

Session 10 – Land/Property Management

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Establishing a valid Lease

Establishing a valid lease is a primary function of any property manager. This section provides additional guidance on establishing a valid lease.

WHAT IS A LEASE?

A lease is a contract (written, verbal or implied) which transfers possession rights from an owner (lessor) to a tenant (lessee). While the tenant is entitled to exclusive possession during the term of the lease, the lessor retains title and reversionary rights to take possession at the end of the lease. Therefore, ownership never transfers in any type of lease. A lease is the only way an owner can legally profit by property ownership (during the ownership) if the owner does not use the property for his or her own business, agricultural or housing needs.

See Sample Lease

WHY IS A LEASE USED?

There are many benefits to a lease not often considered in the recent trends of Real Estate in the United States and particularly in Western States. One overlooked benefit is the security from a possible plummeting market. Tenants can most often secure a specific monthly payment without the threat of losing capital invested in a property's interest. This was especially true in the mid 1980's, where numerous homeowners bought homes only to find a 10 to 15% decline in the property's value within 2 years. If these purchasers could have predicted or foreseen the decline in the region, a residential lease might have been a better option.

Leases are also often used by prospective owners that cannot qualify to purchase or are uncertain about a potential purchase of a property. Leases provide the balance for housing that is needed for those who don't wish to own at a given time.

See Sample Lease

VALIDITY OF THE LEASE:

The statute of frauds mandates certain contracts be in writing. The contract must be signed by the person who is being held to the contract. This statute includes leases for more than one year. Therefore, oral leases one year or less need not be in writing and many are not. Though some leases may be verbal or implied it is extremely difficult to enforce aspects and terms of the lease without a written and signed contract to confirm all parties' awareness of these terms.

See Sample Lease

ORAL LEASE EXAMPLES AND CONDITIONS:

An oral six-month lease, which could ordinarily be enforceable, would be unenforceable if it were not to commence for seven months. By the terms of such a lease, it would take more than one year for full performance (13 months).

An oral lease that continues or automatically renews after 12 months would be unenforceable after the 12 month period unless a period existed without any oral terms of the lease.

By setting forth terms as a written contract the owner or manager is protected against a situation

where the lessee claims the verbal agreement was different from the actual agreement. Both parties are protected by written contracts because people tend to have fitting memories and remember agreements in a manner favorable to them.

Types of Leases:

ESTATE FOR YEARS

The **estate for years** is the most common type of leasehold interest in real property. It is actually any estate created for a fixed period of time and need not be for even one year.

- The term must be certain
- No notice is required to terminate
- No maximum duration

Note: The Statute of Frauds requires "a lease for more than one year must be written."

A majority of American courts have also held that the **fixed term** and any **option periods** are added together; if the total exceeds the statutory period a written lease is mandated.

PERIODIC TENANCY

Periodic tenancy, commonly known as week-to-week or month-to-month or year-to-year is a tenancy which continues from one period to the next automatically, unless either party terminates it at the end of a period, by notice, which is usually the length of the rental period.

- Distinguished from tenancy for years
- Creation of periodic tenancy
- Arising from holdover

GROSS LEASE

A gross lease is a lease where the landlord agrees to be responsible for all expenses which are normally associated with ownership of the leased premises, such as maintenance (includes utilities and repairs), insurance, and taxes. A tenant to a gross lease is only responsible for paying the monthly lump sum base rent and the landlord is responsible for operating the building and all other costs associated with the premises. The tenant's base rent usually includes the building operating costs. Today, a gross lease is very rare.

NET LEASE

A net lease is a lease where the tenant has primary control of the premises and agrees to be responsible for some or all of the operating expenses of the premises, such as utilities, repairs, insurance, or taxes. A tenant who has a net lease is responsible for paying the monthly lump sum base rent as well as some or all of the operating expenses.

Types of Net Leases

Net leases define the responsibilities of the landlord and the tenant differently. The following are types of net leases:

- ❑ **Single Net Lease** – A single net lease is a net lease where the tenant agrees to pay a monthly lump sum base rent as well as the property taxes. The landlord is responsible for all other operating expenses of the premises.
- ❑ **Double Net Lease (NN)** – A double net lease is a net lease where the tenant agrees to pay a monthly lump sum base rent as well as the property taxes and the property insurance. The landlord is responsible for all other operating expenses of the premises.
- ❑ **Triple Net Lease (NNN)** – A Triple net lease is a net lease where the tenant agrees to pay a monthly lump sum base rent as well as the property taxes, the property insurance, and the maintenance. Under a triple net lease there are a few legal defenses which may relieve a tenant of his responsibilities. For example, a triple net lease may relieve the tenant of his responsibility if the property is subject to an eminent domain proceeding.
- ❑ **Absolute Triple Net Lease (Bond Lease)** – An absolute triple net lease is a net lease where the tenant agrees to pay a monthly lump sum base rent as well as the property taxes, the property insurance, and the maintenance. Under an absolute triple net lease there are no legal defenses if a tenant fails to meet his responsibilities.

PERCENTAGE LEASE

What Is a Percentage Lease?

A percentage lease is a lease where rent payments are based on the lease holder's sales or profits. A typical percentage lease will have a base rent, or minimum amount of rent that is due each month. In addition to the base rent, the lease holder must also pay a percentage of the gross or net sales each month, as stipulated in the lease agreement. The lease should state exactly what counts as a "sale" to be included in the calculation of what rent is due.

GROUND LEASE

A GROUND LEASE is a lease of land only and is also commonly referred to as a land lease. At the end of the lease, the lessor gets possession of the property and generally the improvements placed on the property by the tenant. Many of the free standing sites in shopping centers, such as those pads for fast food restaurants, are ground leases. The tenant puts up the building and is responsible for all improvements. The owner keeps title to the property and pays no capital gains taxes, although the owner is taxed on the rent collected.

Ground leases are usually net leases where the tenant pays taxes as well as all other expenses. They may also have a percentage of the rent feature where they include a percentage of the gross in addition to the net amount. This may be in conjunction with a Consumer Price Index (CPI) feature of the net lease. The CPI and the additional percentage serve to give the owner protection against inflation.

Many large chains like ground leases since they avoid tying up huge sums of cash in land. Another advantage is that some owners will accept a much lower rent than the cash value of the land would normally dictate because they realize that they are going to own the tenant's improvements at the end of the lease.

As an example, it is hard for an owner of land worth \$2,000,000 to turn down a net lease offer of \$90,000 a year when the owner will not only get back the property in 20 years, but will own the improvements as well. In addition, the appreciation in value will belong to the owner who did not have any taxes or other carrying costs until that point in time. After 20 years, the owner knows that he or she can sell the property, lease it to others or lease it to the original lessee from a position of great strength.

ASSIGNMENT

An assignment is very similar to a sublease, except the new tenant takes on the rights and obligations of the entire lease, not just for a limited amount of time. In the case of an assignment, there is usually a contract between the new tenant and the original landlord, where one was lacking in a sublease. The original tenant is usually still liable for all the obligations of the original lease until it runs out.

SUBLEASE

A sublease, or sublet, is a contract between a pre-existing tenant and a new tenant. For example, tenant A may have a lease with landlord X, but A subleases the rented property to tenant B through a contract. Generally, the new tenant takes on all the rights and obligations of a normal tenant, but for a limited amount of time. The original tenant is still liable for all the obligations of the original lease until it runs out.

USE OF STANDARD FORMS

A property manager should not attempt to modify standard clauses in a lease, prepare new clauses or prepare complex leases by the cut-and-paste method utilizing clauses from other leases. First of all, it exposes the property manager to liability should his or her draftsmanship create results not contemplated that work to the detriment of the owner.

