DRAFTING AND NEGOTIATING
PRO–LANDLORD AND PRO-TENANT LEASE PROVISIONS

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DRAFTING AND NEGOTIATING PRO-LANDLORD AND PRO-TENANT LEASE PROVISIONS

I. INTRODUCTION

Consider the following two stories which may sound familiar to leasing attorneys:

A. Story No. 1 – Does This Sound Familiar?

Tenant’s counsel receives a lease draft from her client. The lease is for 3,000 square feet of space in a shopping center. The lease draft is approximately 60 pages long, 10 point font, single spaced, on legal-sized paper. The lease form is strongly one-sided in Landlord’s favor. Even the most basic provisions are lengthy. Tenant’s counsel asks for and receives a copy of the letter of intent from her client. It takes several hours to read through the lease, read through the letter of intent, and compare the two.

Having completed her initial review of the lease, and having developed a list of questions and preliminary comments, Tenant’s counsel schedules a call with her client. They review the lease and discuss comments and the attorney completes her initial mark-up, which includes many comments on each seemingly each page to address the one-sided provisions. She sends it to her client for review. The attorney and her client have another call, discuss additional comments, and after some fine-tuning, they send the revised lease to the Landlord.

Several days later a revised draft of the lease is received from the Landlord. The hours of work put in by the Tenant and its counsel to revise the lease have yielded few results, as only about 20% of the requested changes were accepted. The Landlord’s attorney did not want to “change the form”. Over the following days and weeks, additional revised drafts are traded, calls are scheduled between the parties and internally with their counsel, points are debated, and the process drags on.

Finally, after the various compromises have been agreed to, and the lease is up to “version 12” on Landlord counsel’s document management system, the Tenant is reluctantly ready to sign the lease. Patience on both sides has worn thin and the Landlord-Tenant relationship is off to a shaky start.

Most significantly, the lease drafting and negotiation process has taken longer and been more expensive in terms of legal fees than either party intended.

It doesn’t have to be this way.

B. Story No. 2 – Wouldn't it Be Great if…?

Tenant’s counsel receives a draft of a letter of intent from her client for the same property described in Story #1. Specific, targeted changes are made to the letter of intent accounting for the Tenant’s business needs and preferences. Since Landlord and its broker are anxious to strike the deal, after some discussion and fine-tuning the Tenant’s changes are largely accepted and its unique requirements are incorporated into the final letter of intent. Landlord’s counsel carefully includes the specifically negotiated terms in the lease draft.

The lease form the Landlord uses is fair and reasonable as a starting point, since in seeking to speed up the lease negotiation process the Landlord has already incorporated many of the changes Tenants “always” seem to ask for and that the Landlord always agrees to. After one or two rounds of review and commenting on the lease, and a few short phone calls to hammer out the open issues, the lease is finalized about 10 days after the first draft was circulated.

The process has taken less time and been less expensive than either party expected. The Landlord-Tenant relationship is off to a great start and both parties are happy.

II. SCOPE OF ARTICLE

A. Purpose

1. This article will discuss methods and practices which encourage an efficient and effective lease negotiation process.

The lease negotiation process in Story No. 2 was more efficient and effective than the one in Story No. 1 for several reasons:

- Tenant's unique issues and requirements were discussed prior to the lease being prepared;
- Those requirements were negotiated and included in the letter of intent, thus avoiding the need for Tenant to raise the issues after the lease had been drafted;
- Landlord’s lease form was reasonable and incorporated compromise provisions as a starting point, thus reducing the number of provisions for which Tenant’s counsel would need to provide comments;
- Landlord’s counsel carefully incorporated the negotiated terms from the letter of intent into the lease draft, including all of Tenant’s unique requirements;
- Due to the foregoing factors, the lease negotiation process took a much shorter period of time to complete.

While leases come in many shapes and sizes (small retail shops to large office campuses, etc.), and cover many different property types and industries (retail, office, industrial, mixed-use) it is hoped that the issues discussed in this article will be general enough to be relevant across the leasing spectrum, and also specific enough to have real practical value for new leasing practitioners as well as seasoned veterans.

Most commonly, leases are drafted on the Landlord's standard form, with the Tenant's counsel then tasked with making the first set of changes. For this reason, many (but not all) of the examples used below will be of a Tenant's comments to Landlord's lease form language. The principles and practice tips will be applicable no matter which party's lease form is used.

2. This article is more about "form" and less about "substance".

At a minimum, a "pro-Landlord" or "pro-Tenant" lease provision is one the other side will agree to. The purpose of this article is not to discuss substantive lease issues or specific revisions a Landlord or Tenant should commonly ask for. Rather, this article will focus on methods, techniques, and practice tips the author has used and seen others use in efficiently and effectively negotiating leases.

The article will focus on how to make comments and the appropriate scope of those comments, when to ask to for changes, and factors to consider in choosing how to word changes, and the format for communicating your comments.

Often the substance of a comment is lost because it is not clearly or appropriately communicated. With that said, the substance of many different lease provisions will be discussed in the context of examining why certain types of lease comments would be more effective than others in revising the form language.

B. Use of Stories, Examples, and Sample Language

The concepts, ideas, suggestions, and practice tips contained in this article are based on "real-world" experiences over many years of leasing practice, good and bad.

The stories used are meant to trigger ideas and cause the reader to contemplate prior lease negotiation experiences which went well, as well as those which went poorly, and consider what caused the difference.

The example lease comments and sample lease language are intended to bring to the reader's mind comparable provisions in lease forms the reader has drafted or reviewed in representing Landlords and Tenants in a wide array of leasing transactions.

C. Formatting

In making use of sample lease language and sample lease comments, this article will make use of the following common punctuation forms to demonstrated the altered language:

1. New language added to a lease provisions will be double-underlined: like this;
2. Deleted language will be marked with a strike-through: ~~like this~~.

D. Brief Disclaimer

As noted above, throughout this article the author will use sample lease language and suggest sample lease comments to illustrate the points being discussed. These sample provisions and sample revisions are used for illustrative purposes only.

In many cases the standard lease form language used below has been shortened or abbreviated considerably to avoid lengthy quotations. For example, lease provisions which typically are covered in one or more paragraphs or more are sometimes intentionally shortened to one or two sentences. Sometimes only portions of a lease section have been quoted rather than an entire section. Therefore, the lease provisions and sample lease comments included below are not intended to be used as model provisions.

III. WHAT IS A PRO-LANDLORD OR PRO-TENANT LEASE PROVISION?

A. "We Really Want to Get This Deal Done."

If you asked any Landlord or Tenant at the start of the lease negotiation process how they would like it to go, they would likely all say, "We want this deal to go smoothly. We really want to get this deal done."

