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APRIL 2-5, 2024

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Intensive Legal Workshop

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A Caveat

- The information I provide today is general in nature and represents my opinion.
- State laws vary, and some of the clauses I suggest may not be allowed in certain states.
- **Do not** make changes to your rental agreement, forms and other procedures without consulting your own legal counsel.
- This presentation **does not** establish an attorney-client relationship between us.
- **Do not** think these slides constitute full clauses you can copy and place in your own rental agreement.
- **Review** the existing clauses in your rental agreement to ensure you aren't creating conflicts.



Necessary Lease Clauses

The Information You Gather

- **Name:** Make sure it's "right."
- **Address:** We'll discuss the concept of "last known address" several times today.
- **Phonenumberbers:** Get multiples and specify which is which.
- **Work location and phone number.**
- **Government-issued photo ID:** (It should be protected.)
- **Date of birth**
- **Social Security number:** Let's discuss (should be protected).
- **Alternate contact:** Required in many states. Some states require more. An emergency contact is different.

Military Status

- This is governed by the federal Servicemembers Civil Relief Act (SCRA). Several states include their own requirements in their self-storage statutes.
- You're required to ask affirmatively if the person renting from you is active-duty military.
- This includes all military-service branches as well as the National Guard, Reserves and some uniformed responders from the National Institutes of Health and National Oceanic and Atmospheric Administration.
- You are also required to inquire if the renter is a dependent of someone who's active duty. Arguably, dependents are entitled to the same protections under the SCRA.

Lease Term

- **Make it clear:** What is the initial term of the self-storage rental agreement?
- Do you renew on the first of each month or the day of the month the occupant signed the agreement?
- If first of the month, do you prorate? Do you ask for the second month in advance?
- If the agreement renews on the date the agreement was signed, do not use the term “anniversary date.”

Termination

Also prepare for the end of the term.

- How much notice and in what form do you want notice to terminate?
- What amount of notice do you have to give to terminate the occupant?
- Do you need a reason to terminate the occupant?

Space/Unit Size

- None of you have all perfectly sized 10-by-10s.
- Size is for description or demonstration purposes only.
- The occupant has had the opportunity to view the space and determine the size is suitable for their purposes.
- The occupant isn't entitled to money back if the space is "X%" smaller than represented.

State Statutes

- Almost every state has some amount of required language that must be in a rental agreement.
- This might be a bold-type disclosure of the lien and the way the personal property can be sold if the lien is enforced.
- It could also include mandatory language/disclosures to allow for email default notices or to avoid advertising in a newspaper.
- Some states even build into their statutes type-size requirements or other required forms to be provided.

Nevada as an Example

1. Each rental agreement must be in writing and must contain:

(a) A provision printed in a size equal to at least 10-point type that states, "IT IS UNLAWFUL TO USE A STORAGE SPACE IN THIS FACILITY AS A RESIDENCE."

(b) A statement that the occupant's personal property will be subject to a claim for a lien and may be sold or disposed of if the rent or other charges described in the rental agreement remain unpaid for 14 consecutive days.

(c) A provision requiring the occupant to:

(1) Disclose to the owner any items of protected property in the storage space.

(2) If the occupant is subject to mandatory licensing, registration, permitting or other professional or occupational regulation by a governmental agency, board or commission and the protected property to be stored is related to the practice of that profession or occupation by the occupant, provide written notice to that agency, board or commission stating that the occupant is storing protected property at the facility, identifying the general type of protected property being stored at the facility and providing complete contact information for the facility. The occupant shall give the owner a copy of any written notice provided to such an agency, board or commission.

(3) Provide complete contact information for a secondary contact who may be contacted by the owner if the owner is unable to contact the occupant.

Nevada as an Example

2. If any provision of the rental agreement provides that an owner, lessor, operator, manager or employee of the facility, or any combination thereof, is not liable, jointly or severally, for any loss or theft of personal property stored in a storage space at the facility, the provision is unenforceable unless:

(a) The rental agreement contains a statement advising the occupant to purchase insurance for any personal property stored in a storage space at the facility and informing the occupant that such insurance is available through most insurers;

(b) The provision and the statement are:

(1) Printed in all capital letters or, if the rental agreement is printed in all capital letters, printed in all capital letters and boldface type, italic type or underlined type; and

(2) Printed in a size equal to at least 10-point type or, if the rental agreement is printed in 10-point type or larger, printed in type that is at least 2 points larger than the size of type used for other provisions of the rental agreement; and

(c) The provision is otherwise enforceable pursuant to the laws of this state.

