

**SECRETS TO SUCCESSFULLY SECURING THE IDEAL DENTAL OFFICE LEASE**  
**THE “USE” CLAUSE OF THE DENTAL OFFICE LEASE**  
**(Part 1 of a 12-part series)**

By Barry H. Josselson, A Professional Law Corporation \*

One strategy for success in your dental practice is to secure a fair and reasonable dental office lease. Your office lease is *one* of the most critical and significant legal agreements which you will sign in your professional career. Unlike associateship relationships which can be terminated or partnerships/corporations with other dentists which can be dissolved, the dental office lease cannot be ended unilaterally by you or breached with impunity without your incurring substantial legal risk, liability and economic fallout. Accordingly, your understanding the numerous economic and non-economic issues during the course of your negotiations with the landlord and your attorney's analysis of your lease are integral factors to the success of your practice. This article is a 12-part series addressing the dozen most overlooked and ignored provisions of dental office leases. Your following these 12 strategies for addressing these points will assure a fair and equitable lease agreement and business relationship with your landlord for years to come.

*Both landlords and tenants consider the “use” clause of the lease as a critical provision.* Why? The landlord must retain control over the use of the premises for many reasons. First, conflicts can arise among the building's tenants if the uses are not mutually compatible. Secondly, the landlord needs to control or restrict certain types of uses which can strain the capacity of building services, interfere with the quiet enjoyment of other tenants' premises, or require additional parking under applicable codes. For example, the landlord would not want the premises in an upscale shopping center to be used for lower scale purposes such as check cashing or liquor store.

The dentist, on the other hand, wants the use clause to be drafted as broadly as possible not only to provide the dentist with flexibility in his or her own business operations but also to attract a broader group of prospective sublessees or assignees if such need later arises.

Many office leases specify that the tenant shall not permit the premises to be used for any other purpose “without the landlord's prior written consent, which may be granted or withheld in the landlord's sole discretion.” The landlord consequently is able to control any lease assignment or sublease which you may be considering. If your landlord can be unreasonable or arbitrary in approving or disapproving such a change in use of your premises, your right to assign will be effectively limited.

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The better approach when negotiating this provision in your office lease is to apply a “*reasonableness*” standard for the landlord’s consent to a proposed change in use. For example, the lease should state that the dentist tenant should not use the premises for any other purpose “without landlord’s prior written consent, which shall not be unreasonably withheld or delayed.” Then your lease should define what is a reasonable basis for your landlord’s withholding of consent. We suggest the following clause: “Reasonable grounds for withholding consent include any of the following: the proposed use is (i) not consistent with operation of the building as a first class medical/dental office building; (ii) places a disproportionate burden on the building systems; or (iii) would generate excessive foot traffic.”

Please be aware that this suggested clause *also* states that the landlord’s consent to a change in use “shall *not* be unreasonably delayed or withheld.” We deal with landlords who effectively block proposed use changes by tenants (for which the landlord’s consent is required) by ignoring their requests, losing the paperwork provided or engaging in other dilatory tactics. It is prudent for the dentist to negotiate a specific time limit for a response by the landlord so that *consent will be deemed granted* if the landlord does not act within such stated period of time.

***Next issue:*** The “rules and regulations” clause in your lease can result in your landlord shifting the cost and responsibility of certain repairs to you. We will learn how the precise and proper drafting of such clause can help you avoid any unforeseen liability.

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**SECRETS TO SUCCESSFULLY SECURING THE IDEAL DENTAL OFFICE LEASE**  
**THE “RULES AND REGULATIONS” CLAUSE OF THE DENTAL OFFICE LEASE**  
**(Part 2 of a 12-part series)**

By Barry H. Josselson, A Professional Law Corporation \*

One strategy for success in your dental practice is to secure a fair and reasonable dental office lease. Your office lease is *one* of the most critical and significant legal agreements which you will sign in your professional career. Unlike associateship relationships which can be terminated or partnerships/corporations with other dentists which can be dissolved, the dental office lease cannot be ended unilaterally by you or breached with impunity without your incurring substantial legal risk, liability and economic fallout. Accordingly, your understanding the numerous economic and non-economic issues during the course of your negotiations with the landlord and your attorney's analysis of your lease are integral factors to the success of your practice. This article is a 12-part series addressing the dozen most overlooked and ignored provisions of dental office leases. Your following these 12 strategies for addressing these points will assure a fair and equitable lease agreement and business relationship with your landlord for years to come.

*The “rules and regulations” clause* of your lease specifically requires the dentist to abide by the building's or shopping center's rules and regulations. Landlords need the flexibility to add new rules or modify old ones during the tenant's lease term to take into account new developments affecting the building's use. Consequently, the rules and regulations clause is used to modify older leases which have failed to address any important issues.

For example, recent discoveries about indoor air pollution have caused many landlords to attempt to control the types of toxic substances brought into their buildings by tenants. Other clauses found in the rules and regulations provision permit the landlord to control the types of finishes and construction materials which the dentists use in their leasehold improvements. Older leases, however, rarely address these types of concerns. Therefore, if you have agreed in the lease to be bound “by any amendments or additions to the rules relating to the safety and care of the premises or the building”, then the landlord has the flexibility to introduce these restrictions in the form of new and additional rules and regulations.

Your dental real estate attorney should negotiate the following points:

1. Any amendments to the rules and regulations shall be “reasonable”;
2. Any amendments will *not* require the dentist to pay additional rent or increase its monetary obligations to the landlord;
3. No amendment would apply retroactively, and the dentist shall be given sufficient time to comply;

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4. Certain rules and regulations will not be changed without the dentist's prior consent;
5. The rules and regulations will not take precedence over any specific terms of the lease; and
6. The landlord will act in a non-discriminatory manner in enforcing the rules in the building or shopping center.

