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Leasing Challenges

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While many people focus solely on the amount of rent when signing a lease for office space, many of the other terms are actually more important to the business. It is therefore imperative to understand the entire real estate lease. A poorly drafted or inequitable lease can leave a practice to suffer or open to unexpected problems in the future. While there are many issues, including both business and legal, that one must address before signing a lease, the following are a non-exclusive list of questions that should be addressed:

1. Who is the Lessee? If the lease agreement was signed prior to forming an entity (i.e. professional association), it is likely the agreement was signed personally. Yet, even after forming an entity, if the lease is not changed, it could potentially remain in the dentist's name. Since one of the main benefits of creating an entity is to avoid personal liability, the lease must be in the entity's name. As a related issue, many times a landlord will demand that the owner sign a personal guaranty. If at all possible, the Dentist should avoid, or at least limit as much as possible, since it creates personal liability. Although not as ideal, placing the lease in the name of the entity and providing a personal guarantee, still provides better protection than having the lease in the dentist's individual name.

2. How long is the term? While determining the length of the lease is generally straightforward, it can be difficult for new construction or major renovations where the lessee will not take

possession until long after the lease is signed. Usually, the lease term starts upon taking possession. As such, the date of possession becomes important for triggering rent changes, termination and notice provisions for exercising an option.

3. Does the Lease contain a renewal option? If the lease agreement provides a renewal option, it usually requires the tenant provide notice to the landlord, in advance. Some options may even allow tenant to renew the lease at some rate below current market rates or with a small increase over the current lease rate compared to an adjustment tied to the current market rate. Even if an option allows the tenant to extend at current rates, this may benefit the landlord more than the tenant because there is no cost to acquire a new tenant and no loss from market rates. Therefore, it is imperative to closely monitored all contractual dates.

4. What is the "real" rent? Most leases are "triple net" which means the rent will include, not only the quoted monthly rent, but also a portion of the common area maintenance, taxes and insurance cost ("CAM charges"). As such, understanding what expenses will be charged to lessee can be very important. Additionally, if the property is sold, the lease may allow a new landlord to charge back different expenses. Moreover, when renting a new property, the appraisal value after the property is completed can create a large change in the CAM charges. Additionally, many leases provide for the division of CAM charges based on the percentage of

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total property rented. Therefore, if a large tenant leaves, the remaining tenants could be required to pay larger percentages of the CAM charges. In order to control CAM charges, specifically listing the allowable charges and differentiating between maintenance, which might be allowed, and capital improvements, which should not be allowed, becomes essential.

5. Can the landlord charge a management fee? It depends on the lease. If the lease does not explicitly deny landlord the right to charge management fees, the law allows for collection of such. Even if the current landlord does not charge a fee, nothing prevents the landlord from starting to collect fees, a new landlord from charging a fee or a landlord from hiring an affiliate to manage the property. In short, absent language to the contrary, a landlord can charge a monthly fee as part of the CAM charges for managing the property. The only way to truly prevent the charges is to include a specific prohibition in the lease.

6. What requirements can be placed upon the lessee? It is not uncommon for the lessee to be responsible for expenses such as purchasing an HVAC service contract or replacement of glass and lights. In some instances, the lease may require the lessee be responsible for the replacement of HVAC equipment or other major equipment—potentially a huge liability for an older building.

7. Can the landlord rent to other dentists? Without a restriction in the lease, nothing prevents a landlord from renting to whom they wish. While negotiation will depend on the landlord; obviously, the broader the restriction the better the protection. This should clearly be a concern since losing a prospective patient to a competitor because they became confused between two suite numbers would be unfortunate.

8. Do you need to have parking spaces? While it may appear at the start of the lease that there are sufficient parking spaces for all tenants; with changes in tenants comes changes in usage of parking spaces. If one tenant specializes in group activities, such as a workout facility, spaces may come at a premium during peak hours. The best way to protect a practice is to include a specific number of dedicated spaces in the lease. Depending on the design of the property, a lease can even mandate designated spaces.

While this article cannot, and does not address all possible problems associated with negotiating and review a lease, the best advice possible is to simply read the lease carefully. Better yet, the money spent having an expert review the lease may ultimately save both dollars and headaches. Although, the lease may appear straight forward, many contractual terms are terms of art and are thus not always as straightforward as they appear.

This article is drafted for general informational use only; it does not constitute legal advice and should not be used as such. The Rosenblatt Law Firm specializes in helping businesses with legal and business issues. One of the firm's major practice areas is working with dental and medical professionals. If you would like more information, please contact The Rosenblatt Law Firm at 614-9444 or e-mail us at info@rosenblattlawfirm.com.