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Message from the Chair

Elizabeth Blair

As my time as Chair of the Real Property Law Section comes to a close and we transition to the 2021-2022 California Lawyers Association year, we should celebrate the successes of the past CLA year as we look to the future. Although unable to have in person networking events and continuing education, we were able to greatly increase our webinars, bringing more of our great educational content to more of our members. Through new webinars on the COVID-19 laws and regulations, partitions, hate speech, cannabis, commercial leasing, and so many other topics, and re-plays of past content, the Real Property Law Section continued to provide you, our members, with new and emerging legal content to help us all be better attorneys. In addition to the webinars, we also brought you the monthly eNews and this publication, the *California Real Property Journal*. The Real Property Law Section Executive Committee is excited that, in the coming year, we will be providing more amazing educational content as well as a return to in person events and networking opportunities.

As always, I encourage you to get involved with the Real Property Law Section. It is only because of our amazing volunteer Real Property Law Section Executive Committee members and advisors, Practice Area Committee members, speakers, Real Property Journal article authors and editors, other volunteer contributors and CLA staff that we are able to provide the amount of educational content and networking opportunities to you, our members. Please feel free to contact me or any of the other Executive Committee members or advisors. We welcome and encourage your participation and involvement.

Stay safe and healthy.

Best regards,

Elizabeth
Elizabeth A. Blair, Esq.

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Justice Delayed Is Justice Denied: Regaining Possession of Commercial Real Property in a Court System Impacted by the Great Recession and the COVID-19 Epidemic

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I. UNLAWFUL DETAINER PROCEEDINGS WERE SLOWED AS AUSTERITY MEASURES WERE TAKEN IN RESPONSE TO THE GREAT RECESSION AND WILL SLOW FURTHER AS COVID-19 EVICTION MORATORIA EXPIRE

Budget cuts after the "Great Recession" of 2007 to 2009 included a reduction in funding for the California judicial system totaling approximately 25% of its entire budget (approximately $1 billion).[1] These cuts forced California's courts to close fifty-two courthouses, reduce operating hours, reduce services (e.g., court reporters), and generally reduce the public's access to justice.[2]

Among the services that were cut back in that "temporary" moment of fiscal hardship were "specialty" courts, "small claims" courts, and in many cases unlawful detainer (aka "eviction") courts. Since those cuts were first enacted, the budget priorities identified by the trial courts in their annual statements to the California Judicial Council have emphasized the need to return services and reestablish closed departments, including reopening closed unlawful detainer departments.[3] As an example, in San Diego County with a total population of 3.1 million,[4] the number of unlawful detainer court departments before 2008 was four, but that number was decreased to two departments in the initial austerity measures taken after the Great Recession, and now there is only one unlawful detainer department for the entire county.[5] In March 2020, the State of California was forced to temporarily shut down all court operations in response to the COVID-19 epidemic, and despite courts "reopening" more than a year ago, various State and local moratoria[6] have suspended eviction proceedings and generally courts have not been able to impanel juries during the epidemic.[7] Many of the restrictions that have prevented landlords from pursuing eviction proceedings for more than a year are expected to expire in the near future, and the courts have started to conduct jury trials again on a limited basis.[8] The expected influx of new eviction filings as COVID-19 moratoria expire has resulted in a number of articles predicting an imminent wave of evictions and bankruptcies.[9] In short, while California Code of Civil Procedure section 1179 provides that unlawful detainer proceedings are entitled to "precedence" over all other civil proceedings, that "precedence" will not prevent the landlord from experiencing months of delay waiting for trial in many jurisdictions in California, especially in those cases where the tenant demands a jury. In light of the above, this article will review some of the tools available to commercial landlords to expedite recovery of possession of their property and increase the odds of collecting unpaid rent obligations from defaulting tenants.

A. Landlords Should Consider Non-Litigation Options First

As with all eviction proceedings based on tenant default for non-payment of rent, the landlord must consider the cost and delay of litigation against the probability that the tenant (and the tenant's guarantors) will be able to pay the resulting judgment. This process begins with a request that the tenant share information about its financial condition. For those

landlords with tenants who will volunteer information confirming that they do not have sufficient assets to pay, spending even more money to regain possession is often a poor choice. In circumstances where collection of money from the tenant after eviction is unlikely, but the tenant's business appears likely to return to profitable operation once COVID restrictions are lifted, the landlord is often best served by trying to negotiate a lease amendment that allows the tenant to make up for the default over a longer period of time. Examples of potential arrangements include:

- allowing the tenant to pay some or all the past due rent obligation with a separate note that is personally guaranteed or secured against an asset with real value (e.g., a vehicle, the merchandise, or the furniture, fixtures, and equipment in the property);
- agreeing to forbear eviction or collections efforts for a fixed period of time if tenant can obtain new guarantors for the rent obligation, or;
- agreeing to restructure the delinquent rent obligation into a new lease that includes a longer lease term (brokers and property managers sometimes refer to this arrangement as a "blend and extend" lease amendment).

In disputes where collection from the tenant is unlikely and the tenant appears unlikely to return to profitable operation, the landlord's next best option is often a "cash for keys" agreement. Under this option, the landlord agrees to forgive some of the unpaid rent debt or to pay the tenant a modest amount (often covering some portion of the costs of removing the tenant's personal property from the leased premises), or both. To ensure that the agreement is more enforceable than the original lease, these "cash for keys" agreements should be documented in a writing that complies with California Code of Civil Procedure section 664.6[10] that is signed *after*[11] the landlord has filed an unlawful detainer action. To avoid additional procedural delays, practitioners in unlawful detainer proceedings will also often insist on the tenant's concurrent execution of a stipulation for entry of judgment[12] that authorizes the immediate issuance of a writ of possession containing a specified lockout date. Finally, where practicable, any cash payment to the tenant should occur *after* the tenant has actually returned possession.

Where the tenant is unwilling to share its financial information with the landlord, is unwilling to modify the lease in a form acceptable to landlord, or is unwilling to agree to voluntarily return possession of the premises on acceptable terms, the landlord will likely be forced to try to recover possession by prosecuting an unlawful detainer claim.

B. Landlords Have Tools for Accelerating Resolution While Unlawful Detainer Litigation Is Pending

Landlords who are compelled to prosecute an unlawful detainer, in the current what is hopefully a post-COVID-19 environment, will be actively searching for tools to secure tenant assets for future collection so as to create an incentive for the tenant to either return possession before trial or to pursue bankruptcy protection, which protection would occur long before the landlord can reasonably expect to regain possession through an unlawful detainer proceeding. Three tools that can help a landlord achieve these goals are:

- a motion to require the tenant to deposit landlord's damages during the delay, or set trial within fifteen days under California Code of Civil Procedure ("CCP") section 1170.5;
- a motion for pre-judgment writ of attachment against the tenant's assets under CCP sections 483.010 through 483.020; or
- parallel collections litigation against the tenant and tenant's guarantors.

The first option, a CCP section 1170.5 motion, is likely the least effective tool in motivating a prompt return of possession. The court is required to set trial within twenty days of its receipt of plaintiff's request for trial after the defendant has appeared. However, if the court is unable to try the case within twenty days, the landlord may be faced with filing expensive and time consuming motions to move the case forward. For example, the landlord could file a CCP section 1170.5 motion for a finding that the landlord has a probability of success on its claim. Upon making that finding, the court is required to determine the damages that will be caused to the landlord and is required to enter an order requiring the tenant to pay those damages pending trial.[13] CCP section 1170.5 is somewhat useful in obtaining such a pre-trial determination on the probability of success. But, noticed motions requiring a probability of success finding are expensive, and hearing dates may not be available for months. Accordingly, landlords should balance these considerations against their other options, including negotiating a mutually agreeable lease extension. Most importantly the remedy provided in section 1170.5—an order requiring the tenant to deposit estimated damages in advance of trial or have trial conducted within fifteen days—is really a hollow remedy if

the court is incapable of calendaring and conducting a jury trial within fifteen days. Moreover, despite the requirement under section 1170.5 that the court conduct the trial within fifteen days, the unlawful detainer court *cannot* compel the tenant waive its right to a jury and submit to a bench trial, even if that is the only way for the court to meet the section 1170.5 fifteen-day timeline.[14]

The second option, a noticed motion for pre-judgment writ of attachment under CCP section 483.010 through 483.020, is more likely to be effective but it too involves delay and also requires the landlord show a similar "probable validity" of its claims before the court will grant the application.[15] However, unlike CCP section 1170.5, the potential for issuance of an attachment order against the tenant has real consequences because a writ of attachment can freeze up the tenant's assets and establish the landlord as a secured party in future bankruptcy proceedings. A struggling tenant who is borrowing money but not paying rent will often be forced into bankruptcy by a right to attach order. Moreover, there is some disagreement among the bankruptcy courts about perfecting an attachment lien before final judgment.[16] A tenant considering a future bankruptcy petition that requires the landlord to be an "unsecured" creditor will try to accelerate the timing of its bankruptcy petition to a date that is before the hearing on the landlord's application for pre-judgment writ of attachment, or to a date that at least places the attachment lien squarely within the bankruptcy preference period.

The third option to motivate a tenant to return possession without waiting for an unlawful detainer trial is to leverage third parties, such as guarantors, who have influence over the tenant. Many commercial tenants obtain possession from the landlord by providing personal guaranty agreements from principals, or affiliates, or lease co-signers. Often, the same person(s) who provided the guaranty or co-signature are critical to the tenant's continued operation as a business and have the power to compel the tenant to return possession by withholding further assistance or by asserting their own claims against collateral pledged by the tenant, or against the tenant or its principals personally. For landlords holding these third-party obligations, assuming the guaranty agreement contains language waiving statutory surety protections[17] and assuming that the landlord has complied with all contractual and statutory notice requirements, there is no need to delay pursuing a parallel action for breach of contract against the tenant[18] and guarantors concurrently with the unlawful detainer proceeding.[19] In many instances, pre-judgment attachment is also available against the guarantors under CCP section 483.010 through 483.020.

C. Despite Its Reputation for Adding Delay, A Tenant Bankruptcy May Actually Accelerate the Recovery of Possession in Some Circumstances

Landlords have historically sought to avoid bankruptcy proceedings where possible because a bankruptcy petition triggers an automatic stay of eviction proceedings and requires a noticed motion for relief from stay to resume unlawful detainer proceedings.[20] In addition, landlords avoid bankruptcy because the tenant, acting as debtor-in-possession or as trustee, can tie up the property for sixty days or possibly more upon an affirmative showing by the debtor-in-possession or trustee as the tenant decides whether to assume or reject the lease.[21] However, where the timeline to trial in the unlawful detainer court is expected to exceed the sixty-day deadline before the lease is presumed to have been rejected,[22] a bankruptcy petition by the tenant may be the best news a landlord can get.

The landlord has the option to move the bankruptcy court for an order confirming *both* that the lease has been rejected and that the lessor is entitled to *immediate* possession of the leased premises *and* that the landlord holds an unsecured claim for the unpaid rent, when the tenant fails to:

- confirm its intent to assume the lease; or
- provide adequate assurance of compensation for actual losses incurred by lessor as a result of the pre-petition breach; or
- where the tenant fails to provide adequate assurances of future performance if tenant assumes the lease.

Under these circumstances the lease is presumed to have been rejected by the trustee or debtor-in-possession, and the landlord has a good chance of obtaining the requested order.[23]

While the bankruptcy court has authority to order the immediate return of possession of leased property upon actual or presumed rejection by the debtor/tenant, there is no clear enforcement mechanism in statutory or case law if the tenant refuses to comply with the bankruptcy court's order.[24] The lack of clear enforcement mechanisms assumes that the debtor will comply and therefore leaves the landlord with traditional bankruptcy remedies such as civil contempt[25] or a motion to dismiss,[26] if the tenant does not comply.

II. CONCLUSION

Before COVID-19 forced more than a year's worth of eviction litigation to pile up, the austerity measures taken

in response to the Great Recession of 2007 to 2008 were already causing significant delays in California's unlawful detainer courts. As state and local moratoria prohibiting unlawful detainer proceedings are allowed to expire, those delays will only become more severe. Attorneys representing commercial landlords in the present environment, where the statutory "precedence" of unlawful detainer proceedings may not guarantee a trial for months after filing, must think creatively to obtain the best outcome for their clients. This article describes some options for commercial landlords to consider to avoid unlawful detainer litigation entirely and to help achieve a prompt and cost-effective resolution.

Endnotes

1 https://www.courthousenews.com/revised-california-budget-slashes-millions-from-court-funding/.

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11 *Kirby v. S. Cal. Edison Co.,* 78 Cal. App. 4th 840 (2000).

12 *See* Cal. Judicial Council Form UD-115, https://www.courts.ca.gov/documents/ud115.pdf.

13 Cal. Civ. Proc. Code § 1170.5(c).

14 *Garcia v. Cruz,* 221 Cal. App 4th Supp. 1, 6 (2013) (Overturning trial court order compelling bench trial over tenant's jury demand after tenant failed to deposit funds as ordered by trial court).

15 Cal. Civ. Proc. Code § 484.090, *Pech v. Morgan,* 61 Cal. App. 5th 841 (2021).

16 *Diamant v. Kasparian (In re S. Cal. Plastics, Inc.)* 165 F.3d 1243 (9th Cir. 1999) (Addressing attachment lien as unperfected until final judgment); *In re Aquarius Disk Servs. Inc.,* 254 B.R. 253, 260 (Bankr. N.D. Cal. 2000) (Addressing issue of granting holder of attachment lien relief from stay for the purposes of perfecting lien that was established prior to bankruptcy petition).

17 *See* Cal. Civ. Code §§ 2832 through 2856.

18 *Walt v. Sup. Ct.(Clement)*, 8 Cal. App. 4th 1667, 1678 (1992).

19 Cal. Civ. Code §§ 2845, 2856, *Gramercy Inv. Tr. v. Lakemont Homes Nev., Inc.* 198 Cal. App. 4th 903, 911 (2011).

20 *In re Goodman,* 991 F.2d 613, 616 (9th Cir. 1993).