Secondly, preparing a lease using other than what is regarded as a standard industry lease could be construed as the unauthorized practice of law. While there are a great many standardized lease forms covering commercial and industrial properties, if any lease form is to be materially altered or a new lease drafted, competent legal counsel should be sought.

A point to remember is that lease ambiguities are generally resolved against the party drafting the lease. Therefore, it behooves the property manager to make certain that the lease is clear. If a lease form includes a clause you do not understand, see an attorney; don't take chances. Leases often have clauses specifically related to attorney fees that may arise because of the terms within the lease.

LEASES PREPARED BY LESSEES

You should be on your guard when a tenant or tenant's attorney has prepared a lease on a form you are not familiar with. While it may appear clear, you should protect yourself from liability by having the lease reviewed by an attorney. The attorney should also review your customary lease form so that any differences can be noted.

Some will also include a form number. Unfortunately, some people will use this technique to try to take advantage of the other party

You do not want to be a party to any deception. Even if the lease was prepared by your client, you want to make certain the tenant fully understands the lease provisions, especially any unusual provisions in the lessor's favor. You may wish to suggest to the lessee that he or she also have the lease reviewed by an attorney.

Let the market dictate the use of non standardized forms. If the demand for property is down, the property manager may be more inclined to accept the terms of a lease prepared outside of the traditional and standard lease on file.

CONTRACTS OF ADHESION

An adhesion contract is a standardized agreement. Adhesion contracts are on a "take it or leave it" basis. If you don't agree to the terms of the contract, you cannot acquire the products or services. There is no opportunity for negotiation regarding any terms in the contract.

UNDERSTANDING POSITIONS AND EXPECTATIONS

When negotiating a lease, as an agent of the lessor you want to make the best deal possible for your client. The tenant and/or the tenant's representative wants to make the best deal possible for the tenant.

Each party is likely to have an opening position advantageous to them as well as an idea as to how low or how high they can go.

Each party has motivating factors that are not apparent to the other party as an example, clients who have purchased property will often reveal that they would have paid more if they had to and clients in the same transaction have revealed that they would have accepted less.

When you experience many vacancies and/or there is competition in the marketplace from similar property that has been vacant for some time, the tenants have a great deal of leverage in negotiations. Sometimes tenants don't perceive this power and fail to use it. On other occasions, they assume that they have leverage power when in actuality they do not. If the negotiations are to be successful, this perception of power has to be deflated.

An example of deflating the tenant's perception of power would be in negotiating a lease extension. If the tenant believes you need the tenant more than the tenant needs you, then the tenant might demand a reduction in rent for a lease extension. You might be able to reduce the tenant's expectations by notifying the tenant that you will be showing the premises to a prospective tenant. Always use a real person interested in the rental you will be showing. A tactic like this can change a current tenant's attitude.

In a market situation where there is a very low vacancy factor for similar properties and you have several prospective tenants, it is a lessor's market that is advantageous to your client. Nevertheless, in preparing for negotiations you should determine:

1. What you want;
2. What you must have;
3. What is not too important?

You should consider the market to determine what you want. You must consider the supply and demand features of the marketplace. If a particular tenant is important to you, you must consider the fact that too high a rent will mean a marginal or loss operation.

RENT INCENTIVES

Owners like to show high rents to bankers for refinancing as well as to prospective customers when they wish to sell and to establish a base rent in the event of subsequent rent control.

Rental concessions should be considered for several other reasons. If you are taking over a new structure or one that has recently been rehabilitated, you would want to stabilize the structure (fill vacancies) as soon as possible. This could eliminate a negative cash flow for the owner, Rental concessions can give you an edge on the competition.

Rental concessions might be absolutely necessary if the rent being asked is more than market rent for similar available properties. Rental concessions can take several forms:

An effective variation on free rent is to offer it to your present tenants. As an example, offer one month's free rent if the new tenant can bring in someone else to lease a unit. Since the tenant

does not get a rental incentive, he or she is less likely to move when the lease expires.

LEASE RENEWALS

Because of the bother and costs associated with moving, a tenant will generally be willing to pay a premium over comparable vacant units to remain at a location.

A rent increase from five percent to ten percent, even though not indicated by market conditions, will generally be accepted by a commercial tenant. However, you could end up with a vacancy if you get too greedy.

You want to make the increase seem reasonable rather than arbitrary when you offer a tenant a new lease at a higher rent. As an example, you can show cost increases such as taxes and insurance as the reason. There is always some rise in costs.

You might be in a situation where you have several vacancies and a commercial tenant needs a downward adjustment in the rent to survive. Rather than lowering the rent, offer to defer a portion of the rent. As an example, instead of paying \$1,800 per month rent, a tenant may pay \$1,000 per month and sign a note for \$9,600 for the balance of the one-year lease. You haven't reduced rents and there is a possibility that the tenant will recover financially and make good on the note. Later if the tenant is able to pay the full rent you have the tenant pretty well locked in until the arrearage can be paid off.

RECORDING LEASES

If a lender made a loan on a property where a tenant was in possession, a foreclosure of the loan would leave the lender owning the property subject to the lease rights of the tenant. However, if the lease had been signed but the tenant had not yet taken possession of the property, a lender would not have constructive notice of the tenant's rights. So a later foreclosure of a loan could leave a tenant subject to eviction by the foreclosing lender.

DISCLOSURES

If a property manager knows that a property is unsuited or cannot be used for the intended purpose of the prospective tenant, then the prospective property manager must disclose this information. As an example, an intended use might be prohibited by zoning or restrictive covenants. Disclosure would be required if the property manager knew of these restrictions. Similarly, the property manager should disclose any negative information he or she possesses which a prospective tenant would want to know.

Other disclosures are mandated by state statutes in addition to those mentioned above. These types of disclosures might include the following. The more written disclosure that takes place, the better position the property manager is in if any instance of material fact were to arise.

Use the Generic Residential Lease Agreement attached to correlate information supplied in this

section. (Exhibit A)

Section 2

Item 3

Damage Deposits have recently become a large area of concern within leases completed in the Western United States. It is recommended that a clause is added pertaining to the determination in cost of such damages occurring during the duration of the lease. Such as: A dated video recording of the properties current condition is held on file with the lessor or property manager. The lessor may employ the services of a licensed contractor to determine what if any damages were caused by the lessee throughout the duration of the lease.

Providing video proof of a properties condition has become much less costly within the last five years. Property Management companies can easily tally a properties current condition through video and time stamp the file with today's technology. This method provides a reliable source for expected repairs and even more so for the catastrophic loss such as structural interior modification. This allows for little to no interpretation of the item 5 within this same section.

Item 12

This maintenance section should include a clause pertaining to the lessees ability to complete maintenance on the property through the use of subcontractors not approved by the lessor. Example: The lessor does not authorize lessee to order or complete any maintenance or repair to the property without the expressed written consent of the lessor. The lessee is financially responsible for any service ordered by the lessee. The lessor assumes no responsibility for services ordered by the lessee. The lessor may use deposit moneys initially supplied by the lessee to pay any outstanding debt of any service not paid but ordered by the lessee.

Entire Agreement

The terms of a lease should be subject to modification. Instances arise throughout the practice of Property Management that call for future lease modification. These modifications are best enacted when the modification occurs through amendment or addendum to the lease. Though the addendum should be thought out and approved for legal use by a licensed attorney, the integrity of the original lease is not affected unless the addendum contradicts an item within the original contract.

GENERIC RESIDENTIAL LEASE AGREEMENT

Section 1

THIS LEASE AGREEMENT (hereinafter referred to as the "Agreement") made and entered into this _____ day of _____, 20____, by and between _____, whose address is _____ (hereinafter referred to as "Lessor") and _____ (hereinafter referred to as "Lessee").

