NYSBA

FALL 2008 | VOL. 36 | NO. 4

N.Y. Real Property Law Journal

A publication of the Real Property Law Section
of the New York State Bar Association

Inside

NYSBA

NEW YORK STATE BAR ASSOCIATION

Real Estate Titles

Third Edition

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Garden City, NY

The success of the earlier editions of *Real Estate Titles* testifies to the need for a practical work encompassing the many complex subjects surrounding real estate titles. The breadth of the problems encountered in title examination is well beyond the appreciation of most laypersons and lawyers alike. These 2 volumes deal with most of those matters.

Edited by a nationally renowned expert on real estate law and title insurance, James M. Pedowitz, this revised Third Edition of *Real Estate Titles* is a thorough update of the original text and is authored by some of the most distinguished practitioners in the field. Many chapters have been substantially revised, including the chapter on title insurance which now includes copies of the 2006 American Land Title Association policies and the updated Title Insurance Rate Service Association (TIRSA) endorsements. This revised Third Edition includes new decisions, statutes and regulations; the index has also been substantially revised and expanded.

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2007 • 1,632 pp. • loose-leaf • 2 vols.
PN: 521007

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Non-member $180

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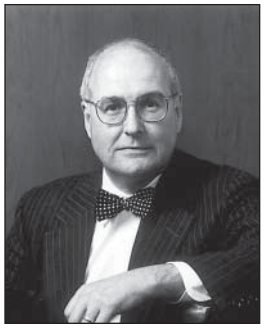
A Message from the Section Chair

And the dream goes on. The dream, of course, is that we have active participation by significant numbers of our Section in our committee meetings. I am not revealing any trade secrets when I say that membership in the New York State Bar Association is expensive and you pay additional dues to be a member of the Real Property Law Section. In order to get the full value, it does take some effort by participating in our committees.

I would like to introduce Ira Goldenberg. He is Chair of a Task Force to open up that wealth of knowledge and fellowship experienced in the committee network of the Real Property Law Section. Accordingly, every committee in the Section is establishing at least two, and potentially three, meetings a year at which *any member* of the Section can call in and participate, particularly those who have already signed up to be a member of a committee. It is in its infancy and we do have so-called glitches to work out. We anticipate that each committee will have a meeting within a short time prior to the Executive Committee meetings on December 5, 2008, January 28, 2009 and April 3, 2009. I mention these dates to give you a "heads-up" as to when you can look for these meetings. The call-in numbers will be published. A few years ago we established a calendar officer, Jerry Goldstein. We will be publishing a calendar of these meetings either on our website at www.nysba.org/realprop or in blast e-mails. The dates, times and call-in numbers will be published so any one of you can participate. Of course, there will be an on-site meeting and you are welcome to participate in that way.

Another very exciting development is the formation of the Real Estate Construction Committee. More than 200 Section members sent in a fax response indicating interest in



such a Committee. Our Co-Chairs are Thomas Curran of Ganfer & Shore, LLP, Susanna S. Fodor of Jones Day, and David L. Pieterse, of Nixon Peabody, LLP. All of you who have sent in a response are on the Committee and you will be hearing within the next month or two as to the first meeting of the Committee—**again with call-in capability.**

We continue to be involved in legislation. Any mention of our legislative activity and success requires the mentioning of Karl Holtzschue. He put in another energetic and exhausting year. A major effort was the adverse possession statute. Bob Zinman headed up a Task Force and he and Bob Parella, professors at St. John's, drafted a statute that the Task Force worked on for an extended period of time and finally presented to the legislature. It was their bill that formed the basis for the discussion in the entire state, both in the legislature and with the governor. Admittedly, we did lose when at the last minute there was inserted a "claim of right provision," but congratulations are in order for Bob and Bob and the entire Task Force.

Another example of the work of the Section is its recent involvement with the New York State Association of Realtors. Sam Tilton is as responsible as anyone in our Section with developing a working relationship with the realtors. We were able to work with them as to the disclosure statute and this year with the Commission Escrow Bill. There was a collaborative effort. I understand everyone may not be ecstatic about one or both of the bills, but our input made it much more palatable to us. Then again, we must understand that in the legislative process total victory is almost never achieved, and with our establishment of various processes we have been able to be effective in modifying these various proposals so that all of you who have to work daily with them will have a better law to work with.

One bill that the Section opposed was the Mortgage Lending Reform Bill, particularly our opposition to the mandatory settlement conferences. Our efforts were headed up by Steve Alden, who chaired the Task Force. We lost on this. **It is now our task to assist the borrowers as best we can.** The legislature has appropriated $25 million to assist in this effort, which is being headed up by our own Brian Lawlor, Executive Deputy Commissioner of the Division of Housing and Community Renewal of the State of New York. I met with him and Lori Harris, who is working with him on the matter, Terry Brooks from the NYSBA, and Gloria Arthur, also from the NYSBA and head of the Pro Bono Department. We are going to have a program this Fall explaining the bill and educating our Section members and lawyers throughout the state as to how to make these conferences work. **We will need volunteers. Please contact me.**

Congratulations to Joel Sachs on the Summer Meeting in Hershey, PA. Speaking of the subprime lending problem, we had a thorough program in Hershey on this issue.

I recently attended a meeting where a participant stated he knew who had a Blackberry and who did not because of the timing of responses to e-mails. Because the technology is there it will be used and there is no avoiding it. However, I want to register my feelings on the matter. Technology has advanced somewhat since I started practicing in '65. At that time I worked in Binghamton and the law

firm I worked at spent six months debating whether it would spend the money to purchase a second IBM electric typewriter. For God's sake, they made the dang things in Binghamton to begin with—talk about supporting the local economy. We had no faxes or e-mails or Fed Ex—in fact the copy machines were not too usable. If a client called and asked whether you got the letter, it was standard practice among lawyers, if the matter had not been addressed, to fudge and say no, it will probably be in tomorrow's mail, and the client had no response.

"To see someone using a Blackberry . . . [while sharing a meal] is to me simply wrong. . . . We have to get a grip on ourselves."

Then came faxes—then voice mail—for heaven sakes, they could leave messages for you 24 hours a day and expect you to respond by 7:30 the following morning. Then came e-mail and now there are Blackberries. Clients expect lawyers to be available 24-7. That is unacceptable. Frankly, anything more than 12-6 is stretching it. Certainly Blackberries have their place while wasting time in Court or on the train or plane, but 24-7? That is simply unacceptable.

I mention one social event in particular, and that is the sharing of a meal—we listen to each other, we talk to each other, we share stories, conversation, laughter, trials, and tribulations. We share conviviality and companionship. To see someone using a Blackberry at that time is to me simply wrong. I do not accept the idea that someone can multi-task in that situation—it is an affront to the people sharing the meal. We have to get a grip on ourselves.

I quote from *Lawyer, Know Thyself* by Susan Swaim Daicoff—American Physiological Association, 2004, at page 10:

> The lawyer depression experts in 1996 studied a wide array of physiological distress symptoms among lawyers. Their findings on depression were consistent with their previous studies: It was present in about 20% of lawyers. However, their findings in other areas were shocking. Not only did large numbers of lawyers report clinically significant depression, they also reported higher than normal levels of global psychological distress and specific symptoms such as anxiety, obsessive-compulsiveness, social alienation and isolation, insecurity, self-consciousness, paranoia, hostility, stress, anger, and marital dissatisfaction . . . 15% to more than 30% of lawyers scored more than two standard deviations above the mean on measures of obsessive compulsiveness, inner personal anxiety and discomfort, depression, general anxiety, and social alienation and isolation. Only about 2.27% of the general population would be expected to have such **severe** symptoms of distress. (Emphasis supplied).

"[I]t is our souls that are at stake and Blackberries are the Sirens."

We must understand how we are selling our very souls—and incredibly we are paying a terrible price in depression, alcoholism, trouble in marriages or unions, and alienated children. I know of one lawyer who recently proudly announced that the Blackberry was kept on the family dining room table during dinner.

I understand Richard Posner's reflection that the lawyers wish to maintain a guild so that they can control their product. His point is that mass production makes guilds obsolete and the modern day practice of law should accustom itself to being a mass-produced product. But as Mary Ann Glendon points out in *A Nation Under Lawyers*, page 91: "How can we claim to be learned in a broader a sense when long hours scarcely leave us time to read a novel or attend a concert? The traditional claim that we pursue our livelihood 'in the spirit of public service' often has a hollow ring." Again, it is our souls that are at stake and Blackberries are the Sirens.

Peter V. Coffey

Real Property Law Section Task Force on Attorney Escrow Supplemental Report

Introduction and Background

In November 2005, then President of the New York State Bar Association, A. Vincent Buzard, wrote a letter to Joshua Stein, then Chair of the Real Property Law Section (RPLS) asking the RPLS to determine what practical methods are available to prevent the theft of real property escrow funds by lawyers. Chair Stein appointed a Task Force on Attorney Escrow, chaired by Ira Goldenberg. The Task Force issued a Report on July 7, 2006. It was approved by the RPLS Executive Committee on July 13, 2006.

In its report, the Task Force concluded that there is nothing fundamentally wrong with attorneys acting as escrow agents, a time-honored and efficient process that works extremely well. To the extent that rare and isolated problems exist, the Task Force described possible ways to mitigate them, to be explored further—requiring dual signatures and requesting that escrow account statements be distributed to all interest parties, as well as freezing escrow accounts held by attorneys who are disbarred, suspended or otherwise no longer practicing law.

As noted in the report, the Task Force was asked to assume that the attorney escrow system be replaced. In that context, the Task Force considered and rejected a number of alternatives. In its view, the only acceptable alternative is for banks to act as escrow agents. A Bank Escrow Deposit Agreement (BEDA) was drafted and appended to the report.

The BEDA does not currently enjoy wide acceptance among lenders. In addition, the BEDA proposal encountered resistance from various groups, including the New York State Interest on Lawyer Account Fund (IOLA), Legal Aid societies, and NYSBA Committees such as the President's Committee on Access to Justice, and the Committee on Legal Aid. The objections to BEDA appear to be a concern with the potential impact on IOLA funding. The Task Force agrees that this concern would need to be addressed before BEDA could be considered a realistic alternative to attorney escrows. Consequently, the Executive Committee of the NYSBA asked the Task Force to explore alternatives other than BEDA that might improve the present escrow system. In response, the Task Force investigated further alternatives discussed in this supplemental report.

Recommended Improvements to the Current System

The Task Force considered three possible ways to strengthen the current system:

(1) asking banks to send monthly statements of the escrow account to both attorneys and both clients;

(2) requiring that disbursements from attorney escrow accounts require dual signatures; and

(3) promptly protecting escrow funds held by attorneys involved in the disciplinary process.

Dual Signatures—Rejected

The Task Force concluded that that it would be too impractical to implement dual signatures. Each contract deposit would require a new set of signature cards and Patriot Act-required disclosure forms to be signed by the parties required to authorize disbursements from each new subaccount. Although dual signatures might be feasible in firms of two or more attorneys, or if they are limited to transactions involving substantial sums, the parties in many residential-sale transactions are represented by sole practitioners. In those transactions, the attorney for the other party would have to be the second signatory. This was viewed as highly impractical. Finally, the Task Force concluded that most banks would resist a practice that would require them to review the checks drawn on the account to ensure compliance with the dual signature requirement.

Duplicate Statements—Recommended

In response to Task Force inquiries, we understand that banks are able to provide monthly statements, perhaps electronically, to both attorneys and their clients. Although any modest cost for duplicate statements charged by the banks might reduce slightly the funds going to IOLA, and some banks might be unable to set up the subaccounts required to accomplish this, the Task Force concluded that it should be promulgated as a Recommended Practice of the RPLS. The standard NYSBA contract of sale forms should be amended to include these procedures. Omissions or modifications could be negotiated on a case-by-case basis.

Protecting Escrow Funds Held by Attorneys Involved in the Disciplinary Process—Recommended

The Task Force also believes that the RPLS should support the efforts of the disciplinary bar to amend the DRs and AD rules to include in suspension-from-practice orders of restraint on suspended attorneys' accounts and provision for transfer of control of the accounts to a responsible attorney, as proposed by the Committees on Professional Discipline of the New York County Lawyers' Association and the NYSBA. This has the potential of reducing the theft of escrow funds by repeat offenders. It is most important that control of the escrow funds be such that they can be used as intended in a timely fashion.

Ira Goldenberg, Task Force Chair

Task Force Members:
Marvin Bagwell, James Blasé, John Blyth, Anne Reynolds Copps, Richard Fries, Eric Garcia, Karl Holtzschue, Melvyn Mitzner, Lucien Morin II, Mindy H. Stern, Samuel Tilton, Joseph Walsh and Howard Wieder.

Report Date: April 11, 2007

The Mutual Indemnification Agreement for Title Insurance in New York State

By Michael J. Berey

Resolving an exception to title that should have been disposed of when a prior title insurance policy on the same property was issued used to regularly be a tortured process, often undertaken in haste on the eve of closing, sometimes even while a closing was in progress. The prior title insurance company or agent, once it received a written request for proof of how an exception was disposed of and could attend to it, had to first locate its file in order to respond. If the prior company was an agent and the proof was either not found or was inadequate, a letter of indemnification would have to be requested of the agent's underwriter. This proved to be an extremely inefficient process for facilitating the timely closing of titles.

On July 22, 2003, seven title insurance companies in New York State, following the lead of title insurers in Alabama and Florida, signed a Mutual Indemnification Agreement for the purpose of streamlining the process of clearing back title matters. This Agreement was expanded effective April 1, 2005, with the execution of the First Amended and Restated Mutual Indemnification Agreement ("First Restated Agreement"), and it was further amended effective April 1, 2006 by the signing of the currently governing Second Amended and Restated Mutual Indemnification Agreement (the "Second Restated Agreement"). A Memorandum of Mutual Indemnification Agreement, as amended and restated, explaining the operation of the Second Restated Agreement, has been distributed generally to title company personnel and agents.

Sixteen title insurers licensed in the State of New York are, as of the preparation of this article, signatories to the Second Restated Agreement. They are Chicago Title Insurance Company, Commonwealth Land Title Insurance Company, Conestoga Title Insurance Company, Fidelity National Title Insurance Company, First American Title Insurance Company of New York, Lawyers Title Insurance Corporation, Northeast Investors Title Insurance Company, Old Republic National Title Insurance Company, The Security Title Guarantee Corporation of Baltimore, Stewart Title Insurance Company, Ticor Title Insurance Company, Ticor Title Insurance Company of Florida, Titledge Insurance Company of New York, Inc., United General Title Insurance Company, Washington Title Insurance Company, and Westcor Land Title Insurance Company. Transnation Title Insurance Company of New York, an original signatory, has merged into Commonwealth Land Title Insurance Company. Each company has a designee, such as this author for First American, to administer the Second Restated Agreement and respond to questions as to its application.

The procedure that a title company or agent must follow under the Agreement is not complicated. Generally, if an exception to title is a "Covered Risk," as defined in the Second Restated Agreement, the title insurer to be indemnified (the "Indemnitee") has a copy of either the title insurance policy issued by or on behalf of the prior title insurer (the "Indemnitor") or a copy of the Indemnitor's marked-up title report, and the Covered Risk is not listed as an exception to title in the Indemnitor's title policy or marked-up report, the Indemnitor is deemed to indemnify the new insurer without further action on the part of either company. If the Covered Risk was excepted but insurance was afforded against collection or enforcement, the Indemnitee is indemnified by the prior title insurer, provided that the new title insurer similarly excepts but insures against collection or enforcement.

For the relationship of Indemnitor and Indemnitee to apply when the new title insurer, directly or by an agent, is issuing an owner's policy, the Indemnitor must have issued either (i) an owner's policy insuring the current record owner (or its successor under either title policy or title insurance Rate Manual provisions for the continuation of coverage), (ii) a loan policy when its insured, now transferring an interest in the property, has acquired title by a foreclosure of the insured mortgage or by a deed-in-lieu, or (iii) a loan policy when the new proposed insured is acquiring title as the successful bidder in the foreclosure of the previously insured mortgage.

For a title insurer issuing a loan policy to be an Indemnitee, the Indemnitor must have issued (i) an owner's policy insuring the current record owner (or its successor with title policy or title insurance Rate Manual provisions for the continuation of coverage), or (ii) a loan policy when the Indemnitee is to be insuring the assignment, consolidation, extension, modification or the spread of the mortgage insured by the Indemnitor.

What is a "Covered Risk"? For a title policy issued by an Indemnitee after April 1, 2005, mortgages and money judgments (not including federal tax liens), and common charge liens filed by Condominium Boards of Managers, the liens of which have not expired by operation of law, against persons or entities out of title, each in an amount not exceeding $500,000, can each be a Covered Risk, provided that no execution has

been made or action commenced to foreclose or otherwise enforce the lien in question on the issue date of the Indemnitee's policy. For federal tax liens the limit is $250,000 (as was the case also for mortgages and money judgments against a person or entity out of title for policies issued prior to April 1, 2005) for each federal tax lien.

For a title policy issued by an Indemnitee on and after April 1, 2006, a mortgage in the original principal amount that does not exceed $750,000 is a Covered Risk, provided no action has been commenced to foreclose or to otherwise enforce the mortgage on the date the Indemnitee issues its policy.

The First Restated Agreement added as a Covered Risk, for both an owner's or loan policy of the new insurer issued on and after April 1, 2005, a mortgage in the original principal amount of $500,000 or less, open of record, made by the current record owner, not excepted in a loan policy issued by an Indemnitor, when the proceeds of the mortgage insured by the Indemnitor were used to pay off that prior mortgage. For an obligation of indemnification to exist for this Covered Risk, additional steps must be taken. The Indemnitee must obtain a copy of (i) the payoff letter for the mortgage, (ii) the certified, bank or attorney's escrow account check(s), issued for payment of the amount stated in the payoff letter as due, and (iii) the letter with which payment was sent to the holder of the mortgage or its representative as stated in the payoff letter. The mortgage amount for this Covered Risk was increased by the Second Restated Agreement to $750,000 for Indemnitee policies issued on and after April 1, 2006.

Among other Covered Risks are proof of the death of a prior owner, the payment of estate taxes by, and exceptions relating to, the devolution of title from, an estate when a conveyance for consideration to a bona fide purchaser has been recorded, other devolution of title issues arising prior to the date of the Indemnitor's policy, and errors in the property description contained in a deed or conveyance (other than a mortgage) that was executed prior to the deed insured under an Indemnitor's owner's policy, provided that the last insured deed contains the correct description.

Mechanic's liens, notices of pendency (and the related, underlying actions), real estate taxes and related tax liens, a federal tax lien in an amount greater than $250,000, and, when the Indemnitee's policy is issued on and after April 1, 2006, a mortgage in an amount greater than $750,000, are examples of matters that are identified in the Agreement as not being Covered Risks. For title issues that are not Covered Risks, proofs and formal letters of indemnification must still be obtained from the prior title agent and its insurer.

Notwithstanding the exclusion of certain matters from the scope of what are Covered Risks, the operation of the Mutual Indemnification Agreement has significantly limited the number of instances in which recourse must be made by a title insurer or agent to a prior company. As a result, the Agreement has simplified an important part of the title clearance process for closings in New York State.

Michael J. Berey is General Counsel/Senior Vice-President, First American Title Insurance Company of New York.

A prior version of this article was published as "New York State's Mutual Indemnification Agreement" in "The Bulletin," Spring 2006, of the New York State Land Title Association. This article is reprinted, as updated and revised, with the permission of the New York State Land Title Association.

Residential Landlord-Tenant Appeals in the Appellate Term

By Gerald Lebovits

I. Introduction

Attorneys who prosecute or defend residential landlord-tenant appeals encounter a thicket of rules along the way to affirmance, reversal, or modification. Some rules apply uniquely to appeals to the Appellate Terms for the First and Second Departments, which hear residential appeals from the New York City Civil Court, Housing Part (called Housing Court), in New York City; from the district and justice courts in Nassau and Suffolk counties; and from the city and justice courts in Dutchess, Orange, Putnam, Rockland, and Westchester counties. Different rules apply elsewhere in New York State, where appeals are heard not in the Appellate Term but in county court.

This article is designed to move practitioners through the Appellate Term thicket, from deciding whether to appeal, to exhausting appellate remedies, to winning a residential landlord-tenant appeal. This article focuses on appeals from the Housing Court, but similar and often identical rules apply to city and district court procedures.

II. From the Appellate Term to the Court of Appeals

After the practitioner obtains a Housing Court order or final judgment under Real Property Actions and Proceedings Law (RPAPL) Article 7, the first appeal is to the appropriate Appellate Term of the Supreme Court. That appeal is as of right.[1] The term "as of right" distinguishes an appeal the Constitution or a statute authorizes from one that must be undertaken by permission, or by leave to appeal—*certiorari* in the federal system. Appeals then go from the Appellate Term by leave (even if there is a dissenting opinion in the Appellate Term) to the Appellate Division, and from there by leave (even if there are dissenting opinions in the Appellate Division) to the Court of Appeals, and by *certiorari* to the U. S. Supreme Court. For appeals from the Appellate Term to the Appellate Division and, later, to the Court of Appeals and the U.S. Supreme Court, "[t]here generally are no restrictions on the types of orders and judgments (whether interlocutory, final, etc.) for which permission to appeal may be sought."[2]

Each department of the Appellate Division may create an Appellate Term.[3] Only the Appellate Division's First and Second Departments have done so. Outside the First and Second Departments—meaning the Third and Fourth departments—residential appeals go from city and justice courts (where they are heard in first instance) to county court (not Supreme Court)[4] and, from there, by right to the Appellate Division,[5] by leave to the Court of Appeals, and then by *certiorari* to the U. S. Supreme Court.

The Appellate Term for the First Department covers New York and Bronx Counties. Housing Court judgments and orders from Manhattan and the Bronx go to the Appellate Term, First Department, located at 60 Centre Street, 4th Floor, New York, New York 10007.[6] The clerk's office's telephone number is (646) 386-7763.

The Second Department has two appellate terms, one for the Second and Eleventh Judicial Districts, which cover Kings, Richmond (Second Judicial District), and Queens (Eleventh Judicial District) Counties, and the other for the Ninth and Tenth Judicial districts, which cover Dutchess, Nassau, Putnam, Rockland, Suffolk (Tenth Judicial District), Orange, and Westchester (Ninth Judicial District) Counties. Housing Court judgments and orders from Brooklyn, Queens, and Staten Island are agued in the Appellate Term, Second Department, Second and Eleventh Judicial Districts, located at 141 Livingston Street, Brooklyn, New York 11201, and at 88-11 Sutphin Boulevard, Queens, New York 11435.[7] Once a year, the justices of the Appellate Term, Second Department, Second and Eleventh Judicial districts, preside in Staten Island at the Richmond County Clerk's Office, Juror Assembly Center, 126 Stuyvesant Place, Staten Island, New York 10301.[8] The central clerk's office for both Appellate Terms in the Second Department is located at 141 Livingston Street, 15th Floor, in Brooklyn. The telephone number is (347) 401-9580.

Every Appellate Term justice is an elected Supreme Court justice chosen by the Chief Administrator of the Courts with the approval of the presiding justice of the respective Department of the Appellate Division.[9] Appellate Term justices are part-time appellate judges who also handle a Supreme Court caseload. A maximum of three justices serve on each panel. Two justices constitute a quorum to render a final order and opinion. Both must concur to render any final order and opinion.[10]

To appeal an Appellate Term order, an appellant must seek and obtain permission from the Appellate Term and, if the Appellate Term denies that application, then from the Appellate Division.[11] The Appellate Division will hear only Appellate Term orders that decide an appeal. To appeal from an order granting a new trial or hearing, the appellant must stipulate that judgment absolute will be entered if the Appellate Division affirms the Appellate Term's judgment.[12]

Motions to reargue Appellate Term orders must be made within 30 days after the court made the order, except for good cause shown.[13] These motions are rarely granted. Leave to appeal to the Appellate Division must be sought within 30 days after service of the Appellate Term order with notice of entry.[14] Appeals to the Appellate Division are governed by CPLR Art 57.

Appeals to the Court of Appeals can be as of right or by permission. If the decision below involves only the constitutionality of a statutory provision under the New York or the U. S. Constitution, an appeal may be taken as of right directly from the court that issued the decision.[15] A case that originates in the Supreme Court goes to the Court of Appeals as of right if two Appellate Division justices dissent on a matter of law.[16] Appeals that originate from Civil Court judgments go to the Court of Appeals by leave regardless whether or how many Appellate Division Justices dissent. Unless an appeal is of right, permission—in the form of a leave application—is required to appeal from the Appellate Division to the Court of Appeals.[17] Leave to the Court is granted in either of two ways. Two judges of the Court of Appeals must grant leave before the Court may hear a civil proceeding.[18] Or two Appellate Division justices may grant leave to the Court.[19] CPLR Art 56 governs appeals to the Court of Appeals.

III. Appealable Judgments, Orders and Paper

When a Housing Court judge renders an adverse decision, the practitioner's first step, after consoling the client, is to decide whether the decision constitutes an appealable order or judgment.[20] If not, the practitioner must first exhaust civil court remedies by making the appropriate motion in the Housing Court. That way the practitioner will seek the relief the client needs and create an appealable order.

It is often necessary to file a notice of appeal concurrently with a Housing Court motion to preserve appellate remedies. On the other hand, if the order is appealable directly, a notice of appeal must first be filed if there is any possibility that the client will appeal or if, having failed to console the client, the client will no longer be using the practitioner's services.

It is for the client, not the lawyer, to decide whether to appeal.[21] But spending the $30 fee to file the notice of appeal will bring peace of mind to both practitioner and client. Advising a client in writing of appellate options is good practice.

A. CPLR 5501: The Court's Jurisdiction

A final judgment is always appealable.[22] When a final judgment is appealed, any non-final judgment or order that affects the final judgment may be reviewed during the appeal.[23] The Appellate Term reviews both law and fact[24] and the Housing Court's exercises of discretion.[25] The Appellate Division reviews Appellate Term decisions on the law and facts, while the Court of Appeals reviews only questions of law, unless the Appellate Division has found new facts.[26]

B. CPLR 5501: Interlocutory Appeals

Before a final judgment is rendered, an appellant may appeal as of right non-final judgments or orders, called interlocutory orders.[27] Non-final orders that affect a final judgment include orders adverse to the prevailing party below, orders denying a new trial or hearing, rulings to which an appellant objected or had no opportunity to object, and a judge's remark to which the appellant objected.[28] Only an interlocutory order that "necessarily affects the final judgment" may be appealed.[29]

To determine whether an intermediate order or interlocutory judgment "necessarily affects the final judgment," the practitioner should ask whether, assuming the interlocutory judgment is erroneous, its reversal would overturn the final judgment. If it would, "it is a reviewable item; if it would not, and the judgment can stand despite it, it is not reviewable."[30]

Although interlocutory Housing Court orders may be appealed immediately, a direct appeal from an interlocutory order terminates when a final judgment is entered.[31]

After a final judgment is entered, an appeal must be taken from it, although a non-final order that affects the final judgment can be reviewed at that time.[32] The right to appeal a pretrial order ends if no appeal is taken within 30 days after a final judgment is entered.[33]

Because the Housing Court handles summary proceedings with relative speed, it is unlikely that the Appellate Term will decide an interlocutory appeal before the Housing Court renders a final judgment. As a result, many appeals from interlocutory orders are accompanied by a request to stay the summary proceeding pending the appeal.[34] But there is no right to a stay while an appeal is pending. Absent special circumstances, the Housing Court and the Appellate Term are reluctant to grant a stay pending an appeal of an interlocutory, prejudgment order in a summary proceeding, even to avoid unnecessary trial time and expense. By the time the Appellate Term considers an interlocutory order, the Housing Court will likely render a final judgment if the case is not stayed and if the order is not merged into the judgment. That alone makes it inefficacious to commence most interlocutory appeals from orders entered during summary proceedings.

The right to perfect an appeal from an interlocutory order is typically exercised at the end of the summary proceeding. This strategy is sound because an appeal from a final judgment brings up for review all prior orders and decisions.[35] If the practitioner appeals an interlocutory

order and a final Housing Court judgment is rendered while the appeal is pending, the Appellate Term has the discretion under CPLR 5520(c) to treat the notice of appeal from the non-final order as a notice of appeal from the judgment.[36] The Appellate Term will dismiss the interlocutory order because the right of direct appeal terminates with the entry of the final judgment.[37]

IV. Nonappealable Orders and Paper

Only an aggrieved party may appeal from the court of original jurisdiction.[38] To be aggrieved, a party must have a direct interest in the controversy and be bound by the lower court's adjudication.[39] If the appellant's interest in the subject matter of controversy ceased *pendente lite*, the appeal will be dismissed because the party is no longer aggrieved under CPLR 5511.[40] A partly successful party is "aggrieved" and may appeal to obtain all the relief to which the party is entitled.[41] Conversely, a judgment or order embodying a decision that "may contain language or reasoning which those parties deem adverse to their interests does not furnish them with a basis for standing to take an appeal"[42] if the prevailing party obtains the relief it sought in first instance.

Similarly, only an order or judgment is appealable.[43] No appeal lies from a conclusion of law, finding of fact, order denying a motion to resettle, pre-trial motion *in limine* on an evidentiary point (which is merely an advisory opinion if it does not affect a substantial right), recommendation, report, ruling (even if reduced to a written order), or verdict.[44] The appeal is taken from the order or judgment that contains a conclusion of law, finding of fact, order denying a motion to resettle, pre-trial motion *in limine*, recommendation, report, ruling, or verdict.

Many Housing Court outcomes are not appealable. Not merely the appellant and the respondent but also judge of first instance must know what is appealable. A respondent faced with an appeal over something not appealable can either move to dismiss the appeal after the appellant files a notice of appeal or wait to raise the point in the respondent's brief.

The following list illustrates Housing Court outcomes that may not be appealed without further motion practice or which require a motion for leave to appeal.

Stipulations. Stipulations of settlement or consent judgments are not appealable.[45] Litigants often stipulate to judgments in the Housing Court. Stipulations are strictly enforced.[46] A stipulation negotiated by represented litigants and so-ordered by a judge in open court is difficult to vacate unless a party committed fraud, illegality, or overreaching, or unless the stipulation is unconscionable or violates public policy.[47] Only the resulting order denying or granting the motion to vacate the stipulation of settlement is appealable.

Orders on Default. An order or judgment entered on default is not appealable,[48] whether in a nonpayment, a holdover, a lockout, or a Housing Part (repair) proceeding. A respondent-tenant's failure to appear at a holdover trial will result in an inquest—which, if the inquest is sustained, will result in an unappealable judgment entered upon default.[49] An unappealable default judgment without an inquest will ensue in a nonpayment proceeding on the respondent-tenant's failure to answer the petition or, having answered the petition, to appear at trial. As to a petitioner who does not appear on a court date, the court will issue an unappealable order of dismissal. If an appellant fails to file opposition papers to a motion requesting final judgment, the appellant is deemed in default, even if the appellant argued orally against the motion.[50] In this case, the appellant is considered a non-aggrieved party.

The party against whom a default is entered must move in the Housing Court under CPLR 5015 to set aside the default. If service was improper, the default will be vacated because the court would have lacked jurisdiction to enter the default. Otherwise, the movant must set forth a valid excuse for the default and a meritorious cause of action or defense to the proceeding.[51] The resulting order may be appealed.