If asked, those parties would also say that they want the lease to protect their interests. They want the lease language to address concerns which are likely arise during the lease term, and allocate risk and set clear expectations about the parties' behavior towards the property being leased and towards each other.

A "pro-Landlord" or "pro-Tenant" lease provision is not one which is totally one-sided in one party's favor. Rather, as described in this article, a "pro-Landlord" or "pro-Tenant" lease provision is one which is drafted in such a way as to create or clarify a right or obligation, but also in a manner reasonable enough that the other party will agree to it.

A provision may be carefully crafted and one-sided, but if the other party doesn't agree to it, the provision is not worth anything.

In the context of a Tenant's attorney making comments to a Landlord's lease form, pro-Tenant lease revisions will bear some of the following characteristics:

- The best way to draft pro-Landlord and pro-Tenant lease provisions is get the key terms agreed to before the lease is ever drafted.
- Only ask for changes you actually need.

- Sometimes it works best to have the other side draft the change language for you.
- Don’t make changes just for the sake of making changes.
- Make it easy for the other side to see what you are asking for.
- Make it easy for the other side to accept your change.
- Make it easy for the other side to say “yes” to the changes you really need.

B. "We Want This Negotiation to Be a Long, Drawn Out, Frustrating Process."

Landlords and Tenants do not enter a lease negotiation hoping for a long, drawn-out process. In seeking to make a Landlord’s lease form more Tenant-friendly, a Tenant’s attorney may make some or all of the following types of comments:

- Deletions of entire sections:
- Replacement of a section in the Landlord’s form with a corresponding section from the Tenant’s form
- Taking a provision setting forth one party’s rights, and simply adding the other party to the provision, thus attempting to make the language mutual.
- Deleting the word “Landlord” and replacing it with the word “Tenant” in a provision granting a certain right.
- changing “shall” to “shall not” or vice versa

IV. SUGGESTIONS TO IMPROVE THE LEASE NEGOTIATION PROCESS

A. Agree on Major Terms before the Lease is Ever Drafted.

As noted above, a “pro-Landlord” or “pro-Tenant” lease provision is one which both addresses a legal or business need of the applicable party and is agreed to by the other party. In the context of a new lease on a Landlord’s form, the best time to “draft” a pro-Tenant lease provision is before the lease is ever drafted.

The Tenant's best opportunity to introduce to the Landlord its unique requirements will be at the letter of intent stage, and not during the negotiation of the lease itself.

The letter of intent or term sheet is a document which sets forth certain basic parameters of the lease, including identity of the parties, the location and size of the leased space, the permitted use of the space, the rental rate, pre-lease construction obligations, and so forth. It is often (but certainly not always) agreed to by the parties or their brokers without review by counsel.

A wise Tenant will take advantage of an important opportunity presented by the letter of intent.

At the letter of intent stage, the Landlord is usually highly-motivated to strike a final business deal and will be more willing to consider and agree to a Tenant’s unique requirements at this stage than it will if those requirements are first introduced in during the lease negotiations.

Some Tenants choose not to involve their attorneys in the review or negotiation of the letter of intent because they either want to save on costs or they see the document as merely a recitation of the financial terms of the deal and some of the basic lease requirements. Not so! For a Tenant, this is when the heavy lifting needs to get done.

Here’s why: It can be very difficult to get a large number of changes negotiated into the Landlord’s set form of lease. If a new concept or request is first introduced by the Tenant or its counsel during the lease negotiations, there is a good chance the Landlord’s attorneys will simply say “no”. However, if a Tenant can get its unique requirements included in the letter of intent, those terms will find their way into the lease 100% of the time and the Tenant can insist that they be included.

Examples of the types of issues or terms a Tenant should negotiate at the letter of intent stage including the following:

- Exclusive use rights;
- Hours of operation (for a retail or office tenant);
- Caps or limitations or exclusions on operating cost items that will be charged to the tenant;
- Unique assignment or subletting requirements;
- Burn-off of the guarantor’s obligations;
- Special or unusual specific rights relative to the Tenant’s proposed use of the space; and
- Parking rights or requirements.

This, of course, is not an exhaustive list by any stretch, but rather indicates the types of issues a Tenant would be well-served in bringing to the Landlord’s attention prior to signing a letter of intent.

B. Take Negotiation of Major Issues "Outside" of the Lease

In many instances, the parties will prefer to agree on basic terms in the letter of intent, and save the detailed negotiations until after the lease is drafted. When this happens, as in Story #1 at the beginning of this article, the lease negotiation can become protracted if issues are raised for the first time in a heavy mark-up of the lease.

In an ideal leasing world, the significant business terms and key lease issues which are truly meaningful to the parties would be negotiated before the lease is drafted. As a practical matter, many Landlord and Tenants choose to table issues until the lease is drafted, and other issues do not or cannot rise to the surface until the lease is reviewed and examined. The initial lease review will likely bring provisions to a party's attention which might not have been considered at the letter of intent stage. Once the lease is reviewed, a Tenant and its counsel will have the chance to compare notes and discuss issues they would like to address with the Landlord.

While providing a heavy mark-up of the lease can be expensive and time-consuming, some Tenants will work with their attorneys to develop an issues list to discuss with the Landlord prior to sending a revised draft of the lease. This approach has two advantages.

First, it places the Tenant's issues before the Landlord in a clear and readily-identifiable manner. Rather than having to search through a mark-up of the lease to discover the Tenant's critical deal points, the parties can work off of the Tenant's list to discuss issues.

Second, by isolating the Tenant's issues outside of the lease language, the lease language does not get in the way. This approach also clarifies the expectations of the parties

Consider the following case study:

> A restaurant business has ten locations in a geographic market. It is considering opening another. It finds a good location and strikes a business deal with Landlord for a 10-year lease. Based on current operations at its existing stores, experiences both good and bad under its existing leases, as well as its business plan over the next 5 years, the Tenant develops a list of 8 to 10 requirements for the new lease. The requirements are specifically tailored to the company's unique needs. The list includes specific use requirements, specific financial reporting requirements, a cap on additional rent, permitted transfer provisions in the event of a sale of its business, a replacement guarantor concept, and a few other issues which the company requires in the lease based on its existing business operations and plans for the future.
>
> Rather than waiting to embed the requirements in a mark-up of the lease, the company provides a list of the required provisions to the Landlord for discussion in memo form early in the process. The terms are analyzed and discussed. The Landlord makes determinations on which provisions are acceptable and which ones require additional negotiation.
>
> Before spending significant legal fees, but with consultation with their respective counsel, the parties come to agreement on the parameters of Tenant's unique requirements and how those terms will be incorporated into the lease. The Landlord provides the agreed upon list to its counsel. Tenant's counsel also has a copy of the list. The terms are incorporated into the lease draft, confirmed by Tenant's counsel, and after one or two rounds of fine-tuning, the lease is finalized and Tenant has confidence signing it with the knowledge that Tenant's key requirements and important business considerations have been included.