WITNESSETH:

WHEREAS, Lessor is the fee owner of certain real property being, lying and situate in _____ County, _____, such real property having a street address of _____.

WHEREAS, Lessor is desirous of leasing the Premises to Lessee upon the terms and conditions as contained herein; and NOW, THEREFORE, for and in consideration of the sum of \$_____ the covenants and obligations contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto hereby agree as follows:

Section 2

1. TERM. Lessor leases to Lessee and Lessee leases from Lessor the above described Premises together with any and all appurtenances thereto, for a term of _____ year(s), such term beginning on _____, and ending at 12 o'clock midnight on _____.

2. RENT. The total rent for the term hereof is the sum of _____ DOLLARS (\$_____) payable on the _____ day of each month of the term, in equal installments of _____ DOLLARS (\$_____) first and last installments to be paid upon the due execution of this Agreement, the second installment to be paid on _____. All such payments shall be made to Lessor at Lessor's address as set forth in the preamble to this Agreement on or before the due date and without demand.

3. DAMAGE DEPOSIT. Upon the due execution of this Agreement, Lessee shall deposit with Lessor the sum of _____ DOLLARS (\$_____) receipt of which is hereby acknowledged by Lessor, as security for any damage caused to the Premises during the term hereof. Such deposit shall be returned to Lessee, without interest, and less any set off for

damages to the Premises upon the termination of this Agreement.

4. USE OF PREMISES. The Premises shall be used and occupied by Lessee and Lessee's immediate family, consisting of

exclusively, as a private single family dwelling, and no part of the Premises shall be used at any time during the term of this Agreement by Lessee for the purpose of carrying on any business, profession, or trade of any kind, or for any purpose other than as a private single family dwelling. Lessee shall not allow any other person, other than Lessee's immediate family or transient relatives and friends who are guests of Lessee, to use or occupy the Premises without first obtaining Lessor's written consent to such use. Lessee shall comply with any and all laws, ordinances, rules and orders of any and all governmental or quasi-governmental authorities affecting the cleanliness, use, occupancy and preservation of the Premises.

5. CONDITION OF PREMISES. Lessee stipulates, represents and warrants that Lessee has examined the Premises, and that they are at the time of this Lease in good order, repair, and in a safe, clean and tenantable condition.

6. ASSIGNMENT AND SUB-LETTING. Lessee shall not assign this Agreement, or sub-let or grant any license to use the Premises or any part thereof without the prior written consent of Lessor. A consent by Lessor to one such assignment, sub-letting or license shall not be deemed to be a consent to any subsequent assignment, sub-letting or license. An assignment, sub-letting or license without the prior written consent of Lessor or an assignment or sub-letting by operation of law shall be absolutely null and void and shall, at Lessor's option, terminate this Agreement.

7. ALTERATIONS AND IMPROVEMENTS. Lessee shall make no alterations to the buildings or improvements on the Premises or construct any building or make any other improvements on the Premises without the prior written consent of Lessor. Any and all alterations, changes, and/or improvements built, constructed or placed on the Premises by Lessee shall, unless otherwise provided by written agreement between Lessor and Lessee, be and become the property of Lessor and remain on the Premises at the expiration or earlier termination of this Agreement.

8. NON-DELIVERY OF POSSESSION. In the event Lessor cannot deliver possession of the Premises to Lessee upon the commencement of the Lease term, through no fault of Lessor or its agents, then Lessor or its agents shall have no liability, but the rental herein provided shall abate until possession is given. Lessor or its agents shall have thirty (30) days in which to give possession, and if possession is tendered within such time, Lessee agrees to accept the demised Premises and pay the rental herein provided from that date. In the event possession cannot be delivered within such time, through no fault of Lessor or its agents, then this Agreement and all rights hereunder shall terminate.

9. HAZARDOUS MATERIALS. Lessee shall not keep on the Premises any item of a dangerous, flammable or explosive character that might unreasonably increase the danger of fire or explosion on the Premises or that might be considered hazardous or extra hazardous by any responsible insurance company.

10. UTILITIES. Lessee shall be responsible for arranging for and paying for all utility services required on the Premises.

11. MAINTENANCE AND REPAIR; RULES. Lessee will, at its sole expense, keep and maintain the Premises and appurtenances in good and sanitary condition and repair during the term of this Agreement and any renewal thereof. Without limiting the generality of the foregoing, Lessee shall:

- (a) Not obstruct the driveways, sidewalks, courts, entry ways, stairs and/or halls, which shall be used for the purposes of ingress and egress only;
- (b) Keep all windows, glass, window coverings, doors, locks and hardware in good, clean order and repair;
- (c) Not obstruct or cover the windows or doors;
- (d) Not leave windows or doors in an open position during any inclement weather;
- (e) Not hang any laundry, clothing, sheets, etc. from any window, rail, porch or balcony nor air or dry any of same within any yard area or space;
- (f) Not cause or permit any locks or hooks to be placed upon any door or window without the prior written consent of Lessor;
- (g) Keep all air conditioning filters clean and free from dirt;
- (h) Keep all lavatories, sinks, toilets, and all other water and plumbing apparatus in good order and repair and shall use same only for the purposes for which they were constructed. Lessee shall not allow any sweepings, rubbish, sand, rags, ashes or other substances to be thrown or deposited therein. Any damage to any such apparatus and the cost of clearing stopped plumbing resulting from misuse shall be borne by Lessee;
- (i) And Lessee's family and guests shall at all times maintain order in the Premises and at all places on the Premises, and shall not make or permit any loud or improper noises, or otherwise disturb other residents;
- (j) Keep all radios, television sets, stereos, phonographs, etc., turned down to a level of sound that does not annoy or interfere with other residents; (k) Deposit all trash, garbage, rubbish or refuse in the locations provided therefore and shall not allow any trash, garbage, rubbish or refuse to be deposited or permitted to stand on the exterior of any building or within the common elements;
- (k) Abide by and be bound by any and all rules and regulations affecting the Premises or the common area appurtenant thereto which may be adopted or promulgated by the Condominium or Homeowners' Association having control over them.

12. DAMAGE TO PREMISES. In the event the Premises are destroyed or rendered wholly inhabitable by fire, storm, earthquake, or other casualty not caused by the negligence of Lessee, this Agreement shall terminate from such time except for the purpose of enforcing rights that may have then accrued hereunder. The rental provided for herein shall then be accounted for by and between Lessor and Lessee up to the time of such injury or destruction of the Premises, Lessee paying rentals up to such date and Lessor refunding rentals collected beyond such date. Should a portion of the Premises thereby be rendered inhabitable, the Lessor shall have the option of either repairing such injured or damaged portion or terminating this Lease. In the event that Lessor exercises its right to repair such untenable portion, the rental shall abate in the proportion that the injured parts bears to the whole Premises, and such part so injured shall be restored by Lessor as speedily as practicable, after which the full rent shall recommence and the Agreement continue according to its terms.

Section 3

13. INSPECTION OF PREMISES. Lessor and Lessor's agents shall have the right at all reasonable times during the term of this Agreement and any renewal thereof to enter the Premises for the purpose of inspecting the Premises and all buildings and improvements thereon. And for the purposes of making any repairs, additions or alterations as may be deemed appropriate by Lessor for the preservation of the Premises or the building. Lessor and its agents shall further have the right to exhibit the Premises and to display the usual "for sale", "for rent" or "vacancy" signs on the Premises at any time within forty-five (45) days before the expiration of this Lease. The right of entry shall likewise exist for the purpose of removing placards, signs, fixtures, alterations or additions, but do not conform to this Agreement or to any restrictions, rules or regulations affecting the Premises.