21 11 USC § 365(d)(3)(A), (B).

22 *In re Sonora Convalescent Hosp., Inc.,* 69 B.R. 134, 136-37 (Bankr. E.D. Cal. 1986).

23 *In re Elm Inn, Inc.,* 942 F.2d 630, 633-34 (9th Cir. 1991); *In re LCO Enters.,* 12 F.3d 938, 941 (9th Cir. 1993).

24 *In re Elm Inn, Inc.*, 942 F.2d at 634 (Holding "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title" in citing the court's authority to order the immediate return of possession, and quoting 11 USC § 105(a)).

25 *In re Walters,* 868 F.2d 665 (4th Cir. 1989) (Discussing civil contempt powers generally).

26 11 USC § 1112(b)(4)(E).

When the Courthouse Doors Are Closed: Trials in a State of Emergency

Hon. Craig G. Riemer

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INTRODUCTION

Since March of 2020, the doors into many of the nation's courthouses have been closed in response to the worldwide COVID-19 pandemic. But except for the first few months, the civil justice system has continued to operate behind those closed doors. Case management proceedings, hearings on motions, and trials have continued to take place. Although counsel, litigants, witnesses, and jurors could not come into the courtroom in person, they could appear remotely, through videoconferencing software such as Zoom, Webex, and Bluejeans.

The transition has not been easy. To conduct remote proceedings, both judges and lawyers have been forced to learn unfamiliar software programs. To take advantage of those programs, both sometimes had to buy new equipment. The courts had to adopt different procedures. But after some initial confusion, technological challenges, and inevitable errors, we discovered that remote proceedings work.

COVID-19 is not the first, and certainly will not be the last, disaster to interrupt the operations of our trial courts. Until the current state of emergency has ended, we need to be prepared to conduct our trials remotely. Moreover, because any emergency of significant duration will produce an even greater backlog of cases to be tried, reduce the number of courtrooms available to conduct those trials, or both, we need to hone our trials so that they can be conducted as quickly and efficiently as possible.

I. THE PANDEMIC IS ALMOST OVER, SO WHY SHOULD I CARE ABOUT REMOTE TRIALS?

As this article is written, the pandemic, at least in California and most of the country, is waning. Governor Newsom has predicted that all limitations on occupancy of stores, bars, restaurants, theaters, and courthouses will be lifted by the middle of June of 2021. If life is going back to normal, why should we care about conducting remote trials? There are at least three reasons.

First, the prediction may be wrong. When the emergency stay-at-home orders were issued back in March of 2020, many of us assumed that the closures of our courthouses would be of short duration, and that we would probably be back to conducting in-person trials again within a few months, and certainly by October or November. That prediction turned out to be wishful thinking. Although the current prediction is based on much better information, it could also be wrong. Whether because of a new variant of the virus, because too many of our fellow citizens refuse or fail to receive a vaccine, or because too few of our fellow citizens continue to wear masks and to maintain safe distances from each other, we could find ourselves in the midst of the so-called Fourth Wave. In short, we cannot guarantee that the courtroom doors will be open in June of this year, or even of the next.

Second, even if the COVID-19 pandemic continues on a downward glidepath here in the United States, it will undoubtedly not be the last pandemic to strike us. Whether it is Ebola, another coronavirus like SARS and COVID-19, or something entirely different, it will come. Although a hundred years passed between the influenza pandemic of 1918 and the onset of COVID-19, we cannot reasonably assume that four or five generations will pass before the next pandemic. Given the increases in both world population density and international travel, it likely to come much sooner. Whether the next pandemic arrives in five months or five years, we should start preparing now by becoming familiar with the presentation of trials remotely.

Third, pandemics are not the only catastrophic events that can prevent you from getting into a courthouse. Even if the next pandemic does not hit the state before we retire, some other sort of disaster probably will. Whether it is an enormous forest fire that engulfs an entire northern county, a 7.5 earthquake that devastates the freeway system in the Los Angeles basin, or something more modest in scope, there will be future situations in which either the courthouse doors are shut or counsel and witnesses have no means to travel to the courthouse. In short, even if the present emergency goes away, other emergencies will arise that will make the presentation of an in-person trial difficult if not impossible. Therefore, we all need to develop the skills to conduct trials during those challenging circumstances.

Even in the absence of any existing or imminent emergency, there is more reason to become comfortable with this new approach: It has the potential to save your client money. Think of the expert witness that you would like to call. The expert charges $5,000 per day, whether for testimony or for travel. The expert lives out of state, and will incur at least one day in travel, possibly two depending on the timing of the testimony. Even if the rest of the trial is conducted in person, presenting that expert's testimony remotely will reduce the cost of that testimony from $10,000 or $15,000 down to $5,000. But that savings is possible only if counsel is willing to master the technology and the procedures for presenting that expert's testimony remotely.

II. FUTURE EMERGENCIES WILL REDUCE THE SUPPLY OF CIVIL COURTROOMS

The precise impact of an emergency on the ability to conduct a trial will obviously vary according to the nature of the particular emergency, the severity of its impact, and the geographic scope of its impact. However, it is safe to make two assumptions: (1) that the emergency will reduce the number of courtrooms conducting trials, possibly to zero; and (2) that after the emergency has abated, the demand for civil trial courtrooms will greatly exceed the supply.

Courtrooms may be closed for many different reasons. As we have recently seen, the threat of disease may require the court to bar attorneys, litigants, witnesses, and jurors from entering. The same threat may deprive the court of judicial officers or other staff. In a different scenario, courthouses may be destroyed or damaged by fire, flood, earthquake, riot, or insurrection. Depending on the nature and scope of the emergency and the resources of the particular court system affected by it, it may shut down some, most, or all the trial courtrooms. For instance, in 2020, Riverside County Superior Court suspended all trials, in all types of departments, for several months. As the emergency abates, or as the court figures out how to operate despite the ongoing emergency, trials will resume. But unless the duration of the emergency was very short, the effects of the suspension of trials will be felt long after trials resume. That will be particularly true for trials of civil cases. Criminal defendants have a right to a speedy trial.[1] Civil litigants have no comparable right. Therefore, when the court can open some but not all of its trial courtrooms, the first to be reopened are likely to be devoted to criminal trials. The resumption of criminal trials may slow or stop the growth in the backlog of criminal cases awaiting trial, but the number of civil cases awaiting trial will continue to grow.

Even when civil trial departments are able to open, they may not be trying civil cases. Because of the backlog of criminal trials and the constitutional and statutory imperatives to try those cases within limited time frames, the court may find it necessary to suspend civil trials so that criminal cases may be tried in courtrooms normally devoted to trials of civil cases.[2] In short, not only will the civil backlog have grown over the length of the emergency, but the number of courtrooms allocated to the trials of those cases may have shrunk. Thus, even after the emergency has abated, the combined effect of that greater workload and smaller workforce will mean that one resource will be in very short supply: trial time in civil trial departments.

A. Adapting to the Scarcity of Trial Time

The scarcity of trial time will affect both the managers of that resource—the civil judges—and the consumers of that resource—counsel in civil cases. The civil judges will seek to allocate that scarce resource as efficiently as possible, so that as many civil cases as possible can be tried within the limited trial-time available. Those cases which can be tried

more quickly and efficiently are likely to be tried ahead of those cases in which counsel do not appear to be concerned with efficiency.

Civil trial counsel will be competing for the limited trial spots available. Because efficiency is one of the primary criteria that the judges will be applying when determining which of the competing cases will be tried, wise counsel will come to the trial date, or to the trial readiness conference, prepared with a plan that demonstrates that the trial time will be used as efficiently as possible, and that the trial will be as short as possible.

B. Achieving an Efficient Trial

Efficiency can be achieved by thoughtfully and realistically considering exactly what you need to prove and what is necessary to prove it.

1. Issues to Consider Before Beginning Any Trial

(a) What Is the Underlying Dispute Between the Parties?

Is the primary dispute a factual one: what happened; what the parties did or did not do; and what resulted from those acts or omissions? Or do the parties simply disagree over the law, i.e., over the legal consequences that flow from those facts? Or do the parties disagree on both the factual and legal issues?

If the material facts are undisputed, it is not necessary to put on any testimony or other evidence. Instead, stipulate to the facts and the relevant documents, and submit the dispute to the court for a decision on the basis of that stipulation and a trial brief. The trial now consists of, at most, closing arguments. Short of a stipulated judgment, nothing could be more efficient.

(b) What Evidence Is Necessary?

Regardless of the breadth of the disputed factual issues, there are always at least some material facts that are undisputed. Do not waste precious trial time presenting testimony or offering documents to establish the existence of facts that are not truly disputed. Before trial, draft a proposed stipulation to those facts that you believe are not reasonably disputed by either side, and discuss it with opposing counsel. Also discuss with opposing counsel every witness that appears on your respective witness lists. What testimony is expected from that witness? Are those facts disputed? If not, then stipulate to the truth of those facts. For instance, often a witness is called merely to establish facts regarding issues of chain of custody, authenticity, or test results. Unless those facts are both material and disputed, the witness is unnecessary.

If a party lacks sufficient knowledge to stipulate that the fact to which a witness's testimony is directed is true, but does not intend to offer any evidence contradicting that testimony, then the parties should stipulate to how the witness would testify if called to the stand. Alternatively, agree that the witness's testimony may be presented by a written declaration, either with or without cross-examination.

If there are credibility determinations that the finder of fact should make concerning a witness's testimony, consider whether putting the witness on the stand is the best way to test that credibility. If the witness was deposed, would the deposition transcript be a sufficient basis from which to determine the witness's credibility? Even if the stipulations are not broad enough to render a witness's testimony entirely unnecessary, the testimony that remains will be narrowly focused on those issues that are truly disputed, rendering the trial more efficient and helping the finder of fact to more easily discern and evaluate the precise factual disputes presented.

Just as it is not necessary to produce at trial every witness who has some knowledge relevant to the case to be tried, it is not necessary to introduce every document produced in discovery. Discuss with opposing counsel every document on your respective exhibit lists. What factual assertion is the exhibit intended to support or rebut? Is that fact disputed? If not, what is the purpose of that exhibit? Stipulate to that undisputed fact and eliminate that exhibit. If the fact to which the exhibit relates is disputed, is there any question concerning the admissibility of the exhibit, or at least the authenticity of the document? List any such agreements on your joint exhibit list. Such a critical evaluation of each exhibit enhances the efficiency of the trial by eliminating unnecessary exhibits, unnecessary testimony to authenticate exhibits, and unnecessary discussion at trial concerning the admissibility of exhibits.

As mentioned, this winnowing of the evidence to determine what is truly necessary both promotes the efficient use of trial time and focuses the disputed factual issues for the finder of fact. In a public health emergency like that from which we are now extricating ourselves, it is an added benefit to reduce the number of witnesses and the length of time each witness is exposed to the other individuals in the courtroom, and vice versa. The risk to everyone in the courtroom is thereby reduced, and any reduction in the risk associated with the

trial increases the chance that your trial will be conducted in person rather than remotely.

2. *Additional Issues to Consider if You Have Requested a Jury Trial*

(a) Is a Jury Trial Necessary?

Although sometimes necessary in the resolution of a civil case, a jury trial is not an efficient use of trial time. In a nonjury trial, there is no need for jury selection, no need to agree upon jury instructions or verdict forms, no need to instruct a jury, and only rarely the need for any motions in limine. If a trial brief has been filed, there is rarely the need for opening statements. The waiver of the right to a jury trial eliminates the need for all those non-essential tasks and saves the time necessary to perform them. Although you may have the right to a jury, consider why it is worth the extra time and effort.

(b) Can the Trial Be Conducted as a Voluntary Expedited Jury Trial?

Expedited jury trials[3] are designed to be completed within two days.[4] Accordingly, they are models of expedition and efficiency. In such an expedited trial, the parties agree to shorten the trial by limiting the number of jurors (to eight)[5] and peremptory challenges (to three),[6] and the length of voir dire, opening statement, the presentation of evidence, and closing argument (collectively to five hours per side).[7]

Any judge looking to schedule an efficient jury trial is going to look favorably on an expedited jury trial. If the number of necessary witnesses is small and the factual disputes limited, it is the most efficient means of presenting a jury trial.

(c) Can Jury Selection Be Shortened?

The statutes governing jury trials prescribe how a jury is selected, but do not preclude the parties from stipulating to something different. Counsel can shorten jury selection by agreeing to vary from those statutory defaults. For instance, although a jury usually comprises twelve jurors, the Legislature has expressly authorized the jury to consist of "any number less than 12, upon which the parties may agree."[8] Similarly, juries in voluntary expedited jury trials consist "of eight jurors, unless the parties have agreed to fewer."[9] Obviously, it takes longer to pick twelve jurors than it does to pick fewer than twelve. To save that time, counsel should consider adopting the eight-juror model employed in expedited jury trials. It substantially reduces the number of jurors, and thus the length of jury selection. Moreover, by specifying that a verdict must be supported by six of the eight jurors,[10] it is consistent with the three-quarters-of-the-jurors standard that governs verdicts in jury trials with twelve jurors.[11]

Regardless of the size of the jury, the selection of additional persons to serve as alternate jurors[12] consumes additional time. That extra time can be avoided by agreeing that no alternates will be selected and that, in the event that one or more jurors must be excused after the jury is sworn, the remaining jurors may return a verdict.[13] The parties may also agree on the number of the remaining jurors that must vote for any verdict.[14] For instance, if the jury initially consisted of twelve jurors, the parties might stipulate that a verdict would be accepted if it is agreed upon by eight or nine of the eleven remaining or by seven or eight of the ten jurors remaining.

