

Negotiating Broker Agreements

By Jay A. Gitles

Your company (the "Company") has decided it needs to find additional space for lease and/or to dispose of excess space and, after extensive due diligence, the Company has identified the ideal real estate broker (the "Broker") to work with in the transaction(s). You and your new Broker have shaken hands on the basic terms of engagement (such as term and commission rates), and you have received and are now asked to review your Broker's standard form of retention agreement (the "Agreement"). The Agreement, as is customary with most broker's standard forms of retention agreements, is only a couple of pages long. Should the Company sign it? After you have considered the issues described in this article and negotiated to protect the Company's interests to fit your particular circumstances, the answer is "yes." This article discusses some of the common issues that you may want to explore before the Company signs and delivers the Broker's form of retention agreement.

COMMISSION PAYABLE

It is still not uncommon to see broker form retention agreements provide commissions are payable when the Broker has produced a "ready, willing and able" party to lease the subject property. You should try to avoid such subjective criteria and include a clause such as the following:

Jay A. Gitles is a partner in the Real Estate Practice Group of Seyfarth Shaw LLP, in the Chicago office. His practice concentrates primarily on the acquisition, development, financing, leasing, and disposition of commercial properties. He can be reached at 312-460-5937 or jgitles@seyfarth.com.

Notwithstanding anything in the Agreement to the contrary, all commissions are payable by the Company only upon complete execution and delivery of a [lease, sublease, lease termination agreement, or other agreement representing a transaction contemplated by this Agreement]. The Company reserves the right to reject any offer presented to it, regardless of price, for any reason or for no reason.

Also, "complete execution" would be intended to include not only the parties to the lease (landlord and tenant), sublease (sublandlord and subtenant), lease termination agreement (landlord and tenant), or other agreement, but also all necessary consenting parties (such as master lessors, or prior mortgagees).

Further, you should try to protect the Company from having the Broker claim a commission would be payable if the Company should happen to undergo a merger, reorganization, or the like. You can consider including a clause such as the following:

Broker shall not be entitled to any commission in the event the Property is transferred pursuant to a merger, consolidation, reorganization or dissolution of the Company, or a sale or exchange of all or substantially all of the assets of the Company, or by operation of law or the sale or exchange of all of the [corporate stock, membership interests, partnership interests] of the Company.

COOPERATING BROKER ARRANGEMENTS

Many form broker agreements do not clarify the commission sharing arrangements if a third-party broker (usually referred to as a "cooperating

broker") brings the transferee to the table. The Agreement should specify that the Broker will cooperate fully with other brokers and how commissions will be divided or payable with respect to any cooperating broker. Local market conditions and customs usually dictate how cooperating broker fees will be allocated and paid. You may want to consider adding a clause such as the following:

Broker shall cooperate fully with other brokers and shall divide its commission payable hereunder with any cooperating broker, in a 2/3 and 1/3 split between the cooperating broker and Broker.

MARKETING EFFORTS

Form broker agreements customarily do not elaborate upon the types of marketing efforts that the Broker will undertake to promote the leasing or other disposition of the subject property. At a minimum, provided that the Company is not motivated to keep the marketing efforts a secret (for instance, so as not to alarm customers or employees or alert competitors), the Agreement should require the Broker to list the property with other brokers through the listing services in the area, on the Broker's own Web site and, if appropriate (and not restricted by existing leases or other encumbrances), to place signs throughout the property advertising that the property is available. The Broker should also be required to update the Company periodically on the progress of the marketing efforts. You may want to consider adding a clause to the Agreement such as the following:

Broker agrees: (a) to meet with the Company and the Company's representatives to discuss objectives, requirements, [leasing, subleasing, ...] strategies and other [leasing,

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subleasing, ...] factors; (b) to exert Broker's good faith efforts to perform Broker's obligations under this Agreement; (c) to submit progress reports to the Company (not less frequently than monthly) concerning prospective [tenants, subtenants, ...] and current market conditions affecting the [lease, sublease, ...] of the subject property; and (d) to assist the Company in the process of identifying, negotiating, contracting or otherwise [leasing, subleasing, ...] the subject property and monitoring closing and time deadlines.

EXPENSES

In connection with the marketing of the property, it is important to determine who will be responsible for costs and expenses incurred. Ultimately, the parties need to discuss a marketing plan and allocate these costs in the Agreement and the circumstances for which the Company can approve marketing collateral (and expenditures) before dissemination. You may want to include a clause in the Agreement such as the following:

Company shall have no responsibility for any advertising, travel or other costs and expenses incurred by Broker in connection with this Agreement, and Broker shall, in its reasonable discretion, decide what, if any, costs to incur and that all such costs shall be the sole responsibility of the Broker.