Nevada as an Example

3. NRS 108.473 to 108.4783, inclusive, do not apply and the lien for charges for storage does not attach unless the rental agreement contains a space for the occupant to provide the name and address of an alternative person to whom the notices under those sections may be sent. The occupant's failure to provide an alternative address does not affect the owner's remedies under those sections.
4. The parties may agree in the rental agreement to additional rights, obligations or remedies other than those provided by NRS 108.473 to 108.4783, inclusive. The rights provided in those sections are in addition to any other rights of a creditor against a debtor.

Defined Terms

- Use the terms defined by your legislature.
- Most statutes define terms for:
 - You as owner or manager
 - The person renting from you
 - The stuff they store
 - The title of the rental document
 - The entirety on your business
 - The space you rent to the occupant

Charges and Fees

If you charge for services such as lock-cutting, lien notices, lien-sale inventories/photos, lien-sale advertising, disposal of goods, sending invoices, credit card services or after-hours response, the fees and their amounts should be disclosed in your rental agreement.

- The same is true for non-sufficient funds, declined credit cards and disputed credit card charges.
- Make sure the late fee you are charging is compliant with the “safe harbor” late-fee laws in your state, if any. (Nevada is \$20 or 20%, whichever is greater.)

Appropriate Use/ Prohibited Property

- If you don't prohibit the storage of an item up front, you're hard-pressed to later claim it's prohibited.
- Be especially vigilant of local fire- and zoning-code prohibitions.
- You also need these “teeth” later to demonstrate a breach.
- Your mortgage and insurance require you to prohibit storage of hazardous materials as defined by the federal Comprehensive Environmental Response Compensation and Liability Act (CERCLA).

Value and Liability Limit

- You need a limit of the value of the personal property stored” provision.
- The lower the value limit (within reason) the better, as courts award damages based on “actual cash value.”
- You must also tie the value limit into a covenant not to sue for more than the value limit, otherwise known as a negligence limit provision.
- Together these clauses become an important hurdle to occupant litigation.
- Many updated statutes recognize the value limit in the rental agreement as the maximum value of the personal property stored.

Release of Liability

- If permitted in your state, you should include a release of liability for loss or damage to the personal property stored in the space.
- You need a separate release of liability for injury or death from actions that occur while in the space or at the facility.
- Although courts won't always extend coverage, include invitees and guests of your occupant in the release language/coverage.

Control of Access

- Denial of access isn't just for default anymore.
- Think in terms of police activity at your facility, unsafe conditions, evacuation orders, power outages and maintenance.

Right to Enter

- This clause needs to allow you the right to enter a unit for two separate situations:
 - Emergencies (do not forget to define an emergency) and the fact that notice will be given after entry. Pay special attention if you use automatic or Bluetooth locks.
 - Non-emergencies: How much notice are you going to give before an entry?
- What happens to the lock (if applicable), or what are your responsibilities regarding locking the space once entry has concluded?

Indemnification

- Indemnification is a contractual agreement that provides that the party giving the indemnification will defend any claim made against the indemnified party and pay any judgments granted against that party.
- In self-storage, this is often related to the actions of one occupant “harming” another occupant or their personal property. For example, one occupant damaging the stored vehicle of another occupant.
- This is one of those clauses in your rental agreement in which the terminology you use really matters.

Waiver of Subrogation

If properly used, this clause will prevent your occupant's insurance company from trying to make a claim against your business for reimbursement if it pays the occupant's claim.

Severability

This language provides that if a court determines that any clause or part of a clause of your rental agreement is legally unenforceable, the court can only disregard that clause or that part of the clause and not disregard the rest of the rental agreement.

Proper Notice

- How do you want to give notice to your occupant?
- How do you want your occupant to give notice to you?
- How do you want your occupant to notify you of change of address and intent to vacate?
- Give yourself the legal right to communicate with the occupant in all possible ways including phone, email, fax, text and social media.

Default Remedies

- Make sure this clause not only defines what can be an event of default (not just non-payment) but also complies with the requirements in your statute.
- **Example:** Some statutes **don't** allow for a space to be overlocked until a certain number of days after a default.
- Make certain you've given yourself all the necessary remedies you may ever need—not just sale, but disposal and towing (if permitted). Also make sure your remedies are appropriate for other defaults.