Parties in civil trials in California are entitled to conduct "liberal and probing" examination of prospective jurors.[15] Similarly, the trial judge is prohibited from setting "arbitrary" time limits or "an inflexible time limit policy for voir dire."[16] However, nothing prevents the parties from imposing such limits on each other by stipulation. For instance, to promote efficiency, counsel might agree that voir dire by counsel would be limited to one hour per side. Alternatively, counsel could agree that the bulk of voir dire would be conducted through a written questionnaire[17] and that any oral follow-up questions would be limited in scope and subject to time limits. Specifically, counsel might stipulate that oral examination must be limited to following up on the prospective jurors' responses to the questionnaire, and to exploring new issues reasonably suggested by either the written or oral responses, and that any such oral voir dire would be limited to thirty minutes per side.

Jury selection is invariably slowed by the need to examine additional prospective jurors because jurors that have already been examined have been removed by the exercise of peremptory challenges.[18] Counsel should consider whether to agree to waive peremptory challenges entirely, and to rely instead on challenges for cause.[19] Alternatively, counsel could agree to limit each side to less than the statutory default of six per side.[20] Once again, the statutory scheme for voluntary expedited jury trials provides a useful model: no more than three peremptory challenges per side.[21]

III. PREPARING FOR A REMOTE TRIAL

The switch from in-person proceedings to remote proceedings was not particularly challenging in the context of case management proceedings and law and motion

hearings. Any evidence presented in those proceedings is in the form of written declarations. Although the arguments in both instances are presented live, many lawyers were already accustomed to presenting those arguments remotely via CourtCall. Appearing remotely became mandatory rather than optional, and the system by which the appearance was being made may have changed, but the process was generally familiar.

The transition to remote trials is more daunting. Whether the trial is to be conducted remotely by choice or by necessity, it requires thoughtful preparation in addition to that to which counsel are accustomed. Counsel and the court need to consider each step of the trial—from summoning a jury to the examination of witnesses to jury deliberations—and to ask whether the remote nature of the trial requires a different process than in a trial conducted in person.

The purpose of this article is to help identify those aspects of the trial that may need to be handled differently from what used to be "normal." Exactly what different procedures are adopted will depend upon the circumstances of each case.

A. Issues That Arise in Any Remote Trial

Regardless of whether the trial is being presented to a judge or a jury, there is a multitude of issues that arise in remote trials that are not present in in-person trials. These issues include those in the following list.

1. What video conferencing platform will be used to conduct the trial? Zoom, Cisco Webex Meetings, Blue Jeans, Microsoft Teams? Something else? Is each attorney familiar with the designated platform? Have counsel confirmed that each party, witness, and privately retained court reporter is familiar with the operation of that platform?

2. Who will "host" the trial and otherwise control the various technological settings during the trial? That would generally be the court, but with the parties' agreement, the host might be one of the parties, particularly if the parties wish to use a platform with which the court is not familiar.

3. Does each attorney, party, witness, and court reporter have the equipment to participate in the remote trial without undue delays? Do all the trial participants have and know how to use speakers, microphone, webcam, and laptop or monitor? Counsel should confirm that each witness counsel intends to call is able to participate in the trial, i.e., has the right equipment, sufficient internet connection speed, and the knowledge of how to use them. In addition, counsel may wish to ensure that any witness who is expected to discuss exhibits can testify on one device (or screen) and review exhibits on another.

4. Does each attorney, party, witness, and court reporter have a suitable space from which to participate in the trial? A suitable space is one in which the attorney or witness will not be interrupted or distracted. It should be free of any background noise that will interfere either with the person hearing others clearly or with the person being clearly heard by others. Similarly, the background should be neutral. Nothing visible in the background should be visually distracting.

5. Does every participant who will be speaking have a separate space? Counsel should not attempt to examine a witness in the same room. The use of multiple devices in the same room, with multiple speakers and microphones, often results in audio feedback and other distortion. In addition, it would generally mean that those participants would need to be masked.

6. In advance of the remote trial, have counsel conducted at least one test session with each of their witnesses appearing remotely? This will allow the witness to practice using the designated platform, become familiar with the process for viewing electronic exhibits, and test all audio and video equipment and settings that will be used at trial.

7. If the trial will be reported, will the court reporter be remote or in the courtroom? Will the reporter be unmuted to allow the reporter to make timely requests for clarification?

8. If an interpreter is necessary, will the interpreter appear remotely, or at the location of the participant requiring interpretation services? Will the interpreter interpret consecutively or concurrently?

9. How should the participants identify themselves when signing into the designated platform? For clarity and consistency, the parties should agree on the form by which participants other than jurors should be identified, such as their full first and last names rather than a screen name.

10. If a witness is disconnected during the witness's testimony, who will contact that witness? Unless the parties agree otherwise, it should be the clerk rather

than one of the parties. To enable the clerk to do so, the parties should provide the clerk with a witness list annotated with the telephone number and email address of each witness.

11. How will witnesses be scheduled? Will witnesses be instructed to connect to the platform at a particular time? If the estimate was not accurate, the witness could end up waiting in the "lobby" or "waiting room" for a long time. Or will a break be taken after every witness while counsel contacts and instructs the next witness to connect?

12. The parties have the right to have nonparty witnesses excluded from the courtroom, to prevent them from hearing the testimony of other witnesses.[22] Prior to their testimony, will nonparty witnesses be excluded from the courtroom? From the platform? From listening to the trial via live stream?

13. Because the witnesses will not be in the physical presence of the court, there is a potential for misconduct of a type that could not occur in a courtroom. For instance, some other person could be in same room as the witness, coaching the witness. Similarly, someone could be coaching the witness by email. The witness could also be consulting written notes or documents, or conducting research online to respond to questions. What instructions will be given to the witness, or what promises will be elicited from the witness, to minimize those risks? For instance, the witness might be instructed that:

    - Unless expressly authorized by the court, no other person may be in the same room as the witness while the witness is testifying; that if an exception is allowed, the other person must be seated behind the witness in view of the camera; and that, to confirm that no unauthorized persons are in the room, the court might at any time require the witness to display a 360-degree view of the room from which the witness is testifying. The witness might be asked under oath whether there are any other such persons, and to promise to notify the court immediately if anyone enters the room.

    - The witness may not have any notes or documents with the witness at the time of the remote testimony, other than the trial exhibits exchanged by the parties and notes or documents that have been shown to opposing counsel at least twenty-four hours in advance of the witness's testimony; the witness may not review any other documents, whether on paper or digital, while the witness is testifying; and the court may require the witness to back up from the witness's webcam so the court and counsel can see the witness's hands during all or part of the witness's testimony. The witness might be asked to affirm under oath that the witness has no such documents.

    - Other than communications between the witness and the witness's attorney of record during breaks, the witness must not engage in any direct or indirect communication with anyone else in any manner whatsoever—including by email, text, chat, or other means—while the witness is testifying, unless that communication is on the record. The witness might be asked to affirm under oath that the witness will not engage in any such unauthorized communication and that the witness will notify the court immediately if the witness receives any chat, email, text, or other electronic message from anyone associated with the trial during the witness's testimony.

14. Will exhibits be on paper or electronic? If the latter, what file formats—.pdf; .doc; .jpeg; .mpeg; *etc.*—are acceptable? How will the exhibits be exchanged among the parties, witnesses, clerk, and court reporter? Are there any oversized, non-documentary, or other non-standard exhibits that need different treatment?

15. If any exhibits are sealed or otherwise confidential, how will those issues be dealt with at trial? Because the proceedings will be live-streamed to provide public access, those issues may be of more concern in a remote trial.

16. How will impeachment exhibits—i.e., documents that counsel wishes to use for impeachment purposes that were not previously disclosed as exhibits—be handled? Among the options the parties might consider are the following:

    - Counsel wishing to use an impeachment document would send an electronic copy of the document to the court, counsel, and the witness at the time counsel seeks to use the document with the witness. It might be sent by email, by the chat function in the designated platform, or by posting it on a secure document repository that

counsel has made available to the court, counsel, and the witness.

- A paper copy of the documents that counsel anticipates using for impeachment purposes would be mailed or otherwise physically delivered to the court, opposing counsel, and the witness at least one business day before the anticipated use of those documents, in sealed envelopes that are marked with instructions that the envelope may not be opened until further notice by the court.

B. Additional Issues That Arise in a Remote Jury Trial

If a jury trial is to be conducted remotely, the following issues need to be addressed in advance.

1. How is your court handling jury assembly? Are the prospective jurors reporting to the jury assembly room remotely or in person? How are prospective jurors being instructed to report remotely to the trial courtroom? Is the entire venire panel reporting to the courtroom at the same time, or are the times staggered?

2. Just as with counsel, parties, and witnesses, the prospective jurors need the proper hardware, sufficient internet service, and a suitable space from which to participate in the trial. How and where will that suitability be determined? Will the inquiries be made orally or in writing? If orally, by whom, and will the judge be present? Will the inquiries be made in the jury assembly room or from the courtroom?

3. Requests to be excused from jury service on the ground of undue hardship may be made in writing or orally on the record.[23] Which method will be used in this trial? If done in writing, will counsel have any opportunity to be heard either before or after the judge rules on the request?

4. Will voir dire be conducted in writing, orally, or some combination of the two? If it will be conducted at least in part by written responses to a questionnaire,[24] who will draft the questionnaire? Will it include a statement of the case, and ask whether the prospective jurors have heard anything about the facts of the case? Will the questionnaire include a list of the parties, attorneys, and witnesses, and ask the prospective jurors regarding their knowledge of any of those individuals? If the parties cannot agree on the text of the questionnaire, when will the court resolve that issue? How will the questionnaire be distributed to the jurors? When will it be answered? How will the answers be collected? When and in what form will the answers be shared with counsel?

5. It may be impractical to have all prospective jurors appear on the screen simultaneously. How many prospective jurors will be examined at a time? Will counsel make a "mini opening" to each group?[25] What is the maximum length of the mini openings?

6. Will counsel place any time limits on each other's voir dire? Will counsel place any subject matter limitations on each other's voir dire? For instance, to ensure that the written questionnaire is complete, oral examination might be limited to following up on the prospective jurors' responses to the questionnaire, and to exploring new issues reasonably suggested by either the written or oral responses.

7. When will challenges for cause[26] be exercised? After the examination of each group of prospective jurors, or not until multiple groups have been examined? When will peremptory challenges[27] be exercised? How will challenges be exercised? By moving counsel into a break-out room, by moving the jurors into the waiting room, by conference call, or by some other means?

8. After the jury has been sworn, the jurors are typically instructed as to how they are to approach their tasks. In addition to the form instructions used in any civil trial,[28] will the jurors be instructed on issues that are unique to remote trials? Those additional juror instructions might include ones similar to the following:

   - Generally, you must conduct yourselves as if you were in a courtroom.
   - You will appear each morning for the trial by joining the meeting reserved for this trial.
   - While you are observing the proceedings, no other member of the household may interrupt or influence your service. You should try to be isolated, if you can.
   - There may be times when our technology fails. If for any reason you are unable to hear the proceedings, please let us know immediately. Often a hand gesture works to get our attention if

audio does not work. You also have the courtroom assistant's phone number, which you can call to let the assistant know of the problem.

- Similarly, if during the trial you are not properly excluded during private conferences between the court and counsel, immediately mute or disconnect yourself from those proceedings. After the private conference is concluded, immediately report that event to me.

9. How will questions that jurors propose be asked of a witness[29] be communicated to the court? How will the court discuss those suggested questions with counsel?

10. After the close of evidence or the completion of closing arguments, the jurors are instructed concerning the manner in which they are to deliberate.[30] Should the jury be instructed any differently in light of the remote deliberations? For instance, the jurors might be instructed similar to the following:

    - While deliberating, you must continue to conduct yourselves as if you were in court.

    - You will appear each morning for court as you normally would by joining the meeting reserved for this trial. Once all jurors are present, the courtroom assistant will admit you into the virtual deliberation room.

    - All jurors must participate in the deliberations. No juror may be excused by the foreperson or by the other jurors—even momentarily—to do any other work or perform any other activity while jurors are deliberating.

    - Other than the other deliberating jurors, no one else may be in the virtual deliberation room. Nor may anyone else listen to the discussions among the jurors. While you are in the deliberation room, you may not engage in any other tasks, including making or receiving phone calls or sending or responding to email.

    - If any juror needs to take a short break—to go to the restroom, to answer an urgent knock at their door, to respond to any emergency, or for any good reason—deliberations must pause. All twelve of you must be present together in the jury deliberation room before anyone may discuss this case.

    - You may as a group decide to take a break to have lunch, get a snack, take a rest, or for any other reason, including ending the day for your evening recess. Your foreperson shall notify the courtroom assistant via chat or email that you want to leave the jury deliberation room. All jurors will then be invited to leave the jury deliberation room. Jurors cannot leave the room on their own. It is important that you do this, so that the meeting may be terminated.

    - If a juror is disconnected during your deliberations, you must pause until that juror is able to reconnect. The foreperson should immediately notify the courtroom assistant which juror has been disconnected so that the court can contact that juror to reconnect to the virtual deliberation room. The court will re-admit the juror to the jury deliberation room as soon as possible. The courtroom assistant will inform the jurors whether the disconnected juror has been contacted and if possible will provide an estimate of when that juror will be able to reconnect. Jurors may take a formal break from proceedings and leave the jury deliberation room while waiting for the juror who dropped off to return to the deliberation room. Or, jurors may remain in the jury deliberation room but if so, jurors may not continue to discuss the case while any juror is missing. Remember all twelve jurors must be present to continue to deliberate.

    - If you have a question or if you request a read-back by the court reporter, please send your question or request to the courtroom assistant via email. Follow the court's prior instructions regarding juror's questions or requests during deliberations.

    - Each of you will receive copies of jury instructions, verdict form, and all exhibits admitted into evidence in this case. When you receive these documents, you may open the attachments to confirm you have access to these materials but do not review or consider these documents when you are not deliberating in the jury deliberation room.

    - When the jury has arrived at a verdict, your foreperson shall notify the courtroom assistant by emailing a copy of the completed verdict.

