

3. Overview

Fees, fees and more fees

Let me warn you at the outset that the only thing free from the government is **information**. Everything else costs money, including **copies** of the free information!

Practically every time you visit the Clerk of the Circuit Court or go to the sheriff's department, a fee will be involved. It is simply part of doing business.

This book does not attempt to itemize every incidental expense incurred along the path to a successful eviction. I'm sure I would miss some anyway; up-to-date fee schedules are available from your sheriff and the Clerk of the Circuit Court.

What is an eviction?

An eviction is a small-claims lawsuit, where you are asking for a court Order to remove the tenant and return legal possession of your property back to you.

You may also be asking for a money judgment for unpaid rent including a late charge.

The legal term for an eviction is *Forcible Entry and Detainer* (where do they come up with these names?).

Civil law

Lawsuits come in two flavors: Criminal and Civil. Evictions are Civil cases, and are handled at the

County level. You will be using the services of the county sheriff and the circuit court.

Your local police department has no standing in eviction cases, unless criminal laws are violated.

Why is it complicated?

In the old days, landlords had all the power; tenants had none. If a tenant fell behind on her rent, the landlord would turn off the water to her apartment. Or remove the apartment door. Or change the locks. Over time, lawmakers – and the courts – began to impose a balance where the rights of a tenant were more equal to the rights of her landlord. Now, if you try one of these or similar tactics, called *Constructive Eviction*, you may be in serious trouble. You've gotta follow the law.

You must adhere to a strict legal process to remove a tenant. That's why you're reading this book, right?

Phillip's story

Phillip is a Chicago area landlord. During a recent winter he purchased a multi-unit property and planned to do a gut rehab.

The only problem was the existing tenants, who had valid leases and were not inclined to move.

Phillip decided to do something a bit unorthodox: he kicked in all the basement windows. With flow-through ventilation, all water pipes in the basement froze and burst.

Then Phillip evicted the tenants on the grounds that the dwelling was uninhabitable.

In court, the judge asked him, "You wouldn't happen to know how those windows got broken, would you?"

"No, your honor."

Although Phillip got away with it, I would not recommend that you try this approach.

But it's my property!

Yep, it is your property. And you are called the Landlord, an archaic term from the Middle Ages.

But you are not really a Lord and your tenants are not your serfs. A landlord is a business person who provides shelter in the form of a house, apartment, warehouse, office building, etc.

Providers of rental housing are closely regulated by a myriad of government agencies and regulations. These include the local government's code enforcement personnel, agencies that enforce fair housing regulations, protect against lead-paint poisoning, and even license your rental property.

Before you lease

Successful evictions result from good planning. Way in advance. Before the tenant moves into your residence.

Start with a good rental agreement. This should list all the terms and conditions of residency; spell out what you – the landlord – will do, and what the tenant is responsible for.

I'm partial to the Sanford Kahn lease from American Legal Forms (americanlegalforms.com), but even it is incomplete. You need to add your own provisions in the form of one or more addenda.

While we won't get into detail here about every lease provision, one provision is essential: the *Lease Addendum for Crime-free Housing (Form 1)*. Why this addendum? It gives you the power to evict if a tenant or his guest engages in illegal activity on the premises.

Nuisance Abatement

Illinois law provides for government intervention when a property is habitually used for illegal purposes. In fact, it provides for **property forfeiture** in the event that an owner does not resolve the problem to the government's satisfaction.

You don't want to lose your property in a forfeiture action, so you need the tools necessary to evict any tenant involved in illegal activities defined in the statutes.

Property forfeiture is enforceable for one year, and is authorized under four sections of the Illinois Compiled Statutes (ILCS).

We cover the eviction process for criminal activity in Chapter 6: Lease Violations.

Train new tenants

When I meet with new tenants to sign the lease, I also give them a blank Five Day Notice. I explain that it is our policy to serve a Notice if their rent is not paid on time. I tell them, "It's not personal. It is simply our policy to serve the Notice any time the rent is past due."

There's a good reason for this. Residents tend to become offended and defensive when served. By introducing the Notice at the beginning of the lease and assuring them it's nothing personal, they are likely to react more positively if they're ever served. They realize it's nothing personal – just business!

Ask yourself if month-to-month leases are right for you

There is a great deal of confusion over month-to-month tenancies. Yes, they should be in writing. No, you don't have to sign a new one every month.

To minimize confusion, my leases are titled "Rental Agreement." I have annual rental agreements and month-to-month rental agreements, depending on the circumstance.

