

Notices To Pay Rent Or Quit - How To Build Your House On A Solid Foundation

By: Richard L. Seide, Esq. and Ellen L. Ticknor
(Commercial Cases)

Construction 101-A

Virtually every commercial Unlawful Detainer case begins with a notice. Notices may include but are not limited to a (i) Notice to Pay Rent or Quit; (ii) Notice to Cure Covenant or Quit; (iii) 30-day Notice to Quit (month to month tenancies only); (iv) 3-day Notice to Quit (nuisance); and (v) 3-day Notice to Quit after Foreclosure. The vast majority of notices served are Notices to Pay Rent or Quit and this article will focus on that type of notice. As suggested by the title of our article, the notice upon which the lawsuit will be based is literally the “foundation” upon which the “house” or Unlawful Detainer action will be built. As in construction, if the foundation of the building is not rock solid, the building will crumble. If the notice is not “rock solid” and thus falls, so does the lawsuit. As a result, the goal is to always craft the notice so that it is accurate, clear and concise and meets all of the current requirements of California law. If the case proceeds to trial, the notice must be able to withstand a tenant or counsel’s attack. Even if the case proceeds by default, an inaccurate or shaky notice may not withstand a court clerk’s scrutiny.

Basic Requirements

Name: While this may seem pretty obvious, we want to reiterate that a notice must include the full and complete name of the tenant. Be sure to check both the face page of your lease and the signature block. It is surprising how many times the name listed on the face page differs from the actual name in the signature block. Include any “dba” or fictitious name your tenant uses. Bottom line: You want to list your tenant’s name completely and accurately.

Lease Guarantor(s): If there is a guarantor(s) for your particular lease, you need to name him/her/ them. The guarantor(s) have a right to receive notice of the delinquency if you intend to hold him/her/ them responsible for performance under the lease.

Assignors: If the lease was assigned and the assignment language holds both the assignor and assignee responsible for performance under the lease, you must name and serve the assignor (original tenant) also.

Subleases: If your tenant has subleased all or a portion of the premises, name the original tenant and the subtenant.

Spare Bodies: Let’s talk about “spare bodies”. Here are some common scenarios:

(1) A new business (not named on your lease) suddenly appears and is doing business out of the premises. You see the new business name on the door or new signage;

(2) You start receiving rent checks from a business “other” than the business named on your lease;

(3) You stop by the premises and are met by “Bob” who indicates he bought the business from “Sue” who is the tenant named on the lease. Bob says Sue is gone and he’s been here for awhile now.

Question: Do you name these “spare bodies” on a notice? DRUM ROLL HERE . . .

Answer: Yes, you

absolutely DO name these new businesses and/or individuals on any notice you serve.

Question: But, but, but . . . these are not “authorized” tenants. We did not consent to any assignment, sale or anything else that would give them a right to be in the premises. We do not want to recognize them as tenants. Where’s the logic here?

Answer: Here is how the court looks at “spare bodies”. If they are going in and out of the premises with a key, they are not breaking and entering nor are they trespassing. While you certainly did not give them

a key, someone (most likely your tenant) did. When that

person gave them access to the premises and a

key, they became your tenant. They

may not be an “authorized”

tenant and that tenancy

can typically be terminated

easily since you never agreed

to it, BUT you must use the

legal process to do that. The

concept is that if someone is in

possession of the premises,

or has any right to occupy the

premises, that person or entity

needs to be named on the notice. When in

doubt, include the person or

entity instead of

leaving them out. So, if you see a new business name, a new sign, receive a rent check from a new entity or meet “Bob”, the new owner, when you visit the premises, make sure to include all of these “spare bodies” on any notice you serve.

Premises Address: Be sure to include the full premises address. We have seen many notices where a suite number was left out. Your tenant may occupy more than one suite, but the notice address designated in the lease may only list one suite. Your tenant may have added additional space since the lease was signed. For purposes of a Notice to Pay Rent or Quit, the ENTIRE premises address is required.