For example, an order awarding attorney fees at an inquest on a failure to appear does not give the losing party a right to appeal.[52] The remedy is to move to vacate the default in Civil Court and, in case of a denial, to appeal the decision on that motion.[53]

Tenant-respondents typically use orders to show cause to set aside defaults. Doing so can afford them an interim stay, if the signing judge agrees, that prevents an eviction before the tenant's motion is heard and resolved. If obtaining a stay is not at issue, a practitioner for a landlord or a tenant who seeks to vacate a default may move by regular motion to vacate the default order or judgment.[54] The resulting order, from an order to show cause or a motion, is appealable directly or on appeal from a final judgment.[55]

Conditional Defaults. If a litigant fails to answer timely or to respond to an order compelling disclosure, called discovery in the federal system, the Housing Court may order the litigant defaulted but vacate the default on condition that the defaulting litigant pay costs. An attorney might be tempted to deposit the check immediately, but doing so waives the right to appeal the order granting a conditional default.[56]

Reargument. An order denying reargument is not appealable.[57] Litigants may, however, appeal orders that deny reargument but which expand on the court's original reasoning. In addition, litigants may appeal an order entered after a judge agrees to hear reargument but then denies the motion and adheres to its original determination. If the order determining reargument is appealed, or if the judge grants a motion to renew, CPLR

5517 triggers extended time limits to appeal.[58]

Before bringing a motion for reargument, the practitioner should file a notice to appeal the underlying judgment or order. If reargument is granted, that order is appealable, even if the Housing Court adheres to its decision in the prior order and even if no appeal is taken from the prior order.[59]

Renewal. An appeal as of right lies from the grant or denial of a motion to renew.[60] An order denying a motion without prejudice to renew is also appealable as of right.[61] The reason an order resolving a renewal motion is appealable but an order denying reargument is not appealable is that a motion to renew puts new material before the court and a motion to reargue does not.

***Ex Parte* Orders**. An *ex parte* order is not appealable.[62] Similarly, a denial of an *ex parte* order is not appealable directly, although it is reviewable under CPLR 5704(b).[63] Thus, no appealable issue arises if a judge denies an *ex parte* subpoena in a nonprimary-residence holdover proceeding. If the judge rules against a litigant at the end of the case, the final judgment may be appealed on the ground that an earlier ruling, such as the court's failure to sign a subpoena, affected the judgment.[64] Counsel should make a record about the court's decision not to sign a subpoena. Otherwise, the error will not be preserved.

Orders to Show Cause. The court's refusal to sign an order to show cause that contains a stay is not appealable.[65] If a Housing Court judge declines to sign an order to show cause, which is submitted *ex parte* (although the court may hear argument from both sides before it signs or declines it), the practitioner may seek a stay from Appellate Term under the *ex parte* procedures in CPLR 5704(b). If the court signs an order to show cause with a stay, the opposing party, *ex parte*, may in the First Department either seek to vacate the stay or use the *ex parte* procedures of CPLR 5704(b) to vacate the order. In the Second Department, a practitioner who seeks to vacate a stay must ask the signing judge to vacate the stay under CPLR 2221(a)(2) before requesting CPLR 5704(b) relief. Once the court determines the order to show cause, which typically contains a stay but need not contain a stay, the order the court issues is appealable.

***Sua Sponte* Orders.** No appeal lies from a *sua sponte* order. The remedy is to move in the Housing Court to vacate the order and then appeal if the motion is denied.[66]

Hearings. A motion may result in an order that a hearing be held to resolve a contested issue of fact. No right exists to appeal as of right from an order that directs a hearing.[67] A mere order that directs a hearing does not affect a substantial right. The party dissatisfied with the order directing a hearing might prevail at the hearing and therefore is not yet aggrieved.

Moot Issues. An appeal will be dismissed if the issue on which the appeal is based becomes academic.[68] Here are some examples of cases in which appeals are rendered moot: A subsequent order dismissing the case on Statute of Limitations grounds;[69] the execution of a warrant of eviction while the appeal is pending if the appeal concerns a motion regarding that warrant;[70] the appellant's consent in a subsequent order to the relief appealed from a previous order;[71] and the expiration of the stay of an eviction warrant's issuance while the appeal is pending if the appeal concerns whether the warrant could properly issue before its expiration date.[72] Additionally, an appealed order will be rendered academic if the parties enter into a stipulation in a subsequent holdover summary proceeding involving the same premises.[73]

The Court of Appeals has formulated a mootness-doctrine exception that arises if the appellant can show three things about the issue under potential appellate review: "(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues."[74]

Death of a Party. The death of a party divests an appellate court of jurisdiction. The court must stay the proceedings until a substitution is done under CPLR 1015(a).[75] The court may hold the appeal in abeyance pending the substitution.[76]

Decisions. A trial court's decision is not appealable unless it is reduced to an order or a judgment.[77] To be appealed, the order must also constitute a final determination of an issue.[78] An order that does not accurately incorporate a decision may not be appealed directly.[79] An order that does not reflect the decision should be resettled.

Housing Court judges typically issue one-paper opinions that combine the decision and order and which merge the decision into the order as an appealable document. The decision and order will often call for the issuance of a judgment. The judgment becomes the appealable paper.

Sometimes a judge will decide a case orally from the bench and issue an order written as an abbreviation on the front page of the court file or somewhere else on some court papers. If so, the practitioner will need to transcribe the tape, the digital recording, or the court reporter's minutes to appeal the order successfully. Orders and oral rulings, even when transcribed, are not appealable unless the judge signs the transcript and the order is entered.[80] A clerk's extract of trial minutes may not serve as an appealable order.[81]

If a judge delivers an order from the bench but does not reduce it to writing, the practitioner must prepare an order for the judge's signature or ask the court to reduce an order to

writing.[82] The Appellate Term accepts a file notation if the Housing Court judge signs and dates it.

Practitioners who wonder whether their order is appealable should attach the Housing judge's memorandum writing to their notice of appeal and then obtain a written order. This situation will occur only if the court dismisses the proceeding. Any other outcome will involve a judgment the clerk writes and the judge signs. That judgment is an appealable paper. Signing a judgment is a ministerial act that can, if necessary, be compelled by a CPLR Article 78 petition.[83]

Inspections. Housing Court judges often exercise their discretion to inspect the location at issue, to assign a resource assistant (a Civil Court clerk) to inspect the premises, or to ask an inspector from the New York City Department of Housing Preservation and Development or other city agency to inspect to determine whether there are violations of the Housing Maintenance Code or other city code affecting the premises or the health and safety of the occupants and guests. A decision and order concerning inspection of the subject premises is not appealable.[84]

Supreme Court Orders and Judgments. The Appellate Term is a part of the Supreme Court. It may not review or overrule another Supreme Court order or judgment.[85] A Supreme Court order or judgment must be appealed to the Appellate Division.

Motion on Notice. No right to appeal lies for an order that does not decide a motion made on notice, but the Appellate Term may exercise its discretion to treat the notice of appeal as an application for leave to appeal.[86]

Accepting Benefits. An appellant who accepts the benefits of the order he or she wishes to appeal waives its right to appeal the order.[87]

V. Standards of Appellate Review

A. Appealing Findings of Fact and Credibility Determinations

An appeal may be predicated on Housing Court's findings of fact, including credibility determinations. But these appeals are rarely successful. Appellate courts are loath to substitute their own findings on a cold record. Deferring to the Housing Court's findings of fact strengthens the power of that court, which sees and hears witnesses, and limits appellate review.[88]

Courts of intermediate appellate jurisdiction, such as the Appellate Term and the Appellate Division, will not ordinarily vacate findings of fact unless the record clearly does not support them.[89] A trial court's credibility determinations are entitled to "the greatest respect"[90] and will not be disturbed if they are reached by "any fair interpretation of the evidence."[91]

The Appellate Term's review of facts is necessarily based on the Housing Court's making findings of fact. If the Housing Court does not do so, the "finding must be predicated on a determination of credibility, then the matter [will be] remanded for a new trial"[92] or other proceedings because appellate courts do not decide credibility issues in first instance.

In the end, however, the scope of review of a court of intermediate appellate jurisdiction over a nonjury-trial determination is as broad as that of the trial judge. It allows the appellate court to substitute its judgment if the evidence fails to support the trial court's findings.[93]

B. Appealing Discretionary Determinations

Courts of intermediate appellate jurisdiction, such as the Appellate Term or the Appellate Division, are vested with broad equity powers to "review a determination for abuse of discretion or substitute its own discretion."[94] The practitioner must always consider whether the ruling appealed from was initially subject to Housing Court's discretion. If it was, the Appellate Term may reverse by invoking its own discretion in the court's interest-of-justice prerogative or by finding that the Housing Court judge committed an abuse of discretion.[95]

The Appellate Term's authority is as broad as the trial court's.[96] In this sense, "the appellate court shall have full power to review any exercise of discretion by the court or judge below."[97] Some Housing Court issues, though, such as whether the court should have permitted an adjournment to allow a party to obtain counsel, lend themselves to reversal only if the Appellate Term finds not merely an abuse of discretion but a clear abuse of discretion.[98]

C. Appealing Unpreserved Issues

Countless cases hold that an appellate court may not consider for the first time on appeal legal issues unpreserved below.[99] The justification is that defects and errors should be pointed out to the court below to give the court an opportunity to correct them. But courts of intermediate appellate jurisdiction, like the Appellate Term, may exercise their interest-of-justice prerogative to consider legal issues not raised below. To do so, the Appellate Term will require the advocate to advance a strong reason.

To allow the court to reach a just and proper determination, moreover, an issue need not be preserved below "if the question presented is one of law which appeared on the face of the record and which could not have been avoided by the respondents if brought to their attention at the proper juncture."[100] In that sense, the Appellate Term may chart a course different from the litigants' course by deciding a case on grounds never raised below or even on appeal.[101]

VI. Notice of Appeal

A. The Notice of Appeal for Appeals "As of Right"

Appellate courts can forgive, for good cause shown, any technical mistake in perfecting an appeal except either a failure to serve or file a notice of appeal or a request for leave to appeal.[102]

If appellant incorrectly pursues an appeal as of right, the Appellate Term may deem the notice of appeal as a motion for leave to appeal and grant leave in the interest of judicial economy.[103]

If a litigant appeals a judgment or order "as of right," the practitioner must file a notice of appeal within 30 days after the prevailing party serves the adversely decided order or judgment, with notice of entry under CPLR 2220(a).[104] If the order with notice of entry is served by mail, the appellant has an extra five days to serve and file the notice of appeal.[105] The same five-day extension for service by mail is granted if the side that lost below serves the notice of entry.[106]

The time requirement to serve a notice of appeal may not be waived, enlarged, or extended, even on consent by a so-ordered stipulation.[107] If the notice of entry is irregular, not served on all the parties, or served improperly, the time to appeal will not start to run with the defective entry or service.[108] Rather, if notice of entry is not effected or served, or effected or served irregularly, the time to appeal will extend indefinitely, barred only by laches.[109]

The 30-day time limit to serve and file a notice of appeal has a few limited exceptions, such where there exists a substitution of parties;[110] wrong method of appeal, such as serving a notice of appeal when a request for leave should have been made;[111] death, suspension, removal, or disability of the appellant's attorney;[112] either late service or late filing of the notice of appeal, but not both;[113] and an automatic stay under the Bankruptcy Code.[114] A practitioner faced with an oral decision can start the time running by serving a shortform cover sheet with notice of entry.[115] To start the time, the winning party need only copy the cover page, enter the judgment, and serve the notice of appeal. If the case was tried, the judgment, not the order, is the appealable paper. Beware a judge's handwritten changes, which, if they are absent from the order served, will prevent the time from beginning to run.[116] It is best to photocopy the order with the handwritten changes.

The Appellate Term has some powers granted to it whether or not a party files a notice of appeal. For example, the court may search the record and grant summary judgment to a non-appealing party—the party that does not file a notice of appeal from the denial of the motion.[117]

B. Where and Whom to Serve the Notice of Appeal

The notice of appeal must be served on the adverse party and filed personally or by mail with proof of service in the Housing Court Clerk's Office in which the order or judgment was issued.[118] Attach to the notice of appeal a copy of the order or judgment appealed from. The $30 filing fee, payable to the Civil Court Clerk's Office, is waived if permission to proceed as a poor person is granted under CPLR Article 11. Obtaining poor-person relief is helpful for pro bono practitioners in the First Department because doing so allows a simplified appeal on the original record, using hand-written briefs, rather than on the full record or by appendix. (All appeals in the Appellate Term, Second Department, are on the original record.[119]) If there are multiple parties, a notice of appeal must be served on all of them. A practitioner who is unsure whether the decision is adverse to a particular party should serve everyone and let them decide whether the appeal affects them.

Service on a party not represented by counsel may be effected personally; otherwise, serve the attorney of record.[120] If served on an attorney, the notice may be served by ordinary mail, although some attorneys prefer to use registered, certified, overnight, or priority mail. The appeal is formally taken when the addressed and stamped envelope carrying the notice is dropped into a mailbox.[121]

In the Appellate Division, First Department, the appellant must serve and file a preargument statement with the notice of appeal.[122] In the Appellate Division, Second Department, the appellant must serve and file a Request for Appellate Division Intervention (RDAI).[123] Housing Court appeals to the Appellate Term have no such requirements.

C. Drafting Tips for the Notice of Appeal

A notice of appeal must contain a caption of the proceeding, the name of the appealing party, the judgment or order being appealed, and the court to which the appeal is taken.[124]

Be careful not to waive appellate issues. If only part of an order is appealed from, an appeal from the balance of the order is foreclosed once the 30-day period elapses.[125] Picking and choosing issues or framing the notice of appeal too narrowly can cause problems later.[126] The appeal should therefore be from "each and every part" of the order or judgment.[127]

A litigant may appeal not only the judgment or order but also the amount of a judgment. For example, if the appeal concerns an award of attorney fees, the practitioner should also appeal the amount of the award. The appellant's first argument is that fees should not have been awarded. The second argument, made in the alternative, is that even if fees were properly awarded, the amount awarded was too high. The issue will be waived if the amount awarded is not challenged timely.[128]

If a later order may affect the appeal, it is necessary to appeal all later orders. However, CPLR 5517(b) permits the Appellate Term to review

any subsequent order not appealed from if the first order is appealable as of right.[129] A single record will serve for all the appeals taken. All that is required is that the practitioner serve and file an additional notice of appeal from each of the later orders, include the orders in the record with their underlying papers, and add further argument to the brief.

VII. Stays Pending Appeal

It is often necessary for practitioners to obtain a stay while a post-judgment appeal is pending. Stays are frequently sought when a judgment is entered against a tenant-respondent. Judgments against tenants may encompass eviction from their residence. For example, a tenant who loses a nonprimary-residence proceeding will be evicted unless a stay is obtained while the appeal is pending. Similarly, if a judgment is entered against a tenant-respondent in a nonpayment proceeding, the tenant's failure to tender the entire amount to the prevailing landlord before the warrant of eviction issues will result in immediate eviction unless a stay is obtained. The Appellate Term is often receptive to granting a stay in a residential proceeding to avoid an immediate eviction if the status quo can be maintained, "lest the one appeal 'as of right' be frustrated."[130] Losing landlord-petitioners also often seek stays. This may happen if a tenant is awarded a large abatement, treble damages, counterclaim, or legal fees, or if the Housing Court directs the landlord to make repairs.

A stay may be sought at any point during an appeal after a notice of appeal is served and filed. Stays pending interlocutory appeals of pre-trial motions are rarely granted. The Appellate Term will review a Housing Court's decision on the motion after final judgment.

In a close case, an appellant who needs a stay should first speak to the respondent. If the respondent agrees not to enforce the order or judgment, no court order for a stay is necessary.

A. Discretionary Stays

There are two types of stays: automatic and discretionary. Litigants mostly seek discretionary stays, found by combining CPLR 2201 with Civil Court Act § 212 and in CPLR 5519(c), the latter of which applies if the automatic-stay provisions of CPLR 5519(a)(2)-(6) do not apply.[131] CPLR 5519(c) lets the Appellate Term modify or vacate a stay motion without the need to appeal a Housing Court stay. The party seeking the stay may move either in the Housing Court under CPLR 5519(c) or in the Appellate Term by affidavit of the party, affirmation of the party's attorney, or both. Where to seek the stay is a matter of strategy. Because the appellant obtained an unfavorable decision from a Housing Court judge, the application for a stay is usually made to the Appellate Term.

The notice of appeal must be served and filed before a stay is sought in the Appellate Term or Civil Court. The motion should include a copy of the judgment or order being appealed, the notice of appeal, and any related orders or decisions. The practitioner should also attach any exhibit that demonstrates why the stay is needed. A brief procedural history and a statement of the merits of the appeal should appear in the affirmation or affidavit or, better, in an attached memorandum of law that is both succinct and concise. The motion should further state when the movant will perfect the appeal and why a stay of enforcement will not irreparably harm the respondent. A competent tenant's counsel in a hold-over proceeding will offer to pay all back and current use and occupancy or explain why the tenant cannot or should not do so.

The Appellate Term often conditions granting a discretionary stay on the respondent's perfecting the appeal by the next term or, in the Second Department, by a specific date. The court will also set an undertaking, usually paying or posting the judgment and monthly sums for accruing rent or use and occupancy, to maintain the status quo. If a tenant-appellant fails to comply with the Appellate Term's conditions of the discretionary stay, then the landlord-respondent may move to vacate the stay and dismiss the appeal.[132] The Appellate Term's order granting the stay will set the conditions to how a stay may be vacated. A practitioner who represents tenant-appellants should advise them to abide by the terms of the discretionary stay. One consequence of failing to adhere to the Appellate Term's conditions is dismissal of the appeal before its merits are determined. Another is an eviction that follows quickly on the heels of the dismissal or the vacatur of the stay.

Practitioners should also carefully examine the term dates; a stay granted shortly before the end of a term may require perfecting an appeal more expeditiously than a stay granted shortly after the beginning of a term.[133]

As Metz and Gruber explain, "[t]he goal of virtually all pre-appeals motions . . . is to obtain an *interim* stay pending disposition of the motion."[134] It is possible to move at the Appellate Term, Second Department, for a stay by order to show cause if interim relief is sought. An interim stay is often called a temporary restraining order, or TRO.

In the Second Department, the practitioner should submit the order to the clerk's office at 141 Livingston Street in Brooklyn. The clerk will give a justice the order for possible signature. Motion papers on notice are required if interim relief is not requested.[135]

In the First Department, an interim stay is obtained from one justice *ex parte*, although the entire panel may hear a stay pending appeal.[136] Applications are processed within 36 hours, and usually the same day. Practitioners should not use an order to show cause. Rather, they should use a short-service notice of motion to ob-

tain an interim stay or a short return date. The papers should include the notice of motion, a supporting affirmation or affidavit, exhibits, a notice of appeal with the filing-fee receipt, and the order or judgment appealed from. Include a blank sheet of paper between the notice of motion and the supporting papers. The Appellate Term will stamp on the blank sheet the return date, thus assigning the return date, and a short stay pending decision. If an interim stay is granted, the adversary must be served.[137]

The adversary may serve responsive (opposition) papers by ordinary mail up to the return date of the motion. There is no right to reply, although replies are considered if they are filed by the return date. As with all motions in the Appellate Term, there is no oral argument. All motions are submitted; no appearance on the return date is contemplated.[138] As with all motions, lack of service is waived if the nonmovant responds on the merits, not merely on jurisdictional grounds.[139]

Practitioners who represent tenant-appellants should know that the entire money judgment amount awarded below likely will be the amount the Appellate Term will require to be deposited with the Civil Court as an undertaking, payable directly to the landlord or to the Department of Finance by bond, money order, or certified check.

B. Automatic Stays

RPAPL 751(1). Subsection 751(1) contains an automatic-stay provision. A tenant sued for not paying rent can obtain a stay by depositing with the Housing Court the amount of rent due after a judgment is issued but before the warrant of eviction issues. This provision is rarely invoked, though it is effective. Appellate practitioners should be aware that RPAPL 751(1) is a Housing Court remedy, not an appellate remedy. A tenant's counsel who wishes to take advantage of RPAPL 751(1) should request that a warrant not issue forthwith on a judgment, but rather on final judgment that both the warrant and its execution be stayed for five days.

CPLR 5519(a)(1). Other than the automatic stay in RPAPL 751(1), the CPLR's automatic-stay provisions are not always useful. Three subdivisions of CPLR 5519 might apply when appealing a summary proceeding. The first is CPLR 5519(a)(1), which provides an automatic stay for a governmental authority. This stay will usually occur only if the City of New York or the New York City Housing Authority (NYCHA) loses below, most often when the City or NYCHA loses a Housing Part (HP) proceeding and is ordered to make repairs.

CPLR 5519(a)(2). The second automatic stay provision is found in CPLR 5519(a)(2), which requires a deposit of an undertaking with the court from which an appeal is taken.[140] CPLR 5519(a)(2) deals only with a judgment or order that "directs the payment of a sum of money," and landlord-tenant proceedings primarily concern possessory issues, which must exist for the Housing Court to have jurisdiction. Assuming that CPLR 5519(a)(2) applies to Housing Court cases, and it might not, this subdivision enables a litigant to obtain an appeal bond from an insurance company or to deposit the judgment in court under CPLR Article 26.

CPLR 5519(a)(6). The last automatic-stay provision deals with "possession or control of real property which the judgment or order directs be conveyed or delivered."[141] The authorities disagree over whether this subdivision applies to Housing Court proceedings. One leading authority suggests that this subdivision refers to selling real property, not possessing real property.[142] In addition, many Civil Court and Housing Part judges believe that this subdivision does not apply to residential landlord-tenant cases, especially holdover proceedings.

Still, many decisions have held that the automatic stay applies to appeals from summary proceedings.[143] Moreover, at least one author has opined that CPLR 5519(a)(6) provides that "an appellant is entitled to a stay as of right."[144]

If an automatic stay is granted, the appellant will be required to deposit with the court from which the appeal is taken an undertaking to prevent or compensate for waste.[145] It is unclear whether that undertaking must be fixed by noticed motion, by *ex parte* order, or by neither. CPLR 5519(a) concerns stays without court order, unlike the discretionary stays in CPLR 5519(c), which necessarily invite opposition. But a court that grants an automatic stay will likely refrain from fixing an undertaking ex *parte.* Thus, it is recommended that a CPLR 5519(a)(6) application be made by order to show cause. Whether or not a CPLR 5519(a)(6) stay is automatic or discretionary, "the amount of the undertaking is, and the opposing party should be given the opportunity to challenge the amount."[146]

There are two significant advantages to making a CPLR 5519(a)(6) motion. The first is that if it succeeds, the tenant-appellant ordered evicted under RPAPL 711(1), 713, or 715 is not automatically required to deposit the entire amount of the judgment as an undertaking. This could aid holdover tenant-appellants, who might pay only the rent specified in the lease and not the fair-market use and occupancy. However, the Appellate Term will often remand for the Housing Court to set the amount of use and occupancy to be paid *pendente lite*, or will issue an orders without prejudice to remand, especially when landlords move to modify the conditions for use and occupancy because the lease rent is lower than market rent. The second advantage is that if an automatic stay succeeds in a holdover proceeding, a tenant can remain in possession for a long time pending appeal, even when the likelihood of prevailing on appeal is slim. The disadvantage is that there is no guarantee that this motion will succeed.

Vacating an Automatic Stay. Only the court that hears the appeal

may vacate an automatic stay granted under CPLR 5519(a).[147] To vacate an automatic stay, the respondent must show that the appeal is without merit or was brought in bad faith or solely to delay, that the stay will cause an undue burden or hardship, or that the appellant failed to comply with the court's order requiring an undertaking.[148]

If the Appellate Term affirms the judgment below or dismisses the appeal, the stay, whether discretionary or automatic, continues for five days after the notice of entry is served and filed in the Appellate Term.[149] Another five days are added if the notice of entry is served by regular mail under CPLR 2103(b). Pursuant to CPLR 5519(e), a stay will expire absent a motion for leave to appeal to the Appellate Division made five days after service of the notice of entry and filing. Practitioners who plan to seek leave to appeal from the Appellate Division if they lose in the Appellate Term should regularly call the Appellate Term clerk's office with the term when oral argument took place to determine whether the Appellate Term has rendered a decision. Doing so rather than waiting for a decision published in the New York Law Journal or online on the Law Reporting Bureau's Web site,[150] or by receiving service from opposing counsel will add more time to prepare a leave application and possibly to continue the stay.[151] The stay expires once the Appellate Division renders a decision affirming or modifying. A debate has arisen over whether a notice of entry need be served or filed.[152]

C. Stays and *Ex Parte* Orders under CPLR 5704(b)

The Appellate Term, which has the same power as the courts from which it hears appeals, may review *ex parte* the Housing Court's *ex parte* orders. The result can be twofold: either an *ex parte* order granted below will be vacated or modified or an *ex parte* order denied below will be granted. The *ex parte* order the Housing Court typically considers is an order to show cause. *Pro se* forms in the landlord-tenant clerk's office are routinely given to tenants who seek judgment relief. A tenant in a nonpayment proceeding may be paying out a judgment over time according to a stipulation that allows an eviction to occur on the tenant's failure to pay. If the tenant returns to the Housing Court to request extra time to pay and shows that money is forthcoming, a judge might sign the order to show cause.

A landlord who believes that the tenant did not have a meritorious reason to obtain an order to show cause may file a CPLR 5704(b) motion with the Appellate Term to vacate the order, especially if several orders to show cause have been signed in one proceeding or if the landlord has reason to believe that the tenant has abused the procedure. The landlord may seek to strike and vacate a stay in an order to show cause, to strike the order from the Civil Court calendar, to direct that no additional marshal's notice be required unless required by the Marshal's Handbook, and to direct that no further applications for a stay be sought.[153] In the Second Department, a landlord, before moving under CPLR 5704(b), must apply to the signing judge to vacate the order or any part of it, such as the stay provision.[154] If the signing judge in the Second Department declines to vacate the order, the landlord may then go to the Appellate Term under CPLR 5704(b). In the First Department, a landlord may bypass the signing judge and go directly to the Appellate Term.

A tenant who brought an order to show cause that the Housing Court declined to sign may go to the Appellate Term to request CPLR 5704(b) review.[155] In a nonpayment proceeding, the Appellate Term might grant the tenant CPLR 5704(b) relief, thus restoring the matter to the Housing Court's calendar, on condition that the tenant deposit money in court.

To file a CPLR 5704(b) motion, the movant prepares a proposed *ex parte* order with an affidavit or affirmation and attached exhibits, including the underlying order. Modifying or vacating an underlying order favoring a tenant is drastic and will be granted only on a strong showing of abuse. If granted against a tenant, the Appellate Term justice who considered it will likely require that the eviction be preceded by proof of service on the tenant and filed with the Housing Court's Clerk's Office. Once the tenant is served, the tenant can go to the Appellate Term to read the CPLR 5704(b) application; it is an *ex parte* application, not a sealed document. By then, however, it may be too late to seek reargument before eviction. Reargument may be futile in any event. Another option for the evicted tenant is to move in the Housing Court to be restored post-eviction.[156]

Although the Appellate Division will not review interim Appellate Term orders, the tenant may nevertheless try to seek review from the Appellate Division by way of a CPLR 5704(a) *ex parte* motion if the tenant can assert that the landlord itself committed an abuse in its CPLR 5704(b) motion to the Appellate Term. Under CPLR 5704(a), the Appellate Division has the jurisdiction to "vacate or modify an order granted without notice to the adverse party by any court or a judge thereof from which an appeal would lie to such appellate division." It is uncertain whether this procedure will work, however. No appeal to the Appellate Division lies from anything the Appellate Term does not decide on appeal. The Appellate Division might find that no appeal lies from the Appellate Term's decision on a CPLR 5704(b) motion.

Although a single Appellate Term justice, in chambers or at home, may modify or vacate an *ex parte* stay, the full panel, according to one author, considers whether to grant relief to a party who failed to obtain it below.[157]

A CPLR 5704(b) motion must be made to the Appellate Term before the return date in Housing Court on

an order to show cause. If the Housing Court hears both sides on a stay issue, the application is no longer *ex parte*, and 5704 jurisdiction is lost.

In the Second and Eleventh Judicial districts, litigants with orders to show cause go to the court's central clerk's office at 141 Livingston Street. In the Ninth and Tenth Judicial Districts, a local clerk will telephone the central clerk's office at 141 Livingston Street. A clerk in the 141 Livingston office will direct the litigant to a court where a Ninth and Tenth justice sits in chambers. The litigant will then go to the justice's chambers with the papers and await a decision.

D. Stays of Reletting and Restoration

In a 2003 opinion overruling its precedent, the Appellate Term, Second Department, decided that it has the jurisdiction to stay reletting and restore a tenant to possession pending appeal.[158] This power stems from the appellate right to issue a prohibitory injunction under CPLR 6301 to preserve the status quo pending appeal. To obtain this relief, the tenant-movant must show a likelihood of success on the merits, the prospect of irreparable harm (counted as the eviction itself), and a balance of equities in the tenant-movant's favor.[159]

VIII. Cross-Appeals

The respondent on appeal may also appeal; the procedure is called a cross-appeal. A respondent may not request any modifications to the Housing Court's order or final judgment unless a cross-appeal is taken.[160] To cross-appeal, the respondent must be an "aggrieved party."[161] The exception to that rule is when the judgment or order does not grant the respondent complete relief or when an error occurs below that, if corrected, would support a judgment in the respondent's favor.[162] For example, an award might be less than the respondent sought below, or the judgment might deny an affirmative claim.[163]

The respondent must serve its cross-appeal during either of the following two time periods, whichever is later: 10 days after the appellant serves its notice of appeal or within the original 30-day period following service of the order with notice of entry.[164] A cross-appeal not served within these time limits will be dismissed.[165] In addition, a cross-appeal perfected improperly will be dismissed.[166]

The Appellate Term, on application, may order both sides to share the costs of ordering the transcript in a cross-appeal.

IX. Perfecting the Appeal

The appellant's time to perfect an appeal—that is, to file the brief and the record—begins to run from the day the notice of appeal is filed in the clerk's office in the county from which the practitioner is appealing. Failure to perfect an Appellate Division appeal will result in dismissal with prejudice.[167] But the Appellate Term has no requirement that an appeal be perfected within a specified term. A respondent must move to dismiss a dilatory Appellate Term appeal. The Appellate Term usually denies these motions unless the appellant defaults in answering or causes an extremely lengthy and unreasonable delay. If the appellant even nominally opposes the motion, the court will typically condition the denial on the appellant's perfecting the appeal by a particular term or date. The respondent should renew the motion to dismiss the appeal if the appellant does not comply with the conditional order. Once an appeal has been perfected, it is rare that an appeal will be dismissed as untimely.

Conversely, the appellant may move to extend, or enlarge, the time to perfect an appeal. One extension is routinely granted on motion for good cause shown. The appellant should explain why the extension is needed. Valid excuses are myriad; they include delays prompted by settlement discussions, awaiting a decision on a motion to reargue, or a burdensome caseload. A smart practitioner will also briefly argue that the appeal is meritorious, that the delay will not prejudice the respondent, that the appellant is close to perfecting the appeal, and what the estimated date of submission is. The motion for an extension should be served before the expiration date, although the return date may be after the expiration date. The application is brought by motion, not by order to show cause. The motion should include the notice of appeal and the order or judgment that is the subject of the appeal. The court must be advised of the respondent's position regarding the request for an extension. Any stipulation in which the respondent consents to an extension should be annexed as an exhibit.

A respondent's attorney who wishes to object to a request for an extension is well-advised to set out good reasons for objecting, especially in response to an appellant's first motion for an extension.

The respondent may also move to accelerate the final due date.

The Appellate Term may expedite perfection on its own motion. In *McDonald v. Wilson*,[168] for example, the court deemed the papers submitted on a motion for a stay pending appeal to be briefs and set the matter down for oral argument on the next calendar date.