A month-to-month tenancy has a start date but no end date. Instead, I insert language that says,

"In consideration of the mutual agreements and covenants herein stated, Landlord hereby rents to Tenant, and Tenant hereby rents from Landlord, for a private dwelling, the Apartment designated above, together with the fixtures and appliances belonging thereto, for an initial period of one (1) month, then month-to-month thereafter until terminated by either party by thirty (30) days advance written notice."

When do I use month-to-month leases? When my market is geared toward low income residents, many who don't even have checking accounts.

Why month-to-month? If my tenants have nothing to lose by defaulting on the lease, then I am the only party who is bound by the contract. They're not bound by the lease; what am I going to do if they default; garnish their savings account? Their wages? No, I'm better off cutting my losses and re-renting the apartment as soon as possible.

When I use month-to-month leases, I normally do so for all the units at the property. If an applicant questions this, I tell them, "It's my policy. All my leases are month-to-month." End of discussion.

What keeps them from moving out?

Nothing keeps a tenant from moving out when she wants to. Especially if she is judgment proof (nothing to lose). I've lost tenants after just a few months. In most cases, though, they seem to stay longer if they don't have to commit for a full year at a time.

Flexibility for me

With a month-to-month rental agreement, I can terminate a tenant with thirty days' written notice. Or I can raise the rent just as quickly.

Once I had a tenant who refused to put his trash inside the dumpster. Too much trouble for Francisco to lift the lid and toss the bag inside. I warned him. He ignored me.

So the next time I found his garbage resting outside the dumpster (I put on rubber gloves and went through the bag), Francisco received a 30 Day Notice of rent increase. A \$25 increase. Per month. The Notice explained **why** his rent was being increased.

That got Francisco's attention. He called to complain to me. Guess what I did? I ignored *him*!

This wasn't my only problem with Francisco. When I'd had my fill, I simply served him a 30 Day Notice to move. Good-bye Francisco. Problem solved! An annual lease would have made this impossible. My only option would be to evict for a lease violation. I cover lease violations later in the book. Here's a hint: Most lease violation evictions are unsuccessful.

Helps you sell

Month-to-month leases are ideal when you decide to sell your rental property. Potential buyers have more options; they can raise rents, remove tenants, even move in themselves. Rental properties with annual leases locked in to below-market rents are difficult to sell for a decent price.

On rare occasions, a lender might have problems lending on a property with monthly tenants. This is mostly due to ignorance on the part of the lender. My advice: Find a smarter lender.

Housing Choice Vouchers (Section 8)

Administered federally by the United States Department of Housing and Urban Development (HUD), Housing Choice Vouchers allow very low-income families to choose and lease safe, decent, and affordable privately-owned rental housing. Here is a list of various types of vouchers:

- Conversion Vouchers
- Family Unification Vouchers
- Homeownership Vouchers
- Project Based Vouchers
- Tenant Based Vouchers
- Vouchers for People with Disabilities
- Welfare-to-Work Vouchers

Discussion of the Section 8 program is beyond the scope of this book, except for three important points.

Section 8 requires annual lease

The Housing Choice Voucher program requires that the initial lease be for twelve full months. If the tenant moves in mid-month, the lease must extend to

the end of the thirteenth month (12½ months duration).

Lease renewals may be written with a provision for cancellation upon thirty-days' notice.

Nonpayment by Housing Authority

You may not penalize (evict) the tenant for nonpayment of rent by the Housing Authority. Paragraph 5d of the Tenancy Addendum form (Form HUD-52641-A [3/2000]) states:

The tenant is not responsible for paying the portion of rent to owner covered by the PHA housing assistance payment under the HAP contract between the owner and the PHA. A PHA failure to pay the housing assistance payment to the owner is not a violation of the lease. **The owner may not terminate the tenancy for nonpayment of the PHA housing assistance payment.**

You can learn more about Section 8 on line at www.hud.gov/offices/pih/programs/hcv/index.cfm.

Notify Section 8

The Voucher program is administered by state or local governmental organizations. Terms of Section 8 participation require the landlord to notify the Public Housing Authority (PHA) upon commencement of an eviction proceeding.

The requirement is contained in the Tenancy Addendum form mentioned above. Paragraph 8f(2) states:

The owner must give the PHA a copy of any owner eviction notice at the same time the owner notifies the tenant.

Annual leases have their place

My more upscale rental property attracts blue collar workers with bank accounts and steady employment. In other words, they have something to lose if they default. Annual leases are perfect for this type of tenant. That's what I use.