**Next issue:** The "restrictions on use" clause in your lease can result in your having to abide with not-yet-drafted restrictions on the use of your premises which could substantially and adversely affect the profitability of your dental practice. We will learn how the precise and proper drafting of such clause can help you avoid any unforeseen monetary costs and liability.

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**SECRETS TO SUCCESSFULLY SECURING THE IDEAL DENTAL OFFICE LEASE**  
**THE “RESTRICTIONS ON USE” CLAUSE OF THE DENTAL OFFICE LEASE**  
**(Part 3 of a 12-part series)**

By Barry H. Josselson, A Professional Law Corporation \*

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*Landlords will also usually place additional restrictions on the dentist’s use of the premises.* For example, restrictions placed upon the number of persons (including visitors) per usable square foot of space in the premises is a way to control the density of occupancy. Landlords also rightfully desire to restrict a legitimate use which could constitute a waste or nuisance or which would unreasonably annoy other occupants of the building. Perhaps the most dangerous and apparently innocuous restriction on use is the typical clause in a lease which reads that “tenants shall comply with all recorded covenants, conditions and restrictions that now or later affect the real property.” This clause should immediately notify you that such documents might contain significant use restrictions or financial obligations in multi-building projects.

Instead, your dental real estate attorney should have this “restrictions on use” clause be substantially rewritten to provide the following:

1. The dentist’s obligation to comply with the recorded covenants, conditions and restrictions (known as “CC&R’s”) is limited to those of which the dentist has *actual* knowledge;
2. Future CC&R’s are limited to those that do *not* adversely affect the dentist’s use or the conduct of his or her dental practice;
3. The dentist should request that the landlord provide copies of the CC&R’s to the dentist as an exhibit to the lease; and
4. The landlord warrants that there are no known violations of any of the CC&R’s which would be detrimental to the dentist’s use or occupancy of his or her premises.

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**Next issue:** The “covenant against liens” clause in your lease can result in your landlord taking away any leverage you may have with any sub-contractor building out your dental office with whose work you are unhappy. We will learn how the precise and proper drafting of such clause can help you avoid any unforeseen monetary costs and liability.

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**SECRETS TO SUCCESSFULLY SECURING THE IDEAL DENTAL OFFICE LEASE**  
**THE “COVENANT AGAINST LIENS” CLAUSE OF THE DENTAL OFFICE LEASE**  
**(Part 4 of a 12-part series)**

By Barry H. Josselson, A Professional Law Corporation \*

One strategy for success in your dental practice is to secure a fair and reasonable dental office lease. Your office lease is *one* of the most critical and significant legal agreements which you will sign in your professional career. Unlike associateship relationships which can be terminated or partnerships/corporations with other dentists which can be dissolved, the dental office lease cannot be ended unilaterally by you or breached with impunity without your incurring substantial legal risk, liability and economic fallout. Accordingly, your understanding the numerous economic and non-economic issues during the course of your negotiations with the landlord and your attorney’s analysis of your lease are integral factors to the success of your practice. This article is a 12-part series addressing the dozen most overlooked and ignored provisions of dental office leases. Your following these 12 strategies for addressing these points will assure a fair and equitable lease agreement and business relationship with your landlord for years to come.

*A “covenant against liens” clause is commonly found in dental office leases.* Its primary purpose is to protect the landlord against potential mechanics’ liens resulting from work performed on the premises pursuant to the dentist’s request. A lien resulting from the dentist’s failure to pay a contractor who worked on the premises causes a breach of this covenant and, therefore, triggers a default under the lease.

The landlord’s and your goals here are in conflict. If the landlord’s ownership interest in the building or shopping center is threatened, the landlord will seek to obtain a release of the lien. This is often accomplished by paying off the mechanic lien and then seeking reimbursement from you as additional rent under the lease. You, however, will want the opportunity to contest the validity of the mechanic’s lien claim without *automatically* being considered in default under the lease merely because of the lien’s existence. Office leases generally provide only a short period of time (for example, five days) within which the dentist must remove the lien or the landlord is then permitted to take any action necessary to remove the lien and without any duty to investigate the validity of the claim.

Many times the dentist may be validly disputing the quality of the lien claimant’s work or the validity of a lien attaching to the dentist’s office premises. However, once the lien claimant has been paid by your landlord under the right reserved to the landlord in the typical dental office lease, you lose all leverage to prompt the lien claimant into properly doing the work without formally filing a lawsuit. For these reasons you will want your “covenant against liens” clause drafted in such a way that it accomplishes two goals: (i) to prevent your landlord *from declaring a default* under the lease

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as long as you are opposing the claim in good faith, and (ii) to prevent your landlord from *paying off the lien claim* as long as you are opposing the claim diligently and in good faith. You and your dental real estate attorney should compare our suggested language with the language found in your lease document:

“If the lien is not released within ten (10) days after landlord notifies tenant of its existence, landlord may immediately take all action necessary to remove the lien, without any duty to investigate its validity, *unless* (i) tenant has commenced legal action to contest or defend the claim of the lien holder and the validity of the lien and (ii) tenant continues as well to prosecute this action to a successful judgment releasing the lien holder’s lien against tenant’s or landlord’s interest in the premises.”

***Next issue:*** The “compliance with laws” clause in your lease can result in your landlord shifting to you the cost and responsibility of making substantial and expensive alterations or improvements to the premises to comply with new laws or government orders (for example, seismic upgrading, removal of friable asbestos, or effecting repairs in compliance with the American with Disabilities Act). We’ll learn how the precise and proper drafting of such clause can help you avoid any unforeseen monetary costs and liability.