The Appellate Term's broad powers also include the power of summary reversal without the need to perfect an appeal. In *Cruz v. Chan*,[169] the court, on its own motion, treated a notice of appeal as an application for leave to appeal, and on granting leave reversed summarily. In *Cruz*, an HP court struck the landlord's answer for lack of verification, even though the landlord offered to verify the answer *nunc pro tunc* before the time to answer had expired. According to the court, the urgent nature of HP proceedings required summary reversal.

In another unusual case, a tenant filed a post-eviction order to show cause in the Appellate Term, Second Department, seeking to be restored. The court signed it and later amended it *sua sponte* to provide for a hearing on the issues raised in the order to show cause.[170] After the hearing, the court summarily reversed because of what it found to be clear error and exigent circumstances.[171]

Either side may move by motion or order to show cause for the Appellate Term in its discretion to grant a preference to hear and decide the appeal.[172] The rules of the Second Department, with its current six-month lag time in hearing appeals, specifically contemplate preferences.[173] Additionally, the parties may stipulate to extensions of time that are "so ordered" by the court to allow late perfection. Either way, perfecting the appeal in the First Department begins with compiling the record and ends with the clerk's return. In the Second Department the process begins and ends with the clerk's return.

A. The Clerk's Return

The Appellate Term, First Department, requires a clerk's return in addition to one original (signed by the attorney) and four copies of the briefs and the full record or one signed original and four copies of the brief and appendices reproduced as authorized by CPLR 5529.[174] The only exception is if the parties consent to appeal on a statement under CPLR 5527, as explained below.[175] In the Second Department, a landlord-tenant appeal can be brought on the clerk's return and one signed original and three copies of the brief.[176] In the Second Department, the appellant may, but need not, print copies of the record.[177]

The Civil Court appeals clerk prepares a form titled the clerk's return on appeal, a cover sheet that enumerates the contents of the clerk's return, and addresses it to the Appellate Term to attest that the record is complete. That form is affixed to the index (see below), the notice of petition and petition, evidence, the judgment, all necessary papers from the Housing Court's file, any opinion of the court, transcripts, and the notice of appeal.[178] The form, together with the file to which the form is affixed, is called the clerk's return.

The appeals clerk is required to give the clerk's return to the Appellate Term, often through counsel if there is one, after the notice of appeal is filed.[179] The brief may not be filed unless the clerk's return is filed first. In the First Department, the appellant must procure the clerk's return within 30 days after the notice of appeal is filed.[180] That requirement, which does not exist in the Second Department (appeals there have no fixed deadlines and thus can wither without being prosecuted), is largely ignored in the First Department because it is often difficult and time-consuming to obtain a full record, especially when the record includes transcripts.

On the other hand, the practitioner should know that although the Appellate Term, First Department, largely ignores the 30-day rule in 22 N.Y.C.R.R. 640.6(a)(1), the court could take a hard line, in its discretion, on a case-by-case basis. So, too, can the Appellate Term, Second Department, in its discretion, dismiss an untimely appeal despite the absence of fixed dates in the Second Department within which an appellant must perfect an appeal.

In the Appellate Division, First Department, Rule 600.11(a)(3) fixes an outside limit for perfecting an appeal "within one year of the date of entry of the judgment or order appealed from," unless the court extends the time for good cause.[181] Undue delay is presumed if perfecting the appeal exceeds a year.[182] Delays in prosecuting appeals frustrate the rights of respondents.[183] As one court has explained, "[b]y analogy to appeals to the Appellate Division, appeals to the Appellate Term, First Department, not perfected within a year . . . are best 'supported by a substantial excuse and a showing of merit to the appeal.'"[184] Therefore, it would be wise for an appellant in an important case to take the initiative to move to extend the time to perfect when it appears likely that additional time is needed to perfect—and in most cases it will be likely because 30 days come and go quickly. Conversely, the respondent would be wise to move to dismiss an unperfected appeal. Otherwise, as in *Cetnar v. Kinowski*,[185] the court might find that the respondent "acquiesced in [appellant's] delay until well after the appeal was taken" and thus excuse late perfection.

In the Second Department, the appellate process is relatively simple because appeals are made on the original record.[186] In the First Department, the practitioner who appeals on a fully reproduced record must first assemble the entire record, as described below, and serve it on the respondent. The appellant then gives the record, with proof of service, to the Civil Court appeals clerk for review. The clerk affixes the return to the record for appellant's counsel's filing with the Appellate Term, which will not accept the record or any briefs without the clerk's return.

B. The Record

If the parties do not agree to a stipulated set of facts, called a CPLR 5527 statement—and they rarely do—the appellant must give the Appellate Term a record of what happened below. The record consists of an original record, a fully reproduced record, or an appendix. An original record is exactly that: the entire original court file, with transcripts. All appeals to the Appellate Term, Second Department, may be made on the original record, as may all poor-person appeals in the Appellate Term, First Department. To obtain an original record, the appellant need only ask. An appellant may subpoena the file from the Housing Court clerk's office, but doing so might upset the clerks.

The record is important. The Appellate Term will not review a final judgment if the Housing judge failed to comply with CPLR 4213(b) specificity requirements. The Housing Court must set forth its rationale and articulate the facts essential to its determination in rendering judgment. Otherwise, the Appellate Term might remand for a new trial.[187]

Likewise, the Appellate Term might decide that the record is so slender or limited that it prohibits intelligent appellate review of the trial court findings. In that case, the Appellate Term will remand for a new trial.[188] The Appellate Term might also remand if either documentary evidence was shown to the court of first instance but it was neither admitted into nor excluded from evidence,[189] or when the centerpiece document of the parties' appellate briefs is ambiguous and is "virtually ignored during the trial proceedings."[190]

1. The Fully Reproduced Record

A fully reproduced record, which must be submitted to the Appellate Term, First Department, unless poor-person relief is granted, consists of the following under CPLR 5526: all the documents to which the judge referred in rendering the order or judgment, the order or judgment itself, the notice of appeal, a corrected transcript or a statement in lieu of a transcript under CPLR 5525(d) if a hearing was held, all motion papers other than memorandums of law, all exhibits, and any underlying documents.[191]

The transcripts, which must also be included in the record, must be prepared and settled according to Civil Court Act § 1704, not under CPLR 5525(b), (c), but the CPLR provides valuable precisions. Transcripts need not be prepared or settled if testimony was not taken:[192] if the parties stipulate under CPLR 5525(b) that a portion of the record need not be transcribed, if the parties agree under CPLR 5525(d) on a statement in lieu of a stenographic transcript, or if the parties agree to a CPLR 5527 statement instead of a record or an appendix.

To obtain a transcript, the practitioner should obtain the digital recording information (or, before the court used its current digital recorders, the pertinent tape and counter numbers) from counsel below, the judge, or the part clerk, who can find them on the court file, in the judge's trial book, in the minute book, or, best of all, though the court file's bar code indexing system as recorded on the courts' digital recorder, and then order the minutes from a transcription company. The minutes must be ready within 10 days after they are paid for. When the minutes are ready the clerk must notify counsel immediately. Quickly after the clerk notifies the appellant that the minutes are ready, the appellant should review them and propose amendments, and serve them on the respondent. Amendments are limited to typographical errors and omissions.[193]

With an amendment to Civil Court Act § 1704(a), the way to settle a transcript for an appeal to the Appellate Terms in New York City has been changed. Effective November 1, 2000, for civil court actions and proceedings that begin on or after that date, an appellant must send the transcript, with proposed amendments, to the respondent within 15 days after receiving the transcript from the clerk. The respondent has 15 days, or 20 if served by mail, to propose objections or amendments. Unless the parties stipulate that the transcript is correct, the appellant "shall then procure the case to be settled on a written notice of at least four days [nine if by mail] to the clerk and to the . . . respondent . . . , returnable before the judge who tried the case." The clerk then prepares a clerk's return, and the judge has five days to indorse settlement on the return.[194]

Previously, Civil Court Act § 1704 provided that on three days' notice (eight if served by mail), either side was entitled[195] to submit the transcript and any changes to the Housing Court judge. The judge who heard the case had to indorse the court's settlement on the clerk's return within five days unless the parties stipulated that the transcript and the amendments were correct. This rule still applies to proceedings begun before November 1, 2000.[196]

Civil Court Act § 1704(a) was amended to conform to the 15-day rule in CPLR 5525(c)(1). The legislative fix was thought necessary because under the old § 1704(a), the parties did not have enough time settle a transcript before a brief had to be perfected. Conformity with CPLR 5525(c)(1) is a meritorious objective because under Civil Court Act § 1703, "[p]ractice and procedure on appeals shall be as provided in article 55 of the CPLR except insofar as [the Civil Court Act] or the rules of [the Civil Court] consistent with [the Civil Court Act] otherwise provide," and the old Civil Court Act § 1704(a) contained significant variants from CPLR 5525(c)(1).[197]

But the new § 1704(a) provides an obstacle if the respondent is recalcitrant—and in that case the new § 1704(a) is different from CPLR 5525(c)(2). Thus, under § 1703, § 1704(a), not CPLR 5525, still controls in significant ways.

According to CPLR 5525(c)(2), if a respondent does not object to the transcript and the appellant's amendments within 15 days (20 if served by mail), the transcript and the amendments are deemed correct without any stipulation or judicial settlement. The transcript and the appellant's amendments are binding under CPLR 5525(c)(2) if the appellant affixes to the transcript and amendments a notice of service and certification under CPLR 5525(c)(3) that the appellant complied with the time limits and that the respondent offered no proposed amendments or objections. And here is the rub: Under the new § 1704(a), the appellant must serve on the respondent and the clerk a second notice, this one

a four-day notice (nine if by mail) for judicial settlement, not merely if the parties cannot agree on the transcript, but even if the respondent does not bother to answer the first notice.[198]

In short, under CPLR 5525, if the appellant does not receive proposed amendments or objections from the respondent, the transcript is deemed settled without judicial involvement. Under § 1704(a), new and old, the appellant still needs a clerk's return. With the new § 1704(a), the appellant must serve a second notice to put the matter before a judge—when the respondent does not care, is happy with the transcript, or means to delay. Previously, the parties submitted the transcript to the clerk, and the clerk sent it to the judge. The new law offers many Housing Court practitioners and the unrepresented a new, extra layer of work and greater effort than for an appeal to the Appellate Division under the CPLR.

The collated record must be 8½ x 11 inches long and reproduced on plain white paper (recycled paper is not yet required in the Appellate Term) and bound on the left.[199] The subject matter of each page of the record must be stated at the top of each page. The record must also include, at the end of the record, an attorney statement under CPLR 2105 or stipulation under CPLR 5532 that affirms that the reproductions of the papers are exact duplicates of those contained in the original file. Many attorneys also include a certification as to no further opinion, although there is no statutory requirement to do so.

The front of the bound record must contain a statement pursuant to CPLR 5531(1-6) that provides the following information: (1) the index number below; (2) the full names of the parties and whether any party has changed; (3) the court and county in which the action was commenced; (4) the date the action began and the dates each pleading was served; (5) a brief description of the case; (6) whether the appeal is from a judgment, an order, or both; the date each judgment or order appealed from was entered; and the name of the judge who made the order or directed the entry; and (7) whether the appeal is on the full record, printed or reproduced, or, if on the original record, whether the appendix method is used or whether the court or statute permitted the appeal on the original record.[200]

A copy of the CPLR 5531 statement must be filed with the Appellate Term Clerk's Office, whether in the First or the Second departments, when the record on appeal or appendix (First Department, where the statement should be in the record) or the brief (Second Department) is filed. In the Second Department the CPLR 5531 statement must be at the beginning of the appellant's opening, or main, brief.[201]

If the record on appeal contains handwritten opinions or orders, the practitioner should type them up and type out at the top "Reproduced for the Court's Convenience."

The five sets of the record on appeal, which the appellant gives to the appeals clerk, with proof of service, should each contain the following consecutively numbered pages, in the following sequence: index (with first and last pages noted—e.g., Summary Judgment Motion . . . 13-16); CPLR 5531 statement; notice of appeal; judgment roll or order appealed from, including pleadings underlying the judgment or order; court's opinions; notice of petition and petition; answer; bill of particulars; any transcript of a proceeding at which testimony was taken (the original, signed transcript must be presented in a separate folder), broken down as to testimony by page of record—e.g., Jane Doe Direct 10, Cross 15, Redirect 20; exhibits (identifying the exhibit at the top of the page and where it was introduced into evidence) or stipulation that exhibits will be handed up when the briefs are filed; stipulation of settlement or notice of settlement of transcript; statement of no further opinion; attorney's CPLR 2105 certification or stipulation waiving certification; and the clerk's return on appeal form, which the Civil Court appeals clerk will insert.

2. The Appendix Method

The appendix method may be used in the Appellate Term, First Department, but the rules of the Appellate Term, Second Department, do not provide for that method. An appendix consists of the reproductions of what the attorneys consider to be the relevant papers supporting the issues being appealed and the original file.[202] Because practitioners often disagree over what an appendix should include, many believe that in a less complicated case it is easier to reproduce the entire record. Respondents may, however, file their own appendix. When the appendix method is used, the appellant must fill out numerous forms from the Civil Court appeals clerk to transfer to the Appellate Term the original record from the landlord-tenant clerk's office.[203] The appendix method is rarely needed when an appeal is from a motion, although that method can be helpful when an appeal follows a hearing or a trial. The appendix method saves appellate printing costs by omitting testimony of witnesses not necessary to resolve appellate issues.

3. The Original Record

All landlord-tenant appeals in the Appellate Term, Second Department, may be prosecuted on the original record, with a clerk's return.[204] In the First Department, an appeal is made on the original record only if the Appellate Term requests the original record or if a poor-person's application is granted. An appellant who proceeds on the original record must settle the minutes and go to the Civil Court appeals clerk to make certain that the papers are in order and to arrange for a clerk's return. The appeals clerk will then forward the original record directly to the Appellate Term. Once the Appellate Term receives the file, the appellant may file the briefs and the notice of argument or, in the Second Department, the note of issue.

4. Assuring an Accurate Record

It is impermissible to expand the record to include material not presented to the court below or to dilute the record by omitting documents.[205] It is also imprudent to play fast and loose with the record on appeal. If an adversary includes new material or excludes existing material, a motion to strike the record or to dismiss the appeal under CPLR 5526 is appropriate.[206] The court may admonish and affirm if a party intentionally fails to include motion papers and exhibits.[207] And the court will not consider anything that is not,[208] or which should not,[209] be in the record. However, it is possible to add to the record by moving to enlarge the record on appeal.[210] If the motion is granted, the practitioner then files a supplemental record.

It is also a bad idea to play fast and loose with the record in the court below. For example, in 1999 an appellant committed shenanigans like asking a trial court to change a judgment issued by a then-deceased justice after appellate remedies were already being pursued. The Appellate Division, First Department, responded by imposing sanctions under 22 N.Y.C.R.R. Part 130-1.2.[211]

An appellate court's determination is based only on the record presented to the court of first instance.[212] But Brandeis briefs are allowed: public records and incontrovertible official documents whose existence and accuracy are not disputed may be cited and considered for the first time on appeal.[213] Aside from evidence of that nature, counsel who obtain new information should bring a motion in the Housing Court to reargue or renew.

C. The Brief

Arguments in the appellate brief—the brief scheduling is explained below in section X.C.—must be based solely on material contained in the record.[214] A party may argue on appeal only facts raised in the Housing Court or facts that can be judicially noticed.[215] A practitioner confronted with arguments unsupported by the record may move to strike the brief, although doing so is often a waste of time. The smarter practice is to comment on that fact in the responsive brief and at oral argument. Moreover, unless the practitioner gives the Appellate Term a strong reason to exercise its interest-of-justice discretion to consider unpreserved arguments, the practitioner should not address on appeal legal issues or theories not raised below.[216]

All issues must be raised in the initial brief. Issues raised in the Housing Court but not raised in the appellant's brief are waived.[217] Arguments not raised are not considered and go unpreserved for further appeals. Issues raised for the first time in a reply brief will be stricken, or at least unread.[218]

In the First Department, unless a justice permits lengthier papers, the opening, or main, and responsive briefs may not exceed 50 pages each. Reply briefs are limited to 20 pages.[219] There is no page limit in the Second Department. The Second Department simply refers the practitioner to CPLR 5528 and 5529 for the form, style, and content of the briefs.[220] The First Department's rules provide nothing about the form, style, and content of briefs, except that nothing may be appended to a brief absent advance permission.[221] But the practitioner in the First Department cannot go wrong by adhering to CPLR 5528 and 5529, especially because appellants and respondents should adhere to the CPLR unless a specific rule to the contrary appears in the Civil Court Act or in an Appellate Term rule.[222]

The civil practice rules provide that the appellant's brief shall contain (1) a table of contents with point headings and the contents of an appendix, if not bound separately; (2) a concise statement, not exceeding two pages, of the questions involved, without names, dates, or particulars but sufficiently specific to appraise the court of the issues and with each question numbered and answered immediately with how the court below ruled; (3) a concise statement of the case and facts; and (4) the argument, divided by point headings (and subheadings) distinctively printed. The rules do not require a conclusion with a prayer for relief, but practitioners should compose one. Practitioners would also be wise to have a separate statement of the case and statement of the facts. The statement of the case serves as a summary of the argument. The statement of the facts should include persuasively written facts and procedural history, but not law or opinion. Law and opinion are reserved for the argument section.

The respondent's answering brief has the same format as the appellant's brief but may include a counterstatement of the questions and facts of the case if the respondent disagrees with the appellant's version.[223] Typically, respondents disagree with the appellant's version of the questions and facts. Note that the respondent's answering brief need not address issues in the same order the appellant presented them. Just as a smart appellant's attorney will begin with the appellant's strongest arguments, a smart respondent's attorney will answer with the respondent's strongest arguments first.

Reply briefs are allowed if they are not repetitious.[224] Because, as explained above, case law prohibits attorneys from raising issues for the first time in reply, practitioners are advised to be complete, and to anticipate the respondent's arguments, in their main briefs. The rules do not contemplate sur-reply briefs, which presumably are forbidden, except on cross-appeals.

When writing a brief to the Appellate Term, the practitioner should concentrate on accurate citing and persuasive writing.

Cite the Sites. Citing poses a special problem before the Appellate Term. All citations should be

in official format, if available: Misc. 3d, A.D.3d, and N.Y.3d.[225] Citing to the West Group's unofficial reporter series (N.Y.S.2d, N.E.2d) is optional. The justices and the Appellate Terms' libraries have the unofficial reporter series (N.Y.S.2d, N.E.2d), but making the justices and their law clerks and court attorneys locate official parallel citations wastes their time—time they can devote to resolving your case. Additionally, practitioners who want to impress the justices will not use the Bluebook citation format. They will use the Official Style Manual, also known as the Tanbook, which the New York State court system devised for its official reports. The newest version of the Tanbook, updated effective October 2007, is available online at www.courts.state.ny.us/reporter/new_styman.htm [last visited March 14, 2008]. Practitioners interested in learning about the Tanbook and citing formats may read a few articles on the subject.[226] All the citations in this article are in Bluebook format, not Tanbook format.

To cite facts from a reproduced record, practitioners should refer to the sequentially paginated record in a bracket or a parenthetical: [R. 22-23, 216-220]. To cite facts when appealing on the original record, practitioners should be as clear as possible. Testimony in a brief must always be accompanied by a reference to the page where the testimony appears.[227] Practitioners who want to be entirely credible will also refer to the transcript's line numbers, although even the best appellate practitioners rarely do so.

Citing is made difficult because most Housing Court and Appellate Term opinions are either unreported or reported only in the *New York Law Journal* or the Housing Court Reporter. But practitioners should try to find official citations to officially reported cases. Many Appellate Term opinions have been lost to posterity. Most Appellate Term opinions are not reported officially or unofficially, and neither Westlaw nor LEXIS tracks Appellate Term opinions reported only in the *New York Law Journal*, even when the Appellate Term affirms or reverses a published Housing Court decision, unless the Law Journal publishes the Appellate Term opinion as a "Decision of the Day," a relatively rare event.[228] Effective late 2001, however, all Appellate Term opinions decided from that point forward are online on the New York State Law Reporting Bureau's Website: www.courts.state.ny.us/reporter/decisions.htm [last visited Mar. 14, 2008]. That Website is now required reading for landlord-tenant practitioners. The Reporting Bureau's Website contains officially published, soon-to-be officially published, and online (unpublished) decisions and motions from the Appellate Terms and from all other courts as well. The Website is updated every business day and has an impressive search function.

Helpful reading can also be found at tenant.net [last visited Mar. 14, 2008], which contains squibs of opinions published in the *New York Law Journal*. Appellate Term opinions are also available now on Westlaw in the NY-CS (published opinions) and NY-ORCSU (unpublished opinions) databases. Practitioners should therefore always use a combined database on Westlaw: "NYLJ, NY-CS, NY-ORCSU."[229] Easily New York's best online resource for New York landlord-tenant case law, statutes, secondary authority, and a great deal more law is the Metropolitan Council on Housing's Housing Links, www.metcouncil.net/factsheets/links.htm [last visited Mar. 14, 2008], and its sibling site, www.hcc-nyc.org/legalservices/housinglinks.htm [last visited Mar. 14, 2008], maintained by Stuart W. Lawrence, Esq., of Manhattan's Housing Conservation Coordinators, Inc.

The moral: Take good care, despite the obstacles, to cite officially reported cases, not to cite reversed cases, and not to let your adversary's or a Housing Court judge's citation to reversed cases go unnoticed. Then tell the court that you shepardized, instacited, or key-cited your authorities: Give the weight of authority in parentheticals (*per curiam*, memorandum, etc.) and the leave denied and appeal dismissed citations. Avoid blocked, lengthy, excessive, and inaccurate quotations. Always using pinpoint (jump) citations allows the reader to find your principle, proves that you really read your case, and assures accurate and complete citing and quoting. Provide explanatory parentheticals to authority when the reference is unclear. Cite key cases and do not string cite. In this context, citing well is not merely writing well. It is researching well, and persuasively.

Write It Right. Every Appellate Term, First Department, opinion is a "*per curiam*" opinion, but the court's opinions are in memorandum format, which allows the court to engage in a brief, often conclusory discussion of the facts and the law. For many years, Appellate Term, Second Department, landlord-tenant opinions have been memorandum opinions.[230] In a memorandum opinion, no matter how it is labeled, the court gets right to the point, sometimes discarding nuance and always excising facts not critical to the result. So too should the practitioner discard nuance, irrelevancies, and invective.[231] Landlord-tenant appellate specialist Paul N. Gruber said, in a February 2001 e-mail to the author, "I've been receiving a few briefs lately that have been needlessly smug, laden with attitude and simply hostile. There's a difference between effective advocacy and professional wrestling. I have never met an appellate judge who appreciates a brief that attacks the opponent as opposed to the opponent's case." Neither will the court accept "an ad hominem attack against the motion court, conduct which itself could support an award of sanctions."[232]

Few other courts look for briefs to be so succinct and concise. Even point and subpoint headings should be succinct and concise. The First Department's rules allow for 50 pages for opening, or main, and responsive

briefs and 20 pages for reply briefs.[233] The Second Department's rules have no page limit, although every appellate court has the power to sanction and impose costs against parties or their attorneys for submitting lengthy briefs.[234] Because the Appellate Terms' rules provide nothing about spacing, margins, point size, or footnotes, practitioners might believe that lengthy briefs are not prohibited. They would be right. But a lengthy, wordy brief is not a winning brief, especially before the Appellate Term.

The best and most successful way to be succinct is to limit appellate issues to those two or three that might succeed. Overinclusiveness is cowardly and a potential way not to get the reader to read what is important. Issues should be organized effectively, first by threshold issues and then by the issues most likely to succeed. If these things are equal, organize by what will give the client the greatest relief. For example, dismissing the petition with prejudice if you represent the tenant in a nonpayment appeal should come before securing a small rent abatement.

Lengthy briefs are disfavored, but devoting space to rebutting the other side's arguments and potential arguments is essential. Pretend that an appellate court attorney from Appellate Term's court-attorney pool, called the Law Department, will draft the opinion. Pretend also that a court attorney from the pool, or perhaps the justice's personal law clerk, will draft any concurrence or dissent. (Current practice is that the Appellate Term, Second Department, court attorney who drafts the proposed majority opinion will draft the concurrence or dissent. Current practice in the Appellate Term, First Department, is for concurring or dissenting justices to author their own separate views.) Because the opinion is tentative, the preliminary drafter (the court attorney or law clerk)—as opposed to the ultimate and real decision makers (the justices)—might not have attended oral argument, stress law and fact in your brief. Do not wait until the reply brief or, worse, oral argument to contradict the opposing side's positions.

Write in simple, concise prose, in plain English. The preceding eight words sound basic. Yet they articulate important advice—advice explained in the following principles of persuasive appellate writing.

1. Use roadmap thesis paragraphs to explain every point heading. Introduce issues with topic sentences. Conclude issues with thesis sentences.

2. Write to the Appellate Term, not to an adversary, a client, or yourself. Assume that your judicial reader knows nothing about your facts but a good deal about the law. Include harmful facts but mitigate them. Always include harmful authorities, and mitigate them as well. Then understate, never overstate. The key to persuasive appellate writing is to be subtle and dignified, not belligerent or extravagant. Avoid adverbial excesses such as "clearly" and "obviously." Do not use italics, underlining, bold, and capitals, or quotation marks for effect.

3. Eliminate legalisms, which are pretentious and add nothing. Forgo foreign words that have English equivalents.

4. Fix nominalizations, or turning verbs into adjectives and nouns. Thus, "He committed a violation of the rules" becomes "He violated the rules." Throw away throat-clearing introductory clauses and phrases like "it is submitted that. . . ." Cut cowardly writing ("generally," typically," and the like).

5. Use the subject-verb-object formation as often as possible, and do not separate subject from verb or predicate. That will prune the single-passive voice. Thus, "The passive voice is avoided by good lawyers" becomes "Good lawyers avoid the passive voice." Blank passives are acceptable under some circumstances, such as when the actor is known or cannot be known. But judicial readers know that some lawyers use blank passives to deceive. Thus, "The passive voice is avoided" is a blank passive because the reader does not know who avoids the passive.

6. Move from old to new in large-scale organization and in sentences. Introduce before you explain. Give the exception before the rule. Do not give exceptions unless fairness requires you to do so, and then set out the exceptions. Write in the positive, not the negative. Thus, "Good lawyers do not write in the negative" becomes "Good lawyers write in the positive." Untangle complex conditionals. Lay out your facts, and apply the law to your facts. Stress well-formulated issues and arguments, not cases. Use cases only to support your propositions. Do not give the facts of a case unless you want to analogize or distinguish.

7. Short words, sentences, and paragraphs are better than long words, sentences, and paragraphs, but vary your sentence and paragraph length for readability.

8. The greatest emphasis is at the end of a sentence or paragraph; the second is at the beginning; the least is in the middle. Thus, "Appellant paid rent, but he paid rent late" is different from "Appellant paid rent late, but he paid rent." Start sentences and paragraphs with something important, but end them with a climax. Save the middle to bury something.

9. Focus on the context and your hoped-for remedy. All law and fact that do not advance your requested remedy is irrelevant detail.

10. Start early, but edit until the deadline. Attend to detail in the final edits.[235]

11. Most important, learn the techniques of honest, ethical legal writing.[236]

X. Noticing, Dismissing, and Abandoning Appeals

A. Notice of Argument

After perfecting the appeal, the practitioner must notice the appeal for argument within the Appellate Term's time constraints; otherwise, the appeal might be dismissed. In the Appellate Term, First Department, appellants or respondents may notice appeals, and thus schedule argument for a particular term of the court, by serving and then filing with the Appellate Term's clerk's office an original notice of argument, with proof of service. In the Second Department, only the appellant may notice the argument; the appellant does so by serving and filing a form called a note of issue.

The contents of the notice of argument or note of issue, which like most forms the Appellate Term's clerk's office will provide, are in the Second Department's rules but not in the First Department's rules. The notice or note must contain the title of the appeal; the judgment or order appealed from, with dates and the county of the Housing Court; the name, address, and telephone number of the attorney and the name of the attorney who will orally argue; and the name of the party who is filing the notice or note.[237] In the Second Department, but not in the First, the appellant must file with the court blank, stamped postcards addressed to all the parties.[238] The court will use the postcards to notify the parties when and where oral argument will take place.

There are preargument conferences in the Appellate Division, First and Second departments, to settle cases and to narrow appellate issues. There are no preargument conferences in the Appellate Term, although many practitioners would like the Appellate Term to assign a seasoned appellate court attorney to conduct them. Settling cases on appeal would save litigants time and money and reduce the court's backlog.

B. Dismissals

The Appellate Term automatically dismisses appeals that have not been brought for argument within the prescribed time limits.[239] In the First Department, the appellant has 60 days from the date the return is filed to notice an appeal for argument.[240] In other words, 60 days after the return is filed, the appeal is placed on an unpublished dismissal calendar, which is called, at least administratively, on the first argument day of each term. Because the First Department has only two argument days a term, an appeal not noticed for argument will be dismissed without warning on the first argument day of the third term following the filing of the return. A respondent noticing the appeal must file and serve the notice at least 68 days before the first day of the term.[241] In the Second Department, an appeal not noticed for argument will be dismissed if it has been on the general calendar for more than 90 days. The Second Department's dismissal calendar is published in the *New York Law Journal* five days before it is called.[242] Although the First Department's dismissal calendar is unpublished, the *New York Law Journal* publishes the list of filed clerk's returns 15 days before the first day of each term.[243] That list serves as a warning to practitioners.

C. Briefing Schedules

The above deadlines are important because they set the date by which opening (main) briefs, answering briefs, and reply briefs, with proof of service, must be filed under 22 N.Y.C.R.R. 640.6(3). In the First Department, the appellant has 53 days before the first day of the term for which argument is noticed to file, with proof of service, the notice of argument and five copies (including one signed original) of the opening brief and the record or appendix. The respondent must then file, with proof of service, four copies and one original of the answering brief, and any exhibits the appellant did not file, at least 31 days before the beginning of the term. That gives the respondent at least 22 days to write, serve and file an answering brief. The appellant who replies may then file four copies and one original of the reply brief, with proof of service, 24 days before the first day of the term. That gives the appellant at least a week to write, serve and file the reply.

A respondent who notices the argument in the First Department must file and serve the notice of argument at least 68 days before the first day of the term.[244] The briefing schedule is the same when the appellant notices the argument for appeal. A respondent who prods an appeal can therefore force an appellant to perfect in 15 days,[245] because the appellant must file the briefs and record or appendix at least 53 days before the first day of the term.

If the appeal is placed or is about to be placed on the dismissal calendar, the practitioner may apply to the court for more time.[246] In the alternative, the appellant and the respondent may stipulate to obtain additional time. An appeal not briefed is deemed abandoned.[247]

In the Second Department, the appellant may file a note of issue, with a signed original with proof of service and three copies of the brief, on or before the last Friday of any month.[248] The respondent's brief is due exactly 14 days after service on the respondent.[249] A reply brief must be served and filed within seven days after the appellant receives the respondent's answering brief.[250]

Practitioners who are bad at math can get an appellate printing company's briefing schedule from the appellate clerks' offices, which will also have for distribution free copies of

briefs, records and forms that novices may use as models. For those who can afford them, appellate printing companies can also greatly assist the novice or busy practitioner to prepare the record quickly and to assure technical compliance with appellate rules. Nevertheless, no competent appellate attorney should rely on anything but the appellate rules themselves. For example, the courts' briefing schedules consider nothing out of the ordinary, such as the briefing schedule for cross-appeals, which is found at CPLR 5530(b), or the schedule if the respondent notices the argument.