The reason the lease negotiation in the foregoing example was successful is the that Tenant was able to alert the Landlord to Tenant's unique requirements, negotiate them outside of the lease language, and then have those terms incorporated into the lease in a manner satisfactory to both parties. This proactive approach to putting issues "on the table" is often more effective than introducing those issues for the first time in a heavy mark-up of the lease.

The process described in the foregoing paragraphs of this section is perhaps the best practice for drafting and negotiating "pro-Tenant" lease provisions. When it can be employed effectively, it dramatically improves both the efficiency and effectiveness of the lease negotiation process in terms of having the Tenant's important requirements incorporated into a lease.

Conclusion: One great way to speed up the lease negotiation process is to come to agreement on key terms outside of the lease, and then have the party which drafted the lease incorporate those terms using language that will be acceptable to both parties.

C. Periodically Update Your Lease Forms

One of the best ways to ensure a protracted and painful lease negotiation process is to start with a heavily one-sided lease form. This goes both ways, as many Landlord forms and Tenant forms have drastically one-sided terms which do not take into fair consideration the other party's reasonable and legitimate needs.

Consider the following provisions taken from Landlord lease forms, all of which invite confrontation and demand to be changed:

> Example #1:
>
> The approximate square footage of the Premises may be adjusted by Landlord if necessary to reflect the actual square footage of the Premises and the decision whether or

not to make the adjustment shall be in Landlord's sole discretion.

Example #2:

Notwithstanding the foregoing, Landlord reserves the right, in Landlord's sole discretion, to modify the calculation of Tenant's Pro Rata Share of Operating Expenses, Taxes, and/or insurance to the extent that Landlord determines necessary to allocate any expense in a manner which Landlord determines to be appropriate.

Example #3:

If, during the Lease Term, Landlord, in Landlord's sole discretion, deems itself insecure as to the performance or prospect of performance by Tenant of any of Tenant's obligations under the Lease, Tenant shall be required to provide Landlord with an additional security deposit in an amount and form acceptable to Landlord in its sole discretion within ten calendar days after notice from Landlord.

Practitioners can debate the appropriateness of such language and whether it is truly in the Landlord's interest to endure the delays and extra time and costs it takes to debate and revise such provisions during the lease negotiation process.

An acceptable lease provision from a Tenant's perspective is typically one in which there is certainty about the Tenant's on-going obligations (especially financial obligations) and a commitment from Landlord that it will act reasonably. The language quoted in the three examples above goes out of its way not to do those things.

In a welcome trend, many Landlords are revising their lease forms to be more competitive. Market-standard lease forms take into account many common changes Tenants would typically ask for.

Because of this, forms have gotten shorter and leaner. Provisions are more clearly-worded. This effort on the part of many Landlords to be more "business-friendly" can reduce the lease negotiation time considerably.

V. PRACTICAL TIPS FOR DRAFTING GOOD LESE REVISIONS

Now, even if the Landlord employs a reasonable form, and even if the Tenant's key business terms are agreed to at the letter of intent stage and then carefully incorporated into the lease, there will still usually be at least a few rounds of back and forth re-drafting as the lease is finalized.

Keeping in mind the overarching principle that the Landlord and Tenant both want to get the lease finalized in an efficient manner, while still protecting their respective interests, the following principles should govern the lease comment and review process:

- Keep your comments proportional to the size of the deal.
- When possible, revise the existing language rather than "re-writing" the lease.
- Focus more on practical matters than theoretical concerns.
- Anticipate the other side's likely response to your request and account for it.
- When reviewing comments, look for ways to be accommodating.
- Only ask for changes if you really need to.

The balance of this article will discuss these principles and how to make lease changes the other side will likely say "yes" to, and how to make it easier and more likely for the other side to say "yes" to the changes a Landlord or Tenant really needs.

A. Keep Your Comments Proportional to the Size of the Deal

Assuming that the lease form used by the party responsible for preparing the initial draft of the lease is at least somewhat reasonable, nothing slows down a lease negotiation process like an overly marked-up lease. In earnestly striving to appropriately represent its client, some attorneys feel the need to make comments to almost every single provision in the lease.

There is a train of thought which says, "if we ask for 100 changes, the Landlord will probably at least agree to 30 of them, and we can use the leverage created by them saying 'no' so much to get the changes we really need".

An overly marked-up lease hampers the lease negotiation process in at least three ways.

First, it bogs the process down since it takes a long time to generate comments, and a long time for the Landlord (or Tenant, if applicable) and its counsel to review and discuss them, and generate a response.

Second, the party receiving the comments is unable to focus on the changes which are truly important to the party who made them, thus lengthening the lease negotiation process as the party making the comments must follow-up repeatedly to have its critical issues addressed.

Third, this inefficiency creates unnecessary expense in terms of legal fees.

Consider the two following examples:

Story #1:

A Landlord had negotiated several leases in a shopping center. The center was located in a thriving part of town. There was a low vacancy rate. The Landlord signed a letter of intent with a new prospect. Several other potential occupants had expressed interest in the space. The Landlord provided its standard lease form and about ten days later the Tenant's attorney provided the mark-up. Every page was heavily commented on. Even innocuous provisions had comments. Rather than incurring the legal fees to have the comments reviewed, the Landlord canceled the deal and moved on to the next Tenant.

More than any other example in this article, the foregoing example highlights the concept of what a pro-Tenant provision is and is not. In attempting to cleverly word every comment and aggressively mark-up the lease, the Tenant's attorney had gone too far and spoiled the deal for its client.

Story #2:

Tenant's counsel reviews and marks up a lease. The scope and breadth of the comments are evidence that the lease had been very carefully reviewed. The lease was marked-up as it if were a major office campus lease. The only problem was that the lease was for a small warehouse space, for a 12 month term, with monthly rent equal to $1,000. The Landlord stood to make $12,000 in rent for the entire lease term. Review and negotiation of all of the lease comments in this case would have cost the Landlord a significant portion of the total rent. The Tenant's comments were not proportional to the size of the deal. Landlord told Tenant to narrow its comments down to a "top five" list before it would proceed further.

Now, the foregoing examples are not meant to discourage counsel for commenting on a lease. The lease terms must be carefully reviewed and necessary comments made. But the point is that different leases (in terms of scope, size, length of term, etc.) require different comments. When it comes to lease comments, one size does not fit all.