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**SECRETS TO SUCCESSFULLY SECURING THE IDEAL DENTAL OFFICE LEASE**  
***THE “REPAIR” AND THE “COMPLIANCE WITH LAWS” CLAUSES***  
***OF THE DENTAL OFFICE LEASE***  
**(Part 5 of a 12-part series)**

By Barry H. Josselson, A Professional Law Corporation \*

One strategy for success in your dental practice is to secure a fair and reasonable dental office lease. Your office lease is *one* of the most critical and significant legal agreements which you will sign in your professional career. Unlike associateship relationships which can be terminated or partnerships/corporations with other dentists which can be dissolved, the dental office lease cannot be ended unilaterally by you or breached with impunity without your incurring substantial legal risk, liability and economic fallout. Accordingly, your understanding the numerous economic and non-economic issues during the course of your negotiations with the landlord and your attorney's analysis of your lease are integral factors to the success of your practice. This article is a 12-part series addressing the dozen most overlooked and ignored provisions of dental office leases. Your following these 12 strategies for addressing these points will assure a fair and equitable lease agreement and business relationship with your landlord for years to come.

*All dental office leases contain two promises or “covenants” obligating the dentist to repair and to maintain* the physical condition of the leased premises: (i) the repair covenant and (ii) the compliance with laws covenant.

The “repair” covenant addresses your obligation to maintain the leased premises in good condition *during* the lease term and to surrender the leased premises in good condition at the *end* of the lease term.

The “compliance with laws” covenant addresses your obligation to perform, in addition to incidental repairs, possible substantial and expensive replacements, alterations or improvements to the leased premises in order to comply with laws or government orders relating to the use and occupancy of your premises.

Determining if you or the landlord is responsible for compliance with applicable laws (for example, seismic upgrading, removal of friable asbestos, or effecting repairs in compliance with the Americans with Disabilities Act of 1990) has become an increasingly significant issue in dental lease negotiations. Repairs, replacements, alterations and improvements needed to comply with applicable health and safety laws can be financially onerous. The significance of deciding who should bear this financial burden is heightened by (i) the public's awareness of the importance of

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avoiding hazards and (ii) government expectations of improved public health and safety. Prior requirements only to warn of certain risks are now being replaced by requirements to abate these hazards. Requirements which previously ignored disabled users are now being replaced by laws to protect the health and safety of all users. Laws which previously incorporated design and construction improvements in new construction are being replaced by laws to retrofit existing construction. Given the potentially significant financial burden of such alterations, your “compliance with laws” covenant must be carefully drafted, reviewed or negotiated by your dental real estate attorney. If (i) the lease is a true “net or triple net” lease (a lease whereby you have the obligation to pay for taxes, insurance, and maintenance on the building), and if (ii) the lease states that you are obligated to “comply with all laws”, there is substantial risk that you will be required to comply with such law and incur the unwarranted burden of paying for the improvements to the landlord’s building.

You, therefore, must analyze whether you have any liability for improvements or alterations mandated by law. This analysis requires a determination of (i) your obligation to undertake repairs and alterations to the premises and (ii) your duty to pay for the cost of the landlord’s compliance with laws (either as a direct charge or as an operating expense which you share with the other tenants). If you have agreed in your lease document to share in such costs without an express limitation (for example, a dollar limit on your compliance obligations) or without an express warranty by the landlord that the building is in compliance with applicable laws, you may have unwittingly agreed to pay for non-compliance conditions existing not only at the commencement of the lease but those triggered by new laws or by the undertaking of other building-related work requiring conformity with an existing legal requirement.

Recommendation: Because landlords attempt to pass compliance costs through to you as an operating expense, your dental real estate attorney should carefully review the operating expense or additional rent provisions of your lease and seriously consider negotiating a dollar limit on the amount of expenses incurred under the “compliance with laws” covenant that the landlord can pass through to you.

Next issue: The “surrender of premises” clause in your lease can result in your landlord shifting the cost and responsibility to you of removing trade fixtures or alterations from your premises at the time of your departure and consequently restoring the premises to their original condition. We will learn how the precise and proper drafting of such clause can help you avoid any unforeseen monetary costs and liability.

**SECRETS TO SUCCESSFULLY SECURING THE IDEAL DENTAL OFFICE LEASE**  
**THE “SURRENDER OF PREMISES” CLAUSE OF THE DENTAL OFFICE LEASE**  
**(Part 6 of a 12-part series)**

By Barry H. Josselson, A Professional Law Corporation \*

One strategy for success in your dental practice is to secure a fair and reasonable dental office lease. Your office lease is *one* of the most critical and significant legal agreements which you will sign in your professional career. Unlike associateship relationships which can be terminated or partnerships/corporations with other dentists which can be dissolved, the dental office lease cannot be ended unilaterally by you or breached with impunity without your incurring substantial legal risk, liability and economic fallout. Accordingly, your understanding the numerous economic and non-economic issues during the course of your negotiations with the landlord and your attorney's analysis of your lease are integral factors to the success of your practice. This article is a 12-part series addressing the dozen most overlooked and ignored provisions of dental office leases. Your following these 12 strategies for addressing these points will assure a fair and equitable lease agreement and business relationship with your landlord for years to come.

*The “surrender of premises” clause in the office lease imposes certain obligations on the dentist to redeliver the premises to the landlord on the expiration or earlier termination of the lease.* Most leases simply state that the dentist will return the premises in the same condition in which they were delivered to him or her at the beginning of the lease (ordinary wear and tear excepted). The landlord generally reserves the right (i) to require the dentist to remove certain items from the premises or (ii) to restore the premises to their original condition. This type of language often results in inconsistencies between the “surrender of premises” clause and other provisions of the lease resulting in litigation between the parties. For example, if you have been *allowed to alter* the premises during the lease term, you may intend the alterations to remain and to be surrendered with the premises at the expiration of the term. Under such a surrender of premises clause, however, you would *incur the cost of removing* the alterations from the premises and restoring the premises to their *original* condition.

Therefore, a properly drafted surrender of premises clause should specify (i) which items the dentist *may remove* from the premises, (ii) which items the dentist *may not remove* from the premises, and (iii) which items the *landlord may require* to be removed from the premises.