Define your terms

Every Rental Agreement should define the security deposit, rental amount and payment frequency (usually monthly), due date, grace period, if any, and late penalty.

Due date

I've tried every variation you could imagine, but gave up trying to accommodate the whims of each tenant.

Now all my rents are due on the first day of the month. Yours should be too.

Grace period

I gave up on grace periods. In the tenant's mind, the last day of the grace period became the *de facto* due date.

Now all my rents are due on the first day of the month with no grace period.

Note that Big Brother may impose a grace period if the due date falls on a weekend or legal holiday. Check with your attorney.

Late charge

Some municipalities (read: Chicago) impose a limit on what you can charge. Follow it.

Otherwise, I favor a late charge equal to five or ten per cent of the monthly rent.

In the past, I imposed daily late fees under the theory that it would motivate tenants to pay before the late charge grew too large.

You should include your late charge as additional rent. Your lease should say:

"Rental amount shall increase by \$xx.xx if not paid by the first day of each month."

Daily fees can backfire

Instead of motivating tenants to pay on time, they viewed the due date as being flexible (pick your own due date and the corresponding amount).

Also eviction courts have begun the practice of awarding only one late fee. So if your late fee is five dollars per day, courts will award you the fee for one day: Five dollars.

Three types of eviction

This book covers in detail three types of evictions, which are:

- Past-due rent
- Lease violation, including criminal activity
- Civil trespass or holding over

Each type has its own procedures and some unique forms, so we will discuss every one in some detail.

The most common is eviction for non-payment of rent. We'll cover this in the greatest detail. Then we'll discuss how the other two eviction types differ.

Do I need a lawyer?

You might. The Small Claims process was designed to provide a way for the little people (you and me) to litigate low-dollar lawsuits ourselves, thus avoiding expensive fees for legal representation.

Who designed the Small Claims process? Lawyers and judges. Who are judges? Former lawyers. So, even though the Small Claims process is more user-friendly, it doesn't always seem that way. You still are required to know the rules and follow them to the letter. This is not something you can do instinctively.

If the tenant uses an attorney, you may want to consider hiring one to represent you, since the stakes have been raised. In all my evictions, the only attorneys I have faced have been the free legal assistance attorneys. Without fail, they all wanted to negotiate an Agreed Order (see Chapter 5).

If the tenant files an Appearance, but then arrives for trial with an attorney, you may want to request a continuance to allow time to hire your own representation.

The judge has discretion as to whether to allow a continuance.

Local custom

The eviction process varies by state. You cannot take what you learn about the Illinois legal system and apply it in Ohio, though you would probably find similarities. This book applies only to procedures applicable in Illinois.

What is self representation?

The legal term for self representation is *pro se*, a Latin phrase meaning "in one's own behalf." You have the legal right to represent yourself in a court of law, without a law degree or license.

Unless you are an attorney, you do not have the right to represent another person, or an entity such as a corporation. So the way you hold title to your property and/or write your leases will control your ability to handle your own evictions.

Land trusts

Land trusts are not a separate entity when it comes to representation. If you hold your income property in a trust, you can still handle your own evictions.

To be safe, your lease should list you (not the trust) as Lessor. That's because you aren't permitted to sign contracts on behalf of the trust. The trustee is the party authorized to do so, not the beneficiary (that's you!).

Corporations and LLCs

Corporations and Limited Liability Companies are distinct entities in the eyes of the law. If you are not an attorney, you may not do your own evictions on behalf of your corporation or LLC. Get an attorney for your court appearances.

I am not disparaging the practice of holding income property in a corporation or LLC. That is not the subject of this book.

But don't despair quite yet! Let's say you hold title to your property as *624 N. County LLC*, but your leases are in your own name as Landlord (Lessor). Now when you perform an eviction, you are representing yourself – you are the Landlord (See **Exhibit 4**).

Check with your corporate/LLC attorney to be sure you can use your own name as Lessor on the leases without jeopardizing your business' legal standing.

Can I get help?

That's what this book is for. You won't get much help from the judge or other court employees. In fact, judges discourage court employees from furnishing advice. They are not qualified and often give erroneous information.

You can get information about what forms are required, and how to fill them out. In fact, the Clerk of the Circuit Court will usually provide examples you can follow.

When you do appear in court, the judge will offer little sympathy for your ignorance on the subject. Ignorant plaintiffs slow the process, and Small Claims court is all about volume.

Center for self-representation

The Nineteenth Judicial Circuit provides a service to pro se litigants. Called the Center for Self-Representation, information is available at the Lake County Courthouse or on line at: www.19thcircuitcourt.state.il.us/.

