

Dentists Who Represent Themselves When Leasing Office Space Have Fools For Clients

By Patrick J. Wood, B.A., J.D. and Jason P. Wood, B.A., J.D.

Putting the final touches on a lease agreement you just negotiated, with what you believe are very favorable terms, is a time to celebrate. Dream office. Great location. Generous tenant improvement allowances. In fact, you're feeling great and you want to shout with glee about it. There's just one minor issue you don't know about: the landlord feels the same way. There's no wondering why the landlord feels the way he does either, since there weren't any lawyers to deal with and the dentist thinks he essentially got everything he was after. That dentist just doesn't know it yet, but by representing himself without a lawyer representing him, problems will likely be inevitable and costly.

Dentists should remember they treat patients. Lawyers negotiate contracts.

Once the lease is signed, you and the landlord often have opposite goals. The landlord wants the lease in effect as soon as possible so he can begin collecting rent from you, even if it's going to take three, four or even five months to "build out" the office space to your specific conditions. You just want to get into a nice, attractive new space and start running your practice. But how would you know that if a contractor lags on building out your space, he should be the one paying the rent for that extra time, not you. And neither the landlord, nor the contractor, is likely to tell you this, either.

When leasing space for that dream office, you should try to gain every concession possible from the landlord so that when it comes time to pay that first month's rent, it isn't overwhelming.

If your landlord is building out the space, he will try to economize on every item, reducing his costs and increasing his net profit on top of the cash already paid to him, a lot of cash for the initial and standard five- or 10-year lease agreement. Your ultimate goals may be the same – long-term financial efficiency, but again, you are at opposite ends of the spectrum when it comes to your dream office.

If you and your attorney agree that the landlord will build out the space and act as a general contractor, you should be prepared to tell him what type of cabinetry you want, whether you want Berber carpeting or tile flooring and where you do and do not want your restrooms located. You should have every detail spelled out: sinks, staff break rooms, patient waiting areas, built-in desks, areas for administrative duties, and the like. But, again, you treat dental patients. Lawyers advise clients on leases. It is sort of like asking an MD to fill a cavity, or you to perform breast enhancement surgery. Competent lawyers are the ones you should turn to when negotiating a lease because the handful who specialize in dental practice law, know all the nondental items you don't.

With lawyer in tow, and you deciding to take an active role in the building out of your office, there are many issues and items that must be addressed.

In the paragraphs that follow, the authors examine common lease issues that most dentists don't know about when negotiating their leases.

Office Build-Out Issues

Most leases provide the dentist with a limited time to complete the build out of their space, and the landlord will even try to start the build out period before the lease is even signed. Therefore, you should require that the landlord have a limited time to review your plans, and you should put penalties in your construction contract so that your contractor has to pay your rent if he doesn't finish on time.

Another common build-out issue is the tenant improvement allowance the landlord gives you. When you negotiate the rent, the landlord will rent the space based upon the leasable square footage, typically measured from the exterior walls of the entire unit. However, the landlord will routinely give the dentist a tenant improvement allowance based upon the usable square footage, causing the tenant improvement allowance to be 10-20% less than had it been based on the leasable square footage. Always insist that the tenant improvement allowance be based upon what you are leasing, i.e., leasable square footage.

Rent Increases

Nearly all leases have rent escalation clauses, which are either contractual in nature or that are tied to one of any number of commonly used economic indexes, such as the consumer price index, cost of funds, and others you know from watching Lou Dobbs on CNN. This is what you and your landlord will be negotiating and, with any luck, your lawyer can talk him into tying such increases to one of the less volatile indexes. There should always be a ceiling on such increases, just as the landlord will insist on a floor for the same indexes.