Counsel and their clients will be informed. Once counsel and parties have connected, all jurors will be readmitted to the courtroom where the verdict will be reviewed and then placed on the record.

11. Will the jurors deliberate remotely or in person? If remotely, how will each juror receive a copy of the final jury instructions, the verdict form, and the admitted exhibits? By email, or some other means? How will any questions the jurors have during deliberations[31] be communicated to the clerk? By email, by chat, or by some other means?

C. Additional Issues That Arise in a Hybrid Trial

A particular trial might not be conducted either entirely in person or entirely remotely. Instead, some trials might be conducted in between those two models. For instance, a particular trial might be conducted entirely in person except for a specific element, such as the selection of a jury or the examination of a particular witness. Moreover, the decision to conduct some portions remotely might have nothing to do with a risk of transmitting an infectious disease.

If some portion of the trial is being conducted in person, but during some public health emergency regarding the transmission of disease, counsel should discuss the following questions with the court: Will the participants in the courtroom be required to socially distance? Will the participants be masked? If so, will attorneys be masked during statements and closing arguments? What about when examining witnesses? Similarly, will witnesses be required to wear masks while testifying? May the witnesses wear clear face shields rather than masks? Who will provide those face shields?

IV. CONCLUSION

Whether a remote trial is mandated because of a state of emergency or chosen by the parties for the convenience of witnesses, counsel need to develop the ability to present a trial remotely in a competent and persuasive manner. Moreover, until the backlogs created by the existing emergency are entirely erased, counsel should focus on how to present their trials, remote or otherwise, in the most efficient manner possible.

Endnotes

1 U.S. Const. amend. VI; Cal. Const. art. I, § 15; Cal. Pen. Code §§ 686, 1382.

2 A reallocation of criminal trials to civil trial departments is not merely a hypothetical possibility. Although not prompted by any natural disaster, the Riverside County Superior Court did exactly that in 2005. Rather than dismiss hundreds of criminal cases that it did not have enough criminal courtrooms to try, the court suspended all civil trials for several months, and continued to fill civil departments with criminal trials almost continuously thereafter. As a result, during the period from August of 2005 through July of 2007, when I was assigned to a vertically calendared civil department, I presided forty-four criminal jury trials, compared to only twenty-two (mostly nonjury) civil trials I was able to squeeze in between the criminal cases.

3 Cal. Civ. Proc. Code § 630.01.

4 Cal. Rules Ct. r. 3.1550.

5 Cal. Civ. Proc. Code § 630.04(a).

6 *Id.* § 630.04(b).

7 *Id.* § 630.03(e)(2)(B); Cal. Rules Ct. r. 3.1550.

8 Cal. Civ. Proc. Code § 220.

9 *Id.* § 630.04(a).

10 *Id.*§ 630.07(b).

11 *Id.* § 618.

12 *Id.* § 234.

13 *Id.* § 233.

14 *See, e.g.*, *Id.* §§ 630.07(b) (parties to voluntary expedited jury trials may stipulate to a number other than six), 630.26(a) (same re mandatory expedited jury trials).

15 *Id.* § 222.5(b)(1).

16 *Id.* § 222.5(b)(2).

17 *Id.* § 205(c)-(d).

18 *Id.*§ 231(c).

19 *Id.* § 230.

20 *Id.* § 231(c).

21 Cal. Civ. Proc. Code § 630.04(b).

22 Cal. Evid. Code § 777.

23 Cal. Rules Ct. r. 2.1008(c).

24 Cal. Civ. Proc. Code § 205(c).

25 *Id.* § 222.5(d).

26 *Id.* § 230.

27 *Id.* § 231.

28 CACI nos. 100-118.

29 Cal. Rules Ct. r. 2.1033.

30 CACI no. 5000.

31 Cal. Rules Ct. r.2.1030.

MCLE Self-Study Article: It's Not Easy Being Green: California's Journey Towards a More Sustainably-Built Environment

Check the end of this article for information on how to access one MCLE self-study ethics credit.

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I. INTRODUCTION

California has long been a leader—whether in business, technology, or culture—and it is no different when it comes to "green building" and sustainable construction. In 2006, California passed the Global Warming Solutions Act—the first statewide cap on greenhouse gas emissions in the country.[1] Four years later, the Golden State adopted CALGreen—a first-in-the-nation state-mandated green building code.[2]

What exactly does all this mean? It means that owners, developers, and contractors—in both public and private works—have seen dramatic shifts in both what they are legally required to do, but also in what consumers have simply come to expect in just the last decade or so.

While a discussion of all aspects of "green building" is beyond the scope of this piece, this article will discuss some of the key moments in California's push towards carbon neutrality and 100-percent renewable energy, the resulting changes to California's construction sector (with a focus on public works-related legislation), and the litigation that (perhaps, inevitably) arose.

II. OVERARCHING STATEWIDE GOALS AND THEIR PROGRESSION

As carbon dioxide emissions continue to rise globally, California has numerous aggressive goals to decrease pollution and increase air quality as the global leader in climate policy. Overall, these policies commit to reduce eighty percent in greenhouse gas emissions (GHG) relative to a 1990 baseline by 2050. There have been many strategies that were

developed to track and reduce GHG across all sections. The California Air Resources Board (CARB) is responsible for ensuring that California meets these goals. As the world's fifth largest economy and the twelfth largest emitter of carbon worldwide, the world is looking to California to respond to climate change.

A. Assembly Bill 32 (Health and Safety Code §§ 38500 Through 38599)

The state's greenhouse gas reduction program, Assembly Bill (AB) 32, was passed in 2006. It authorized CARB to monitor and regulate sources emitting greenhouse gases. AB 32 was also called the "Global Warming Solutions Act," confirming California's commitment to transition to a sustainable, clean energy economy. Its target was to reduce emissions to the 1990 level by 2020. This level was approved to be 431 $MMTCO_2e$ (431 million metric tonnes of carbon dioxide equivalent). This is an aggregated statewide limit and is not sector or facility specific. AB 32 also created the cap-and-trade program, which expired in 2020 but was extended to 2030 by AB 398.

According to the U.S. Energy Information Administration, from 1990 to 2015, California's GHG emissions from the electric power sector were reduced by 24%, commercial and residential sector emissions by about 14%, and industrial emissions by 13%.[3] Transportation-related emissions declined from 2007 through 2013, but rose in both 2014 and 2015. Overall, California's total GHG emissions were 2% higher than 1990 levels as of 2015 as shown in **Figure 1** below.

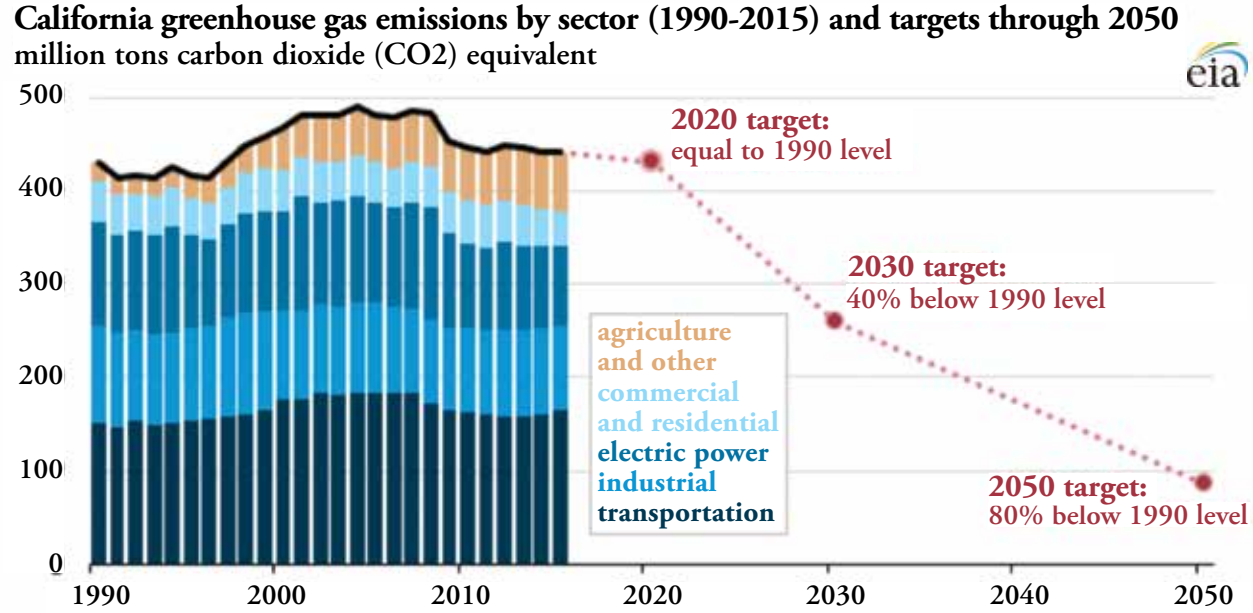

Figure 1 Emission Reduction Status and Targets Chart[4]

However, progress has been made since 2015. As of October 2020, GHG emission levels remain below the 1990 baseline. CARB reported that 2018 emissions were six million $MMTCO_2e$ below the 2020 target of 425.3 $MMTCO_2e$.[5] CARB also reported that GHG emissions in California have dropped from a 2001 peak of 14.0 tons per person to 10.7 tons per person in 2018, a twenty-four percent decrease. CARB published a report titled "California Greenhouse Gas Emissions for 2000 to 2018" which showed the state crossing the 2020 limit around the end of 2015, thereby meeting the AB 32 goal.[6]

B. Senate Bill 32 (Health & Safety Code § 38566)

Ten years after the passage of AB 32, California raised the emissions goal to forty percent below 1990 levels by 2030 with the passage of Senate Bill 32 in 2016. This equates to a limit of 258.6 MMTCO2e. Although California met the AB 32 goal, CARB published documents indicating that the 2030 goal will be challenging to reach, noting that it will require a much steeper rate of greenhouse gas reductions.

According to the Energy Futures Initiative's (EFI) white paper "Optionality, Flexibility & Innovation: Pathways For

Deep Decarbonization in California," there are no "silver bullet" technology solutions to meet this requirement.[7] There will need to be significant improvements and cost reductions in key technologies, including carbon capture, utilization, and storage at industrial facilities and natural gas power plants. EFI notes that several economic sectors have not made measurable emissions improvements in recent years including the industry, transportation, and agriculture sectors.

Currently, there are four programs that focus on addressing the impacts of climate change:

1. The cap-and-trade program;
2. The Low Carbon Fuel Standard (LCFS);
3. The zero emission vehicle (ZEV) mandate; and
4. The Renewables Portfolio Standard (RPS).

These programs cover transportation fuels, industrial emissions, vehicle emissions, and emissions from electricity generation. These programs have more-stringent emissions reduction targets starting in 2021.

The cap-and-trade program has received the most publicity of the four programs. University of California Berkeley's Center for Law, Energy & Environment's fact sheet on cap-and-trade explains that the program sets a declining cap on statewide emissions in accordance with emission reduction targets and generates a number of emission credits equal to the cap.[8] The program funds preservation and restoration of tens of thousands of acres of open space. It also has helped plant thousands of new trees, funded 30,000 energy efficiency improvements in homes, expanded affordable housing, boosted public transit, and helped more than 100,000 Californians purchase zero-emission vehicles.

On July 25, 2017, Governor Jerry Brown, former Governor Arnold Schwarzenegger, State Senate President pro tempore Kevin De Leon, and political, environmental, and business leaders from across the State came together to celebrate the extension of the cap-and-trade program.[9] They met on Treasure Island to affirm the State's bipartisan commitment to reducing pollution and promoting economic growth.

"Thanks to bipartisan support California was able to extend its historic cap-and-trade program which protects our environment and preserves our nation-leading economic growth," said former Governor Schwarzenegger. "Governor Brown and legislative leaders from both parties came together to ensure that California continues to march toward a clean, prosperous future. I hope politicians around the country can learn from the example set in Sacramento last week. Republicans and Democrats were able to come together to pass legislation that helps clean up our environment for our children while at the same time supporting a booming economy." Governor Schwarzenegger added: "America did not drop out of the Paris agreement. America is fully in the Paris agreement. The states and the cities in America, the private sector, the academic sector, the scientists—everyone is still in the Paris agreement. There's only one man that dropped out."[10]

Governor Brown closed the program, noting that "California is leading the world in dealing with the principal existential threat that humanity [is] facing … we are a nation-state in a globalizing world and we're having an impact and you're here witnessing one of the key milestones in turning around this carbonized world into a decarbonized, sustainable future."[11]

C. Executive Order B-55-18

Executive Order B-55-18 (2018) established a statewide goal of carbon neutrality by 2045.[12] The Executive Order defines "carbon neutrality" as achieving net-zero carbon dioxide emissions, striking a balance between the CO_2 emitted into the atmosphere and the CO_2 removed from the atmosphere. CARB states this goal will be extremely challenging to meet: "By any measure, in any scenario, achieving carbon neutrality by 2045 will require a wholesale transformation of California's energy economy."[13]

There are numerous studies on means to achieve carbon neutrality. One of them is EFI's May 2019 white paper titled "Optionality, Flexibility & Innovation: Pathways For Deep Decarbonization in California," which provides a comprehensive sector-by-sector study of policies and decarbonization options for California.[14] EFI's report identifies thirty-three clean energy pathways. Innovation will play a big part in achieving the goal, including introducing clean energy technologies while maintaining reliability, low cost, security, and availability. Innovation must also include the development of affordable, large-scale negative-emissions technologies. The success of this Executive Order will require alignment of interests and commitment of key stakeholders. According to CARB's draft report on "Achieving Carbon Neutrality in California," this goal will require a "wholesale transformation of California's energy economy." There is simply no easy solution towards deep decarbonization.