It is a good practice to discuss with a client the scope of comments they expect when reviewing a lease on their behalf. In some cases the answer will be, "take it all the way". In many cases though the client will say, "just ask for what we need to get the deal done."

B. When Possible, Revise the Existing Language Rather Than Re-Writing the Lease

It is a reality of lease drafting that most practitioners start with a standard form or template approved by their client. For some, their form language is considered sacred, and there is a great reluctance to change the form. The reluctance to make many changes to the form language stems from the fact that lease provisions build off of, relate back to, and complement one another. Making a change in a section early in the lease could have an unintended consequence later in the lease.

Consider the following suggestions:

- Understand that there is a natural reluctance to change the form language.
- Don't re-write the lease. Where possible, work with the form language.
- Avoid deleting entire chunks when possible. Deletions are often disagreed over more than insertions of new language.
- Be concise in your wording.

Here are a few examples of requested changes that are unlikely to be agreed to because they involve substantial re-writing of form language, followed by examples of sample language requesting an equivalent revision which is much more likely to be accepted:

Example #1:

Starting language:

Except for Landlord's Work (if any) to be performed pursuant to Exhibit D, all alterations and improvements to the Premises shall be installed at Tenant's expense only in accordance with plans and specifications which have been previously submitted to and approved in writing by Landlord, which approval shall be governed by the provisions set forth in this section. No alterations or physical additions in or to the Premises may be made without Landlord's prior written consent, which shall not be unreasonably withheld or delayed; however, Landlord may withhold its consent to any alteration or addition that would adversely affect (in the reasonable discretion of Landlord) the (1) Building's Structure or the Building's Systems (including the Building's restrooms or mechanical rooms), (2) exterior appearance of the Building, (3) appearance of the Common Area, or (4) provision of services to other occupants of the Project.

Tenant's change:

~~Except for Landlord's Work (if any) to be performed pursuant to Exhibit D, all alterations and improvements to the Premises shall be installed at Tenant's expense only in accordance with plans and specifications which have been previously submitted to and approved in writing by Landlord, which approval shall be governed by the provisions set forth in this section. No alterations or physical additions in or to the Premises may be made~~Following the completion of Tenant’s Work, Tenant may make such interior non-structural alterations, improvements and additions to the Premises including, without limitation, changing color schemes, installing new countertops, flooring, wall-covering and modifying the layout of the Tenant fixtures, as Tenant deems necessary or desirable without obtaining Landlord's consent. Notwithstanding the foregoing, Tenant shall not make any alterations, improvements, additions or repairs in, on, or about the Premises which affect the structure or the mechanical systems of the Building (to the extent the mechanical systems do not exclusively serve the Premises) without Landlord's prior written consent, which consent shall not be unreasonably withheld, conditioned or delayed~~; however, Landlord may withhold its consent to any alteration or addition that would adversely affect (in the reasonable discretion of Landlord) the (1) Building's Structure or the Building's Systems (including the Building's restrooms or mechanical rooms), (2) exterior appearance of the Building, (3) appearance of the Common Area, or (4) provision of services to other occupants of the Project.~~ Landlord shall be deemed to have approved any subsequent improvement proposed by Tenant unless Landlord disapproves of Tenant's proposal in writing within fourteen (14) days of receiving Tenant's proposal and request for consent..

Likelihood of those changes being accepted = 0% chance. In the foregoing revision, the blackline reveals that substantial portions of the form language was deleted and replaced by new language.

This may seem like the easiest way to draft of “pro-Tenant” provision, but it is often an ineffective drafting strategy. One word that comes to mind in looking at that blacklined paragraph is “cluttered”. It would require a careful review of both the language deleted and language inserted to understand and evaluate the change.

Here is a better way to make the equivalent comment (by inserting controlling or nullifying language at the end of provisions rather than deleting entire sections.):

> Except for Landlord's Work (if any) to be performed pursuant to Exhibit D, all alterations and improvements to the Premises shall be installed at Tenant's expense only in accordance with plans and specifications which have been previously submitted to and approved in writing by Landlord, which approval shall be governed by the provisions set forth in this section. No alterations or physical additions in or to the Premises may be made without Landlord's prior written consent, which shall not be unreasonably withheld or delayed; however, Landlord may withhold its consent to any alteration or addition that would adversely affect (in the reasonable discretion of Landlord) the (1) Building's Structure or the Building's Systems (including the Building's restrooms or mechanical rooms), (2) exterior appearance of the Building, (3) appearance of the Common Area, or (4) provision of services to other occupants of the Project. The foregoing notwithstanding, Tenant may make interior, non-structural alterations and improvements to the Premises, including changing color schemes, installing new countertops, flooring, wall-coverings and modifying the layout of the Tenant fixtures, provided that such alterations or improvements are completed in a good, workmanlike, diligent, and lien-free manner and are undertaken and completed in compliance with all applicable legal requirements.

By inserting the changed language at the end of the provision, it is easy to focus in on the requested revision and see how it impacts the prior language in the provision. The language also takes into account issues the Landlord would focus on (completion of the work in a lien-free manner, in compliance with law, etc.) and therefore is likely to be accepted.

Example #2 – Permitted Use:

Starting language:

Tenant shall continuously occupy and use the Premises only for the Permitted Use, using only the Trade Name, and shall comply with all Laws relating to this Lease and/or the use, maintenance, condition, access to, and occupancy of the Premises and will not commit waste, overload the Building's Structure or the Building's Systems or subject the Premises to use that would damage the Premises. Tenant shall keep the Premises open for business with adequate and competent personnel in attendance on all days and during all hours (including evenings) established by Landlord from time to time as store hours for the Project (which shall in no event be less than from 11:00 a.m. to 9:00 p.m. every day except Sundays and holidays, and 11:00 a.m. to 5:00 p.m. on Sundays), except to the extent Tenant may be prohibited from being open for business by applicable Law.

