs. tit. 6, § 638.2 (N.Y.C.R.R.); TSB-M-00(4)I; TSB-M-00(5)C.
3. 6 N.Y.C.R.R. § 638.3(eb).
4. Tax Law § 19(b)(11)(a); 6 N.Y.C.R.R. § 638.7(c)(1)(ii)(a).
5. 6 N.Y.C.R.R. § 638.3(cl).
6. 6 N.Y.C.R.R. § 638.7(c)(1)(iii).
7. 6 N.Y.C.R.R. § 638.3(k).
8. 6 N.Y.C.R.R. § 638.7(c)(1)(i).
9. 6 N.Y.C.R.R. § 638.3 (eu).
10. 6 N.Y.C.R.R. § 638.7(c)(1)(iv).
11. TSB-M-00(4)I; TSB-M-00(5)C.
12. 6 N.Y.C.R.R. § 638.7.
13. 6 N.Y.C.R.R. § 638.7(m).
14. 6 N.Y.C.R.R. § 638.5(a).
15. Tax Law § 19(a)(1); TSB-M-00(5)C; TSB-M-00(4)I.
16. TSB-M-00(4)I; TSB-M-00(5)C; 6 N.Y.C.R.R. § 638.5(b).
17. Tax Law § 19(d)(3), (e).
18. Tax Law § 19(b)(6); 6 N.Y.C.R.R. § 638.3(aw).
19. Tax Law § 19(b)(9); 6 N.Y.C.R.R. § 638.7 (a)–(o).
20. See notes 30-32 and accompanying text.
21. Tax Law § 19(a)(3).
22. A "credit allowance year" is the later of (a) the tax year during which the property, construction, completion or rehabilitation has been placed in service or has received a final certificate of occupancy, or (b) the first tax year under which the credit is claimed under the initial credit component certificate. Tax Law § 19(b)(2-a).
23. Tax Law § 19(a)(3).
24. *Id.*
25. Tax Law § 19(b)(11).
26. Tax Law § 19(a)(4).
27. *Id.*
28. Tax Law § 19(a)(3).
29. *Id.*
30. Tax Law § 19(b)(1); 6 N.Y.C.R.R. § 638.3(c).
31. *Id.*
32. TSB-M-00(5)C; TSB-M-00(4)I.
33. Tax Law § 19(c)(1).

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Commercial Applications of the New UCC Insurance Policy

By S.H. Spencer Compton

Secured finance practitioners are scrambling to educate themselves about the benefits of UCC insurance and, in many instances, are requiring such lien perfection and priority insurance in connection with their Uniform Commercial Code filings. They are doing so either as part of their prudent underwriting practices or in response to the uncertainty that has been created by the revision to Article 9 of the Uniform Commercial Code.[1] This article will summarize various protections offered by UCC insurance and identify the kinds of transactions where UCC insurance is becoming commonly used.

1. What Is UCC Insurance?

UCC insurance provides a lender coverage insuring that its security interest is validly created and is enforceable, and that its lien has been properly perfected and has priority as insured, subject to the policy exclusions and exceptions to the coverage. Generally, UCC insurance indemnifies the named insured, and its successors and assigns, against loss it incurs if a perfected security interest in scheduled collateral fails as a result of any of the following insured risks:

(a) failure of the security interest to attach to or be created as to the collateral;

(b) failure of the security interest to be perfected;

(c) failure of the security interest to have priority against

(i) other security interests in the same collateral;

(ii) the lien of a lien creditor[2]; or

(iii) a party acquiring an interest in the collateral after the date of the policy;

(d) failure of the security interest to be valid and enforceable due to fraud, forgery, undue influence, duress, incapacity, incompetency or impersonation;

(e) failure of an assignment of the security interest by its holder; and

(f) a claim in an adversary proceeding under the Bankruptcy Code asserting that the security interest is not valid or does not have the priority insured.

Similar to a real estate title insurance policy, the UCC insurance policy provides for defense of an insured against risks protected under the policy at the expense of the insurer. If that defense is ultimately not successful, the insurer pays for the covered loss.

UCC insurance coverage is based upon the same due diligence which should be conducted to issue a legal opinion, but without the exceptions, qualifications and assumptions which diminish the assurances offered in such opinions. Under a UCC insurance policy, the insurer is an indemnitor of the accuracy of the underlying due diligence, whereas a legal opinion assumes and relies on such accuracy. This important distinction can be compared to the difference between strict liability and ordinary liability. The scope of protection under a UCC insurance policy far exceeds that afforded under any customary legal opinion.

Except in connection with certain mezzanine finance transactions, UCC insurance does not provide coverage against the debtor's failure to have title to the collateral which is subject to the lien insured under the UCC insurance policy. It is important to note that a legal opinion would not give assurances regarding title to the collateral under any circumstances. An endorsement to the UCC insurance policy deleting the exclusion regarding title to the collateral, where the collateral is certificated securities pursuant to Article 8 of the UCC, may be available for a mezzanine finance transaction subject to the satisfaction of certain underwriting requirements.

In addition, at the lender's request, and for no additional charge, the insurance company issuing the UCC policy will prepare all of the insured UCC-1 financing statements.

2. Recent Revision to Article 9 of the Uniform Commercial Code

As most secured finance practitioners know, by July 1, 2001, most states have enacted legislation repealing the current Article 9 to each state's Uniform Commercial Code and adding a new Article 9. The new legislation is based on a revision of Article 9 prepared under the sponsorship of the American Law Institute and the National Conference of Commissioners on Uniform State Laws. The revision is intended to simplify and standardize rules for the creation, perfection, priority and enforcement of security interests and to promote electronic commerce. It affects, among other things, changes to the way collateral

is described, changes to the way security interests are perfected, and changes in the locations in which filings of financing statements are to be made. Revised Article 9 provides for a five-year transition period with complex transition rules. For lenders concerned by the potential for erroneous filings due to confusion during this transition period, the transition rules endorsement to a UCC insurance policy provides coverage against the failure to comply with the transition rules.

3. What Kinds of Transactions Are Most Suited for UCC Insurance?

As a general proposition, any lender which is secured by a material amount of tangible or intangible personal property (e.g., a loan to a hotel operator who pledges its interests in fixtures, fittings and equipment; a project finance loan where equipment or machinery are a major portion of the collateral; or a loan against inventory) should consider the protections offered by UCC insurance. Most lenders will therefore benefit from UCC insurance, unless (as in the case of a loan secured only by a mortgage on raw land) the lender is not secured by any personal property of value.

The lender of a mezzanine loan—a loan secured by pledges of individuals' equity interests in some entity, where the entity is the mortgagor under an existing mortgage loan and the lender is secured by the mortgagor's interest in real property—can realize substantial protection by insuring the attachment, perfection and priority of its security interest in the pledged equity interests. Like a mortgage loan lender, the validity and priority of whose lien against real property is typically insured under a mortgagee title insurance policy, the mezzanine lender can now obtain coverage against the failure of its UCC filings to attach, be perfected or have the priority insured under the UCC insurance policy.

Today, many lenders are requiring lien perfection and priority insurance in connection with their Uniform Commercial Code filings, either as a part of prudent underwriting practice or in response to the uncertainty created by the revised Article 9 to the Uniform Commercial Code. Secured finance practitioners can alleviate their lender clients' concerns by considering the protections offered by UCC insurance.

Endnotes

1. The First American Title Insurance Company and its family of companies, including the First American Title Insurance Company of New York, were the first title insurance companies to offer UCC insurance.
2. Coverage as to tax liens is by endorsement after additional searches are conducted.

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Tenant's Checklist of Silent Lease Issues (Second Edition)

By S.H. Spencer Compton and Joshua Stein

Silence is golden—but not necessarily in a lease.

WHEN A PROSPECTIVE TENANT asks you to review and negotiate a lease, you will need to think about at least two very different types of issues.

First, you will deal with issues that the express terms of the lease suggest. For example, you may ask for longer notice periods, the opportunity to cure defaults, "reasonableness" as a way of dealing with any number of issues, a narrowing of any open-ended tenant obligations or landlord discretion, and flexibility on use and transfers. You will also demand absolute clarity regarding all monetary and other significant obligations, deletion of inappropriate or excessive obligations and restrictions, and correction of errors and internal inconsistencies. Finally, you will respond to any other issues that jump out based on your review of the language of the lease. To identify issues like these, you will need to read the proposed lease and propose revisions based on your experience and knowledge and the tenant's specific needs. It is a reactive process that starts with the express language of the lease itself.

Second, you will probably want to identify and deal with issues that a landlord's typical standard lease does not mention at all, but that may nonetheless be important to your client. These are the "silent issues" in any lease. Unlike the first category of issues, the silent issues are not necessarily easy to identify, because nothing in the landlord's standard lease form would alert you to them.

GENESIS OF THIS CHECKLIST • In 1999 and 2000, a subcommittee of the Commercial Leasing Committee of the New York State Bar Association Real Property Law Section developed and published a checklist of silent lease issues for use by attorneys who represent commercial space tenants. That original checklist was republished extensively and drew many comments and responses from readers. Based on those comments, further thought, subsequent experience, and further review by members of the subcommittee, the subcommittee has updated the Tenant's Checklist of Silent Lease Issues and is now pleased to offer a second edition of the checklist, which follows. Like the first edition, this second edition is intended to help tenants' attorneys identify and (if they choose to) raise "silent lease issues" when they review a typical landlord's standard commercial lease.

The original "silent lease issues" checklist project expanded to include other issues (not just silent issues) that the tenant's counsel may wish to raise in lease negotiations. Reminders were also added for some, but not all, "due diligence" a tenant might want to undertake before signing a lease. This second edition of the checklist continues that approach.

This checklist of "silent lease issues" mentions each issue only once, even if it might reasonably belong under more than one heading. Any user of this checklist should read it from beginning to end.

WHAT THE CHECKLIST IS AND DOES • This checklist discusses a tremendous range of issues, representing or at least touching on almost every possible issue or event that could arise or occur when two parties have potentially conflicting interests in the same real property over a very long time.

A lease amounts to a private statute. But unlike a legislative statute, the parties who must live with it have no way to change it, except by persuading the other party to agree to a change. A lease needs to be right. Before embarking upon the relationship that this statute (the lease) will govern, each party has an opportunity to shape the statute that will govern the relationship. This checklist is intended to assist a tenant and its counsel in taking advantage of that opportunity.

Which Issues Should You Raise?

Depending on the market, the parties, the transaction, its timing, the scope and terms of your engagement, and any other circumstances, you may or may not choose to raise issues from this checklist. Even if you do raise these issues, you will not necessarily prevail on any of them. The fact that any particular lease does not reflect positions suggested here does not necessarily mean that the tenant's counsel did a bad job. To the contrary, to serve its client best, sometimes the tenant's counsel should raise no issues at all and just get the deal signed, or identify and raise issues that are outside this checklist.

Conversely, if the tenant's business strategy is to prolong lease negotiations as much as possible—an easy goal to achieve—this checklist will provide plenty of help. More than almost any other category of real estate negotiations, lease negotiations can take as much or as little time as the parties want. For example, the definition of "operating expenses," in and of itself, can raise dozens of knotty issues that may amount to a reinvention of cost accounting.

In deciding what issues to raise, a tenant may also want to think ahead and assess how those issues are likely to turn out once the tenant raises them. In a landlord-oriented market, the tenant may prefer vagueness and uncertainty (and the likelihood of a tenant-oriented judge) over the adverse certainty that might result if the tenant raised an issue and tried to clarify vague language, and the landlord clarified it in a manner that benefited the landlord. This dynamic arises whenever a lease is "vague" on any issue.

What Types of Leases?

This checklist applies mainly to substantial commercial space leases, for both retail and office tenants. Most issues here will apply to some leases but not others. You should interpret almost every item in the checklist as if prefaced by the caveats: "if applicable, appropriate, desired, and possible under the circumstances, taking into account the size and nature of the transaction, the condition of the market, the tenant's business and anticipated use of the premises, the needs and negotiating positions of the parties, the tenant's expectations regarding lease negotiations, the timing, and all other circumstances."

Some items on the list are appropriate only for very large tenants, who might occupy all or most of a large building. If a smaller tenant raised some of these issues, a landlord might reasonably regard the tenant's requests as bizarre.

Certain issues in this checklist will apply only to certain types of leases. The checklist makes no effort at all to explain which issues apply to which leases. The checklist also makes no consistent effort to suggest how a landlord might respond to any of these issues. Because of these limitations, this checklist is suited more to an experienced lease negotiator than to a novice. Even a novice, however, will find this checklist useful. All users should use this checklist prudently and with good judgment.

The checklist does not consider "triple-net" leases, ground leases, "bondable" leases, "synthetic" leases, "build-to-suit" leases, leases from a seller to a purchaser of a company, or other specialized leasing transactions.

The checklist does not represent a position statement or recommendation by the publisher or by the New York State Bar Association or its Real Property Section, Commercial Leasing Committee, or any of their subcommittees, or any organization with which any subcommittee member is affiliated. The checklist does not define a "minimum standard of practice." It is not exhaustive or complete. It is just a resource for leasing practitioners—no one's smoking gun in any future dispute. It creates no legal duties or obligations. Users of this checklist are cautioned not to rely on it in any way or for any purpose.

When first published in the New York State Bar Association *Real Property Law Journal* in 1999, this checklist consisted of a list of topics for the lease negotiator to consider, with no statements or recommendations.

In the editing process for an earlier republication of the first edition of the checklist, it was decided to express the "silent lease issues" as affirmative, absolute recommendations, in the interests of a more direct and lively presentation. This second edition continues that approach. Thus, the discussion now sometimes states that a tenant "should" consider or even "should" obtain certain provisions. Each such statement must be taken with a bushel of salt, because the authors do not purport to establish or define "standard" requirements for what any lease "should" or "should not" say. Every lease is its own negotiation, depending largely on the business and marketplace contexts. The making of definitive one-size-fits-all recommendations would thus be inconsistent with reality—i.e., it would be a tenant's fantasy—in the world of commercial real estate leasing. Nevertheless, it simplifies and streamlines the presentation.

This checklist considers lease negotiations from the tenant's perspective. It's a tenant's checklist. The authors and the subcommittee members do not necessarily believe that landlords should accept a tenant's position regarding any issue suggested in this checklist. Though the authors of the checklist and the subcommittee members will be honored and pleased if anyone reads this checklist and mentions it in lease negotiations, this checklist does not estop any author or subcommittee member from taking any position in any lease negotiation.

The Silent Lease Issues Subcommittee has been co-chaired by S.H.

