



COLORADO REAL ESTATE JOURNAL

THE COMMUNICATION CHANNEL OF THE COMMERCIAL REAL ESTATE COMMUNITY

AUGUST 21, 2013 – SEPTEMBER 3, 2013

Drafting Better Apartment Documents

During the recession, many multifamily investors began drafting their own purchase agreements and leases. If done properly, this is fine way to reduce legal costs. That said, certain drafting details (often considered minor style or formatting issues) can affect the substance of an agreement, frustrate the parties' intent and increase costs in the long run. While there is no definitive list of do's and don'ts for these drafting details, the 10 simple suggestions below can make documents more user-friendly and avoid confusion, disputes and, perhaps most importantly, legal fees on the back end.

1. Use layout to guide the reader. Break long paragraphs into shorter, visually manageable portions. For documents more than a page or two long, include headings describing the contents of each section. For longer documents, provide a table of contents with page references that automatically update.

2. Use automatically updating cross-references. Most documents will be revised after their initial draft resulting in changes to section numbers. Use automatically updating cross-references in the initial draft, so that when Section 10 refers to "the easement granted pursuant to Section 8 above," the reference to "Section 8" will automatically become "Section 7" when Section 5 is deleted. This avoids the need to search for and update each individual cross-reference manually, saving time and reducing the risk that some cross-references will be overlooked.

3. Choose defined terms to maximize understanding. Defined terms should be short, impactful and consistent with common speech. For example, use "Buyer" instead of "Purchaser." Avoid using pairs differentiated only by suffixes,



William M. Hof

Partner, Husch Blackwell LLP,
St. Louis, MO



Kevin H. Kelley

Partner, Husch Blackwell LLP,
Denver

so that rather than "Lessor" and "Lessee," use "Landlord" and "Tenant." Not only will this help readers understand the defined party's role, it also will be far less likely for the drafter to confuse the defined terms when drafting.

4. Set off defined terms. Use formatting features to make it easy to find the definition for a defined term. For a reader trying to determine exactly what property is being sold, which definition do you suppose the reader would locate first: (the "Property") or (the "Property")?

5. Be specific about where referenced items can be found. Do not force the reader to search an entire document for a concept. For example, when using defined terms before they are defined, refer specifically to the section that defines the term – e.g., "prorated as of the Closing Date (as defined in Section 5 below)" – rather than "defined herein." Similarly, rather than referring to "the insurance that Tenant is obligated to carry hereunder," provide the section

number where such insurance is addressed.

6. Is a separate glossary necessary? It may seem useful to have all defined terms and their definitions in one section, but this is often not the case. Typically, defined terms can most succinctly be defined in context, which often leads to the glossary definitions stating that a term "has the meaning given such term in Section ____," defeating the point of the glossary. Implementing the suggestions in numbers 4 and 5 above may eliminate the need for a glossary. If not, a simple index identifying where defined terms are defined may be sufficient.

7. Anticipate execution. Many documents are now signed in counterparts. Unless there is a particular reason to have all signatures on one page, place the signature blocks on separate pages in the initial draft to make the execution process smoother.

8. Number exhibits by section of origin. For documents with more than just a few exhibits, label exhibits

according to the sections of the document in which they initially appear, rather than labeling them "Exhibit A," "Exhibit B," etc. If the initial exhibit first appears in Section 2(b), label that exhibit as "Exhibit 2(b)" (rather than "Exhibit A"). Naturally, you should use automatically updating cross references for this label. Not only does this provide a handy cross-reference between an exhibit and its location within a document, it allows for additions and deletions of exhibits to the document without re-numbering other exhibits.

9. Don't use color in exhibits. While using color in exhibits (e.g., "the Property outlined in red on Exhibit 2(b)") seems like a nice way to take advantage of modern technology to make intent clear, the opposite is often true. Color will not reproduce when copied unless special attention is given – which, most frequently, it will not be – leaving a copy that cannot stand alone. Instead, use some method that will easily reproduce when copied in black and white, such as hatching (////).

10. Prevent unintended execution. Often other agreements may be attached as exhibits to a primary agreement (e.g., a form of deed attached to a purchase agreement). These exhibits – as stand-alone documents themselves – usually have signature blocks, and parties often mistakenly sign these exhibits before they should. Avoid this by removing the signature blocks from these exhibit documents.

It is unlikely that any of the items discussed above will make or break a document. However, keeping these and other style and formatting issues in mind when drafting, will contribute to the overall quality of the documents and help avoid confusion and potential disputes in the future.