

The Association of the Bar of the City of New York

Committee on Real Property

Model New York City Office Lease

Commentary

Introduction

The leasing of office space in the City of New York is critical to the economic life of the City, its constituents and the real estate practice of many of our attorneys.

For years the industry relied heavily on the forms provided by the Real Estate Board of New York, Inc., and many landlords and attorneys continue to use those forms. As landlords and attorneys became more sophisticated, lengthy riders were added to the Board forms, containing significant provisions of the lease. As technology developed, and sophistication grew, landlords tended to develop their own “standard” forms for each of their buildings. Today, it seems that each building has its own “standard” form and that a new “standard” form is developed each time a building is erected or changes ownership.

Most forms are voluminous, and a testament to the complexity of the area and the sophistication of the industry. Basically, however, they all contain the same provisions, each form tailored to fit the desire of a particular landlord or practitioner. Most forms, in their initial draft, are heavily weighted in favor of the landlord. Leases of 100 or more pages are used for all types of transactions, from individual suites to multiple floors. In most cases, the initial draft of a lease does not contain those changes which every landlord and landlord’s attorney will accept, without much debate. Everyone has “standard” alternative provisions, and even these have “standard” changes, again for the asking. Some forms are user friendly, others are not. In many cases, the form is an amalgam of provisions from a number of other forms, without conformity.

The Committee believes that this situation creates an unnecessarily expensive and laborious process. It is the view of the Committee that the time has come for the Committee to propose a model office lease that is easy to produce, read and understand, and which avoids, in many cases, a long, drawn out and contentious negotiation process. Attached to this Commentary is that model office lease.

The Committee wishes to acknowledge the work of its Subcommittee on Leasing, which worked for more than two years to develop the model. The members of the Subcommittee were (in alphabetical order): Mitchell N. Baron, Esq., David Calabrese, Esq., Anthony B. Casareale, Esq., David Cohen, Esq., Daniel A. Goldberger, Esq., Paul E. Hanau, Esq., Greer M. Hersch, Esq., Ralph J. Kreitzman, Esq., William Jay Lippman, Esq., Stuart Mass, Esq., Keith E. Reich, Esq., Alec Sauchik (Student Member), Craig Schiller, Esq., L. Stanton Towne, Esq., Andrew Jay Weiner, Esq., Jo-Ann H. Whitehorn, Esq. and Lowell D. Willinger, Esq. Although all of the

members made important contributions, the Committee wishes to particularly acknowledge the efforts of Mitch Baron, Nancy Connery, Bill Lippman and Stan Towne.

The Committee and the Subcommittee also wish to express their thanks to a number of industry members and practitioners, representing all views, who took the time to review and comment on drafts of the entire lease and certain selected provisions in their areas of expertise. The Committee's work would have been incomplete, and the credibility of the lease would have been in doubt, had the Committee not sought and incorporated those comments.

### The Guidelines

The Committee adhered to the following guiding principles:

1. An office lease. The Committee elected to develop an office lease, which is the predominant form in use in New York City. The Committee recognizes that there are a variety of other forms in use, particularly the loft and store forms. The Committee believes that there is little need for these separate forms, and with certain, but relatively few, changes the office lease can be adapted to these other uses.

2. Fair, but Landlord oriented. The Committee's work would be futile if, initially, landlords did not accept the lease. Accordingly, the Committee developed a lease which it believes will be acceptable to New York City landlords. However, the lease provides tenants with a number of provisions which any landlord would provide to any tenant.

3. Simple but Complete. The Committee desired to create a lease suitable for both small and large transactions, although for many large transactions certain provisions may need to be altered, and certainly there will be greater negotiation.

4. Easy to Prepare and Deliver. The Committee desired not only to develop a lease which would abbreviate negotiations, but which could be prepared and delivered quickly. Accordingly, the lease contains a "Basic Terms" Section at the beginning so that, in most cases, the lease can be prepared and delivered by simply completing the blanks in that Section.