Special Supplement: Tenant's Checklist of Silent Lease Issues (Second Edition)

Spencer Compton and Joshua Stein, who were also the primary authors of both the first and second editions of the "Tenant's Checklist of Silent Lease Issues." The tenant's checklist was conceived, initiated, and edited by Joshua Stein. Members of the Tenant's Silent Lease Issues Subcommittee included David Badain, Joel Binstok, Harvey Boneparth, Mordecai Braunstein, Robert Bring, Philip Brody, Steven Cohen, Nancy Connery, Kathleen Cook, Samuel Gilbert, Holly Gladstone, Barry Goldberg, Gary Goodman, James Grossman, Andrew L. Herz, Jonathan Hoffman, Gary Kahn, Andrew Lance, Bruce Leuzzi, Benjamin Mahler, Melvyn Mitzner, John Oler, Huck Qavanaugh, Robert Reichman, Rhonda Schwartz, Karen Sherman, Barry Shimkin, David Tell, Michael Utevsky, Benjamin Weinstock and Allen Wieder.

SUGGESTIONS ARE WELCOME • Changes, additions, and other improvements to this checklist are welcome. They will be taken into account as appropriate if and when the authors publish a third edition of this checklist.

The Silent Lease Issues Subcommittee has also developed a separate "Landlord's Checklist of Silent Lease Issues" for commercial space landlords, which was published in the New York State Bar Association's *New York Real Property Law Journal*, Summer 2002, Volume 30, No. 3, and modified and republished in *The Practical Real Estate Lawyer*, July 2002. That landlord's checklist seeks to identify landlords' concerns that standard lease forms cover inadequately, as well as concerns for landlords that have arisen based on trends in law and practice since about 1980. The landlord's checklist, in the opinion of the authors, is of a scope and value similar to the tenant's checklist, even though the landlord's checklist is more amorphous. Both the landlord's and the tenant's checklists will appear in the *Commercial Real Estate Leasing Manual*, to be published by the New York State Bar Association in 2002 or 2003, under the editorial supervision of Joshua Stein.

If you have suggestions for the landlord's or tenant's checklist or would like to reprint one or both of them, please send e-mail to joshua.stein@lw.com or shcompton@firstam.com. As was the case for the first edition of the tenant's checklist, it is anticipated that consent to reprint this second edition will be readily granted and the checklist will be widely circulated in its revised form.

Tenant's Checklist of Silent Lease Issues

This checklist should be regarded solely as a list of suggestions and potential issues. The appropriateness of any item depends on the precise circumstances of the transaction, market conditions, and the relative bargaining strength of the parties. Please read the preceding discussion whenever using this checklist.

1. Alterations

1.1. *Acceptable Contractors*. Attach as an appendix a list of pre-approved contractors, architects, etc. If the landlord has approval rights, have the landlord pre-approve as many names as possible.

1.2. *Consent Requirements*. The landlord should agree to be reasonable about approving any non-structural tenant alterations. Prohibit the landlord from requiring the tenant to make any changes in alterations that would increase their cost, except any changes necessary because the tenant's plans do not comply with law.

1.3. *When Consent Not Required*. Set a threshold for work that does not require the landlord's consent—such as decorative or minor (less than a stated amount) alterations or partition walls. Changes in the economy and work structures mean that many tenants may need more flexibility than in the past to relocate partition walls almost at will. If the tenant regards its space arrangements, designs, and office layouts as proprietary information, the tenant may want the landlord to allow the tenant to make any alterations permitted by law, with no need to obtain the landlord's consent—or even to deliver plans to the landlord.[1]

1.4. *Flexibility*. How much flexibility should the tenant have in choosing its architects, engineers, other consultants, and contractors? The tenant will not want to be limited to the landlord's approved list.

1.5. *Multiple Floors*. A multi-floor tenant may want the right to construct internal stairs, and drill through floors for cabling. Such a tenant may also want the right to use the building's internal fire staircases for access between floors.

1.6. *Risers, Etc*. The tenant may want to use riser spaces, shafts, chambers, and chases

to run ducts, pipes, wires, and cables. Although the concept of limiting each tenant to its proportionate share of this space has a ring of fairness to it, will this meet the tenant's needs? Not if the landlord's building is inadequate (as a whole) to meet the needs of modern tenants. Try to have conduits and risers exclusively allocated to the tenant, not shared. At a minimum, try to control who else may use them, and how.

1.7. *Limit Fees*. If the tenant agrees to reimburse the landlord for fees of its architects, engineers, or other consultants in connection with the landlord's approval of any alterations, the tenant will want to limit or negotiate those fees. More generally, why should the tenant agree to pay them at all?

1.8. *Time to Remove Liens*. If the tenant's work produces liens, the tenant will want enough time to remove them, after taking into account procedural requirements of applicable law, and related delays. The landlord should agree not to pay any lien that the tenant has bonded.

1.9. *Use of Sidewalk*. A ground floor tenant may want the right to install awnings, canopies, and crowd control barriers on the sidewalk.

1.10. *Americans with Disabilities Act of 1990 (the "ADA")*. The tenant should have no duty to bring any elements of the existing building into ADA compliance (e.g., elevator buttons), unless (perhaps) the tenant actually alters that particular element of the building.

1.11. *Permits*. The landlord should agree to cooperate with the tenant in the process of applying for building permits and other governmental approvals for the tenant's work.

1.12. *Right to Finance Alterations*. The tenant may want the right to finance alterations. What cooperation will the tenant need from the landlord? What documents will the tenant's lender probably request? Require the landlord to assist as needed.

2. Alterations (Initial Occupancy)

2.1. *Landlord's Space Preparation*. The lease should define how the landlord will prepare the space for the tenant, including asbestos abatement or removal, demolition, refireproofing, leveling of floors if raw space, and closing of floor penetrations. Does the space contain any unusual existing improvements, such as vaults, that the tenant will want the landlord to remove? If the landlord's work is late or defective, this should be treated in a manner similar to a failure to deliver possession (see that heading below).

2.2. *Consent to Tenant's Initial Work and Anticipated Work*. The landlord should consent in advance to the tenant's initial alterations and any anticipated future alterations.

2.3. *Existing Violations*. The landlord should agree to cure any violations existing against the building that may interfere with the tenant's performing its alterations.

2.4. *Credit Issues*. Is the landlord creditworthy? If the landlord fails to build out or contribute to the tenant's work, what are the tenant's remedies? Most leases say that the landlord has no liability beyond its interest in the premises (if that). At a minimum, the tenant will want a right to offset against rent—with an interest factor—for any landlord contribution not paid or work not performed.

2.5. *Building Systems*. Are the existing building systems adequate? Should the landlord agree to complete any upgrades? When? Will the tenant require the landlord to construct any new installations outside the tenant's premises? What about HVAC, fire safety, or other system connections? Signage? Does the tenant have any special electrical requirements? Does the tenant require any space outside the premises to install electrical or other equipment for its own use? A backup generator?

2.6. *Staging or Storage Area*. Will the tenant need any staging area, "lay-down" area, or storage area for its construction activities and move-in program? If the building has a loading dock or outside hoist, the tenant may want

the right to some guaranteed usage or priority.

2.7. *Substantial Completion*. If the landlord is performing the tenant's initial alterations, "substantial completion" should require the landlord to have installed and activated all communications systems, utilities, and interior elevator service. Consider requiring the landlord to deliver a permanent certificate of occupancy, because a temporary certificate of occupancy, which expires after 90 days, may not be sufficient.

2.8. *New York City Commercial Rent and Occupancy Tax.* New York City commercial tenants pay a "commercial rent and occupancy tax" that is almost unique to New York City. In a particularly formalistic application of that tax, city tax officials will impose a commercial rent tax on the rent that a tenant would have paid but for an express rent credit that the lease gives the tenant to compensate the tenant for work it performed to build out its space. The city treats that credit as if it were a "deemed" payment of rent, hence a taxable event. On the other hand, if the parties achieve the same economic result through a free rent period or some other dollar adjustment of the rent not tied to the cost of the tenant's work, no commercial rent tax is due on the rent forgone. So a careful tenant will ask for a free rent period or a general rent abatement rather than a rent credit tied in any way to the cost of the tenant's alterations.

2.9. *Tax Implications of Build-Out Allowances*. When a landlord contributes funds to a tenant's alterations, that payment may create immediate taxable income to the tenant, though the landlord cannot recoup the same outlay except through depreciation on a schedule of up to 39 years, regardless of the lease term. Only the Internal Revenue Service wins. The tenant may wish to negotiate instead that the landlord owns (and depreciates) the tenant's improvements for tax purposes, in exchange for some other benefit to the tenant. Or the parties might characterize the allowance as reimbursement for current expenses, such as the tenant's cost of moving, buying out its existing lease, or purchasing tangible personal property like furniture, fixtures, or equipment. Although the tenant may still suffer taxable income, the recharacterization will improve the landlord's position, by giving the landlord either a current deduction or a much shorter depreciation period. Consider having an engineer or appraiser prepare a cost segregation study, to determine which property can be depreciated over such shorter periods.

3. Assignment and Subletting Consents

3.1. *Landlord's Consent*. Ideally, the tenant should be able to assign or sublet without the landlord's approval. At a minimum, such consent should not be unreasonably withheld. Try to provide that the landlord's consent will be automatically given if specified objectives and easy criteria (e.g., net worth, reputation, no felony convictions, experience, and proposed use) are met. Set standards for reasonableness. Rent should not be a criterion for approving subleases. (The tenant must keep paying rent no matter what.)

3.2. *Simple Approval Procedure*. Make the approval process as simple and expeditious (and as early in the transaction closing process) as possible. Instead of requiring the tenant to submit to the landlord fully executed assignment or subletting documents, ask the landlord to agree to approve or disapprove the transaction in principle—before the tenant even starts its marketing—based solely on the tenant's anticipated pricing. As a fallback, defer the landlord's approval only until the tenant has delivered a term sheet, the identity of a proposed subtenant or assignee, and (in the case of an assignee only) its financial statements. These early approval procedures are particularly important if the landlord can recapture the space upon any assignment or subletting.

3.3. *Consent Form*. Attach as an exhibit the required form for the landlord's consent to any transfer. Goal: prevent the landlord from adding new conditions and restrictions

(which may be inconsistent with the lease, but the tenant may not be paying enough attention at the time) when the landlord consents to any transaction.

3.4. *Carve-Out for Affiliates*. Expressly permit any assignments and subleases to affiliates (defined as broadly as possible) or successors, or in connection with the sale of the tenant's business. If the tenant operates multiple locations, a "sale of business" should include the sale of a single location. Define "affiliate" to include trusts, estates, and foundations in which the tenant or its officers are involved. There should be no burdens (e.g., brokerage commissions, recapture rights, etc.) for affiliate transactions.

3.5. *Suppliers, Vendors, Customers, and Others*. Allow the tenant to sublet to the tenant's suppliers, vendors, or customers, as appropriate for the tenant's business convenience. Will the tenant or its principals form joint ventures or other new businesses (e.g., the formerly hot "Internet incubators") that should be able to share the tenant's space without any need for landlord approval?

3.6. *Licensees*. The tenant should not need the landlord's consent to grant bona fide concessions or licenses.

3.7. *Recapture Right*. If the tenant requests approval of an assignment or sublet but the landlord elects to "recapture" the space, the tenant may want to have the right to withdraw the request. If the landlord elects not to exercise a recapture right, the landlord's consent to the proposed assignment or sublease should not be unreasonably withheld, conditioned, or delayed.

3.8. *Assignment/Sublet Involving Other Tenants*. Obtain the landlord's prior consent to any assignment or subletting by other tenants in the building to this tenant, and vice versa, and any discussions contemplating any such transaction. Ask the landlord to waive in advance (for the benefit of this tenant) any provisions in other tenants' leases that would prohibit or limit such transactions or discussions.

4. Assignment and Subletting Implementation

4.1. *Assignor and Guarantor Protections*. As a general legal proposition, when the tenant assigns the lease, the tenant remains liable for any default by the assignee, and even any default by a subsequent assignee. To facilitate future transactions, the tenant may want to try to mitigate that long-term post-assignment exposure (which may severely constrain the tenant's flexibility when negotiating a future assignment). Ideally, try to have the lease provide that both the assignor and any lease guarantor are released from liability if the tenant assigns the lease and satisfies certain conditions. (If the tenant cannot obtain this protection, then the tenant may ultimately need to structure any future lease transfer as a sublease.) As a backup, try to have the landlord agree to give any unreleased assignor and guarantor notice of any assignee's default and an opportunity to cure it. (The assignor's and guarantor's liability would terminate if the landlord did not give the notice.) An unreleased assignor and guarantor might also want a right to obtain a "new lease" if the landlord terminates the lease and the unreleased assignor and guarantor later performs the tenant's obligations. If the landlord and the assignee modify the lease, a typical boilerplate may say that the unreleased assignor (and its guarantor) are fully liable under the modification. Although such boilerplate may be appropriate in the context of an affiliate guaranty, it is not appropriate with an unreleased assignor of a lease. The tenant should insist that in such case the assignor's and guarantor's liability will never exceed what it would have been under the original lease.

4.2. *Stock Transfers*. If a lease treats a stock transfer as an assignment for consent purposes, it should not do so for purposes of requiring the assignee to assume the lease. Even if the lease deems the purchaser of the stock to have taken an assignment of the lease, that "deemed" assignee should not be required to assume liability under the lease. (Many land-

lords' forms are written in a way that might require such an assumption of liability.) If the lease deems an equity transfer to constitute a lease assignment, any or all of the following may need to be excluded from that proposition: mergers, initial public offerings, any change of corporate control of a substantial operating company, transfers of publicly traded stock, and the sale of all or substantially all of the tenant's assets (excluding cash or cash equivalents on the tenant's balance sheet).

4.3. *Assignment of Security Deposit*. A tenant will want the right to assign the security deposit to any assignee of the lease. If the security is a letter of credit, the landlord should cooperate regarding substitution of one letter of credit for another if the tenant assigns the lease or merely changes banks.

4.4. *Confidentiality*. The landlord should agree to keep confidential any financial information that a possible assignee or tenant furnishes. The landlord should agree to sign a standard confidentiality agreement if a (prospective) assignee or subtenant requests it. Such an agreement would include a requirement to return any confidential information if a transaction dies. Similar requirements should apply for final sublease documents delivered to the landlord.

4.5. *Splitting the Lease*. The tenant may want the right to sever a large lease into two or more separate and independent leases, to facilitate assignment in pieces (a more flexible exit strategy).