A properly drafted surrender of premises clause should also require the landlord (i) to notify the tenant in writing of the items which the landlord requires to be removed, (ii) to give notice within a stipulated period *before* the date on which the tenant's surrender obligations arise, and (iii) to relieve the dentist from any obligation to remove those items if the landlord fails to give notice.

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Recommendation: You and your dental real estate attorney should negotiate these three modifications:

1. First, modify the period within which you must remove the items you have a right to remove (or are obligated to remove) from the premises. Most leases require that the dentist finish the removal process before the lease term expires or terminates. Many dentists need a short, rent-free period after expiration or termination of the lease to remove those items from the premises.

2. Second, provide broader removal rights favoring the dentist compared to the landlord's normal provisions. To insure that the lease properly addresses your requirements, your legal counsel should ascertain what items you intend to install on the premises and which items you will want the right to remove. This issue of the removal of the trade fixtures installed on the premises is often the subject of negotiation between the landlord and dentist. Under California law, unless the lease specifically precludes you from removing trade fixtures, *you have the right to do so* no matter how they are attached to the real property (as long as they can be removed without seriously damaging the property and have not become an "integral" part of the premises).

3. Third, add a clause in your lease obligating the landlord to inform you, at the time alterations are made or property is installed, that those changes must be removed at the end of the lease term.

Next issue: The "estoppel certificate" clause in your lease can result in your landlord requesting you to confirm certain terms and conditions of your lease to a prospective purchaser of the property or to a lender refinancing the building's loan. We will learn how the precise and proper drafting of such clause can help you obtain reciprocal assurances from the landlord if you assign your office lease to a purchaser of your dental practice or are obtaining an office leasehold improvement loan from your dental lender.

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**SECRETS TO SUCCESSFULLY SECURING THE IDEAL DENTAL OFFICE LEASE**  
**THE “ESTOPPEL CERTIFICATE” CLAUSE OF THE DENTAL OFFICE LEASE**  
**(Part 7 of a 12-part series)**

By Barry H. Josselson, A Professional Law Corporation \*

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*All properly drafted office lease documents require a tenant to complete a certificate and acknowledge the accuracy of the information provided therein. This document is known as an “estoppel certificate”.*

The purposes of an “estoppel certificate” clause in the lease are many:

1. To confirm that the dentist’s lease is in full force and effect;
2. To clarify whether the dentist’s lease has been amended, extended or assigned to another dentist;
3. To ascertain whether any defaults exist under the lease;
4. To provide reassurance to a lender or buyer of the property that the dentist has no claims against the landlord which the landlord may *not* have disclosed to the lender or buyer;
5. To confirm that the rent payable is as stated in the lease or as otherwise represented by the landlord; and
6. To confirm that the dentist does not claim any oral or other agreement with the landlord which the lender or buyer is unable to discover by perusing the lease document. The lease, with all of its amendments, is attached as an exhibit to the estoppel certificate when the dentist signs the certificate. The dentist is then required to sign and return the estoppel certificate within a specific time period.

*Recommendation:* As with all provisions of your office lease, the estoppel certificate clause is *uniformly drafted in favor of the landlord* and does *not* provide any rights or benefits to the dentist. For example, the lease will *not* impose on the landlord a *reciprocal* duty to sign an estoppel

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certificate in connection with your assignment, sublease, or other transfer of your lease to another dentist. Such duty, however, should be requested by you since the same assurances provided by an estoppel certificate are often sought by a lender to or prospective assignee, subtenant, or purchaser of your dental practice.

***Next issue:*** The “additional requested document” clause in your lease can result in your landlord requesting certain financial information about your practice to provide to any prospective lender or purchaser of the building. We will learn how the precise and proper drafting of such clause can help you avoid the landlord’s disclosing any confidential financial information supplied by you as well as avoid incurring unnecessary or burdensome auditing costs in preparing any financial statements.

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***THE “ADDITIONAL REQUESTED DOCUMENTS” CLAUSE OF***  
***THE DENTAL OFFICE LEASE***  
**(Part 8 of a 12-part series)**

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*Office leases also have an “additional requested documents or instruments” clause.* Such provision requires the dentist to provide financial information to the landlord. The landlord then transmits this information to any prospective lender or purchaser of the building. Because this financial disclosure requirement can be burdensome, the dentist should carefully consider whether he or she wishes to agree to it.

First, if the dentist agrees to provide financial information to the landlord upon request, the information provided should be *limited* to only that which the dentist prepares in the normal course of business. If the dentist does not ordinarily prepare *audited* financial statements, the lease should specify that only *unaudited* financial statements will be accepted. It is also appropriate to limit the number of times in any year that information can be requested by the dentist's landlord.

Second, make sure that the “additional documents or instruments” provision is a reciprocal requirement obligating *both* the landlord and the dentist rather than just a *unilateral* obligation by the dentist. What obligation or requirement should the landlord satisfy upon the dentist having provided such financial information? The lease should definitely include a provision whereby the *landlord* must treat as *confidential* all financial information supplied by the dentist. There should be a further requirement that the landlord *instruct* prospective lenders, purchasers and any attorneys who may obtain or review the data also to keep such information confidential.

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Third, a properly drafted additional requested documents or instruments clause should specify that a “landlord waiver” be among the documents that may be required from the landlord by the dentist. The landlord waiver document assures the dentist’s lender that the landlord will not claim a lien on the dentist’s personal property (dental equipment, accounts receivable and supplies) in which the lender is taking a secured interest after having made a loan to the dentist either to purchase a dental practice or to build a new office. In addition, the landlord waiver agreement reassures the lender that it will have full access to the premises to repossess the property if the dentist defaults under the loan. Many practice purchase and sale transactions between dentists or start-up practices requiring loans from lenders become substantially delayed or entirely aborted because of the landlord’s intransigent position that it be able to foreclose on the dentist’s practice assets should the dentist breach the lease.