III. COMPARISON TO OTHER MAJOR MARKETS / NEIGHBORING STATES

Although the United States announced its plan to withdraw from the Paris climate agreement in 2017, less than two years after the U.S. committed to fighting climate change, states representing fifty-five percent of the U.S. population and forty percent of U.S. greenhouse gas emissions committed to uphold the Paris accord GHG goals.[15] Further, it notes that nine states, plus the District of Columbia and Puerto Rico, plan to transition to a 100 Percent Clean Future (i.e., "net-zero greenhouse emissions economywide by 2050 and net negative emissions thereafter") by 2050, while six states set ambitious emissions reductions goals by 2050.[16] **Table 1**, below, summarizes these goals as of October 2019.

Table 1 - Climate Policy Progress Among the States Plus D.C. and Puerto Rico[17]

California:	Passed legislation for 100 percent zero carbon electricity by 2045 and executive order for economywide carbon neutrality by 2045
Colorado:	Passed legislation requiring 90 percent emission reductions below 2005 levels economywide by 2050, setting a goal to eliminate emissions by 2050, and requiring large investor-owned utilities to reduce emissions by 80 percent below 2005 levels by 2030. Governor Polis has put forth a plan to move to 100 percent clean electricity by 2040.
Hawaii:	Passed legislation for 100 percent renewable electricity by 2045 and economywide goal of being carbon-neutral by 2045.
Maine:	Passed legislation for 100 percent renewable electricity by 2045 and economywide reductions of 80 percent by 2050.
Nevada:	Passed legislation setting a goal of 100 percent carbon-free electricity by 2045.
New Mexico:	Passed legislation requiring 100 percent carbon-free electricity by 2045.
New Jersey:	Passed legislation to reduce emissions 80 percent below 2006 levels by 2050 and rejoined the Regional Greenhouse Gas Initiative in June 2019.
New York:	Passed legislation requiring 100 percent carbon-free electricity by 2040 and goal of net-zero emissions economywide by 2050.
Washington:	Passed legislation requiring 100 percent clean electricity by 2045.
District of Columbia:	Passed legislation for 100 percent renewable electricity by 2032.
Puerto Rico:	Passed legislation for 100 percent renewable energy by 2050.

By April 2020, the Center for American Progress reported that more states were taking action.[18] In its article entitled "States are Laying a Road Map for Climate Leadership," the Center for American Progress reported that fifteen states and territories are moving toward a 100 percent clean energy future. Virginia became the first southern state in April 2020 to enact 100 percent clean energy legislation. On February 19, 2021, the United States rejoined the Paris Agreement.[19]

The State Climate Policy Maps site by the Center for Climate and Energy Solutions reports that, as of April 2021, thirty-two states have released a climate action plan or are in the process of revising or developing one.[20] The plans generally include emissions reduction goals and detail actions needed to meet those goals.

IV. CURRENT WAYS OF REACHING THOSE GOALS

A. Building Efficiency and Electrification

According to CARB, 25% of California's greenhouse gas emissions come from the use of electricity and natural gas in residential and commercial buildings.[21] California cannot achieve its energy goals without reducing emissions from buildings. These emissions come from the processes that make the home and commercial and office buildings comfortable to inhabit— heating, cooling, cooking, lighting, and more. There are three key strategies to decarbonize buildings:

1. clean energy supply resources;
2. energy efficiency improvements in buildings and appliances; and
3. energy demand flexibility.

These strategies will need to increase building electrification, shifting to use electricity rather than fossil fuels, especially in older buildings for heating, ventilation, air conditioning, and water heating systems. This could reduce GHG emissions by 30-60% compared to mixed-fuel homes.[22]

1. Senate Bill 100

Senate Bill (SB) 100 is energy legislation requiring the state to procure 60% of all electricity from renewable sources by 2030 and 100% from carbon-free sources by 2045; double the energy efficiency of existing buildings; and allow greater electric utility investment in electric vehicle charging infrastructure.

2. Senate Bill 1477 Clean Homes to Californians

In 2018, Governor Jerry Brown signed SB 1477, which deployed $50 million annually to help deliver clean and affordable homes.[23] This bill provides incentives for innovative, near-zero emission homes and will push the market to develop clean technologies. It allocates $50 million each year until 2023 to support BUILD and TECH programs, which together will help make California's homes more climate-friendly and affordable to heat.[24]

3. BUILD (Building Initiative for Low-Emissions Development)

BUILD incentivizes contractors to find innovative and low-cost ways to build clean and is dedicated to all-electric housing in lieu of buildings fueled with fossil gas. Under BUILD, contractors may explore technologies that work together to reduce climate pollution, including high-efficiency heat pumps, solar thermal, energy efficiency, battery storage, and other advanced technologies that reduce emissions from buildings.

4. TECH (Technology and Equipment for Clean Heating)

TECH focuses on technologies that have the greatest potential to reduce climate pollution, and to improve the health and safety of, and energy affordability for, low-income households. Clean-heating technologies can dramatically cut harmful pollution and lower utility bills. This includes switching to highly-efficient electric heat pumps.

5. CalGreen and Energy Standards

The California Energy Commission has implemented title 24, California Code of Regulations, since the 1970s and updates it every three years.[25] Part 6 of title 24 is the Building Energy Efficiency Standards (Energy Code) and part 11 of title 24 is the California Green Building Standards Code (CALGreen). The Energy Code is focused on reducing energy consumption by implementing efficiency standards for new and existing buildings. The code applies to the planning, design, operation, construction, use, and occupancy of every newly-constructed building in California.

CALGreen is focused on improving public health, reducing environmental impacts, and encouraging sustainable construction in residential and nonresidential buildings. Examples include better building insulation, more-efficient lighting and appliances, and air system improvements, all of which will save energy and reduce maintenance costs over the life of a building. CALGreen defines a green building as one that follows a holistic approach, focused on five categories:[26]

1. planning, design, and site development;
2. energy efficiency;
3. water efficiency and conservation;
4. material conservation and resource efficiency; and
5. indoor environmental quality.

CALGreen standards encompass a comprehensive set of mandatory construction measures for each category, ranging from electric vehicle charging infrastructure to low-flow faucets to construction waste stream management.

B. Sustainable Construction Pipeline for Public Works

1. Buy Clean California Act

Public works projects have a role to play as well. In 2017, for example, then-Governor Jerry Brown signed AB 262, the "Buy Clean California Act" (BCCA), into law. The BCCA is codified in Public Contract Code sections 3500 to3505.

In general, the BCCA requires certain state agencies to award projects to contractors certifying that the embedded carbon emissions for "eligible materials" they use (carbon steel rebar, flat glass, mineral wood board insulation, and structural steel) meet specific standards.[27] Established by the Department of General Services (DGS), those standards set forth the maximum acceptable global warming potential (GWP), reported as the carbon dioxide equivalent[28] for each category of eligible materials.[29] The DGS determines the GWP limits by analyzing data from publicly-available Environmental Product Declarations (EPD),[30] which are independently-verified and registered documents that report a product's environmental impact over its life cycle.[31]

Additionally, the GWP limits consider the carbon impacts of the eligible material's manufacturer only, and not the fabricator, as "the majority of GWP production is

attributed to the manufacturer of the material rather than the fabricator."[32] First established on January 1, 2021,[33] the DGS will revisit its GWP calculation every three years.[34]

The BCCA applies to contracts entered into on or after July 1, 2021[35] by any of the following: the Department of Water Resources; the Department of Transportation; the Department of Parks and Recreation; the Department of Corrections and Rehabilitation; the Military Department; the Department of General Services; the Regents of the University of California; the Trustees of the California State University; and agencies with authority under Management Memo 18-01 ("Awarding Authorit(ies)").[36] Awarding Authorities must include in bid specifications that the GWP not exceed the maximum GWP permitted by the BCCA.[37] While an Awarding Authority may require a lower GWP than what is established by the DGS, it cannot permit a higher GWP.[38] In other words, an Awarding Authority may require contractors to exceed the standards set by the DGS, but it generally cannot relax the standards set by the DGS. Per the BCCA, an Awarding Authority "shall strive to achieve a continuous reduction of emissions over time."[39]

Successful bidders for a contract must submit a proper EPD for each eligible material it proposes to use on a project.[40] Importantly, contractors are not permitted to install any eligible materials until it submits the required EPDs.[41]

That said, Awarding Authorities and contractors are not entirely without recourse in the event they cannot submit the required EPD. First, the BCCA permits exceptions to compliance on a case-by-case basis if an Awarding Authority determines "upon written justification published on its Internet Web site" that requiring compliance with a particular eligible material for a particular contract "would be technically infeasible, would result in a significant increase in the project cost or a significant delay in completion, or would result in only one source or manufacturer being able to provide the type of material needed by the state."[42] Time and, oftentimes, litigation will tell as to what will be considered a "significant increase" in project cost, or a "significant delay" in project completion.

Second, the requirements of Public Contract Code section 3503, part of the BCCA, are also inapplicable if an Awarding Authority determines that an "emergency" exists.[43] An "emergency" means "a sudden, unexpected occurrence that poses a clear and imminent danger, requiring immediate action to prevent or mitigate the loss or impairment of life, health, property, or essential public services."[44] It also includes emergencies caused by the following circumstances:[45]

1. the failure or threat of failure of any bridge or highway structure;
2. the failure or threat of failure of any dam, reservoir, aqueduct, or other water facility;
3. damage to a state-owned building or other real property by storm, flood, fire, or earthquake for which remedial measures are immediately required; and
4. if after the approval of project plans, specifications, or cost estimates, the acceptance of any bid is determined to not be in the State's best interest.

2. Assembly Bill 1365 – Public Contracts: Clean Concrete[46]

Introduced in February 2021 by then Assembly Member Rob Bonta (now Attorney General Bonta), Assembly Bill 1365 would supplement the BCCA by adding section 3503.1 relating to "clean concrete." If passed, section 3503.1 would require the DGS to establish, by January 1, 2024, a maximum GWP for structural concrete products, including ready-mix, shotcrete, precast, and concrete masonry units, similar to what is currently required for carbon steel rebar, flat glass, mineral wood board insulation, and structural steel. The GWP limit would be reviewed every three years, starting on January 1, 2027.

Before calculating a GWP limit for concrete, however, AB 1365 would mandate that, starting on January 1, 2022, an Awarding Authority require that specifications for a bid or proposal for a project contract only include performance-based specifications for concrete used as a structural material, and, separately, that successful bidders submit EPDs for concrete products before they are installed in the project. The DGS will then anonymously and publicly publish the data contained in EPDs submitted pursuant to section 3503.1, ostensibly for purposes of informing the DGS's GWP calculation that must be published two years later.

3. Senate Bill 596 – Greenhouse Gases: Cement and Concrete Production[47]

While AB 1365 seeks to address concrete used in certain public works projects, Senate Bill 596 would require CARB to develop, by December 31, 2022, a "comprehensive strategy" to reduce the carbon impact of concrete used in the State by at least forty percent from 2019 levels by 2030, and to achieve carbon neutrality by 2045. In developing this strategy, CARB must:

1. develop life-cycle greenhouse gas emissions reporting and tracking mechanisms for cement and concrete used in California;

2. evaluate the average volume-weighted greenhouse gas intensity of concrete used in 2019 to establish a baseline from which to measure reductions;

3. identify modifications to existing measures and evaluate new measures to achieve objectives;

4. prioritize actions that reduce adverse air quality impacts and support economic development in communities neighboring cement plants;

5. include provisions to minimize and mitigate potential leakage;

6. coordinate and consult with other government entities, academia, industry, public health authorities, and local communities;

7. prioritize actions that leverage federal incentives;

8. evaluate measures to support the use of low-carbon concrete; and

9. select one or more communities located adjacent to cement plants for participation in an emissions reduction program.

V. THE CONTENTIOUS CASE OF CALICO

As California transitions away from fossil fuels and more towards electrification, unsurprisingly, conflicts will arise—even among interest groups that would traditionally be viewed as allies of one another. Take, for instance, the Calico Solar Project—originally slated to be an 8,230 acre solar farm that was to have been built in the Mojave Desert in San Bernardino County, California.[48] Approved by both the California Energy Commission for licensing certification, and by the United States Bureau of Land Management (BLM) for construction and operation through a right-of-way grant in 2010,[49] the Calico Solar Project was the subject of multiple lawsuits from several major national environmental groups, including the Defenders of Wildlife, Sierra Club, and the Natural Resources Defense Council (NRDC), as well as Native American groups such as La Cuna de Aztlan Sacred Sites Protection Circle Advisory Committee.[50]

The most high-profile were a pair of lawsuits filed by the NRDC, Defenders of Wildlife, and the Sierra Club in March of 2012.[51] Sierra Club and Defenders of Wildlife alleged violations of the Endangered Species Act, the National Environmental Policy Act, the Bald and Golden Eagle Protection Act, the Federal Land Policy and Management Act, and the Administrative Procedure Act.[52] In their suit, the plaintiffs contended that the Calico Solar Project site:

> [I]s comprised of lands identified by [the U.S. Fish and Wildlife Service ("FWS")] as high value habitat for the federally threatened desert tortoise located in the Pisgah Valley, a region which serves as a wildlife movement corridor for desert tortoise critical to recovery of the species. BLM and FWS have also identified the Project lands as foraging habitat for golden eagles, a California fully protected species. In evaluating the Project's impacts on desert tortoises and golden eagles, BLM and FWS ignored relevant scientific information, failed to fully and accurately assess some impacts and wholly overlooked others, and failed to determine whether proposed mitigation plans would effectively ameliorate adverse impacts.[53]

Through its lawsuit, the Sierra Club and Defenders of Wildlife sought:

> (i) an order vacating BLM's record of decision, final environmental impact statement, and right-of-way grant for the Calico Solar Project and remanding the matter to BLM to correct the defective analyses identified herein;
>
> (ii) an order vacating FWS's biological opinion and incidental take statement in support of the Calico Solar Project and remanding the matter to FWS to correct the defective analyses identified herein;
>
> (iii) an injunction prohibiting BLM from issuing a notice to proceed or, if such notice has already been issued, halting the Project until Defendants' violations are remedied; and
>
> (iv) such other relief as is requested herein. [block text broken into separate lines for clarity.][54]

Similarly, the NRDC sued the BLM, contending that the Calico Solar Project was unlawful under the Endangered Species Act, National Environmental Policy Act, the Bald and Golden Eagle Protection Act, and the Federal Land Policy and Management Act.[55] The NRDC alleged that:

In late 2010, facing an end-of-year deadline under the American Recovery and Reinvestment Act, the U.S.