4.6. *Protections for Subtenants*. The landlord should agree to give "nondisturbance" or "recognition" rights to subtenants if the tenant satisfies certain tests. The lease should also give subtenants as much flexibility as possible—the same flexibility as the tenant?—regarding future assignments and subletting.

4.7. *Participation in "Profits."* If the landlord will participate in any "profits" the tenant realizes from assignment or subletting, define the tenant's costs as broadly and inclusively as possible, including brokerage commissions, professional fees, build-out, costs (including rent payable to the landlord) of carrying the space vacant during a reasonable marketing period, transfer taxes, and the unamortized balance of the tenant's original improvements to the space. Also subtract the cost of any free rent period in defining the tenant's profit. Try to allow the tenant to claim all these deductions at the beginning of the sublease term, rather than amortize them (typically without interest) over the term of the sublease. The tenant's profit participation payments to the landlord should be due only to the extent the tenant actually receives the anticipated "profit." If the subtenant or assignee defaults, the tenant should be able to stop paying and perhaps insist on recalculating any payments already made.

4.8. *Multiple Lease Transfers.* If the landlord is entitled to a "profit" payment for any assignment or sublease, the tenant may want to negotiate a "basis adjustment" for purposes of any future transaction. For example, suppose an assignee pays $1 million for a lease assignment, and the landlord receives 50% of that payment. What happens when the new tenant, the assignee, later assigns that lease again? At that point, the landlord has already "taxed" the first $1 million of increased value of the tenant's leasehold. The lease should allow the assignee to treat that lease purchase payment as part of the assignee's cost of the lease, when subleasing or assigning to someone else. The tenant's deductions should include any consideration the tenant paid to acquire the lease, straight-lined over the remaining term of the lease.

4.9. *Bills and Administration*. If the tenant sublets, try to have the landlord agree to bill the subtenant directly for any services the landlord provides to the subtenant, and any other landlord sundry charges that apply to the subleased part of the premises. Although the tenant cannot expect to be relieved of liability for these charges if the subtenant does not pay, the tenant can save time and effort by extricating itself from the billing

process. The same goes for any other function—e.g., requesting overtime HVAC or other building services—where the tenant might need to serve as a communications channel between the subtenant and the landlord.

4.10. *Transfer Defaults*. If the tenant violates a restriction on transfer in the lease, try to obtain notice and opportunity to cure (by rescinding the transfer)—just like any other default under the lease. Why should this particular default be deemed an automatic event of default?

4.11. *Guarantor*. Allow the tenant to replace any guarantor (if the replacement guarantor meets certain criteria) if the tenant has a right to assign without the landlord's consent. If the assignee delivers such a replacement guarantor—or if the landlord consents to an assignment without requiring a new guarantor—the first guarantor should be automatically released.

5. Bills and Notices

5.1. *Attorneys and Managing Agents*. Attorneys and managing agents should be allowed to give notices on behalf of their clients. This should apply not only to any attorney or managing agent identified in the lease, but also to any future replacement whether or not the landlord has formally notified the tenant of the change.

5.2. *Copies*. If the landlord gives the tenant any notice, the landlord should agree to give a copy to the tenant's central leasing personnel, and perhaps to other specified recipients (counsel and the like). If the tenant delivered a letter of credit in place of a security deposit, backed by a reimbursement agreement signed by a third party (e.g., the tenant's venture capitalist), then the landlord should also agree to give that third party a copy of any notice from the landlord.

5.3. *Delivery*. The landlord should deliver bills and notices by personal service or nationally recognized overnight courier. State when notices become effective.

5.4. *Notices Until Lease Commencement Date*. Until the lease commencement date, the landlord should deliver all notices to the tenant's existing address, not the premises.

5.5. *Delivery Notices*. Require the landlord to provide written notice of delivery of any part of the premises. The premises should not be deemed delivered until the tenant has received that notice and, perhaps, a certain period of time has elapsed. (The tenant is often not ready to begin using the space immediately. The more process and the more delay the tenant builds into the rent commencement date, the less rent the tenant will need to pay for space it is not ready to use.)

5.6. *Deemed Waivers*. If the tenant is deemed to have waived any claims for failure to make them within a specified period (e.g., objections to the landlord's delivery of the premises), then the lease should require the landlord to remind the tenant of the deemed waiver provisions as part of the notice that triggers the waiver.

6. Building Security

6.1. *Description of Program*. Describe (and require the landlord to provide) a security program (including package scanning and messenger interception, lobby desk, the tenant's own lobby desk, security guards, keycards, night access doors, and operating hours), in accordance with criteria specified in the lease.

6.2. *Tenant's Security*. Allow the tenant to establish its own security system and connect that system to the landlord's.

6.3. *New Measures*. The landlord should be required to obtain the tenant's consent for any new security measures (e.g., messenger interception) or changes in existing measures. The tenant should also seek the right to require subsequent changes to the landlord's security program if the tenant determines changes are appropriate. Any tenant's exercise of its consent rights should not impose on the tenant any liability for criminal actions of third parties or other adverse events.

7. Consents

7.1. *Quick Exercise*. The landlord should be required to grant or deny any required consent quickly. Silence should be deemed to constitute consent after a stated period. (As a compromise, the tenant might agree to remind the landlord in its consent request and/or to give a reminder notice if the landlord has not responded within a certain time.) Any failure to consent must specify all grounds for that failure. Those grounds must be reasonable.

7.2. *Use of Name*. The landlord should consent to the tenant's use of the name and likeness of the building in the tenant's promotional and publicity materials.

7.3. *Site Plan*. For new construction, the tenant may want the right to consent to the landlord's site plan (particularly as it relates to parking) and any changes.

7.4. *Press Releases*. Press releases, tombstones, and announcements for the lease should require the tenant's approval, and may not disclose any terms of the lease without the tenant's consent.

7.5. *Pre-Consent*. Are there any future changes in the tenant's needs for which the tenant wants the landlord's consent today in the lease (e.g., a pending merger)?

7.6. *Consent*. Any consent by the landlord not to be unreasonably withheld, conditioned, or delayed.

7.7. *Tenant Consent Rights*. Does the tenant anticipate any situations where the landlord should be required to seek the tenant's consent (e.g., changes in building security)?

7.8. *Damages*. For unreasonable denial of consent, try to trim back the standard lease language by which the tenant waives any right to recover damages. Perhaps the tenant should be able to obtain damages up to a specified dollar amount. The tenant's position is particularly compelling where the lease requires the landlord's consent in connection with the sale of the tenant's business, and the landlord withholds consent—in violation of the lease—and thus derails the tenant's entire transaction.

8. Defaults and Remedies

8.1. *Notice and Opportunity to Cure*. The tenant wants notice of, and the opportunity to cure, any monetary or other default.

8.2. *Default Triggered by Bankruptcy*. Although "ipso facto" clauses are typically unenforceable against a debtor-tenant, beware of any event of default triggered by someone else's bankruptcy, for example, that of a guarantor. Any such event of default is typically enforceable without a problem.

8.3. *Limitation on Landlord's Remedies*. Limit the landlord's remedies (for example, to exclude lease termination or eviction) for defaults or disputes below a threshold level of materiality. Why should the risk of lease termination hang over the tenant for every possible lease default or alleged default, and hence almost every possible dispute with the landlord? The tenant should also ask the landlord to waive any right to recover consequential damages.

8.4. *Nonmonetary Defaults*. The tenant might want to eliminate all "nonmonetary" defaults. Instead, require the landlord to convert any "nonmonetary" default into a monetary default by curing it and sending the tenant a bill for reimbursement (a provision common in old Woolworth's leases—though apparently it was not enough to save the chain from oblivion). Or, provide that so long as the tenant remains current in its monetary obligations, the landlord cannot exercise certain remedies (e.g., lease termination) for a nonmonetary default until the landlord has obtained a court order. (In practice, a court will often put the landlord in the same position anyway, regardless of what the lease says, such as through the "Yellowstone" procedure in New York.)

8.5. *Future Equipment Financing*. Require the landlord—as well as its mortgagee—to waive or subordinate any statutory or other lien on fixtures, equipment, and other personal property of the tenant, either in all cases or if the tenant's asset-based lender asks for it. To allow such a lender to realize on

and remove any financed equipment, the landlord should also agree to enter into a landlord's consent, to give the lender (for example) a brief lease extension if the lease terminates and the right to conduct an auction on the premises.

8.6. *Holdover Rent for Partial Months*. Prorate holdover rent on a per diem basis for partial months. (As a practical matter, that may be the single most important concession for a tenant to request in the typical "boilerplate" of any lease, which will usually impose a month's holdover rent for a day's delay in moving out.) Consider building in a short-term right to hold over at the same rent, for flexibility in the event of delays in relocating.

8.7. *Mitigation of Damages*. The landlord must seek to mitigate damages. (New York still imposes no such requirement on commercial landlords.) For example, the landlord must try to relet the premises. If the landlord does mitigate its damages, the landlord must credit against the tenant's liability any money that the landlord collects.

8.8. *Waiver of Self-Help*. Ask the landlord to waive any right of self-help (to retake possession) and any right to lock out the tenant.

8.9. *Acceleration of Rent*. If the landlord has the right to accelerate all rent as liquidated damages, first try to eliminate this remedy. If you can't, seek the following: (1) the tenant gets credit for fair and reasonable rental value, and (2) a discount rate as high as possible (for example, prime rate rather than four percent per annum).

8.10. *Default by Subtenant*. If a subtenant causes any nonmonetary default under the lease, extend the tenant's cure period to allow time for the tenant to enforce the sublease and (if necessary) obtain possession of the subleased premises.

9. Casualty

9.1. *Right to Terminate*. If a material casualty occurs and the landlord either cannot or does not repair within a specified time period, or if the casualty occurs during the last two or three years of the lease term, allow the tenant to terminate the lease.

9.2. *Adverse Impact on Business.* Allow the tenant to terminate the lease or abate rent if a casualty or other event (e.g., a terrorist attack affecting some other building)—or restoration from a casualty—causes any temporary or permanent material change in the tenant's permitted use (e.g., loss of nonconforming use status), access, parking, traffic volume, pedestrian volume, or visibility of the premises.

9.3. *Extent of Restoration; Interaction with Loan Documents*. Ideally, require the landlord to restore in all cases—whether or not the landlord has adequate insurance proceeds, i.e., whether or not the landlord has adequately insured the building. Beware of the terms of subordination, nondisturbance and attornment agreements, which may in effect modify the restoration requirements of the lease to conform to those of the loan documents. If the tenant negotiates a broad obligation to restore but the landlord's loan documents allow the lender to take the money and run, and the tenant has agreed in an SNDA that the loan documents will govern, then the tenant loses. A major tenant will usually not tolerate this result.

9.4. *Abatement During Restoration*. Abate rent, escalations, alteration fees and any other payments during all restoration—both the landlord's and the tenant's—especially if major fixtures need to be restored. Refund prepaid rent and other items. These measures will often be a "win-win" for both parties, because the landlord can often insure the loss (on a property-wide basis) more easily and economically than each tenant individually.

9.5. *Other Premises*. If a casualty affects only improvements outside the tenant's premises, the landlord cannot terminate the tenant's lease unless the landlord: (1) makes the tenant whole, and (2) terminates all other similarly situated leases.

9.6. *Landlord's Waiver of Right to Sue*. Even without a waiver of subrogation, the landlord should agree not to sue the tenant if the tenant negli-

gently caused a casualty that a typical casualty insurance policy would have covered.

9.7. *Lease Extension*. After a loss, try to extend the lease termination date to compensate the tenant for the period when the tenant could not use and occupy the premises. Even if the lease terminates, if the premises are tenantable and legally occupiable, seek some short extension of the term to give the tenant some additional time to operate and a transition period to new premises.

9.8. *Time to Restore*. Negate (or limit) any right for the landlord to obtain an extension of time to restore based upon force majeure.

10. Condemnation

10.1. *Partial*. If a partial condemnation occurs, then require the landlord to restore the premises, at least to the extent of available condemnation proceeds. If the partial condemnation affects the premises or more than _____% of the whole building, the tenant may still want the right to terminate.

10.2. *Separate Claim*. A tenant wants to be able to submit a separate claim to the condemning authority for: (1) the value of the leasehold estate, and (2) moving expenses, trade fixtures, goodwill, advertising, printing, phone lines and damages for interruption of business. Landlords and lenders rarely tolerate item "1," but may accept it provided that the tenant's award does not diminish sums payable to the landlord and its lender.

10.3. *Physical Impairments*. The tenant may want a right to terminate or abate rent if any condemnation, including a road widening or other change, materially and adversely affects the tenant's business, such as by impairing parking, access (e.g., loss of curb cuts), traffic volume, or visibility.

11. Electricity

11.1. *Totalized Submeter Readings*. The readings from multiple submeters should be totalized, using a third-party service and appropriate security controls to limit access to submetering equipment and computers.

11.2. *Usage Survey*. Allow either party, not just the landlord, to initiate a usage survey.

11.3. *Rate for Submetered Electricity*. The tenant should pay for submetered electricity using the same tariff under which the landlord purchases electricity. If the landlord purchases electricity from a private provider, the rate the tenant pays should not exceed the public utility's rate.

11.4. *Sufficient Wattage*. The landlord should assure the tenant that the existing electrical system provides enough power for the tenant's present and near-term anticipated needs.

11.5. *Additional Electrical Capacity*. The tenant should be able to obtain more electrical capacity if needed, quickly, at a defined or ascertainable cost. The landlord should reserve a certain number of watts per foot for the tenant, even if the tenant is not already using it. (If the tenant later needs more electricity but the building has no available capacity, the resulting delays in obtaining additional capacity may hurt the tenant's business.)

11.6. *Location for Power Delivery*. Specify the delivery point for electrical power.

11.7. *Tenant's Emergency Generator*. Allow the tenant to install an emergency generator and fuel tank (or other arrangements for fuel). Allocate ownership, responsibilities (including responsibilities for regular testing and refueling), and costs between the landlord and the tenant. The tenant should have no duty to remove this equipment at the end of the term.

11.8. *Backup Electrical Operation*. The landlord should give the tenant prior notice before any scheduled electrical shutdown or testing of the landlord's emergency generators. Limit the frequency of such shutdowns and the periods when the landlord can test its emergency generators. (These generators, when running, can produce background noise about as subtle as jet engines.)

11.9. *Building Generator*. Give the tenant the right to use the building generator. The landlord should reserve a certain amount of generator capacity for the tenant and agree to keep the fuel tanks full.

11.10. *Riser Space*. Allow the tenant to reserve additional riser space.

11.11. *Capacity*. Allow the tenant to reserve additional capacity in the buss duct or other main electrical distribution system.

