Winning Court Strategies

By Jeffrey S. Bennett, Attorney at Law

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

EVICTION ACTIONS

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

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

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

1. OUTDATED FORMS: Old forms often contain language which is either insufficient or improper under current Oregon law. For example, many older Notices of Termination For Nonpayment of Rent contain language requiring tenants to deliver their rent payment by the termination time/date when the notice is posted and mailed. The current statute only requires that the tenants mail their rent to the landlord by the deadline. Always use the most up to date forms available.

2. POSTING AND MAILING: Posting and mailing of notices (without adding three days for mailing) is only permitted when the rental agreement and surrounding facts meet all of the requirements of ORS 90.155. At the risk of oversimplifying that statute, the post and mail clause must be reciprocal in nature, and it must allow the tenant to post and mail notices to the landlord at a designated location, that is within a reasonable distance from the tenant's location, and that is available 24 hours per day, seven days per week. Many older rental agreements–as well as some newer ones–do not contain sufficient language to render posting and mailing legal. In such cases, service must be made personally or via first class mail.

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

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

5. KNOW WHEN TO USE 60 DAY NOTICES: "No Cause" Notices must be 60 days long (as opposed to the

old 30 day time limit) if all current tenants have resided in the premises for more than a year.

6. ALL TENANTS NOT NAMED: In order to file an FED against all tenants within an apartment unit, all of those tenants must be named in the termination notice. Problems may arise when a "guest" has lived in the apartment for many months or a child tenant attains the age of eighteen. In most cases–albeit not all cases–it is best to name these other individuals in the termination notice.

7. USE OF WRONG NOTICE: I have seen a few landlords attempt to convert 30 Day Notices of Termination Without Cause into "For Cause" or "With Cause" notices by writing in descriptions of events which precipitated the notice. However, such events are rare. A more common problem is the use of a 24 Hour Notice (Outrageous Conduct) when a 30 Day Notice of Termination For Cause would be more appropriate. If the acts which are described in the notice are not "outrageous in the extreme," consider using a 30 Day Notice of Termination For Cause instead. Finally, I see countless 30 Day No Cause Notices used by unknowing landlords in an effort to prematurely terminate a term lease. You cannot prematurely terminate a lease with a No Cause Notice. (Note: You can, however, serve a 30 Day No Cause Notice on a tenant more than 30 days before the end of the lease if the termination date is the same as the last date of the lease. In other words, you can use this notice in order to prevent any renewal of the lease.)

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

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

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

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

12. ACCEPTING PARTIAL PAYMENT: Partial payments are always problematic. (1) If you accept a partial payment before serving a Notice of Termination For Nonpayment of Rent, then enter into a written partial payment agreement, signed by the tenant, which states when the remainder of the payment will be made. If the tenant defaults in the payment obligation set forth in the partial payment agreement, you may serve a Notice of Termination For Nonpayment of Rent after that default. (2) If you accept a partial payment after having already served a Notice of Termination For Nonpayment of Rent, and the tenant defaults in the payment obligation set forth in the partial payment agreement, then I recommend that you serve a Notice of Termination For Nonpayment of Rent after that default. There are very limited exceptions to this rule, and playing the "exceptions game" carries significant risk.

13. PAYMENT BEYOND TERMINATION DATE: If you accept any rent for any time period beyond the termination date (e.g., if the termination date is the 15th of the month, and you accept 16 days' worth of rent), your termination notice is likely void under the "waiver" statute. On the other hand, there is a ten day refund period during which you can return the excess payment to the tenant to avoid waiving your termination notice.

14. PAYMENT AFTER FED IS FILED: If you accept rent from a tenant after an FED is filed, you may have

waived your eviction rights. The same result may arise if you serve a new termination notice while the FED is pending. Don't do this…. or talk with your attorney about possible exceptions.

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

16. INCORRECT DOLLAR AMOUNTS DEMANDED IN NOTICES OF TERMINATION FOR NONPAYMENT OF RENT: If you demand more money than you're owed, in your Notice of Termination For Nonpayment of Rent, then your Notice will be fatally flawed. I've seen excess demands happen in a variety of contexts. Here are two common scenarios: (1) the landlord failed to properly serve a Notice of Rent Increase, yet included the rent increase in the Notice of Termination For Nonpayment of Rent; and (2) the landlord misread the Rental Agreement or tenant ledger at the time the Notice was being prepared.

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

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

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

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

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

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

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

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

25. FAILING TO KNOW A GOOD DEAL WHEN YOU SEE ONE: At an FED first appearance, some tenant's attorney might tell you that his client (your tenant) will vacate the premises in seven days if you'll pay

that attorney $500.00 for his fees. Since trials often take place more than seven days after the first appearance, and since attorneys typically charge more than $500.00 to go to trial with you… don't pass up on a good deal.

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

NON-EVICTION MATTERS

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

2. RESERVATION DEPOSITS: These have become increasingly popular in the past decade. However, their use is limited to the following: (a) The application must be approved; (b) the landlord must give the applicant a written statement describing the terms of the agreement to execute a rental agreement and the conditions for refunding or retaining the deposit; (c) if a rental agreement is executed, the landlord shall either apply the deposit toward the monies due the landlord under the rental agreement or refund it immediately to the tenant; (d) if a rental agreement is not executed due to a failure by the applicant to comply with the agreement to execute, the landlord may retain the deposit; (e) if a rental agreement is not executed due to a failure by the landlord to comply with the agreement to execute, within four days the landlord shall return the deposit to the applicant either by making the deposit available to the applicant at the landlord's customary place of business or by mailing the deposit by first class mail to the applicant. Please note that if a landlord fails to comply with this section, the applicant or tenant, as the case may be, may recover from the landlord the amount of any fee or deposit charged, plus $100.

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

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

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

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

not the landlord, upon request of the tenant, the person must show the tenant written evidence from the landlord authorizing that person to act for the landlord in making the repairs. If the tenant does not request repairs in writing, the landlord should still enter, inspect, and perform the necessary repairs. However, such entry should only occur after first serving a Notice of Intent to Enter upon the tenant.

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

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

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

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

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

ABOUT THE AUTHOR

Jeffrey S. Bennett is a partner in the Portland law firm of Warren Allen LLP. A member of the Oregon, Washington and Idaho state bars, Mr. Bennett is the head of his firm's Landlord law department and has specialized in both residential and commercial Landlord/Tenant law for the past two decades. His articles have

appeared in The Business Journal, Apartments Northwest, and in other media, and Mr. Bennett is a frequent lecturer at regional Landlord/Tenant seminars. Mr. Bennett is an active member of the Metro Multifamily Housing Association, Rental Housing Association of Greater Portland, Oregon Landlord Support Association, and the National Association of Residential Property Managers. Mr. Bennett represents many of the largest regional and national property management companies doing business in Oregon and Washington all the way down to owners of single family residential homes and small office complexes. The remainder of Mr. Bennett's practice emphasizes business law, real estate, commercial litigation, and a variety of general civil matters. Outside of his law practice, Mr. Bennett is also a landlord, has been on the Board of Directors for both the East Portland and Gresham Area Chambers of Commerce, is an avid fisherman and musician, and is an author of numerous books on whitewater rafting and kayaking.