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Winning Court Strategies: Oregon

By Jeffrey S. Bennett, Attorney at Law

As a landlord's attorney, I have come to learn that most court cases are not won or lost in the courtroom. Instead, the results of a civil action are often foretold days, weeks or months in advance. The outcome of an FED may be predicted when the landlord serves a termination notice; the outcome of a security deposit dispute may be determined when the final accounting period lapses; and discrimination cases can be foretold with a mere reading of an advertisement.

EVICTION ACTIONS

Most landlord/tenant litigation arises out of possessory claims. If the notice was correctly chosen, properly completed, and correctly served, the landlord's chances of courtroom success are greatly enhanced. Then again, any miscue in the notice process can lead to failure.

Having filed and/or tried hundreds, if not thousands, of landlord-tenant disputes, I analyze the likelihood of success in an FED from the perspective of a tenant's attorney. Although this sounds strange at first blush, it actually makes remarkably good sense. Tenants' attorneys are always lurking on the horizon, eagerly awaiting an opportunity to take advantage of the myriad of mistakes commonly made by landlords. If I can anticipate the types of defenses and counterclaims the tenant's attorney will raise, I can quickly weed out those cases in which tenants regularly prevail.

Below, you will find a "laundry list" of common errors made by landlords in conjunction with the service of notices and/or the filing of FEDs. These are the exact errors tenants' attorneys prey upon. However, by understanding your rival, you will enhance your chances of winning your FEDs. So, take a few minutes to read this list, and keep this memo handy whenever you are preparing notices.

1. OUTDATED FORMS: Old forms often contain language which is either insufficient or improper under current Oregon law. For example, the rapid changes in laws during 2015 and 2016 triggered back-to-back forms changes for many forms manufactures. A notice that looked perfectly good one week was obsolete the next week. By continually checking forms manufacturers' websites, you'll often be able to stay a step ahead of problems created by using outdated forms.

2. POSTING AND MAILING: Posting and mailing of notices (without adding three days for mailing) is only permitted when the rental agreement and surrounding facts meet all of the requirements of ORS 90.155. At the risk of oversimplifying that statute – which all landlords should read and understand – the rental agreement's post and mail clause must (a) be reciprocal in nature, and (b) allow the tenant to post and mail notices to the landlord at a designated location (i.e., and address that is clearly designated in the rental agreement). The landlord's designated location for receipt of posted notices from tenants must be (a) within a reasonable distance from the tenant's location, and (b) available 24 hours per day, seven days per week, and 365 days per year. Many older rental agreements–as well as some newer ones–do not contain sufficient language to render posting and mailing legal. Further, some landlords forget to insert their designated address, insert an incomplete address, insert an incorrect address, and/or insert a distant address in the rental agreement. Any such defect means that posting and mailing (without adding three days for mailing) is illegal. In summary, if the stars don't perfect align in a manner that allows posting and mailing of notices, then service must be made personally or via first class mail (with three additional days added for mailing).

3. POSTING AND MAILING, PART TWO: A Multnomah County Circuit Court judge recently ruled that the words, "main entrance of the complex office," insufficiently described the landlord's address, for the purpose of receiving posted notices from tenants. Aside from the recent ruling denouncing the legality of that clause, a different Oregon judge upheld a nearly identical clause. (A tenant's attorney appealed the trial court's decision upholding the legality of the relevant clause, but the appellate decision may not be revealed for many months or years.) If landlords rely upon rental agreements containing the foregoing type of clause, and don't add three extra days (for mailing) to their notices, then landlords risk losing eviction actions. Unless landlords desire to assume the foregoing risk, they should add three days (for mailing) to their written notices.

4. MAILING BY CERTIFIED MAIL: Mailing notices via certified or registered mail will not constitute legal service. Accordingly, mail notices via first class mail only.

5. IMPROPER TIME LINES: I regularly reject notices on the basis that the time lines were improperly calculated. For example, I have seen scores of mailed notices which have only allowed two extra days for mailing as opposed to the three extra days required by statute. This is usually just a clerical error, but constitutes a fatal defect nonetheless.