11.12. *Retroactivity*. Try to limit the period during which the landlord can retroactively bill the tenant for increased rates or usage.

12. Elevators

12.1. *Freight Elevators for Moving*. Ask to use the freight elevators without charge to move in and move out. The tenant should seek the use of several elevators—e.g., all the passenger elevators in the building—on weekends and at night for the same purposes. Ideally, all this elevator usage should be free.

12.2. *Night Service*. The lease should provide that "night service" for elevators (some cabs out of service) cannot begin before a specified time. Require a minimum number of elevators to be in service at all times.

12.3. *Changing Elevator Banks*. The landlord should be prohibited from reconfiguring elevator banks. If the tenant's space is the first stop, it should remain so.

12.4. *Exclusive Service*. The tenant may want exclusive elevator service. The tenant may want cars not being used to be parked at, or returned to, the tenant's floor for the tenant's convenience.

12.5. *Routine Repairs*. Require the landlord to perform routine elevator repairs and maintenance only outside business hours.

12.6. *Waiting Time*. Specify the maximum average waiting time for elevators.

12.7. *Security Measures*. The tenant should have approval rights over the institution and modification of elevator security measures, including 24-hour keycards. Does the tenant want to require any such measures?

12.8. *Service Contract*. Require the landlord to maintain an elevator service contract requiring the maintenance contractor to respond to a stuck elevator within ___ minutes.

13. End of Term

13.1. *Duty to Restore*. The tenant will want to disclaim any obligation to restore (i.e., remove the tenant's alterations) at the end of the term. As a compromise measure, the tenant might be willing to restore such of the tenant's improvements as are unusual, particularly difficult to remove, or improperly made, or if the landlord reasonably required restoration as a condition to the landlord's consent to the tenant's work. But what's "reasonable"? Instead, try to specify an objective test for what the tenant must remove. Require the landlord to give a reminder notice at least ___ months but no more than ___ months before the end of the term if the landlord intends to enforce the restoration requirement.

13.2. *Restoration*. If the tenant must restore, then allow the tenant to: (1) perform any necessary restoration work rather than paying the landlord to do it; (2) enter the premises for some reasonable period after the end of the lease term as needed; (3) during such period, pay only an equitable per diem payment rather than holdover rent; and (4) meet only a "substantial completion" standard rather than a higher standard that might apply to delivery of new space. Once the tenant notifies the landlord the work is done, the landlord should have a short time to object; silence should be deemed approval. The landlord must specify all objections within the objection period, all in reasonable detail. If the landlord's objections are minor and the tenant resolves them within a reasonable period, the tenant should no longer be required to pay any rent during that reasonable period.

13.3. *Condition of Returned Premises*. The tenant should have no duty to return the premises in any particular condition. For example, it should have no obligation to replace a worn-out compressor in the last year of the term.

13.4. *Removal of Personal Property*. Allow the tenant to enter the premises for a short time after the lease expires in

order to remove the tenant's personal property.

13.5. *Demolition Clause*. If the tenant is unable to negotiate a "demolition" clause out of the lease, then the landlord should not be able to terminate under a demolition clause unless the landlord: (1) provides reasonable notice; (2) acts in good faith; (3) terminates the leases of all other tenants; (4) has entered into a binding non-cancellable demolition agreement; (5) has obtained a demolition permit; and (6) deposits the lease termination payment in escrow.

13.6. *"For Rent" Signs*. The landlord should not post "for rent" signs until the term has actually ended.

13.7. *New Location Sign*. For a reasonable time after the lease has terminated, the tenant may want to be able to install a sign directing customers to the tenant's new location.

13.8. *Prepaid Rent*. Upon any termination not arising out of the tenant's default, the landlord must promptly refund prepaid rent and other payments together with accrued interest and an administrative fee if not paid promptly.

13.9. *Holdover Rent*. Holdover rent should not apply for some limited period when the parties are negotiating a lease extension in good faith for the premises or premises in another building. Try to eliminate holdover rent where there is no new tenant waiting to occupy the premises. Also, try to negotiate the right to a short-term lease extension to avoid holdover rent problems or where a retail tenant wants to stay through the holiday season.

13.10. *Subtenant Problems.* If the tenant cannot vacate solely because a subtenant fails to surrender its subleased premises to the tenant, then the tenant should try to limit its liability so as to apply only to the part of the premises that the subtenant failed to surrender, or at most the entire floor that includes those premises. Absent such a concession, the tenant may be liable for holdover rent for the entire leased premises, even though the tenant had moved out and the subtenant's holdover affected only a tiny corner of one floor.[2]

13.11. *Receipt and Release*. Require the landlord to issue a receipt and release upon request at the end of the lease term.

14. Escalations (Generally)

14.1. *Proportionate Share Computation*. In computing the tenant's proportionate share, if the rentable square footage (the numerator) includes the tenant's share of the common areas, confirm that the denominator also includes all the common areas. If the square footage of the building is increased, the denominator should increase accordingly. Exclude basement/mezzanine space from the numerator. Avoid contributing to the landlord's land banking or costs of carrying dead space.

14.2. *Over-reimbursement*. Do all of the tenants' percentages add up to 100 percent, or is the landlord being over-reimbursed for escalations? Are the anchor tenants paying their share, or is that share being shifted to the other tenants?

14.3. *Mixed Uses*. In a mixed-use building (including office with retail on the ground floor), are all tenant types being treated the same way or at least equitably? Should they be? Should certain parts of the project be excluded from the tenant's escalation formulas? More generally, the existence of multiple uses in the same building can make any allocations much harder to understand and much more subjective (i.e., it creates much more room for abuse, and makes the abuse that much harder to find). If possible, the tenant would prefer to contribute only to an allocation of costs within the particular single-use component of the project that the tenant actually occupies.

14.4. *Occupiable Space*. The lease should allocate escalations based on occupiable space (as the denominator), not occupied space.

14.5. *Multiple Escalations*. The lease should not allow multiple escalations that give the landlord duplicative recoupment of a cost increase, or double-count any charges included in operating

expenses or elsewhere. For example, the marketing director's salary should be either an operating expense or a charge to the marketing fund, but not both. Anything treated as "real estate taxes" should not also be treated as "operating expenses." These principles can be expressed both generically and/or by combing through and comparing the various definitions.

14.6. *Lease Termination During Calendar Year*. Apportion escalations if the lease terminates during a calendar year. (Otherwise, the landlord could argue that annual calculation procedures obligate the tenant to contribute to an entire year's escalations.)

14.7. "*Base Year*." Any "base year" should fully include all expenses. Were any expenses not yet being fully incurred? Did any exclusions apply?

14.8. *Cap on Escalations*. The tenant might try to negotiate an annual limit on escalations—either a specific dollar figure, a percentage, a percentage of CPI, or the comparable cost increases in a "basket" of comparable buildings, if such information can be obtained.

14.9. *Free Rent Period*. Does the "free rent" period apply to escalations or just base rent?

14.10. "*Porter's Wage*" *Escalation*. For "porter's wage" escalations, the lease should exclude fringe benefits and the value of "time off." Try to limit the measure to reflect only base hourly rate. If fringe benefits cannot be excluded, try to define how they are calculated.

14.11. *Consumer Price Index Adjustment*. For a consumer price index (CPI) adjustment, the lease should measure any increase consistently from the starting year of the lease, rather than from the preceding year's CPI. The adjustment clause should specify exactly which CPI index is being used and what happens if that index stops being issued.

14.12. *Escalations Below Base*. If an escalation amount goes below the original base, seek a credit against fixed rent.

14.13. *Fixed Rent Increases*. To avoid controversy over calculating escalations, consider negotiating fixed rent increases in place of all pass-throughs of expenses.

14.14. *Waiver of Escalations*. Escalations should be deemed waived if not billed within a certain period.

15. Estoppel Certificates

15.1. *By Whom*. Both the landlord and the tenant should agree to furnish estoppel certificates. (How often?)

15.2. *Who Can Rely*. Make sure subtenants and assignees can rely on the landlord's estoppel certificate, not just lenders.

15.3. *Form*. Attach an acceptable form of estoppel certificate as an exhibit to prevent subsequent issues.

15.4. *Legal Fees*. Should the landlord reimburse the tenant for its legal fees in researching and preparing future estoppel certificates?

15.5. "*Knowledge*." Qualify appropriate sections of any estoppel certificate to apply only to the tenant's knowledge; especially for issues involving additional rent claims. Alternatively, the tenant should reserve its rights on these claims. A typical 10-day requirement to deliver an estoppel certificate is too short for the tenant to conduct adequate due diligence to knowingly surrender claims involving complicated and potentially debatable billing of operating expenses and utility charges. This is particularly true where the tenant is a large company.

15.6. *Conflict of Terms*. If the estoppel certificate and the lease conflict, the lease should govern. The delivery of an estoppel certificate should not be deemed to waive or modify any rights or remedies of the signer.

15.7. *Failure to Sign*. Negate any liability of the tenant (e.g., claims of "tortious interference") if the tenant does not sign the estoppel certificate. Limit the landlord's remedy to an injunction, a deemed estoppel, or a nuisance fee.

16. Failure to Deliver Possession

16.1. *Remedies*. Allow the tenant to terminate or receive a substantial rent abatement if the landlord does not deliver possession by a date certain (also try to get day-for-day—or better—rent credit for the delay). Consider requiring the landlord to pay for or provide temporary space or

pay the tenant's holdover damages in its present space. If the lease sets a formula for any payment or credit to the tenant for delayed delivery, courts may test it under a "liquidated damages" analysis. Add the typical recitations to seek to validate any liquidated damages clause.

16.2. *Lender's Approval*. If the lease is conditioned on a lender's (or any other) approval, set an outside date for approval and allow the tenant to terminate if the landlord misses the date. Instead, try to have the landlord deliver the approval when the parties sign the lease, particularly if the tenant is under timing pressure to resolve its occupancy arrangements.

16.3. *Termination of Lease*. If the tenant terminates the lease because the landlord does not timely deliver possession, the landlord should refund all payments and redeliver any other documents (such as letters of credit) delivered on lease signing. Also ask the landlord to agree to compensate the tenant for the tenant's costs.

16.4. *Late Delivery of Premises*. If the landlord delivers the space late, push back all rent abatements and adjustments as well as the expiration date (and base years, at some point).

16.5. *Seasonal Businesses*. For seasonal businesses, the tenant may not want to be obligated to initially open for business during its slow season. Try to control periods or dates during which the landlord may deliver the premises. A certain day of the week? Not during the holiday season?

17. Fees and Expenses

17.1. *Reasonableness*. Limit fees and expenses to those which are reasonable, actual, and out-of-pocket. No fees "as set by landlord" or as "modified from time to time."

17.2. *Legal Fees and Expenses*. Exclude legal fees and expenses relating to a claimed default if no default exists or the landlord otherwise does not prevail.

17.3. *Reimbursement to Prevailing Party*. Make the obligation to reimburse attorneys' fees run both ways. Whoever prevails should recover attorneys' fees, including the value of in-house counsel's time.

18. Heating, Ventilation, Air Conditioning

18.1. *Specifications*. Specify required HVAC service, with variations by day of week and season, both during and outside business hours. Require the landlord to air-condition all interior public areas. Allow the tenant to test air quality from time to time.

18.2. *Rates*. The lease should state the rates (and the basis of rates) for overtime HVAC. Squeeze out any profit component. If the landlord later charges any other tenant a lower rate, the tenant should get the benefit of that lower rate.

18.3. *Allocation of Charges*. Allocate overtime HVAC charges among multiple simultaneous users.

18.4. *Notice for Overtime*. Minimize or eliminate any prior notice requirement for overtime HVAC.

18.5. *Discount*. The tenant should get a discount on overtime HVAC if the tenant commits in advance to specified levels of usage.

18.6. *Miscellaneous Issues*. Should the tenant have the right to install supplemental HVAC? How much condenser water must the landlord provide? Chilled water? Who owns the equipment? Who pays costs? Who must repair/restore? Should the tenant be able to reconfigure building standard HVAC as needed for supplemental service? Will the tenant need access to fresh air louvers? Where?

18.7. *Water Treatment*. Require the landlord to add appropriate chemicals to any HVAC-related water lines, to prevent pipe corrosion and system breakdowns. The landlord should maintain records of these treatments and give them to the tenant upon request.

19. Inability to Perform

19.1. *Force Majeure*. Give force majeure protections to the tenant, not just the landlord. The landlord must give notice of a force majeure event within a specified time, or lose the right to claim such event as force majeure.

19.2. *Right To Cure*. Allow the tenant to cure the problem if the landlord fails to perform—even if that failure is caused by "force majeure." If the landlord fails to reimburse the tenant's cure costs, then allow the tenant to offset rent. Consider the interaction between this rent offset and any rent abatement arising from casualty and condemnation.

19.3. *Force Majeure Exceptions*. Although "force majeure" clauses always have a certain logic and fairness to them, should the tenant always allow the landlord the potentially open-ended extensions of time that a "force majeure" clause might justify? If the lease requires the landlord to restore after casualty within a certain time, should the landlord be entitled to an endless extension of time? What about delivery of the premises? What about maintenance of the roof? At some point, the "force majeure" clock should stop ticking or the "rent abatement" clock should start ticking, perhaps at double speed—even for "force majeure" delays.

20. Insurance

20.1. *Common Standard*. The tenant should have no obligation to provide more insurance than similar tenants customarily maintain in similar buildings, or to provide insurance at rates that are not reasonable.

20.2. *Type of Insurance*. Allow the tenant to carry blanket insurance, self-insure, or use a "captive" carrier. In the case of a large corporate tenant, the insurance requirements should conform to the tenant's company-wide insurance program.

20.3. *Waiver of Subrogation*. Insurance policies should contain a waiver of subrogation clause. The lease should then contain matching waiver and release language.

20.4. *Property and Liability Insurance*. The landlord should carry property and liability insurance, and provide evidence of such insurance on the tenant's request.

20.5. *Effect of Sublease*. To the extent the tenant subleases out the premises, a subtenant's insurance coverage and insurance certificates (if otherwise substantially in compliance with the lease) will meet the tenant's insurance obligations.

20.6. *Landlord's Deductible*. A major tenant may care about the size of the landlord's deductible and how that deductible will be funded in the event of a casualty. Whose risk is the deductible? Is it an operating expense?

20.7. *Insurance Advice*. Send the insurance and casualty provisions of the lease to the tenant's insurance adviser for review and comment.

21. Landlord's Access to Premises

21.1. *Prior Notice*. How much and what type of prior notice should the landlord give to gain access to the tenant's premises?