PERSONAL SERVICES

You and your Company have probably made your decision to work with a particular broker or a team of brokers within the brokerage firm. However, most brokers' form retention agreements do not protect the Company from situations where the individual broker or key members of the brokerage team leave the brokerage firm. Accordingly, you may want to add a clause to the Agreement such as the following:

This Agreement involves the rendition of personal services by Broker and, therefore, neither this Agreement nor any interest herein may be assigned or transferred

by Broker without the prior written consent of the Company.

These concerns may also be alleviated if you are successful in negotiating a clause into the Agreement that would permit the Company to terminate the Agreement "at will." Conversely, the Company should attempt to retain the express right to assign the brokerage agreement to successor owners of the subject property. Such clause would state, for example:

Company may assign this Agreement without the permission of Broker, provided that such assignee is the owner of the Property and assumes all obligations of the Company hereunder and, upon such assignment, Company shall be fully released from any and all obligations and liabilities hereunder.

TERM; SURVIVAL

The Company typically intends to engage the Broker for a fixed interval. If the term of the Agreement expires without having produced a transaction for which a commission is payable, most broker's form agreements protect the Broker if the Company enters into a transaction with a party that was introduced to the property during the term of the brokerage agreement. Such protection of the Broker is appropriate, but usually needs to be scaled back somewhat (as to the eligible parties and the duration of protection). Accordingly, you should consider including a clause in the Agreement such as the following:

The Property shall be deemed submitted to a person or entity by or on behalf of the Broker only if the Property was actually shown to such person or entity (or someone acting on his, her, or its behalf), and the publishing, mailing or other dissemination of advertising or other materials shall not be deemed submission of the Property to any person or entity.

Typically, this survival clause should stay in effect for no more than one-quarter of the overall length of the original Agreement. Additionally, to help avoid conflicts, the Company may want to include a clause in the Agreement requiring the Broker to submit a list of the qualified prospects to the Company promptly after termi-

nation of the Agreement. If the Company subsequently enters into a new brokerage agreement, in order to avoid duplicate claims for commissions, the Company must make sure to carve out commissions payable under the original Agreement. Here's a sample clause to add to the Agreement:

New Broker acknowledges that the Company is in the process of terminating a brokerage agreement with Old Broker, which agreement provides, in part, that under certain circumstances, Old Broker shall be entitled to a commission in the event the Property is sold or otherwise disposed of on or before ____ () months from the termination of said agreement. Accordingly, notwithstanding anything in this Agreement to the contrary, no commission shall be payable to New Broker in the event the Property is leased, subleased, sold or otherwise disposed of pursuant to a transaction for which Old Broker shall be entitled to a commission as aforesaid.

'As Is'

Most broker's forms do not address issues concerning the condition of the property or what types of representations and warranties the Company may be able to offer to prospective tenants or subtenants (or other transferees). The Company, in most circumstances, will want to market the available property on an "As Is" basis. Clarifying such terms in the Agreement is a good idea, and you may want to consider including the following:

Company represents that it has no information regarding present and future zoning and environmental matters affecting the subject property and regarding the condition of the subject property and Broker acknowledges and agrees to market the subject property for [lease, sublease, ...] in its "AS IS" and "WHERE IS" condition without representation or warranty by or on behalf of the Company.

CONFLICTS OF INTEREST; BROKER DISCLOSURES

Most high-quality brokers and their firms may be simultaneously working

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on many other engagements that have similar requirements to those of the Company. The Company, as part of its broker selection due diligence, should determine its comfort level knowing that the Broker is representing other parties competing in the same marketplace. In rare instances (such as for an unusually large transaction or for a unique property type), the Company may seek some form of exclusivity so as to prevent the Broker from representing others with similar requirements at the same time. The Broker should be prepared to disclose to the Company all potential conflicts of interest.

AUTHORITY

Third parties often routinely view brokers as agents of the Company.

However, most broker's form agreements do not clarify the scope of the Broker's authority to act on behalf of the Company. Accordingly, you should consider adding a clause in the Agreement expressly defining (and usually limiting) the scope of authority. Here is an example:

Nothing in this Agreement shall be deemed to create any joint venture or partnership between the parties. Neither the Broker nor the Company shall have the power to bind or obligate the other, except as and to the extent expressly set forth in this Agreement.

BOILERPLATE PROVISIONS

Since most broker form agreements are so brief, you are likely to find several important boilerplate provisions have been omitted. Accordingly, if there is no notice provision, you should add one. Further, you may

want to confirm which state's law will govern (particularly if the engagement involves properties in more than one state or if the Company and the Broker are based in different states). Further, check to make sure that the Agreement includes provisions concerning severability, entire agreement, counterpart execution, amendments in writing, and successors and assigns.

CONCLUSION

Before rushing into executing a form broker retention agreement, make the effort to clarify some of the ambiguities frequently seen and add some additional protections for the Company. High-quality brokers will not be offended by your interest in balancing out their form agreement, and you will have diminished the risk of future conflict with your new Broker.