D. Abandonment

Sometimes appellants leave appeals to die on the vine. The case may settle or the appellant may decide not to pursue the appeal, but abandonment is a poor way to leave things. The Court of Appeals, strongly advising practitioners not to abandon an appeal, has ruled that the Appellate Division may dismiss a second appeal that presents the same issue as an earlier abandoned appeal.[251] Although the Appellate Division has the discretion to entertain an appeal after an earlier appeal is dismissed for failure to prosecute, *Rubeo* holds that the Appellate Division need not exercise this discretion. Writing for the Court, Chief Judge Kaye advised the practitioner to avoid this situation by moving for an extension of time under 22 N.Y.C.R.R. 670.8(d)-(h) or by withdrawing the appeal. That way, the Chief Judge explained, the practitioner will be "sparing the Appellate Division the burden of carrying, monitoring and ultimately dismissing [the appeal]."[252]

Thus, instead of abandoning an appeal, withdraw it. That way, a practitioner who decides to appeal again in the future may still address issues raised in the first appeal.[253]

XI. Oral Argument

The Appellate Term, First Department, conducts 10 sessions a year—none in July or August. Oral argument is scheduled for the first and second Monday of each month. The Appellate Term, Second Department, also conducts 10 sessions a year—none in July or August. For the Second and Eleventh Judicial District, oral argument is usually heard twice a month on Wednesdays. The court will send a postcard to the litigants two weeks in advance stating where, at 141 Livingston Street in Brooklyn, 88-11 Sutphin Boulevard in Queens, or 126 Stuyvesant Place in Staten Island, oral argument will take place. For the Ninth and Tenth Judicial Districts, oral argument is usually heard twice a month on Tuesdays in Central Islip, Goshen, Mineola, and White Plains. The clerk's office tries to group arguments at these locations and will notify the litigants by postcard. The calendar is called at 9:30 a.m.

In the Appellate Term, Second Department, a practitioner must request oral argument. Oral argument is requested by asking for it, and stating who will argue and for how long, at the upper right-hand corner of the brief's cover page.[254] According to some counsel, the Second Department will allow oral argument whether or not a request for argument is noted on the brief. The First Department's rules about requesting oral argument are contradictory. Practitioners in the First Department are therefore urged to follow the Second Department's rules about requesting oral argument on the brief's cover page, lest they risk submitting the appeal without oral argument.[255] If the appellant does not request oral argument, the respondent should also submit, lest defeat be snatched from the jaws of victory. Whether or not oral argument is assumed in the First Department, orals can be waived by stipulation, by writing "submitted" on the brief's cover page, or by not appearing on oral-argument day. If one side does not appear for a scheduled oral argument, the side that appears may argue anyway.

The calendar for oral argument in the First Department is printed in the *New York Law Journal* six days before the first day before each term.[256] The Second Department notifies litigants through publication in the *New York Law Journal* 12 days before the term begins and by postcard to be received at least five days before the term begins.[257]

A practitioner who cannot argue on a particular day may obtain a stipulation from opposing counsel or move for an adjournment. If the Appellate Term is given a reason, it "is usually liberal with the first adjournment."[258]

The Appellate Term is a hot bench. The justices are prepared for oral argument because they read the litigants' briefs in advance and receive bench briefs from their law clerks or the court-attorney pool. Practitioners should get to the point and be prepared for focused questions that will sidetrack a rehearsed presentation. Practitioners who worry that they made a more effective argument after they left the courthouse than while in the courthouse should not worry unduly. Unless the justices tell you, "We disagree, but we'll think about it"—a crushing prediction one hears from time to time in the Appellate Term—it often happens that the final opinion bears little resemblance to the oral argument. Nevertheless, no practitioner should miss the opportunity to argue. Briefs count for more than oral argument in most appeals, but close cases are won or lost at oral argument in the Appellate Term.

Cases are called according to the calendar, but it is wise to arrive at the beginning of the oral argument. That will enable the advocate to assess the court and, even more important, to avoid arriving late. The appellant is seated to the left of the podium, or to the right of the justices; the respondent is seated to the right of the podium, or to the left of the justices.

If you want the court to consider a case not in your brief—a *New York Law Journal* case decided after the briefs were filed, for example—give your adversary notice and make

enough copies for each justice. Before the calendar is called, ask the clerk to distribute the case to the justices.

Oral argument is limited to 15 minutes,[259] although the Presiding Justice may (and often will) cut it short or allow more time. Rebuttals are rare; sur-rebuttals are almost unheard of.

A few pointers will aid the oral advocate.

1. After you introduce yourself quickly, give a quick roadmap of all the major points you plan to argue: "This case should be reversed for three reasons. First, . . ." That will assure your organization and the justices' comprehension. It will also focus the court to ask what it is concerned about and to allow a sidetracked speaker to mention something important at least once—at the beginning, when it counts most.
2. Discuss only important things in your few moments before the court. Do not raise in oral argument anything overly controversial, lest your argument excite opposition. Your brief speaks for itself on the details and on the less critical issues. Do not argue issues not in your brief or your adversary's brief.
3. Have a conversation with the court. Do not be stiff. Do not read. Especially do not read your brief or recite long quotations.
4. Answer all the questions when you get them, and try to begin your answer with a yes or no.
5. If you have a theme of your case, you will never get stuck. Develop a theme in advance. Then dwell on emotional themes without getting emotional.
6. Do not interrupt a justice who is speaking.
7. Do not interrupt your adversary or make faces or gestures while your adversary or a justice is speaking.
8. Turn your cell phone off when you enter the courtroom.
9. Appellate advocacy is different from trial advocacy. Be respectful. Do not try to clobber your adversary, the court below, or the justices. Be firm, not obsequious.

Once oral argument ends, the practitioner must wait from one to 12 months for a decision. A three-to-six month wait for a decision is the norm. Currently, the Appellate Term, Second Department, schedules oral argument later than the First Department will, but the First Department will take longer than the Second Department to decide the appeal. The net effect in both departments is that it sometimes takes longer than a year after the summary proceeding is decided for the court to decide the appeal of the summary proceeding.

The Appellate Term will not read postargument briefs.

XII. Frivolous Appeals, Attorney Fees, and Costs

A. Frivolous Appeals

Litigants sometimes abuse their appellate remedies by filing frivolous appeals. An appeal is frivolous if it is "completely without law or merit," if "it is undertaken primarily to delay or prolong the resolution of the litigation or to harass or maliciously injure another," or if "it asserts material factual statements that are false."[260] A party may move the Appellate Term under CPLR 2214 or 2215 to request that the court award costs sanctions for frivolous litigation.[261] The Appellate Term may also impose costs or sanctions on its own.[262]

B. Pleading Attorney Fees

Practitioners should request attorney fees in the petition, or as a counterclaim in the respondent's answer, if the Housing Court has any basis to award attorney fees in a landlord-tenant proceeding. But at least in consolidated cases in which one petition requests attorney fees, a postjudgment request for attorney fees is permitted unless the moving party intentionally relinquishes its claim.[263]

In *A.D. 1619*, a prevailing landlord moved after the proceedings ended to amend two petitions to include attorney fees. The first petition included a claim for attorney fees; in the second case, "[a] claim for attorney fees was interposed for the first time in landlord's postjudgment and postappeal motion approximately nine months after our order."[264] After the court denied the motion to amend, the Appellate Term held that a party should give notice of a claim for attorney fees near the start of a case to avoid surprise and prejudice.[265] Thus, the Appellate Term affirmed the trial court's denial of the motion to amend the petition to include a late claim for attorney fees.[266]

On appeal, the Appellate Division answered that the tenant could not claim surprise "since respondent was aware of Article 19 of the lease providing for the landlord's recovery of attorneys' fees if the landlord prevailed in litigation over nonpayment of rent, and indeed, since the landlord's petition in the second of the two consolidated nonpayment proceedings expressly demanded such fees."[267] Despite *A.D. 1619*, the practitioner is still advised to claim attorney fees early, even though the Housing Court will not address attorney fees until a case is over.[268]

A.D. 1619 raises another interesting question: May a party who has not claimed attorney fees before the trial court amend its petition after winning an appeal? Perhaps. Depending on how much time has passed, laches may apply and a plenary action may be required. But notions of fair play may make it possible for an indigent litigant to claim attorney fees after an appeal if an attorney did not represent the indigent at trial, and thus did not claim attorney fees below, if the indigent won the appeal while represented by counsel.[269]

C. Appealing Amounts of Legal Fees and Prevailing-Party Status

Appellate issues arise over whether the Housing Court should have awarded attorney fees and over the amount awarded. If the Appellate Term finds that the Housing Court wrongly awarded an amount or that a different party prevailed, the Appellate Term will remand the case to the Housing Court to determine the amount of legal fees.[270]

D. Determining Fees

The Appellate Term may award a fee-on-a fee for pursuing an appeal over legal fees.[271] A fee-on-a-fee is justified for time an attorney spends to recover a legal fee. But the Housing Court retains jurisdiction over attorney fees arising out of a proceeding held before it.[272] As a result, the Housing Court may, following an appeal, award attorney fees and disbursements incurred to handle a motion to vacate a judgment, to appeal, and to prosecute or defend appellate and postappellate motions.[273]

E. Appellate Costs

A prevailing party in the Appellate Term is entitled to costs on appeal,[274] although costs are modest and appellate courts have the discretion to award costs to the losing side.[275] As explained above, costs may also be awarded for frivolous litigation under 22 N.Y.C.R.R. 130.1-1(d).

XIII. Conclusion

Appeals to the Appellate Term, at least in the First Department, where appeals on the fully reproduced record are the norm, are tedious and complex. On the first go-around, the practitioner might spend as much time complying with the rules as preparing the legal issues on appeal. But that thicket of complexity is more illusory than real. Although the rules are stultifying and time-consuming to follow, they are easy to learn with a little practice. A practitioner who completes but one appeal will know most of the rules by heart. Then the practitioner can get down to the serious business of winning residential landlord-tenant appeals.

Endnotes

1. N.Y.C. Civ. Ct. Act § 1702(a) (McKinney 1989); N.Y. CPLR 5515(1), 5703(a) (McKinney 1995).
2. Sanford F. Young, *Appeals from Intermediate Courts Require Careful Adherence to Applicable Statutes and Rules*, 71 N.Y. St. B.J. 8, 14 (Mar. 1999).
3. N.Y. Const. art. VI, § 8 (McKinney 2006); N.Y.C. Civ. Ct. Act § 1701 (McKinney 1989).
4. Uniform City Ct. Act § 1701 (appeals from City Ct.); Uniform Just. Ct. Act § 1701 (appeals from Justice Ct.). County Court appellate practice and procedure is provided for in CPLR Art. 55. The rules governing appealability to County Court are similar to those in the Appellate Division. *See* N.Y. CPLR 5701 (McKinney 1995).
5. N.Y. CPLR 5703(b) (McKinney 1995).
6. 22 N.Y.C.R.R. 640.1 (2007).
7. *Id.* 730.1(a)(1), (f).
8. Oral argument will be heard in 2008 at 126 Stuyvesant Place on November 12.
9. N.Y. Const. art. VI, § 8(a) (McKinney 2006); 22 N.Y.C.R.R. tit 22, ch. I, § 1.1(f), 730.1(c)(2).
10. N.Y. Const. art. VI, § 8(c) (McKinney 2006).
11. N.Y. CPLR 5703(a) (McKinney).
12. *Id.*
13. 22 N.Y.C.R.R. 640.9(a)(1) (First Department), 731.11(a), 732.11(a) (Second Department) (2007).
14. N.Y. CPLR 5513(b), 5703(a), 5516 (McKinney 1989); 22 N.Y.C.R.R. tit. 22, ch. IV, §§ 640.9(b) 731.11, 732.11.
15. N.Y. CPLR 5601(b) (McKinney).
16. *Id.* 5601(a).
17. *Id.* 5602(5)(b).
18. *Id.* 5602(a).
19. *Id.* 5601(a).
20. For two brief and helpful articles on appellate jurisdiction, see Craig Peterson, *Appellate Jurisdiction and Scope of Review* 17 in New York Appellate Practice (unpublished article, N.Y. St. Bar Ass'n CLE 2007) [hereinafter "Appellate Jurisdiction"]; James E. Pelzer, *The Basics of Appellate Jurisdiction: The Concepts of Aggrievement, Appealability & Reviewability in New York Civil Appellate Practice* 29 in New York Appellate Practice (unpublished article, N.Y. St. Bar Ass'n CLE 2007).
21. *See, e.g.*, *In re Judicial Settlement of Account of Proceedings of McGinty*, 129 Misc. 2d 56, 59, 492 N.Y.S.2d 349, 352 (Surr. Ct. Queens Co. 1985).
22. N.Y.C. Civ. Ct. Act § 1702(a)(1)-(3) (McKinney 1989).
23. N.Y. CPLR 5501(a)(1) (McKinney 1995).
24. *Id.* 5501(d).
25. N.Y.C. Civ. Ct. Act § 1702(d) (McKinney 1989).
26. N.Y. CPLR 5501(c) (McKinney 1995). New York and the federal courts both use the "judicial notice" doctrine. New York also uses the federal appellate *de novo* standard to review questions of law and, for intermediate courts of appellate jurisdiction like the Appellate Term and the Appellate Division, the federal "clearly erroneous" appellate standard to review questions of fact. New York and federal appellate courts review discretionary determinations under the same abuse-of-discretion standard, but New York does not follow the federal "plain error" doctrine as part of a "harmless error" review. For the differences between the New York and federal appellate standards, see Gerald Lebovits, The Legal Writer, *Technique: A Legal Method to the Madness—Part I*, 75 N.Y. St. B.J. 64 (June 2003); Gerald Lebovits, The Legal Writer, *Technique: A Legal Method to the Madness—Part II*, 75 N.Y. St. B.J. 64 (July/Aug. 2003).
27. N.Y.C. Civ. Ct. Act § 1702(a)(1) (McKinney 1989).
28. N.Y. CPLR 5501(a)(2-4) (McKinney 1995).
29. *Id.* 5501(a).
30. David D. Siegel, New York Practice § 530, at 910 (4th ed. 2005).
31. N.Y.C. Civ. Ct. Act § 1702 (McKinney 1989); N.Y. CPLR 550 (McKinney 1995); *Nivens v. N.Y.C. Hous. Auth.*, 246 A.D.2d 520, 521, 667 N.Y.S.2d 415, 417 (2d Dep't 1998) (mem.), *lv. denied*, 92 N.Y.2d 805, 700 N.E.2d 319, 677 N.Y.S.2d 780 (1998); *Essex v. Newman*, 237 A.D.2d 486, 486, 655 N.Y.S.2d 595, 596 (2d Dep't 1997) (mem.).
32. N.Y. CPLR 5501(a)(1) (McKinney 1995); *Wolf v. Rand*, 258 A.D.2d 401, 404, 685 N.Y.S.2d 708, 711 (1st Dep't 1999) (mem.); *Charchan v. Wilkins*, 231 A.D.2d 668, 669, 647 N.Y.S.2d 550, 551 (2d Dep't 1996) (mem.); *McGraw v. Wack*, 220 A.D.2d 291, 292, 632 N.Y.S.2d 135, 136 (1st Dep't 1995) (mem.).
33. *In re Aho*, 39 N.Y.2d 241, 248, 347 N.E.2d 647, 651, 383 N.Y.S.2d 285, 289 (1976).
34. N.Y. CPLR 5519 (McKinney 1995).
35. *Id.* at 5501(a); *Smith v. Maya*, 27 H.C.R. 415B, 416-17, N.Y.L.J., July 23, 1999, at 30, col. 5 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.).

36. *Eighty-First Assocs. v. Morell*, 27 H.C.R. 350A, N.Y.L.J., June 23, 1999, at 26, col. 1 (App. Term 1st Dep't) *(per curiam)*.

37. *Rochdale Vil., Inc. v. Goode*, 16 Misc. 3d 49, 50, 842 N.Y.S.2d 142, 143 (App. Term 2d Dep't 2d & 11th Jud. Dists. June 14, 2007) (mem.).

38. N.Y. CPLR 5511 (McKinney 1995).

39. *E.g.*, *Advanced Distribution Sys., Inc., v. Frontier Warehousing, Inc.*, 27 A.D.3d 1151, 1152, 811 N.Y.S.2d 840, 841 (4th Dep't 2006) (mem.).

40. *In re Luckenbach's Will*, 303 NY 491, 104 N.E.2d 870, 303 N.Y. 491 (1952).

41. *Parochial Bus Sys., Inc. v. Bd. of Educ. of N.Y.C.*, 60 N.Y.2d 539, 544, 458 N.E.2d 1241, 1243, 470 N.Y.S.2d 564, 566 (1983).

42. *Pennsylvania General Ins. Co. v. Austin Powder Co.*, 68 N.Y.2d 465, 472-73, 502 N.E.2d 982, 986, 510 N.Y.S.2d 67, 71 (1986).

43. N.Y. CPLR 5512(a) (McKinney 1995).

44. *See* Appellate Jurisdiction, *supra* note 20, at 22-24.

45. *Johnson v. Hunte*, 8 Misc. 3d 133(A), 2005 N.Y. Slip Op. 51160(U), *1, 2005 W.L. 1713319, at *1 (App. Term 2d Dep't 2d & 11th Jud. Dists. July 21, 2005) (mem.); *Roberson v. Morris*, 22 H.C.R. 292C, N.Y.L.J., May 18, 1994, at 23, col. 3 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.).

46. *E.g.*, *130 W. 57 Co. v. Farley*, 27 H.C.R. 82A, N.Y.L.J., Feb. 16, 1999, at 29, col. 1 (App. Term 1st Dep't) (*per curiam*).

47. *E.g.*, *Merwest Realty Corp. v. Prager*, 264 A.D.2d 313, 313-14, 694 N.Y.S.2d 38, 39 (1st Dep't 1999) (mem.); *Knickerbocker Village v. Doe*, N.Y.L.J., Jan. 5, 1994, at 21, col. 2 (App. Term 1st Dep't) (*per curiam*).

48. N.Y. CPLR 5511 (McKinney 1995); *Abboud v. Abuhegazy*, 243 A.D.2d 519, 519, 663 N.Y.S.2d 96, 97 (2d Dep't 1997) (mem.); *In re Spedicato v. Div. Hous. Comm. Renewal*, 241 A.D.2d 343, 344, 660 N.Y.S.2d 970, 970 (1st Dep't 1997) (mem.); *Blackman v. Powell*, 19 H.C.R. 698B, N.Y.L.J., Dec. 3, 1991, at 30, col. 6 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.).

49. *Everett D. Jennings Apts. L.P. v. Hinds*, 12 Misc. 3d 139(A), 2006 N.Y. Slip Op. 51335(U), *1 2006 W.L. 1892280, at *1 (App. Term 2d Dep't 2d & 11th Jud. Dists. May 18, 2006) (mem.).

50. *Simon v. Whitfield*, 2008 N.Y. Slip Op. 50515(U), *1 (App. Term 2d Dep't 2d & 11th Jud. Dists. Mar. 7, 2008) (mem.) ("Since landlord failed to submit opposition to said cross motion, the order granting the relief requested was entered on default, and no appeal lies therefrom by the defaulting party.") (citing N.Y. CPLR 5511; *Coneys v. Johnson Controls, Inc.*, 11 A.D.3d 576, 577, 782 N.Y.S.2d 669, 670 (2d Dep't 2004)); *301 Oriental Blvd. LLC v. Rovner*, 5 Misc. 3d 134(A), 799 N.Y.S.2d 162, 2004 N.Y. Slip Op. 51480(U), *1 (App. Term 2d Dep't 2d &11th Jud. Dists. Nov. 30, 2004) (mem.). Under 22 N.Y.C.R.R. tit. 22, ch. II, § 208.11(b)(3), Housing Court may preclude oral argument from a landlord who does not submit papers opposing a tenant's motion. *4117 15th Ave. Realty Corp. v. Huredo*, 184 Misc. 2d 986, 987, 712 N.Y.S.2d 304, 305 (App. Term 2d Dep't 2d & 11th Jud. Dists. 2000) (mem.). But oral opposition is insufficient in any event; oral argument is not part of the appellate record and is of no evidentiary value because it is unsworn. *Fox v. T.B.S.D. Inc.*, 278 A.D.2d 612, 613-14, 719 N.Y.S.2d 150, 151 (3d Dep't 2000), *lv. denied*, 96 N.Y.2d 716, 754 N.E.2d 1114, 730 N.Y.S.2d 31 (2001). Thus, it is irrelevant for appellate purposes that Housing Court heard oral argument; it is an unappealable default nonetheless. *Brown v. Chase, 3* Misc. 3d 129(A), 787 N.Y.S.2d 676, 2004 N.Y. Slip Op. 50371(U), * 1, 2004 W.L. 1049221, at *1 (App. Term 2d Dep't 2d & 11th Jud. Dists. Apr. 29, 2004) (mem.) ("Failure to interpose written opposition to a motion renders the resulting order or judgment equivalent to an order or judgment entered upon consent or at least acquiescence, by which the appellant is not aggrieved, and decisions have likened such an appeal to one taken from an order or judgment entered on default, from which no appeal lies. This is true even when, as in this matter, the appealing party appears on the motion return date and orally opposes the motion. . . .") (citations omitted). For a discussion of this issue, see Jaya K. Madhavan, *Core Differences Between the First and Second Departments in Residential Landlord-Tenant Law* 2 (unpublished article, N.Y. St. Jud. Inst. MCJE 2007).

51. *Barasch v. Micucci*, 49 N.Y.2d 594, 599, 404 N.E.2d 1275, 1277, 427 N.Y.S.2d 732, 734 (1980); *Berlin v. New Hope Holiness Church of God, Inc.*, 93 A.D.2d 798, 798, 460 N.Y.S.2d 961, 962 (2d Dep't 1983) (mem.).

52. *Bd. of Mgrs. of Greentree at Murray Hill v. Golub*, 17 Misc. 3d 128(A), 2007 N.Y. Slip Op. 51910(U), *1, 2007 W.L. 2937118, at *1 (App. Term 1st Dep't Oct. 5, 2007) (*per curiam*) (citing N.Y. CPLR 5511).

53. *Id.* (citing *Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin, LLP v. Mazzella*, 262 A.D.2d 15, 690 N.Y.S.2d 561 (1st Dep't 1999) (mem.)).

54. N.Y. CPLR 5015 (McKinney 1995).

55. *Id.* 5501(a)(1).

56. *Campion v. Alter Coach Lines, Inc.*, 137 A.D.2d 647, 647, 524 N.Y.S.2d 738, 738 (2d Dep't 1988) (mem.); *Manhattan Mansions v. Gonclaves*, 2003 N.Y. Slip Op. 51445(U), *1, 2003 W.L. 22849767, at *1 (Hous. Part Civ. Ct. N.Y. County May 7, 2003) (Gerald Lebovits, J.).

57. *Deshler v. East West Renovators, Inc.*, 259 A.D.2d 351, 351, 687 N.Y.S.2d 65, 66 (1st Dep't 1999) (mem.); *Bossio v. Fiorillo*, 222 A.D.2d 476, 477, 635 N.Y.S.2d 59, 60 (2d Dep't 1995) (mem.); *N.Y.C. Prop. Mgmt. v. Santos*, 18 Misc. 3d 5, 6, ___ N.Y.S.2d ___ (App. Term 1st Dept 2007) (*per curiam*); *615 Co. v. Axelrod*, 24 H.C.R. 32A, N.Y.L.J., Jan.17, 1996, at 29, col. 2 (App. Term 1st Dep't) *(per curiam)*.

58. David D. Siegel, Practice Commentaries, N.Y. CPLR 5517, 2007 (McKinney 1995).

59. *Centennial Restorations Co. v. Wyatt*, 248 A.D.2d 193, 197–98, 669 N.Y.S.2d 585, 588 (1st Dep't 1998) (mem.); *cf.* N.Y. CPLR 2221, 5701(a)(2)(viii) (Appellate Division McKinney 1995).

60. *Roberts v. Narcissus Boutique, Ltd.*, 72 A.D.2d 808, 808, 421 N.Y.S.2d 917, 918 (2d Dep't 1979) (mem.).

61. *Venetucci v. Venetucci*, 151 A.D.2d 472, 472, 542 N.Y.S.2d 663, 663 (2d Dep't 1979) (mem.).

62. *W. 141 St. HDFC v. Jones*, 18 Misc. 3d 135(A), 2008 N.Y. Slip Op. 50183(U), *1, 2008 W.L. 269096, at *1 (App. Term 1st Dep't Jan. 31, 2008) (*per curiam*).

63. *Spedicato v. Div. Hous. Comm. Renewal*, 241 A.D.2d at 344, 660 N.Y.S.2d at 970; *Violante v. Berkowitz*, 90 A.D.2d 837, 837, 456 N.Y.S.2d 78, 79 (2d Dep't 1982) (mem.).

64. *McGraw v. Wack*, 220 A.D.2d at 292, 632 N.Y.S.2d at 136.

65. *Edwards v. Chavanes*, 15 Misc. 3d 139(A), 841 N.Y.S.2d 819, 2007 N.Y. Slip Op. 50993(U), *2, 2007 W.L. 1438704, at *2 (App. Term 2d Dep't 2d & 11th Jud. Dists. May 14, 2007) (mem.); *Paolini v. Thurston*, 25 H.C.R. 424A, N.Y.L.J., Aug. 7, 1997, at 25, col. 1 (App. Term 1st Dep't) *(per curiam)*.

66. *Kennedy Plaza, LLC v. Powell*, 11 Misc. 3d 132(A), 2006 N.Y. Slip Op. 50355(U), *2, 2006 W.L. 623696, at *3 (App. Term 2d Dep't 2d & 11th Jud. Dists. Mar. 9, 2006) (mem.).

67. *E.g.*, *Perez v. Perez*, 100 A.D.2d 962, 963, 474 N.Y.S.2d 989, 990 (2d Dep't 1984) (mem.).

68. *Lefkowitz v. Weis*, 261 A.D.2d 448, 448, 687 N.Y.S.2d 296, 296 (2d Dep't 1999); *Eighty-First Assocs.*, 25 H.C.R. 179A, N.Y.L.J., Mar. 27, 1997, at 27, col. 4.

69. *Fergusson v. Dumbacher*, 16 Misc. 3d 131(A), 2007 N.Y. Slip Op. 51430(U), *1, 2007 W.L. 2141615, at *1 (Appellate Term 1st Dep't July26, 2007) (*per curiam*).

70. *Lebron v. Hendrickson*, 10 Misc. 3d 133(A), 2005 N.Y. Slip Op. 52086(U), *1, 2005 W.L. 3488278, at *1 (App. Term 2d Dep't 9th & 10th Jud. Dists. Dec. 12, 2005) (mem.).

71. *341 E. 19th St. Realty v. Sylvester*, 8 Misc. 3d 138A, 2005 N.Y. Slip Op. 51311(U), *1, 2005 W.L. 1981546, at *1 (App. Term 2d

Dep't 2d & 11th Jud. Dists. Aug. 17, 2005) (mem.).

72. *Pandya v. Korolev*, 9 Misc. 3d 127(A), 2005 N.Y. Slip Op. 51469(U), *1, 2005 W.L. 2276670, at *1 (App. Term 2d Dep't 2d &11th Jud. Dists. Sept. 16, 2005) (mem.).

73. *Tower W. Assocs. v. Presley*, 13 Misc. 3d 133(A), 2006 N.Y. Slip Op. 51894(U), *1, 2006 W.L. 284422, at *1 (App. Term 1st Dep't Oct. 5, 2006) (*per curiam*).

74. *In re Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 715, 409 N.E.2d 876, 878, 431 N.Y.S.2d 400, 402 (1980).

75. *15th Assocs. v. Pamblanco*, 15 Misc. 3d 127(A), 2007 N.Y. Slip Op. 50546(U), 2007 W.L. 852508, at *1 (App. Term 1st Dep't Mar. 21, 2007) (*per curiam*).

76. *Park City LLC v. Benami*, 5 Misc. 3d 129(A), 2004 N.Y. Slip Op. 51266(U), *2, 2004 W.L. 2399139, at *2 (App. Term 2d Dep't 2d &11th Jud. Dists. Oct. 25, 2004) (mem.).

77. N.Y. CPLR 5512(a) (McKinney 1995); *Oppenheim & Co., P.C. v. Bernstein*, 198 A.D.2d 163, 164, 604 N.Y.S.2d 62, 63 (1st Dep't 1993) (mem.); *Schicchi v. J.A. Green Constr. Corp.*, 100 A.D.2d 509, 510, 472 N.Y.S.2d 718, 719 (2d Dep't 1984) (mem.); *Jessamy v. Waltonsteed*, 13 Misc. 3d 128 (A), 2006 N.Y. Slip Op. 51742 (U), *1 (App. Term 2d Dep't 9th & 10th Jud. Dists. Sept. 14, 2006) (mem.).

78. *In re Shulz v. Galgano*, 88 N.Y.2d 1015, 1015, 671 N.E.2d 1272, 1272, 648 N.Y.S.2d 875, 875 (1996) (mem.).

79. *Peron Restaurant, Inc. v. Young & Rubicam, Inc.*, 179 A.D.2d 469, 470, 578 N.Y.S.2d 194, 195 (1st Dep't 1992) (mem.).

80. N.Y. CPLR 2219(b), 5512(a); *In re Commitment of Juan Alejandro R. II*, 221 A.D.2d 183, 83, 633 N.Y.S.2d 159, 159 (1st Dep't 1995) (mem.); *Blaine v. Meyer*, 126 A.D.2d 508, 508, 510 N.Y.S.2d 628, 628 (2d Dep't 1987) (mem.).

81. *Wilson v. Schindler Haughton Elevator Corp.*, 118 A.D.2d 777, 777, 500 N.Y.S.2d 310, 310 (2d Dep't 1986) (mem.).

82. N.Y. CPLR 5512 (McKinney 1995); *225 Holding Co. v. Beal*, 12 Misc. 3d 136(A), 2006 N.Y. Slip Op. 51269(U), *3, 2006 W.L. 1843973, at *3 (App. Term 2d Dep't 9th & 10th Jud. Dists. June 28, 2006) (mem.).

83. *Martinez v. Jacobson*, 253 A.D.2d 521, 522, 677 N.Y.S.2d 161, 162 (2d Dep't 1998) (mem.) (noting that stipulations need not be "so ordered"), *lv. denied*, 93 N.Y.2d 818, 719 N.E.2d 927, 697 N.Y.S.2d 566 (1999).

84. *Zaccaro v. Freidenbergs*, 10 Misc. 3d 143(A), 2006 N.Y. Slip Op. 50096(U), *2, 2006 W.L. 211717, at *2 (App. Term 1st Dep't Jan. 27, 2006) (*per curiam*).

85. *Negron v. Goldman*, 4 Misc. 3d 140(A), 2004 N.Y. Slip Op. 50958(U), *2, 2004 W.L. 1944983, at *2 (App. Term 1st Dep't Aug. 20, 2004) (*per curiam*).

86. *1223 Bushwick, LLC v. Williams*, 2008 N.Y. Slip Op. 50512(U), *1, 2008 W.L. 711713 (App. Term 2d Dep't 2d & 11th Jud. Dists. Mar. 5, 2008) ("No appeal as of right lies from an order which decides a motion that was not made on notice . . . [a]lthough under appropriate circumstances leave to appeal may be granted.") (citing N.Y.C. Civ. Ct. Act § 1702(a)(2); CPLR 2211; N.Y.C. Civ. Ct. Act § 1702(c)); *Benben v. DiMartini*, 4 Misc. 3d 135(A), 2004 N.Y. Slip Op. 50778(U), *1, 2004 W.L. 1620872, at *1 (App. Term 2d Dep't 9th & 10th Jud. Dists. July 7, 2004) (mem.).