**Next issue:** The “holding over” clause in your lease can result in your landlord exacting a substantial increase in your office lease rent through your inadvertently or intentionally remaining in your office after the expiration of your lease term. We will learn how the precise and proper drafting of such clause can help you avoid any unforeseen monetary costs and liability.

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**SECRETS TO SUCCESSFULLY SECURING THE IDEAL DENTAL OFFICE LEASE**  
**THE “HOLDING OVER” CLAUSE OF THE DENTAL OFFICE LEASE**  
**(Part 9 of a 12-part series)**

By Barry H. Josselson, A Professional Law Corporation \*

One strategy for success in your dental practice is to secure a fair and reasonable dental office lease. Your office lease is one of the most critical and significant legal agreements which you will sign in your professional career. Unlike associateship relationships which can be terminated or partnerships/corporations with other dentists which can be dissolved, the dental office lease cannot be ended unilaterally by you or breached with impunity without your incurring substantial legal risk, liability and economic fallout. Accordingly, your understanding the numerous economic and non-economic issues during the course of your negotiations with the landlord and your attorney's analysis of your lease are integral factors to the success of your practice. This article is a 12-part series addressing the dozen most overlooked and ignored provisions of dental office leases. Your following these 12 strategies for addressing these points will assure a fair and equitable lease agreement and business relationship with your landlord for years to come.

The “hold-over” clause in dental office leases is the provision which is the least negotiated and most ignored by dentists. A dentist “holds-over” by remaining in possession of the premises, with or without the landlord's express or implied consent, after the lease expires or is otherwise terminated. The hold-over clause specifies the consequences of the dentist's remaining in possession.

The amount of rent due from the tenant during any hold-over period is the key issue to be negotiated. On the one hand, landlords usually want to impose rent at a high multiple of the rent currently in effect when the lease is terminated to motivate the tenant either to extend the lease on mutually agreeable terms (for example, according to the lease's option to renew) or to vacate the premises. The landlord also wants to be reasonably certain of the future date that the premises will be available for occupancy by a new tenant. Consequently, hold-over rental rates vary from 125% to 200% of the then current rental rate. Such dramatic increase in rent is the means by which the landlord seeks to motivate or to penalize the tenant who is dilatory in electing to remain in or to vacate the premises.

The relevance of the hold-over clause is very real: dentists sincerely believe that they will either exercise their options to renew their leases and stay in the premises or, should they decide to leave, vacate the premises in a timely manner and relocate to other dental space. Reality, however, is not quite as orderly as dentists may assume. Some of our dental clients unwittingly have their hold-over clause applied to them because of their own miscalculation as to the time it takes to build out a new dental office and it, therefore, not being ready for occupancy at the end of their former premises' lease term. Sometimes the dentist's general contractor or other third parties readying the

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new premises for the dentist's occupancy have been delayed by unanticipated events such as the city's slow approval of their plans, permits for constructions being issued in a tardy manner, or subcontractors having to redo less than satisfactory work. In these instances the dentist has regrettably incurred the landlord's onerous hold-over rental rate because of such delay. The landlord is *not* motivated to waive the higher hold-over rental rate especially if the landlord knows the dentist shall be eventually departing from the premises. There is no incentive by the landlord to retain the dentist's goodwill if the dentist is not intending to remain as a tenant.

Recommendation: Negotiate the following three provisions to be included in your lease to adequately protect you and to still provide the landlord with its goal of a hold-over rental rate:

1. The hold-over rental rate should penalize the dentist and protect the landlord from a *protracted* hold-over by the dentist which is *not* consented to by the landlord. Make provisions, therefore, in the lease that the hold-over rental rate shall apply after a reasonable grace period following the conclusion of the lease term if you have not vacated the premises (for example, thirty to sixty days). The landlord's original rent would continue to be paid by you during such short period. After the agreed upon "grace period," the 125% to 200% rental increase would kick in.

2. If you hold over *without* the landlord's consent and with the knowledge that the landlord has leased (or is negotiating to lease) the premises to a new tenant, you may be liable to the landlord for its lost profits due to your intentional interference with the landlord's contractual relations with the proposed tenant. Accordingly, provide in the hold-over clause that your hold-over rental rate shall be the landlord's *sole* recourse against you for any damages it may have suffered due to your delay in vacating.

3. Landlords *usually* require an indemnity from a tenant against any liabilities or losses (including lost profits) suffered by the landlord because of the tenant's wrongfully holding over. In many leases the general indemnity provisions are broad enough to cover the landlord's losses. It is prudent for the dentist to attempt to *modify such indemnification clause* in the lease by limiting its impact. Specifically rewrite the indemnification clause and hold-over rental rate clause to specify the sole damages suffered by the landlord relative to any delay by the dentist in vacating the premises. Otherwise, you may be liable to your landlord for its lost profits due to your interference with the landlord's contractual relations with other prospective tenants.

Next issue: The "assignment and subletting" clause in your lease can result in your landlord exercising unilateral and complete control over the dentist to whom you may wish to assign your office lease and to sell your dental practice. We will learn how the precise and proper drafting of such clause can help you avoid any unforeseen problems, risks and economic losses.

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**SECRETS TO SUCCESSFULLY SECURING THE IDEAL DENTAL OFFICE LEASE**  
**THE “ASSIGNMENT AND SUBLETTING” CLAUSE OF THE DENTAL OFFICE LEASE**  
**(Part 10 of a 12-part series)**

By Barry H. Josselson, A Professional Law Corporation \*

One strategy for success in your dental practice is to secure a fair and reasonable dental office lease. Your office lease is *one* of the most critical and significant legal agreements which you will sign in your professional career. Unlike associateship relationships which can be terminated or partnerships/corporations with other dentists which can be dissolved, the dental office lease cannot be ended unilaterally by you or breached with impunity without your incurring substantial legal risk, liability and economic fallout. Accordingly, your understanding the numerous economic and non-economic issues during the course of your negotiations with the landlord and your attorney's analysis of your lease are integral factors to the success of your practice. This article is a 12-part series addressing the dozen most overlooked and ignored provisions of dental office leases. Your following these 12 strategies for addressing these points will assure a fair and equitable lease agreement and business relationship with your landlord for years to come.