21.2. *Purpose of Access*. Limit the landlord's access to certain defined purposes (e.g., repairs, inspection, or to show premises to prospective future tenants within the last ___ months of the term only).

21.3. *Frequency*. Limit how often the landlord can enter the premises.

21.4. *Sensitive Areas*. Should the lease prohibit or restrict the landlord from entering "special spaces" (bank vault, securities vault, network control rooms, and the like) for cleaning and other purposes? If the tenant regards its entire operation as proprietary and "top secret," then perhaps the lease should not allow the landlord access at all.

21.5. *Time of Access*. Should access be limited to certain hours (business hours, after hours)?

21.6. *Authorized Personnel*. Precisely who among the landlord's employees, agents, and contractors should have access?

21.7. *Presence of Tenant's Representative*. The tenant may want its representative to be present whenever the landlord is on the tenant's premises. This is particularly important in any area where the tenant has sensitive, dangerous, or expensive personal property.

21.8. *Disruption and Security*. The landlord should minimize interference with the tenant's business and comply with the tenant's reasonable instructions and security

requirements, even if this requires the landlord to use overtime labor.

21.9. *Placement of Pipes and Conduits*. If the landlord wants to reserve the right to install pipes and conduits, the tenant may want to limit exactly where—such as only within existing walls or above ceilings. Should the landlord be required to minimize any damage associated with the installation or maintenance of these conduits?

21.10. *Storage of Materials*. If the landlord stores materials in the premises for making repairs, limit to those necessary for repairs within the premises. This can be particularly problematic if the premises includes a terrace—a tempting storage area for long-term exterior projects. In any case, the landlord should store materials in the premises only for short periods.

21.11. *Repair Work Outside Business Hours*. If the landlord's work in or affecting the premises will cause inconvenience, noise, odors, or the like, the landlord should work only outside business hours.

21.12. *Hazardous Materials*. If the landlord will use hazardous materials for any work in or affecting the premises, the landlord should agree to notify the tenant in advance and provide "material safety data sheet" disclosures.

22. Leasehold Mortgages and Tenant's Financing

22.1. *Landlord's Consent*. Ask the landlord to consent in advance to the tenant's grant of leasehold mortgage(s). The leasehold mortgagee should have the rights to: (1) receive notice of default from the landlord, (2) cure, and (3) obtain a new lease from the landlord if the original lease terminates (other than a scheduled termination in accordance with its terms).[3]

22.2. *Equity Pledges.* If the tenant's owners pledge their equity as collateral for a loan, the pledgee may want protections under the lease like those of a leasehold mortgagee.

22.3. *Financing, Generally*. Does the tenant anticipate entering into any other financing arrangements that might affect the landlord, the lease, or the premises? If so, consider adding appropriate language to the lease to preserve the tenant's flexibility.

23. Maintenance and Cleaning

23.1. *Structural Repairs.* Require the landlord to maintain and repair the "structure" of the building (including the roof, the foundation, and other structural elements) and maintain and repair common areas, parking lots, garages and sidewalks. Define "structural" (broadly) to avoid future disputes over what it means. Try to have it cover everything except improvements unique to a particular tenant.

23.2. *Building and Systems Maintenance*. The landlord should maintain electrical, plumbing, sewage, HVAC, and other building systems, at least to the point of entry into the premises. Consider whether to require the landlord to maintain service contracts. Allow the tenant and its advisers to inspect building systems.

23.3. *Standard for Maintenance*. The landlord should maintain the building and common areas (including any empty shop spaces, and all common areas on any multi-tenant floor, whether or not fully occupied) in an attractive and first-class manner. "Maintenance" should include provision of security. Require the landlord to repaint and recarpet periodically.

23.4. *Cleaning Standards*. Specify standards for the landlord's cleaning services, both within the premises and in common areas. Limit the scope of possible "extras." Try to define the pricing of "extras." Cleaning standards are an economic issue. Review and negotiate them accordingly. If the cleaning standards say the landlord does not need to clean any "computer areas," how much space will this exclude for a modern office? If the landlord wants to disclaim any responsibility for cleaning of certain areas (food preparation, etc.), obtain a credit for the value per square foot of the "building standard" cleaning not provided. As an alternative, give the tenant an allowance in that amount with the tenant paying only for any cleaning that is above stan-

dard (considered for the space as a whole).

23.5. *Cleaning Hours*. Specify the earliest time at which cleaning may commence.

23.6. *Right to Terminate*. The tenant may want to be able to terminate the landlord's cleaning services and take over cleaning of all common areas or just the premises, with a rent credit.

23.7. *Garbage Removal*. Define the location, access, timing, and other arrangements for garbage removal. The landlord should provide separate recycling containers or areas.

23.8. *Repairs Covered by Insurance*. Require the landlord to make repairs—even if otherwise the tenant's obligation—where the need arises from an event covered by insurance that the landlord carried or should have carried.

24. Operating Expenses—Calculation and Auditing

24.1. *Statement by Professional*. An independent managing agent or (better) a certified public accountant should prepare the statement of operating expenses. Attach as a lease exhibit the last few years of operating expense statements. Ask the landlord to confirm that: (a) these were the statements actually used for pass-throughs to existing tenants; and (b) future operating expenses will be calculated the same way.

24.2. *Time for Revision*. Set a time limit for the landlord's revisions to operating expense statements—and make that limit "time of the essence."

24.3. *Gross-Up*. In any year the building is not fully occupied, operating expenses are often "grossed up" as if the building had been fully or nearly fully occupied during the entire year. Confirm that the base year and adjustment year are treated consistently.

24.4. *Timing of Operating Expense Statement*. The landlord should provide the annual operating expense statement within a reasonable time (90-180 days) after year-end, especially when the tenant pays monthly operating expense escalation estimates on account.

24.5. *New Expense Items*. If the landlord later incurs new categories or items of expense that were not being incurred when the lease was signed (e.g., a new earthquake insurance program or expanded security), ask the landlord to "gross up" the base year to reflect what this expense would have been if the landlord had already been incurring it the day the lease was signed.

24.6. *Right to Review and Challenge*. Give the tenant meaningful rights to examine and question the landlord's operating expense calculations. Those rights should survive termination of the lease. The lease should give the tenant reasonable time to: (1) notify the landlord it wants to audit expenses; (2) conduct and complete the audit; and (3) specify if, and how, it contests the landlord's calculations. Avoid any schedule that requires the tenant to provide more detail than is reasonable at any particular stage of the process. If the tenant discovers egregious errors, allow the tenant to reopen operating expenses from earlier years, even if the time to do so has otherwise expired.

24.7. *Books and Records*. The landlord must keep books and records, for a specified number of years, in a single place under a unified system.

24.8. *Base Year*. The audit right should include the base year, expiring no earlier than the expiration date for the right to audit the first operating year. The tenant may wish to audit the base year at the same time the tenant audits the first operating year.

24.9. *Landlord's Responsibility for Audit Cost*. The landlord should pay the cost of audit (credit it against the next month's rent) if the audit discloses an overcharge of more than ___%.

24.10. *Most Favored Nation; Landlord's Discovery of Error*. If some other tenant's audit discloses a discrepancy, the landlord should automatically give this tenant the benefit of any resulting adjustment to operating expenses—even if this tenant does not ask. If the landlord forgets to do so, the landlord must pay interest at a penalty rate. Also, if on a particular issue, the landlord makes a better deal with any other tenant, this

tenant gets the benefit. If the landlord fails to timely disclose the better deal to this tenant, the landlord pays a penalty.

24.11. *Choice of Auditing Firm*. The lease should not limit the tenant's right to engage a firm of its own choosing (e.g., a contingent fee lease auditor) to examine the landlord's books and records.

24.12. *Parking Lots*. Treat the cost of filling potholes and restriping as an operating expense, but resurfacing as a capital expense to be borne by the landlord without reimbursement. Require resurfacing at least once every ___ years. Exclude any parking lot maintenance costs for at least ___ years after the commencement date.

24.13. *Tenant-Specific Exemptions*. Look for justifications to be exempted from particular expenses (e.g., elevator expenses for a ground floor tenant).

24.14. *Confidentiality*. If the landlord requires the tenant to agree to sign a confidentiality agreement regarding any future lease audit, insist that the form of agreement be attached to the lease, or that the agreement be built into the lease. Either approach avoids the risk of extended delays in trying to negotiate a confidentiality agreement when the need arises.

24.15. *Credit*. Try to get credit for any income the landlord derives from common areas (e.g., signage).

25. Operating Expenses—Exclusions

The tenant may desire to exclude the following from operating expenses:

25.1. *Above-Standard Cleaning*. Costs of cleaning portions of the building that have cleaning requirements higher than the tenant's (e.g., cleaning some other tenant's employee cafeteria);

25.2. *ADA*. ADA compliance costs, particularly when triggered by the operations of other tenants;

25.3. *Advertising*. Advertising expenses, including the cost of maintaining any web site;

25.4. *Art*. The purchase or maintenance of any artwork or sculpture;

25.5. *Breach of Lease*. Costs incurred because any party breaches any lease;

25.6. *Capital*. Costs that under generally accepted accounting principles consistently applied would be considered capital or are otherwise outside normal costs and expenses in connection with the operation, cleaning, management, security, maintenance, and repair of similar buildings; or as an alternative perhaps allow capital expenditures if (1) the tenant approves any expenditure above a certain level or (2) an expenditure is justified by the cost of repairs or undertaken to reduce operating expenses, and then only to the extent that the landlord demonstrates actual reduction;

25.7. *Collateral Source*. Any cost reimbursed by insurance proceeds (or that would have been so reimbursed, if the landlord had carried customary insurance), condemnation award, or the indemnification of any third party;

25.8. *Contributions*. Charitable or political contributions;

25.9. *Development-Related Payments*. Exactions paid to any governmental body or community organization, including infrastructure, traffic improvements, curb cuts, roadway improvements, transit costs, "impact fees," and so on;

25.10. *Environmental*. Costs of testing for, handling, remediating, or abating asbestos and other hazardous materials or electromagnetic fields, or to remove chlorofluorocarbons (CFCs) or accomplish other future retrofitting driven by as-yet-unknown future environmental concerns, or to purchase environmental insurance;

25.11. *Excessive Management Fees*. Management fees in excess of those charged in comparable buildings;

25.12. *Executive Salaries*. Salaries for officers higher than the building manager;

25.13. *Fines*. Fines and penalties;

25.14. *Food Court*. Costs related to food court tenants to the extent they exceed normal costs (or allocate food seating area as tenant space);

25.15. *Holidays*. Any holiday decorations or gifts (or limit to reasonableness);

25.16. *Construction*. The cost to perform initial construction and to correct initial construction defects (and the same for any future alterations or additions);

25.17. *Mall Advertising*. Retail tenants should consider trying to opt out of any mall advertising program, or cap the amount of their contribution;

25.18. *Negligence*. Costs resulting from the landlord's negligence;

25.19. *Other*. Next year's newest area of legal concern (for inspiration, check the latest new and improved carve-outs from "nonrecourse" treatment in mortgage finance transactions);

25.20. *Ownership-Related Costs*. Ground rent; mortgage interest, principal and transaction costs; build-out of tenant space; clean-up of the landlord's construction projects of any kind; and general and administrative expenses (overhead);

25.21. *Payments to Affiliates*. Expenses paid to the landlord's affiliates in excess of market rates (But what's market and how do you know? The tenant may want preapproval rights.);

25.22. *Professional Fees*. Brokerage fees and commissions; legal fees and expenses to negotiate and enforce leases; accounting fees;

25.23. *Specific Tenant-Related*. Any costs for a service not provided to this tenant and included in its rent (for example, the incremental cost of a higher level of service provided to office or retail tenants); reimbursed or reimbursable by specific tenants other than through pro rata rent escalations (e.g., fees for excessive use of utilities); or caused by the acts or omissions of particular other tenants; and

25.24. *Telecom Installation*. Either exclude costs or offset against the income the landlord receives.

26. Options

26.1. *Additional Space*. The tenant may want an option, right of first refusal or right of first offer for additional space.

26.2. *Sublet Excess Space*. As a fallback, consider negotiating a wide-open right to sublet excess space until needed (if this works as a business matter).

26.3. *First Refusal Mechanics*. For a right of first refusal, seek a "second bite at the apple" if the landlord later decides to market the space in smaller pieces or on different terms than originally contemplated.

26.4. *Excess Space Notices*. Whether or not the tenant has preemptive rights to extra space, the landlord should agree to advise the tenant regularly of any space that becomes available, giving as much notice as reasonably possible under the circumstances.

26.5. *Early Termination Options*. The tenant may want early termination options, either complete or partial ("shed rights").

26.6. *Renewal Option.* The tenant will often seek a right to renew the term, in which case the tenant must scrutinize and confirm it can live with whatever conditions, requirements, and procedures the landlord tries to attach to the renewal option—particularly the proposition that rent can never go down during the renewal term and limiting the renewal right to the initial tenant. Try to time the process to give the tenant time to move if the landlord's conditions or the appraised value are unacceptable.

26.7. *Appraisal*. If rent during the option term depends on an appraisal, allow the tenant to withdraw its option exercise if the tenant disapproves of the new rent as finally determined. Set objective appraisal criteria. Does the definition of "fair market rental value" make sense? Does it give the landlord "credit" for value-enhancing measures (e.g., a tenant improvement allowance) that the landlord will not in fact deliver to the tenant? If the tenant won't be receiving such an allowance, the definition of "fair market rental value" should not pretend that the tenant will receive such an allowance.

26.8. *Purchase Option*. The tenant may want the right to purchase the building if the landlord intends to sell it or if the equity owners of the landlord intend to sell a substantial portion of their equity. If the landlord converts the building to a condomini-

um, the tenant may want the right to purchase.

26.9. *Reminder Notices.* Require the landlord to send reminder notices of any upcoming option exercise deadline, but not more than _____ days, or less than ____ days, before the deadline. Extend the deadline and the lease expiration date if the landlord delays sending notice.

26.10. *Short-Term Extension*. Try to negotiate the right to a short-term lease extension (at the tenant's option) to avoid holdover problems if the tenant suffers delays in moving.

26.11. *Base Years*. For any lease renewal, reset the base years for escalations.

26.12. *Rule Against Perpetuities.* Consider possible impact of the rule against perpetuities on any option rights in a lease or ancillary to a lease.

27. Parking

27.1. *Specific Requirements*. Define the location, number, and pricing (or assurance of no fee) for parking spaces (reserved and unreserved). Attach a parking diagram as an exhibit. Prohibit the landlord from changing the parking arrangements without the tenant's consent. The tenant may want to seek some reserved, covered, indoor, or otherwise "premium" parking spaces.