Assignment and Sublet, and Jury Waiver

- You want the person who signs the rental agreement to be the actual occupant of the space and the person who owns the personal property in the space.
- You need to be allowed to assign the rental agreement in case you ever form a new entity or sell.

Jury waiver:

No good ever comes out of a self-storage jury trial
(if permitted by your state law.)

Site of Law

This clause requires that the law of the state where the self-storage facility is located be used for any court action, and that if there's a court action, it occurs in the jurisdiction you pick.

Employees

- Employees can't modify the rental agreement orally; modifications can only be in writing and signed by someone authorized by the company.
- Employees can't be used to help load/unload/move any personal property.
- Occupants can't be threatening to employees of the facility.



Modern Lease Clauses

Modern-Day Payment

- How do you accept rent?
- Where/by what means do you accept rent?
- When do you refuse certain forms of payment, such as checks or credit cards, after the occupant is late or if a payment form has previously not worked?
- When do you remove an overlock after payment of late rent?

Forms of Payment

- Clarify under which terms you'll charge a credit card including setting up auto payment.
- What are you allowed to charge to the credit card?
- Are you allowed to try again if the credit card is declined? Is there a fee for declined credit card payments? Disputed credit card payments?
- Do you accept ACH? If so, how, when and what are you allowed to debit from the account?
- Do you accept other forms of payment such as Venmo or crypto?
- The occupant is responsible for confirming that the auto payment goes through.

Damage to Facility or Space

- Make it the responsibility for the occupant to pay for damages to the space and facility in the rental agreement, otherwise you may not be able to recover these damages.
- Specifically prohibit conduct that would damage the space and facility.
- Consider rules for non-vehicle, gas-powered items such as chainsaws, tractors and snow blowers.

Insurance Requirements

You fall into one of three camps:

- You don't care about contents insurance and say only that the owner isn't responsible to insure.
- You'd like occupants to carry contents insurance but aren't going to enforce it.
- You require proof of insurance, and if the occupant doesn't have any, you'll require them to enroll in an insurance plan sold at the facility.

When discussing insurance, I know some of you opt to offer a protection plan instead of contents insurance.

'Security-Type' System Disclaimers

- Even a fence or a gate is a security feature.
- These features don't guarantee that personal property won't be lost, stolen or damaged.
- The occupant will be safe on the property or in the space.
- The systems aren't guaranteed to always work properly.

Release for Mold

- Separate and apart from a regular release, you need to disclaim liability for mold.
- Generally, it isn't your fault if something becomes moldy.
- You may not be able to know mold is occurring because the occupant keeps the keys to the lock (different clause for vehicles stored outdoors).
- Include proper storage directions to help prevent mold.

Good Lock Clause

- Where do you stand on a lock recommendation or requirement?
- Who chooses the lock to use? Who keeps the keys?
- What happens if the lock is removed, defeated or defective? Or you find the unit unlocked, or you take the lock off for an emergency or non-emergency entry?
- If you're using an electronic-lock system, you must be even more careful to define your rights and responsibilities.

Inspect the Space

Since you can't and shouldn't want to get into the space, you need to legally clarify the responsibility of the occupant to check on their personal property at appropriate intervals.

Partial Payments

- Even if you occasionally accept partial payments, consider prohibiting them in your rental agreement, so you aren't obligated to accept them.
- I disagree with clauses in many rental agreements that state partial payments don't waive any default notices given and you can proceed to sale even after partial payment(s).

Alternative Dispute Resolution

- ADR clauses represent the highest and best hurdles to the courthouse. They protect against people filing in small-claims court just to see if they win any judgment.
- These clauses generally include mandatory mediation and/or arbitration.
- Additionally, in many states, a mandatory arbitration clause prevents the formation of class-action lawsuits.

Additional Clauses

A few other clauses to consider:

- Define loitering and prohibit it.
- How many hours per day can the occupant be in the space?
- Extermination responsibility.

Special-services clauses:

- Temperature/humidity control.
- Use of electricity, dumpster, potable water, dump station, service bay and wash bay.
- Extended gate/door access to the space.
- Package acceptance.
- Elevators, lifts, carts, docks, alarm systems, snow removal.



Vehicle Storage

Vehicle Storage

Vehicle storage is a different business from self-storage. The focus in this presentation is on outdoor vehicle storage, but most of these issues apply to indoor vehicle storage as well.