6. KNOW WHEN YOU CAN USE 30 DAY NOTICES: "No Cause" Notice strategies are greatly affected by Senate Bill 608. Landlords can still serve 30 Day No Cause Notices within the first year of the *tenancy*, if the tenants are month-to-month. Landlords can also serve 30 Day Nonrenewal Notices upon fixed term lessess who's lease expires within the first year of *occupany*. Otherwise, No Cause Notices are usually prohibited, but for some limited exceptions. In order to understand the exceptions, you must know and understand SB 608.

7. KNOW WHEN TO USE 90 DAY NOTICES: If and when No Cause Notices are allowed, the No Cause Notices served upon tenants within the cities of Portland and Milwaukie must be 90 days long (as opposed to the old 30 and 60 day time limits), if the Notice and tenancy are subject to Portland's/Milwaukie's renter's protection ordinances. (Note: Portland's laws are quite complex and onerous. This lecture handout does not cover the entirety of Portland's laws.) Bend also has a 90 Day No Cause Notice rule that kicks in after the first year of the tenancy.

8. ALL TENANTS NOT NAMED: In order to file a solid FED action against all tenants within an apartment unit, all of those tenants must be named in the termination notice. While the words, "and All Other Occupants" should be included in termination notices, the foregoing phrase may not cover known tenants, and may not support the filing of an FED against your known tenants. If you list tenants in FED pleadings who weren't listed in your termination notice, those tenants may have a due process-like defense in the FED action. If you

don't list known tenants in your FED pleadings, then you may not discover the magnitude of your problem until you attempt to lock out the tenants (via the proverbial "sheriff's lock out"). At the time of the lockout, a tenant who was not named in the notice or FED may successfully argue that he/she wasn't named in the judgment, and that the sheriff is not authorized to remove him/her from the premises. Other, more complex, issues may arise when a guest has lived in the apartment for many months or when a child tenant attains the age of eighteen. In some cases–albeit not all cases–it may be advisable to name these other individuals in the termination notice. However, seek legal counsel before doing so.

9. USE OF WRONG NOTICE: I have seen a few landlords attempt to convert Notices of Termination Without Cause into "For Cause" or "With Cause" notices by writing in descriptions of events which precipitated the notice. Don't do that! A more common problem is the use of a 24 Hour Notice (for Outrageous Conduct) when a Notice of Termination For Cause would be more appropriate. If the acts which are described in the 24 Hour Notice are not "outrageous in the extreme," consider using a Notice of Termination For Cause instead. Finally, I see countless No Cause Notices used by unknowing landlords in an effort to prematurely terminate a term lease. You cannot prematurely terminate a lease with a No Cause Notice.

10. RETALIATORY NOTICES: When a tenant complains to the landlord or a governmental agency about the property or other statutorily described landlord-tenant issues, the landlord cannot serve a "no cause" notice of termination, unless the landlord has good reason to do so. If the tenant creates a factual scenario that would render a No Cause Notice retaliatory, then landlords are still permitted to serve "For Cause" Notices and other default-based Notices (e.g., Notice of Termination For Nonpayment of Rent, 24 Hour Notice, or 30 Day Notices of Termination For Cause).

11. FOR CAUSE NOTICE WITH INADEQUATE DESCRIPTION OF DEFAULT/CURE: Any time you serve a 30 Day Notice of Termination For Cause, you must clearly describe the tenant's defaults as well as the acts the tenant must undertake in order to cure the defaults.

12. FOR CAUSE WITHOUT CURE DATE: A 30 Day Notice of Termination For Cause must provide the tenant with an opportunity to cure the defaults. The cure date is 14 days after the notice is served (17 if the notice is served via mail only). If the tenant doesn't cure the default, the termination date is 30 days after the notice is served (33 if mailed).

13. DEMANDING CASHIER'S CHECKS OR MONEY ORDERS IN NOTICES OF TERMINATION FOR NONPAYMENT OF RENT: This is only permissible in limited circumstances, and is not permissible if the rental agreement doesn't allow for the same.

14. LATE CHARGES ADDED: Do not add late charges and rent together when calculating the amount the tenant must pay in order to cure the rent default pursuant to a Notice of Termination For Nonpayment of Rent.