27.2. *Bicycles and Motorcycles*. The landlord should provide parking for bicycles, mopeds and motorcycles in a convenient location.

27.3. *Building Expansion*. If the landlord expands the building, the parking ratio shouldn't worsen.

27.4. *High Parking Uses*. The tenant may wish to prohibit nearby high parking uses (e.g., movie theater, trade school, restaurant), although some of these uses are now regarded as less objectionable than in the past.

27.5. *Location/Quantity of Employee Parking*. The landlord must enforce employee parking restrictions against other tenants.

27.6. *Snow*. The landlord must clear snow from, and otherwise maintain, the parking area.

27.7. *Lighting*. Set standards for lighting of common areas and parking decks (especially important to a 24-hour operation).

27.8. *Patterns.* The landlord may not interfere with or change traffic patterns in the parking lot areas.

27.9. *Fences*. Allow the tenant to require the landlord to install a fence to segregate parking areas from adjacent heavy-usage facilities.

28. Percentage Rent

28.1. *Rent Abatements*. Rent abatements or other rent reductions should not reduce percentage rent breakpoints (to avoid an anomaly where the breakpoint drops because of negotiated rent abatements, resulting in percentage rent payments increasing by a like amount).

28.2. *Partial Year Gross Sales*. Annualize first year and last year gross sales, with a seasonal adjustment, to prevent excessive percentage rent if the tenant opens or closes in its peak season.

28.3. *No Partnership*. State that the parties do not intend to establish a partnership or joint venture.

28.4. *Exclusions from "Gross Sales."* Depending on the type of business, the lease should exclude or subtract certain items from "gross sales," such as: sales made by concessionaires, sales not in the ordinary course of business, sales to employees up to a certain percentage or only if at a discount, sales taxes, refunds, returns, credit card fees, custom tailoring, and monogramming. The tenant will want to avoid any suggestion that the landlord can collect percentage rent on any sales the tenant makes through catalogs or the Internet.

28.5. *Time Limits*. Impose time limits on the landlord's right to audit. Prohibit use of contingent fee auditors.

28.6. *Revenue Maximization*. The tenant should avoid any obligation to operate or to "maximize" revenues. The tenant should not make any representation concerning the volume of its business.

28.7. *Special Categories*. The tenant may wish to negotiate a lower percentage rate for particular low-margin activities or categories of sales.

28.8. *Free Rent Covers Percentage Rent*. Any free rent period should abate percentage rent, too.

28.9. *Use*. Tie percentage rent to the tenant's use of the premises. What happens if the tenant assigns to another operator with a different use? Allow the assignment even if the percentage rent changes, provided the assignee agrees to pay at least the same total rent as the assignor did in its last year of operations.

29. Quiet Enjoyment

29.1. *No Default*. Beware of "quiet enjoyment" conditioned on no default. The tenant would prefer to condition quiet enjoyment only on the landlord's not having terminated the lease.

29.2. *Sidewalk Sheds and Scaffolding*. The tenant may want the right to reduce the rent if a sidewalk shed servicing the landlord's or another tenant's construction project or scaffolding impairs access or visibility. Try to limit these sidewalk sheds and scaffolding (duration, minimum clearance, frequency, purpose). Seek the right to install signs (at the landlord's expense) on the visible face of the sidewalk shed or scaffolding. Require the landlord to remove promptly all unauthorized postings or graffiti on any sidewalk shed or similar temporary fences and to light the underside of any installation described in this paragraph.

29.3. *Dumpsters, Staging Areas, Laydown Areas*. Try to control where the landlord may install these items. Prohibit them in parking areas.

29.4. *Remedies*. If the landlord breaches the covenant of quiet enjoyment, the tenant cannot easily prove the amount of the injury or damages. Consider providing for liquidated damages or some other mechanism to quantify damages. Include recitations to validate any liquidated damages formula.

30. Radius Clauses

30.1. *Physical Scope.* Try to limit the physical scope of any radius clause—ideally, only a mile or two, depending on the site and the tenant's plans.

30.2. *Exclusions.* If the tenant must agree to a radius clause, carve out: (a) existing stores; (b) any new stores purchased in a future corporate transaction; (c) relocation of existing stores within any retail property where the tenant is already doing business; and (d) any stores operated by any possible future acquiror of the tenant's business.

30.3. *Termination.* Try to terminate the radius clause at a certain date or if the tenant has achieved a certain level of percentage rent.

30.4. *Near End of Term.* In the last few years of the lease term, the radius clause should terminate, to facilitate a graceful shift to a new location. In the alternative, allow the tenant to open a new store nearby provided that the tenant protects the landlord from any decrease in percentage rent during the remaining lease term.

31. Real Estate Tax Escalations

31.1. *Definition of Property*. Confirm that the property to which the real estate tax escalation applies does not include other parcels or improvements.

31.2. *Substitute or Additional Taxes*. The definition of "substitute or additional taxes" that become taxes requires especially close attention. Confirm they are truly appropriate for pass-through to the tenant.

31.3. *Landlord's Tax Protest*. For the base year, review any landlord tax protest filing to understand the landlord's theories for low value. Will those theories inevitably vanish next year, producing built-in increases? In the lease, express the base year real estate taxes as "$___ per square foot." Avoid referring to the taxes payable in a particular tax year, because such a reference could increase escalations if the landlord successfully protests base year taxes.

31.4. *Installment Payments*. Require the landlord to pay real estate taxes in installments, as taxes are due. In any event, calculate tax pass-throughs as if the landlord were paying in installments over the longest period allowed.

31.5. *Special Assessments*. The landlord should pay special

assessments in installments and treat them as taxes only to the extent they fall within the lease term.

31.6. *Right to Contest*. Allow the tenant to require the landlord to contest, or if the landlord does not, the right to contest the taxes in the landlord's name or the tenant's, as necessary. Check statutory and case law requirements as to who may contest taxes. For example, in New York a tenant that leases only part of a building lacks standing to contest taxes. Whether the tenant leases only part of the building or the whole thing, any tax contest will still require cooperation, and delivery of necessary information and signatures, by the landlord. Require the landlord to contest taxes if a certain proportion of tenants so request. Require the landlord to forward notice to the tenant of any tax contest deadline so as to allow the tenant sufficient time to contest if the landlord is unwilling to do so.

31.7. *Tax Refunds*. The landlord must promptly pay the tenant its share of tax refunds even after the lease expires. The landlord must notify the tenant of any such refunds promptly when received. If the landlord fails to do so, or must be reminded, then the landlord must pay a penalty interest rate or some multiple of the amount due to the tenant.[4]

31.8. *Tax Protest Costs*. Any contingent fees paid to real estate tax counsel should be arm's length and commercially reasonable. The landlord should not collect a separate "management fee" for its services in contesting real estate taxes.

31.9. *Base Year Reassessment*. If the base year is reassessed downward, reduce base rent by the amount of the tax savings.

31.10. *Abatement or Deferral Program*. If any tax abatement or deferral program might be available, the landlord should agree to apply for it. The risk of loss of tax abatements (e.g., for lack of validity) should belong to the landlord, not the tenant.

31.11. *Artificially Low Assessments*. If, under local assessment rules, the first year's free rent produces an artificially low tax assessment that year, the assessment may automatically rise by the same amount in future years. The tenant may then over the years pay extra tax escalation payments far beyond the value of the free rent. This depends very much on local tax assessment procedures.

31.12. *Exclusions*. Real estate tax escalations should exclude: penalties or interest; excise taxes on the landlord's gross or net rentals or other income; income, franchise, transfer, gift, estate, succession, inheritance, and capital stock taxes; taxes on land held for future development ("outparcels"); increases in real estate taxes resulting from construction during the lease term if not done for the benefit of tenants generally or if it does not create additional proportionate rentable area; termination of interim assessment; loss or phase-out (whether or not scheduled) of abatement or exemption; corrections of underpayments in previous periods; acquisition of development rights from other property; increases resulting from the landlord's failure to deliver required information to the taxing authority; and, if possible, sale of the property.

32. Representations and Warranties

The tenant may wish to ask the landlord to provide representations and warranties, including the following:

32.1. *Asbestos and Hazardous Materials*. The premises are free of asbestos and other hazardous materials. The landlord should provide any document required to confirm this, for purposes of building permit applications (such as a New York City ACP-5 form showing that the tenant's work will be a non-asbestos job). The landlord should indemnify the tenant against liability arising out of any environmental issues that existed before the tenant took possession, whether or not the landlord caused them;

32.2. *Certificate of Occupancy*. Attach a true and correct copy of the certificate of occupancy as an exhibit. The landlord should represent that the tenant's use as permitted by the lease won't

violate the certificate of occupancy or other leases or agreements of the landlord;

32.3. *Commissions and Brokerage Fees*. The landlord has paid or will pay all brokerage fees and commissions for the lease. (If the tenant cares about its relationship with the broker, the tenant may want the right to offset rent and pay the broker if the landlord does not);

32.4. *Impact and Hookup Fees*. The landlord has paid or will pay all impact fees, hookup charges, and other governmental exactions imposed upon the landlord;

32.5. *Rights of Third Parties*. The landlord's entry into the lease does not violate any rights of third parties (such as the prior tenant that was evicted from the space; other tenants in the building);

32.6. *Submetering*. Equipment is in place and in good working order for any submetering of utilities the lease contemplates;

32.7. *Utilities*. Adequate utility locations and capacity are available both within the building and at the premises;

32.8. *Violations*. The premises are subject to no outstanding violation of any code, regulation, ordinance, or law, and the landlord should cure existing violations at the landlord's expense;

32.9. *Validity of Lease*. Each party represents and warrants to the other that the lease has been duly authorized, executed and delivered and is valid and binding; and

32.10. *Zoning*. The property is properly zoned and the tenant's permitted use under the lease is legal.

33. Requirements of Law

33.1. *Responsibility for Compliance*. The landlord should be responsible for compliance with existing and new laws (including ADA) if the compliance applies generically to the property (e.g., "mere office use") or the need to comply existed before the lease was executed.

33.2. *New Requirements*. The landlord should comply with any new legal requirement if the potential noncompliance did not result from the tenant's actions, and failure to comply may impair the tenant's alterations or use in the manner the lease contemplates.

33.3. *Permits*. The landlord should cooperate in obtaining permits, such as by signing applications and providing necessary existing information, all within a short turnaround time. The landlord is responsible for ADA and all other baseline legal compliance.

34. Restrictions Affecting Other Premises

34.1. *Against Landlord*. Consider imposing radius restrictions against the landlord, particularly where the landlord operates its properties under an identifiable brand name (a new trend).

34.2. *Use of Building*. Prohibit the landlord from changing the use of the overall building or any part of it—such as turning the older half of a regional mall into a call center. Restrict the type of retail tenancies or other uses in the building (e.g., no fast food). Consider issues of density, traffic, parking, demographics, compatibility, likelihood of picketing or controversy, security concerns, and other potential problems affecting building use and other tenants.

34.3. *Prohibited Uses*. Prohibit flea markets, carnivals, petting zoos, clothing drop-off boxes, kiosks (especially if competitive or within __ feet of the entrance or windows of the premises), drive-up booths, and the like, elsewhere on the landlord's property, including common areas.

34.4. *Additional Construction*. Limit the location and type of any additional construction by the landlord (e.g., on "outparcels").

34.5. *Minimum Operating Hours*. Establish minimum operating hours for the property as a whole or for specific other tenants.

34.6. *Landlord's Activities and Kiosks*. Limit the landlord's activities and installations (e.g., kiosks) on the sidewalk (or common area of a mall) within a specified area near the premises.

34.7. *Scope of Restrictions*. To the extent that the lease restricts the landlord's activities, consider how broadly those restrictions should apply. Ideally, they should affect both the existing structure and any future expansion in

which the landlord has any interest (or for which the landlord or an affiliate presently controls the site). Try to have the landlord agree not to enter into a reciprocal easement agreement or otherwise facilitate any nearby construction by others unless the counterparty agrees to honor the same restrictions.

34.8. *Public Areas*. The tenant should control (or have the right to require, within reason) future changes to public areas, lobbies, elevators, parking lots and other common areas. Require the landlord to renovate and update these areas periodically to keep them consistent with first-class standards as they change from time to time. Require tenant approval for the plans for all such work.

34.9. *Exclusive Uses*. The tenant may want exclusive rights for certain uses.

35. Rules and Regulations

35.1. *Nondiscriminatory Enforcement*. Require the landlord to impose and enforce its rules and regulations in a nondiscriminatory way. If the tenant so requests, the landlord should impose and enforce those rules and regulations against other tenants.

35.2. *New Rules*. New rules should be reasonable and of the type customarily imposed for similar buildings. New rules should require the tenant's approval. If the landlord wants to give the tenant a short period to object to any new rules, insist that the landlord give the tenant formal notice of any new rule, accompanied by a reminder of the short period in which the tenant may object.

36. Sale of Property

36.1. *Assumption of Obligations*. The purchaser should assume all obligations—including all existing undischarged obligations—of the landlord, including the obligation to return the tenant's security deposit and refund any previous rent overcharges. Some landlord's lease forms say the old landlord is not responsible, but neither is the new one.

36.2. *Transfer of Security Deposit*. Require the landlord to transfer the security deposit to any purchaser of the property, with the purchaser giving the tenant a written confirmation of receipt. Allow the tenant to offset rent if the landlord does not comply with these requirements.

36.3. *Rental Payments to Purchaser*. The tenant should not be required to pay rent to a purchaser until the tenant has received notice of the sale and purchase.

37. Security Deposit

37.1. *Interest*. Require the landlord to hold the security deposit in an interest-bearing account with all interest to be paid to the tenant.

37.2. *Letter of Credit*. Allow the tenant at any time to substitute a letter of credit or other alternative form of security. If the tenant thereafter fails to maintain the letter of credit, the landlord should be free to draw, but such failure should not constitute a lease default and the tenant should continue to have the right to deliver a letter of credit. If the lease no longer requires a letter of credit at some point, require the landlord to sign whatever cancellation documents the letter of credit issuer requires.

37.3. *Return*. The landlord should promptly return the security deposit after the lease expires.

37.4. *Reduction*. Allow the tenant to reduce the security deposit over time, at least if the tenant is not in default. If the tenant has any concern about the landlord's creditworthiness, such reductions are particularly desirable in the last year or two of the lease term.

38. Services by Landlord

38.1. *Existing Systems*. Allow the tenant to use existing cabling and other systems including chases (channels on the underside of the floors). The landlord should agree not to damage or remove such systems.