*The “assignment and subletting” clause in a lease routinely includes many restrictions on the dentist's right to transfer the lease.* The assignment and subletting provision reflects opposing interests between the landlord and tenant. The landlord's desires are threefold: (i) to secure a credit worthy tenant who will meet its financial obligations and whose use, character and reputation are appropriate for the building; (ii) to enjoy the same freedom to approve a new tenant as it had in selecting the original tenant; and (iii) to avoid competition from tenants in the leasing of space and to benefit from any increases in market rental rates over the lease rent then presently due. The dentist, on the other hand, has a major interest in preserving flexibility. The dentist may need to downsize and dispose of excess space. Or the dentist who initially leases surplus space but anticipates future growth will want to sublease the excess space until it is needed to accommodate the practice's growth. Second, the dentist may wish to sell the practice or relocate it. Third, the dentist will want to profit from any appreciation in the value of the lease, especially from any investment which has been made in the improvements to the premises (for example, extensive plumbing, cabinetry, and other trade fixtures uniquely suited to the dental practice).

Because leases require the landlord's prior consent to any “transfer”, it is imperative that your document clearly spell out what constitutes a “transfer”. An assignment of the lease to another dentist? A sublease of the premises to a space-sharing dentist? A pledging of the dentist's leasehold interest as security for a loan? Any change in the ownership of the dental practice (for example, bringing into the practice a 50% partner or shareholder)? Any change in the organization of the dentist (for example, the dentist becoming a professional dental corporation in lieu of practicing as a sole proprietor)? *A transfer requiring that the dentist obtain the landlord's prior written consent is usually broadly defined in the dental lease to include all of these events.*

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California law previously permitted *only reasonable restraints* on your right to transfer or to sublease office space to another party. In 1989 and 1991, California passed legislation setting forth that parties should be free to negotiate the terms of their office lease irrespective of how one-sided or onerous such terms might be. Consequently, any transfer restriction (which is clearly expressed in a lease document) is generally enforceable. Dentists, therefore, need to be extremely cautious when signing leases without perusing the specific language regarding their rights to assign or to sublease to other dentists. Your dental real estate attorney should negotiate the following provisions to be included in your lease document:

1. If the lease permits the landlord to restrict your ability to assign or to sublet the lease, the lease should provide that the landlord's consent "may not be unreasonably withheld."

2. If your assignment or subletting clause provides that the landlord's consent is subject to any express standard or condition (whether or not it is reasonable; for example, subject to the "landlord's sole and arbitrary discretion"), such provision is absolutely enforceable by the landlord. Accordingly, do not sign leases with standards or conditions granting the landlord the right to withhold its consent unless such criteria are based on "reasonableness."

3. If the landlord requires that its consent be obtained and is unwilling to include a "reasonableness" standard, then merely include the requirement that the landlord's consent must be obtained and omit any language establishing the standard by which the landlord is bound to act. California law requires that the landlord may not unreasonably withhold consent (i) if the lease is silent on the standards for the landlord's giving consent and (ii) if the lease were executed after September 22, 1983.

4. If the landlord is unwilling to agree to a "reasonableness" standard or to exclude any reference to the criteria for which the landlord may give consent, then delete in its entirety the clause pertaining to your obligation to obtain the landlord's consent prior to the transfer of the lease. California law provides that if the lease contains no restriction on assignment and subletting, then the lease is freely transferable by the dentist.

5. Document in writing (and not through verbal communication) your request for the landlord's consent to the transfer. California law provides that the landlord's failure to respond in writing within a reasonable period of time to your written request for consent will be deemed an unreasonable withholding of consent.

6. An "assignment" of the lease is a transfer by the dentist of all of its rights and interest under the lease for the remaining term. By contract, a "sublease" is a transfer of less than all of the dentist's rights and interest under the lease (for example, under a space-sharing relationship with another dentist, transferring possession of only part of the premises for less than the remaining term of the lease or on terms which are different from those found in the lease between the landlord and the original tenant). In an assignment, the assigning dentist remains liable after the assignment unless the dentist has been expressly released from liability by the landlord. It is, therefore, critical that if you sell your practice and assign the lease to the purchasing dentist, try to obtain the landlord's release from any further liability after the sale to the buyer is consummated.

Recommendation: The best time to reduce your exposure or delete your responsibility for your new buyer's acts under the lease is before you sell your practice - at the time of the signing a new lease or renewing your existing lease.

7. Limit the scope of transfers for which the landlord's consent is required. The most common exclusion is one permitting a transfer of the office lease to a new entity resulting from organizational changes (for example, changing from a sole proprietor to a professional dental corporation.) Also, try to anticipate the kinds of transfers you are most likely to make and then negotiate exclusions for these transfers. For example, if you know that you will initially want to bring in an additional dentist to sublet surplus space, you should negotiate an exclusion from the landlord's consent for subleases of this excess space for a specified period of time. Or, if instead of subletting space, you anticipate that you will be space-sharing with another dentist to save money or generate other economies of scale, your landlord is more likely to exclude this space-sharing from the transfer restrictions if the sharing is limited to a certain number of persons and to a certain type of profession (for example, no more than two additional dentists).

Key point: Be aware that the landlord's consent to your sublease is not a consent to make alterations or additions to the premises which may be required to implement the sublease. You will still have to follow those procedures set forth in the "alterations and additions" clause of your lease.