15. ACCEPTING PARTIAL PAYMENT: Partial payments are always problematic. Accordingly, I strongly recommend that you avoid accepting partial payments. However, there are some ways to avoid partial payment problems. (1) If you accept a partial payment before serving a Notice of Termination For Nonpayment of Rent, then you should enter into a written partial payment agreement, signed by the tenant, which states when the remainder of the payment will be made. If the tenant thereafter defaults in the payment obligation set forth in the partial payment agreement, you may serve a Notice of Termination For Nonpayment of Rent after that default. (2) If you accept a partial payment after having already served a Notice of Termination For Nonpayment of Rent, and the tenant defaults in the payment obligation set forth in the partial payment agreement, then I recommend that you serve a Notice of Termination For Nonpayment of Rent after that

default. There are very limited exceptions to this rule, and playing the "exceptions game" carries significant risk.

16. PAYMENT BEYOND TERMINATION DATE: If you accept any rent for any time period beyond the termination date (e.g., if the termination date is the 15th of the month, and you accept 16 days' worth of rent), your termination notice is likely void under the "waiver" statute. This issue often arises in leap years, when a Notice of Termination sets forth a February 28 termination date, whilst the landlord accepts rent through February 29. On the other hand, there is a ten day refund period during which you can return the excess payment to the tenant to avoid waiving your termination notice.

17. PAYMENT AFTER FED IS FILED: If you accept rent from a tenant after an FED is filed, you may have waived your eviction rights. The same result may arise if you serve a new termination notice while the FED is pending. Don't do this…. or talk with your attorney about possible exceptions.

18. PAYMENT DEMANDS IN NOTICES OF TERMINATION FOR NONPAYMENT OF RENT WHEN PERSONAL SERVICE IS USED: Payment by a tenant who has received a Notice of Termination For Nonpayment of Rent is timely if mailed to the landlord within the period of the notice unless: (a) The notice is served on the tenant: (1) By personal delivery as provided in ORS 90.155 (1)(a); or (2) By first class mail and attachment as provided in ORS 90.155 (1)(c); (b) A written rental agreement and the notice expressly state that payment is to be made at a specified location that is either on the premises or at a place where the tenant has made all previous rent payments in person; and (c) The place so specified is available to the tenant for payment throughout the period of the notice.

19. TOO MUCH RENT DEMANDED IN NOTICES OF TERMINATION FOR NONPAYMENT OF RENT: If you demand more money than you're owed, in your Notice of Termination For Nonpayment of Rent, then your Notice will be fatally flawed. I've seen excess demands happen in a variety of contexts. Here are two common scenarios: (1) the landlord failed to properly serve a Notice of Rent Increase, yet included the rent increase in the Notice of Termination For Nonpayment of Rent; and (2) the landlord misread the Rental Agreement or tenant ledger at the time the Notice was being prepared. Portland's renter's protection ordinance sets forth particular standards for the contents of Notices of Rent Increase.

20. INCORRECT DOLLAR AMOUNTS DEMANDED IN NOTICES OF TERMINATION FOR NONPAYMENT OF RENT: Notices of Termination For Nonpayment of Rent are allowed to demand one thing: rent. If your Notice of Termination For Nonpayment of Rent demands non-rent items (e.g., utilities or noncompliance fees), in order for the tenant to avoid termination of the tenancy, the Notice is fatally flawed.

21. FAILING TO PROPERLY RETURN PAYMENT: There are only two permissible methods for returning a rejected payment to a tenant: personal delivery and first class mail. Posting is impermissible.

22. VERBAL EXTENSIONS OF NOTICE DEADLINES: Any time a notice deadline is verbally extended, this could nullify the notice. Accordingly… don't do it.

23. MODIFYING NOTICES: Notices are designed to meet specific statutory requirements. Unless required in order to render the notice complete, don't modify notice forms.

24. INCORRECT/INCOMPLETE ADDRESS(ES): Judges vary on their interpretation of incomplete address designations for landlords and tenants in notices of termination. So as to avoid creating defenses relating to incorrect or incomplete addresses, list the landlord's and tenant's addresses fully. Include the proper suffix for the street address (e.g., street, lane, avenue, circle, loop, etc.).