14. SUBORDINATION OF LEASE. This Agreement and Lessee's interest hereunder are and shall be subordinate, junior and inferior to any and all mortgages, liens or encumbrances now or hereafter placed on the Premises by Lessor, all advances made under any such mortgages, liens or encumbrances (including, but not limited to, future advances), the interest payable on such mortgages, liens or encumbrances and any and all renewals, extensions or modifications of such mortgages, liens or encumbrances.

15. LESSEE'S HOLD OVER. If Lessee remains in possession of the Premises with the consent of Lessor after the natural expiration of this Agreement, a new tenancy from month-to-month shall be created between Lessor and Lessee which shall be subject to all of the terms and conditions hereof except that rent shall then be due and owing at _____ DOLLARS (\$ _____) per month and except that such tenancy shall be terminable upon thirty (30) days written notice served by either party.

16. SURRENDER OF PREMISES. Upon the expiration of the term hereof, Lessee shall surrender the Premises in as good a state and condition as they were at the commencement of this Agreement, reasonable use and wear and tear thereof and damages by the elements excepted.

17. ANIMALS. Lessee shall be entitled to keep no more than _____ (____) domestic dogs, cats or birds; however, at such time as Lessee shall actually keep any such animal on the Premises, Lessee shall pay to Lessor a pet deposit of _____ DOLLARS (\$ _____), _____ DOLLARS (\$ _____) of which shall be non-refundable and shall be used upon the termination or expiration of this Agreement for the purposes of cleaning the carpets of the building.

18. QUIET ENJOYMENT. Lessee, upon payment of all of the sums referred to herein as being payable by Lessee and Lessee's performance of all Lessee's agreements contained herein and Lessee's observance of all rules and regulations, shall and may peacefully and quietly have, hold and enjoy said Premises for the term hereof.

19. INDEMNIFICATION. Lessor shall not be liable for any damage or injury of or to the Lessee, Lessee's family, guests, invitees, agents or employees or to any person entering the Premises or the building of which the Premises are a part or to goods or equipment, or in the structure or equipment of the structure of which the Premises are a part, and Lessee hereby

agrees to indemnify, defend and hold Lessor harmless from any and all claims or assertions of every kind and nature.

20. DEFAULT. If Lessee fails to comply with any of the material provisions of this Agreement, other than the covenant to pay rent, or of any present rules and regulations or any that may be hereafter prescribed by Lessor, or materially fails to comply with any duties imposed on Lessee by statute, within seven (7) days after delivery of written notice by Lessor specifying the non-compliance and indicating the intention of Lessor to terminate the Lease by reason thereof, Lessor may terminate this Agreement. If Lessee fails to pay rent when due and the default continues for seven (7) days thereafter, Lessor may, at Lessor's option, declare the entire balance of rent payable hereunder to be immediately due and payable and may exercise any and all rights and remedies available to Lessor at law or in equity or may immediately terminate this Agreement.

21. LATE CHARGE. In the event that any payment required to be paid by Lessee hereunder is not made within three (3) days of when due, Lessee shall pay to Lessor, in addition to such payment or other charges due hereunder, a "late fee" in the amount of _____ (\$_____).

22. ABANDONMENT. If at any time during the term of this Agreement Lessee abandons the Premises or any part thereof, Lessor may, at Lessor's option, obtain possession of the Premises in the manner provided by law, and without becoming liable to Lessee for damages or for any payment of any kind whatever. Lessor may, at Lessor's discretion, as agent for Lessee, relet the Premises, or any part thereof, for the whole or any part thereof, for the whole or any part of the then unexpired term, and may receive and collect all rent payable by virtue of such reletting, and, at Lessor's option, hold Lessee liable for any difference between the rent that would have been payable under this Agreement during the balance of the unexpired term, if this Agreement had continued in force, and the net rent for such period realized by Lessor by means of such reletting. If Lessor's right of reentry is exercised following abandonment of the Premises by Lessee, then Lessor shall consider any personal property belonging to Lessee and left on the Premises to also have been abandoned, in which case Lessor may dispose of all such personal property in any manner Lessor shall deem proper and Lessor is hereby relieved of all liability for doing so.

23. ATTORNEYS' FEES. Should it become necessary for Lessor to employ an attorney to enforce any of the conditions or covenants hereof, including the collection of rentals or gaining possession of the Premises, Lessee agrees to pay all expenses so incurred, including a reasonable attorneys' fee.

24. RECORDING OF AGREEMENT. Lessee shall not record this Agreement on the Public Records of any public office. In the event that Lessee shall record this Agreement, this Agreement shall, at Lessor's option, terminate immediately and Lessor shall be entitled to all rights and remedies that it has at law or in equity.

25. GOVERNING LAW. This Agreement shall be governed, construed and interpreted by, through and under the Laws of the State of _____.

26. SEVERABILITY. If any provision of this Agreement or the application thereof shall, for any reason and to any extent, be invalid or unenforceable, neither the remainder of this Agreement nor the application of the provision to other persons, entities or circumstances shall be affected thereby, but instead shall be enforced to the maximum extent permitted by law.

27. BINDING EFFECT. The covenants, obligations and conditions herein contained shall be binding on and inure to the benefit of the heirs, legal representatives, and assigns of the parties hereto.

28. DESCRIPTIVE HEADINGS. The descriptive headings used herein are for convenience of reference only and they are not intended to have any affect whatsoever in determining the rights or obligations of the Lessor or Lessee.

29. CONSTRUCTION. The pronouns used herein shall include, where appropriate, either gender or both, singular and plural.

30. NON-WAIVER. No indulgence, waiver, election or non-election by Lessor under this Agreement shall affect Lessee's duties and liabilities hereunder.

31. MODIFICATION. The parties hereby agree that this document contains the entire agreement between the parties and this Agreement shall not be modified, changed, altered or amended in any way except through a written amendment signed by all of the parties hereto.

As to Lessor this _____ day of _____, 20____.

Witnesses: "Lessor" _____.

As to Lessee, this _____ day of _____, 20____.

Witnesses: "Lessee" _____.

Evicting a Tenant

Understanding the appropriate and legal methods required to evict a tenant is another important aspect of a managers responsibilities.

Though Nevada has many jurisdictions relative to court policy and proceedings, the majority of the state's population resides in Clark County. Therefore, this course uses Clark County for its primary example. Though other district courts exist within the state, these courts proceedings are very similar if not identical to Clark County.

The recent shift within the real estate economic marketplace has created a larger number of tenants and thus a larger number of all aspects of the tenant / landlord relationship. The eviction process is often an important step in this relationship, as landlords must retain the legal recourse to recover all property interests when required. Following the legal methods to properly evict is imperative to quick property recovery.

Many summary articles, forms and laws will be presented within this text. Before such items are presented, it is important to understand what eviction is and a quick summary of the process. It is also important to understand that aside from law, the most important document to consider when evaluating the eviction of a tenant is the acknowledged lease. When prepared by a landlord or property manager, leases should always be strong enough to support the landlords best interest with the minimum tenant law represented. Creating a "Bullet proof" or tenant proof lease can make the landlords job much easier when it comes to the eviction process.

What is eviction as a definition –

The disturbance of a tenant's enjoyment of all or any material part of the leased premises by act of the landlord or by claim of a superior title by a third party. It is the legal process of removing a tenant from the premises for some breach of the lease. In the case of partial eviction, the tenant is deprived of the use of part of the premises. Upon eviction, the tenant is no longer responsible for paying rent, unless the lease contains a survival clause stating that the tenant's liability for rent survives eviction.

