

Thursday, November 4, 2021
8:00 AM – 9:15 AM

Seminar 5

**Mortal Kombat: Surviving as a Leasing Attorney
(f/k/a Leasing Bootcamp I)**

Presented to

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by:

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I. CRITICAL DATES; LEASE TERM; RENEWAL OPTIONS

- A. Effective Date: This is the date on which the Lease is fully executed and delivered by the parties. The Lease terms become effective as of the Effective Date, except that the obligation to pay rent might not commence until the Rent Commencement Date.
- B. Delivery Date: This is the date on which the landlord is required to deliver possession of the Premises to the tenant and the tenant is entitled to occupy and use the Premises (sometimes known as the occupancy date). The tenant will often seek to fix this date so that it can schedule its work and open for business during a particular month/season.
- (i) Some obligations such as payment of utilities or insurance should not commence until the date that the landlord delivers possession of the space to the tenant.
 - (ii) Consider what, if any, representations or warranties should be made by the landlord regarding the condition of the Premises, HVAC, building systems, hazardous materials or the landlord's work. Or is the lease truly as-is? If there is landlord's work, then the tenant will seek inspection and punch list procedures so that it has an opportunity to inspect the landlord's work and have open items timely resolved.
- C. Rent Commencement Date ("RCD") – This is the date on which the tenant is obligated to commence paying base rent and additional rent under the Lease.
- (i) If the lease calls for landlord's work only, then the RCD usually is a certain number of days following the date on which the landlord has substantially completed the landlord's work and delivered possession of the Premises to the tenant. The tenant should ensure (i) there is enough time to stock, staff and be ready to open for business and (ii) there is a date by which the landlord is required to completed the landlord's work. The tenant may negotiate a rent credit if the landlord's work is not completed and the space is not delivered by a certain date.
 - (ii) If the lease calls for tenant's work, then the RCD usually is a certain number of days (90-120 is a typical range) after the latest to occur of the following events: (a) The landlord has completed the landlord's work and delivered possession of the Premises to the tenant, (b) the landlord has approved the tenant's plans and specifications or (c) the tenant has obtained its building and/or occupancy permit. The tenant's main concern is

to ensure that it has sufficient time to complete the tenant's work and open for business; whereas the landlord's main concern is that the tenant timely applies for and diligently pursues its permits. Sometimes the landlord reserves the right to pursue permits on behalf of the tenant.

- (iii) Consider blackout dates or a blackout period for delivery or RCD to occur. The tenant may negotiate for a termination right if the landlord has not delivered by an outside date.

D. Lease Year – the “Term” is not a set number of years or months, but rather a number of “lease years” which is commonly defined as 12 full consecutive calendar month period following the Rent Commencement Date. The exact Rent Commencement Date is almost always unknown on the Effective Date, so it is common to have the tenant and the landlord sign a Commencement Date Agreement once the RCD is known, which document memorializes a mutual agreement of specific dates as the RCD, lease year and expiration date of the Term.

E. Renewal Options – The tenant may be entitled to renewal option upon the expiration of the initial Term. The landlord may resist because of the uncertainty of market rent in the future. If the parties agreed upon a renewal option, then the lease should define a time by which the tenant must exercise that option so that the landlord has a reasonable amount of time to market the space.

- (i) Often the right to renew is conditioned upon the tenant being open and operating in the entire Premises and not being in default at the time notice is given (or at the commencement of the renewal term); although with larger tenants that is not always the case.
- (ii) The landlord may try to make the renewal right “personal” to the original tenant and to provide that the option will not survive an assignment of the Lease or sublease of the Premises.
- (iii) If there is a co-tenancy or exclusive violation, then the landlord may want the tenant's right to reduced rent to terminate if the tenant voluntarily exercises its renewal right. The tenant may ask for a reminder notice before its renewal right terminates.
- (iv) Some leases will provide for payment of unamortized tenant improvement allowance (and unamortized broker's commissions) if the tenant does not exercise a renewal option.

II. RENT PROVISIONS AND ADDITIONAL RENT

A. Base Rent – “Rent” is defined as all rent payable by the tenant under the Lease, including Base Rent, Percentage Rent, and Additional Rent (CAM, RET, INS and other amounts payable by the tenant to the landlord under the Lease).

