I. Introduction

A. Existing tenants may determine that they are operating in too much space relative to a current prototype or may seek to reduce occupancy costs by downsizing their space. In such circumstances, Landlords and Tenants must consider and work through a number of issues and problems. This discussion will cover downsizing opportunity and challenges for tenants and landlords in traditional department stores, junior anchors and in-line stores.

II. Hypothetical

A. You’re in-house counsel for a big box retailer, Spears. Spears is struggling. Sales are down. Numerous stores are drastically underperforming and many stores are no longer profitable in their current formats. The CEO walks into your office and wants to know what Spears’ options are and whether or not Spears can close or downsize the underperforming stores. You dive into the assignment. Where do you look? What are your considerations? What provisions of the various leases and occupancy agreements are you going to focus on during your review?

B. As general counsel for a commercial real estate developer, you receive a notice from your largest big box store, Spears. Spears is the largest anchor tenant at your most prominent center. The notice indicates that Spears needs to downsize to reduce its occupancy costs and it is going to sublease its space to:
   i. multiple tenants (including a full service restaurant operator, a fast casual restaurant, a heart-rate monitored, high-intensity class based gym, and a medical marijuana dispensary); or
   ii. one large fitness facility and movie theater/entertainment complex with a bowling alley.

What are the possible concerns/repercussions for your client?

C. What if, instead of leasing its space, Spears owns its space and occupies it pursuant to an REA (or other similar agreement) with the developer? What impact does that have on the analysis?

D. In lieu of subleasing, Spears and landlord have agreed to a rent reduction and the addition of a percentage rent element to the lease. As landlord’s attorney and tenant’s attorney what are the issues that need to be addressed in the amendment?

III. Second Hypothetical

A. You receive a “fully” negotiated LOI from your client, a developer. You recently did a lease for this client with “The Selfie Store.” Eighteen months in to its ten year term, the Selfie Store has realized that it didn't need 15,000 square feet of space to print, retouch, and frame selfies to sell to their customers. Selfie Store’s footprint is way too large and they are going to try to reduce occupancy costs by significantly downsizing. The “fully” negotiated LOI, which happens to be signed by your client and the Selfie Store, only says: “The Selfie Store will surrender 10,000 square feet of space to Landlord and will continue to operate in the remainder of the space. Submission of this LOI shall not constitute an offer or option to lease the premises. All terms and conditions outlined in this proposal above are non-binding and shall not become effective or binding unless and until such time as a lease has been fully negotiated and executed by all parties.” You call opposing counsel to hash out the details of this space reduction agreement. What are the issues and concerns for each party to this agreement?

IV. Open discussion and questions