8. Also, many landlords insist that any options to renew or other rights negotiated by you remain "personal" to the original tenant and, therefore, are not transferable by you to the dentist to whom you may have assigned or sublet your premises. Consequently, if these options to renew or other rights are valuable to you and your practice, the landlord's restrictions will adversely impact your ability to transfer your lease. Action item: Negotiate changes to these clauses at the same time that you are reviewing or negotiating your assignment and subleasing clauses.

Next issue: The "subordination, non-disturbance and attornment" clause in your lease can result in your abdicating any protection you may have from a new landlord terminating your lease if there has been a lender's foreclosure on your building. We will learn how the precise and proper drafting of such clause can help you avoid any unexpected evictions and unforeseen risks or liability.

**SECRETS TO SUCCESSFULLY SECURING THE IDEAL DENTAL OFFICE LEASE**  
**THE “SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT” CLAUSE**  
**OF THE DENTAL OFFICE LEASE**  
**(Part 11 of a 12-part series)**

By Barry H. Josselson, A Professional Law Corporation \*

One strategy for success in your dental practice is to secure a fair and reasonable dental office lease. Your office lease is *one* of the most critical and significant legal agreements which you will sign in your professional career. Unlike associateship relationships which can be terminated or partnerships/corporations with other dentists which can be dissolved, the dental office lease cannot be ended unilaterally by you or breached with impunity without your incurring substantial legal risk, liability and economic fallout. Accordingly, your understanding the numerous economic and non-economic issues during the course of your negotiations with the landlord and your attorney's analysis of your lease are integral factors to the success of your practice. This article is a 12-part series addressing the dozen most overlooked and ignored provisions of dental office leases. Your following these 12 strategies for addressing these points will assure a fair and equitable lease agreement and business relationship with your landlord for years to come.

“Subordination, non-disturbance, and attornment” clauses (hereinafter referred to as “SNDA” clauses) are often the subject of intense negotiations when leases are drafted; however, many dentists ignore or are unaware of their significance when they sign their leases.

These clauses define the relationship between the landlord's current and future lenders and the tenant if the landlord defaults on its loan obligations and the lender forecloses on the property.

As a condition of lending money to landlords, lenders require that their liens be senior and superior to all other liens or encumbrances on the real property, including office leases. Therefore, to meet this requirement, all preexisting leases (such as your dental office lease) must be subordinated to the lender's lien. If a dentist had a lease with a landlord and were in possession of the premises before the lender's financing lien had been recorded, the dentist's lease would have priority over the lender's lien if a foreclosure were to occur. Your right to possession of the premises would, therefore, not be affected by the lender's foreclosure of the property. A “subordination” clause provides that the dentist agrees (i) to forego its priority position (with the office lease) and (ii) to give the lender's lien priority in the event of foreclosure.

In exchange for agreeing to a “subordination” clause, a dentist with bargaining leverage will often require that the lender agree that it will not disturb the dentist's right to possession in case of a foreclosure provided the dentist is not in default under its lease. This is known as a “non-disturbance” clause. Many lenders typically require that the dentist “attorn” to the lender if the lender steps into the landlord's shoes via a foreclosure. This “attornment” clause means that the dentist acknowledge the lender as the new owner and promise to abide by all of the terms and conditions of the lease with this new owner.

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Consequently, the usual dental lease contains a subordination clause and an attornment clause. *These two clauses protect the landlord.* The lease may include a “non-disturbance” clause; however, *this is less likely because it protects the dentist.*

Because of the great number of real estate foreclosures in California in the mid 1990’s, lenders and tenants each became interested in including “SNDA” clauses in office leases. Note, however, that the interests of the lender and the dental tenant are diametrically opposite: the landlord’s lender wants to recover as much as possible its loan principal with interest. That objective can be accomplished by having the real estate as security for the loan be as valuable as possible in event of foreclosure. A building filled with financially sound tenants whose leases are current, at market rents, and which extend for a reasonable time into the future protects the lender. However, the landlord’s lender also wants flexibility to decide which strategy best suits its needs. Therefore, consider the following:

a. *In good economic times*, rents are high, dentists are looking for office space, and the lender is, therefore, less concerned about keeping existing tenants if the landlord were to default. The lender might in fact prefer to be able to cut off the rights of existing tenants if the lender expected to be able to acquire new tenants with more lucrative lease arrangements if the landlord defaulted on its loan. In this type of dental office lease environment, the lender may *not* be interested in obtaining attornment agreements from dentist/tenants and may *not* be willing to enter into non-disturbance agreements.

b. *In difficult economic times*, when leaseable property is quite prevalent (for example, in the mid 1990's in California), few tenants are seeking space and rents do not rise. The lender may prefer to keep almost any tenant in the property after a landlord's default. This possibility is likely if the dentist negotiated its lease when rental rates were *higher* than the market rate at the time of the foreclosure. In this environment the lender will want to have an attornment clause in the lease and will permit the tenant not to be disturbed in its occupancy of the premises.

3. *The lender’s goals* are to keep its options open and retain as much flexibility as possible to continue or to terminate leases after the foreclosure has been completed and the real estate climate becomes more predictable to the lender. This flexibility can be accomplished by requiring the dentist to attorn at the lender’s request and by *not* extending any non-disturbance protection to the dentist.

4. *The dentist’s goals* are totally opposite to those of the lender. In favorable economic times when premium office space is scarce, the dentist wants to preserve a favorable rental rate and a good office location. Moreover, *the dentist may also have made a substantial investment in leasehold improvements which would otherwise be lost if the office lease were terminated prematurely by the lender.* Accordingly, you should strive to protect your leasehold interest by negotiating a favorable non-disturbance clause as part of any agreement to subordinate your leasehold interest to the lender’s lien. On the other hand, in more difficult economic times as illustrated by California’s last recession, your strategy might be to escape from the lease. Closing or relocating the dental practice may be appropriate. Other factors to consider might be the

substandard condition of the building, and the reality that the current rent might greatly exceed the cost of comparable space elsewhere.