- (i) Base Rent or Minimum Rent is the fixed rent amount payable by the tenant to the landlord throughout the term on a monthly basis. Rent for a partial month should be prorated. In some jurisdictions it may be advantageous for the landlord to provide for annual rent and specify that it is payable in monthly installments. The landlord will always want to provide that Base Rent is payable without notice, demand or offset. The tenant wants an offset right if the landlord fails to perform its maintenance/repair or other obligations.
- (ii) Most Leases include a late payment penalty and/or default interest; the tenant may argue for one and not both. Usually there is a 5-day grace period for Rent before it constitutes an event of default for purposes of the Lease. The landlords may agree to give a written notice, but no notice after 2 or 3 occurrences in one lease year.

B. Percentage Rent – This is rent paid based on the tenant's gross sales at the Premises. Percentage Rent is in addition to Base Rent and is calculated as a percentage of the tenant's gross sales once gross sales for a calendar or lease year exceed a minimum stated amount.

- (i) Percentage Rent can be payable on a monthly basis based on 1/12th of the Minimum

Basis of Sales, with a true-up at the end of the calendar or lease year. Usually, however, Percentage Rent is not due and payable until the tenant's Gross Sales have exceeded the stated Minimum Basis of Sales amount. The tenant must submit certified monthly statements of Gross Sales and a certified annual statement.

- (ii) Definition of "Gross Sales" is critical. The landlord wants to capture all sales made at or from the Premises, even if the sale occurred via the internet but is fulfilled at the Premises. The landlord also wants to include sales made in patio or outdoor areas. The tenant negotiates a number of exceptions to Gross Sales, such as (i) sales tax, (ii) *de minimus* sales to employees, (iii) credit card fees, (iv) returns of merchandise.

C. Common Area Maintenance ("CAM") – most retail leases are "triple net", which means that the tenant is responsible for the payment of its proportionate share of Common Area Maintenance, Real Estate Taxes and Insurance. These amounts are estimated each year by the landlord, then the tenant pays its estimated amount each month, and there is a "reconciliation" at the end of the period. Proportionate share is a ratio or percentage based on the number of square feet in the Premises over the total number of square feet of leasable area of the Shopping Center. Can be based on "leased area" or "occupied area" but then the tenant pays a higher percentage if Shopping Center is not fully leased – should at least be not less than 80% of leased area. May exclude anchor tenants or tenants of at least 50,000 square feet – if so CAM costs should be reduced by any contribution from such tenants. The tenant wants to avoid subsidizing other tenant's CAM.

- (i) CAM clause is one of the most heavily negotiated sections. Initially, CAM was maintaining sidewalks, parking lots, other common areas. Now it has been expanded to include all of the landlord's operating expenses. From the landlord's perspective, CAM should cover all of its costs of ownership, management, maintenance, repair, replacement, inspection, improvement, operation and insurance together with allocated overhead and administrative costs. From the tenant's perspective, just costs to maintain and operate the center.
- (ii) Capital Expenditures – the tenants object to including capital expenditures in CAM, as these type of expenditures are investments and more long-term in nature. Any capital improvement should be amortized over its useful life.
- (iii) Management and Administrative Fees – Many leases provide for a 5% administrative fee on the total costs of operating and maintaining the center. That may be acceptable, but there should not be an additional "management" fee payable to a third party – the tenants would argue that a management fee in addition to an administrative fee is "double dipping" (paying for the same thing). If the tenant agrees to pay both, at a minimum the tenant should not pay an administrative fee on the management fee.
- (iv) Other typical exclusions from CAM: (a) repairs to the extent covered by insurance, (b) leasing commissions, attorney fees and costs negotiating leases or in connection with tenant disputes, (c) costs of correcting defects in construction of Shopping Center improvements, (d) depreciation and amortization of the landlord's original investment in capital improvements, (e) interest on debt or amortization payments, (f) leasing commissions, (g) the landlord repair obligations for roof and structure, (h) costs for cleanup or removal of hazardous substances.
- (v) CAM caps. A "cap" sets the maximum amount of CAM charges that can be assessed to the tenant. This gives the tenant some degree of predictability. If there is a cap, that usually makes the negotiations of what is included/excluded somewhat easier. There can be a first year CAM cap and/or an ongoing CAM cap. An ongoing CAM cap is usually set at the lesser of (a) the actual increase in the tenant's pro rata share or (b) a set percentage over the prior year (5% is common). CAM caps can be "cumulative" or "non-cumulative". Cumulative CAM caps are favored by the landlords and establish increases each year over the CAM expense for the first base year or the prior year (i.e., the landlord can recover any unused increases from prior years). Non-cumulative CAM caps are preferred by the tenants. A non-cumulative cap sets a ceiling on annual increases in CAM expenses and does not allow the landlord to recover any unused increases from prior years. So-called "uncontrollable" expenses are excluded from the