87. *HPS Holdings Co. v. AL & Assocs.*, 10 Misc. 3d 135(A), 2005 N.Y. Slip Op. 52103(U), *1, 2005 W.L. 3488430, at *1 (App. Term 2d Dep't 2d &11th Jud. Dists. Dec. 5, 2005) (mem.).

88. *See, e.g., Jacobs v. Rosenberg*, 20 H.C.R. 754A, N.Y.L.J., Dec. 21, 1992, at 23, col. 2 (App. Term 1st Dep't) (*per curiam*).

89. *See, e.g., Charles J. Hecht, P.C. v. Clowes*, 224 A.D.2d 312, 312, 638 N.Y.S.2d 42, 43 (1st Dep't 1996) (mem.); *D'Amico v. Allstate Ins. Co.*, 194 A.D.2d 761, 761, 599 N.Y.S.2d 296, 296 (2d Dep't 1993) (mem.). For the state appellate standard reviewing facts, see *Thorsen v. Penthouse Int'l*, 80 N.Y.2d 490, 495, 606 N.E.2d 1369, 1370, 591 N.Y.S.2d 976, 979 (1992).

90. *Eschbach v. Eschbach*, 56 N.Y.2d 167, 173, 436 N.E.2d 1260, 1264, 451 N.Y.S.2d 658, 662 (1982) (internal quotations omitted).

91. *Claridge Gardens, Inc. v. Menotti*, 160 A.D.2d 544, 545, 554 N.Y.S.2d 193, 194 (1st Dep't 1990) (mem.); *accord Minick v. Park*, 27 H.C.R. 103A, N.Y.L.J., Feb. 25, 1999, at 29, col. 2 (App. Term 1st Dep't) (*per curiam*).

92. *A Real Good Plumber, Inc. v. Kelleher*, 191 Misc. 2d 94, 96, 740 N.Y.S.2d 745, 747 (App. Term 2d Dep't 2d & 11th Jud. Dists. 2002) (mem.); *accord Nederpelt v. Ben Hur Moving & Stor.*, 18 Misc. 3d 138(A), 2008 N.Y. Slip Op. 50314(U), *1, 2008 W.L. 480036, at *1 (App. Term 1st Dep't Feb. 22, 2008) (*per curiam*).

93. *Northern Westchester Prof. Park Assocs. v. Town of Bedford*, 60 N.Y.2d 492, 499, 458 N.E.2d 809, 812, 470 N.Y.S.2d 350, 354 (1983).

94. *Alliance Prop. Mgmt. & Develop., Inc. v. Andrews Ave. Equities, Inc.*, 70 N.Y.2d 831, 833, 517 N.E.2d 1327, 1328, 523 N.Y.S.2d 441, 442 (1987) (mem.) (reviewing CPLR 5015 motion to vacate default).

95. *Bouton v. De Almo*, 12 Misc. 3d 132 (A), 2006 N.Y. Slip Op. 51166 (U), *1, 2006 W.L. 1747493, at *1 (App. Term 1st Dep't June 26, 2006) (*per curiam*).

96. *360 W. 55th St. L.T.v. Anvar*, 13 Misc. 3d 7, 9, 822 N.Y.S. 2d 353, 354 (App. Term 1st Dep't Aug. 3, 2006) (*per curiam*).

97. N.Y.C. Civ. Ct. Act § 1702(d).

98. *See, e.g., Blunt v. Northern Oneida County Landfill*, 145 A.D.2d 913, 913-14, 536 N.Y.S.2d 295, 296 (4th Dep't 1988) (mem.).

99. *E.g., Rentways, Inc. v. O'Neill Milk & Cream Co., Inc.*, 308 N.Y. 342, 349, 126 N.E.2d 271, 274 (1955); *Nelson v. Times Square Stores Corp.*, 110 A.D.2d 691, 691, 487 N.Y.S.2d 814, 815 (2d Dep't 1985) (mem.).

100. *Libeson v. Copy Realty Corp.*, 167 A.D.2d 376, 377, 561 N.Y.S.2d 604, 605 (2d Dep't 1990) (mem.); *accord Infante v. Bisnauthsing*, 16 Misc. 3d 127(A), 2007 N.Y. Slip Op. 51231(U), *1, 2007 W.L. 1774917, at *1 (App. Term 1st Dep't June 20, 2007) (*per curiam*).

101. *See, e.g., Notre Dame Leasing, L.L.C. v. Rosario*, ____H.C.R.____ N.Y.L.J., July 18, 2001, at 21, col. 2 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.) (quoting *Morris Plan Co. of New York v. Globe Indemnity Co.*, 253 N.Y. 496, 497, 171 N.E. 756, 756 (1930) (*per curiam*) ("Our duty does not require us to reject a contention sound in its ultimate conclusion because the path that we follow is different from the one marked out for us in the argument of counsel."), *reconsidering* 188 Misc. 2d 291, 727 N.Y.S.2d 271 (App. Term 2d Dep't 2d & 11th Jud. Dists. 2001) (mem.), *aff'd*, 308 A.D.2d 164, 761 N.Y.S.2d 292 (2d Dep't 2003), *aff'd*, 2 N.Y.3d 459, 812 N.E.2d 291, 779 N.Y.S.2d 801 (2004).

102. N.Y. CPLR 5520, 5514 (McKinney 1995).

103. *Green v. Crosby*, 11 Misc. 3d 132(A), 2006 N.Y. Slip Op. 50353(U), *1, 2006 W.L. 623678, at *1 (App. Term 2d Dep't 2d & 11th Jud. Dists. Mar. 9, 2006) (mem.).

104. N.Y. CPLR 5513(a) (McKinney 1989).

105. *Id.* 2103(b)(2); *Messner v. Messner*, 42 A.D.2d 889, 890, 347 N.Y.S.2d 589, 589 (1st Dep't 1973) (*per curiam*).

106. N.Y. CPLR 5513(d) (McKinney 1989).

107. *Id.* 5513, 5514, 5520; *Haverstraw Park, Inc. v. Runcible Properties Corp.*, 33 N.Y.2d 637, 637, 301 N.E.2d 553, 553, 347 N.Y.S.2d 585, 585 (1973) (mem.); *Reinfeld v. 325 W End Corp.*, 43 A.D.2d 671, 671, 350 N.Y.S.2d 140, 141 (1st Dep't 1973) (*per curiam*) (waiver).

108. *Cohen v. Grossman*, 185 A.D.2d 719, 720, N.Y.S.2d 893, 893 (4th Dep't 1992) (mem.); *Maddox v. New York,* 104 A.D.2d 430, 431, 478 N.Y.S.2d 923, 924 (2d Dep't 1984) (mem.); *Nagin v. Long Island Sav. Bank*, 94 A.D.2d 710, 710, 462 .N.Y.S.2d 69, 70 (2d Dep't 1983) (mem.).

109. *Dobess Realty Corp. v. City of N.Y.*, 79 A.D.2d 348, 350, 436 N.Y.S.2d 296, 299 (1st Dep't) (*per curiam*), *appeal dismissed*, 53 N.Y.2d 1054, 425 N.E.2d 888, 442 N.Y.S.2d 500 (1981).

110. N.Y. CPLR 1022 (McKinney 1997).

111. N.Y. CPLR 5514(a) (McKinney 1995).

112. *Id.* 5514(b).

113. *Id.* 5520(a).

114. 11 U.S.C. § 362.

115. N.Y. CPLR 2219(a) (McKinney 1991); *Corteguera v. City of N.Y.*, 179 A.D.2d 362, 363, 577 N.Y.S.2d 837, 838 (1st Dep't 1992) (mem.).

116. *Masters, Inc. v. White House Discounts, Inc.*, 119 A.D.2d 639, 640, 500 N.Y.S.2d 790, 791 (2d Dep't 1986) (mem.).

117. *WSC 72nd St. Owners L.L.C. v. Bondy*, 9 Misc. 3d 126(A), 806 N.Y.S.2d 449, 2005 N.Y. Slip Op. 51432(U), *2, 2005 W.L. 2216948, at *2 (App. Term 1st Dep't Sept. 9, 2005) *(per curiam)*.

118. N.Y. CPLR 5515(1) (McKinney 1995).

119. 22 N.Y.C.R.R. 731.1(a), 732.1(a).

120. N.Y. CPLR 2103 (McKinney 1997).

121. *Id.* at 2103(b)(2).

122. 22 N.Y.C.R.R. 600.17(a).

123. *Id.* at 670.3(a).

124. N.Y. CPLR 5515(1) (McKinney 1995).

125. *See, e.g.*, *Dingle v. Pergament Home Centers, Inc.*, 141 A.D.2d 798, 798, 530 N.Y.S.2d 25, 25 (2d Dep't 1988) (mem.).

126. *See City of Mt. Vernon v. Mt. Vernon Hous. Auth.*, 235 A.D.2d 516, 517, 652 N.Y.S.2d 771, 772 (2d Dep't 1997) (mem.) (prohibiting appellant from amending notice because appellant appealed from order that denied motion to amend complaint but not from order that granted dismissal against appellant).

127. N.Y. CPLR 5515 (McKinney 1995).

128. *See, e.g.*, *Stanley v. Hawkins*, 180 Misc. 2d 302, 302, 688 N.Y.S.2d 379, 379 (App. Term 1st Dep't 1999) *(per curiam)*.

129. *Brooklyn Props., LLC v. Shade*, N.Y.L.J., Feb. 11, 2003, at 23, col. 6 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.).

130. Robert W. Kanter, (Former Chief Clerk), App. Term, 1st Dept, Lecture before N.Y. County Law. Ass'n Civ. Ct. Prac. Sect., Feb. 13, 2003, minutes at 1.

131. Jeffrey R. Metz & Paul N. Gruber, Motion Practice in the Appellate Term 41 (unpublished article, N.Y. ST. B. ASS'N CLE 1994) [hereinafter "Motion Practice"].

132. *Sherman Nagle Realty Corp. v. Cruz*, 5 Misc. 3d 140(A), 799 N.Y.S.2d 164, 2004 N.Y. Slip Op. 51664(U), *1, 2004 W.L. 2963998, at *1 (App. Term 1st Dep't Dec. 20, 2004) (*per curiam*).

133. James Briscoe West, *Landlord-Tenant Appeals* 17 n.7 (unpublished article, N.Y. COUNTY LAW ASS'N. CLE 1999) [hereinafter "Landlord-Tenant Appeals"].

134. *Motion Practice*, *supra* note 131, at 47 (emphasis in original).

135. *Id.* at 48.

136. *Id.* at 47.

137. *Id.* at 48.

138. 22 N.Y.C.R.R. 640.8(c), 731.7, 732.7; *see generally* CPLR Art. 22 (motions).

139. *Brooklyn Props*., N.Y.L.J., Feb. 11, 2003, at 23, col. 6 (noting that landlord's counsel received tenant's papers only from marshal but answered on merits and thus waived jurisdictional defect).

140. *See* N.Y. CPLR Article 25 (undertakings).

141. N.Y. CPLR 5519(a)(6) (McKinney 1995).

142. *See* Eric A. Portugese, CLS Commentaries to CPLR 5519.

143. *See, e.g.*, *Horowitz v. Safeco Ins. Co. of Am*., 50 A.D.2d 1042, 1042, 377 N.Y.S.2d 750, 751 (3d Dep't 1975) (mem.); *In re Eleven Eleven Book Ctr., Inc. v. Ribaudo*, 86 Misc. 2d 17, 19-20, 381 N.Y.S.2d 643, 644-45 (Sup. Ct. N.Y. County 1976) (dismissing Article 78 petition to stay warrant and fix undertaking, but only because petitioner did not appeal judgment of eviction); *Oleck v. Pearlman*, 49 Misc. 2d 202 *passim*, 267 N.Y.S.2d 76 *passim* (Sup. Ct. Kings County 1966); *Mountbatten Equities v. Tabard Press Corp.*, 87 Misc. 2d 861, 864-65, 386 N.Y.S.2d 785, 788 (Civ. Ct. N.Y. County 1976), *modified on other grounds*, 88 Misc. 2d 831, 390 N.Y.S.2d 513 (App. Term 1st Dep't) (*per curiam*); *Moskowitz v. Rassbach*, N.Y.L.J., Apr. 2, 1997, at 29, col. 2 (Hous. Part Civ. Ct. N.Y. County). One court even found that automatic stays apply to landlords. *See Brown v. 99 Sutton LLC*, 2002 N.Y. Slip Op. 40223(U), *2, 2002 W.L. 1275171, at *2 (Hous. Part Civ. Ct. Kings County May 22, 2002) (setting undertaking for landlord that wanted to appeal ruling favoring tenant in illegal-lockout proceeding).

144. Andrew A. Scherer, Residential-Tenant Landlord Law in New York § 18:27, at 988 (2007–2008 ed.).

145. N.Y. CPLR 5519(a)(6) (McKinney 1995); *Pisano v. County of Nassau*, 41 Misc. 2d 844, 845-46, 246 N.Y.S.2d 733, 736 (Sup. Ct. Nassau County 1963), *aff'd,* 21 A.D.2d 754, 252 N.Y.S.2d 22 (2d Dep't) (mem.) *lv. denied*, 14 N.Y.2d 489, 202 N.E.2d 158, 253 N.Y.S.2d 1027 (1964).

146. *Landlord-Tenant Appeals*, *supra* note 133, at 16.

147. N.Y. CPLR 5519(c) (McKinney 1995); *Hunt v. Grinker*, 169 A.D.2d 477, 478, 564 N.Y.S.2d 350, 351 (1st Dep't 1991) (mem.).

148. Eric A. Portuguse, *CLS Commentaries to CPLR 5519*.

149. N.Y. CPLR 5519(e) (McKinney 1995).

150. New York Official Reports, *Decisions, available at* www.courts.state.ny.us/reporter/decisions.htm (last visited Mar. 14, 2008).

151. *See* 22 N.Y.C.R.R. 640.9(c) (providing for stay applications pending motion for reargument or leave to appeal before Appellate Term, First Department).

152. *Compare* CPLR 5519(e)(ii) *with* 5519(e)(i).

153. *Motion Practice*, *supra* note 131, at 70.

154. N.Y. CPLR 2221(a)(2) (McKinney 1995).

155. *Greenhaus v. Milano*, 242 A.D.2d 383, 384, 661 N.Y.S.2d 664, 665 (2d Dep't 1997) (mem.).

156. For a discussion of that option, see Gerald Lebovits, *Post-Eviction Motions to Restore*, 33 N.Y. Real Prop. L.J. 84 (Spring 2005) (updated and reprinted in two parts at 5 Landlord-Tenant Monthly 1 (June 2007) and 5 Landlord-Tenant Monthly 1 (July 2007)).

157. Scherer, *supra* note 144, at § 18:32, at 989–90 (Fern Fisher, View from the Bench).

158. *See Brooklyn Props., LLC v. Shade*, N.Y.L.J., Feb. 11, 2003, at 23, col. 6 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.); *accord Wilmaud Realty Corp. v. Burnett*,____H.C.R.____, N.Y.L.J., Aug. 22, 2003, at 21, col. 4 (App. Term 2d & 11th Jud. Dists.) (mem.).

159. *See generally Doe v. Axelrod*, 73 N.Y.2d 748, 750, 532 N.E.2d 1272, 1272, 536 N.Y.S.2d 44, 44 (1988) (*per curiam*).

160. *Thoda v. Arcoleo*, 179 A.D.2d 508, 509, 579 N.Y.S.2d 30, 31 (1st Dep't 1992) (mem.); *Creative Cabinet Corp. of Am., Inc. v. Future Visions Comp. Store*, 140 A.D.2d 483, 484, 528 N.Y.S.2d 596, 597 (2d Dep't 1988) (mem.).

161. N.Y. CPLR 5511 (McKinney 1995); *Parochial Bus Sys. Inc. v. Bd. of Educ. Of the City of N.Y.*, 60 N.Y.2d 539, 544-45, 458 N.E.2d 1241, 1243, 470 N.Y.S.2d 564, 566; *Arvic Realty Corp. v. RST* Assocs., *L.P.*, 9 Misc. 3d 137(A), 2005 N.Y. Slip Op. 51723(U), *1-2, 2005 W.L. 2764265, at *1-2 (App. Term 1st Dep't Oct. 25, 2005) (*per curiam*) ("[W]e have no occasion to address those portions of the final judgment as may be deemed to have been adverse to petitioner.").

162. N.Y. CPLR 5501 (McKinney 1995).

163. *See 87th St. Owners Corp. v. Olnick Org.*, 21 H.C.R. 8A, N.Y.L.J., Jan. 7, 1993, at 21, col. 2 (App. Term 1st Dep't) (*per curiam*) (holding that respondent may not get additional attorney fees from court below absent cross-appeal).

164. N.Y. CPLR 5513(c) (McKinney 1989).

165. *In re Sudarsky v. Div. Hous. Comm. Renewal*, 285 A.D.2d 704, 706, 685 N.Y.S.2d 704, 707 (1st Dep't 1999) (mem.).

166. *D'Onofrio Bros. Const. Corp. v. Bd. of Educ.*, 72 A.D.2d 760, 760, 421 N.Y.S.2d 377, 378 (2d Dep't 1979) (mem.).

167. *Cross Westchester Develop. Corp. v. Sleepy Hollow Motor Ct., Inc.*, 222 A.D.2d 644, 644-45, 636 N.Y.S.2d 372, 373 (2d Dep't 1995) (mem.), *lv. denied*, 88 N.Y.2d 802, 667 N.E.2d 338, 644 N.Y.S.2d 688 (1996).

168. N.Y.L.J., Mar. 7, 2003, at 20, col. 3 (App. Term 2d Dep't 9th & 10th Jud. Dists.) (mem.).

169. N.Y.L.J., Apr. 16, 2001, at 34, col. 2 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.).

170. *Hegeman Asset L.L.C. v. Smith*, 5 Misc. 3d 8, 11, 783 N.Y.S.2d 192, 195 (App. Term 2d Dep't 2d & 11th Jud. Dists. 2004) (mem.).

171. *Id*. at 13, 783 N.Y.S.2d at 196.

172. N.Y. CPLR 5521(a) (McKinney 1995).

173. 22 N.Y.C.R.R. 731.5, 732.5.

174. *Id.* 640.2(a).

175. *See id*. 640.2(c).

176. *Id*. 731.1(a), 732.1(a).

177. *Id*. 731.1(c), 732.1(c).

178. N.Y.C. Civ. Ct. Act § 1704.

179. *Id.*

180. 22 N.Y.C.R.R. 640.6(a)(1).

181. N.Y. 1st Dep't R. 600.11(a)(3).

182. *Zetlin v. Hanson Holdings, Inc.*, 63 A.D.2d 878, 878, 405 N.Y.S.2d 472, 473 (1st Dep't 1978) (mem.).

183. *Tonkonogy v. Jaffin*, 21 A.D.2d 264, 249 N.Y.S.2d 934 (1st Dep't 1964) (*per curiam*).

184. *Manhattan Mansions*, 2003 N.Y. Slip Op. 51445(U), *1 (quoting *Zetlin*, 63 A.D.2d at 878, 405 N.Y.S.2d at 473).

185. *Cetnar v. Kinowski*, 245 A.D.2d 974, 975, 667 N.Y.S.2d 107, 109 (3d Dep't 1997).

186. 22 N.Y.C.R.R. 731.1(a), 732.1(a).

187. *Nederpelt*, 18 Misc. 3d 138(A), 2008 N.Y. Slip Op. 50314(U), *1, 2008 W.L. 480036, at *1.

188. *See generally Joseph v. Trust*, 7 Misc. 3d 75, 795 N.Y.S. 2d 813 (App. Term 1st Dep't 2005) (*per curiam*).

189. *Driscoll v. AV Polo Run Assocs*., 17 Misc. 3d 128 (A), 851 N.Y.S.2d 63, 2007 N.Y. Slip Op. 51932(U), *1, 2007 W.L. 2962738, at *1 (App. Term 1st Dep't Oct. 11, 2007) *(per curiam*).

190. *Joseph*, 7 Misc. 3d at 77, 795 N.Y.S.2d at 814.

191. N.Y. CPLR 5526 (McKinney 1995).

192. N.Y.C. Civ. Ct. Act § 1704(b).

193. *Ayton v. Bean*, 29 A.D.2d 577, 578, 459 N.Y.S.2d 460, 461 (2d Dep't), *appeal dismissed*, 60 N.Y.2d 770, 457 N.E.2d 804, 469 N.Y.S.2d 697 (1983).

194. N.Y.C. Civ. Ct. Act § 1704(a).

195. *Id.* § 1703.

196. *See id*.

197. *Id*.

198. N.Y. CPLR5526 (McKinney 1995).

199. *Id.*

200. N.Y. CPLR 5531 (McKinney 1995).

201. 22 N.Y.C.R.R. 731.2(b), 732.2(b).

202. N.Y. CPLR 5528(a)(5), 5529 (McKinney 1995).

203. 22 N.Y.C.R.R. 640.2(a).

204. *Id*. 731.1(a), 732.1(a).

205. *Becker v. City of N.Y.*, 249 A.D.2d 96, 97, 671 N.Y.S.2d 88, 90 (1st Dep't 1998) (mem.).

206. *See Mount Lucas Assocs., Inc. v. MG Ref. & Mktg., Inc.*, 699 N.Y.S.2d 666, 666 (1st Dep't 1998) (mem.); *Bennett Excavators Corp. v. Lasker-Goldman Corp.*, 11 A.D.2d 734, 734, 204 N.Y.S.2d 706, 707 (2d Dep't 1960) (mem.).

207. *2001 Real Estate v. Campeau Corp. (U.S.), Inc.*, 148 A.D.2d 315, 316, 538 N.Y.S.2d 531, 531-32 (1st Dep't 1989) (mem.).

208. *O'Connor v. Papertsian*, 309 N.Y. 465, 469, 131 N.E.2d 883, 885 (1956).

209. *In re Hayes' Will*, 263 N.Y. 219, 221,188 N.E. 716, 717 (1934).

210. N.Y. CPLR 5526 (McKinney 1995); *Mount Lucas Assocs., Inc. v. MG Ref. & Mktg., Inc.*, 250 A.D.2d 245, 254, 682 N.Y.S.2d 14, 21 (1st Dep't 1998).

211. *See Levy v. Carol Mgmt. Corp.*, 206 A.D.2d 27 *passim*, 698 N.Y.S.2d 226 *passim* (1st Dep't 1999) (*per curiam*).

212. *Schenck v. Hill, Lent & Troescher*, 130 A.D.2d 734, 735, 516 N.Y.S.2d 37, 38 (2d Dep't 1987) (mem.).

213. *Brandes Meat Corp. v. Cromer*, 146 A.D.2d 666, 667, 537 N.Y.S.2d 177, 178 (2d Dep't 1989) (mem.). Named after Supreme Court Justice Louis D. Brandeis, a "Brandeis brief" contains legal argument along with reliable economic and social surveys and studies not presented in first instance.

214. *Mount Lucas Assocs.*, 250 A.D.2d at 254, 682 N.Y.S.2d at 21.

215. *E.g.*, *Buley v. Beacon Tex-Print, Ltd.*, 118 A.D.2d 630, 631, 499 N.Y.S.2d 782, 784 (2d Dep't 1986) (mem.).

216. *E.g.*, *Fresh Pond Rd. Assocs. v. Estate of Schacht*, 120 A.D.2d 561, 561, 502 N.Y.S.2d 55, 56 (2d Dep't 1986) (mem.), *lv. denied*, 68 N.Y.2d 802, 498 N.E.2d 429, 506 N.Y.S.2d 865 (1986); *Buckingham v. Donarry Realty Corp.*, 25 A.D.2d 722, 723, 268 N.Y.S.2d 775, 777 (1st Dep't 1966) (*per curiam*).

217. *See VDR Realty Corp. v. Mintz*, 167 A.D.2d 986, 987, 562 N.Y.S.2d 7, 8 (4th Dep't 1991) (mem.).

218. *Minichiello v. Supper Club*, 251 A.D.2d 182, 183, 674 N.Y.S.2d 369, 371 (1st Dep't 1998) (mem.).

219. 22 N.Y.C.R.R. 640.5(d).

220. *See id*. 731.1(a), 732.1(a).

221. *See id*. 640.5(e).

222. N.Y.C. Civ. Ct. Act § 1703.

223. N.Y. CPLR 5528(c) (McKinney 1995).

224. *Id*. 5528(b).

225. *See id*. 5529(e). For a discussion of the Official Reports, see Gerald Lebovits, *A Review: The Third Series*, 77 N.Y. St. B.J. 30 (Mar./Apr. 2005).

226. *See* Gerald Lebovits, *New Edition of State's "Tanbook" Implements Extensive Revisions in Quest for Greater Clarity*, 74 N.Y. St. B.J. 8 (Mar./Apr. 2002); Gerald Lebovits, The Legal Writer, *Tanbook, Bluebook, and ALWD Citations: A 2007 Update*, 79 N.Y. St. B.J. 52 (Oct. 2007); Gerald Lebovits, The Legal Writer, *Write the Cites Right—Part I*, 76 N.Y. St. B.J. 64 (Oct. 2004); Gerald Lebovits, The Legal Writer, *Write the Cites Right—Part II*, 76 N.Y. St. B.J.64 (Nov./Dec. 2004).

227. 22 N.Y.C.R.R. 640.5(c).

228. *See* Editor's Note, 1 Finkelstein & Ferrara's Landlord-Tenant Prac. Rep. 8 (Feb. 2000) ("You can't always rely on the official reporters or those expensive on-line research services to tell you whether a particular lower court case has been affirmed or reversed on appeal.").

229. For an article about conducting online landlord-tenant legal research, see Gerald Lebovits & Daniel J. Curtin, Jr., Legal Research, *Riding the Landlord-Tenant Super-Highway*, 2 Finkelstein & Ferrara's Landlord-Tenant Prac. Rep. 1 (Sept. 2001).

230. For the differences between "*per curiam*" and "memorandum" opinions, and for explanations of appellate concepts like concurrences and dissents, see Gerald Lebovits, The Legal Writer, *Technique: A Legal Method to the Madness—Part I*, 75 N.Y. St. B.J. 64 (June 2003); Gerald Lebovits, The Legal Writer, *Technique: A Legal Method to the Madness—Part II*, 75 N.Y. St. B.J. 64 (July/Aug. 2003).

231. For an explanation why invective is not merely unprofessional and uncivil but also unsuccessful, flawed advocacy, see Gerald Lebovits, *Professionalism in the Legal Profession*, 5 Richmond County B. Ass'n J. 8 (Summer 2006).

232. *Rector, Church Wardens & Vestrymen of Trinity Church in City of N.Y. v. Video Editions, Inc.*, 4 Misc. 3d 43, 44, 780 N.Y.S. 2d 837, 838 (App. Term 1st Dep't 2004) (*per curiam*).

233. 22 N.Y.C.R.R. 640.5(d).

234. *See Slater v. Gallman*, 38 N.Y.2d 1, 4-5, 339 N.E.2d 863, 864-65, 377 N.Y.S.2d 448, 450-51 (1975).

235. For more advice on how to write briefs in landlord-tenant cases, see Gerald Lebovits, *What Readers of Legal Briefs Hate: The Top 30 Sins*, 1 Finkelstein & Ferrara's Landlord-Tenant Prac. Rep. 12 (Aug. 2000), and Gerald Lebovits, *What Readers of Legal Writing Like: The Top 29 Selections*,

2 Finkelstein & Ferrara's Landlord-Tenant Prac. Rep. 5 (July 2001).

236. For some articles on ethical writing, see Gerald Lebovits, The Legal Writer, *Legal-Writing Ethics—Part I*, 77 N.Y. St. B.J. 64 (Oct. 2005); Gerald Lebovits, The Legal Writer, *Legal-Writing Ethics—Part II*, 77 N.Y. St. B.J. 64 (Nov./Dec. 2005); JoAnn M. Wahl, *Ethics in Appellate Practice* 631 *in* New York Appellate Practice (unpublished article, N.Y. St. Bar Ass'n CLE 2007); David O. Boehm, *Ethical Considerations for Appellate Counsel* 639 *in* New York Appellate Practice (unpublished article, N.Y. St. Bar Ass'n CLE 2007); Robin M. Heaney, *Brief Writing and Oral Argument, Including Ethics Considerations for Appellate Counsel* 765 *in* New York Appellate Practice (unpublished article, N.Y. St. Bar Ass'n CLE 2007).

237. 22 N.Y.C.R.R. 731.4(b), 732.4(b).

238. *Id.*

239. *Id.* 640.6(a)(3)(iii), 731.8(a) 732.8(a).

240. *Id.* 640.6(a)(3)(1).

241. *Id.* 640.6(a)(3)(ii).

242. *Id.* 731.8(c), 732.8(c).

243. *Id.* 640.6(2).

244. *Id.* 640(a)(3)(ii).

245. *Id.* 640.6(a)(3)(ii).

246. *Id.* 640.6(a)(3)(iii), 731.8(a), 732.8(a).

247. *2246 Holding Corp. v. Nolasco*, 15 Misc. 3d 142(A), 841 N.Y.S.2d 824, 2007 N.Y. Slip Op. 51099(U), *1, 2007 W.L. 1558619, at *1 (App. Term 1st Dep't May 30, 2007) (*per curiam*).

248. 22 N.Y.C.R.R. 731.4(c), 732.4(c).

249. *Id.*

250. *Id.*

251. *See Rubeo v. Nat'l Grange Mutual Ins. Co.*, 93 N.Y.2d 750, 720 N.E.2d 86, 697 N.Y.S.2d 866 (1999).

252. *Id.* at 755, 720 N.E.2d at 88, 697 N.Y.S.2d at 868.

253. *Cf. N.Y.C. Hous. Auth. v. Quinones*, 23 H.C.R. 58B, N.Y.L.J., Jan. 31, 1995, at 25, col. 4 (App. Term 1st Dep't) (*per curiam*) (declining to consider in second appeal issues dismissed in first appeal for failure to prosecute).

254. 22 N.Y.C.R.R. 731.2(a)(2), 732.2(a)(2).

255. *Compare id.* 640.5(a) *with id.* 640.7(c).

256. *Id.* 640.7(b).

257. *Id.* 731.4(d), 732.4(d).

258. Kanter, *supra* note 130, at minutes at 3.

259. 22 N.Y.C.R.R. 640.8(d), 731.6(a), 732.6(a).

260. *Id.* 130-1.1(c)(1-3).

261. *Id.* 130-1.1(d).

262. *Id.*

263. *A.D. 1619 Co. v. VB Mgmt., Inc.*, 259 A.D.2d 382, 382, 687 N.Y.S.2d 127, 128 (1st Dep't 1999) (mem.), *appeal dismissed*, 93 N.Y.2d 1030, 719 N.E.2d 912, 697 N.Y.S.2d 552 (1999).

264. *A.D. 1619 Co. v. VB Mgmt., Inc.*, 175 Misc. 2d 1021, 1022, 672 N.Y.S.2d 985, 986 (App. Term 1st Dep't 1998) (*per curiam*).

265. *Id.*, 672 N.Y.S.2d at 986.

266. *Id.*, 672 N.Y.S.2d at 986.

267. 259 A.D.2d at 382, 687 N.Y.S.2d at 128.

268. *See Solow v. Wellner*, 86 N.Y.2d 582, 589, 658 N.E.2d 1005, 1008, 635 N.Y.S.2d 132, 135 (1995).