Timing of Notices: California statutory law specifies that a Notice to Pay Rent or Quit be for a period of three (3) days. Landlords and tenants are free to increase that time period and they frequently choose to do so. The parties may not, however, shorten the time period. While three days is the minimum or “floor”, many leases specify five, ten or other number of days as the time period during which a tenant may cure after service of a notice. If your lease specifies a time period that is greater than three (3) days, your notice must provide that longer time period. Accordingly, it’s crucial that you check the language of your lease to make sure that your notice complies with what you contractually agreed to do. These requirements will be found in the default section of your lease.

Base Rent and Additional Rent: The portion of the notice that comes under most frequent attack by tenants and their counsel is the portion that lists the amounts that are due and unpaid. This is truly the place where your foundation can be attacked and has the potential to crumble. To reiterate, if the notice crumbles, so does the case.

Base rent and triple net charges (“NNN”) are clearly items that can and should be included in the notice. Itemizing those charges by month and amount is the preferred method. If the lease provides for the tenant to reimburse for utilities that are billed by the landlord, then those amounts may be included as well.

Late Charges and Other Penalties: Most judges generally view items such as late charges, NSF fees, interest charges and tenant re-bills (i.e. re-key

Continue to next page...



charges) in a dim light. Many judges will void a notice if those types of charges are included; and as noted above, if the notice crumbles, so does the lawsuit. The amounts that are due for late charges and the other types of charges noted above are typically small compared to the base rent and NNN charges that are due. We suggest you NOT jeopardize your case by including charges that are questionable. Please keep in mind that if we have the opportunity to settle an Unlawful Detainer action for you, we'll always attempt to recapture those types of charges for you as part of any settlement.

Time Limitation - One Year

Notices to Pay Rent or Quit may only demand rent that is owed for a time period of one year or less. While it's unusual for a landlord to "sit" on base rent for more than a year without serving a tenant, it does happen. There may also be NNN or utility charges on the books that were not paid and have been allowed to "linger" for more than a year. Those older charges cannot be included in a Notice to Pay Rent or Quit – and that's by statute. It is not a discretionary requirement. You can still sue and recover these "old" amounts, but not in the context of an Unlawful Detainer action.

Additional Language

The language of notices has changed in recent years. If you are using a notice "form" that hasn't been reviewed in the last five years, you might want to have it reviewed and revised as appropriate. Current law requires that (i) the landlord payee be identified; (ii) a business address where a payment can be "hand" delivered be provided; and (iii) the normal hours of business be provided. We also recommend that your notice include language that specifically states that the amounts listed are "reasonably estimated" to be the amounts due. This gives you some leeway with NNN estimates.

Acceptance of Partial Payments

When a notice is served and a partial payment is tendered, you "may" be able to accept the partial payment and still proceed with an action for Unlawful

Detainer. The determining factor is whether the partial payment does or does not satisfy (or pay off) the entire amount demanded in the original notice. Remember, since the notice is, in fact, the "foundation" for the lawsuit, it is critical that the notice remain valid and in place. Any partial payments should be discussed with counsel prior to them being accepted and deposited or, alternatively, rejected and returned to the tenant. Please keep in mind that this option to accept a partial payment pertains to commercial property cases only.

Summary

While the Notice to Pay Rent or Quit appears to be a relatively simple document to prepare, it must be accurate, clear and in compliance with California law. A bit of attention to detail making sure your foundation is solid on the front end will go a long way to ensuring that your "house" stands firm during litigation. This produces a great result for ownership.



Ellen Ticknor
Friend of IREM

Ellen Ticknor
Director Of Client Relations
eticknor@seidelaw.com
(949) 474-8000

Our firm specializes in the representation of commercial real estate owners and managers. We handle lease negotiation and drafting, commercial collection, eviction matters,

tenant work-outs, the creditor side of bankruptcy, the defense of mechanics' lien actions, and other work that helps to maximize the value of the real estate. We strive to be diligent, innovative and responsive to our clients' needs. We also offer legal updates and proactive legal seminars to our clients.