Department of the Interior drove to approve the massive, utility-scale Calico Solar project on pristine lands in the Mojave Desert's Pisgah Valley. These lands provide prime habitat for the desert tortoise, which is threatened with extinction, the golden eagle, and many other rare and sensitive plant and animal species. Yet, to meet the deadline, the Department and its agencies pushed forward without fully considering the project's impacts on these species. The [BLM's] environmental review failed to consider realistic alternative sites off public land. The [FWS] rendered a Biological Opinion that relied heavily on a methodology known to grossly undercount desert tortoise populations and on mitigation measures that will kill many tortoises they are intended to save.[56]

Specifically, the NRDC brought its action "to challenge these reviews and approvals by the Department of the Interior, the [BLM], and the [FWS]."[57]

It should be noted that the Sierra Club's 2012 lawsuit with the Defenders of Wildlife was not its first challenge to the Calico Solar Project. In 2011, the Sierra Club sued the California Energy Commission over the project as well.[58] Filed as a petition to the California Supreme Court, the Sierra Club argued that the California Energy Commission rushed the environmental review without full consideration of the impacts on wildlife and without identifying adequate mitigation measures.[59] The supreme court denied the petition without comment.[60]

A different outcome, however, awaited the 2012 lawsuits by the NRDC, Sierra Club, and Defenders of Wildlife. Whether as a result of "changed market conditions" (as contended by the Calico Solar Project's developer),[61] because of the constant litigation, or because of some other factor, in 2013, the developer dropped its application to proceed with the Calico Solar Project, and the right-of-way that permitted its construction was terminated.[62] As a result, the 2012 lawsuits brought by the NRDC, Sierra Club, and Defenders of Wildlife were dismissed without prejudice.[63]

Litigation surrounding big solar farms have not stopped simply because the Calico Solar Project never came to fruition.[64] With California's goal of using 60% renewable electricity by 2030, and 100% carbon-free electricity by 2045, and with government agencies continuing to approve large utility-scale solar farms,[65] controversies surrounding how California is to meet its clean energy goals will continue to arise.

VI. CONCLUSION

According to CARB, residential and commercial buildings account for nearly a quarter of the State's total greenhouse gas emissions.[66] Thus, it is no surprise that "greening"—not just what is built, but how it is built—has a crucial role to play in whether, and how, California reaches its goal of carbon neutrality and 100-percent renewable energy.

Where change goes, though, disputes are sure to follow. The Calico Solar Project litigation reminds us that the road to reaching the State's goals will not come without hurdles.

California, however, is accustomed to being at the head of the pack, including the legislative wrangling and litigation that comes with spearheading change. As California continues to update its building codes and expand ways to reach its greenhouse gas and clean energy goals, we can expect to see more disputes as the State marches towards a more sustainable and green-energy future.

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Ten Tips for Upgrading the AIR Commercial Real Estate Lease Form

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The AIR lease forms have frustrated commercial leasing attorneys for decades in California. Whether representing landlords or tenants, there are many aspects of the AIR lease forms, which contain a multitude of non-market and eccentric terms, that need to be modified to prove more effective and more consistent with commercial leasing practice in California.[2]

Using the AIR lease forms present several challenges, including the requirement to use the AIR CRE software.[3] This is a proprietary software and the parties ultimately end up signing a cumulative redline of the lease.[4] The theory behind this is that if the parties are very familiar with the form, then after signing, it will be easy to quickly determine the changes to the form lease made for a particular lease transaction. However, in our experience, the businesspeople are almost never familiar with the forms and few attorneys are comfortable with them either. Yet commercial real estate brokers continue to promote these forms as the "easy" way to complete a transaction, although this is rarely the case.

The purpose of this article is to highlight ten areas of the AIR form lease that should be modified to be consistent with California commercial leasing practice. With these changes, the forms will be closer to fulfilling their promise of being a "form lease" of value to commercial leasing professionals.[5]

There are a variety of AIR lease forms available depending on the economics of a particular deal, e.g., gross, net, single tenant or multi-tenant.[6] There are roughly three categories of leases based on the property type: industrial, office, and retail.[7] For the purpose of this article referring to the Standard Multi-Tenant Office Lease – Net (hereinafter referred to as the "AIR Form Lease") will be referenced, but the majority of these provisions appear in most of the AIR lease forms that are published.[8]

I. RENT INCREASE FOR VARIOUS DEFAULTS; INCREASE IN SECURITY DEPOSIT

A. Rent Increase for Various Defaults: Several provisions in the AIR Form Lease grant the landlord the unilateral right to increase the base rent by 10% upon the occurrence of a tenant breach. For example, section 6.4 of the AIR Form Lease provides that if the tenant fails to allow the landlord to inspect the premises in connection with hazardous materials, then "Base Rent shall be automatically increased, without any requirement for notice to Lessee, by an amount equal to 10% of the then existing Base Rent or $100, whichever is greater for the remainder of the Lease." This type of automatic increase also applies if: (i) Tenant fails to timely deliver an estoppel certificate (section 16(b)), (ii) Tenant fails to maintain the insurance coverage required by the lease (section 8.9), or (iii) if Tenant assigns the lease in violation of the assignment provision (section 12.1(d)).

> Not only are these concepts more appropriately handled in the default provision, but they are also unique to the AIR Form Lease and are not used in even the most aggressive California landlord lease forms. This creates a more arduous negotiation process, as all tenants will want to strike these

terms and some landlords will insist on including the provision simply because it happens to appear in the AIR Form Lease. For this reason, a tenant attempting to delete this language may have a difficult time prevailing. This presents an unfair advantage to landlords as this provision is not commercially reasonable and is never used outside of the AIR Form Lease universe.

B. Increases in Security Deposit. Section 5 of the AIR Form Lease provides for an automatic increase in the amount of the security deposit following any increase in the base rent: "If the Base Rent increases during the term of this Lease, Lessee shall, upon written request from Lessor, deposit additional monies with Lessor so that the total amount of the Security Deposit shall at all times bear the same proportion to the increased Base Rent as the initial Security Deposit bore to the initial Base Rent." The amount of the security deposit is typically negotiated at the letter of intent stage. It is unlikely that the parties were aware of this language in the AIR Form Lease because if they had been, they would have dealt with it at the letter of intent stage. This language should be deleted from the AIR Form Lease.[9]

II. BROKER PROVISIONS

The AIR Form Leases were created by the American Industrial Real Estate Association (the "AIREA"). The AIREA is an organization focused primarily on commercial real estate brokers, and so it should not be surprising that the AIR Form Lease includes many provisions whose sole purpose is to protect the brokers.[10] Crucially, the AIR Form Lease includes the brokers as parties to the lease. There are a number of problems with this concept.

First, brokers should not be parties to the lease nor should brokers be third party beneficiaries of the lease. Typically, the landlord has agreed to pay commissions to the landlord's broker and the tenant's broker. Under California law, such an agreement should be memorialized in writing. If the broker has a dispute with the landlord over payment of commission, then under the AIR Form Lease, the broker could sue to enforce the terms of the commission agreement as set forth in the AIR Form Lease, which means the tenant could be dragged into the dispute. The more prudent practice would be for the brokers and the landlord to enter into a separate written agreement to provide for the payment of broker commissions.

Ronald Rossi, a commercial leasing attorney, points out that "tenants and landlords can also end up in court if the broker or agent handling the transaction breaches a duty or makes a mistake while assisting the tenant/landlord in negotiating the lease." [11] In particular, he notes that section 25(b) of the AIR Form Lease includes an artificial statute of limitations of one year. In addition, a party's damages against a broker are limited to the amount of the broker commission paid to the broker.[12] These issues are more appropriately handled in a separate commission agreement between landlord and the brokers.

To address these problematic provisions, the following changes should be made to the AIR Form Lease: (i) section 1.10(b) should be revised to provide that brokerage commissions be paid to brokers pursuant to a separate written agreement, (ii) references to brokers should be deleted from section 31 (Attorneys' Fees), (iii) the last sentence of section 22 should be deleted, (iv) sections 15.1, 15.2, and 25 should be deleted in their entirety, and (v) the signature blocks for the brokers should be deleted.

III. STANDARD STATUTORY WAIVERS

One of the more egregious oversights in the AIR Form Lease from the landlord's point of view is the lack of statutory waivers.[13] It is common practice in California commercial leases to provide for the waiver of various statutes. The idea is that sophisticated parties to a commercial lease can create their own rubric for determining how to deal with security deposits, repairs, and casualty and condemnation events rather than relying on outdated statutes.[14]

A. Security Deposit: California courts have upheld the validity of a tenant waiver of the benefits of California Civil Code section 1950.7(c) in commercial leases.[15] The following language should be added to section 5 of the AIR Form Lease: "Lessee hereby waives the protections of Section 1950.7(c) of the California Civil Code, as it may hereafter be amended, or similar laws of like import."[16] In addition, the tenant may wish to insert a time period for the return of the security deposit.

B. Repairs: The following language should be added to section 7.2 (which deals with landlord's repair obligations):

> To the extent allowed by law, Lessee waives the right to make repairs at Lessor's expense under Sections 1941 and 1942 of the California Civil Code, and the right to terminate the Lease under Section 1932(1) of the California Civil Code, and any other laws, statutes or ordinances now or hereafter in effect of like import.

C. Casualty: The following language should be added to section 9 (which deals with the impact of fire or other casualty damage to the premises):

> The provisions of this Lease, including this Section 9, constitute an express agreement between Lessor and Lessee with respect to any and all damage to, or destruction of, all or any part of the Premises, the Building or the Project, and any statute or regulation of the State of California, including, without limitation, Sections 1932(2) and 1933(4) of the California Civil Code, with respect to any rights or obligations concerning damage or destruction in the absence of an express agreement between the parties, and any other statute or regulation, now or hereafter in effect, shall have no application to this Lease or any damage or destruction to all or any part of the Premises, the Building or the Project.

D. Condemnation: The following language should be added to section 14 (which deals with the impact of eminent domain or governmental taking on the premises):

> The rights contained in this Section 14 shall be Lessee's sole and exclusive remedy in the event of a taking or condemnation. Lessor and Lessee each waives the provisions of Section 1265.130 and 1265.150 of the California Code of Civil Procedure and the provisions of any successor or other law of like import.

E. Waiver of Forfeiture: Under California law, commercial tenants have certain rights to cure their lease defaults and restore (i.e., avoid forfeiture of) the lease. These statutory rights would conflict with the specific tenant and landlord remedies set forth in the lease. To avoid confusion, the anti-forfeiture statutes should be waived by tenant. The following language should be added to section 13(c) of the AIR Form Lease: "Lessee hereby waives California Civil Procedure Section 1174(c), 1179 and California Civil Code Section 3275."[17]

IV. ROUNDING FOR RENT

Section 4.3 of the AIR Form Lease provides that "all monetary amounts shall be rounded to the nearest whole dollar." This provision wreaks havoc with both landlord's and tenant's accounting, with both parties likely not even aware of this provision, nor is this rounding customary in commercial leases and property management practices. This sentence should be deleted from the AIR Form Lease.

V. INSURANCE

The AIR Form Lease contains an odd construct related to insurance not seen elsewhere in commercial leases in California in our experience. Section 1.9 of the AIR Form Lease creates a defined term, the "Insuring Party," which is defined as the lessor. This redundant defined term is actually an improvement over the prior iteration which allowed either lessor or lessee to be listed as the insuring party, which makes little sense for a multi-tenant building. In the AIR Form Lease, the Insuring Party is responsible for insuring the building and common areas of the project. Other than a ground lease and, less frequently, a single-tenant lease (each of which have their own separate forms), the landlord should always be the insuring party in a commercial lease.[18] The tenant's insurance obligations are called out in separate sections (sections 8.2(a) and 8.4 of the AIR Form Lease).

Despite the fact that the Insuring Party is defined as lessor, with no distinguishing aspects that create any need to have a separate defined term, the term is still used throughout the AIR Form Lease. The continued use of this term leads to confusion and recommend that this term be deleted. The effect of this deletion would be to also: (i) delete section 1.9, (ii) change the language in section 8.3(d) regarding Lessee's Improvements to read as follows: "Lessor shall not be required to insure Lessee Owned Alterations and Utility Installations unless the item in question has become the property of Lessor under the terms of this Lease," and (iii) change the reference to Insuring Party in section 9.2 to Lessor. This last point would be subject to negotiation since landlords typically require tenants to pay a pro rata share of any deductible under landlord's insurance policy, but for our purposes, at least clarifying that this is lessor's obligation will provide a clearer understanding from which to begin those negotiations.

Another problem with the insurance terms of the AIR Form Lease is section 8.5, which allows either party to buy insurance if the other party fails to carry the insurance required by the lease. While it is common for commercial leases to contain provisions allowing landlords to place insurance on a tenant's behalf if the tenant's insurance lapses, the reverse is generally not true.[19] Even the right of a landlord to buy/place insurance on a tenant's behalf is controversial in commercial leases and in particular, national tenants may consider this to be a deal breaker. The last sentence

of section 8.5 should be deleted and substituted with the following language:

> In the event Lessee shall fail to procure such insurance, or to deliver such certificates (and such other evidence satisfactory to Lessor of the maintenance of such insurance), then in addition to any other remedy available pursuant to this Lease or otherwise, Lessor may, at its option, following delivery of written notice to Lessee of such failure and Lessee's failure to cure the same within five (5) business days following Lessee's receipt of such notice, procure such policies for the account of Lessee, and the cost thereof shall be paid to Lessor within five (5) days after delivery to Lessee of bills therefor, plus an administrative fee of five percent (5%) of such cost.