The Differences

- The value of the item stored.
- Vehicles are full of hazardous materials—gas, oil, transmission, brake fluid, batteries, chemical toilet and propane.
- Outdoor vehicle storage is a bailment; you can see and touch the vehicle, you know when damage has occurred, and you have a higher duty to try to protect against damage and loss.
- You know when the vehicle is parked on site and when it isn't.
- It's easy for vehicles to be parked in the wrong space, over the line or otherwise impinge on someone else's space.
- Default remedies for vehicle storage are generally different than for personal property.
- Mother Nature can really mess things up in a hurry.

Vehicle-Storage Questions

All vehicle storage requires asking questions you don't necessarily worry about with traditional self-storage.

The big questions:

- What's being stored?
- Who owns it?
- Who insures it?
- Who has a lien or liens on it?

Then play connect the dots.

Separate Agreement

Outdoor vehicle storage needs a separate rental agreement. Indoor vehicle storage may be done by addendum, but a separate agreement is also possible.

Reasons:

- Definition of what's stored is different
- Bailment waiver is different
- Insurance is different
- Value is different
- Default is way different
- Hazardous materials is different
- No lock clause



If You Are Going to Have a Sale



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A Lien Sale

There is simply no way this class can teach you how to perform a proper lien sale given that there are so many different states represented. However, there are some big-picture thoughts worth sharing today:

- A lien sale should always be a last resort.
- If you are in communication with the occupant, you should not sell.
- The reason for the sale is to help satisfy the lien. There are rare circumstances—and only after following other procedures under the statute—that are you allowed to just dispose of personal property without a sale.

If You Are Going to Sell

Every state except Alaska has a lien-sale statute, and the state is working on one.

There are a few commonalities under these statutes:

- There are definitions for you and the renter and, most importantly, a term known as the last-known address.
- Every statute will require some form of written notice to the renter at the last-known address.
- As we have discussed, make certain you control how you are notified and how you accept changes made to the last-known address.

If You Are Going to Sell

- Make sure you count the “days required” properly. Generally, calculating a number of days “after” something requires that you add a day to your count.
- Understand the way you need to serve the notice(s).
- Understand any publishing requirement for a newspaper, and if there is an exception to using a newspaper, understand the trade-off risk.
- Know from the beginning if you are having a sale at your facility or online (and if you can sell online.)
- Don't get upset if your occupant ends up buying their personal property at the sale. That might be a better result than you think.

If You Are Going to Sell

- Have a well-drafted set of sale rules for in-person or online sales to cover all the what-ifs of the event.
- Review and understand the actual EULA with your online lien-sale company to know when a “sale” actually occurs. Further, understand what happens if the winning bidder doesn’t appear to pay and claim.
- Ultimately, if you go this far, never have a “no sale.”



Terms That Cause Aggravation



Easy Fixes: Statutory Terms (NV)

- “Owner” includes a lessor, operator or other person authorized by the owner to manage a facility, enter into rental agreements with occupants and collect rent from occupants.
- “Occupant” includes a person or a person’s sublessee, successor or assignee who's entitled to the exclusive use of an individual storage space at a facility pursuant to a rental agreement.
- “Personal property” means any property not affixed to land and includes without limitation merchandise, furniture, household items, motor vehicles, boats and personal watercraft.

Easy Fixes: Statutory Terms (NV)

- “Last known address” means the postal and electronic mail address, if any, provided by an occupant in the most recent rental agreement between the owner and the occupant, or the postal and electronic mail address, if any, provided by the occupant in a written notice sent to the owner with a change of the occupant’s address after the execution of the rental agreement.
- “Storage space” means a space used for storing personal property, which is rented or leased to an individual occupant who has access to the space.
- “Facility” means real property divided into individual storage spaces. The term doesn't include a garage or storage area in a private residence.

Free

- “Free” is defined by **Merriam-Webster** as:
 - Not costing or charging anything
 - Having a scope not restricted by qualification
- Are there any conditions or costs associated with your first month free offers?
- Do you offer a free truck?
- When was the last time you really got a free cell phone?

Safe or Secure

“Safe” is defined by **Merriam-Webster** as:

- Free from harm or risk
- Secure from threat of danger, harm or loss
- Affording safety or security from danger, risk or difficulty

So ... how completely free from danger, harm or loss is your facility?