Tenant's change:

Tenant ~~shall continuously occupy and use the Premises only for the Permitted Use, using only the Trade Name, and shall comply with all Laws relating to this Lease and/or the use, maintenance, condition, access to, and occupancy of the Premises and will not commit waste, overload the Building's Structure or the Building's Systems or subject the Premises to use that would damage the Premises. Tenant shall keep the Premises open for business with adequate and competent personnel in attendance on all days and during all hours (including evenings) established by Landlord from time to time as store hours for the Project (which shall in no event be less than from 11:00 a.m. to 9:00 p.m. every day except Sundays and holidays, and 11:00 a.m. to 5:00 p.m. on Sundays), except to the extent Tenant may be prohibited from being open for business by applicable Law~~may operate (or not operate) its business in such manner and at such hours as Tenant considers proper in Tenant's sole business judgment. It is expressly understood and agreed that Tenant makes no representations or warranties, oral or written, as to the level of Gross Sales it may generate from the Premises or the number of customers that it will bring to the Project. The parties acknowledge that Tenant has no obligation to open or operate at the Premises, but in the event Tenant elects not to operate at the Premises for a period of four (4) consecutive months, excluding any closure due to any Force Majeure, casualty, condemnation, inventory, renovation, remodeling, or assignment of this Lease or subletting of the Premises, then Landlord may recapture the Premises and terminate this Lease upon thirty (30) days prior written notice to Tenant unless Tenant resumes operation in the Premises prior to the expiration of such thirty (30) day notice period, in which case, Landlord's recapture and termination notice shall be null and void. If Landlord terminates this Lease, Landlord shall reimburse Tenant for the unamortized cost of Tenant's improvements to the Premises. The foregoing recapture right shall be Landlord's sole remedy in the event Tenant elects not to operate in the Premises.

Likelihood of being accepted = 0%. This is a classic example of paragraph in a Landlord's lease form seemingly being deleted and replaced with one from the Tenant's form. Further, it introduces a significant new business term (the Tenant's go-dark right) which should have been agreed to in the letter of intent stage.

Change language that is more likely to be acceptable:

Tenant shall continuously occupy and use the Premises only for the Permitted Use, using only the Trade Name, and shall comply with all Laws relating to this Lease and/or the use, maintenance, condition, access to, and occupancy of the Premises and will not commit waste, overload the Building's Structure or the Building's Systems or subject the Premises to use that would damage the Premises. Tenant shall keep the Premises open for business with adequate and competent personnel in attendance on all days and during all hours (including evenings) established by Landlord from time to time as store hours for the Project (which shall in no event be less than from 11:00 a.m. to 9:00 p.m. every day except Sundays and holidays, and 11:00 a.m. to 5:00 p.m. on Sundays), or such other hours as Tenant remains open for business in its other locations in the market where the Premises is located, except to the extent Tenant may be prohibited from being open for business by applicable Law, and except

> during reasonable periods of time for repairing, cleaning, and decorating the Premises, provided that Tenant shall use commercially reasonable efforts to remain closed for business for only the minimum time required under the circumstances.

Why is this better? It adds Tenant's requirements without heavily deleting Landlord's language, it ties the change to Tenant's other locations in the market, it grants Tenant the right to close for a limited and reasonable number of circumstances, but also addresses the Landlord's concern by providing that Tenant will re-open as promptly as reasonably possible.

> Example #3 – Condemnation Awards:
>
> In this final example, a provision is turned completely on its head by replacing one party with the other:
>
> Starting language:
>
> If any Taking occurs, then Landlord shall receive the entire award or other compensation provided by the condemning authority.
>
> Tenant's comment:
>
> If any Taking occurs, then ~~Landlord~~ Tenant shall receive the entire award or other compensation provided by the condemning authority.

Likelihood of success = 0%. Here is a better, more nuanced way to address the Tenant's concern by addressing Landlord's claim to award as well as addressing a legitimate Tenant concern:

> If any Taking occurs, then Landlord shall receive the entire award or other compensation provided by the condemning authority applicable to the land on which the Building is located and the improvements taken; provided, however, that Tenant may separately pursue a claim against the condemner for the value of Tenant's personal property, moving costs, loss of business, and other claims Tenant may have.

In the foregoing examples, an emphasis has been made on working with the form language by making additions at the end of provisions instead of making deletions. This strategy is a good one to employ in marking-up a lease, but there are times when the only feasible comment is to delete an objectionable provision.

A common example of this is the Landlord's relocation right:

> Landlord may, at Landlord's expense, relocate Tenant within the Project to space which is comparable in size, utility and condition to the Premises. If Landlord relocates Tenant, Landlord shall reimburse Tenant for Tenant's reasonable out-of-pocket expenses for moving Tenant's furniture, equipment, and supplies from the Premises to the relocation space and for reprinting Tenant's stationery of the same quality and quantity as Tenant's stationery supply on hand immediately before Landlord's notice to Tenant of the exercise of this relocation right."

There is rarely an acceptable middle ground or compromise position on this provision, so a frequently made (and accepted) comment is simply to delete it:

> ~~Landlord may, at Landlord's expense, relocate Tenant within the Project to space which is comparable in size, utility and condition to the Premises. If Landlord relocates Tenant, Landlord shall reimburse Tenant for Tenant's reasonable out-of-pocket expenses for moving Tenant's furniture, equipment, and supplies from the Premises to the relocation space and for reprinting Tenant's stationery of the same quality and quantity as Tenant's stationery supply on hand immediately before Landlord's notice to Tenant of the exercise of this relocation right~~.

C. Focus on Practical Matters More Than Theoretical Concerns

As noted above, it is a good practice to discuss with a client the scope of comments they expect when their counsel reviews a lease on their behalf. In some cases the answer will be, "take it all the way". In many cases though the client will say, "just ask for what we need to get the deal done."

If a client makes the latter statement, their counsel should focus on practical matters such as Tenant's use, payment obligations, maintenance, repair, and replacement, obligations, and other provisions that touch directly on the Tenant's ability to operate its business from a practical perspective. This requires the Tenant's attorney to be selective.

The following sample lease provision is one the author considers to be more of a "theoretical" concern:

If Tenant does not deliver to Landlord the certificate signed by Tenant within such required time period, Landlord, Landlord's lender and any prospective purchaser or mortgagee, may conclusively presume and rely upon the following facts: (i) this Lease is in full force and effect; (ii) the terms and provisions of this Lease have not been changed except as otherwise represented by Landlord; (iii) not more than one monthly installment of Minimum Rent and other charges have been paid in advance; (iv) there are no claims against Landlord nor any defenses or rights of offset against collection of Rent or other charges; and (v) Landlord is not in default under this Lease. In such event, Tenant shall be estopped from denying the truth of the presumed facts.

The language deals with a situation where a Tenant does not timely deliver an estoppel certificate. It provides that the Landlord's buyer or lender can rely on the estoppel statements in the lease. In reality, it is highly unlikely a buyer or lender would ever rely on those certifications made in the lease. While this language is understandably objectionable from a Tenant's perspective, it is probably not worth fighting over. This is the type of provision that could either be ignored, or, if deletion is requested, deleted so the parties can focus on more important issues.

Generally the attorneys are at fault when a lease negotiation is bogged down debating theoretical issues instead of focusing more on practical concerns.