25. HAZARDS WITH FILING ON MONDAY: This is one of the newest surprises for many landlords. If a Notice of Termination For Nonpayment of Rent expires on a Sunday, then the tenant has the absolute right to pay on Monday per ORS 187.010. (Further, if that Monday is a holiday, then the payment deadline is extended to the next non-holiday, which will likely be Tuesday.) Since a landlord cannot file the FED until the cure deadline has lapsed–which, again, is extended at least one day, if the Notice expired on Sunday–filing an FED on Monday is, at best, problematic. (Also see, ORS 105.115(2)(b).)

26. DON'T FILE TOO EARLY: Landlords can't file eviction actions until the notice of termination upon which it is based has expired and tenant has failed to either cure the default (if required) or vacate the premises.

27. NO TIME DEADLINE INCLUDED: A Notice of Termination For Nonpayment of Rent must include the date and time for payment… not just the date.

28. UNDERSTAND THE RULES APPLICABLE TO FEDERALLY SUBSIDIZED TENANCIES: Federally subsidized projects and tenancies (such as Section 8 or Low Income Housing Tax Credit Properties) are governed by additional laws. These laws may modify, add to, or supersede obligations created under Oregon state laws.

29. KNOW WHO YOU ARE: Eviction actions must be filed in the name of the "real party in interest." If the landlord is an assumed business name, limited liability company, corporation, or any type of partnership that must be registered with the Oregon secretary of state's office, then check the state's website. If your entity is not properly registered with the Oregon secretary of state's office, then correct your registration problems, before you file an eviction action. Further, note that some tenants' attorneys are now contending that an assumed business name should not be listed, by itself, as the Plaintiff in any FED. Those attorneys contend that the "registrant" (i.e., the person or entity that owns the assumed business name) must be named as the Plaintiff. If you insert the full name of the landlord (e.g., Acme Apartment Owners, LLC dba Acme Apartments) in your notices, you'll be better positioned to avoid "real party in interest" defenses.

30. PAY ATTENTION TO NEW LAWS: The law changes quickly. Portland enacted ordinances protecting tenants with very little public notice, and with little passage of time. What worked in court yesterday, may not work today. Pay attention to legal updates, and modify your practices to match current laws and legal interpretations.

31. HAVE GOOD EVIDENCE: If your FED strategy will depend upon your ability to prove a tenant's conduct (e.g., smoking, creating excessive noise, or parking in the wrong place), make sure you have solid evidence. If you are claiming that a tenant damaged property, take photos. If you are claiming that a tenant was too noisy, make sure that a reliable witness (or, better yet, multiple witnesses) can testify sufficiently so as to convince a judge that the noise incidents occurred and were excessive. If you're unsure as to whether your photographs or witness testimony would convince a judge or jury that the tenant was in default, you may not have a good basis for filing an FED.

32. KNOW A GOOD DEAL WHEN YOU SEE ONE: At an FED first appearance, some tenant's attorney might tell you that his client (your tenant) will vacate the premises in seven days if you'll pay that attorney $700.00 for his fees. Since trials often take place more than seven days after the first appearance, and since attorneys typically charge more than $700.00 to go to trial with you… don't pass up on a good deal.

33. ATTORNEY CAVEATS: There are many variations and twists on the foregoing scenarios. Plus, there are undoubtedly some "tenant tricks" that I forgot to mention. Accordingly, don't construe this handout too literally. Instead, use it as a tool to expand your knowledge base, and rely upon your reading of the Oregon Residential Landlord and Tenant Act (the "ORLTA"), or the advice of your attorney, before making important decisions. You can find the ORLTA and the FED statutes online. (Simply Google "ORS Chapter 90" and "ORS Chapter 105.")