269. *See* Laurie L. Lau, *A Further Consideration of Attorneys' Fees in the Housing Court From One Judge's Perspective* 15 (2007) (unpublished article, N.Y. St. Bar Ass'n Cttee. on Landlord-Tenant Proceedings CLE) ("[A] tenant may request attorney's fees at any time. . . .") (citing *Frank v. Park Summit Realty Corp.*, N.Y.L.J., Oct. 4, 1989, at 22, col. 2 (Sup. Ct. NY County), *aff'd & modified on other grounds*, 175 A.D.2d 33, 573 N.Y.S.2d 655 (1st Dep't 1991) (mem.), *aff'd & modified*, 79 N.Y.2d 789, 587 N.E.2d 287, 579 N.Y.S.2d 649 (1991) (mem.).

270. *See, e.g.*, *Duell v. Condon*, 200 A.D.2d 549, 549-50, 606 N.Y.S.2d 690, 691 (1st Dep't 1994) (mem.), *aff'd*, 84 N.Y.2d 773, 647 N.E.2d 96, 622 N.Y.S.2d 891 (1995); *390 W. End Assocs. v. Steppacher*, 23 H.C.R. 191A, N.Y.L.J., Apr. 12, 1995, at 25, col. 3 (App. Term 1st Dep't) (*per curiam*).

271. *E.g.*, *Kumble v. Windsor Plaza Co.*, 161 A.D.2d 259, 260, 555 N.Y.S.2d 290, 291 (1st Dep't) (mem.), *appeal dismissed*, 76 N.Y.2d 843, 559 N.E.2d 1285, 560 N.Y.S.2d 126 (1990); *Perkins v. Town of Huntington*, 117 A.D.2d 726, 726-27, 498 N.Y.S.2d 451, 453 (2d Dep't 1986) (mem.).

272. *Masbel Realty Corp. v. Birnbaum*, 26 H.C.R. 360A, N.Y.L.J., June 16, 1998 (App. Term 1st Dep't) (*per curiam*).

273. *See Duell*, 84 N.Y.2d at 784 n.2, 647 N.E.2d at 101 n.2, 622 N.Y.S.2d at 896 n.2.

274. N.Y. CPLR 8107, 8203 (in fine) (McKinney 1981).

275. *See Camarella v. E. Irondequoit Cent. Sch. Bd.*, 34 N.Y.2d 139, 141–42, 313 N.E.2d 29, 29, 356 N.Y.S.2d 553, 554 (1974) (mem.).

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Contract of Sale for Office, Commercial and Multi-Family Residential Premises—A Commentary

Use of Printed Forms

Printed forms are commonly used in real estate transactions. When properly handled, they can significantly speed up drafting and negotiation by providing a familiar framework and standardized language. We should not have to "reinvent the wheel" for every transaction. The Committee on Real Property Law of the Association of the Bar of the City of New York has prepared the form Contract of Sale for Office, Commercial and Multi-Family Residential Premises in the hopes of providing a standardized framework for sales of commercial buildings and multi-family residential properties.

General Description

The 2007 form of Contract of Sale is an updated version of the form contract previously drafted by the Committee on Real Property Law and published by Blumberg & Co. as Form 154. The updated form attempts to provide comprehensive coverage of the bulk of the provisions common to most sales of commercial real estate, including office, commercial, and multi-family residential buildings. The form should help prevent omissions and allow concentration on the unique aspects of the transaction. However, it will have to be modified to fit the individual transaction. The parties may, of course, add a rider modifying the printed form.

It is customary in New York for the seller's attorney to prepare the contract of sale. The committee strove for a balance between the interests of the seller and the purchaser that would require the seller to be reasonably forthcoming but not go so far as to discourage use of the form by sellers' attorneys.

The basic elements of the transaction are covered in the form. The seller is required to make various representations concerning the status of tenancies and other matters, and the seller's obligations between contract signing and closing are spelled out. The representations are not exhaustive, but in a seller's market the seller may want to curtail its representations. In a buyer's market, the buyer may negotiate for an expanded list of representations. A detailed list of closing obligations is included, which should serve as a checklist for both attorneys.

The comprehensiveness of the coverage should be a help to purchasers' attorneys who lack extensive experience in these transactions. The organization of the material allows for easy modification and cross-referencing.

Special Features

To simplify use of the contract as a printed form, most of the substantive information is set out in the contract schedules. For example, the purchase price is detailed in Schedule C, and variable information is, for the most part, inserted in Schedule D (such as the name of the purchaser's title company, the date and place of the closing, the name of the broker, the maximum amount that the seller must spend to cure violations, and the seller's maximum expense to cure title defects).

Major Changes in Form

The 2007 form effected a number of changes in the contract including the following:

1. Addition of language clearly providing for the assignment of the seller's mortgage to the purchaser's bank. Section 2.04.
2. Modification of description of any purchase money mortgage to include non-recourse carve-outs. Section 2.05(c).
3. Modification of escrow provision to (a) identify the location of the bank in which the escrow deposit will be held, and (b) exculpate the escrow agent from liability for loss of the contract deposit caused by the insolvency of the bank in which the escrow deposit is held. Section 2.06.
4. Expansion of the representations concerning leases to cover occupancies. Section 4.03.
5. Addition of language requiring compliance with the New York City Displaced Service Workers Act, and expansion of representations concerning union affiliation. Section 4.07.
6. Addition of purchaser's due diligence period. Section 17.
7. Modified provisions relating to survival of Seller's representations, including provision for a minimum threshold of liability and a cap on liability. Section 4.25.
8. Modified purchase money mortgage provisions.
9. Addition of definition of "institutional lender." Section 18.10.
10. Modification of the casualty clause. Section 8.
11. Modification of some of the existing representations, and addition of new representations. Section 4.
12. Addition of Patriot Act certifications. Section 4.21 and 5.02.

A more detailed description of the specific contract provisions is set out below.

Section 1. Sale of Premises and Acceptable Title

Section 1 contains the basic sentence that "Seller shall sell and Purchaser shall purchase." The premises are described in some detail, all in one place. The description of the premises has been expanded in the new form. Title is to be fee simple, subject only to listed permitted exceptions and matters insured against by the purchaser's title insurance company.

Sections 2.01 and 2.02. Purchase Price and Acceptable Funds

Section 2.01 refers to Schedule C for the total purchase price. Schedule C breaks down the purchase price into its component parts, consisting of the down payment, the closing checks (or wire transfer), the portion of the purchase price attributable to any Existing Mortgages and the portion of the purchase price paid through execution and delivery of a purchase money note and mortgage. Section 2.02 describes the criteria for acceptable checks. Certified or official bank checks are required, except that seller may, at its election, require the closing funds to be paid by wire transfer. The form contract does not permit the balance of the purchase price to be paid with an attorney escrow check that is not a certified check or an official bank check. Seller's counsel should be aware that (a) many banks today refuse to issue certified checks, although they will issue official bank checks, and (b) certified checks are not entirely secure in that a bank that has issued a certified check will honor a stop payment order issued by the purchaser. Personal checks are permitted up to the amount of $2,500, in order to facilitate payment of apportionments calculated at or just prior to the closing.

Section 2.03. Existing Mortgages

Section 2.03 provides that if the purchase price is to be paid in part by taking title subject to Existing Mortgages, and if required principal payments are made between the contract signing and the closing, the amounts allocated to the Existing Mortgage and the cash portion of the purchase price shall be appropriately adjusted at closing to reflect payments of principal. The wording is intended to ensure that the full purchase price is paid, notwithstanding any reduction in the principal amount of the Existing Mortgage during the contract period.

The term "Existing Mortgage" is intended to encompass only those mortgages specifically designated as Existing Mortgages on Schedule C.

The seller and the purchaser must furnish information and cooperate to obtain any required consent to purchaser's acquisition of the property subject to an existing mortgage, but neither is required to make any payment to obtain such consent. The purchaser is not required to accept changes in the terms of the Existing Mortgages.

Section 2.04. Assignment of Seller's Mortgage

Even if the purchaser is not paying a portion of the purchase price by taking the property subject to an Existing Mortgage, the purchaser will usually want the seller to arrange to have its mortgage assigned to the purchaser's lender, in order to save mortgage tax to the extent of the principal amount of the seller's mortgage. Since the purchaser benefits from the assignment, the purchaser must pay all costs. The seller's attorney may want to consider negotiating a split of the mortgage tax savings, in which event the form must be modified.

Section 2.05 Purchase Money Mortgage

Section 2.05(a) refers the parties to Schedule K for the form of purchase money mortgage and note. The contract form thus requires the parties to fully negotiate the forms of the purchase money loan documents prior to execution of the contract. The City Bar's website includes sample purchase money mortgage and note forms drafted by the Committee on Real Property Law of the New York City Bar.

Section 2.05(b) provides that the purchase money mortgage shall be subordinate to the Existing Mortgage (as it may be extended, modified, consolidated or replaced), provided that (i) the interest rate of the Existing Mortgage is not increased over an agreed amount and (ii) if the principal amount of the Existing Mortgage is increased, the increase will be used to reduce the principal due on the purchase money mortgage. If the purchaser is not taking title subject to an Existing Mortgage, but is both borrowing money from a lender and giving the seller a purchase money mortgage (an unlikely event), Section 2.05(b) will have to be modified to provide for the subordination of the Purchase Money Mortgage to the purchaser's new mortgage.

Section 2.05(c) sets out certain provisions to be included in the Purchase Money Mortgage. Since the form of the Purchase Money Mortgage is to be attached to the contract (Section 2.05(a)), Section 2.05(c) is not an essential provision. It was included in the form contract largely to serve as a partial checklist of issues that should be dealt with in the Purchase Money Mortgage. The drafter should be sure that the provisions included in Section 2.05(c) conform to the provisions of the form mortgage attached to the contract, or should delete Section 2.05(c) entirely. The provisions highlighted in Section 2.05(c) include the following:

a. The mortgagor has the right to prepay without penalty at any time after the end of the fiscal year of the mortgagee in which the closing occurs (or a specified prepayment date), thus preserving to the seller the benefits of an installment sale over at least two years. If prepayment is to be

prohibited for a longer period, or is not to be prohibited at all, the appropriate insert should be made in Schedule D.

b. The mortgagor is not personally liable on the purchase money note, and recourse for nonpayment is limited to the mortgaged property; except for certain customarily accepted carveouts. If the purchase money mortgage is intended to be recourse, subsection (c)(ii) should be deleted.

c. Subsection (c)(iii) is intended to effect compliance with Real Property Law § 274-a, which requires non-institutional lenders to provide estoppel certificates upon the borrower's request.

Additional provisions should be set forth in a rider or in the attached mortgage form. Possible additions might include: (i) a provision that a default or commencement of a foreclosure proceeding under a prior mortgage would be a default under the purchase money mortgage; (ii) a right of the mortgagee to cure defaults under prior mortgages and add the cost to the amount secured by the purchase money mortgage (subject to review of mortgage tax consequences with the title company); (iii) a prohibition of additional mortgages without consent of the purchase money mortgagee; (iv) a requirement of monthly escrow deposits for real property taxes and insurance premiums to the extent such payments are not required by any first mortgage; (v) imposition of an agreed charge for late payments, and (vi) a due on sale/transfer clause.

Section 2.06. Escrow of Down Payment

The escrow agent (called the "Escrowee" in the contract) is usually the seller's attorney. The duties of the escrow agent are set forth in some detail. The down payment is required to be deposited in an interest-bearing account, and the interest follows the down payment. If title closes, the interest is paid to the seller and is not credited against the purchase price. If the closing does not occur, the escrowee is authorized to disburse the escrowed funds upon demand of one party if the other party does not object within ten (10) business days after notice. The liability of the escrowee is limited to bad faith, willful disregard of the contract or gross negligence, and a provision has been added expressly exculpating the escrow agent from liability for lost interest if the down payment is withdrawn prior to the date interest is posted or for loss caused by the bankruptcy of the depository bank. The escrowee is indemnified by the parties. The escrowee acknowledges its agreement to Section 2.06 by signing the contract on the signature page.

Section 3. The Closing

The scheduled date, time and place of the closing are to be inserted in Schedule D.

Section 4. Representations and Warranties of Seller

Section 4 contains the representations and warranties of the seller. Section 4.01 confirms the purchaser's normal expectation that the seller is the sole owner of the premises and therefore the proper party with whom to contract. If this is not the case, the seller must say so. Section 4.01 has been expanded to include representations that the *seller* has not granted any purchase option, right of first refusal or right of first offer. The purchaser might seek to negotiate a broader representation that the seller has no knowledge of any such right, but the committee felt that the seller's representation on this front should be limited to the seller's acts.

Section 4.02 states that no notice of default has been received concerning the Existing Mortgages and that the seller has delivered a true copy of the Existing Mortgages to the purchaser. It does not contain a representation that the Existing Mortgages will not be due on sale, since the documents should speak for themselves.

If the purchaser is buying a tenanted property in reliance on the cash flow to be generated by the existing tenants, or on projected cash flow to be generated by new tenants upon the reletting of space subject to expiring leases, Section 4.03 is the heart of the contract. Section 4.03 includes disclosure as to leases, licenses, and written occupancy agreements affecting the premises, which are collectively defined as the "Leases." The seller represents that the rent schedule information (see discussion under "Schedules") is accurate and there are no Leases other than those listed on the rent schedule. The seller additionally represents that, except as shown in the rent schedule: the leases are (a) in effect and have not been amended; (b) there are no renewal rights, extension options, or expansion options; (c) no tenant has an option to buy; (d) the rents are current and there are no arrearages in excess of one month; (e) no tenant is entitled to a rent concession or abatement for any period following the closing; (f) the seller has sent no notices of default (which default remains uncured); (g) no action against the seller by any tenant is presently pending (except with respect to claims covered by insurance); and (h) there are no security deposits other than those set forth in the rent schedule. The 2007 form adds the following new representations: that (a) true copies of the leases have been delivered to purchaser (if seller has concern about the completeness of seller's files or has lost signed copies, seller may want to modify this representation to a "substantial" compliance standard); (b) the tenants are in actual possession (this representation is not normally requested or given for multi-family residential premises); (c) to seller's actual knowledge, seller has performed its obligations under the leases and there is no notice of default outstanding;

(d) to seller's actual knowledge, there is no bankruptcy proceeding pending against any tenant, and (e) no leasing commissions are due or owing with respect to any of the leases. As to the last representation, because commissions may be paid in installments that may extend to the post-closing period and because commissions may become due with respect to future lease renewals, buyer may want to expand this representation to cover commissions that will become payable in the future. On the other hand, because the purchaser generally has no liability under the common law of New York State for future commissions (as of 2007), the seller may object to including such a representation. Both parties, however, should consider the possibility that commissions will become payable after the closing date.

If there are a great many tenants or if there is a seller's market, the seller may be unwilling to make such precise representations, particularly with respect to commercial leases. For example, the seller may refuse to make any representations at all concerning the leases, requiring the buyer to rely on its own review of the lease files and on estoppel certificates obtained from tenants; or it may insist on qualifying its representations.

For commercial buildings, purchasers should consider negotiating for representations by seller that it has performed all "landlord's work" required to be performed under the Leases and has paid all construction allowances owed tenants. If the seller will not make such representations, such issues can be covered through the estoppel certificates. Possible purchaser additions to the list of seller lease representations are numerous, especially in a purchaser's market.

Because the parties initial the leases, the seller is relieved of the consequences of a misrepresentation if the initialed lease provides information contrary to the seller's contract representation.

Sections 4.04 and 4.05 concern rent stabilization and rent control and are applicable only to New York City properties.

Sections 4.06, 4.07 and 4.08 provide for attachment of schedules listing insurance policies, employees and service contracts, if any. Section 4.07 has been updated to cover three basic situations: (a) buildings whose employees are unionized, (b) buildings whose employees are not unionized and who are in New York City (and therefore potentially covered by the Displaced Building Service Workers Act, N.Y.C. Admin. Code Sec. 22-505 *et seq*) (DBSWA)), and (c) buildings whose employees are not unionized and who are not covered by the DBSWA. DBSWA covers non-union buildings in New York City, other than (a) *residential* New York City buildings of less than 50 units, (b) commercial New York City office, institutional, or retail buildings of less than 100,000 square feet, and (c) New York City buildings in which the City of New York and/or any governmental entity (the head or majority of members of which are appointed by one or more officers of the City of New York) occupies 50% or more of the rentable square footage). If the DBSWA applies, the purchaser is required to continue to employ the building's employees for a period of ninety (90) days. With respect to unionized buildings, sellers and purchasers should note that although the seller may have made all contributions required through the date of closing, retroactive assessments may be assessed under the Taft-Hartley Act against the seller if it is subsequently determined that a union's pension plan is underfunded. The seller can avoid such liability by having such potential obligations bonded.

With respect to Section 4.08, the parties should be aware that because service contracts are often informally drawn or provide for "automatic" renewal, it is sometimes difficult to determine whether they are transferable or terminable. In New York, General Obligations Law § 5-903 makes most automatic renewal clauses unenforceable if the contractor fails to give appropriate advance notice of the renewal provision. The contract assumes that the service contracts will be assigned to the purchaser at the closing (see Section 10.01(f)).

Section 4.09 provides that the copy of the certificate of occupancy attached to the contract in Schedule J is a true copy and has not been amended or superseded. However, the seller makes no representation as to compliance therewith. This is an example of a situation where an issue is raised in the form contract, but protection for the purchaser has not been provided. The purchaser's attorney should carefully explain to his or her client the risks of failure to have valid certificates of occupancy for all of the premises as constructed and used as of the closing date, and the risks of failure to comply with any existing certificate. Those consequences include the possible need to amend the certificate of occupancy, which may impose on the building owner the burden of upgrading the building to comply with current code requirements, and the risk that a tenant with a non-conforming use may have the right to withhold rent or abandon the space. Requirements of lenders for such certificates should be anticipated. In a municipality, such as New York City, where certificates of occupancy are easily accessible on-line, the seller's attorney may elect to eliminate this representation from the contract. Outside New York City, the provision for optional initialing of certificates of operation should be deleted if inapplicable.

The assessed valuation and real estate taxes are referred to in Section 4.10 and are to be inserted in Schedule D. Section 4.11 assumes that each residential apartment contains a range and refrigerator owned by the seller. Other personal property may be listed on a schedule, which is optional. All personal property is rep-

resented to be free of liens other than Existing Mortgages (Section 4.12).

Section 4.13 is a representation that the building's incinerators and boilers are being operated in accordance with law. The purchaser wants such a representation because, if the applicable permits have not been obtained by the seller, sooner or later the purchaser will have to obtain such permits and possibly have to replace or alter such equipment to obtain the permits. The purchaser may want to expand the representation to include building air conditioning equipment, which in New York City often requires an equipment use permit. Note again, however, that the seller in a seller's market may be unwilling to give the buyer such representations and require the buyer to rely on its own due diligence. This would be an especially appropriate position to take if the purchaser has been given a due diligence period.

The seller represents in Section 4.14 that there are no assessments payable in annual installments that are liens. If there are assessments that will survive the closing, Section 12 of the contract provides for apportionment of such assessments. Section 4.14 is another example of a representation that a seller, particularly in New York City, may want to delete, because the purchaser can obtain the information on-line from the City.

Section 4.15 provides that seller is not a foreign person. If the seller is a non-resident alien, Section 2.07 of the contract will control.

In Section 4.19, the seller represents that the premises constitute one tax lot. If all or part of the property is erroneously included in another taxpayer's tax lot, the purchaser will be unable to obtain financing and the property will be subject to foreclosure if the other taxpayer defaults in paying taxes. Accordingly, the purchaser would generally require the seller to correct the tax lot description as a condition to closing.

Section 4.21 contains the seller's Patriot Act representation and Section 5.01(f) contains the purchaser's Patriot Act representation. The parties should not rely solely on the representations contained in the contract to assure Patriot Act compliance, but should each, as a matter of course, check the Treasury Department's list of Specifically Designated National and Blocked Persons to determine if the other party is a prohibited person.

A representation has been added (Section 4.22) that, to seller's knowledge, there are no underground fuel tanks at the property. The purchaser should not rely entirely on the seller's representation, which is only intended to flush out information within the seller's actual knowledge, but should independently evaluate the need for an environmental review of the property. It is not uncommon for a seller to refuse to make any environmental representations or, at a minimum, to limit such representations to the seller's actual knowledge. The seller will, of course, always have liability to government agencies having jurisdiction if the property was contaminated or if contaminants were released from the property during the period that the seller owned the property. But the seller will generally resist giving the purchaser surviving environmental representations that create an independent obligation to the purchaser, because the purchaser's instinct will be to find other parties to share the cost of any environmental remediation.

Section 4.25 provides for the survival of some of the seller's representations for a limited period of time, and survival is generally limited to those items that the purchaser cannot independently verify before the closing date. To the extent that the purchaser becomes aware, at the closing date, that seller's representations are incorrect, the purchaser is precluded from making a claim for such misrepresentations. The survival of the seller's representations is often one of the most hotly negotiated contract issues. In a seller's market, the seller may be unwilling to permit survival of any of the representations or may only agree to a shortened survival period of six (6) months or less. Where the seller does agree to survival of representations, there is typically a floor and a cap. The floor is to prevent litigation over minor matters. The cap is to limit the seller's exposure. The floor and the cap are highly negotiable.

The penultimate paragraph of Section 4.25 limits the phrase "to seller's knowledge" to the actual knowledge of an identified person. If the seller is a "mom and pop" entity, the limitation may not be appropriate. But if the seller is a larger enterprise with many employees, it is prudent for the seller to identify a single person whose knowledge is attributable to seller. The buyer should ask the questions necessary to assure it that the identified person has the requisite knowledge.

Section 5. Acknowledgments of Purchaser

In Section 5.01 the purchaser acknowledges that it has inspected the premises or has had opportunity to inspect the premises, and will accept them "as is," subject to Section 7 (violations), Section 8.01 (destruction, damage or condemnation), and Section 9.04 (replacement of personal property), and subject to reasonable use, wear, tear and natural deterioration between the contract signing and the closing. In Section 5.02 the purchaser acknowledges that it is not relying on any representations not expressly set forth in the contract. If the purchaser is relying on the seller for any information that is not included in the form contract representations, the purchaser should consider expanding the list of seller representations.

Section 6. Seller's Obligations as to Leases

Section 6 sets out the seller's obligations as to leases between the contract signing and the closing. This is one of the most important sections of the contract, because it deals with an essential part of the business transaction. The form assumes that the purchaser is relying on the current rent roll and, accordingly, provides in Section 6.01 that the seller may not, without the purchaser's prior written consent, amend, renew or extend any existing lease, grant a lease to an occupant who does not have a lease, consent to an assignment or subletting, or terminate a lease or tenancy (except for the tenant's default). The purchaser is required to be reasonable in granting or withholding its consent, a provision that a purchaser may want to delete or modify in appropriate circumstances.

Section 6.02 deals with new leases. Before entering into a new lease, the seller is required to notify the purchaser of the identity of the proposed tenant, together with (a) either a copy of the proposed lease or a summary of its terms and (b) a description of any brokerage commission payable. This information should contain all the business terms of the proposed deal. If the purchaser objects, the seller may not enter into the lease, but the purchaser must pay the seller at the closing the benefit of his or her bargain: the proposed rent less the seller's reletting expenses, prorated over the term of the lease and apportioned as of the closing date. The time for the purchaser to act is limited to seven (7) business days after receipt of purchaser's notice. If the purchaser does not object, the seller may enter into the proposed lease and the prorated reletting expenses are to be apportioned at the closing. Where the contract period is short or the purchaser wants a vacant building, the purchaser may insist on the right to disapprove new leases without paying the seller for its lost income.

Under Section 6.03 the purchaser agrees to accept vacancies not wrongfully caused by the seller. The seller is prohibited from granting rent concessions for periods following the closing. Purchasers sometimes seek to include a provision in this section that would prohibit the seller from applying the security deposit against unpaid obligations of a tenant unless the tenant has vacated the premises, thus protecting the purchaser from inheriting a situation in which a delinquent tenant is in possession with no security or a depleted security deposit.

Section 7. Building Code Violations

Section 7.01 requires the seller to remove violations of law, including violations of building codes and fire codes, which were issued prior to the contract date and municipal liens that attached prior to the closing. The purchaser may want to expand this to violations issued prior to the closing, but New York sellers customarily refuse to accept this change for fear that the purchaser's inquiries may lead to new violations being placed on the premises between the contract signing and the closing. Outside New York City the appropriate code references should be substituted. If the seller fails to comply, it must pay the purchaser at the closing the reasonably estimated unpaid cost of removal or compliance, but the purchaser is required to accept title subject to such violations and liens unless its institutional lender reasonably objects or, in the case of a multiple dwelling, if the violation would cause rent to be unrecoverable or to be grounds for allowing tenants to withhold rent. Outside New York City, the latter clauses should be deleted or the appropriate statutory references should be substituted. Both parties should note that there is no mechanism provided to resolve a dispute as to the "reasonably estimated" cost.

Section 7.02 allows the seller to cancel the contract if the reasonably estimated cost of compliance with Section 7.01 would exceed the amount specified in Schedule D.

Section 7.03 expressly permits the seller not to comply with violations for which a tenant is responsible. However, the purchaser is not required to accept tenant violations if its institutional lender objects.

Outside New York City this entire section should be carefully examined in the light of local custom.

Section 8. Destruction, Damage, Condemnation

The New York version of the Uniform Vendor and Purchaser Risk Act provides that the risk of loss between the date of the contract and the closing will be on the seller unless purchaser has taken possession of the property. The Committee believes that incorporating the statute by reference is not adequate for either party. Accordingly, Section 8 contains the following formula: if the damage does not (a) exceed an amount negotiated by the parties, as determined by an engineer selected by seller and reasonably satisfactory to purchaser, (b) adversely affect the lobby, building-wide systems or common areas and the continued operation of the undamaged portion of the building, and (c) give rise to rent abatement or termination rights of tenants under leases covering more than a specified portion (to be negotiated by the parties) of the rentable square feet, purchaser may not terminate the contract because of the damages, but seller will assign to purchaser seller's interest in the insurance proceeds (less any amounts spent by seller to comply with law, to safeguard the premises or for emergency repairs). Before agreeing to this provision, the purchaser needs to determine the size of the insurance policy's deductible.

If the damage (i) exceeds the amount negotiated by the parties or (ii) affects the lobby, building-wide systems or common areas or the continued operation of the building, or (iii) gives rise to rent abatement or termination rights of tenants under leases covering more than the portion of rentable square feet negotiated by the parties, purchaser may elect to terminate the contract.

Section 8 also covers condemnation by providing that purchaser may terminate the contract or elect to close title and receive an assignment of seller's right to the condemnation award, if a condemnation proceeding is instituted that affects all or any part of the property. The Committee does not propose a formula for determining when a taking is substantial or insubstantial because in New York City, partial takings are rare, although not unheard of (especially with respect to subway construction). Outside New York City, and perhaps even in boroughs other than Manhattan, the parties may want to define what constitutes a substantial taking, bearing in mind that a taking of all or any part of a building is usually (unless the purchaser intends to demolish) deemed substantial, and that a taking of a portion of the land may be substantial or insubstantial depending on whether parking is critical to the use of the premises, how much land is taken (and possibly its location), and the purchaser's plans for future development of the property.

Section 9. Seller's Covenants

Section 9 contains the usual affirmative and negative covenants of the seller covering the period between the contract signing and the closing (in addition to those relating to leases set out in Section 6). Section 9.01 provides that if purchaser is acquiring subject to an Existing Mortgage, the seller may not amend or prepay the mortgage and must make the required payments. Section 9.02 prohibits the seller from modifying existing service contracts or entering into new ones, unless they are terminable without penalty on no more than thirty (30) days' notice. In appropriate cases the purchaser may want to delete the last clause to make the prohibition absolute, or may even allow the seller more freedom. Section 9.03 requires the seller to maintain the insurance referred to in Schedule G until the closing. This is particularly critical if the purchaser is investing significant sums in its due diligence and pre-closing activities, because the purchaser will want assurance that if there is a casualty, there will be available sufficient insurance proceeds for restoration (this assumes, of course, that the purchaser has reviewed and approved the property's insurance program).

Section 9.04 prohibits removal of personal property unless replaced by similar items of at least equal quality. If there are unique items involved, the purchaser may want to modify the clause. Section 9.05 prohibits settlement of real estate tax protests for periods which may affect the purchaser without the reasonable consent of the purchaser. Section 9.06 requires the seller to give the purchaser reasonable access to the premises, the leases and other documents before the closing. Section 9.07 obligates the seller to operate the premises in substantially the same manner as on the date of the contract. The purchaser should consider whether other covenants would be appropriate.

Section 10. Seller's Closing Obligations

Section 10 lists the usual documents to be delivered by the seller at the closing, including deed, leases, a check or credit for the security deposits or an assignment of security deposits, etc. *Outside New York City*: the description of the deed in Section 10.01(a) must be modified to provide for the customary form.

In addition, seller is obligated to deliver estoppel letters from the building's tenants in the form of Schedule F. The seller's attorney will prepare the form of estoppel certificate attached to the contract. Estoppel certificates are generally only required with respect to commercial tenants, and not with respect to tenants of multi-family residences. Whether estoppel letters will be required from 100% of the commercial tenants is negotiable, but the purchaser should ensure that estoppels are obtained from the key commercial tenants (whose names will be listed in subparagraph (r)).

Section 10.01(k) should be modified to conform to local custom as to payment of transfer taxes and, if the city or county imposes a transfer tax on the purchaser as the primary obligor, to provide for purchaser payment of any transfer taxes imposed by statute on the purchaser as the primary obligor.

One of the closing documents to be delivered by seller is an assignment of all leases, which must include an indemnification by seller of claims by tenants with respect to any failure by seller to perform its obligations under the leases prior to the closing date. Not all sellers will be willing to give such an indemnity.

Section 10 essentially provides a list of the documents to be provided by the seller at the closing. The list will vary with the circumstances, and the purchaser may want to add to the list. Common additions might include a requirement that seller deliver a bill of sale for personal property, and mortgagee approvals of any new leases if purchaser is acquiring the property subject to Existing Mortgages.

Section 10.02 requires seller to notify unions with contracts affecting the premises of the sale and the name and address of the purchaser. Seller's failure to do so will result in continuation of liability under the union contracts after the closing date through the date the union receives notice.

Section 11. Purchaser's Closing Obligations

Section 11 requires the purchaser to, among other things, deliver at the Closing the required checks in payment of the purchase price; the purchase money note and mortgage, if any; an indemnification agreement as to the transferred security deposits; an indemnification agreement with respect to obligations under union contracts; an agreement assuming the seller's obligations under the tenant leases and related subordination, non-disturbance, and attornment agreements, an agreement assuming seller's obligations for brokerage commissions with respect to leases made prior to closing if such brokerage obligations are disclosed in Schedule E; and a certificate confirming the continued accuracy of seller's representations (subject to the survival limitations set out in Section 5 of the contract). The purchaser is also required to sign transfer tax returns.

If the seller is assigning service contracts to the purchaser, the seller should add to the list of purchaser documents an assumption of the seller's obligations under the Service Contracts.