Damage to Office

Earthquakes, fires, floods, even riots are part of the landscape in California. The authors have noticed all too often in their practice that one of the victims of these calamities is the dental practice owner. The typical lease provides that if the dental lease office is damaged, the lease remains in effect if the landlord elects to rebuild, but imposes no time limit on when it is to be rebuilt. Some leases even require the tenant, or the tenant's insurance company, to continue paying the rent while the office is unusable. While most of the time rent is abated, even the highly motivated landlord can have difficulty rebuilding, usually because of building permit delays (in the case of widespread destruction) or because insurance companies won't pay enough to cover the cost to rebuild. The authors have seen numerous situations where a dentist, tired of waiting for the landlord to rebuild, built out a new office at a significant cost only to have the landlord call back two or even three years later and tell the dentist he must return and start paying rent because the dentist's lease was still in effect.

The solution? Insist on having the landlord start repairs within a certain time period (e.g., 90 days) and complete the repairs by a certain date (e.g., 180 days). If the landlord fails to meet these goals, you should have the option to terminate the lease so you can move onto a new location.

Subordination Clauses

The subordination clause is an almost invisible clause in most leases because of the intricacies of the mortgage foreclosure clauses. These clauses typically require that your lease will become subordinate to any new financing the landlord places on his or her building. If our real estate bubble ever bursts, many landlords will lose their buildings as rents decrease and they can't pay the mortgage. If a lender forecloses and there is a new owner, the new landlord does not have to honor your subordinated lease, and you may lose your dental office space. However, most landlords will allow modification to these clauses during lease negotiations because they know they won't own the building if this ever becomes an issue. Therefore, always ask the landlord for a waiver of such clauses.

Assignment Clauses

A typical landlord wants to control who occupies his or her space and will insert clauses that virtually destroy a dentist's ability to sell his or her dental practice.

For instance, it is common to have recapture clauses in the lease, allowing the landlord to cancel the lease if asked to assign it to the dentist buying your practice. They almost always have a clause making the lease renewal options personal in nature, so that when you try to sell your dental practice, you only can assign the lease through the current expiration date. If this is the case, the buyer's lender won't finance the sale because they want the lease to last as long as the lender's loan will be in effect (i.e., 7-10 years). Many landlords may insert clauses that give the landlord a right to claim a portion of the profits you receive from the sale of your dental practice.

Virtually all standard form leases contain provisions which keep the original tenant on the hook for the rent through the expiration of the term, including all option periods. This occurs whether the lease specifically states this, or if the lease is silent as to when the tenant is released from liability, by operation of law. You want to ask the landlord to release you from liability, either at the time you sell your dental practice or at the end of the current lease term, so that you don't remain liable throughout the entire lease term. Even if the landlord won't release a tenant at the time of assignment, they usually will allow a release at the end of the then-lease term, based on the argument that if the buyer is a bad tenant, the landlord has lease remedies which allow the landlord to deny the buyer the right to renew the lease term.

Recapture clauses should be negotiated out of leases, as should all options - personal language. Leases should not give the landlord any right to make a claim upon the purchase price you received for your practice. You should try to obtain a release of liability to avoid the nightmare of a default occurring well after you have retired and are unable to take over the office.

These assignment clauses can destroy the nest egg you are building in a successful dental practice. This is why it is so important, whether you are buying a dental practice or building one from scratch, to have an attorney with experience in the dental field assist you with your lease negotiations.

The list of legal "dos" and "don'ts" for dentists astounds most of them when we sit down for an initial conference on selling, buying, relocating, leasing, or otherwise affecting the ownership of a dental practice.

It is often said that he who represents himself has a fool for a client. As the reader can tell from the points raised above, a dentist representing himself rather than utilizing an experienced dental attorney can miss issues which could make their dental practice relatively worthless. With such a valuable investment as a dental practice, it obviously is in the dentist's best interest to retain the services of an expert in the leasing area.

Jason P. Wood, B.A., J.D. and Patrick J. Wood, B.A., J.D.

jason@dentalattorneys.com or pat@dentalattorneys.com | (800) 499-1474 | www.dentalattorneys.com

Jason is an associate attorney in the law firm of Wood & Delgado, and Patrick is the founder and senior partner of Wood & Delgado, a law firm which specializes in representing dentists for their business transaction needs. Wood & Delgado represents dentists in California, Nevada and Colorado.