Typical grounds for the eviction of a tenant by a landlord include nonpayment of rent, unlawful use of the premises violating the use provisions of the lease or non compliance with health and safety codes.

Summary of the eviction process in Nevada

1. A notice must be served to the tenant. Depending on the reason for the landlord's decision to evict your tenant this notice may be a 3/5/30 day notice. Some evictions require a secondary notice to be served prior to eviction. Some notices require a tenant's right clause to be printed on it.

Notices are \$45.00 or \$65.00 each depending where the property is located.

2. At the expiration of the notice excluding the date of service, weekends and holidays. The court will allow the landlord or agent for process to file a motion for summary eviction on the 9th business day with the court of proper jurisdiction. Eviction Costs are between \$250.00-\$275.00 this includes court costs and Constable Mileage fees. Most agents for process will require a copy of the lease to proceed.
3. The tenant may contest this filing and file an answer with the court within the time indicated on the notice and days allotted by the court. If this is the case a hearing will be set within 7 days. The average rate for attorney representation or agent for process is \$350.00-\$450.00 per case requiring litigation.
4. If no answer by tenant the Court will sign the order and authorize the 24 hour lockout. A 24 hour notice is served to the tenant requiring the tenant to vacate the premises within 24 hours (if notice served on Fri. the lockout would occur on next business day) During the 24 hour period the Tenant may file a motion for stay if granted a hearing will be set within 7 days.
5. After the 24hour notice is served the Constable will return to the property and remove the tenants; the landlord or agent for process will be present and secure the dwelling at no additional charge and to meet the Constable and the locksmith of landlord's choice.

Commonly asked questions relative to the eviction process (From a Landlords perspective)

The tenant has caused the landlord nothing but problems. Can the landlord just change the locks?

Nevada law does not allow landlords to simply throw out tenants without the proper legal procedure. A landlord who evicts a tenant without utilizing the proper legal devices can be subject to damages and other legal headaches.

What reasons can I evict my tenant?

Much of this answer depends on the original acknowledged lease.

Nevada law allows landlords to evict their tenants for numerous reasons such as failure to timely pay rent, destruction of the rental property, violations of the law, disturbing other tenants and unauthorized tenants/subtenants. However, the reason for the eviction will dictate the type of notice that should be used and the overall eviction process. Therefore, it is important to choose the right type of legal notice.

Can a landlord evict a tenant themselves?

Yes. However, the landlord should realize that this is a legal proceeding. If the landlord fails to follow the proper format for the notice and eviction, or if the landlord fails to notify the tenant in the proper manner, the eviction will not be granted and the landlord will have to begin the entire process over again. That is why using an eviction service, makes sense.

NRS 40.253 Unlawful detainer: Supplemental remedy of summary eviction and exclusion of tenant for default in payment of rent.

1. Except as otherwise provided in subsection 10, in addition to the remedy provided in NRS 40.2512 and 40.290 to 40.420, inclusive, when the tenant of any dwelling, apartment, mobile home, recreational vehicle or commercial premises with periodic rent reserved by the month or any shorter period is in default in payment of the rent, the landlord or his agent, unless otherwise agreed in writing, may serve or have served a notice in writing, requiring in the alternative the payment of the rent or the surrender of the premises:

(a) At or before noon of the fifth full day following the day of service; or

(b) If the landlord chooses not to proceed in the manner set forth in paragraph (a) and the rent is reserved by a period of 1 week or less and the tenancy has not continued for more than 45 days, at or before noon of the fourth full day following the day of service.

As used in this subsection, "day of service" means the day the landlord or his agent personally delivers the notice to the tenant. If personal service was not so delivered, the "day of service" means the day the notice is delivered, after posting and mailing pursuant to subsection 2, to the sheriff or constable for service if the request for service is made before noon. If the request for service by the sheriff or constable is made after noon, the "day of service" shall be deemed to be the day next following the day that the request is made for service by the sheriff or constable.

2. A landlord or his agent who serves a notice to a tenant pursuant to paragraph (b) of subsection 1 shall attempt to deliver the notice in person in the manner set forth in paragraph (a) of subsection 1 of NRS 40.280. If the notice cannot be delivered in person, the landlord or his agent:

(a) Shall post a copy of the notice in a conspicuous place on the premises and mail the notice by overnight mail; and

(b) After the notice has been posted and mailed, may deliver the notice to the sheriff or constable for service in the manner set forth in subsection 1 of NRS 40.280. The sheriff or constable shall not accept the notice for service unless it is accompanied by written evidence, signed by the tenant when he took possession of the premises, that the landlord or his agent informed the tenant of the provisions of this section which set forth the lawful procedures for eviction from a short-term tenancy. Upon acceptance, the sheriff or constable shall serve the notice within 48 hours after the request for service was made by the landlord or his agent.

3. A notice served pursuant to subsection 1 or 2 must:

(a) Identify the court that has jurisdiction over the matter; and

(b) Advise the tenant of his right to contest the matter by filing, within the time specified in subsection 1 for the payment of the rent or surrender of the premises, an affidavit with the court that has jurisdiction over the matter stating that he has tendered payment or is not in default in the payment of the rent.

4. If the tenant files such an affidavit at or before the time stated in the notice, the landlord or his agent, after receipt of a file-stamped copy of the affidavit which was filed, shall not provide for the nonadmittance of the tenant to the premises by locking or otherwise.

5. Upon noncompliance with the notice:

(a) The landlord or his agent may apply by affidavit of complaint for eviction to the Justice Court of the township in which the dwelling, apartment, mobile home or commercial premises are located or to the district court of the county in which the dwelling, apartment, mobile home or commercial premises are located, whichever has jurisdiction over the matter. The court may thereupon issue an order directing the sheriff or constable of the county to remove the tenant within 24 hours after receipt of the order. The affidavit must state or contain:

(1) The date the tenancy commenced.

(2) The amount of periodic rent reserved.

(3) The amounts of any cleaning, security or rent deposits paid in advance, in excess of the first month's rent, by the tenant.

(4) The date the rental payments became delinquent.

(5) The length of time the tenant has remained in possession without paying rent.

(6) The amount of rent claimed due and delinquent.

(7) A statement that the written notice was served on the tenant in accordance with NRS 40.280.

(8) A copy of the written notice served on the tenant.

(9) A copy of the signed written rental agreement, if any.

(b) Except when the tenant has timely filed the affidavit described in subsection 3 and a file-stamped copy of it has been received by the landlord or his agent, and except when the landlord is prohibited pursuant to NRS 118A.480, the landlord or his agent may, in a peaceable manner, provide for the nonadmittance of the tenant to the premises by locking or otherwise.

6. Upon the filing by the tenant of the affidavit permitted in subsection 3, regardless of the information contained in the affidavit, and the filing by the landlord of the affidavit permitted by subsection 5, the Justice Court or the district court shall hold a hearing, after service of notice of the hearing upon the parties, to determine the truthfulness and sufficiency of any affidavit or notice provided for in this section. If the court determines that there is no legal defense as to the alleged unlawful detainer and the tenant is guilty of an unlawful detainer, the court may issue a summary order for removal of the tenant or an order providing for the nonadmittance of the tenant. If the court determines that there is a legal defense as to the alleged unlawful detainer, the court shall refuse to grant either party any relief, and, except as otherwise provided in this subsection, shall require that any further proceedings be conducted pursuant to NRS 40.290 to 40.420, inclusive. The issuance of a summary order for removal of the tenant does not preclude an action by the tenant for any damages or other relief to which he may be entitled. If the alleged unlawful detainer was based upon subsection 5 of NRS 40.2514, the refusal by the court to grant relief does not preclude the landlord thereafter from pursuing an action for unlawful detainer in accordance with NRS 40.251.