38.2. *Performance Standards*. Set performance standards or criteria for any landlord services (e.g., comparable to those provided in a basket of other buildings).

38.3. *Management Company Replacement*. The tenant may want a right to require the landlord to replace the management company or the

leasing broker if specified standards are not being met.

38.4. *Windows*. Allow the tenant to abate rent if windows are bricked up or covered over for any reason. The landlord should install (and repair/replace) sunscreen or other film on windows if needed, or at least give the tenant the right to do so.

38.5. *Promotional Fund*. Should the landlord agree to operate any promotional association, fund, or other similar activities? Should the lease require that all other tenants participate?

38.6. *Non-Occupancy Credits*. If the tenant is not in occupancy, give the tenant credit for any variable costs that the landlord avoids (e.g., cleaning). (Such a provision appears in some government leases but rarely, if ever, in commercial leases.)

38.7. *Receipt of Deliveries*. Specify the location, arrangements, timing, and fees (none) for the tenant's receipt of deliveries.

38.8. *Contact Person*. Require the landlord to designate a single contact person for all questions, problems, and issues regarding the premises, together with a 24-hour emergency telephone number for problems arising outside business hours.

38.9. *Overtime Services*. The cost of any overtime services should be shared with any other tenants using such services at the same time. The tenant should receive a "most favored nation" rate.

38.10. *Lobby or Parking Lot Renovations*. If the landlord undertakes lobby or parking lot renovations, the landlord must complete them quickly, provide equivalent access, and shield from view unsightly construction areas. If the landlord fails to do so, abate rent. Prohibit such work during November and December.

39. Signage and Identification

39.1. *Signage Requirements*. Describe the signage requirements (for lobby, floor lobbies, elevators, exterior entry area, driveways, roadway pylons, rooftop, common areas, and other exterior locations) for the tenant and any subtenant(s). Let the tenant make future changes in its signage. Make the tenant's signage rights as transferable as any other rights under the lease. Allow use of logo or distinctive company typeface.

39.2. *Other Parties' Signage*. Establish requirements for, and otherwise control, other tenants' signage and the landlord's overall signage program (including future changes).

39.3. *Signage Position*. Does the tenant want the top position on any pylon sign? Second from top? Largest position on any other sign?

39.4. *Name of Building*. Prohibit the landlord from naming the building after the tenant, any other tenant, or any competitor of the tenant. Does the tenant want affirmative naming rights? Prohibit the landlord from using the tenant's name in any landlord advertising.

39.5. *Directory Entries*. Require the landlord to provide building directory entries for the tenant and any subtenant or assignee. If the landlord tries to limit those entries, do those limitations make sense? Does the tenant contemplate needing directory entries for parties other than the tenant and its subtenants or assignees, such as joint ventures or other new entities? Consider prohibiting any other tenant from being more visible or using its logo in the building directory unless this tenant has the same right. Don't limit the number of the tenant's listings if the landlord uses a computerized directory.

39.6. *Flagpoles*. The tenant may want the exclusive right to use any flagpoles at the property.

39.7. *Billboards*. Prohibit the landlord from installing billboards or other signs anywhere on the premises or outside the windows of the building, even if such billboards or other signs are allegedly transparent from the interior of the building.

40. Subordination and Landlord's Estate

40.1. *Proof of Fee Estate*. The landlord should represent that it owns the fee estate. Perhaps attach a copy of the landlord's deed as an exhibit.

40.2. *Nondisturbance Agreement from Mortgagees and Ground Lessors*. The landlord should at lease signing deliver a

nondisturbance agreement from all mortgagees and ground lessors. Attach the form of nondisturbance agreement to the lease. Beware of allowing the landlord to deliver such an agreement after the lease has been signed, with a right for the tenant to terminate if it is not timely delivered. In practice, such a right will rarely be exercised (which may say something about the practical importance of these agreements).

40.3. *Conditions for Subordination*. If the lease is "subordinate," subordination should be conditioned on the landlord's having delivered specified nondisturbance protections from holders of senior estates (e.g., in the form attached to the lease). Don't settle for "best efforts." The tenant cannot be obligated to "subordinate" to any mortgage if such mortgage is subordinate to any mortgage or any other lien that has not given the tenant nondisturbance protections. (Foreclosure on that latter, more senior, mortgage could wipe out both the more junior mortgage and the tenant.)

40.4. *Debt Service Should Not Exceed Rent*. When the tenant leases all or most of the space or an entire building, the tenant may want the landlord to agree that the debt service payable under any fee mortgage will not exceed the rent under the lease.

40.5. *Negotiations of Nondisturbance Agreements*. Require the landlord to reimburse the tenant for legal fees for any negotiations of nondisturbance agreements with mortgagees.

40.6. *Compliance with Mortgages*. Avoid any covenant to be bound by (and do nothing to violate) any present or future mortgages. Such a provision may amount in part to an "end run" around negotiated nondisturbance rights and priorities as well as other lease provisions.

40.7. *Rent Redirection Notice*. If the landlord's lender delivers a rent redirection notice to the tenant, state that the tenant may comply without liability even if the landlord disputes its lender's right to deliver the notice.

40.8. *Landlord's Lender's Approval Rights*. Understand the approval rights of the landlord's lender under its loan documents (e.g., assignment, subletting, lease amendments, etc.) and try to trim back if excessive. Ask the lender to pre-approve as much as possible.

41. Tenant's Remedies Against Landlord

41.1. *Set-Off and Termination*. The tenant may cure the landlord's defaults (after notice), set off the cost of cure (with interest) against rent, and terminate the lease. The tenant can set off against rent for claims against the landlord or any judgment against the landlord that is returned unsatisfied (or, if the landlord is in bankruptcy, then based upon the mere filing of a claim in the bankruptcy). The tenant may want similar remedies if any representation or warranty by the landlord is wrong.

41.2. *Abatement*. The tenant may want the right to abate the rent if essential building services (access, electricity, elevators, air-conditioning, etc.) are disrupted for longer than a specified period (after notice?), and the right to terminate the lease if any rent abatement continues for more than a certain number of days.

41.3. *Self-Help*. The tenant may want emergency self-help rights if a water leak, power failure, or communications failure imperils the tenant's computer systems, communications systems, or other mission-critical equipment or operations. Allow only a very short period before this self-help right accrues for any fundamentally important function of the tenant, such as the tenant's network control center or computer system.

41.4. *Payment of Rent No Waiver*. The tenant's payment of rent with knowledge of a landlord default should not waive the default.

41.5. "*Exculpation*" *Clause*. Where an "exculpation" clause limits the landlord's liability to the landlord's interest in the property, try to include the following within the definition of the landlord's interest in the property: rental income, insurance proceeds, escrow funds, condemnation awards, the landlord's interest in security deposits, and sales and refinancing pro-

ceeds. For certain major landlord obligations—e.g., completion of build-out or return of a security deposit—consider whether "exculpation" makes sense or whether, to the contrary, the tenant should insist on some level of creditworthy assurances from someone beyond a single-asset landlord.

42. Use

42.1. *Any Lawful Use*. Try to allow "any lawful use" or at least "any lawful retail/office use."

42.2. *Permitted Uses*. Describe permitted uses generically to avoid restricting future use by a subtenant or assignee (e.g., "medical or other health practitioner's offices" or "executive offices" rather than "podiatrist's offices" or "main headquarters of XYZ Corp."). If the tenant anticipates making unusual uses of the space (e.g., basketball courts, pets, bicycles hanging from the ceiling, sleeping facilities, etc.), confirm that the lease and applicable law will not prohibit these uses.

42.3. *Future Change of Use*. Build in flexibility for future change of use, if any possibility exists of a change in circumstances (e.g., likely technological obsolescence of the tenant's business).

42.4. *Incidental Uses*. Allow incidental uses, such as ATM machines, food, training, duplicating, ancillary retail, gym, day care, other amenities, network control center, etc. If necessary, the tenant can usually agree that these facilities will be open only to the tenant's employees.

42.5. *Duty to Operate; Recapture*. The tenant would prefer to have no duty to open or operate, implied or otherwise. If the landlord counters with a request for a recapture right if the tenant goes dark for a specified period, carve out permitted closures (e.g., force majeure, alterations, inventory-taking, other brief closings). Limit the landlord's decision period on any recapture. When recapturing, the landlord should reimburse the tenant's unamortized cost of furniture, furnishings, equipment, and improvements. Any recapture notice by the landlord must be accompanied by mortgagee consent to be effective.

42.6. *Satellite Dishes and Antennas*. The landlord should allow the tenant to install satellite dishes and antennas on the roof, either at no charge or for a defined or ascertainable charge. Allow the tenant to relocate this equipment if necessary to improve performance. The landlord should agree that future rooftop users will be obligated not to interfere with the tenant's use.

42.7. *Rooftop, Generally*. The tenant may also want the right to install its own backup generators, supplemental air-conditioning, and other equipment on the roof. If this will require structural reinforcement, the landlord should consent to it, and ideally pay for it. For any rooftop equipment, the tenant will also want the landlord's consent, without charge, to the running of any wires, cables, connections, and lines between the premises and the tenant's rooftop equipment. The tenant would prefer not to be obligated to remove any rooftop equipment or connecting lines at the end of the term.

42.8. *Use of Sidewalks and Exterior Areas*. Will the tenant need to use the sidewalk or the exterior of the building for special events, temporary installations, or other purposes? Exterior loudspeakers? Exterior laser or light displays?

42.9. *Conflict with Other Leases*. The lease should not say that the tenant's use may not conflict with other leases or mortgages—unless this lease defines exactly what those other leases or mortgages prohibit.

42.10. *Common Facilities*. Allow the tenant to use building common facilities, such as cafeteria or health clubs, auditoriums, conference facilities, and common lavatories if the premises does not include lavatories. The lease should state the minimum operating hours (24 hours in the case of lavatories and other essential facilities) and standards for common facilities and any cost for such uses.

42.11. *Exclusive Use*. The lease should give the tenant the exclusive use of terraces or other identified outdoor space or facilities adjacent to the tenant's premises. The landlord should maintain

and clean these areas according to specified standards.

42.12. *24/365 Access*. The tenant should obtain 24-hour access, 365 days a year, via elevator or (if the elevator is broken) stairway.

42.13. *Reception, Security, Other Facilities*. Will the tenant want to install any reception, security, package handling, messenger, or other facilities in the lobby, basement, or ground floor of the building?

42.14. *Storage Areas*. In addition to the premises, the tenant may want to lease storage area available in the building.

42.15. *Competitors*. Even for non-retail space, try to prohibit the landlord from leasing space in the building to the tenant's competitors (creating a risk of a competitor's taking the tenant's staff, customers, or clients).

43. Utilities, Generally (Excluding Electricity)

43.1. *Entry Point*. The landlord should bring all utilities to a defined entry point on the perimeter of the premises.

43.2. *Special Requirements*. Allow the tenant or its service providers to install T-1 lines, multiple points of entry, and other special telecommunications facilities, including cabling and connections from service providers to the premises.

43.3. *Free Choice of Carrier*. Allow the tenant to use any carriers or utilities it wishes for telecommunications and other services. The landlord must, without charge, cooperate as needed, such as by signing papers, providing closet space in the basement, and providing information.

43.4. *Interruption of Service*. If certain utilities are interrupted for more than a minimal period, allow the tenant to abate rent and at some point eventually terminate the lease. Trigger rent abatement rights based upon ____ or more days of outages during any ____ day period, rather than requiring that any single outage must continue for ____ days before the tenant may abate.

43.5. *Excess Capacity*. Restrict the landlord's use of excess capacity for any generators, fuel systems, etc.

43.6. *Alternative Providers*. Limit the landlord's right to change power or telecom providers.

44. Miscellaneous

44.1. *Right To Re-Measure*. Allow the tenant to re-measure the square footage upon completion of the landlord's work (at least for a new building).

44.2. *Rent Commencement*. The tenant should not pay rent until particular anchor tenants are open for business; the landlord has finished specified construction, including common areas; and the landlord has paid the tenant the agreed construction cost reimbursement.

44.3. *Limited Liability*. Limit the tenant's liability and the liability of the tenant's general partners to their interest in the lease. Allow for release of departing or deceased partners.

44.4. *Confidentiality*. If the lease requires the tenant to give the landlord any financial, sales-related, or other sensitive information about the tenant, the landlord should keep it confidential.

44.5. *Adjacent Work*. If a third party will pay compensation for inconvenience caused by work on an adjacent or nearby site, should the landlord or the tenant receive it?

44.6. *Initial Criteria and Specifications*. State the criteria and specifications for the landlord's initial construction of the building, common areas, parking lot, and so forth.

44.7. *Engineering Issues*. Work with the tenant's engineers and other consultants to identify needs, standards, and specifications for all building services and the landlord's alterations.

44.8. *Cost of Capital Improvements*. If the estimated cost of any capital improvement or replacement for which the tenant is responsible exceeds a specified amount (perhaps varying based on the remaining term of the lease), then the tenant may terminate the lease or require the landlord to contribute to the cost based on the expected useful life of the improvement or replacement relative to the remaining term of the lease.

44.9. *Other Business Relationships*. Do the landlord and the tenant have any other relationship (e.g., purchase and sale

of a business) that might give rise to tenant claims against the landlord, which the tenant should be entitled to offset against rent?

44.10. *Change in Zoning*. Allow the tenant to terminate if a change in zoning or other law (or inability to obtain or maintain necessary permits) prevents or impairs the tenant from operating its business, in whole or in part.

44.11. *Other Tenants' Closure*. The tenant may want the right to terminate the lease (or pay only percentage rent) if specified other retail tenants shut down.

44.12. *Strike*. If a strike occurs, the landlord should agree to establish a separate gate for the striking union to minimize any interference with the tenant. If the landlord or any other tenant uses a labor force that causes disharmony with the tenant's labor force, require the landlord to remove the former labor force from the building. (Most leases express only the converse proposition.)

44.13. *Hoist*. The tenant may want the right to install and/or use an outside hoist. Conversely, the landlord should agree to remove promptly any hoist that the landlord installs for construction.

44.14. *Work Outside Premises.* What construction projects or alterations might the landlord undertake outside the leased premises that might cause the tenant concern or hurt the tenant's business? Try to identify them and negotiate appropriate restrictions or rent credits.

44.15. *Indemnification*. The tenant should be responsible only for the direct consequences of its own acts and omissions. Keep any indemnity narrow. Negate tenant liability for consequential damages.

44.16. *Board Approval*. If the tenant will require its own internal board or other approval to ratify a contemplated transaction, provide for such condition in all papers, term sheets, leases, and other documents.