Section 8.6 should be revised to clarify the obligations of the parties regarding the waiver of subrogation as follows[20]:

> Lessor and Lessee intend that their respective property loss risks shall be borne by reasonable insurance carriers to the extent above provided, and Lessor and Lessee hereby agree to look solely to, and seek recovery only from, their respective insurance carriers in the event of a property loss to the extent that such coverage is agreed to be provided hereunder. Without affecting any other rights or remedies, Lessee and Lessor each hereby release and relieve the other, and waive their entire right to recover damages against the other, for loss of or damage to its property arising out of or incident to the perils required to be insured against herein. The effect of such releases and waivers is not limited by the amount of insurance carried or required, or by any deductibles applicable hereto. The failure of a party to insure its property shall not void this waiver. The Parties agree that their respective property insurance policies are now, or shall be, endorsed such that the waiver of subrogation shall not affect the right of the insured to recover thereunder, so long as no material additional premium is charged therefor.

Section 8.8 of the AIR Form Lease (Exception of Lessor and its Agents from Liability) has been found to be enforceable under California law.[21] Section 8.8 provides an additional clarification regarding the waiver of subrogation and would ideally be included in that provision (section 8.6). That being said, this provision should include an exception for losses due to landlord's gross negligence or willful misconduct. Section 8.8 should be revised as follows:

> Notwithstanding the negligence or breach of this Lease by Lessor or its agents but subject in all events to the waiver of subrogation set forth in Section 8.6, neither Lessor nor its agents shall be liable under any circumstances for: (i) injury or damage to the person or goods, wares, merchandise or other property of Lessee, Lessee's employees, contractors, invitees, customers, or any other person in or about the Premises, whether such damage or injury is caused by or results from fire, steam, electricity, gas, water or rain, indoor air quality, the presence of mold or from the breakage, leakage, obstruction or other defects of pipes, fire sprinklers, wires, appliances, plumbing, HVAC or lighting fixtures, or from any other cause, whether the said injury or damage results from conditions arising upon the Premises or upon other portions of the building of which the Premises are a part, or from other sources or places, (ii) any damages arising from any act or neglect of any other tenant of Lessor or from the failure of Lessor or its agents to enforce the provisions of any other lease in the Project, or (iii) injury to Lessee's business or for any loss of income or profit therefrom. Instead, it is intended that Lessee's sole recourse in the event of such damages or injury shall be to file a claim on the insurance policy(ies) that Lessee is required to maintain pursuant to the provisions of paragraph 8 so long as the waiver of subrogation required to be in Lessor's insurance policies described in Section 8.6 is in full force and effect. The foregoing is not intended to shield Lessor from liability from the willful misconduct or gross negligence of Lessor or its agents and in all events, Lessor shall be liable for all losses due to its willful misconduct or gross negligence.

VI. NOTICE PROVISION

The notice provision allows notice by facsimile. Fewer and fewer companies use fax machines anymore, so this should be deleted. The most recent iteration of the AIR Form Lease now includes notice by email. The actual notice addresses follow the signatures of the parties and include a place to insert each party's email address. The parties should ensure that the email recipient is someone who is in a position to regularly receive emails or set up a new email account that can be monitored by a variety of parties, e.g.,

leasenotices@tenantco.com.[22] The parties may also wish to provide that notice will be delivered by one of the standard methods with a concurrent copy by email. Notice by email has become increasingly important during the COVID-19 global pandemic as many offices have been shuttered during government-mandated shelter-in-place orders. Thus, a standard Federal Express notice provision may not always be sufficient.

VII. ESTOPPEL CERTIFICATES

The AIR Form Lease entitles both landlord and tenant the right to request an estoppel certificate from the other, which is unusual for typical commercial leases. Most landlords object to providing an estoppel certificate to a tenant.[23] On the other hand, it is crucial that the landlord be able to obtain an estoppel certificate from the tenant.[24] In addition, section 16(c) of the AIR Form Lease provides that tenant has to provide financial statements to landlord from time to time. This is a standard commercial lease provision but given its relative importance to both landlords and tenants and its independence from the estoppel obligations, the title of section 16 should be revised to include a reference to financial statements.

I recommend that: (i) section 16 be renamed "Estoppel Certificates; Financial Statements," and (ii) section 16(a) and section 16(b) be deleted and replaced with the following (with section 16(c), re-labeled as section 16(b)):

> (a) Lessee shall within 10 business days after written notice from Lessor execute and deliver to Lessor a statement in writing in form similar to the then most current "Estoppel Certificate" form published by the AIR Commercial Real Estate Association, plus such additional information and/or statements as may be reasonably requested by Lessor. Any such certificate may be relied upon by any prospective mortgagee or purchaser of all or any portion of the Project. Failure of Lessee to timely execute and deliver such estoppel certificate shall constitute an acceptance of the Premises and an acknowledgment by Lessee that statements included in the estoppel certificate are true and correct, without exception.

VIII. ASSIGNMENT/SUBLETTING

A. **Profit-Sharing**: There are some omissions in the Assignment/Subletting provision (article 12 of the AIR Form Lease) which could be addressed including the addition of a landlord recapture provision[25] and a permitted transfer clause,[26] however, as these provisions are not necessarily market and are often heavily negotiated I do not include them here. A profit-sharing provision is standard and should be added to the AIR Form Lease when representing the landlord. The use of the term profit here refers to the excess of the rent which a tenant receives when subleasing the premises over the rent payable by the tenant to the landlord pursuant to the terms of the lease.[27] Tenants will want the ability to deduct all subleasing costs (e.g., broker commissions, attorneys' fees) from such profit before delivering landlord's share to landlord.

At present in California, it is typical that commercial leases provide for an equal sharing of profit between landlord and tenant. However, this is subject to negotiation and some landlord forms will start with landlord retaining 100% of profits.

Under California law, if a lease is silent, then the tenant retains any profits in connection with a subletting or assignment. The California Civil Code provides that landlords may condition its consent to the sublease on the sharing of any sublease profits.[28] In the case of *Ilkhchooyi v. Best*, such a provision was found unconscionable because the definition of profit included non-lease related compensation, e.g., the value of goodwill associated with tenant's business (which was being sold in connection with the lease assignment).[29] Thus, a profit-sharing provision must be carefully drafted to avoid being deemed unenforceable.[30]

A standard provision[31] such as the following should be added to the AIR Form Lease as a new section 12.4:

> 12.4 **Profit Sharing**. Lessee shall pay to Lessor, immediately upon receipt thereof, fifty percent (50%) of the excess of all rental compensation received by Lessee for an assignment or subletting over the Rent allocable to the portion of the Premises covered thereby, after deducting the following costs and expenses for such assignment or sublease: (i) brokerage commissions and reasonable attorneys' fees; and (ii) the actual costs paid in making any improvements in the Premises required by any sublease or assignment.

B. Notices to Subtenant: The AIR Form Lease provides that in the case of a sublease, landlord agrees to send notices of any tenant default to a subtenant and allows subtenant to cure any such defaults (section 12.3(e)). There are many reasons why the tenant would want to avoid having the

subtenant cure the tenant's defaults. For example, the tenant might be in a dispute with the landlord and disagrees about the nature of the default, or such cure could complicate tenant's dealings with landlord. If the tenant wishes to grant the subtenant such cure rights, then such agreement should be reflected in the sublease itself or in any separate landlord consent to sublease. Thus, section 12.3(e) should be deleted from the AIR Form Lease.

IX. HOLDOVER

The holdover provision in a commercial lease provides that the tenant will be required to pay an increased rental amount if it stays in the premises past the expiration or earlier termination of the lease. Currently in California commercial leases, the holdover rate is typically 150% of the base rent in effect immediately prior to lease expiration, however, many landlord forms start with 200%. The AIR Form Lease provides in section 26 for a holdover rate of 150% of Base Rent applicable immediately preceding the expiration or termination of the Lease. Under California law, holdover rent is viewed as a reasonable landlord remedy in the event of tenant's holding over, and not as an unenforceable penalty.[32] However, there are situations where the holdover rent, even at 150%, is not enough to make the landlord whole if the landlord has a new tenant waiting to take occupancy of the premises. In addition, if there has been a steep increase in the fair market rent of the premises from the original lease commencement, then 150% may be substantially less than the current market rent for the premises. In these cases, landlords typically add an additional remedy by requiring the current tenant to indemnify the landlord for losses incurred by landlord as a result of such current tenant's failure to timely surrender the premises.[33] These losses may include claims by a new tenant against landlord for failure to timely deliver the premises to the new tenant. For example, landlord's lease with the new tenant may provide that if landlord fails to deliver the premises by a certain date, then tenant is entitled to a rent credit in the amount of one day's base rent for each day of delay. Landlord could then claim this rent credit as a loss which directly resulted from the current tenant's holding over in the premises past the expiration date of the lease. However, absent the tenant indemnity referenced above, the current tenant could argue that the holdover rental rate was intended as liquidated damages and designed to make landlord whole and should therefore make the tenant not be liable for any other costs unless specifically set forth in the lease.

Thus, the following standard indemnity language should be added to the end of section 26 of the AIR Form Lease:

> The provisions of this Section shall not be deemed to limit or constitute a waiver of any other rights or remedies of Lessor provided herein or at law. If Lessee fails to surrender the Premises upon the termination or expiration of this Lease, in addition to any other liabilities to Lessor accruing therefrom, Lessee shall protect, defend, indemnify and hold Lessor harmless from all loss, costs (including reasonable attorneys' fees) and liability resulting from such failure, including, without limiting the generality of the foregoing, any claims made by any succeeding tenant founded upon such failure to surrender and any lost profits to Lessor resulting therefrom.

Tenants may wish to include a requirement that landlord notify tenant that it has signed a lease with a new tenant before the indemnity would be applicable.

X. FORCE MAJEURE AND COVID

The AIR Form Lease does not include a force majeure clause. In light of the COVID-19 global pandemic, the force majeure clause in commercial leases has come under intense scrutiny.[34] The vast majority of standard force majeure clauses in commercial leases in California provide that a force majeure event excuses a party's performance but will never excuse tenant's obligation to pay rent. California does have a statutory force majeure provision, California Civil Code section 1511(2), but if the commercial lease includes a force majeure provision, such provision will preclude either party's reliance on the statutory provision. Parties should consider whether this statute should be specifically waived in commercial leases going forward to avoid any confusion.

In addition, in light of the effect of the pandemic on businesses, a topic of increasing debate is whether the parties should negotiate an exception to the general rule that a tenant is never excused from the payment of rent. Similar to the provision allowing for the abatement of rent in the event of a casualty (which is set forth in section 9.6(a) of the AIR Form Lease), such a provision would provide that during any period that tenant is unable to use the premises due to a shelter-in-place order, rent will abate [this would be added as a new provision to the AIR Form Lease]:

50. **Force Majeure; Abatement**.

Force Majeure. As used herein, "**Force Majeure**" shall mean strikes, acts of God, shortages of labor or materials, war, terrorist acts, civil disturbances disease outbreak, epidemic, pandemic (including without limitation COVID-19), government regulations or restrictions (e.g., shelter-in-place orders or orders requiring the closure of non-essential businesses), and other causes beyond the reasonable control of the performing party. However, Tenant's obligations that can be performed by the payment of money (e.g., payment of Rent and maintenance of insurance) shall not be excused due to Force Majeure. Nothing herein contained shall excuse a party from exercising all due diligence and taking all necessary actions possible under the circumstances to terminate any delaying cause due to Force Majeure at the earliest feasible time. Any party claiming a delay due to Force Majeure shall promptly notify the other party hereto regarding the nature of such Force Majeure event and the estimated length of such delay.

Abatement. Notwithstanding anything to the contrary contained in this Lease, if: (i) any governmental authority orders the closure of Lessee's business as a result of the Covid-19 or any other pandemic (e.g., shelter-in-place orders or orders requiring the closure of non-essential businesses) (hereinafter, a "**Closure Order**"), (ii) as a result of such Closure Order, Lessee ceases to operate its business in the Premises and (iii) Lessee's business interruption policies required to be carried pursuant to this Lease will not cover Lessee's Base Rent payments to Lessor during the period of such Closure Order, then 50%[35] of all Base Rent due hereunder shall abate during the period such Closure Order is in effect (the "**Abatement Period**"). For the avoidance of doubt, a Closure Order being lifted includes any order allowing Lessee to operate at less than full capacity, i.e., Lessee is obligated to pay full Base Rent during any period in which it is allowed to operate in the Premises, even at less than full capacity. In consideration for Lessor's agreement to abate 50% of Base Rent during the Abatement Period, Lessee knowingly and intentionally waives and agrees not to assert or raise any current or future defenses, rights or claims, whether at law, equity or otherwise, based upon, arising from or in connection with (A) any moratorium, limits or conditions imposed by law due to the Covid-19 or any other pandemic on Lessor's rights and remedies, including, moratoria on unlawful detainer actions, and (B) with respect to Lessee's obligation to pay 50% of Base Rent during the Abatement Period (other than in connection with a casualty or taking which shall be governed by the provisions of ***Sections 9*** (Damage or Destruction) and ***14*** (Condemnation) of the Lease, respectively), force majeure, acts of God, illegality, frustration, frustration of purpose, prevention of performance, duress, impossibility, emergency, unconscionability, absence or lack of control, rescission, and any other excuses or defenses of performance.

CONCLUSION

Despite the loud complaints of California commercial leasing lawyers, it appears that the AIR Form Lease is here to stay. To make the AIR Form Lease fulfill its promise of being a helpful document that will facilitate and expedite commercial leasing transactions, the foregoing changes should be made to the AIR Form Lease.

Endnotes

1 The author would like to thank Krista Kim for her invaluable contributions to this article and for partnering on the presentation at the 2018 annual California Real Property Law Section annual meeting on which this article is based.