7. The tenant may, upon payment of the appropriate fees relating to the filing and service of a motion, file a motion with the court, on a form provided by the clerk of the court, to dispute the amount of the costs, if any, claimed by the landlord pursuant to NRS 118A.460 for the inventory, moving and storage of personal property left on the premises. The motion must be filed within 20 days after the summary order for removal of the tenant or the abandonment of the premises by the tenant, or within 20 days after:

- (a) The tenant has vacated or been removed from the premises; and
- (b) A copy of those charges has been requested by or provided to the tenant, whichever is later.

8. Upon the filing of a motion pursuant to subsection 7, the court shall schedule a hearing on the motion. The hearing must be held within 10 days after the filing of the motion. The court shall affix the date of the hearing to the motion and order a copy served upon the landlord by the sheriff, constable or other process server. At the hearing, the court may:

- (a) Determine the costs, if any, claimed by the landlord pursuant to NRS 118A.460, and any accumulating daily costs; and
- (b) Order the release of the tenant's property upon the payment of the charges determined to be due or if no charges are determined to be due.

9. A landlord shall not refuse to accept rent from a tenant that is submitted after the landlord or his agent has served or had served a notice pursuant to subsection 1 if the refusal is based on the fact that the tenant has not paid collection fees, attorney's fees or other costs other than rent, a reasonable charge for late payments of rent or dishonored checks, or a security. As used in this subsection, "security" has the meaning ascribed to it in NRS 118A.240.

10. This section does not apply to the tenant of a mobile home lot in a mobile home park or to the tenant of a recreational vehicle lot in an area of a mobile home park in this State other than an area designated as a recreational vehicle lot pursuant to the provisions of subsection 6 of NRS 40.215.

(Added to NRS by 1967, 195; A 1969, 263, 575; 1973, 1085; 1975, 1202; 1977, 418, 1346; 1979, 1398, 1879; 1985, 229; 1987, 1239; 1989, 1082, 1232; 1991, 113; 1995, 1851; 1997, 3511; 1999, 981)

NRS 40.254 Unlawful detainer: Supplemental remedy of summary eviction and exclusion of tenant from certain types of property. Except as otherwise provided by specific statute, in addition to the remedy provided in NRS 40.251 and in NRS 40.290 to 40.420, inclusive, when the tenant of a dwelling unit which is subject to the provisions of chapter 118A of NRS, part of a low-rent housing program operated by a public housing authority, a mobile home or a recreational vehicle is guilty of an unlawful detainer, the landlord is entitled to the summary procedures provided in NRS 40.253 except that:

- 1. Written notice to surrender the premises must:
 - (a) Be given to the tenant in accordance with the provisions of NRS 40.280;
 - (b) Advise the tenant of the court that has jurisdiction over the matter; and
 - (c) Advise the tenant of his right to contest the notice by filing within 5 days an affidavit with the court that has jurisdiction over the matter that he is not guilty of an unlawful detainer.
- 2. The affidavit of the landlord or his agent submitted to the Justice Court or the district court must contain:
 - (a) The date when the tenancy commenced, the term of the tenancy, and, if any, a copy of the rental agreement.

(b) The date when the tenancy or rental agreement allegedly terminated.

(c) The date when the tenant became subject to the provisions of NRS 40.251 to 40.2516, inclusive, together with any supporting facts.

(d) The date when the written notice was given, a copy of the notice and a statement that notice was served in accordance with NRS 40.280.

(e) A statement that the claim for relief was authorized by law.

3. If the tenant is found guilty of unlawful detainer as a result of his violation of any of the provisions of NRS 453.011 to 453.552, inclusive, except NRS 453.336, the landlord is entitled to be awarded any reasonable attorney's fees incurred by the landlord or his agent as a result of a hearing, if any, held pursuant to subsection 6 of NRS 40.253 wherein the tenant contested the eviction.

(Added to NRS by 1985, 227; A 1989, 1084, 1234; 1991, 115; 1995, 1853; 2001, 1065; 2003, 561)

NRS 40.255 Removal of person holding over after 3-day notice to quit; circumstances authorizing removal.

1. Except as provided in subsection 2, in any of the following cases, a person who holds over and continues in possession of real property or a mobile home after a 3-day written notice to quit has been served upon him, and also upon any subtenant in actual occupation of the premises, pursuant to NRS 40.280, may be removed as prescribed in NRS 40.290 to 40.420, inclusive:

(a) Where the property or mobile home has been sold under an execution against him or a person under whom he claims, and the title under the sale has been perfected;

(b) Where the property or mobile home has been sold upon the foreclosure of a mortgage, or under an express power of sale contained therein, executed by him or a person under whom he claims, and the title under the sale has been perfected;

(c) Where the property or mobile home has been sold under a power of sale granted by NRS 107.080 to the trustee of a deed of trust executed by such person or a person under whom he claims, and the title under such sale has been perfected; or

(d) Where the property or mobile home has been sold by him or a person under whom he claims, and the title under the sale has been perfected.

2. This section does not apply to the tenant of a mobile home lot in a mobile home park.

(Added to NRS by 1961, 412; A 1969, 263; 1979, 1880)

NRS 40.260 Tenant of agricultural lands may hold over if not notified. In all cases of tenancy upon agricultural land where the tenant has held over and retained possession for more than 60 days after the expiration of his term, without any demand of possession or notice to quit by the landlord, or the successor in estate of his landlord, if any there be, he shall be deemed to be holding by permission of the landlord, or the successor in the estate of his landlord, if any there be, and shall be entitled to hold under the terms of the lease for another full year, and shall not be guilty of an unlawful detainer during the year, and such holding over for the period aforesaid shall be taken and construed as a consent on the part of the tenant to hold for another year.

[1911 CPA § 647; RL § 5589; NCL § 9136]

NRS 40.270 Tenant has similar remedies against subtenant. A tenant may take proceedings similar to those prescribed in this chapter, to obtain possession of the premises let to any under tenant, in case of his unlawful detention of the premises underlet to him.

[1911 CPA § 648; RL § 5590; NCL § 9137]

NRS 40.280 Service of notices to quit; proof required before issuance of order to remove.

1. Except as otherwise provided in NRS 40.253, the notices required by NRS 40.251 to 40.260, inclusive, may be served:

(a) By delivering a copy to the tenant personally, in the presence of a witness;

(b) If he is absent from his place of residence or from his usual place of business, by leaving a copy with a person of suitable age and discretion at either place and mailing a copy to the tenant at his place of residence or place of business; or

(c) If the place of residence or business cannot be ascertained, or a person of suitable age or discretion cannot be found there, by posting a copy in a conspicuous place on the leased property, delivering a copy to a person there residing, if the person can be found, and mailing a copy to the tenant at the place where the leased property is situated.

2. Service upon a subtenant may be made in the same manner as provided in subsection 1.

3. Before an order to remove a tenant is issued pursuant to subsection 5 of NRS 40.253, a landlord shall file with the court a proof of service of any notice required by that section. Except as otherwise provided in subsection 4, this proof must consist of:

(a) A statement, signed by the tenant and a witness, acknowledging that the tenant received the notice on a specified date;

(b) A certificate of mailing issued by the United States Postal Service; or

(c) The endorsement of a sheriff, constable or other process server stating the time and manner of service.

4. If service of the notice was not delivered in person to a tenant whose rent is reserved by a period of 1 week or less and the tenancy has not continued for more than 45 days, proof of service must include:

(a) A certificate of mailing issued by the United States Postal Service or by a private postal service to the landlord or his agent; or

(b) The endorsement of a sheriff or constable stating the:

(1) Time and date the request for service was made by the landlord or his agent;

(2) Time, date and manner of the service; and

(3) Fees paid for the service.