5. Alternative Provisions. In view of the Committee's desire for ease of preparation, the Committee decided not to provide alternative clauses, other than for electricity. The Committee recognizes that many buildings cannot easily, or will not, convert from one method of providing electricity to any other. Therefore, the lease offers the following three methods of providing electricity: "Direct"; "Rent Inclusion"; and "Submeter". Only the applicable method should be included in the delivered lease. All of the methods have common provisions, and these provisions have been conformed in each method. The other significant area of choice is escalations. The Committee considered all of the methods in use, as well as the "pass-through" method. The Committee believes that in New York City, the preferred method is escalations, not pass-throughs. The Committee also believes that, in addition to a real estate tax escalation, the most common of the escalations is an actual expense escalation (although the Committee recognizes that other escalations may be easier to administer).

6. Definitions. The Committee believed that a long “definitions” section or exhibit was unnecessary and awkward. Many definitions are used in only one Article (such as “escalations”), so defining terms within that Article made sense. For those defined terms which are used in multiple Articles, a simple reference section as part of the “Basic Terms” Section directs the user to the Section in which the definition appears.

7. Rules and Regulations. The Committee believed that standard rules and regulations are lengthy and both repeated and contradicted provisions of the lease. The Committee developed a limited number of Landlord’s Regulations directed solely to the operational aspects of the building. This also allows for the imposition of future regulations limited to building operations.

### Specific Comments

This part of the Commentary is not intended to analyze every provision of the lease, or even its most significant provisions. The Committee’s intent in this part is merely to make certain observations which, it hopes, will allow the user insights into the Committee’s thinking.

1. Landlord. The Committee decided to use “Landlord” rather than “Owner”. The Committee believes that, although some owners prefer “Owner”, the traditional title is accepted by most, and should not be seen to have a negative connotation.

2. Article 1. Basic Terms and Definitions.

(a) Basic Terms. There are very few Basic Terms. The Committee believed that an alphabetical order, rather than attempting to prioritize the terms, was preferable.

(b) Guarantor. Although the Guarantor may be only a “good guy” Guarantor, the Committee believes that the traditional term is appropriate.

(c) Notice Address. The Committee believes that many landlords and tenants do not require, or need, copies of notices to attorneys.

(d) Premises. The inclusion of certain fixtures and improvements makes clear the responsibility for insuring, repairing and restoring these items.

(e) Landlord’s Work. The Lease works for “AS IS” leases, without change. The user can merely delete Exhibit B, or insert “none” at Section 1.7 or on Exhibit B.

3. Article 3. Use. The Committee believes that the term “offices”, together with the prohibitions in Section 3.2, adequately define the permissible uses.

4. Article 4. Condition of the Premises; Landlord’s Work. The Committee debated inserting an “outside date” concept but elected to omit it. The Committee believes that for most transactions an “outside date” is unnecessary (the landlord’s incentive is for rent to commence). The Committee also believes that the remedy of termination does not benefit either the landlord

or the tenant. If a “penalty” is to be negotiated, the timing and the amount must be determined on a case by case basis.

5. Article 7. Expenses. The Committee elected to dispense with the traditional long list of inclusions. Instead, the Committee believes that the general statements, together with the list of exclusions, is adequate.

6. Article 8. Electricity. The Committee did not provide for a specific quantity of electricity to be supplied by the landlord. The tenant must in each transaction determine that the electricity available to the Premises meets its needs.

7. Article 16. Assignment and Subletting. The Committee wishes to emphasis the following:

(a) The landlord’s termination option applies only to an assignment of the lease or a sublet of all or substantially all of the Premises, but does not apply in connection with a merger, consolidation or sale of all or substantially all of the tenant’s stock or assets, unless the lease is the primary asset of the assignor.

(b) The landlord’s consent is not to be unreasonably withheld or delayed for all transactions (including a transaction excluded from the landlord’s termination option) except a transaction with a controlled affiliate (in which case consent is not required).

8. Article 20. Security. The Committee elected to allow either the landlord or the tenant to substitute a letter of credit for cash. The Committee believes that given the advantages of a letter of credit in the event of a bankruptcy, the landlord should have this option. The form of the letter of credit adopts the provisions of the International Standby Practices 1998.