2 The AIR form is described as "in wide use" in California by Clint Wilson and Kent Burton in their article, *Suggested Tenant Revisions to the "AIR" Standard Industrial/Commercial Multi-Tenant Lease – Net* in California Real Property Journal, volume 33, number 4 (2015). *See also, Items to Negotiate in the AIR Standard Lease Form*, LA. Law., Jan. 2007, https://www.ravidlawgroup.com/publications/items-to-negotiate-in-the-air-standard-lease-form/. It is important to note that if the parties are using the AIR Form Lease, they will inevitably draft an addendum (in MSWord) which may include additional deal particulars, such as condition of premises (including whether landlord or tenant will be performing any work), consequences for delay in delivery, Patriot Act, and agreement to use DocuSign for lease execution,

among others. Each of the authors have their own forms of these addenda but the contents of such addenda are beyond the scope of this article. For more information on drafting such addenda, please feel free to contact the authors.

3 http://www.aircre.com/. The cost for a single license of the software (which is installed on a single computer) is $600 [this is a one-time fee]—note the WinAIR software was replaced in 2017 with the AIR CRE forms. Each additional registration for use on a computer in the same office is $200. There is also a small fee to print the lease in "final," executable form. The initial license comes with 200 "tokens." The cost to print one "final" version of the lease (without the DRAFT stamp but with the redlining) is approximately six tokens. As mentioned above, the parties typically also prepare an MSWord addendum to the AIR Form Lease.

4 James S. Arico, *AIR Lease Forms – Good for the Goose or Good for the Gander? A View From the Tenant's Perspective*, ClarkTalk Blog (Jan. 26, 2016), https://clarktalkblog.com/2016/01/26/air-lease-forms/.

5 Until the AIR makes the changes to the forms, counsel for landlords and tenants can make the changes in connection with specific lease transactions. There are several additional changes that should be made to the AIR Form Lease that are outside the scope of this article, including: (i) changes to section 2.3, *see* Walter R. Zagzebski, *The Allocation of Repair Obligations in Form Leases*, Los Angeles Lawyer (November 2005), (ii) section 7.3(c) which refers to the bond amount in connection with mechanic's liens as 150%—which should be changed to 125% to reflect the change in California mechanic's lien laws in 2012, and (iii) section 47 is a waiver of trial by jury which after *Grafton Partners v. Superior Court*, 36 Cal. 4th 944 (2005) is no longer enforceable in California. *See* Ravid Law Grp., *Items to Negotiate in the AIR Standard Lease Form*, L.A. Law., Jan. 2007 blog post, https://www.ravidlawgroup.com/publications/items-to-negotiate-in-the-air-standard-lease-form/.

6 *See, e.g.*, John Pagliassotti & Richard Riemer, *The Difference Between the Industrial/Commercial Single Tenant Lease – Net and the Industrial/Commercial Single Tenant Lease – Gross*, AIR Commercial Real Estate Forms: A User's Manual, vol. 1 – Lease Forms and Addenda (2d ed. 2015). For an overview of the AIR Form Leases, *see Standard Industrial/Commercial Multi-Tenant Lease – Net* in Miller & Starr, Landlord and Tenant in California Real Estate Law and Practice: California Real Estate Forms, volume 6, section 2:62 (2019 update); and *Standard Industrial/Commercial Multi-Tenant Lease – Gross* in Miller & Starr, Landlord and Tenant in California Real Estate Law and Practice: California Real Estate Forms, volume 6, section 2:63 (2019 update),.

7 The AIR form library includes additional forms such as ground leases which are outside the scope of this article.

8 All references in this article to sections in the AIR Form Lease refer to the Standard Multi-Tenant Office Lease – Net. The AIR Form Lease referenced in this article was updated on October 22, 2020 (note that the latest date of update in the forms is in the footer of the AIR Form Lease). The AIR produces a handbook covering the leases forms in detail, *see* John L. Pagliassotti and Richard L. Riemer, AIR Commercial Real Estate Forms: A User's Manual Volume 1 – Lease Forms and Addenda (2d ed. 2015).

9 *The Automatic Security Deposit Increase Provision*, A.I.R. Forms Practitioner, https://airpractitioner.com/2015/06/23/the-automatic-security-deposit-increase-provision/.

10 Ravid Law Grp., *Items to Negotiate in the AIR Standard Lease Form*, L.A. Law., Jan. 2007 blog post, https://www.ravidlawgroup.com/publications/items-to-negotiate-in-the-air-standard-lease-form/.

11 Ronald Rossi, *Remember, Very Little Is Standard When It Comes To "Standard Forms,"* Mar. 13, 2017 blog post, https://www.rhrc.net/Remember-Very-Little-Is-Standard-When-It-Comes-To-Standard-Forms.shtml.

12 *Id.*

13 It has been argued that the California waivers are not included so that the AIR form leases can be used in other states; however, the AIR Form Lease does contain the standard California statutory remedies provisions in section 13.2. The AIR Form lease also contains warning language "CERTAIN PROVISIONS OF THE LEASE MAY NEED TO BE REVISED TO COMPLY WITH THE LAWS OF THE STATE IN WHICH THE PREMISES ARE LOCATED." The argument that the form is not California specific is not persuasive as the default provision clearly is meant to reference California statutory remedies. For an overview of statutory waivers

in commercial leases, *see Common Tenant Waivers in Leases (CA),* Practical Law Practice Note.

14 For an overview of these concepts, *see Are You Really Waiving your Rights?*, Tenant Guardian Blog, http://tenantguardian.com/are-you-really-waiving-your-rights/

15 The effect of not waiving section 1950.7(c) is that landlord is then limited in what landlord can deduct from the security deposit of accrued (and not future) rent. *See 250 L.L.C. v. Photopoint Corp.*, 131 Cal. App. 4th 703 (2005).

16 *Items to Negotiate in the AIR Standard Lease Form*, L.A. Law., Jan. 2007, https://www.ravidlawgroup.com/publications/items-to-negotiate-in-the-air-standard-lease-form/.

17 *See In re Art and Architecture Books of the 21st Century*, 518 B.R. 43 (2019).

18 Sidney G. Saltz, *The Treatment of Insurable Risks in Commercial Leases*, Real Est. Rev. (Winter 1989); Sidney Saltz, *Allocation of Insurable Risks in Commercial Leases*, 37 Real Prop., Prob. and Trust J., no. 3, at 479 (Fall 2002). *See also*, Ann Peldo Cargile, *The Basics of Insurance in Leases*, Prob. and Prop. (Nov./Dec. 2000).

19 The exception here would be in the case of a large national tenant; however, it is unlikely that a large national tenant would use an AIR form, as they are much more likely to insist on using their standard form. *See* Nathan J. Wautier, *Considerations When Leasing to a National Tenant*, Jan. 25, 2012 Blog Post, https://www.reinhartlaw.com/knowledge/considerations-when-leasing-to-a-national-tenant/.

20 For an overview of drafting a waiver of subrogation clause, *see* Sidney G. Saltz, *Allocation of Insurable Risks*, 37 Real Prop., Prob. and Tr. J., no. 3, at 485-87.

21 *Frittelli, Inc. v. 350 N. Canon Drive, LP.,* 202 Cal. App. 4th 35 (2011).

22 *Think Twice Before You Click 'Send' – AIR Allows Notices By E-mail*, A.I.R. Forms Practitioner (Dec. 15, 2015) https://airpractitioner.com/2015/12/15/think-twice-before-you-click-send/.

23 The rare instance might be in the case of an assignment of the lease; however, any estoppel type language (e.g., no defaults under the lease) would typically be handled in the landlord consent agreement. *Landlord Estoppel Certificate*, Practical L. For a sample clause for a landlord estoppel, *see Put Limits on Tenant's Right to Estoppel Certificate*, Com. Lease L. Insider (Sept. 17, 2015).

24 Brent C. Shaffer, *Using Tenant Estoppel Letters to Cut to the Chase,* 15 Prob. and Prop., no. 6 (Nov./Dec. 2001); *see also*, Marc Leonard Ripp, *Negotiate New and Standard Terms in Estoppel Certificate Clause*, Com. Lease L. Insider (Sept. 17, 2015).

25 Recapture provisions are enforceable in California, *see Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 826 P.2d 710 (Cal. 1992); *see also*, Ann Peldo Cargile, E*nforceability of Clauses Providing for Profit-Sharing and Termination Rights* (Brent C. Shaffer, ed.), The Sublease and Assignment Deskbook: Legal Issues, Forms and Drafting Techniques for Commercial Lease Transactions, at 122-23 (2d ed. 2013).

26 Brent C. Shaffer, *Case Law Regarding Impact of Lease Assignment Language on Business Restructurings*, The Sublease and Assignment Deskbook: Legal Issues, Forms and Drafting Techniques for Commercial Lease Transactions, at 89-101 (Brent C. Shaffer, ed., 2d ed. 2013).

27 Profit sharing is typically limited to subleases as assignments are by definition a direct granting of all rights under the lease to an assignee with no modifications.

28 Cal. Civ. Code § 1995.240.

29 45 Cal. Rptr. 2d 766 (Ct . App. 1995).

30 Ann Peldo Cargile, *Enforceability of Clauses Providing for Profit-Sharing and Termination Rights*, The Sublease and Assignment Deskbook: Legal Issues, Forms and Drafting Techniques for Commercial Lease Transactions, 120-21((Brent C. Shaffer, ed., 2d ed., 2013).

31 This language provides a starting point for landlords and tenants. In sophisticated commercial leasing transactions, this provision would be subject to further negotiation by landlords and tenants. Landlords will want to limit the deductible costs, require tenant to amortize such costs over the sublease term, and allow landlords the right to audit tenant's books regarding such profit and costs. Tenants would typically want to push back on the amortization language, add additional costs which can be deducted like rent concessions and allowing a reasonable time to pay such profit to landlord by substituting "10 business days" or some longer period for "immediately."

32 *Constellation-F, LLC v. World Trading 23, Inc.,* 45 Cal. App.5th 22, 258 Cal.Rptr.3d 341 (2020); *see also*, Ira Meislik, *Why Are Obnoxious Holdover Rents Enforceable?*, Ruminations: Retail Real Est. Law Blog (Feb. 16, 2020), http://www.retailrealestatelaw.com/archives/4540.

33 *Include Eight Protections in Holdover Clause,* Com. Lease L. Insider (July 25, 2014).

34 A full discussion of force majeure clauses is outside the scope of this article, for a general overview, *see* Louis Gonzalez, Josh Escovedo & Mark Ellinghouse, *COVID-19's Impact on Leasing and Other Real Estate Transactions*, 38 Cal. Real Prop. J., no. 4, 4-15 (2020); *see also*, Deborah Yoon Jones, *Force Majeure Clauses in the Face of Covid-19: Commercial Leasing Guidance,* The Lexis Prac. Advisor J. (Summer 2020).

35 This percentage is subject to negotiation between landlord and tenant; retail tenants may insist that no rent be payable during any period when tenant cannot operate its business in the premises as a result of any shelter-in-place orders. *See, e.g., How to Give Tenants Future Pandemic Rent Relief,* Com. Lease L. Insider (July 24, 2020).


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Will A Folding Or Foldable Bike Help You With Your 2021 Fitness Goals?: On the Real Property Law Section's newly formed Health & Wellness Committee, we pride ourselves in offering suggestions that could benefit the physical and mental health of all RPLS members. So, what does a "folding" or "foldable" bike have to do with this?

Section Calendar of Events

Missed it live? Check out the online catalog (calawywers.org/education/).

► **Interested in presenting a real property webinar for RPLS? We are always looking for good ideas. Contact: Nancy Goldstein – nancy@gr8calilawyer.com**

Title	Event	Date
Crocker Commercial symposium	Virtual education and networking	September 9, 2021
CLA 2021 Virtual Annual Meeting	Education, networking, activities	September 23-25, 2021
What's Up With Us! RPLS attorneys discuss hot topics, cases, events, and interviews	Your home, office, anywhere via Zoom. **Free**. But the knowledge is priceless.	Third Thursday of each month at 12:30 pm. **WUWU**

Section Deadlines

Deadline for RPLS eNews

The 10th of each month

Inviting case summaries, practice tips, short articles of interest to the real estate community

Want to be interviewed for a future eNews, the monthly RPLS electronic newsletter?

Contact **Kyle Yaege, kyle@hickmanrobinsonlaw.com.**

CALIFORNIA LAWYERS ASSOCIATION

CLA IS MORE THAN JUST THE

Real Property Law Section

If you're a member of the Real Property Law Section, you're a member of the California Lawyers Association (CLA) and if you're not a member yet, we hope you'll join us! Didn't know you were a member? Don't know what that means? Keep reading.

What is CLA?

The California Lawyers Association is the statewide, voluntary bar association for *all* California lawyers. CLA is a 501(c)(6) professional association that launched in January of 2018. CLA offers unparalleled continuing legal education, the chance to develop an incredible statewide network of relationships, advocacy on matters critically important to the profession, and opportunities for statewide professional visibility and leadership. Our mission is to promote excellence, diversity and inclusion in the legal profession, and fairness in access to justice and the rule of law.

How did CLA originate?

In 2017, the California Legislature decided it was important for the State Bar of California to focus on its regulatory duties—licensure, admissions, and discipline. It enacted S.B. 36, which provided for the creation of the California Lawyers Association with the 16 substantive efforts law Sections and CYLA as its inaugural members. CLA also took on those roles that are traditionally associated with professional associations.

Beyond my Section, what does CLA do?

We do what statewide bar associations typically do, including advocating on behalf of our members and the profession, giving awards to stellar members of the profession, serving as a communications hub among various stakeholders in the state, and representing the state's attorneys on the national and international stage. CLA does all of these things and more!

How can I get more involved?

CLA has a variety of organization-wide committees, many of whom are often looking for members. In particular, our Programs Committee, our Awards Committee, our Membership Committee, and our Diversity Advisory Council are great opportunities to get more engaged across the organization. Go to our website, CALawyers.org to learn more!

Learn more at CALAWYERS.ORG

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