CAM cap – usually snow removal, utilities, and insurance (assuming insurance is part of CAM and not a separate charge).

- (vi) Initial CAM Charge. Some leases will provide for a fixed initial CAM charge for the first lease or calendar year of the term. May be difficult for a the landlord to provide. There can also be fixed, stepped increases, which give the tenant certainty but may result in paying more in CAM charges than it otherwise would.
 - (vii) Reconciliation/Audit Rights. the tenant may want or insist on a right to audit its CAM charges to ensure that CAM is being calculated in accordance with lease terms. the landlord wants to (a) limit the time period for the audit (e.g. ninety (90) days after receipt of the annual CAM reconciliation statement), (b) not allow an audit if the tenant is in default, (c) not allow contingency fee based auditors, (d) keep audit results confidential, (e) cap audit costs. the tenant wants to (v) require the landlord to bill CAM and send reconciliation statement timely, (w) require immediate reimbursement of over-payments (rather than apply to later CAM charges), (x) recover audit costs if a certain % overcharge is discovered, (y) allow contingency fee audits, (z) require the landlord to maintain sufficient records at a convenient location so that it can perform the audit in a cost effective manner.
- D. Real Estate Taxes -- the tenant is required to pay its pro-rata share of "Taxes". the landlord's definition of Taxes is expansive and includes real estate taxes and assessments, governmental charges and impositions of every kind or nature, regular or special, direct or indirect, presently foreseen or unforeseen or known or unknown, levied or assessed by municipal, county, state, federal or other governmentaltaxing or assessing authority upon, against or with respect to the real estate upon which the Shopping Center, or any part of it, is located and to any improvements located in the Shopping Center, and any other taxes or assessments which the landlord becomes obligated to pay with respect to the Shopping Center. the tenant wants to ensure that Taxes exclude the landlord's income or franchise taxes, taxes arising from improvements made by or due to special use of other tenants, taxes assessed due to change in ownership (reassessments), interest and penalties, rent taxes and impact fees.
- (i) the tenant pays its pro rata share monthly but can try to pay annually or semi-annually as a reimbursement of actual Taxes paid v. an estimated monthly amount that is "escrowed" with the landlord. If a major tenant pays Taxes on its own parcel separately, those RET should be excluded. If the tenant's parcel can be separately assessed that may be beneficial to the tenant.
 - (ii) the tenant should receive benefit of discounts if paid early and perhaps require early payment.
 - (iii) Right to contest Taxes. Taxes include costs of contest or appeals. the tenant has the right to contest if the landlord fails to contest - or the right to require the landlord to contest. the landlord may agree if a certain percentage of tenants request tax context. the landlord wants to recover costs for a contest, i.e., providethat any tax decrease that flows through to tenants is net after payment of attorney's fees and costs.
- E. Insurance – The cost of the landlord's insurance is included as Additional Rent, sometimes within CAMcosts. the landlords tend to have insurance charge separate so that it is not subject to a CAM Cap, however – argument is that insurance is not a controllable cost.
- (i) the landlord wants to be sure that all coverages required by it or its mortgage lender are passed through,including earthquake, hurricane, windstorm, flood, other insurance. If the landlord self-insures or has self-insured retentions, specifically state that the insurance charge includes such amounts. the landlord's insurance coverage specifically excludes the tenant's leasehold improvements.
 - (ii) the tenant may ask to include insurance as part of CAM so that it is capped. There should be no administrative fee on insurance, however. the landlord's insurance should be primary as to the common areas and should be subject to the same standards and requirements that the tenant's insurance is (e.g.,notice of cancellation, Best's Rating). If there is self-insurance or obligation to pay pro rata share of self-insured retentions or

deductibles, require the retentions or deductibles to be in a commercially reasonable amount not in excess of what typical premium and deductible would be if there were a third party insurer.