The importance of obtaining a non-disturbance agreement from the landlord cannot be over-emphasized. If the dentist is required “to attorn” at the request of the foreclosing lender and at the same time has no non-disturbance clause protection, the dentist is faced with two problems. First, the dentist can lose an economically viable lease. Secondly, the dentist cannot effectively plan his or her relocation because eviction proceedings can proceed quickly subsequent to a foreclosure lender’s decision not to seek an attornment from the dentist.

*How can you protect yourself?* Foreclosure by the lender generally terminates all subordinate leases; therefore, sophisticated dentists frequently insist on receiving assurances of non-disturbance of their tenancies in case of such foreclosure. In circumstances where the lease is subject to a preexisting deed of trust, you ideally should obtain non-disturbance protection by securing a *separate* non-disturbance agreement from the *existing* lien holders. For a lease which provides that it will be subordinated to *future* lien holders, the non-disturbance protection clause should be *included in the lease agreement itself*.

Your bargaining position is radically different between existing and future lenders. An *existing* lender has no obligation to grant a non-disturbance protection clause to you because your lease is *already subordinate* to the lender’s mortgage. In a tight office lease market, however, both landlords and lenders are motivated to attract good credit tenants, and lenders are therefore often amenable to grant non-disturbance protection. Because of the myriad commercial office lease foreclosures in California in the mid 1990’s and dentists’ awareness of the importance of non-disturbance clause protection, more dentists are seeking such non-disturbance clauses and lenders have consequently become more willing to agree to them. In a large dental office lease transaction or in a transaction with a possibility of foreclosure by the lender, *you should make receipt of a non-disturbance clause a condition of the deal*.

You have substantially more leverage with regard to a *future* lender by insisting that your agreement to subordinate your lease be contingent on your receipt of written assurance of non-disturbance from the future lender. *It is perfectly reasonable and appropriate for you to expect not to be dispossessed* from your premises due to the landlord’s default if (i) you have performed your obligations under the lease and if (ii) you have expended considerable sums of money to build out your office space.

***Next issue:*** The “repairs and maintenance” clause in your lease can result in your landlord shifting the cost and responsibility of making repairs (regardless of their cost or nature) to you. We will learn how the precise and proper drafting of such clause can help you avoid any unforeseen monetary costs and liability.



**SECRETS TO SUCCESSFULLY SECURING THE IDEAL DENTAL OFFICE LEASE**  
**THE “REPAIRS AND MAINTENANCE” CLAUSE OF THE DENTAL OFFICE LEASE**  
**(Part 12 of a 12-part series)**

By Barry H. Josselson, A Professional Law Corporation \*

One strategy for success in your dental practice is to secure a fair and reasonable dental office lease. Your office lease is *one* of the most critical and significant legal agreements which you will sign in your professional career. Unlike associateship relationships which can be terminated or partnerships/corporations with other dentists which can be dissolved, the dental office lease cannot be ended unilaterally by you or breached with impunity without your incurring substantial legal risk, liability and economic fallout. Accordingly, your understanding the numerous economic and non-economic issues during the course of your negotiations with the landlord and your attorney’s analysis of your lease are integral factors to the success of your practice. This article is a 12-part series addressing the dozen most overlooked and ignored provisions of dental office leases. Your following these 12 strategies for addressing these points will assure a fair and equitable lease agreement and business relationship with your landlord for years to come.

The “repairs and maintenance” clause of the lease allocates between the landlord and dentist the duties and responsibilities regarding repair and maintenance of the components of the premises, the systems (for example, heating, ventilation and air-conditioning) and equipment serving the premises, the structural and exterior portions of the building, and the common areas of the building.

The landlord’s and dentist’s objectives are both mutual and conflicting regarding these repair and maintenance duties. The landlord is motivated to have you maintain your premises in good operating condition to increase the building’s attractiveness and marketability. You, on the other hand, want to be assured that the repair and maintenance of the exterior and public areas of the building are accomplished in a prompt and responsible manner.

Because new or existing laws might require significant repairs or renovations be made to the dentist’s office, both the “compliance with laws” covenant (as previously addressed) and the “repair and maintenance” clause should consistently and clearly state whether the landlord or the dentist is required to make the requisite repairs or renovations. For example, if the parties intend the dentist to be responsible for *all* repairs and renovations required by law *regardless* of their cost or nature, the lease agreement *should specifically state* this intention. Conversely, if the parties stipulate that the dentist should *not* be required to pay for repairs over a *specified dollar amount*, this intention *should be expressly set forth* in the lease document.

A properly negotiated “repairs and maintenance” clause between the landlord and dentist allocates these responsibilities between the parties on an *equitable* basis. For example, a repairs and

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maintenance clause may limit the dentist's repair and maintenance obligations to (i) non-structural portions of the premises (including the tenant improvements), (ii) that portion of the main building's systems and equipment located in the premises, and (iii) any systems and equipment which *exclusively* serve the premises. In most leases the term "tenant improvements" is defined in detail in the lease or the leasehold improvements exhibit. If the parties do not execute an exhibit defining the tenant improvements, they should include a definition of "tenant improvements" in the lease.

What about your right to make repairs and deduct their cost from the rent? Landlords strenuously resist giving tenants the right to make repairs on the landlord's behalf. Landlords are appropriately hesitant to grant such "self-help" rights because of their belief that they are better qualified to manage and operate the building. Some landlords, however, may give to a dentist who is leasing substantial space a "modified" right of self-help (for example, a right to perform repairs to systems and equipment serving *only* the dentist's premises and *not* the building exterior or common areas). Most landlords would also require that the tenant's rights under this clause arise only if the landlord has failed to make repairs to the premises or systems and equipment serving the premises within a certain prescribed period of time (for example 30 days). Try to negotiate (i) a right to *abate* your rent or (ii) a right to *terminate* the lease should the landlord fail to perform its obligations.

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