NON-EVICTION MATTERS

1. ADVERTISING: All advertisements should be factually accurate and nondiscriminatory.

2. RESERVATION DEPOSITS: These have become increasingly popular in the past decade. However, their use is limited to the following: (a) The application must be approved; (b) the landlord must give the applicant a written statement describing the terms of the agreement to execute a rental agreement and the conditions for refunding or retaining the deposit; (c) if a rental agreement is executed, the landlord shall either apply the deposit toward the monies due the landlord under the rental agreement or refund it immediately to the tenant; (d) if a rental agreement is not executed due to a failure by the applicant to comply with the agreement to execute, the landlord may retain the deposit; (e) if a rental agreement is not executed due to a failure by the landlord to comply with the agreement to execute, within four days the landlord shall return the deposit to the applicant either by making the deposit available to the applicant at the landlord's customary place of business or by mailing the deposit by first class mail to the applicant. Please note that if a landlord fails to comply with this section, the applicant or tenant, as the case may be, may recover from the landlord the amount of any fee or deposit charged, plus $150.

3. RENTAL AGREEMENTS: A provision prohibited by the ORLTA included in a rental agreement is unenforceable. If a landlord deliberately uses a rental agreement containing provisions known by the landlord to be prohibited and attempts to enforce such provisions, the tenant may recover, in addition to the actual damages of the tenant, an amount up to three months' periodic rent.

4. UTILITIES AND SERVICES: While landlords are generally allowed to charge tenants for utilities, there are a number of scenarios that can give rise to tenants' damage claims. If, at the time the parties enter into a rental agreement, the tenant is not informed that he/she will be paying for utilities that serve common areas, the landlord, or other tenants, a damage claim may arise. Damage claims may also arise in certain circumstances if the landlord is charging administrative fees and expenses in conjunction with the billing of utility charges.

5. HABITABILITY CLAIMS AND DEFENSES: The landlord has a general obligation to maintain the premises in a habitable condition. The tenant has a general obligation to use the premises in the manner for which it was intended and to avoid causing damage. These obligations often collide when the parties' relationship and dealings are tested in an eviction setting. However, there are multiple statutory provisions that deal with tenants' withholding rights and tenants' ability to procure, pay for, and be reimbursed for repair expenses. In order to avoid habitability claims, perform periodic inspections, proactively maintain the premises, and timely respond to maintenance requests.

6. MAINTENANCE REQUESTS: There is a common misperception that maintenance requests must be in writing. If the tenant requests repairs or maintenance in writing, the landlord or landlord's agent, without further notice, may enter upon demand, in the tenant's absence or without the tenant's consent, for the purpose of making the requested repairs until the repairs are completed. The tenant's written request may specify allowable times. Otherwise, the entry must be at a reasonable time. The authorization to enter provided by the

tenant's written request expires after seven days, unless the repairs are in progress and the landlord or landlord's agent is making a reasonable effort to complete the repairs in a timely manner. If the person entering to do the repairs is not the landlord, upon request of the tenant, the person must show the tenant written evidence from the landlord authorizing that person to act for the landlord in making the repairs. If the tenant does not request repairs in writing, the landlord should still enter, inspect, and perform the necessary repairs. However, such entry should only occur after first serving a Notice of Intent to Enter upon the tenant.

7. UNLAWFUL ENTRIES: Unlawful entries can occur in three primary ways: (a) The landlord enters the premises without having served a 24 Hour Notice of Intent to Enter (when one is required); (b) the landlord properly serves a 24 Hour Notice of Intent to Enter then enters the premises despite the tenant's denial of the right to enter; and/or (c) the landlord lawfully conducts an emergency entry but fails to serve an Emergency Entry Notice within 24 hours following the entry. Any such unlawful entry carries a penalty of at least one month's rent.

8. UNLAWFUL OUSTERS: If a landlord unlawfully removes or excludes the tenant from the premises, seriously attempts or seriously threatens to unlawfully remove or exclude the tenant from the premises or willfully diminishes or seriously attempts or seriously threatens unlawfully to diminish services to the tenant by interrupting or causing the interruption of heat, running water, hot water, electric or other essential service, the tenant may obtain injunctive relief to recover possession or may terminate the rental agreement and recover an amount up to two months' periodic rent or twice the actual damages sustained by the tenant, whichever is greater. If the rental agreement is terminated, the landlord shall return all security deposits and prepaid rent recoverable under ORS 90.300. The tenant need not terminate the rental agreement, obtain injunctive relief or recover possession to recover damages under this section.

