

LANDLORD-TENANT LAW

Why Should I Call My Litigator To Draft a Lease?

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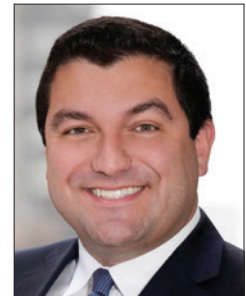
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Typically, a tenant and/or landlord will negotiate a draft term sheet for a lease and then both sides will call their respective transactional attorneys to draft the lease. However, the next time you call your transactional attorney to draft the lease, you may want to call a litigator as well to review the form of your lease.

Litigators are traditionally sought when a dispute has arisen that requires adjudication before the courts. A growing trend has emerged where litigators are being retained to assist in the lease negotiations as co-counsel with transactional attorneys in an effort to try and avoid being in court later on. Transactional attorneys and litigators are two different breeds of attorneys, but both are necessary in the everyday life of landlord-tenant law.



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Transactional attorneys will typically prepare contracts and negotiate deals while litigators will try to advocate for his/her client's rights in court. Both have very important skill sets but very different skill sets which if used together, can create the ultimate representation for clients looking to negotiate a lease. For instance, transactional attorneys will prepare leases and try to contemplate scenarios and write in protections for the client to cover all possible scenarios. A litigator will look at the contract from all scenarios and think how a judge would interpret the clauses.

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You may want to start with having a litigator to review the initial draft of the lease prepared to ensure the draft is up to date on the enforceability requirements of various clauses such as, holdover clauses, default provisions, liquidated damages among others. Then you can have your Litigator on call as a resource during negotiations and changes to such provisions.

The value of adding a litigator to the preparation of leases in conjunction with a talented transactional attorney is not overkill, but rather is necessary to draft a lease in the way which if it ever came to court, the attorney litigating the case would be able to enforce correctly

Having your litigator involved from the outset could reduce the risk of litigation over conflicting or ambiguous language because the litigator will be looking at the lease language written by the transactional attorney with an eye on avoiding future litigation

within the intent of which it was supposed to be written. It logically follows that if you have a litigator involved with the preparation of the lease, then that litigator would then be in a better position to defend you and/or advocate for your rights under that contract for the relief the client needs.

It has become too commonplace that litigators spend years litigating over what the intent of the parties were to explain conflicting or ambiguous language in leases. Having your litigator involved from the outset could reduce the risk of litigation over conflicting or

ambiguous language because the litigator will be looking at the lease language written by the transactional attorney with an eye on avoiding future litigation.

It is also commonplace that a transactional attorney prepares lease agreements from forms and standard forms that have been used over and over again for decades. The law is constantly changing and in real estate, there had been significant legislation that has altered the rules, laws and regulations of the industry with respect to landlord tenant law that constantly requires forms to be updated.

Also, there is case law which is decided every day that changes how contracts are interpreted. It is useful to have a litigator look at your lease form to make sure that your lease is enforceable in accordance with the most recent case law. For instance, several months ago the Appellate Division First Department in *Archives LLC v Volpe* 2023 NY Slip Op 05354, held that personal guarantees where the guarantor irrevocably absolutely and unconditionally guarantees all sums due and owing under the subject lease does not make the guarantor liable for holdover use and occupancy after a tenant's lease term expires.

The court held that use and occupancy, even if agreed as a fixed rate for holdover use and occupancy in the lease, is not covered by the guaranty unless specified.

Some transactional attorneys may not follow case law developments as closely as litigators who experience these developments on a daily basis throughout their practice and thus may not be aware of such newly

updates such as the *Volpe* holding and how courts interpret this provision and may not have a carve out for holdover use and occupancy and guarantees.

The holding in *Volpe* is significant because the language cited above is the language that you typically see in a guarantee form which has existed for decades. A litigator's insight would be helpful in this situation so that the form can be updated in accordance with the Appellate Division's holding in *Volpe* at the intention of the parties to have a guarantor guarantee all sums due and owing under the lease may not be appropriately documented in an enforceable manner to conform with the new requirement in the caselaw.

Another example is when transactional attorneys try to insert liquidated damage provisions in leases. Such provisions may not follow the "well-established" rule that a liquidated damages provision should be reviewed as of the date of its making by reviewing whether the damages flowing from a prospective breach were readily ascertainable at the time of contracting or whether the damages penalty

imposed are conspicuously disproportionate to the foreseeable losses at the time of contracting thereby making it an unenforceable penalty (see *Bates Adv. USA, Inc. v 498 Seventh, LLC*, 7 NY3d 115 (2006)).

Transactional attorneys will attempt to try and write such provisions so that it covers every possible outcome. A litigator will look for the inconsistencies and show how the provision does not clearly cover and assist in tailoring the clause so that the liquidated damage provisions will be enforced.

It is important in the practice of leasing in general that transactional attorneys and litigators work together to make the contract that best honors the intention of the parties in a way where if adjudication becomes necessary, that the client's rights were appropriately protected in the contract.

If you are a tenant or landlord entering into a lease soon you may want to call not just your transactional leasing counsel but your litigator as well. Because if you call your litigator to help prepare your lease, you may not need to call your litigator for an issue later on.