[1911 CPA § 649; RL § 5591; NCL § 9138]—(NRS A 1961, 413; 1967, 196; 1985, 231, 1418; 1987, 701; 1995, 1854; 2007, 1287)

EVICTIION IN NEVADA

There are two ways to initiate an eviction in Nevada:

1. Filing and serving a forma, civil eviction known as an unlawful detainer action, and;
2. Using the summary eviction procedures contained in NRS 40.253 and NRS 40.254

The Summary eviction process is generally a simpler and quicker process than the formal unlawful detainer eviction proceeding (Note: Summary eviction may not be used against tenants of mobile home parks). Summary eviction may be used when the only issue to be adjudicated by the court during the proceeding is possession of the rental unit. Summary eviction does not allow the to seek damages; it does allow the tenant to counterclaim up to the alleged rent amount owed claimed by the Landlord. Additionally, the summary eviction process only provides for a cour hearing, rather than trial; there are no “discovery” rights for either party. These forms and instructions apply only to summary eviction actions.

Different types of Evictions and their instructions are available and can be printed. Available forms for Summary Evictions are:

5 DAY NO PAY

Step 1 – Unlawful Detainer for Non Payment of Rent

Step 2 – 24 Hour Landlords Affidavit/Declaration for Summary Eviction Non Payment of Rent

NO CAUSE 5/7/30 – Day

Step 1 – No Cause Termination Notice to Vacate

Step 2 – 5 Day Notice of Unlawful Detainer for Failure to Vacate Rental Unit & Notice of Summary Eviction

Step 3 – 24 Hour Landlords Affidavit/Declaration For Summary Eviction for No Cause

5 DAY BREACH

Step 1 – Notice of Termination of Violation of Lease or Rental Agreement

Step 2 – 5 Day Notice of Unlawful Detainer for Failure to Vacate Rental Unit for Violation of Lease/Rental Unit

Step 3 – Landlords Affidavit/Declaration for Summary Eviction for Breach

NUISANCE/WASTE/UNLAWFUL BUSINESS

Step 1 – Notice of Termination for wrongful Assignment or Subleasing Waste, Unlawful Business, Nuisance or Violations of Controlled Substances Laws 3-Day

Step 2 – Unlawful Detainer 5 Day

Step 3 – 24 Hour Landlord Affidavit/Declaration for Summary Eviction

Step #1 – Read the entire set of instructions

Please print, read and understand all the instructions.

Step #2 – Complete the notice requirements.

Once you have read the instructions for the eviction and decide that this process is necessary, you will have to give notice to your tenants.

Step #3 Filing the eviction

If the tenant fails to comply with the terms set in the notice issued to them, you may proceed to the next step, which will formally evict the tenant from the housing.

Agent Fiduciary and Responsibility as it pertains to a managers responsibility

THE FORMATION OF AGENCY

The most common methods to create agency are expressed, implied, ratification and estoppel. Expressed agency is the cleanest and simplest. Expressed, written or oral, means that the agency was clearly stated in words. Obviously the expressed written agreement is preferable to the expressed oral agreement, as the evidence needed in court to prove or disprove the relationship is in writing. Most states have a *statute of frauds* that may require contracts to be in writing before the court will allow a suit for commission due under an agency. When statute of fraud applies, the broker cannot collect a commission unless there is an agreement in writing for the commission. Please consider, however, that agency responsibilities can be created by spoken agreements. Unfortunately the common law of agency requires no writing to hold the broker liable for the fiduciary responsibilities for his or her actions or the actions of linked salespersons.

Written and oral agreements are easy to understand, but agency by implication, appearance, ratification and estoppel are less familiar. When a couple fills out a marriage license and swears in front of witnesses and a religious or court official, they enter into a legal contract of marriage. The marriage is an expressed contract both in writing and orally. A couple who lives together without a formal marriage may still be legally married by the law of their actions in sharing equally, having children, etc. Another example of an implied contract might be ordering a meal in a restaurant. This creates the implied contract that the patron will pay the price on the menu and the restaurant will provide an edible meal. Pumping gas at a self serve pump creates the implied contract that the motorist will pay for the gas before driving off. For many years, the real estate industry preferred the simplicity of client agency.

Two additional ways to create agency have not been addressed as yet: Agency by estoppels and ratification. Ratification means to later acknowledge or restate a previously implied relationship. This can occur easily in real estate. Suppose that an agent working with a landlord were to ask oral permission to show an unlisted home in a “for sale by owner” situation. The agent probably will discuss the commission to be paid, but as you recall cannot enforce this part of the promise. After showing the property the agent prepares a proper written offer with a commission written in and presents it to the client for signature. When the client signs the contract he or she “ratifies” the previous oral contract. This takes care of the real estate side of the transaction, but what about the agency relationships? Was the agent representing the client as a client or was he representing the client?

Apparent agency, ostensible agency, and estoppel are less likely methods of creating agency, but deserve discussion. If an agent can become an agent by implication of his or her actions, the concept of apparent agency holds that the client, as well, can create agency by allowing someone to *appear to be an agent*. Often called *ostensible agency*, this form of agency results from the principle intentionally or unintentionally allowing a third party to believe that an agency

relationship exists. The concept of *estoppel* means that the principal can create agency if he or she fails to “estoppel” someone from acting like his or her agent. If a lessor of office space were to allow a real estate agent to show property for lease without a listing and allow that agent to negotiate a lease and by inaction, fail to notify the tenant that there was no agency, then the landlord might have some liability for the actions of the agent. In allowing the agent to *appear to be empowered* the principal may have created the agency in fact. In summary then, agency responsibilities and liabilities can be created by actions or spoken words in addition to written agreements. In many states a formal written agreement must be provided before an agent can sue for an unpaid commission. The easy creation of unintentional agency relationships has led to misunderstandings between agents clients. Consumer protection laws in many states have been created to force disclosure of agency relationships prior to providing any real estate assistance.

When a fiduciary duty is imposed, equity requires a stricter standard of behavior than the comparable tortious duty of care at common law. It is said the fiduciary has a duty not to be in a situation where personal interests and fiduciary duty conflict, a duty not to be in a situation where their fiduciary duty conflicts with another fiduciary duty, and a duty not to profit from their fiduciary position without express knowledge and consent. A fiduciary cannot have a conflict of interest. It has been said that fiduciaries must conduct themselves “at a level higher than that trodden by the crowd”.

In Commercial Law, a Principal is a person, fictitious or otherwise, who authorizes an Agent to act to create one or more legal relationships with a Third Party. This branch of law is called Agency and relies on the common law proposition, *qui facit per alium, facit per se*: this is Latin for *he or she who acts through another, acts personally* and it is a parallel concept to vicarious liability and strict liability in which one person is held liable in Criminal Law or Tort for the acts or omissions of another.

Agency is an area of commercial law dealing with a contractual or quasi-contractual tripartite set of relationships when an Agent is authorized to act on behalf of another (called the Principal) to create a legal relationship with a Third Party. Succinctly, it may be referred to as the relationship between a principal and an agent whereby the principal, expressly or implied, authorizes the agent to work under his control and on his behalf. The agent is, thus, required to negotiate on behalf of the principal or bring him and third parties into contractual relationship. This branch of law separates and regulates the relationships between:

- Agents and Principals;
- Agents and the Third Parties with whom they deal on their Principals' behalf; and
- Principals and the Third Parties when the Agents purport to deal on their behalf.