9. FINAL ACCOUNTINGS: If you intend to withhold any portion of the security deposit, then serve your final accounting via personal delivery or first class mail, within the 31 day time limit set forth in ORS 90.300. Never send final accountings via certified mail. If you don't timely serve your final accounting, then the tenant can sue you for double the amount of the security deposit wrongfully withheld. There are no exceptions to the 31 day rule. Therefore, excuses such as "I couldn't complete the repairs within 31 days," "I didn't know where the tenant went," or "I hadn't rounded up all of the bids before the 31 days expired," will not extend the 31 day deadline.

10. ILLEGAL FEES: Landlords are prohibited from charging any of the following fees, if designated as follows: (1) Administrative Fees; (2) Move-In / Move-Out Fees; (3) Pet Fees (pet deposits were unaffected by the new laws); and (4) Cleaning Fees (cleaning deposits are still permitted). This severely impacts landlords who were accustomed to charging administrative fees, move-in/move-out fees, service of notice fees, etc. Those landlords who didn't charge such fees don't seem to mind. If a landlord deliberately uses a rental agreement containing provisions known by the landlord to be prohibited and attempts to enforce such provisions, the tenant may recover in addition to the actual damages of the tenant an amount up to three months' periodic rent. Accordingly, don't charge illegal fees.

11. RENT INCREASES: Rent increase notices have become incredibly complicated. A description of the relevant rent increase laws is well beyond the scope of this handout. However, here is a brief primer, which you should perceive as being a mere introduction to the current laws, and full of holes large enough to drive trucks through:

Portland and Milwaukie: In Portland and Milwaukie, A landlord may not increase a tenant's rent or associated housing costs by 5 percent or more over a 12 month period unless the landlord gives notice in writing to each affected tenant: (a) at least 90 days prior to the effective date of the rent increase; or (b) the

time period designated in the rental agreement, whichever is longer. Such notice must specify (a) the amount of the increase, (b) the amount of the new rent or associated housing costs and the date, as calculated under the law, and (c) when the increase becomes effective.

State of Oregon: Pursuant to Oregon Law (House Bill 4143), if a tenancy is a month-to-month tenancy, the landlord may not increase the rent: (a) during the first year after the tenancy begins, and (b) at any time after the first year of the tenancy without giving the tenant written notice at least 90 days prior to the effective date of the rent increase. The notices required under this section must specify: (a) the amount of the rent increase; (b) the amount of the new rent; and (c) the date on which the increase becomes effective.

Penalties: There are significant penalties associated with violating the foregoing laws. Accordingly, study them carefully, procure sound legal advice, and proceed cautiously.

12. FAIR HOUSING MATTERS: Fair housing litigation has gone through the roof, and initial tenants' claims (along with those of organizations such as Fair Housing Council of Oregon) have ballooned to gut-wrenching levels. From tenant-on-tenant discrimination to disparate impact issues relating to criminal applicants, the odds are stacked heavily in favor of tenants being able to assert discrimination claims… regardless of their validity. Further, many discrimination laws are so poorly written (including the two just mentioned) that it's impossible to ascertain what it takes to comply with the same. What's the moral of this story? Proceed cautiously! Take a conservative, low-risk approach to fair housing matters, and let the tenants' advocates aim their litigation weapons at someone other than you.

12. DON'T LOSE SIGHT OF ECONOMICS: As stated in the previous section, I have represented countless landlords in FED matters who contacted me after a first appearance already occurred. Many of these landlords ran into a tenant's attorney who demanded $500.00 in consideration for a vacate date, refused to accept that offer, and demanded a trial. By the time the smoke cleared in every case, my client spent more in litigation fees and costs than they would have had they settled at the first appearance. The same scenarios occur in non-FED disputes. Remember, you're in the business of being a landlord. Don't lose sight of your business goal: making a profit. The second you let emotion take control of your decision making process, you'll likely reduce – or eliminate – profits.

FOR MORE INFORMATION, VISIT NORTHWESTLANDLORDLAW.COM

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