III. LANDLORD INCENTIVES, INDUCEMENTS AND ALLOWANCES

Oftentimes landlords will offer certain "inducements" to a tenant in order to make the economics of a transaction more appealing. Make no mistake, however: there is no such thing as a "free lunch" and these incentives will be wrapped into the ultimate rent number a tenant ends up paying. Tenants, however, may be willing to pay more rent over the Term of the lease in order to get some help "up front" before it opens its doors and starts making money and Landlords are typically happy to get a solid rent stream over the Term which balances out any incentives given at the beginning of a transaction.

- A. Free Rent -- the landlord may afford the tenant an "inducement" relieving the tenant of the obligation to pay Base Rent for a specified period following the Rent Commencement Date. the landlord would want to ensure that the tenant is not in default, has completed the tenant's work and is open and operating. the landlord still may want a security deposit and one month's Base Rent paid in advance, which would be applied to the first month of Base Rent due after the free rent period. the landlord may also want to "recapture" the free rent as part of its damages in the event the tenant later defaults under the Lease.
- B. Tenant Allowance -- It is very common in a retail lease for the landlord to agree to pay or "reimburse" the tenant for the cost of making improvements to the premises or performing its "buildout" to required specifications. This is normally called a "Tenant Allowance". The landlord builds this cost into Base Rent and the tenant "repays" the the tenant Allowance over the term of the Lease.
- (i) The amount of the tenant Allowance is the lesser of the tenant's actual cost to perform the tenant's work or a specified per square foot amount, although a tenant may try to negotiate a fixed amount (as it will be repaying the agreed upon amount in Base Rent in any event). The landlord wants to ensure that the tenant Allowance reimburses the tenant only for leasehold improvements made at the premises and not inventory, signage or other assets that may be used elsewhere.
 - (ii) The tenant prefers payment of the tenant Allowance in installments based upon the percentage of the tenant's work completed. The landlord often insists that the tenant Allowance is paid at one time, once all of the tenant's work is completed, the tenant is open and operating and paying Rent, the tenant is not in default, and the tenant has obtained its certificate of occupancy and has provided the landlord final, unconditional lien waivers from its general contractor and all subcontractors. The tenant would prefer just to obtain the lien waiver from the general contractor, not subcontractors. A middle ground is to require lien waivers from subcontractors who performed services or furnished materials in an amount over a specified dollar amount (such as \$5,000 or \$10,000). The tenant also wants an exception that if it has not opened due to a default of the landlord, the tenant Allowance is still payable.
 - (iii) The tenant Allowance may be given in the form of Rent credits. The tenant would want to ensure that, if the Lease terminates other than due to the tenant's default, the landlord is obligated to pay the balance of the tenant Allowance to the tenant in cash. The tenant also prefers that the tenant Allowance be applied 100% toward all Rent until completely used.
 - (iv) If the tenant Allowance is not paid, the tenant will want the right to offset against Rent. The landlord will want to limit the offset to a percentage of Rent, or provide that the offset can only be against Base Rent (versus Base Rent and Additional Rent).
 - (v) The landlord wants the right to offset the tenant Allowance amounts against any tenant default or to repair any damage to the Shopping Center, or to apply toward Rent at the landlord's discretion. The landlord also requires that the tenant repay the unamortized balance of the the tenant Allowance if the tenant terminates the Lease early due to a gross sales kickout right or if the tenant exercises an early termination right.

- C. Other Inducements or Concessions -- Not as common but the landlord can offer a structured Rent schedule based on Gross Sales. That is, the Base Rent is established, but if the tenant exceeds a certain amount of Gross Sales during any rolling 12-month period, Base Rent increases by a prescribed amount for the balance of the term. The landlord can also offer a shorter term, but require a termination fee or payment of unamortized the tenant Allowance if the tenant does not exercise the renewal term. Fixed or capped CAM is another possible inducement or concession. the landlord could structure the deal as a “gross” rent deal, without triple net charges for taxes, insurance and maintenance. Other the landlord inducements?