D. Anticipate the Other Side's Likely Response and Account For it

As noted earlier, a good "pro-Landlord" or "pro-Tenant" lease revision is one which addresses an important legal or business concern of the party and is accepted by the other side. In other words, make it easy for the other side to accept your change by considering what their likely response will be and addressing it in your revised language.

Here are several examples:

1. Example #1: Abandonment of the Premises

Starting Language:

It shall be an Event of Default hereunder if Tenant abandons or vacates the Premises or any substantial portion thereof.

Tenant's comment:

~~It shall be an Event of Default hereunder if Tenant abandons or vacates the Premises or any substantial portion thereof~~.

That change is unlikely to be accepted because it fails to account for the Landlord's legitimate concern that the premises be adequately maintained (this assumes of course that the lease does not already have a continuous use clause).

Compromise that addresses Tenant's concern and Landlord's concern:

It shall be an Event of Default hereunder if Tenant abandons or vacates the Premises or any substantial portion thereof and fails thereafter to maintain the Premises in the condition required under the Lease.

2. Example #2: Remeasurement

Original Language:

Landlord and Tenant stipulate that the number of rentable square feet in the Premises and in the Shopping Center set forth above shall be binding upon them.

Tenant's Change:

Landlord and Tenant stipulate that the number of rentable square feet in the Premises and in the Shopping Center set forth above shall be binding upon them. If Tenant so requests in writing prior to the commencement of the Work, the area of the Premises or the Shopping Center shall be remeasured, at Landlord's cost, by an engineer or architect reasonably satisfactory to Tenant from the exterior face of any exterior walls and to the centerline of any common walls.

That language is problematic because it grants Tenant a new right which it can exercise at Landlord's expense. One good question to ask yourself before making a change is, "is it likely that the other side will agree to this?" If not, consider alternative wording.

Better Language to Propose:

Landlord and Tenant stipulate that the number of rentable square feet in the Premises and in the Shopping Center set forth above shall be binding upon them. If either party so requests in writing prior to the commencement of the Work, the area of the Premises or the Shopping Center shall be remeasured, at the requesting party's cost, by an engineer or architect reasonably satisfactory to both parties from the exterior face of any exterior walls and to the centerline of any common walls**.**

3. Example #3: Changes to the Common Areas

Original Language:

As used herein, the "Common Area" means the part of the Shopping Center designated by Landlord from time to time for the common use of all Tenants, including parking areas, sidewalks, landscaping, curbs, loading areas, private streets and alleys, lighting facilities, hallways, malls, and restrooms, all of which are subject to Landlord's sole control. Landlord may from time to time: change the dimensions and location of the Common Area, as well as the location, dimensions, identity and type of buildings; construct additional buildings or additional stories on existing buildings or other improvements in the Shopping Center; and eliminate buildings.

Tenant's Change:

As used herein, the "Common Area" means the part of the Shopping Center designated by Landlord from time to time for the common use of all Tenants, including parking areas, sidewalks, landscaping, curbs, loading areas, private streets and alleys, lighting facilities, hallways, malls, and restrooms, all of which are subject to Landlord's sole control. Landlord may from time to time: change the dimensions and location of the Common Area, as well as the location, dimensions, identity and type of buildings; construct additional buildings or additional stories on existing buildings or other improvements in the Shopping Center; and eliminate buildings; provided Landlord shall not make any changes to the Common Area that materially, adversely and permanently reduce access to and from the Premises from the abutting public thoroughfares.

The Tenant's revised language addresses an important concern of the Tenant's, but it also places a new restriction on the Landlord which is "closed-ended", meaning there are no exceptions. When placing a new restriction on a party, consider ways to leave it "open-ended", on a reasonable basis:

Compromise:

As used herein, the "Common Area" means the part of the Shopping Center designated by Landlord from time to time for the common use of all Tenants, including parking areas, sidewalks, landscaping, curbs, loading areas, private streets and alleys, lighting facilities, hallways, malls, and restrooms, all of which are subject to Landlord's sole control. Landlord may from time to time: change the dimensions and location of the Common Area, as well as the location, dimensions, identity and type of buildings; construct additional buildings or additional stories on existing buildings or other improvements in the Shopping Center; and eliminate buildings**;** provided Landlord shall not make any changes to the Common Area that materially, adversely and permanently reduce access to and from the Premises from the abutting public thoroughfares. The foregoing restriction shall not apply to any changes, alterations or other actions required by applicable Laws, or that are the result of or are necessitated by a Casualty or a Taking.

E. When Reviewing Comments, Look for Ways to be Accommodating

In order to have an efficient lease negotiation process, the party making the comments needs to account for the other side's needs and likely responses, but the party receiving and reviewing the comments also needs to look for ways to be accommodating. Looks for places to say "yes". If you are not willing to accept a comment, consider what you can give to address the other party's issue.

Many Landlords have fallback positions or standard language they will use in response to common Tenant comments. In an effort to move the deal along, they will give something.

In an effort to keep the process moving forward, a party reviewing and considering the other side's lease comments should ask themselves: What is the real issue? If we can't use their language precisely, what can we give?

Consider the following examples:

1. Example #1 – Landlord's Lien:

Most Landlord lease forms will include a contractual Landlord's lien provision. Stated simply, this provision creates a security interest for the Landlord's benefit in the Tenant's inventory and equipment. Among its other remedies, if a Tenant defaults in the performance of its lease obligations, the Landlord could foreclose on the security interest by seizing and selling the Tenant's collateral at auction, and applying the sale proceeds to the Tenant's open account balance.

> To secure performance of Tenant's obligations hereunder, Tenant grants to Landlord a contractual security interest in all of Tenant's property located in the Premises, and all proceeds thereof (collectively, the "Collateral"). Upon the occurrence of an Event of Default, Landlord may, in addition to all other remedies, exercise the rights afforded to a secured party under the Uniform Commercial Code of the state in which the Premises are located with respect to such Collateral.

An issue for the Tenant is that often its equipment and inventory is either leased or financed. That being the cases, here is a comment I commonly see to the Landlord's lien provision:

> ~~To secure performance of Tenant's obligations hereunder, Tenant grants to Landlord a contractual security interest in all of Tenant's property located in the Premises, and all proceeds thereof (collectively, the "Collateral"). Upon the occurrence of an Event of Default, Landlord may, in addition to all other remedies, exercise the rights afforded to a secured party under the Uniform Commercial Code of the state in which the Premises are located with respect to such Collateral~~.

What is a reasonable compromise the Landlord can propose, considering the reality of the Tenant's business operations?