Safe or Secure

Follow up questions:

- How well do your security features (fences, gates, cameras, lights, perimeter alarms, door alarms or motion detectors) really protect the occupant's personal property?
- What about the occupant's individual safety while at your facility?
- How "guaranteed" are these features to be working at all times?

Surveillance or Monitor

- **Surveillance:** Close watch kept over someone or something (as by a detective)
- **Monitor (as a verb):** To watch, keep track of, or check usually for a special purpose
- When you claim to have a surveillance camera, or that cameras are monitored, is someone watching them all the time?
- Try terms such as CCTV, cameras in use or video recording.

Source: Merriam-Webster

Climate Control

- **You do not control the climate!**
- If a customer comes to you from another facility where climate control meant that the building was kept at 72 degrees year-round, with redundant heating and cooling systems along with a back-up generator, what does this occupant expect when they rent climate control from you?
- *Perhaps, you control the temperature.*

Humidity Control

Unless you have systems to both add and remove humidity to maintain a constant relative humidity, your facility isn't humidity controlled.

Perhaps, your storage spaces are dehumidified.

Grace Period

- This term implies an extension or delay of enforcement.
- If you're allowed to declare a default or impose a late fee at day five (for example) if you offer a five-day grace period, then you may not be able to take those actions until day 10 or 11.
- This is especially important in states where there are 10- or 15-day limitation before you can serve a notice, or states where you can't sell or tow for 60-plus days delinquent. All the sudden, a legal sale or tow becomes a defective one due to a grace period not being honored.

Sole Discretion

When we discussed discrimination earlier, this is one of those terms that can get you into a “discussion” with your occupant about why you're refusing, for example, a partial payment, a late payment, a payment by check, etc., because your rental agreement states it's within your sole discretion to accept or reject.

Abandoned

- **Abandon:** To give up with the intent of never again claiming a right or interest in (*abandoned* property)
- This means you have to know the intentions of your occupant when they last left the facility.
- A contractual definition of abandonment might be one solution.

Source: Merriam-Webster

Authorized Access

- Why do you want people to believe you are the gate keeper?
- Anyone with a key and a gate code can get in.
- When you collect this information, you're saying you'll prohibit anyone not listed from accessing the storage space.
- Have you ever had a couple getting divorced fight over the contents of the unit?
- A completely different term is alternate contact, which you should/must collect.



Dead Tenants

Your Occupant Is Dead

This is the hardest issue to handle.

Begin with the proposition that you can't presume service of your default notice(s) on a person who's deceased = you can't legally sell a dead occupant's property without additional factors in place.

Biggest Mistakes Made

The facility operator grants access after being presented with:

- A death certificate
- A power of attorney
- A copy of a will not yet probated

What Is Probate?

Probate is your best option.

- Probate also refers to the general administering of a deceased person's will or the estate of a deceased person without a will.
- This is handled by a probate judge or magistrate, generally in a separate division of the court systems known as Probate Court, though some states provide that a “regular” judge hears probate cases on a separate docket or rotates to the probate division for a period of time.

Probate Purposes

- The main function of placing an estate into probate is the orderly transfer of assets and the payment of debts of the deceased party.
- Sometimes a probate court must determine which conflicting sets of documents are genuine and the last and final wishes of the decedent.
- Additionally, sometimes there are challenges to the competency or ability of the decedent to have made changes to the estate documents later in life.
- Probate courts sort all this out.

An Executor/Executrix

- One common term in probate is the person who's named to be the representative of the estate. If named in a will, then the person appointed to be the representative is the executor or executrix.
- The executor's main duty is to carry out the instructions to manage the affairs and wishes of the deceased.
- This includes disposition of assets including special bequests and payment of the debts.

Administrator/ Administratrix

The administrator/administratrix performs the same functions but the title is assigned when there's no will to appoint an executor, or the executor isn't able or willing to perform the duties assigned by the probate court.

Why Do You Care?

Things can go wrong ... quickly.

If the family of the deceased occupant doesn't want to open a probate estate or the family, if any, doesn't even come forward to try to claim the content of the space, there's risk to the operator of a wrongful disposal.

The Best Scenario

Best options:

1. Family member removes and you “don’t know”
2. Executor or administrator presents documentation
3. Small estate/summary administration/affidavit to collect personal property
4. You file as a creditor of the estate
5. Releases from all entitled to inherit

If none of these happen, it puts you in murky water.
Contact your attorney for assistance.

Questions

Answers

Contact the Presenter



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