Section 12. Apportionments

Section 12.01 provides for apportionment as of the close of business of the day prior to the closing (in other words, the purchaser is treated as owner of the property on the day of closing) of prepaid rents and additional rents, other revenues, interest on Existing Mortgages if purchaser is acquiring the premises subject to such mortgage(s), real estate taxes, water charges, sewer rents, wages and benefits of continuing employees, fuel (at the current price), charges under transferred service contracts, administrative charges on tenant security deposits, dues to rent stabilization associations if the property is residential and subject to rent regulation, reletting expenses, and senior citizen exemptions. The reference in subsection (g) to administrative charges on security deposits should be deleted if inapplicable. Outside New York City: (i) the description of taxes and other charges in subsection 12.01(c) should be modified as appropriate; and (ii) the reference in subsection (h) to dues to rent stabilization associations should be deleted.

The seller should consider whether leasing commissions, construction allowances, or other prepaid expenses should be added to the list of apportioned expenses.

Section 12 provides for temporary apportionment of taxes if the tax rate has not been fixed before the closing, with recomputation after it has been fixed. Installments of special assessments allocable to the period after the closing are the purchaser's expense. If an assessment is listed on Schedule D, Section 12.01(k) calls for apportionment.

The obligation to correct errors in computation survives the closing.

Section 12.02 requires rent arrears received after the closing to be applied in the following order of priority: (i) to the month preceding the closing month; (ii) to the closing month; (iii) to the months following the closing month; and (iv) to the other months preceding the closing month. This provision is subject to negotiation. Purchasers sometimes omit the fourth category on the grounds that the seller had its opportunity to collect and should not benefit from the purchaser's success in collection after the closing and that the purchaser's obligation should be discharged after collection of one month's arrears. Reasonable expenses of collection are deductible. Obviously, this obligation survives the closing.

Section 12.03, which is not applicable to residential property, covers percentage rent, escalation charges and other charges, some of which will usually become due after the closing for periods prior to the closing. Again, reasonable expenses of collection are deductible and the obligation survives the closing.

Section 13. Objections to Title and Seller's Obligations

Section 13.01 requires the purchaser to promptly order an examination of title and furnish a copy of the title report to the seller's attorney upon receipt. It does not require the purchaser to specify its objections or otherwise waive them. Some sellers will require a waiver if the purchaser fails to raise objections within a specified period. The Committee elected not to follow that route because it was felt to unfairly penalize purchasers whose attorneys fail to give notice of objections. However, if there is a long contract period, the seller may insist on such a provision. The seller is entitled to reasonable adjournments of up to sixty (60) days to cure defects, except that the time period is shortened if purchaser's loan commitment expires earlier.

Section 13.02 provides that if the seller is unable to convey title in accordance with the contract, the purchaser may accept title nevertheless, without credit against the monies payable at the closing. If the purchaser does not elect to close, it may terminate the contract, in which event the sole liability of the seller is to refund the downpayment, without interest, and pay purchaser's costs of title examination and survey. The seller is not permitted to refuse to pay off mortgages or other liens, of which seller has actual knowledge, which can be satisfied or discharged by payment of a sum certain (other than Existing Mortgages, which are permitted exceptions).

Section 13.03 allows the seller to use the purchase price to pay taxes, liens and encumbrances if the seller provides official bills showing the amount due, and requires the purchaser to provide separate checks for

such payment upon reasonable request made in advance. If the charges, liens or encumbrances impair title, the seller may deposit funds or other assurances with the purchaser's title insurance company to pay such charges, liens and encumbrances. The purchaser must accept such insurance, in lieu of discharge of such charges, liens and encumbrances at closing, unless its institutional lender reasonably objects.

Section 13.04 provides that the seller's sole remedy for the purchaser's default is to retain the downpayment as liquidated damages. Section 13.05 gives purchaser the right to specific performance or damages if seller *willfully* defaults. In a seller's market, the seller is likely to limit the purchaser's remedy on a seller default to recovery of its down payment. Sellers take this position in order to prevent a defaulting buyer from initiating frivolous litigation to tie up the property by claiming a seller default. Such a position, of course, effectively prevents a legitimate buyer from obtaining a remedy for a seller default. The form attempts to bridge the gap by allowing the purchaser to obtain either specific performance or damages if the seller *willfully* defaults. Section 13.05 should be read in conjunction with Section 13.07, which provides that if the purchaser has grounds for refusing to close (for example, by reason of seller's default), the seller's sole liability is to refund the downpayment and to reimburse the purchaser for the cost of updating the existing survey (or the cost of a new survey) and departmental searches. The seller's liability is similarly limited if either seller or purchaser terminate the contract for reasons permitted by the contract pursuant to a provision that specifically refers to Section 13.07.

Section 13.06 grants the purchaser a vendee's lien against the premises for the amount of the down payment.

Section 14. Broker

Section 14 contains mutual representations and indemnities by the seller and the purchaser that either (i) the broker identified in the contract brought about the sale or (ii) no broker is entitled to commission. The party responsible to pay the commission is designated. These obligations survive the closing.

Seller's counsel should note that sellers are sometimes reluctant to give such a representation because of the number of cold calls received by the seller that can't be tracked. In such a situation the seller is truly relying on the purchaser to identify the brokers with whom the purchaser has dealt, and the seller will limit its obligation to an indemnification of the purchaser for claims made by brokers with whom the seller, but not the buyer, has dealt.

Section 15. Notices

Section 15 provides for notices to be delivered personally or sent by prepaid certified mail, nationally recognized overnight courier, or facsimile transmission, addressed as set forth in Schedule D.

Section 15.01 also authorizes the attorneys to give notices on behalf of their clients. Although the Committee elected to permit notices to be given by facsimile transmission, some attorneys eliminate fax transmissions as a mode of notice because of concerns that faxes will become lost in interoffice mail.

Section 16. Limitation on Survival of Representations, etc.

Section 16 provides that no representations, warranties, covenants or other obligations of the seller shall survive the closing, except as otherwise provided (see Sections 4 and 5).

Section 17. Due Diligence Period

The Committee elected to include a due diligence clause in the model contract, although in some markets at some times, inclusion of a due diligence period is not customary. The number of days in which the purchaser must complete its due diligence investigation must be inserted in Section 17.01. Section 17.02 provides that the purchaser must give notice of termination on or before the last day of the due diligence period. The scope of the due diligence will depend on the nature and location of the property. For example, multitenant residential property in New York City requires significant due diligence to determine if the tenants are paying legal rents. Local Law 11 compliance (façade inspection) is also a significant issue in New York City. Suburban and rural properties tend to generate greater concerns about environmental contamination than New York City properties.

In giving notice of termination, purchaser's attorney must take into account the notice periods set out in Section 15. The length of the due diligence period will depend on the size and use of the property, the nature of the property, and the availability of environmental investigators and engineers. Purchasers should note that all institutional lenders require environmental and engineering reports from their approved list of consultants.

In the model form, the purchaser's right to terminate is limited to those instances in which the environmental and/or engineering inspections are unsatisfactory to the purchaser. It is not unusual to see a due diligence clause give the purchaser a right to terminate if the purchaser is dissatisfied with any matter relating to the property, but the Committee elected to limit the purchaser's due diligence right to engineering and environmental matters. The seller

is required to cooperate with purchaser's due diligence inspection, but the purchaser does not have the right to conduct a Phase II environmental investigation without the consent of seller. Phase II investigations generally involve invasive testing and are rarely obtained absent specific environmental concerns. The purchaser is required to deliver copies of all reports to the seller. Sellers should be aware that if an environmental investigation discloses any contamination, all parties with knowledge (including the consultant who performed the environmental testing) are required to report the contamination to the appropriate authorities.

Under Section 17.04 the Purchaser indemnifies the seller from all loss caused by the due diligence inspection. The indemnity only covers damage caused by the inspection itself, and not environmental liabilities arising from the disclosure of the existence of environmental contamination.

Section 17 makes time of the essence with respect to purchaser's actions. Accordingly, the purchaser must terminate within the prescribed time period.

Section 18. Miscellaneous

Section 18 contains the usual miscellaneous provisions. Assignment by the purchaser is prohibited. If either seller or purchaser is involved in a Section 1031 like-kind exchange, Section 18.01(b) will become applicable. If the purchaser intends to form a new entity to take title, the purchaser should request a modification to Section 18.01(a) to permit assignment of the contract to an entity controlled by purchaser.

Schedules

The description of the premises (Schedule A) is to be attached separately, preferably by photocopying the title insurance policy description and adding the tax map designation (to eliminate typographical errors and proofreading). The title insurance description rather than the deed description should be used because the title company has insured only the title policy description.

Schedule B lists the usual permitted exceptions. Paragraph 1 assumes a continuation of the present use by the purchaser. Paragraph 6 requires acceptance of out-of-date or irrelevant liens on personalty. The existing survey should be described at the end of Paragraph 10. Additional permitted exceptions from the seller's title insurance policy should be added, beginning with a new Paragraph 11.

Schedule C sets out the purchase price.

Schedule D is to be filled in as applicable. Any additional schedules or riders should be referred to in the body of the contract.

Schedule E, the Rent Schedule, is to be attached. A format was not prescribed because this schedule will often be prepared by the managing agent, perhaps from a computer print-out, or by the seller. Ideally, it should contain all the material terms of the leases and tenancies, such as the names of each tenant, annual base rentals, security deposits, renewal options (sometimes), termination options, and rights of first refusal to lease or buy.

Acknowledgment

The Committee thanks Karl Holtzschue, former chair of the Committee, for providing the Committee with a copy of his commentary to the original form of contract (published in the New York Law Journal), which served as the framework for this commentary, and also gives special thanks to William Jay Lippman, former Chair of the Committee, for initiating the project and spearheading its completion, and to JoAnn Whitehorn, Lowell Willinger, Linda Myles and Eugene Caiola for their continuing, diligent and intelligent contributions.

Submitted By:
Committee on Real Property Law
of the Association of the Bar
of the City of New York
Nancy Connery, Chair
William Lippman, Former Chair
Eugene Caiola, Secretary

Contract of Sale–Office, Commercial and Multi-Family Residential Premises

Between

_____ ("Seller")

and

_____ ("Purchaser")

dated _____

Premises:

Street Address:_____

City or Town: _____

County: _____

State: New York

Contract of Sale—Office, Commercial and Multi-Family Residential Premises

CONTRACT OF SALE ("Contract") dated _____ between _____ ("Seller") and _____ ("Purchaser").

Seller and Purchaser hereby covenant and agree as follows:

Section 1. Sale of Premises and Acceptable Title

§1.01. Seller shall sell to Purchaser, and Purchaser shall purchase from Seller, at the price and upon the terms and conditions set forth in this contract: (a) the parcel of land more particularly described in Schedule A attached hereto ("Land"); (b) all buildings and improvements situated on the Land (collectively, "Building"); (c) all right, title and interest of Seller, if any, in and to the land lying in the bed of any street or highway in front of or adjoining the Land to the center line thereof and to any unpaid award for any taking by condemnation or any damage to the Land by reason of a change of grade of any street or highway; and (d) the appurtenances and all the estate and rights of Seller in and to the Land and Building (collectively, the "Premises"). For purposes of this contract, "appurtenances" shall include all right, title and interest of Seller, if any, in and to (i) streets, easements, rights-of-way and vehicle parking rights used in connection with the Premises; (ii) any strips or gores of land between the Land and abutting or adjacent properties; (iii) the leases, licenses and occupancy agreements for space in the Building, and all guarantees thereof, as shown on Schedule E attached hereto and any leases entered into by Seller between the date of this contract and the Closing (as hereinafter defined); (iv) the Service Contracts (as hereinafter defined); (v) plans, specifications, architectural and engineering drawings, prints, surveys, soil and substrata studies relating to the Premises in Seller's possession, whether or not stored, managed or contained on computer software or hardware; (vi) all operating manuals and books, data and records regarding the Premises and its component systems in Seller's possession; (vii) all licenses, permits, certificates of occupancy and other approvals issued by any state, federal or local authority relating to the use, maintenance or operation of the Premises or the fixtures, machinery or equipment included in this sale to the extent that they may be transferred or assigned; (viii) all warranties or guaranties, if any, applicable to the Premises, to the extent such warranties or guaranties are assignable; (ix) all tradenames, trademarks, servicemarks, logos, copyrights and good

will relating to or used in connection with the operation of the Premises and (x) air rights and development rights. This sale also includes all trade fixtures and all equipment, machinery, materials, supplies and other personal property attached or appurtenant to the Building or located at and used in the operation or maintenance of the Land or Building to the extent same are owned by Seller or any affiliate of Seller (the "Personal Property"). The street address of the Premises is set forth on Schedule D attached hereto.

§1.02. Seller shall convey and Purchaser shall accept fee simple title to the Premises in accordance with the terms of this contract, subject only to: (a) the matters set forth in Schedule B attached hereto (collectively, "Permitted Exceptions"); and (b) such other matters as the title insurer specified in Schedule D attached hereto (or if none is so specified, then any title insurer licensed to do business by the State of New York) shall be willing to omit as exceptions to coverage or to except with insurance against collection out of or enforcement against the Premises.

Section 2. Purchase Price, Acceptable Funds, Existing Mortgages, Purchase Money Mortgage, Escrow of Downpayment and Foreign Persons

§2.01. Purchaser shall pay Seller the purchase price ("Purchase Price") set forth in Schedule C attached hereto, subject to the terms and conditions of this contract. Seller and Purchaser acknowledge that no portion of the Purchase Price is allocated to the Personal Property, if any, transferred pursuant to this contract.

§2.02. Except for the downpayment (hereinafter defined), all monies payable under this contract, unless otherwise specified in this contract, shall be paid by (a) certified checks of Purchaser or any person making a loan to Purchaser drawn on any bank or trust company having a banking office in the City of New York and which is a member of the New York Clearing House Association, or (b) official bank checks drawn by any such banking institution, except that uncertified checks of Purchaser payable to the order of Seller up to the amount of $2,500 shall be acceptable for sums payable to Seller at the Closing, or (c) with respect to the portion of the Purchase Price payable at the Closing, at Seller's election, by wire transfer of immediately available federal funds to an account designated by Seller not less than three business days prior to the Closing.

§2.03. If Schedule C provides for the acceptance of title by Purchaser subject to one or more existing mortgages (collectively, "Existing Mortgage(s)"), the amounts specified in Schedule C with reference thereto may be approximate and the following shall apply:

(i) If at the Closing the aggregate principal amount of the Existing Mortgage(s), as reduced by payments required thereunder prior to the Closing, is less than the aggregate amount of the Existing Mortgage(s) as specified in Schedule C, the difference shall be added to the monies payable by Purchaser at the Closing, unless otherwise expressly provided herein.

(ii) If any of the documents constituting the Existing Mortgage(s) or the note(s) secured thereby prohibits or restricts the conveyance of the Premises or any part thereof without the prior consent of the holder or holders thereof ("Mortgagee(s)") or confers upon the Mortgagee(s) the right to accelerate payment of the indebtedness or to change the terms of the Existing Mortgage(s) if a conveyance is made without consent of the Mortgagee(s), Seller shall notify such Mortgagee(s) of the proposed conveyance to Purchaser within 10 days after execution and delivery of this contract, requesting the consent of such Mortgagee(s) thereto. Seller and Purchaser shall furnish the Mortgagee(s) with such information as may reasonably be required in connection with such request and shall otherwise cooperate with such Mortgagee(s) and with each other in an effort expeditiously to procure such consent, but neither shall be obligated to make any payment to obtain such consent. If such Mortgagee(s) shall fail or refuse to grant such consent in writing on or before the closing date specified in Schedule D or shall require as a condition of the granting of such consent (i) that additional consideration be paid to the Mortgagee(s) and neither Seller nor Purchaser is willing to pay such additional consideration or (ii) that the terms of the Existing Mortgage(s) be changed and Purchaser is unwilling to accept such change(s), then unless Seller and Purchaser mutually agree to extend such date or otherwise modify the terms of this contract, either Purchaser or Seller may terminate this contract by notice given to the other party within five business days after notice of such Mortgagee's decision. If either Purchaser or Seller terminates this contract pursuant to this §2.03(b), such termination shall be subject to the provisions of §13.07.

§2.04. Even if Schedule C does not provide for the acceptance of title by Purchaser subject to one or more Existing Mortgages, Seller shall, upon request of Purchaser, use commercially reasonable efforts to cause the holder(s) of the existing mortgage(s) encumbering the Premises to assign it (them) to Purchaser's lender at Closing, and to deliver to Purchaser's lender the original mortgage(s) and the original promissory note(s) secured thereby and Purchaser shall pay any and all costs in connection therewith. The amount paid by Purchaser (or its lender) to the holder(s) of such existing mortgage(s) as payment for the assignment of such mortgage(s) shall be deemed a payment on account of the Purchase Price.

§2.05. If Schedule C provides for payment of a portion of the Purchase Price by execution and delivery to Seller of a note secured by a purchase money mortgage ("Purchase Money Mortgage"), such note and Purchase Money Mortgage shall be substantially in the forms attached hereto as Schedule K. At the Closing, Purchaser

shall pay the mortgage recording tax and recording fees therefor, the filing fees for any financing statements delivered in connection therewith and the fees of Seller's attorney for preparing the note and Purchase Money Mortgage (to the extent such attorneys' fees do not exceed $_____).

(b) If Schedule C provides for the acceptance of title by Purchaser subject to Existing Mortgage(s) prior in lien to the Purchase Money Mortgage, the Purchase Money Mortgage shall provide that it is subject and subordinate to the lien(s) of the Existing Mortgage(s) and shall be subject and subordinate to any extensions, modifications, renewals, consolidations, substitutions or replacements thereof (collectively, "Refinancing" or "Refinanced Mortgage"), provided that (i) the rate of interest payable under a Refinanced Mortgage shall not be greater than that specified in Schedule D as the Maximum Interest Rate or, if no Maximum Interest Rate is specified in Schedule D, shall not be greater than the rate of interest that was payable on the refinanced indebtedness immediately prior to such Refinancing, and (ii) if the principal amount of the Refinanced Mortgage plus the principal amount of other Existing Mortgage(s), if any, remaining after placement of a Refinanced Mortgage exceeds the amount of principal owing and unpaid on all mortgages on the Premises superior to the Purchase Money Mortgage immediately prior to the Refinancing, an amount equal to the excess shall be paid at the closing of the Refinancing to the holder of the Purchase Money Mortgage, without prepayment premium or other charge, in reduction of principal payments due thereunder in inverse order of maturity. The Purchase Money Mortgage shall further provide that the holder thereof shall, on demand and without charge therefor, execute, acknowledge and deliver any agreement or agreements reasonably required by the mortgagor to confirm such subordination.

(c) The Purchase Money Mortgage shall contain the following additional provisions:

(i) "The mortgagor or any owner of the mortgaged premises shall have the right to prepay the entire unpaid indebtedness secured by this mortgage, together with accrued interest, but without penalty, at any time on or after [*insert the day following the last day of the fiscal year of the mortgagee in which the Closing occurs or, if a Prepayment Date is specified in Schedule D, the specified Prepayment Date*], on not less than 10 days' written notice to the holder hereof."

(ii) "Notwithstanding anything to the contrary contained herein, the obligation of the mortgagor for the payment of the indebtedness and for the performance of the terms, covenants and conditions contained herein and in the note secured hereby is limited solely to recourse against the property secured by this mortgage, and in no event shall the mortgagor or any principal of the mortgagor, disclosed or undisclosed, be personally liable for any breach of or default under the note or this mortgage or for any deficiency resulting from or through any proceedings to foreclose this mortgage, nor shall any deficiency judgment, money judgment or other personal judgment be sought or entered against the mortgagor or any principal of the mortgagor, disclosed or undisclosed, but the foregoing shall not adversely affect the lien of this mortgage or the mortgagee's right of foreclosure. Notwithstanding the provisions of this subparagraph (ii), mortgagor shall be personally liable to mortgagee for losses due to:

(A) fraud or intentional or willful misrepresentation;

(B) mortgagor's misapplication or misappropriation of rents or other income received by mortgagor after the occurrence of an event of default;

(C) mortgagor's misapplication or misappropriation of tenant security deposits or rents collected more than (1) month in advance;

(D) the misapplication or the misappropriation of insurance proceeds or condemnation awards;

(E) mortgagor's failure to pay real estate taxes, water charges or sewer rents (except to the extent that sums sufficient to pay such amounts have been deposited in escrow with mortgagee pursuant to the terms hereof) but only to the extent that the mortgaged premises generates sufficient income to pay the same when due;

(F) any act of intentional waste or arson by mortgagor, or any officer, director, member or general partner of mortgagor;

(G) subject to the rights of the holder of any superior mortgage, mortgagor's failure following any event of default to deliver to mortgagee on demand all rents and other income and books and records relating to the mortgaged premises;

(H) damage to the mortgaged premises arising from the intentional misconduct or gross negligence of mortgagor, or any officer, director, member or general partner of mortgagor."

(iii) "In addition to performing its obligations under Section 274-a of the Real Property Law, the mortgagee, if other than one of the institutions listed in Section 274-a, agrees that, within 10 days after written request by the mortgagor, but not more than twice during any period of 12 consecutive months, it will execute, acknowledge and deliver without charge a certificate of reduction in recordable form (a) certifying as to (1) the then unpaid principal balance of the indebtedness secured hereby, (2) the maturity date thereof, (3) the rate of interest, (4) the last date to which interest has been paid and (5) the amount of any escrow deposits then held by the mortgagee, and (b) stating, to the actual knowledge of the mortgagee, whether there are any alleged defaults hereunder and, if so, specifying the nature thereof."

(iv) The additional provisions, if any, specified in a rider hereto.

§2.06. All sums paid on account of the Purchase Price prior to the Closing (collectively, "Downpayment") shall be paid by good check or checks drawn to the order of and delivered to Seller's attorney or another escrow agent designated in writing by the parties ("Escrowee"). The Escrowee shall hold the proceeds thereof in escrow in a special bank account at _____ located at _____ (or as otherwise agreed in writing by Seller, Purchaser and Escrowee) until the Closing or sooner termination of this contract and shall pay over or apply such proceeds in accordance with the terms of this section. Escrowee shall hold such proceeds in an interest-bearing account, and such interest shall be paid to the same party entitled to the Downpayment, and the party receiving such interest shall pay any income taxes thereon. Escrowee shall not be responsible for any interest on the Downpayment except as is actually earned, or for the loss of any interest resulting from the withdrawal of the Downpayment prior to the date interest is posted thereon or for any loss caused by the failure, suspension, bankruptcy or dissolution of the institution in which the Downpayment is deposited. The tax identification numbers of the parties are set forth in Schedule D. Each of the parties, upon Escrowee's request, shall promptly furnish to Escrowee a completed and executed Form W-9, together with such other information as Escrowee shall reasonably require. At the Closing, such proceeds and the interest thereon, if any, shall be paid by Escrowee to Seller. If for any reason the Closing does not occur and either party makes a written demand upon Escrowee for payment of such amount, Escrowee shall give written notice to the other party of such demand. If Escrowee does not receive a written objection from the other party to the proposed payment within 10 business days after the giving of such notice, Escrowee is hereby authorized to make such payment. If Escrowee does receive such written objection within such 10 day period or if for any other reason Escrowee in good faith shall elect not to make such payment, Escrowee shall continue to hold such amount until otherwise directed by written instructions from the parties to this contract or a final and non-appealable judgment of a court. However, Escrowee shall have the right at any time to deposit the escrowed proceeds and interest thereon, if any, with the clerk of the Supreme Court of the county in which the Premises is located. Escrowee shall give written notice of such deposit to Seller and Purchaser. Upon such deposit Escrowee shall be relieved and discharged of all further obligations and responsibilities hereunder. If the Downpayment is deposited in a money market account, dividends thereon shall be treated, for purposes of this Section, as interest.

(b) The parties acknowledge that Escrowee is acting solely as a stakeholder at their request and for their convenience, that the duties of Escrowee hereunder are purely ministerial in nature and shall be expressly limited to the safekeeping and disposition of the Downpayment in accordance with the provisions of this contract, that Escrowee shall not be deemed to be the agent of either of the parties, and that Escrowee shall not be liable to either of the parties for any act or omission on its part unless taken or suffered in bad faith, in willful disregard of this contract or involving gross negligence. Seller and Purchaser shall jointly and severally indemnify and hold Escrowee harmless from and against all costs, claims and expenses, including reasonable attorneys' fees, incurred in connection with the performance of Escrowee's duties hereunder, except with respect to actions or omissions taken or suffered by Escrowee in bad faith, in willful disregard of this contract or involving gross negligence on the part of Escrowee.

(c) Escrowee has acknowledged agreement to these provisions by signing in the place indicated on the signature page of this contract.

(d) If Escrowee is Seller's attorney, Escrowee or any member of its firm shall be permitted to act as counsel for Seller in any dispute as to the disbursement of the Downpayment or any other dispute between the parties whether or not Escrowee is in possession of the Downpayment and continues to act as Escrowee.

(e) Escrowee may act or refrain from acting in respect of any matter referred to in this §2.06 in full reliance upon, and with the advice of, counsel which may be selected by it (including any member of its firm) and shall be fully protected in so acting or refraining from action upon the advice of such counsel.

§2.07. If Seller is a "foreign person," as defined in Internal Revenue Code Section 1445 and regulations issued thereunder (collectively, the "Code Withholding Section"), or if Seller fails to deliver the certification of non-foreign status required under §10.01(k), or if Purchaser is not entitled under the Code Withholding Section to rely on such certification, Purchaser shall deduct and withhold from the Purchase Price a sum equal to ten percent (10%) thereof and shall at Closing remit the withheld amount with Forms 8288 and 8288A (or any successor forms) to the Internal Revenue Service; and if the cash balance of the Purchase Price payable to Seller at the Closing after deduction of net adjustments, apportionments and credits (if any) to be made or allowed in favor of Seller at the Closing as herein provided is less than ten percent (10%) of the Purchase Price, Purchaser shall have the right to terminate this contract. If Purchaser so terminates this contract, such termination shall be subject to the provisions of §13.07. The right of termination provided for in this §2.07 shall be in addition to and not in limitation of any other rights or remedies available to Purchaser under applicable law.

Section 3. The Closing

§3.01. Except as otherwise provided in this contract, the closing of title pursuant to this contract ("Closing") shall take place on the scheduled date and at the time of closing specified in Schedule D (the actual date of the Closing being herein referred to as "Closing Date") at the place specified in Schedule D.

Section 4. Representations and Warranties of Seller

Seller represents and warrants to Purchaser as follow:

§4.01. Seller is the sole owner of the Premises and has not granted any option to purchase the Premises or any right of first refusal or right of first offer to purchase the Premises.

§4.02. If the Premises are encumbered by an Existing Mortgage(s), no written notice has been received from the Mortgagee(s) asserting that a default or breach exists thereunder which remains uncured and no such notice shall have been received and remain uncured on the Closing Date. If Schedule C provides for the acceptance of title by Purchaser subject to one or more Existing Mortgages, Seller represents and warrants that Seller has delivered to Purchaser true and complete copies of the Existing Mortgage(s) and the promissory notes secured thereby, and that same have not been modified or amended except as shown in such documents.

§4.03. The information concerning written leases, written licenses and written occupancy agreements (which together with all amendments and modifications thereof are collectively referred to as "Leases") and any tenancies or occupancies in the Premises not arising out of the Leases (collectively, "Tenancies"; and each, individually, a "Tenancy") set forth in Schedule E attached hereto ("Rent Schedule") is accurate as of the date set forth therein or, if no date is set forth therein, as of the date hereof, and there are no Leases or Tenancies of any space in the Premises other than those set forth therein and any subleases or subtenancies. Except as otherwise set forth in the Rent Schedule or elsewhere in this contract:

(a) all of the Leases are in full force and effect;

(b) none of the Leases has been modified, amended or extended;

(c) no renewal or extension options or options for additional space have been granted to tenants, occupants or licensees;

(d) no tenant, occupant or licensee has an option to purchase the Premises or a right of first refusal or first offer with respect to a sale of the Premises;

(e) the rents and fees set forth are being collected on a current basis and there are no arrearages in excess of one month;

(f) no tenant, occupant or licensee is entitled to rental concessions or abatements for any period subsequent to the scheduled date of Closing, other than an abatement by reason of a casualty disclosed to Purchaser that occurred after the date of execution and delivery of this contract;

(g) Seller has not sent written notice to any tenant, occupant or licensee claiming that such tenant is in default, which default remains uncured;

(h) no action or proceeding instituted against Seller by any tenant, occupant or licensee of all or part of the Premises is presently pending in any court or other tribunal, except with respect to claims involving personal injury or property damage which are covered by insurance;

(i) there are no security deposits other than those set forth in the Rent Schedule;

(j) the Rent Schedule accurately sets out all security deposits held by Seller with respect to the Leases and Tenancies;

(k) true and complete copies of the Leases have been delivered to Purchaser or its counsel and initialed by representatives of Purchaser and Seller;

(l) the tenants, occupants and licensees under the Leases and Tenancies are in actual possession of the space demised;

(m) to Seller's actual knowledge, Seller has performed all of the landlord's obligations under the Leases and Tenancies;

(n) Seller has received no notice(s) of any default of the landlord under the Leases that remains pending;

(o) to Seller's actual knowledge, no action or proceeding, voluntary or involuntary, is pending against any tenant, licensee or occupant under any bankruptcy or insolvency act; and

(p) no leasing commissions are due or owing with respect to any of the Leases or Tenancies and all leasing commissions have been paid in full with respect to all of the Leases and Tenancies, except to the extent any brokerage agreements may provide for payment of a commission in case of any renewal, extension or expansion of space.

If any Leases which have been exhibited to and initialed by Purchaser or its representative contain provisions that are inconsistent with the foregoing representations and warranties, such representations and warranties shall be deemed modified to the extent necessary to eliminate such inconsistency and to conform such representations and warranties to the provisions of the Leases.

§4.04. If the Premises or any part thereof are subject to the New York City Rent Stabilization Law, Seller is and on the Closing Date will be a member in good standing of the Real Estate Industry Stabilization Association, the rents shown are not in excess of the maximum collectible rents, and, except as otherwise set forth in the Rent Schedule, no tenants or occupants are entitled to senior citizen exemptions, there are no proceedings with any tenant presently pending

before the New York State Division of Housing and Community Renewal in which a tenant has alleged an overcharge of rent or diminution of services or similar grievance, and there are no outstanding orders or judgments of the Conciliation and Appeals Board or the New York State Division of Housing and Community Renewal that have not been complied with by Seller.

§4.05. If the Premises or any part thereof are subject to the New York City Emergency Rent and Rehabilitation Law, the rents shown are not in excess of the maximum collectible rents, and, except as otherwise set forth in the Rent Schedule, no tenants are entitled to exemptions as senior citizens, there are no proceedings presently pending in which a tenant has alleged an overcharge of rent or diminution of services or other grievance, and there are no outstanding orders that have not been complied with by Seller.

§4.06. Schedule G attached hereto lists all insurance policies presently affording coverage with respect to the Premises, and the information contained therein is accurate as of the date set forth therein or, if no date is set forth therein, as of the date hereof.

§4.07. Schedule H attached hereto lists all employees presently employed at the Premises and the compensation payable to each, and the information contained therein is accurate as of the date set forth therein or, if no date is set forth therein, as of the date hereof, and, except as otherwise set forth in such schedule, none of such employees is covered by a union contract and there are no retroactive increases or other accrued and unpaid sums owed to any employee. The employees listed in Schedule H attached hereto are covered by collective bargaining agreements with Locals _____ and _____ (the "Union Contracts"); Schedule H lists the employment classification and union affiliation of each person employed at the Premises that is covered by the Union Contracts; Seller has timely made all contributions required to be made by Seller pursuant to the Union Contracts with respect to Seller's period of ownership of the Premises, including, but not limited to, Seller's obligations with respect to union pension and retirement benefit plans established pursuant to the Taft-Hartley Act, 29 U.S.C. § 186 ("Union Retirement Plans"), and Seller shall not, after the date of this contract, enter into any new union contract or modify any existing Union Contract without first obtaining Purchaser's approval, which approval shall not be unreasonably withheld or delayed. If the Premises are located in the City of New York and the employees presently employed at the Premises are not covered by the Union Contracts, Seller and Purchaser shall each comply with the applicable provisions of Section 22-505 of the New York City Administrative Code (the "Displaced Building Service Workers Act"). Seller and Purchaser shall each indemnify and hold harmless the other against any loss, costs, claims, liabilities and expenses it may incur, including reasonable attorneys' fees, by reason of the other party's breach of its obligations under the Union Retirement Plan and the Displaced Building Service Workers Act. The indemnification obligations set forth in this §4.07 shall survive Closing.