> To secure performance of Tenant's obligations hereunder, Tenant grants to Landlord a contractual security interest in all of Tenant's property located in the Premises, and all proceeds thereof (collectively, the "Collateral"). Upon the occurrence of an Event of Default, Landlord may, in addition to all other remedies, exercise the rights afforded to a secured party under the Uniform Commercial Code of the state in which the Premises are located with respect to such Collateral. The foregoing notwithstanding, Landlord hereby subordinates the foregoing security interest, to all "purchase money security interests" (as such term is defined in the UCC) in the Collateral, and Landlord agrees to execute its standard form of subordination agreement to evidence such subordination.

The Landlord can agree to subordinate its contractual lien as a means of making it easier to Tenant to get financing to operate Tenant's business.

2. Example #2 – Limitation of Liability:

   Starting language:

> The liability of Landlord (and its partners, shareholders or members) to Tenant (or any person or entity claiming by, through or under Tenant) for any default by Landlord under the terms of this Lease or any matter relating to or arising out of the occupancy or use of the Premises and/or other areas of the Project (including the Common Area) shall be limited to Tenant's actual direct, but not consequential, damages therefor and shall be recoverable only from the interest of Landlord in the Project, and Landlord (and its partners, shareholders or members) shall not be personally liable for any deficiency.

Tenant's concern will be the limitation on the scope of damages which are recoverable, and limitation on the ability to collect. Tenant's mark-up:

> The liability of Landlord (and its partners, shareholders or members) to Tenant (or any person or entity claiming by, through or under Tenant) for any default by Landlord under the terms of this Lease or any matter relating to or arising out of the occupancy or use of the Premises and/or other areas of the Project (including the Common Area) shall be ~~limited to Tenant's actual direct, but not consequential, damages therefor and shall be~~ recoverable ~~only~~ from the interest of Landlord in the Project, and Landlord (and its partners, shareholders or members) shall ~~not~~ be personally liable for any deficiency.

Compromise from Landlord which expands and clarifies Tenant's sources of recovery:

> The liability of Landlord (and its partners, shareholders or members) to Tenant (or any person or entity claiming by, through or under Tenant) for any default by Landlord

under the terms of this Lease or any matter relating to or arising out of the occupancy or use of the Premises and/or other areas of the Project (including the Common Area) shall be limited to Tenant's actual direct, but not consequential, damages therefor and shall be recoverable only from the interest of Landlord in the Project, including Landlord's insurance proceeds and sale proceeds derived from the Shopping Center, and Landlord (and its partners, shareholders or members) shall not be personally liable for any deficiency.

3. Example #3 – Permitted Use:

Original Language (from a Tenant's lease form):

The Leased Premises may be used by Tenant for the operation of a restaurant with drive through facility or for any other lawful purpose.

The use language is so broad as to be almost meaningless. Landlord's proposed change:

The Leased Premises may be used by Tenant for the operation of a restaurant with drive through facility~~ or for any other lawful purpose.~~

Compromise from Tenant accounting for Landlord's concern:

The Leased Premises may be used by Tenant for the operation of a restaurant with drive through facility~~ or for any other lawful purpose~~ approved by Landlord in its reasonable discretion, provided that such change in use shall not violate the terms of any applicable restrictions recorded against Shopping Center, or in any other leases at the Shopping Center which are then in effect.

4. Example #4 – Indemnity:

Original:

Tenant shall defend, indemnify, and hold harmless Landlord and its representatives and agents from and against all claims, demands, liabilities, causes of action, suits, judgments, damages, and expenses (including reasonable attorneys' fees) arising from any injury to or death of any person or the damage to or theft, destruction, loss, or loss of use of, any property or inconvenience (a "Loss") (i) occurring in or on the Shopping Center to the extent caused by the negligence or willful misconduct of any Tenant Party, or (ii) occurring in the Premises; provided, however, that such indemnity shall not apply to the sole or gross negligence or willful misconduct of Landlord and its agents.

This is a provision that the party reviewing a lease draft often wants to make mutual. Tenant's comment:

~~Tenant~~Each party shall defend, indemnify, and hold harmless ~~Landlord~~the other party and its respective representatives and agents from and against all claims, demands, liabilities, causes of action, suits, judgments, damages, and expenses (including reasonable attorneys' fees) arising from any injury to or death of any person or the damage to or theft, destruction, loss, or loss of use of, any property or inconvenience (a "Loss") ~~(i) occurring in or on the Shopping Center~~ to the extent caused by the negligence or willful misconduct of ~~any Tenant Party~~the indemnifying party, ~~or (ii) occurring in the Premises~~; provided, however, that such indemnity shall not apply to the sole or gross negligence or willful misconduct of ~~Landlord~~the party being indemnified and its agents**.**

Most Landlords will not agree to a fully mutual indemnity since the purpose of the provision is to shift certain risks to the Tenant. However, as a compromise many Landlords will grant some indemnity rights to the Tenant. Again, the question is, "if we can't say yes to their change, what can we give?"

Tenant shall defend, indemnify, and hold harmless Landlord and its representatives and agents from and against all claims, demands, liabilities, causes of action, suits, judgments, damages, and expenses (including reasonable attorneys' fees) arising from any injury to or death of any person or the damage to or theft, destruction, loss, or loss of use of, any property or inconvenience (a "Loss") i) occurring in or on the Shopping Center to the extent caused by the negligence or willful misconduct of any Tenant Party, ii) occurring in the Premises; provided, however, that such indemnity shall not apply to the sole or gross negligence or willful misconduct of

Landlord and its agents**.** Landlord shall defend, indemnify, and hold harmless Tenant and its representatives and agents from and against all claims, demands, liabilities, causes of action, suits, judgments, damages, and expenses (including reasonable attorneys' fees) arising from any Loss occurring in or on the Common Areas to the extent caused by the negligence or willful misconduct of Landlord.

5. Example #5 – Insurance Certificates:

Original Language:

Tenant shall furnish to Landlord certificates of such insurance and such other evidence satisfactory to Landlord of the maintenance of all insurance coverages required hereunder at least ten (10) days prior to the earlier of the Commencement Date or the date Tenant enters or occupies the Premises, and at least fifteen (15) days prior to each renewal of said insurance, and Tenant shall obtain a written obligation on the part of each insurance company to notify Landlord at least 30 days before cancellation or a material change of any such insurance policies.

Tenant's Comment:

Tenant shall furnish to Landlord certificates of such insurance and such other evidence satisfactory to Landlord of the maintenance of all insurance coverages required hereunder at least ten (10) days prior to the earlier of the Commencement Date or the date Tenant enters or occupies the Premises~~, and at least fifteen (15) days prior to each renewal of said insurance, and Tenant shall obtain a written obligation on the part of each insurance company to notify Landlord at least 30 days before cancellation or a material change of any such insurance policies~~.

