

Legal Q & A

By Richard Beckman, Attorney

Question 1: I have heard that if I rent an illegal unit, I can't collect rent. Is this true?

Answer 1: If the tenant stops paying rent and there is no certificate of occupancy for the rental unit, and one is required by local ordinance (which is almost certainly going to be the case), the courts will not order the tenant to pay the back rent, due to the illegality of the unit. However, the tenant will also not be allowed to remain in possession and will be evicted if the owner otherwise complies with the unlawful detainer (eviction) process.

Question 2: If I give my tenants a 24-hour written notice to enter, can they deny me access, and if they do, what should I do?

Answer 2: As has previously been explained in this column, a landlord's right of entry to a rented apartment is set out in Civil Code Section 1954, which states:

(a) A landlord may enter the dwelling unit only in the following cases:

- (1) In case of emergency.
- (2) To make necessary or agreed repairs, decorations, alterations or improvements, supply necessary or agreed services, or exhibit the dwelling unit to prospective or actual purchasers, mortgagees, tenants, workers, or contractors or to make an inspection pursuant to subdivision (f) of Section 1950.5.
- (3) When the tenant has abandoned or surrendered the premises.
- (4) Pursuant to court order.

(b) Except in cases of emergency or when the tenant has abandoned or surrendered the premises, entry may not be made during other than normal business hours unless the tenant consents to an entry during other than normal business hours at the time of entry.

The question does not indicate how the tenant is denying access – for example, by having changed the locks and withholding a duplicate from the landlord, or by physically blocking access at the time the landlord tries to enter, or by notifying the landlord that the tenant is 'not available at that time, so please do not enter in my absence'.

If the landlord provides proper notice of intent to enter for a permitted reason, and the tenant refuses, the landlord has several options depending on the method the tenant uses to prevent access. First, in my opinion, and under any of the above scenarios, would be to speak or otherwise communicate with the tenant to try to discover why the tenant is unwilling to allow the landlord access, and try to resolve the tenant's concern such that access will be granted without further conflict.

If that approach is unworkable, the landlord should refer to the lease, to see if there is a provision requiring the tenant to provide access upon proper notice. If there is such a provision, the landlord can serve a 'three day notice to cure breach of lease or quit,' compelling the tenant to either allow access, or risk being evicted. If there's no such provision, and the lease is month to month, the landlord should be able to serve a '30 day notice of change of terms of tenancy' to impose such a provision. If the landlord feels that is too long to wait to gain access, and access is denied because the tenant has changed the locks, the landlord can - at some legal risk - follow up the notice to enter with a locksmith who will be able to 'pick' the locks to allow access. However, I discourage that approach, because of the risk that this entry would be deemed in violation of the tenant's rights of occupancy or privacy or both. But other attorneys I have spoken to about this subject believe such entry would be legally permitted, unless of course the tenant is physically preventing the landlord's entry. In that case, under no circumstances - other than extreme emergency -

should a landlord force her way into the unit. She should instead consult with counsel for specific advice under the circumstances.

Question 3: I recently purchased property in Oakland that came with a long time tenant (10 yrs) who never had a written contract. Can I insist the tenant sign a lease, either for one year or month to month?

Answer 3: For a month to month tenant, not in a 'rent controlled' city or town, the landlord can serve the tenant with a 30 day notice of change of terms of tenancy, which can be an entire lease. If the tenant remains in possession and pays the rent after the 30 day period, he will be deemed to have accepted the new lease terms. In a rent controlled city or town, such as Oakland, imposing new terms on an existing tenancy is much more complicated, and in some cases is not permitted if the new terms 'materially' lessen the rights the tenant previously enjoyed under her month to month rental agreement. The tenant may file a petition to have the new terms considered to be a 'rent increase' in excess of the annual allowed amount, by claiming that the new terms constitute a reduction in the tenant's housing services which were provided previously, such as parking, laundry, etc.

Question 4: Every month my tenant turns in a rent check, it bounces. What can I do about this constant hassle of going back and forth to the bank & dealing with essentially a "non-payment"? Also, can I charge fees for bounced checks?

Answer 4: If the tenant is a month to month tenant, you would be well within your rights to simply serve a notice of termination (30 or 60 days depending how long the tenant has lived there), and ending the relationship and your headache. If the tenant is on a one year lease, it is likely the lease has a provision that states repeated instances of 'bounced' checks is a material breach of the lease, and cause for termination of the tenancy.

A written lease is also the only way you will be able to seek fees for the costs of the bounced checks. And because the law of what is called 'liquidated damages' is a bit tricky, seeking to enforce late fees of bounced check fees through litigation is generally not recommended. If the tenant pays the demanded fees as required under the lease, great. If the tenant refuses, for whatever reason, the landlord needs to have the late fee provision reviewed by someone familiar with the case *Orozco v Casimiro* (2004) 121 Cal.App.4th Supp. 7, which is a detailed explanation of issues raised by the late fee claim in the residential rental context.

Question 5: My tenant has given me notice that she is moving out at the end of the month, but is applying her security deposit to the last month's rent. The lease specifically says the security deposit may not be used for last month's rent. But it's already one week after the first and she has not paid rent. Any suggestions?

Answer 5: This is a common problem for landlords whose tenants give notice that the tenant is leaving at the end of the month. Most tenants seem not to recognize the difference between security deposit and 'last month's rent'. And in fact, the law governing security deposits - Civil Code Section 1950.5 - considers any money paid to the landlord, no matter how it is described, to be 'security deposit.' But it matters to the landlord because if the tenant applies the security deposit to her last month's rent, the landlord is left with nothing to apply to damages belong normal wear and tear or cleaning to return the unit to the condition it was delivered in to the tenant.

If the lease specifically describes any money paid in addition to the first month's rent as 'security deposit,' then the landlord is entitled to hold that deposit until the tenant vacates, and then to account for it according to the rules of CC 1950.5. If the tenant, as in the questioner's situation,

attempts to apply it to their last month's rent, the landlord can notify the tenant, informally or by a three day notice to pay or quit, that the deposit may not be applied to last month's rent, and the rent is due for the period. The tenant's failure to pay the rent will subject her to an eviction action for non payment of rent.

It is crucial, however, that the deposit not be referred to as 'last month's rent' in the agreement, or the landlord will lose the right to apply that money to the security deposit. In non-'rent controlled' cities, if the tenant is on a month to month agreement, the rental terms can be changed to re-assign the deposit amount from last month's rent to strict security deposit.

Richard Beckman has been practicing landlord-tenant law for over 19 years, primarily in rent-controlled jurisdictions such as San Francisco, Oakland and Berkeley. He represents clients in a broad range of real estate-related disputes, including partition of co-ownership interests, purchase contract disputes, insurance coverage analysis and land use. Mr. Beckman also specializes in all aspects of landlord-tenant issues, representing landlords and tenants in residential and commercial matters. He can be reached at 415-495-8500; fax 415-495-8590 or by visiting www.BMDLLP.com.