44.17. *Warranties*. If the landlord has the benefit of any warranties for the building, the tenant may want to be a beneficiary of those warranties and have the right to enforce them directly against the warrantor.

44.18. *Relocation*. If the landlord wants to have the right to relocate the tenant, require: (1) the new premises must be physically higher (or no more than ___ floors lower) than the existing premises; (2) the landlord must pay for all direct and indirect costs of relocation (e.g., new letterhead, announcements, rewiring costs); (3) the configuration, size, and layout of the new premises are subject to the tenant's reasonable approval; (4) the tenant need not relocate until the new premises are fully built out at the landlord's expense; and (5) a free rent period.

45. Due Diligence

As noted above, this checklist should not be regarded as exhaustive or complete. This is particularly true as it applies to the following list of "due diligence" that the tenant's counsel may wish to perform:

45.1. *Existing Condition of Premises*. Is the existing condition of the premises satisfactory? What personal property is included? Should the landlord be required to remove—or be required to leave in place—any existing improvements?

45.2. *Title Search*. Perform a title search and review, or an online search to confirm ownership of the fee (easily available in many areas). Check for any use or other restrictions.

45.3. *Square Footage*. Calculate the actual square footage and scope of the premises. Do all of the landlord's exclusions of space from the premises make sense? For example, should the elevator lobby be part of the premises?

45.4. *Special Permits*. Do any unusual uses require special measures for permits (e.g., liquor licenses, sidewalk cafes)? How long will that process take, and what will it require? What other permits might the tenant need, such as public assembly?

45.5. *Ventilation*. Does the space provide adequate ventilation, or adequate pathways for the tenant to install new ventilation?

45.6. *Escalations*. Due diligence issues regarding escalations:

(a) *Capital Projects.* What capital projects are underway or contemplated today? Does the tenant agree with how the landlord plans to treat them?

(b) *Historical Operating Expenses.* Historical amounts for operating expenses and taxes, including review of underlying financial information and documents.

(c) *Pre-Programmed Increases in Tax Assessment.* Investigate any built-in future increases in the tax assessment (e.g., termination of interim assessment, upcoming loss or phase-out of existing abatement or exemption). Is the building fully assessed?

45.7. *Telecommunications Capacity*. Investigate available capacity and pathways for telecommunications and other utilities.

45.8. *Technological Requirements*. Check the tenant's network and other technological requirements.

45.9. *Rooftop*. Check lines of sight for a rooftop satellite dish or antenna. Can the roof support any heavy equipment the tenant will install?

45.10. *Present Occupancy*. What is the present occupancy of the premises to be leased? What is the practical likelihood of delays in possession?

45.11. *Tenant's Existing Lease*. Review the existing tenant's lease for expiration date, holdover penalties, etc.

45.12. *Disposition of Present Premises*. What are the tenant's plans for disposing of the premises it now occupies? Does the tenant understand any uncertainties and risks in that process?

45.13. *Engineering*. The tenant's engineers should consider a range of issues, including the adequacy, directness, and feasibility of pathways for utilities and services for the premises.

45.14. *Security*. Is the landlord's security program consistent with the tenant's desires?

45.15. *Submeter*. If the premises are submetered, does any submeter serve space outside the premises?

45.16. *Operating Requirements*. Does the tenant have any unusual operating requirements, procedures or expectations? A certain level of loading docks, freight elevators, security guards, or lobby operations? Anything outside the premises? Identify those assumptions and state them in the lease.

45.17. *Environmental*. Consider whether an environmental review is necessary.

46. Preliminary Arrangements and Considerations

46.1. *Brokerage*. Is the brokerage agreement in place and are the commission negotiations completed?

46.2. *Term Sheets and Letters of Intent*. Attorneys should deal with term sheets and letters of intent early in the lease negotiation process to raise and resolve major issues while it is relatively easy (and inexpensive) to do so.

46.3. *Tax Incentives*. Can the tenant qualify for any tax incentives, abatements, deferrals, rebates, subsidies, or other governmental benefits? Check the timing requirements and pitfalls for any application (e.g., a tenant must sometimes apply before "committed" to the new location).

46.4. *Premises Off the Market*. During the lease negotiations, ask the landlord to agree to remove the space from the market and not to negotiate with other parties for a specified period. Should the parties agree to a break-up fee? A reimbursement of expenses if the deal dies?

46.5. *Tenant's Professionals*. Select, coordinate, and negotiate the contracts of the tenant's other professionals: architect, broker, engineer, facilities consultant, signage designer, space planner, and so forth. Try to get architects started early. Architects usually cost less than either lawyers or rent.

46.6. *Tenant's Procedures*. Understand the tenant's (and the landlord's) internal approval procedures, including any documentation requirements and likelihood for delay.

46.7. *Backup Lease Negotiations*. Consider negotiating multiple leases at the same time (though perhaps at various stages of negotiations) to be able to recover quickly if the lease negotiations for a particular premises break down or the landlord decides to lease to some other tenant.

47. Lease-Related Closing Documents

At closing, any significant lease transaction may require a number of documents other than the lease itself. Counsel should resolve these documents as part of the process of negotiating the lease. They might include any of the following:

47.1. *Memorandum of Lease*. Mention any "exclusive use" rights and other lease provisions that restrict the landlord's activities on other premises. Record the memorandum against all affected real property (e.g., outparcels).

47.2. *Nondisturbance Agreement*. See the "lender's form" nondisturbance agreement as soon as possible, so it can be negotiated and signed along with the lease. Attach it as an exhibit as the standard for future nondisturbance agreements.

47.3. *Recognition Agreement and Estoppel from Ground Lessor*.

47.4. *Written Authority for Agent*. If the landlord's agent signs the lease (or any future amendment or estoppel certificate), the landlord should deliver a copy of a written authorization to sign.

47.5. *Additional Consents*. Does the landlord need any consents or approvals? This is especially important where the landlord is a governmental entity or charity. Approvals could be internal or require cooperation from lenders, ground lessors, or other third parties. The landlord should represent and warrant that it needs no further consents or approvals, and deliver copies of any necessary consents or approvals at closing.

47.6. *Opinion of Landlord's Counsel*. Such an opinion could be limited to authorization and execution and related issues, without entering the morass of issues raised by "enforceability."

47.7. *Transfer Taxes*. Beware of transfer taxes generally. The calculation and allocation of transfer taxes, if any, on the creation of the lease (including the treatment of any transfer of personal property) should be embodied in a closing document. Remember that in New York a lease coupled with a purchase option may be subject to transfer tax.

47.8. *Title Insurance*. Consider obtaining a policy of leasehold title insurance.

47.9. *Unusual Security Arrangements*. Unusual security arrangements—letters of credit, delivery of marketable securities, and the like—should be structured and documented. The landlord's lender and conceivably other third parties may also need to get involved in these discussions.

47.10. *Leasehold Insurance*. Consider separate casualty insurance coverage for a valuable leasehold.

47.11. *Landlord's Approval*. The landlord's approval of plans and specifications for initial work (if not attached as an exhibit to the lease).

47.12. *Diagram of Premises*. The lease should have an exhibit consisting of a precise diagram of the premises. Confirm that the tenant, the broker, and other advisers reviewed and approved the diagram.

47.13. *Guaranty*. Any guaranty of a lease will raise its own issues, outside the scope of this checklist.

47.14. *Internal Approvals*. Any documents necessary to evidence the tenant's internal approval of the contemplated lease (resolutions, consents, or the like).

47.15. *Brokerage Commission*. Evidence of payment of any brokerage commission.

48. Post-Closing Items

Like any other real estate transaction, a tenancy under a lease may require post-closing legal attention in order for the tenant to preserve its rights. The following are a few items that the tenant's counsel may want to handle or at least mention to the tenant:

48.1. *Advice and Administration Memo*. The tenant may desire its counsel to prepare a memorandum to summarize any proactive and nonobvious actions the tenant should take to protect its position under the lease. Such a memo might, for example, describe the deadlines and process for objecting to the landlord's delivery of the space; escalation statements; or provision of building services.

48.2. *Ticklers for Deadlines*. The tenant may want to make tick-

ler file entries for tax protest deadlines, option and/or renewal exercise dates, letter of credit renewal dates, and any other deadlines.

48.3. *Filings, Etc*. If the lease contemplates the tenant will make any nonintuitive filings, or take any other nonstandard actions, the tenant's counsel may wish to bring those matters formally to the tenant's attention.

48.4. *Escalation Audits*. Note the deadlines to initiate any audit of the landlord's operating expenses or other escalations. For the first year of operating expenses, audit not only the operating expenses for that year but also the base year.

48.5. *Tax Protests*. The tenant should understand the deadlines for tax protests and any actions the tenant should take to preserve and exercise any rights to require the landlord to protest taxes.

48.6. *Options; Rent Adjustments.* The parties should memorialize all option terms and rent adjustments in writing.

48.7. *Estoppel Certificates.* If the landlord asks the tenant to sign an estoppel certificate, the tenant should take it seriously, start researching the facts immediately, and take advantage of the opportunity to put pressure on the landlord to solve any problems that the tenant has identified. Courts do take estoppel certificates seriously. The tenant should not lightly "sign and return." If the lease allows the tenant to require estoppel certificates of the landlord, the tenant may occasionally wish to do so, simply to avoid future issues and theories.

48.8. *Future Lease Transactions.* Any future lease amendments (or negotiated termination of the lease) may require the landlord's mortgagees' consent.

48.9. *Effect of Memorandum of Lease.* If the tenant recorded a memorandum of the original lease, then New York law in effect requires an amendment to the memorandum to be recorded whenever the lease is amended. Even if the amendment does not change any information that the recorded memorandum of lease disclosed, the additional recording is required perhaps to give notice of the mere fact that the lease was amended. The tenant should insist on such an additional recording.

Endnotes

1 The suggestion in the preceding sentence reflects concerns that were for the most part confined to "dotcom" tenants. The demise of the "dotcom" tenants may minimize the likelihood that this issue will actually be relevant in future lease negotiations, but some tenants—occasionally—may care about this issue.

2 Tenants need to understand this risk when evaluating prospective subtenants and negotiating subleases. As one way to mitigate the risk, the tenant might have the sublease expire six months before the main lease, at which point the subtenant would be required to deliver appropriate estoppel certificates and other assurances (an increased security deposit?) regarding its obligation to vacate, and the sublease might convert to a license arrangement. A strong tenant might ask the landlord to bear the risk of subtenant holdover.

3 For the lease to be truly "mortgageable," it needs much more than this. *See* Joshua Stein, "Model Leasehold Mortgagee Protections," American College of Real Estate Lawyers Papers, October 1999.

4 Landlords have been known to forget to give former tenants their share of any subsequent refunds of real estate taxes they paid. This can produce a nontrivial profit center for the landlord, and an issue in negotiating a subsequent purchase and sale of the building.

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BERGMAN ON MORTGAGE FORECLOSURES:

Mortgage Language and the Borrower in Hiding

By Bruce J. Bergman

Service of process is a rather mundane, mechanical subject—vital obviously to the litigation process, but somewhat uninspiring, at least from this vantage point. Adding to the somnolence the topic produces in some quarters, it is also an area of portentous problems. Lenders are painfully aware that in a New York foreclosure case, a significant portion of the time expended is consumed by process service. Even when a person's whereabouts are known, should they be served by other than in-hand delivery pursuant to CPLR 308(1), they then have at least 40 days to respond to the complaint. Of course, a more severe time killer is the defendant who cannot so readily be found—hardly an uncommon circumstance.

One way mortgagees might *intend* to exacerbate the missing borrower dilemma is to rely upon the standard mortgage provision to the effect that any notice to be given to the borrower will be by delivery or mail to a stated address, most often (but not always) the mortgaged premises. A further provision is that the notice will go to a different address only if the borrower has given the lender notice of that other address. It would, of course, be comforting for mortgagees to know that if a borrower silently departs the mortgaged premises (or wherever else he lives) and never provides notice of a new address, service of process in the event of a foreclosure action could be made at the premises. Is such comfort available?

"Lenders are painfully aware that in a New York foreclosure case, a significant portion of the time expended is consumed by process service."

Regrettably, it is not—absent providing a false address or engaging in conduct designed to prevent the mortgage holder from ascertaining the borrower's correct address.[1] Why this is so is readily understood by a few quick words about service of process rules in the Empire State. If a prospective defendant is never home, the process server can "nail and mail," which means mail the summons and complaint to the last known address (and the mortgage clause discussed helps there), but nail (that is, affix to the door) at the usual place of abode. Thus, there is a clear distinction between last known address and usual place of abode.[2]

A like distinction applies if some person of suitable age and discretion is home other than the party to be served. The summons and complaint can be handed to such a person at the dwelling place/usual place of abode. But going to the last known residence is not a proper substitute.[3]

In the end, service of process cannot be made at the last known address, and the mortgage agreement to receive notices is not equivalent to an agreement to accept service of process.[4] That being so, a suggested remedy is to employ a mortgage provision which specifically authorizes service of process at the last known residence. It would surely save considerable time in many a foreclosure case.

Endnotes

1. *Citibank, N.A. v. Robinson*, N.Y.L.J., July 17, 1996, at 24, col. 5 (Sup. Ct., Kings Co., Belen, J.), citing *Cuomo v. Cuomo*, 144 A.D.2d 331 (2d Dep't 1988); *Sherrill v. Pettiford*, 172 A.D.2d 512 (2d Dep't 1991).
2. *Robinson*, N.Y.L.J., July 17, 1996, at 24, col. 5, citing *Feinstein v. Bergner*, 48 N.Y.2d 234 (1979).
3. *Id.*, citing *Cuomo v. Cuomo*, 144 A.D.2d 331 (2d Dep't 1988).
4. *Id.*

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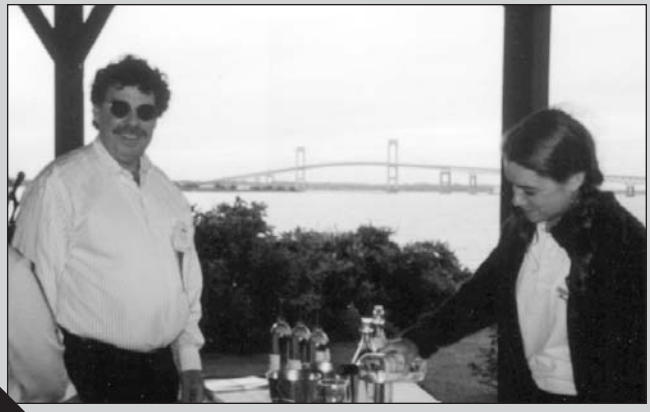

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