IV. USE OF PREMISES

A use provision is exactly what it sounds like. It describes and typically limits the use a tenant may engage in, and outlines what the conditions may be required before a tenant can change that use. Tenants prefer broad use clauses, while landlords prefer a use clause to be drafted as narrowly as possible.

A. Permitted/Required Uses --

(i) The landlord view:

- a. Keep as narrow as possible
- b. State with particularity
- c. Limit incidental uses
- d. Tradename
- e. Quality levels
- f. Tied to other locations
- g. Menu
- h. Subject to all exclusives/uses/laws, present/future

(ii) The tenant view:

- a. Broaden to allow for:
 - i. evolution of product/brand
 - ii. lease transfer
- b. Avoid quality commitments
- c. Examine restrictions and attempt to procure representation and/or waivers from the landlord

B. Exclusive and Prohibited Uses --

(i) Permitted and Prohibited Uses. The tenant will desire to have some control over the types of uses elsewhere in the Shopping Center.

- a. Prohibited Uses. These protect the customer experience and minimize parking issues and will typically include uses such as parking intensive uses like movie theaters, bars, health clubs, restaurants and night clubs, as well as potentially “offensive” uses such as adult book stores, vape shops, cannabis outlets, etc.
- b. Exclusive Uses are intended to protect a tenant’s business and customer experience by limiting the competitors permitted. These provisions will typically name the type of Shopping Center tenants or occupants that are prohibited from engaging in the tenant’s business. [Note: it is important to both landlords and tenants that a distinction be drawn for violations of an exclusive use provision by the landlord versus a breach by another tenant in violation of the terms of its lease (a “rogue tenant”). Ideally, the remedies for both types of breach should be spelled out in the lease.

(ii) Common Area Access Concerns. Tenants want unrestricted access for customers and deliverytrucks across the common area. Landlords, however, want to govern the number, location and configuration of parking spaces in the common areas as well as the location and dimensions of all vehicular and pedestrian access ways in the Shopping Center.

- (iii) **Specific Access Provisions.** These may address construction work, repairs or maintenance, and/or grand opening activities in the Shopping Center after the tenant takes possession of the Premises. The landlord will want to prevent any such activities from impeding ingress and egress in the Shopping Center.
- (iv) **Common Area Use Concerns.** Tenants want the right to use the common area for uses that enhance their business as well as rights to prohibit the use of the common area for uses that detract from their business. These provisions may list permissible and impermissible uses of the common areas.

C. **Co-Tenancy** – These provisions are typically requested by tenants who are essentially taking the position that they will only agree to sign a lease and pay the rent if they are assured that they won't be the only tenant in the center and/or that certain "anchor" tenants will exist in order to draw traffic to the Shopping Center. Co-tenancy provisions typically will include timing limitations, specific named tenants, and remedies (reduced rent, ability to terminate, etc.) Generally, there are 3 standards:

- (i) **Non-Consent/Non-Specific** – if a tenant fits certain criteria, they may automatically be substituted for a named co-tenant.
- (ii) **Non-Consent/Specific** – attaching a list of co-tenants that may be swapped out for a named co-tenant.
- (iii) **Consent/Non-Specific** – certain criteria are enumerated, following which consent must be reasonable.

Other components:

- (i) **GLA Component**
 - a. The tenant's position – what's the use in paying all this below-market rent if there's nobody here to help me draw customers?
 - b. The landlord's position – I agree that, for certain tenants (and types of tenants), a critical mass is important to sales.
- (ii) **Exclusions** – certain tenants seek to exclude other tenants, classes of tenants or other categories from the calculation of GLA.
 - a. The tenant's position – that bank/real estate office/dentist does nothing for me! If I'm already requiring that tenant as a named co-tenant, I don't want the landlord to get credit for them in the density requirement too!
 - b. The landlord's position – you're leasing space here because you've asked me to assemble a center comprised of what the market demands. If that includes a dentist or a yoga studio, then I shouldn't be penalized for that.
- (iii) **Remedies**
 - a. Go Dark/Cease Operations Alternate Rent
 - b. Termination

V. **EXIT STRATEGIES.** These are mechanisms in the lease that permit a substitution of tenants and come in a variety of forms. These sections are typically highly negotiated if the tenant wants the right to do so without landlord's prior consent.