Compromise language which accounts for the fact that many insurance providers will not provide certificates in the time frame required under the initial lease language, but also accounts for the fact that Landlord cannot permit a lapse in insurance coverage by Tenant:

Tenant shall furnish to Landlord certificates of such insurance and such other evidence satisfactory to Landlord of the maintenance of all insurance coverages required hereunder at least ten (10) days prior to the earlier of the Commencement Date or the date Tenant enters or occupies the Premises, and ~~at least fifteen (15) days prior to each renewal of said insurance, and~~ Tenant shall ~~obtain a written obligation on the part of each insurance company to~~ notify Landlord ~~at least 30 days~~ before cancellation or a material change of any such insurance policies, provide Landlord with copies of renewal certificates, and under no circumstance shall Tenant permit a lapse in the insurance coverage required under this Lease.

F. If the Revised Language is Reasonable, Accept the Changes and Move On

The question asked in the prior section was, "if we can't say 'yes' to a requested change, what can we give?" A corollary to that is that "if we can say 'yes', we should." If a party's comment is reasonable and addresses a legitimate business or legal concern in a manner which accomodates both parties' needs, accept it and move on.

1. Example #1 – Construction of Improvements:

Original Language in Tenant's Form:

After the Effective Date and when all contingencies to which this Lease is subject shall have been eliminated, Tenant shall have the right to enter upon the Leased Premises personally and through its agents and contractors for the purpose of removing all existing buildings and structures, if any, from the Leased Premises and constructing and erecting thereon the Building and such structures and improvements as Tenant may deem necessary or convenient in connection with its use and occupancy of the Leased Premises. Landlord hereby expressly consents to the performance of such work; provided, however, that the foregoing shall not be deemed to impose upon Tenant any obligation with respect to the payment to Landlord of rent or charges other than as herein expressly provided.

Landlord's Comments:

After the Effective Date and when all contingencies to which this Lease is subject shall have been eliminated, Tenant shall have the right to enter upon the Leased Premises personally and through its agents and contractors for the purpose of removing all existing buildings and structures, if any, from the Leased Premises and constructing and erecting thereon the Building and such structures and improvements as Tenant may deem necessary or convenient in connection with its use and occupancy of the Leased Premises substantially in compliance with the plans and construction drawings initially approved by Landlord. Landlord hereby expressly consents to the performance of such work; provided, however, that the foregoing shall not be deemed to impose upon Tenant any obligation with respect to the payment to Landlord of rent or charges other than as herein expressly provided. All alterations, additions, and improvements shall be constructed in a good and workmanlike manner, maintained, and used by Tenant, at its risk and expense, in accordance with all applicable laws.

Landlord's concern that construction be completed in accordance with the approved plans and legal requirements is reasonable and understandable. This is the type of comment that should readily be accepted.

While comments can often be made without wholesale deletions of form language, sometimes deletions of entire sections or portions of sections are necessary in order to properly make the comment:

2. Example #2 – Rent Offset:

Landlord shall be in default under this Lease if Landlord fails or refuses to perform any of Landlord's obligations under this Lease and such failure or refusal to perform is not cured within thirty (30) days after notice of the default has been given by Tenant to Landlord. If the default cannot reasonably be cured within said thirty (30) day period, Landlord shall not be in default of this Lease if Landlord commences to cure the default within the thirty (30) day period and diligently and in good faith continues to cure the default. Should Landlord fail to timely cure any default, then Tenant may do so upon written notice to Landlord and offset the cost of such cure, plus Tenant's attorneys' fees and interest thereon at the maximum rate permitted by law, against the monthly installment(s) of rent next due hereunder.

Landlord's Requested Change:

Landlord shall be in default under this Lease if Landlord fails or refuses to perform any of Landlord's obligations under this Lease and such failure or refusal to perform is not cured within thirty (30) days after notice of the default has been given by Tenant to Landlord. If the default cannot reasonably be cured within said thirty (30) day period, Landlord shall not be in default of this Lease if Landlord commences to cure the default within the thirty (30) day period and diligently and in good faith continues to cure the default. Should Landlord fail to timely cure any default, then Tenant may do so upon written notice to Landlord and ~~offset the cost of such cure, plus Tenant's attorneys' fees and interest thereon at the maximum rate permitted by law, against the monthly installment(s) of rent next due hereunder~~Landlord shall reimburse Tenant for the verifiable cost thereof within ten (10) days after written demand from Tenant.

G. If the Form Language is Okay, Leave it Alone

If the language in a Landlord or Tenant's lease form is acceptable for a given provision, there is no need to ask to change it.

VI. ADDITIONAL LEASING PRACTICE COURTEISIES"

A. Redline, Blackline, or "Tracked Changes"

Make it easy for the other side to see what you are asking for by providing some form of redline or blackline. Many lawyers use redlining or blacklining software. These programs are superior to the "tracked changes" function in Microsoft Word. Many firms employ email filters which scrub the "tracked changes" from a document when sending or receiving it via email.

B. Send a Redline and Revised Clean Copy

When transmitting a revised draft of a lease, provide both a redline and a clean copy. When transmitting the initial draft of the lease, do not send a clean copy in PDF only. Make the document user-friendly for the other side.

C. 8.5" X 11" Vs. 8.5" X 14" Paper

While most law firms are set up to print documents on legal-sized paper (8.5" x 14"), many businesses are not. It is aggregating when a client cannot print a document because the paper size is too large. For those who have not done this already, consider shifting all lease documents to standard size 8.5" x 11" paper.

D. Use of Redlines as Execution Versions

Some Landlords prefer to have their Tenants execute a redlined version of the lease, likely to preserve the form changes and make it easier for their management company and lease administrators to know which provisions in the lease are "non-standard". This is discourteous to the Tenant. Execution copies should be a "clean" version of the lease. Redlines can be stored with the execution version for easy review later on.

VII. CONCLUSION

In summary:

- The best way to draft pro-Landlord and pro-Tenant lease provisions is get the key terms agreed to before the lease is ever drafted.
- Only ask for changes you actually need.
- Sometimes it works best to have the other side draft the change language for you.
- Don't make changes just for the sake of making changes.
- Make it easy for the other side to see what you are asking for.
- Make it easy for the other side to accept your change.
- Make it easy for the other side to say "yes" to the changes you really need.

The principles discussed in this article are intended to make the lease negotiation process more efficient for both Landlords and Tenants, as well as increase the likelihood that a party's needs will be met in the lease negotiation process. A lease negotiation does not need to be a long, drawn out, frustrating affair. If the parties act reasonably and their counsel focus on drafting clearly-worded provisions which accommodate the other party's legitimate needs in a balanced way, the lease negotiation process will take less time and yield a final lease document both parties can be happy with.