

# Leases for Docs

By Justin S. Daniels

A thorough understanding of all aspects of a commercial lease is essential to successfully investing in a medical office building or running your medical practice. Commercial property investors determine whether or not to purchase a commercial building based in large part on the lease revenue such building generates. Physicians who lease space know that one of their single biggest fixed operating costs is making that lease payment every month. Yet landlord and tenants alike avoid understanding most commercial lease provisions beyond the rent payment until the misconception costs them thousands of dollars along with a hefty legal bill. This article focuses on common issues that arise in build-out, restrictive use, assignment and right-of-first-refusal provisions. These four areas cause disagreement between landlords and tenants that siphon away time, attention

and resources from running your medical practice.

Physicians moving to new space typically require that the landlord build out the space to meet the physician's specific needs. As with most construction projects, delays inevitably occur that prevent the physician from inhabiting the space on time. A landlord may argue that such delay is excused because the lease includes a *force majeure* clause that excuses prompt performance when delays outside the landlord's control (i.e., the contractor walks off, materials are delayed) happen. A physician, however, opening his medical practice could be in breach of his hospital recruitment contract if the office is not open for business by a certain date. A physician should request specific damages to address the issue of what happens if the premises are not open when promised. Physicians can also negotiate to

receive free rental months or a per diem amount for each day the delay continues.

Commercial leases typically contain a lease provision allowing a physician to use the leased premises for a specific purpose such as a family practice medical office. Landlords may insist on these restrictions so that there are not two family practices located in the same building when the landlord has promised a tenant exclusivity and is charging a rent premium for the right. The family practice physician, on the other hand, may want the flexibility to assign or sublease space to a specialist when it is not being used in an effort to increase revenue by utilizing the space that is already part of the monthly rent payment. The restrictive use provision permits the landlord to charge a premium for an exclusive use, such as a family practice medical office, while effectively limiting a physician's options for assigning or subleasing the space since the space may only be used for a specific purpose.

The assignment provision is a commonly used but greatly overlooked provision in a lease agreement. Assignment is usually permitted without landlord consent in leases that do not address assignment. In most commercial leases, however, assignment will not usually be permitted without the landlord's consent. The landlord, moreover, may require the payment of fees to compensate it for the processing and attorney fees related to its consent. In the event the landlord permits the assignment, it generally requires that the existing tenant remain liable in the event the new tenant fails to fulfill its rental obligations. Physicians can request that the landlord not unreasonably withhold its consent while a landlord will prefer to have the blanket right to refuse the assignment. The assignment provision wording can have a significant impact on a physician selling his practice to a buyer who wants to use the existing space. If the physician selling his business is not careful, the landlord can have veto rights over the proposed sale if it refuses to consent to the assignment of the lease.



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Certain leases may contain provisions giving a tenant the right of first refusal to acquire the property in the event the landlord wishes to sell it. The issue that can arise in this situation is when the lease is silent on how many times the tenant may exercise such right of first refusal. A landlord tried to sell a property after giving the tenant notice and the deal ultimately fell through. On the subsequent deal, the landlord found a willing buyer and entered into a contract without giving the tenant another notice because the landlord thought it had to give such notice only once. A court, reviewing the provision that left silent how often a tenant could exercise such rights, determined that landlord had violated the lease by failing to notify the tenant the second time. The landlord could have easily remedied the problem with a provision limiting the tenant's right of first refusal to a one-time right.

Commercial leases share much in common with insurance policies. Everyone is familiar with rental rates, renewal options or an insurance endorsement but no one pays any attention to build-outs, use restrictions, sub-letting, first refusal rights or insurance policy exclusions until a problem exists. Relieving a pounding litigation headache from failing to address these common commercial lease issues usually costs three times as much as initially taking an ounce of legal aspirin.

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