The services provided change over time, so you might want to check it out to see if there is anything offered that would benefit you.

Dress for success

Each judge establishes his/her own expectations for decorum in the courtroom. One should dress in a manner that the judge expects. To be safe, I checked the Nineteenth Judicial Circuit web site. Here's what it says:

Dress as though you were going to an important job interview. Shorts, bare feet, tank tops, halter tops, sandals, hats and other very casual clothing is not acceptable. You will be removed from the courtroom if you violate court dress code; this may result in an arrest warrant for failure to appear or a default of your civil case. Regardless of how you personally feel about the dress code, obey the rules. You are not in court to make a symbolic statement regarding your lifestyle.

In my experience, Small Claims/Eviction court is a bit less formal, but that could change with a different judge.

Judge decides

Although eviction laws are spelled out in the Illinois Statutes and Supreme Court rules, they are subject to interpretation and local court discretion.

If you prove your case, every judge will rule in your favor. At minimum, you will win an Order for possession. The variable is how long any particular judge will stay his Order. Some judges are more susceptible to a tenant's sob story than others.

No two judges are alike. Most appear to be pro-tenant; I haven't seen any pro-landlord judges. The best you can hope for is a judge who is neutral, siding with neither the plaintiff or defendant.

At the time I started doing my own evictions, the presiding judge was very tenant-friendly. He would ask the tenant,

- Do you owe the rent?
- Do you agree that the landlord is entitled to take possession of the dwelling?
- Do you have children?
- How much time do you need?

I heard an anecdote from one landlady. The judge asked the tenant if she had children. "Yes, I do," she replied, failing to mention that those children were fully grown and didn't live at home. He didn't ask.

Another anecdote was about the tenant who borrowed a friend's small children so she could take them to Eviction Court – and tug at the judge's heart-strings. It worked.

Same judge, different day

Generally, the same judge is assigned to Small Claims court for a period of years. Then the judge moves on or retires. If the regular judge is sick or on vacation, another judge serves as a substitute. My experience is that substitute judges are unpredictable. Some are great, others are clueless about the process and eviction law.

Final say

Judges differ on how they handle the variables left to discretion. Some of these are:

- How long to stay the possession Order;
- To award money judgment for rent up to eviction day, or only the amount claimed on the Five Day Notice;
- Overlooking minor errors on legal documents

But the judge has final say, unless you want to file a Motion to Reconsider, or appeal. A Motion to Reconsider is easy to file, and easy to be heard. But it's difficult to get the judge to reverse his own ruling. After all, what judge wants to overrule himself? Besides, there is no court reporter in Small Claims court, so there's no trial record to review.

But if a substitute judge makes an incorrect ruling, it might make sense to file a *Motion to Reconsider* to be heard in the regular judge's courtroom. You would file a *Notice of Motion (Form 2)* and pay a fee with the Clerk of the Circuit Court.

The appeal process is much more complex and technical, and involves an appeals court. Not something one would resort to in a Small Claims action.

Almost always stayed

It is rare that an Order granted for possession is effective immediately.

The custom is to stay the Order for seven or fourteen days. If the tenant has shown up for court, he might get a fourteen-day stay. No-shows usually get seven days.

I've seen the judge stay his Order for thirty days; it just depends on the situation and the judge. He exercises a great deal of discretion. Do something to make him or her angry, and you won't catch a break.

Mind numbing

Presiding over Small Claims court has to be a mind-numbing experience. The judge deals with dozens of cases each day; hears the same stupid excuses and goes through the same motions over and over again.

I could not be a Small Claims judge. Don't have the temperament. Over the years I've observed judges display incredible patience with ignorant plaintiffs who come to court without proper documents and are uneducated in eviction laws. Defendants do not seem to understand why they have to move, or they ask for a long stay of the judgment. Don't know how the judges do it.

Legal expenses

Unless your lease states otherwise, the losing party is required to pay reasonable and customary legal expenses incurred by the prevailing party.

You may want to include a clause in your rental agreement limiting the amount recoverable by the winning party. Otherwise, a disgruntled tenant may hire a hotshot lawyer and sue you for thousands.

Faced with the possibility of incurring huge legal expenses (or at least having to fund your own high-priced defense before trial), you'd be tempted to settle the lawsuit. I would.

With a cap – say \$500 – on recoverable legal expenses, the tenant would be required to fund his hotshot legal team for the additional fees. He'd be less likely to try something like this in the first place. You're not writing a blank check.