A. **Assignment and Subletting** – competing interests: the tenant views the Lease as an essential asset to its business and feels that it should have the right to assign the Lease or sublet the Premises without having to obtain the approval or consent of the landlord. The landlord feels that it is making this particular Lease transaction with a known, approved tenant with its attendant

experience, trade name, and credit, and for a particular defined use - so there should be no assignment of Lease rights or no permitting another party to use or occupy the Premises.

- B. Tenant Kickout Right – A “kickout” generally is used to refer to a tenant right to terminate the Lease in the event a specified amount of Gross Sales is not generated by the tenant at the Center during a specified “measuring period”. The landlord will want the measuring period to occur at least after the tenant has operated for at least one or two years in order to give the tenant time to establish the location. The landlord will want a fixed measuring period rather than a “rolling” twelve month period and will want a radius restriction so that the tenant does not open a competing store that will draw business away from this location. The tenant will want to use a rolling twelve month measuring period that does not go away if Gross Sales exceeds the threshold. The tenant will also want to avoid a radius restriction (or at least be sure to exclude any existing or pending locations), avoid the requirement to be open but agree that, if not open, Gross Sales from the prior period will be imputed, allow the kickout right to continue if there is an assignment or sublease and no reimbursements for the tenant Allowance or brokers’ commissions.
- C. Other Termination Rights – Some leases have specifically negotiated termination rights for the benefit of the landlord or the tenant (unrelated to Gross Sales).
- (i) A unilateral or bilateral right to terminate for any or no reason (i.e., for “convenience).
 - (ii) the tenant in a particular trade or business that may be susceptible to changes in law may want a right to terminate if the change in law makes it illegal to continue to operate the business for the stated permitted use. Examples – pay day lenders, pawn shops, marijuana shops.
 - (iii) Relocation provisions. The landlord would like the right to relocate smaller tenants in the event of a redevelopment or in the event to accommodate an anchor or junior anchor tenant. If the tenant agrees to relocation, it should be at no cost to the tenant, in certain permitted areas. The tenant will want the right to terminate the Lease if the proposed relocation premises is not acceptable – and the right to recover its cost to build out and equip the Premises and to move to a new location. The landlord may want the right to retract its relocation notice if the tenant terminates.

VI. INSURANCE AND INDEMNITY.

- A. Landlord’s Insurance – The landlord normally obtains and maintains two types of insurance (x) property or casualty insurance that covers damage to the landlord’s own property - the Shopping Center building or improvements (i.e., “special form cause of loss” insurance formerly known as “all risk” insurance) and (y) commercial general liability insurance that covers accidents and damages that the insured party causes others.
- (i) Special form cause of loss insurance covers damage and casualty on the building and common area – can include a number of coverages, such as earthquake, flood, boiler and machinery, mold, windstorm, terrorism, seepage or leakage and loss of rent. The tenant is normally not named as an additional insured and the landlord’s special form cause of loss policy does not cover the tenant’s property. The tenant would like the casualty insurance to provide coverage for the full replacement value of the property (after all, the landlord is exculpated), while landlords only obtain insurance for up to 80% of the insurable value.
 - (ii) Commercial general liability insurance – the insurance company pays those sums that the insured becomes legally obligated to pay another party as damages because of bodily injury or property damage. This insurance can be occurrence based or claims made. CGL insurance covering business and property risks should be “occurrence” form coverage.
 - (iii) Waiver of subrogation – The landlord insures its interest in the building, and the tenant insures its interest in its own property and equipment located within the leased premises. If a casualty event occurs and the building or the leased premises is damaged, the parties agree that each will look only to its own insurance and not sue the other party – regardless of which party may be at fault or which party caused the casualty event. The provision also provides that each party’s insurance company will not be permitted to sue the other

party under the legal theory of “subrogation”. The waiver of subrogation should apply as to the insurance policies required to be carried by the other party and not the policies actually obtained, so that if a party fails to obtain/maintain the required insurance, the waiver still applies.