Agency RESPONSIBILITIES

If an agent is judged in court on how well he or she did his or her job he will be judged on the following five fiduciary responsibilities that an agent owes to his or her principal.

1. LOYALTY
2. OBEDIENCE
3. CARE AND DILIGENCE
4. ACCOUNTING
5. DISCLOSURE/CONFIDENTIALITY

The first letters of the fiduciary responsibilities form the acronym LO CAD and it is a “low cad” of an agent that does not observe these duties to the principal.

REAL ESTATE DIVISION

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PROPERTY MANAGEMENT

What is Property Management?

Property Management means the physical, administrative or financial maintenance and management of real property, or the supervision of such activities for a fee, commission or other compensation or valuable consideration, pursuant to a property management agreement. NRS 645.019.

What is a Property Management Agreement?

Property Management Agreement means a written contract between a client and a broker in which the broker agrees to accept valuable consideration from the client or another person for providing property management for the client. NRS 645.0192

What is a Property Manager?

Property Manager means a person engaged in property management who, as an employee or independent contractor, is associated with a licensed real estate broker, whether or not for compensation and has obtained a Property Manager Permit. NRS 645.0195

What activities may a licensed real estate agent perform?

A real estate licensee may rent, lease or lease option real estate and perform all activities necessary to represent their client, either the owner or the renter, leading to the conclusion of an agreement to rent, lease, or option the property involved. These activities include, but are not limited to, advertising a property, preparing the lease, rental or option agreement, having a credit check run on the prospective tenant, checking the tenant's references, doing a walk-through inspection with the tenant and negotiating the price and other terms and conditions of the agreement.

A real estate licensee may also accept an initial check for rent and deposits required by the rental, lease or option agreement. The check must be made out to the owner, property manager or escrow company. The real estate licensee's fee or commission must be made out to the broker with whom they are associated at the time of the transaction.

A real estate licensee may, during the listing and sale period, arrange for a listed property to have pool or yard maintenance, be cleaned and repaired. An agent may

also arrange for and coordinate repairs agreed to during and as a part of the sale negotiations.

What activities must be performed by one who holds a Property Manager Permit?

Once an agreement to rent, lease or option has been concluded, an unpermitted real estate licensee may not be involved in any aspect of the physical, financial, or administrative management of the real estate which has been rented, leased or optioned. Issues which arise during the term of a rental, lease or option agreement must be handled by the owner of the property or a permitted Property Manager who has agreed to manage the property. Involvement with payments or collections, during the term of the rental or lease also require a property management permit. An unpermitted real estate licensee is also prohibited from engaging in the management of real estate during periods between rentals, leases or other transactions.

A permitted property manager must enter a written property management agreement with the client pursuant to NRS 645.6056 before commencing the management of any real estate. This agreement must be approved and signed by the permitted broker or designated broker salesman.

What actions may be taken if unlicensed property management activities are conducted which require a license?

It is unlawful for any person, limited-liability company, partnership, association or corporation to engage in the business of, act in the capacity of, advertise or assume to act as, a (a) Real estate broker, real estate broker-salesman or real estate salesman within the State of Nevada without first obtaining the appropriate license from the Real Estate Division as provided for in this chapter; and (b) Property manager within the State of Nevada without first obtaining from the Real Estate Division a license as a real estate broker, real estate broker-salesman or real estate salesman and a permit to engage in property management. NRS 645.230.

The Real Estate Commission may impose an administrative fine against any person who knowingly: (a) Engages or offers to engage in any activity for which a license, permit, certificate or registration or any type of authorization or any regulation if the person does not hold the required license, permit, certificate or registration or has not been given the required authorization; or (b) Assists or offers to assist another person to commit the above described violation.

The Real Estate Commission may impose an administrative fine for conducting

unlicensed property management activity in an amount not to exceed the amount of any gain or economic benefit that the person derived from the violation or \$5,000, whichever amount is greater. NRS 645.235.

To view the applicable statutes and regulations in their entirety, visit our website at www.red.state.nv.us.

10/15/08

REAL ESTATE DIVISION

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“TRUST ACCOUNT” IN THE TITLE OF A BANK ACCOUNT

NRS 645.310(4) requires that when a real estate broker receives money “which belongs to others,” the broker shall “promptly deposit the money in a separate checking account located in a bank or credit union in this State which must be *designated a trust account*” (emphasis added). Further, NAC 645.655(8) requires that “A real estate broker who is engaged in property management for one or more clients shall maintain two separate property management trust accounts.”

What is a trust account and why do some banks have difficulty establishing trust accounts for real estate brokerages?

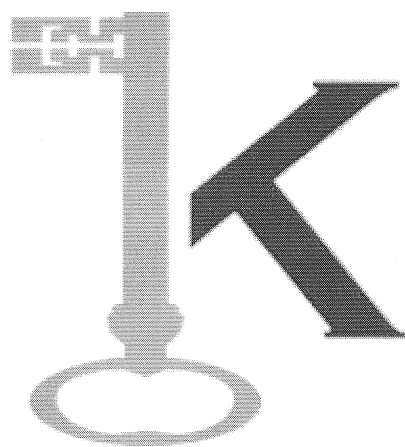
A trust account is an account that is managed by one party for the benefit of another. The person managing an account in trust is a fiduciary to the ultimate owner or beneficiary of the account. The term can be used generically for any trust account, regardless of whether there is a formal trust agreement.

A “formal trust agreement” is often where the conflict with the bank begins. It is common today for individuals performing estate management to create trusts for family or other beneficiaries so that assets will be distributed upon the individual’s death according to the individual’s wishes and with minimum tax impact. A written trust agreement is usually prepared by an attorney and properly defines the trust assets, management and distribution. It is this formal trust agreement that the bank will ask for if a licensee, who wishes to open a broker trust account or the property management trust accounts, approaches with a request to “open a trust account”.

To avoid this miscommunication, the licensee should simply state that he or she would like to “open two business accounts” and, when completing the paperwork for the title of the accounts, make sure that the words “trust account” appear in the title. No separate trust agreement is required. The trust account provisions of NRS and NAC 645, along with the property management agreement, define the assets, management and distribution of the funds in these accounts. The main purpose for using the trust account designation is to make it clear to the bank and others that the funds in these accounts are not brokerage funds, but belong to others.

As trustee, in the broad sense of the word, of the funds which belong to others in the accounts, “The real estate broker is personally responsible and liable for such deposit at all times.” NRS 645.310(4)

06/14/12



NEVADA REAL ESTATE DIVISION
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CLASSROOM CONTENT AND INSTRUCTOR EVALUATION REPORT

☒ POSTLICENSING EDUCATION ☐ CONTINUING EDUCATION (Check relevant box)

COURSE TITLE: Module I, K & O
CE/POST #: POST.10014-RE HOURS: 3 DATE: _____
SPONSOR: Key Realty School
INSTRUCTOR: _____

I. <u>INSTRUCTOR:</u>	<u>Excellent</u>	<u>Average</u>	<u>Not Acceptable</u>
Knowledge of course content	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Questions answered/Examples used	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Presented all topics on outline	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Timely start and finish of class	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Ability to control disruptions	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
II. <u>CONTENT/MATERIALS:</u>			
Course objectives/outcomes	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Organization of materials	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Practical value of content	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Value of resource materials*	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Content and materials current	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

For "Not Acceptable" rating(s) state your reasons.

1. _____
2. _____
3. _____
4. _____
5. _____

Other comments regarding the course and/or instructor.

1. _____
2. _____
3. _____

Name (optional): _____ Date: _____

* Any supplemental/additional information such as useful websites, case studies, articles from publications, etc.

NOTE: No exceptions to this format without Division's prior approval.