B. Tenant’s Insurance – The tenant is required to obtain and maintain (x) special form cause of loss property insurance insuring all leasehold and building improvements in the premises, the tenant’s stock-in-trade, trade fixtures, furniture, furnishings, special equipment, floor and wall coverings, and all other items of personal property of the tenant located on or within the Premises and (y) commercial general liability insurance in respect of its business conducted at the premises.

(i) Other general coverages – a retail lease may also require the the tenant to obtain and maintain workers’ compensation insurance (meeting the requirements of the workers’ compensation laws of the State in which the Premises is located), employer liability insurance covering all of the tenant’s employees at the Premises, plate glass insurance covering all plate glass on the Premises at full replacement value and commercial automobile liability insurance for hired, owned/registered under the tenant’s name and non-owned vehicles. Often, the tenant may ask to self-insure for plate glass and argue for the deletion of business auto liability when no work is being performed by the tenant at the Premises.

(ii) Specific coverages – depending on the tenant’s particular use, there may be special insurance policies that a prudent the landlord would require. For example if the tenant operates a restaurant or bar selling alcoholic beverages, the landlord should require that the the tenant maintain “dram shop” or liquor liability coverage for liability arising from the sale of these alcoholic beverages, and in restaurant leases, the landlord may consider requiring the tenant to maintain products liability coverage. A tenant providing physician or dental services at the leased premise should be required to obtain and maintain professional liability insurance or malpractice insurance.

C. Indemnity -- An agreement whereby one party agrees to protect another party against certain future claims or losses. An indemnity can really cover anything, subject to certain legal restrictions. For instance, one party cannot be obligated to indemnify the other from for such party’s negligence or intentional acts.

(i) Indemnity v. Insurance – many non-legal professionals (and legal professionals) often conflate indemnity concepts with insurance requirements. Indeed, while they have much interaction with one another, they are entirely distinct concepts. Insurance speaks entirely to solvency being guaranteed by a third-party, while indemnity is the requirement to apply monies or efforts to a situation. So, you can have indemnity without insurance, but insurance without indemnity may leave you relying on either an “equitable indemnity” or nowhere at all...

(ii) Lease Indemnities.

1. Third party liens - mechanic’s and materialmen.
2. Environmental issues -pre-existing, third-party and ongoing.
3. Suit by a third party for personal injury (e.g., a slip and fall)
4. Broker commissions.
5. Additional coverage issues.
 - a. Third party claims against the indemnitees only or also claims suffered directly by the indemnitees?
 - b. Should the indemnity apply even if the loss is covered by the indemnitee’s insurance?
 - c. Should the indemnity obligation be reduced by the fault of the indemnitee - i.e., is it a comparative analysis?

VII. HOW TO THINK LIKE A LAWYER – INTERACTIVE DISCUSSION

Seminar will contemplate the following scenarios:

- A. Client has asked you:
 - To prepare a lease draft
 - To review and comment on a lease draft
 - To review and analyze an existing lease (e.g in the context of a financing)

- B. General priorities:
 - Quality of analysis and advice
 - Efficiency of legal services provided

- C. Most clients aspire to sign a short, fair and well-drafted lease. Which means your obstacles are:
 - The lease is long
 - The lease is poorly drafted
 - The lease is imbalanced in favor of the other side

- D. Where do you begin?

- E. Your approach to any lease negotiation will vary based on:
 - A “hands-on” client who wants to be walked through, and consulted on, every issue
 - A “hands-off” client who defers entirely to your expertise and judgment throughout

Not all clients self-identify at the outset. Some may tell you they are hands-off but in fact are quite the opposite.

DO:

- Prioritize substance over form and style
- Maintain clear sight of your client’s interests
- Consider and respect the interests of the opposing parties
- Defer to your client and other professionals on operational or specialty issues
- Find creative compromises and barter
- Learn, listen and strive to improve

DON’T:

- Prioritize form and style over substance
- Engage in academic disputes with opposing counsel
- Say “no” without considering all possible alternatives
- Give advice about the space or operations without a complete understanding
- Disrespect opposing counsel
- Over-promise or under-deliver
- EVER throw opposing counsel “under the bus” in an email to all parties involved.