§4.08. The schedule of service, maintenance, supply and management contracts ("Service Contracts") attached hereto as Exhibit I lists all such contracts affecting the Premises, and the information set forth therein is accurate as of the date set forth therein or, if no date is set forth therein, as of the date hereof.

§4.09. The copy of the certificate of occupancy for the Premises attached hereto as Schedule J is a true copy of the original and such certificate has not been amended or superseded, but Seller makes no representation as to compliance with any such certificate.

§4.10. (a) As of the date of this contract: The assessed valuation of the Land and Building and the real estate taxes set forth in Schedule D, if any, are the assessed valuation of the Premises and the real estate taxes payable with respect thereto for the fiscal year(s) indicated in such schedule (subject to any abatements that may become applicable after the date of this contract and any increases or changes in real estate taxes resulting from a retroactive change in the tax rate). Except as otherwise set forth in Schedule D, there are no tax abatements or exemptions affecting the Premises as of the date of this contract.

(b) There are no pending proceedings or appeals to correct or reduce the assessed valuation of the Premises.

§4.11. Except as otherwise set forth in a schedule attached hereto, if any, if the Premises are used for residential purposes, (i) each apartment contains a range and a refrigerator, and all of the ranges and refrigerators and all of the items of personal property (or replacements thereof) listed in such schedule, if any, are and on the Closing Date will be owned by Seller free of liens and encumbrances other than the lien(s) of the Existing Mortgage(s), if any, and (ii) all apartments have been painted within the last three years.

§4.12. The Personal Property, as of the Closing Date, is owned by Seller free of liens and encumbrances other than the lien(s) of the Existing Mortgage(s), if any.

§4.13. To Seller's knowledge no incinerator, compactor, boiler or other burning equipment on the Premises is being operated in violation of applicable law. If copies of a certificate or certificates of operation therefor have been exhibited to and initialed by Purchaser or its representative, such copies are true copies of the originals.

§4.14. Except as otherwise set forth in Schedule D, to Seller's knowledge, no assessment payable in annual installments, or any part thereof, has become a lien on the Premises.

§4.15. Seller is not a "foreign person" as defined in the Code Withholding Section.

§4.16. Seller is a _____ that has been duly organized and is in good standing under the laws of the state of its formation.

§4.17. Seller has taken all necessary action to authorize the execution, delivery and performance of this contract and has the power and authority to execute, deliver and perform this contract and consummate the transaction contemplated hereby. The person signing this contract on behalf of Seller is authorized to do so. Assuming this contract has been duly authorized, executed and delivered by each of the other party(ies) to this contract, this contract and all obligations of Seller hereunder are the legal, valid and binding obligations of Seller, enforceable in accordance with the terms of this contract, except as such enforcement may be limited by bankruptcy, insolvency, reorganization or other similar laws affecting the enforcement of creditors' rights generally and by general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law).

§4.18. The execution and delivery of this contract and the performance of its obligations hereunder by Seller will not conflict with any provision of any law or regulation to which Seller is subject or any agreement or instrument to which Seller is a party or by which it is bound or any order or decree applicable to Seller or result in the creation or imposition of any lien on any of Seller's assets or property which would materially and adversely affect the ability of Seller to carry out the terms of this contract. Seller has obtained any consent, approval, authorization or order of any court or governmental agency or body required for the execution, delivery or performance by Seller of this contract.

§4.19. The Premises constitute one tax lot.

§4.20. Seller has not received written notice of and has no knowledge of any action, suit, arbitration, unsatisfied order or judgment, government investigation or proceeding pending against Seller with respect to the Premises which if adversely determined could have a material adverse effect on the Premises or interfere with the consummation of the transaction contemplated by this contract.

§4.21. Seller is not a, and is not acting directly or indirectly for or on behalf of any, person, group, entity or nation named by any Executive Order of the United States Treasury Department as a terrorist, "Specifically Designated National and Blocked Persons," or other banned or blocked person, entity, nation or transaction pursuant to any law, order, rule or regulation that is enforced or administered by the Office of Foreign Assets Control and Seller is not engaged in this transaction, directly or indirectly on behalf of, or instigating or facilitating this transaction, directly or indirectly, on behalf of any such person, group, entity, or nation.

§4.22. To Seller's knowledge, there are no underground fuel storage tanks at the Premises.

§4.23. Seller has received no notice of and has no knowledge of any actual or proposed taking in condemnation of all or any part of the Premises.

§4.24. Seller has been known by no other name for the past ten (10) years except: _____.

§4.25. The representations and warranties of Seller set forth in §§ 4.03, 4.04, 4.05, 4.07, 4.08, 4.10(b), 4.11, 4.12, 4.13, 4.18, 4.20 and 4.21 as restated as of the Closing shall survive the Closing for a period of [*one year*] (the "Survival Period"). None of Seller's other representations or warranties shall survive the Closing. No claim for a misrepresentation or breach of warranty of Seller shall be actionable or payable if the breach in question results from or is based on a condition, state of facts or other matter which was known to Purchaser prior to the Closing. Seller shall have no liability to Purchaser for any misrepresentation or breach of warranty of Seller (a) unless the valid claims for all such misrepresentations or breaches collectively aggregate more than [$_____] (the "Floor"), in which event the full amount of such valid claims shall be actionable up to the aggregate amount of $_____, and (b) unless written notice containing a description of the specific nature of such breach shall have been given by Purchaser to Seller prior to the expiration of the Survival Period, if any, and an action shall have been commenced by Purchaser against Seller within the Survival Period, if any. The prevailing party in any litigation arising from a claim under this §4.25 shall be entitled to reimbursement for all legal fees and expenses in connection therewith.

For purposes of this Section, the phrase "to Seller's knowledge" shall mean the actual knowledge of _____ without any special investigation.

Except where limited specifically to the date of this contract or other date, the representations and warranties made by Seller in this contract are made as of the date of execution and delivery of this contract, and except as otherwise set forth in §6.05, shall be deemed restated and shall be true and accurate on the Closing Date.

Section 5. "As Is" Condition, No Representations Not Expressly Set Out in Contract, Representations and Warranties of Purchaser

§5.01. Purchaser acknowledges that:

(a) Purchaser has inspected or has had an opportunity to inspect the Premises, is fully familiar with the physical condition and state of repair thereof, and, subject to the provisions of §7.01, §8.01, §9.04 and Section 7, shall accept the Premises "as is" and in their present condition, subject to reasonable use, wear, tear and natural deterioration between now and the Closing Date, without any reduction in the Purchase Price for any such change in condition. Seller shall not

be liable for any latent or patent defects in the Premises.

(b) Before entering into this contract, Purchaser has made such examination of the Premises, the operation, income and expenses thereof and all other matters affecting or relating to this transaction as Purchaser deemed necessary. In entering into this contract, Purchaser has not been induced by and has not relied upon any representations, warranties or statements, whether express or implied, made by Seller or any agent, employee or other representative of Seller or by any broker or any other person representing or purporting to represent Seller, which are not expressly set forth in this contract, whether or not any such representations, warranties or statements were made in writing or verbally.

§5.02. Purchaser represents and warrants to Seller that:

(a) The funds comprising the Purchase Price to be delivered to Seller in accordance with this contract are not derived from any illegal activity.

(b) Purchaser has taken all necessary action to authorize the execution, delivery and performance of this contract and has the power and authority to execute, deliver and perform this contract and the transaction contemplated hereby. The person signing this contract on behalf of Purchaser is authorized to do so. Assuming this contract has been duly authorized, executed and delivered by each of the other party(ies) to this contract, this contract and all obligations of Purchaser hereunder are the legal, valid and binding obligations of Purchaser, enforceable in accordance with the terms of this contract, except as such enforcement may be limited by bankruptcy, insolvency, reorganization or other similar laws affecting the enforcement of creditors' rights generally and by general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law).

(c) The execution and delivery of this contract and of any note and Purchase Money Mortgage required hereunder and the performance of its obligations hereunder by Purchaser will not conflict with any provision of any law or regulation to which Purchaser is subject or any agreement or instrument to which Purchaser is a party or by which it is bound or any order or decree applicable to Purchaser, and will not result in the creation or imposition of any lien on any of Purchaser's assets or property which would materially and adversely affect the ability of Purchaser to carry out the terms of this contract. Purchaser has obtained any consent, approval, authorization or order of any court or governmental agency or body required for the execution, delivery or performance by Purchaser of this contract.

(d) Purchaser is a _____ that has been duly organized and is in good standing under the laws of the state of its formation.

(e) To Purchaser's knowledge, there is no action, suit, arbitration, unsatisfied order or judgment, government investigation or proceeding pending against Purchaser which, if adversely determined, could individually or in the aggregate materially interfere with the consummation of the transaction contemplated by this contract.

(f) Purchaser is not a, and is not acting directly or indirectly for or on behalf of any, person, group, entity or nation named by Executive Order of the United States Treasury Department as a terrorist, "Specifically Designated National and Blocked Person," or other banned or blocked person, entity, nation or transaction pursuant to any law, order, rule or regulation that is enforced or administered by the Office of Foreign Assets Control and Purchaser is not engaged in this transaction, directly or indirectly, on behalf of, or instigating or facilitating this transaction, directly or indirectly, on behalf of any such person, group, entity or nation.

(g) The representations and warranties of Purchaser set forth in this Section 5 are made as of the date of this contract and are restated as of the Closing and shall survive the Closing for a period of [*one year*], except that the representation in §5.02(d) shall not survive the Closing.

For purposes of this §5.02, the phrase "to Purchaser's knowledge" shall mean the actual knowledge of _____ without any special investigation.

Section 6. Seller's Obligations as to Leases

§6.01. Unless otherwise provided in a schedule attached to this contract, Seller shall not, between the date of this contract and the Closing, without Purchaser's prior written consent, which consent shall not be unreasonably withheld or delayed: (a) amend, renew or extend any Lease in any respect, except to the extent required by law or by the express terms of such Lease; (b) grant a written lease to any person or entity occupying space without a Lease (except as required by law); (c) terminate any lease or Tenancy except by reason of a default by the tenant thereunder; (d) consent to the assignment of a Lease or subletting by any tenant except as required by the terms of the applicable Lease or by law or (e) permit anyone to use or occupy any space pursuant to an oral agreement except pursuant to the Tenancies. Seller shall not, without Purchaser's consent (which may be granted or denied at Purchaser's discretion) enter into any lease or other occupancy agreement with any person or entity directly or indirectly affiliated with or related to Seller, Seller's managing agent, or any principal of Seller or Seller's managing agent (a "Related Lease Transaction").

§6.02. Unless otherwise provided in a schedule attached to this contract, Seller shall not, between the date of this contract and the Closing, permit the occupancy of, or enter into any new lease, occupancy agreement or

license agreement for, space in the Building which is presently vacant or which may hereafter become vacant, without first giving Purchaser written notice of the identity of the proposed tenant, occupant or licensee, together with (a) either a copy of the proposed lease, occupancy agreement or license agreement, or a summary of the terms thereof in reasonable detail and (b) a statement of the amount of the brokerage commission, if any, payable in connection therewith and the terms of payment thereof.

If (y) Purchaser objects to such proposed lease, occupancy agreement or license agreement and notifies Seller of its objection within seven business days after receipt of Seller's notice, or (z) such lease, occupancy agreement or license agreement constitutes a Related Transaction, Seller shall not enter into the proposed lease, occupancy agreement or license agreement. If clause (y) applies and the prospective tenant, licensee or occupant would have commenced paying rent or a license fee prior to the Closing Date if Purchaser had not objected, Purchaser shall pay to Seller at the Closing, in the manner specified in §2.02, (A) the rent, additional rent and other charges that would have been payable under the proposed lease, occupancy agreement or license agreement from the date on which the tenant's, occupant's or licensee's obligation to pay rent would have commenced if Purchaser had not so objected until the Closing Date, less (B) the Reletting Expenses (hereinafter defined), as amortized over the period commencing on the proposed rent commencement date of such lease or agreement and ending on the proposed expiration date of such lease or agreement and apportioned as of the Closing Date. The "Reletting Expenses" shall equal the amount of the brokerage commission, any construction allowance or other monetary payment to be made to the proposed tenant, occupant or licensee, and the reasonable cost of decoration or other work required to be performed by the landlord under the terms of the proposed lease, occupancy agreement or license agreement to prepare the premises for the tenant's, occupant's or licensee's occupancy.

If Purchaser does not so notify Seller of its objection to a proposed lease, occupancy agreement or license agreement or consents to same and if such lease or agreement does not involve a Related Transaction, Seller shall have the right to enter into the proposed lease, occupancy agreement or license agreement with the tenant, occupant or licensee identified in Seller's notice. If Seller enters into such lease or agreement and Seller has reasonably incurred out-of-pocket expenses in connection with such transaction, including brokerage commissions, reasonable legal fees, and/or fix up costs (the "Leasing Expenses"), then:

1. If the new tenant or occupant is not required to commence paying, and does not pay, rent until after the Closing Date, Purchaser shall reimburse Seller at the Closing for all the Leasing Expenses and Seller shall pay to the appropriate parties the Leasing Expenses, which obligation shall survive the Closing; but

2. If the new tenant or occupant commences paying rent prior to the Closing Date, Purchaser shall pay Seller at Closing the unamortized portion of the Leasing Expenses. The Leasing Expenses shall be amortized over a period commencing on the rent commencement date under such lease or agreement and ending on the expiration date of such lease or agreement (not taking into account any renewal or extension rights), and the unamortized portion shall be determined as of the Closing Date. Seller shall pay to the appropriate parties the Leasing Expenses, which obligation shall survive the Closing.

If Seller fails to pay the Leasing Expenses as required by this Section, Seller shall indemnify and hold harmless Purchaser from all loss, cost, expense, liability, and damages, including reasonable attorneys' fees, Purchaser may incur by reason of such failure, which indemnification obligation shall survive Closing.

§6.03. If any space is vacant on the Closing Date, Purchaser shall accept the Premises subject to such vacancy, provided that the vacancy was not permitted or created by Seller in violation of any restrictions contained in this contract.

§6.04. Seller shall not grant any concessions or rent abatements for any period following the Closing without Purchaser's prior written consent.

§6.05. Seller does not warrant that any particular Lease or Tenancy will be in force or effect at the Closing or that the tenants will have performed their obligations thereunder. The termination of any Lease or Tenancy prior to the Closing by reason of the tenant's default shall not affect the obligations of Purchaser under this contract in any manner or entitle Purchaser to an abatement of or credit against the Purchase Price or give rise to any other claim on the part of Purchaser.

§6.06. Seller hereby indemnifies and agrees to defend Purchaser against any claims made by tenants in the Premises with respect to their security deposits other than (a) claims with respect to tenants' security deposits to the extent paid, credited or assigned to Purchaser pursuant to §10.01, (b) claims made against Purchaser pursuant to §7-107 of the New York General Obligations Law ("GOL") with respect to funds for which Seller was not liable, and (c) claims made pursuant to §7-108 of the GOL by tenants to whom Purchaser failed to give the written notice specified in §7-108(2)(c) of the GOL within thirty days after the Closing Date. The foregoing indemnity and agreement shall survive the Closing and shall be in lieu of any escrow permitted by §7-108(d) of the GOL, and Purchaser hereby waives any right it may have to require any such escrow.

Section 7. Responsibility for Violations

§7.01. Except as provided in §7.02 and §7.03, all notes or notices of violations of law or governmental ordinances, orders or requirements which were noted or issued prior to the date of this contract by any governmental department, agency or bureau having jurisdiction as to conditions affecting the Premises and all liens which have attached to the Premises prior to the Closing pursuant to the Administrative Code of the City of New York, if applicable, shall be removed or complied with by Seller and Seller shall pay any fines or penalties imposed by reason of any such violations. If such removal or compliance or payment of fines or penalties, as applicable, has not been completed prior to the Closing, Seller shall pay to Purchaser at the Closing the reasonably estimated unpaid cost, including the reasonable fees of Purchaser's attorney, architect and expediter, to effect or complete such removal or compliance and any penalties imposed for noncompliance, and Purchaser shall be required to accept title to the Premises subject thereto, except that Purchaser shall not be required to accept such title and may terminate this contract if (a) Purchaser's institutional lender reasonably refuses to provide financing by reason thereof or (b) the Building is a multiple dwelling and either (i) such violation is rent impairing and causes rent to be unrecoverable under Section 302-a of the Multiple Dwelling Law or (ii) a proceeding has been validly commenced by tenants and is pending with respect to such violation for a judgment directing deposit and use of rents under Article 7-A of the Real Property Actions and Proceedings Law. All such notes or notices of violations noted or issued on or after the date of this contract shall be the sole responsibility of Purchaser.

§7.02. If the reasonably estimated aggregate cost to remove or comply with any violations or liens which Seller is required to remove or comply with pursuant to the provisions of §7.01 shall exceed the Maximum Amount specified in Schedule D, Seller shall have the right to cancel this contract, unless Purchaser elects to accept title to the Premises subject to all such violations or liens, in which event Purchaser shall be entitled to a credit of an amount equal to the Maximum Amount against the monies payable at the Closing.

§7.03. Seller's failure to remove or fully comply with any violations which a tenant unaffiliated with Seller is required to remove or comply with pursuant to the terms of its lease by reason of such tenant's use or occupancy shall not be an objection to title or a breach of Seller's obligations under this Section 7. Purchaser shall accept the Premises subject to all such violations without any liability of Seller with respect thereto or any abatement of or credit against the Purchase Price, except that if Purchaser's institutional lender reasonably refuses to provide financing by reason of a violation described in this Section, Purchaser shall not be required to accept the Premises subject thereto and Purchaser shall have the right to terminate this contract.

§7.04. If this contract is terminated by Purchaser or Seller pursuant to this Section 7, such termination shall be subject to the provisions of §13.07.

§7.05. If required, Seller, upon written request by Purchaser, shall promptly furnish to Purchaser written authorizations to make any necessary searches for the purposes of determining whether notes or notices of violations have been noted or issued with respect to the Premises or liens have attached thereto.

Section 8. Destruction, Damage or Condemnation

§8.01. Damage by Casualty.

(a) Damage Not in Excess of [$_____]. If, prior to the Closing, there shall occur damage to the Premises caused by fire or other casualty which would cost less than [$_____] (the "Casualty Threshold") to repair, as reasonably determined by an engineer selected by Seller and reasonably satisfactory to Purchaser, and such fire or other casualty does not adversely affect the lobby, building-wide systems, or common areas and the continued operation of the balance of the Premises not damaged and does not give rise to rent abatement or termination rights of lessees under leases covering more than ___% (the "Percentage") of the rentable square feet of the Building, then Purchaser shall not have the right to terminate this contract by reason thereof, but Seller shall assign to Purchaser at the Closing, by written instrument in form and substance reasonably satisfactory to Purchaser, all of the insurance proceeds payable on account of any such fire or casualty, shall deliver to Purchaser any such proceeds actually paid to Seller, and shall afford to Purchaser at Closing a credit against the balance of the Purchase Price in an amount equal to any deductible. If the limit of Seller's insurance policy with respect to a casualty at the Premises is less than the cost of restoration, then Buyer shall be entitled to a further reduction in the Purchase Price in an amount equal to the difference between the cost of restoration and the limit of such insurance policy (less the deductible). The proceeds of rent interruption insurance, if any, shall on the Closing Date be appropriately apportioned between Purchaser and Seller.

(b) Damage in Excess of [$_____]. If prior to the Closing there shall occur damage to the Premises caused by fire or other casualty which would cost an amount equal to the Casualty Threshold or more to repair, as reasonably determined by an engineer selected by Seller and reasonably satisfactory to Purchaser, or the damage affects the lobby, building-wide systems, or common areas or the continued operation of the balance of the Premises not damaged or gives rise to rent abatement or termination rights of lessees under leases covering more than the Percentage of the rentable square feet of the Building, then Purchaser may elect to terminate this contract by notice given to Seller and Escrowee within ten (10) days after Seller has

given Purchaser notice that such damage occurred, or at the Closing, whichever is earlier, upon which termination, Escrowee shall deliver the Downpayment to Purchaser, this contract shall thereupon be null and void and neither party hereto shall thereupon have any further obligation to the other, except for those obligations and liabilities that are expressly stated to survive termination of this contract. If Purchaser does not elect to terminate this contract, then the Closing shall take place as herein provided, without abatement of the Purchase Price, and Seller shall assign to Purchaser at the Closing, by written instrument in form reasonably satisfactory to Purchaser, all of the insurance proceeds payable on account of any such fire or casualty, shall deliver to Purchaser any such proceeds or awards actually paid to Seller, and shall afford to Purchaser at Closing a credit against the balance of the Purchase Price in an amount equal to any deductible. The proceeds of rent interruption insurance, if any, shall on the Closing Date be appropriately apportioned between Purchaser and Seller.

(c) Seller agrees not to repair any damage to the Premises (other than emergency repairs) without Purchaser's prior written consent and not to incur Reimbursable Amounts totaling in the aggregate in excess of [$_____] without Purchaser's prior written consent. Purchaser shall have the right to participate in any discussions, claims adjustments or settlements with insurance companies regarding any damage to the Premises.

(d) The term "Reimbursable Amounts" shall mean costs and expenses actually and reasonably incurred by or for the account of Seller in connection with fire or other casualty for (x) compliance with governmental ordinances, orders or requirements of any governmental department, agency or bureau having jurisdiction of the Premises, (y) safeguarding the Premises or any part thereof, including any protective restoration or (z) emergency repairs made by or on behalf of Seller (to the extent Seller has not theretofore been reimbursed by its insurance carrier).

§8.02. Condemnation. If after the execution and delivery of this contract and prior to Closing, any proceedings are instituted by any governmental authority which shall relate to the proposed taking of all or any portion of the Premises by eminent domain, or if any such proceedings are pending on the date of execution and delivery of this contract, or if all or any portion of the Premises is taken by eminent domain after the date of this contract and prior to the Closing, Seller shall promptly notify Purchaser in writing no later than two business days after Seller's receipt of any notification or the date of Closing, whichever occurs earlier. Purchaser shall thereafter have the right and option to terminate this contract by giving written notice to Seller and Escrowee within thirty (30) days after receipt by Purchaser of the notice from Seller or on the Closing Date, whichever is earlier. If the Closing Date was scheduled to occur after the institution of such proceeding, the Closing Date shall be deemed adjourned in order that Purchaser shall have its full thirty-day period within which to determine whether or not to proceed with Closing. If Purchaser timely terminates this contract, Purchaser shall be entitled to receive the Downpayment from Escrowee and this contract shall thereupon be terminated and become void and of no further effect, and neither party hereto shall have any obligations of any nature to the other hereunder or by reason hereof, except for those obligations and liabilities that are expressly stated to survive termination of this contract. If Purchaser does not elect to terminate this contract, the parties hereto shall proceed to the Closing and at the Closing, Seller shall assign to Purchaser all of its right, title and interest in all awards in connection with such taking and shall pay to Purchaser any award paid to Seller with respect to such taking. Purchaser shall have the right to participate in discussions or proceedings with any governmental authority relating to the proposed taking of any portion of the Premises.

§8.03. The provisions of this Section 8 shall survive the Closing.

Section 9. Covenants of Seller

Seller covenants that between the date of this contract and the Closing:

§9.01. If Purchaser is acquiring the Premises subject to the Existing Mortgage(s), the Existing Mortgage(s) shall not be amended or supplemented or prepaid in whole or in part. Seller shall pay or make, as and when due and payable, all payments of principal and interest and all deposits required to be paid or made under the Existing Mortgage(s).

§9.02. Seller shall not modify or amend any Service Contract or enter into any new service contract unless the same is terminable without penalty or fee by the then owner of the Premises upon not more than 30 days' notice.

§9.03. Seller shall maintain in full force and effect until the Closing the insurance policies described in Schedule G attached hereto.

§9.04. No fixtures, equipment or personal property included in this sale shall be removed from the Premises unless the same are replaced with similar items of at least equal quality prior to the Closing.

§9.05. Seller shall not withdraw, settle or otherwise compromise any protest or reduction proceeding affecting real estate taxes assessed against the Premises for any fiscal period in which the Closing is to occur or any subsequent fiscal period without the prior written consent of Purchaser, which consent shall not be unreasonably withheld or delayed.

§9.06. Seller shall allow Purchaser or Purchaser's representatives access to the Premises (provided such access shall not unreasonably interfere with the occupancy of tenants), the Leases and other documents required to be delivered under this contract upon

reasonable prior notice at reasonable times.

§9.07. Seller shall operate the Premises in substantially the same manner as the Premises are being operated on the date of this contract.

Section 10. Seller's Closing Obligations

§10.01. At the Closing, Seller shall deliver the following to Purchaser:

(a) A statutory form of bargain and sale deed without covenant against grantor's acts, containing the covenant required by Section 13 of the Lien Law, and properly executed in proper form for recording so as to convey the title required by this contract.

(b) All Leases, assignments of leases, subleases, subordination, nondisturbance and attornment agreements and tenant files and records.

(c) A schedule of all security deposits (and, if the Premises contains six or more family dwelling units, the most recent reports with respect thereto issued by each banking organization in which they are deposited pursuant to GOL § 7-103) and a check or credit to Purchaser in the amount of any cash security deposits, including any interest thereon, held by Seller on the Closing Date or, if held by an institutional lender, an assignment to Purchaser and written instructions to the holder of such deposits to transfer the same to Purchaser, and appropriate instruments of transfer or assignment with respect to any security deposits which are other than cash.

(d) A schedule updating the Rent Schedule and setting forth all arrears in rents and all prepayments of rents.

(e) All Service Contracts initialed by Purchaser and all others in Seller's possession which are in effect on the Closing Date and which are assignable by Seller.

(f) An assignment to Purchaser, without recourse or warranty, of all of the interest of Seller in the Service Contracts, union contracts, if any, certificates, permits and other documents to be delivered to Purchaser at the Closing which are then in effect and are assignable by Seller.

(g) (i) If Schedule C provides for the acceptance of title by Purchaser subject to one or more Existing Mortgages, written consent(s) of the Mortgagee(s), if required under §2.03(b), and (ii) certificate(s) executed by the Mortgagee(s) in proper form for recording and certifying (1) the amount of the unpaid principal balance thereof, (2) the maturity date thereof, (3) the interest rate, (4) the last date to which interest has been paid thereon and (5) the amount of any escrow deposits held by the Mortgagee(s). Seller shall pay the fees for recording such certificate(s). Any Mortgagee which is an institutional lender may furnish a letter complying with Section 274-a of the Real Property Law in lieu of such certificate.

(h) If Schedule C provides for the acceptance of title by Purchaser subject to one or more Existing Mortgages, an assignment of all Seller's right, title and interest in escrow deposits for real estate taxes, insurance premiums and other amounts, if any, then held by the Mortgagee(s).

(i) To the extent they are then in Seller's possession and not posted at the Premises, certificates, licenses, permits, authorizations and approvals issued for or with respect to the Premises by governmental and quasi-governmental authorities having jurisdiction.

(j) Such affidavits as Purchaser's title company shall reasonably require in order to omit from its title insurance policy all exceptions for judgments, bankruptcies, work by the City of New York (if the Premises are in the City of New York), emergency repair liens of the City of New York (if the Premises are in the City of New York) or other returns against persons or entities whose names are the same as or similar to Seller's name, to omit the rights of parties who are no longer in possession and to limit the exception for tenants and occupants to those having "rights as tenants only."

(k) (i) Checks to the order of the appropriate officers or the Title Company in payment of all applicable real property transfer taxes and copies of any required tax returns therefor executed by Seller, which checks shall be certified or official bank checks if required by the taxing authority or the Title Company unless Seller elects to have Purchaser pay any of such taxes and credit Purchaser with the amount thereof, and (ii) a certification of non-foreign status, in form required by the Code Withholding Section, signed under penalty of perjury, and (iii) Form RP-5217 (or, in New York City, Form RP-5217NYC). Seller understands that such certification will be retained by Purchaser and will be made available to the Internal Revenue Service on request.

(l) To the extent they are then in Seller's possession, copies of current painting and payroll records. Purchaser shall make all other Building and tenant files and records, including those contained on computer software, available to Seller for copying, which obligation shall survive the Closing.

(m) An original letter, executed by Seller or by its agent, advising the tenants of the sale of the Premises to Purchaser and directing that rents and other payments thereafter be sent to Purchaser or as Purchaser may direct.

(n) If Schedule C provides for the acceptance of title by Purchaser subject to one or more Existing Mortgages, notice(s) to the Mortgagee(s), executed by Seller or by its agent, advising of the sale of the Premises to Purchaser and directing that future bills and other correspondence should thereafter be sent to Purchaser or as Purchaser may direct.

(o) If Seller is a corporation and if required by Section 909 of the Business Corporation Law, a resolution of

Seller's board of directors authorizing the sale and delivery of the deed and a certificate executed by the secretary or assistant secretary of Seller certifying as to the adoption of such resolution and setting forth facts showing that the transfer complies with the requirements of such law and the deed referred to in §10.01(a) shall also contain a recital sufficient to establish compliance with such law. If Seller is a partnership or limited liability company, the written consent of the partners or members to the extent required by the partnership agreement or operating agreement and delivery of a certificate executed by the general partner of any partnership or by the manager (if any) or a member of a limited liability company, attaching true and complete copies of the organizational documents of Seller and affirming that the sale and conveyance of title comply with the requirements of such organizational documents (or of the applicable statute, if any).

(p) Possession of the Premises in the condition required by this contract, subject to the Leases and Tenancies, and keys therefor.

(q) A blanket assignment, without recourse or representation, of all Seller's right, title and interest, if any, to all contractors,' suppliers,' materialmen's and builders' guarantees and warranties of workmanship and/or materials in force and effect with respect to the Premises on the Closing Date and a true and complete copy of each thereof.

(r) Estoppel letters in the form attached hereto as Schedule F from the following tenants: _____ _____.

(s) A certificate of Seller confirming that the warranties and representations of Seller set forth in this contract are true and complete on and as of the Closing Date (the statements made in such certificate shall be subject to the same limitations on survival as are applicable to Seller's representations and warranties under §4).

(t) A blanket assignment of all Leases and an agreement to indemnify and defend Purchaser against any claims made by tenants, subtenants, occupants or licensees with respect to any failure of Seller to perform its obligations prior to the Closing Date.

(u) Upon request of Purchaser, a bill of sale transferring to Purchaser the Personal Property free and clear of all liens and encumbrances except, if applicable, for the lien of the holder of the Existing Mortgage.

(v) Any other documents required by this contract to be delivered by Seller.

§10.02. Seller shall promptly after the Closing, notify the unions having Union Contracts affecting the Premises of the sale of the Premises and the name and address of Purchaser.

Section 11. Purchaser's Closing Obligations

At the Closing, Purchaser shall:

§11.01. Pay to Seller (and/or to Seller's designee(s) provided Seller shall have given notice to Purchaser of the name(s) of such designee(s) not less than five days prior to Closing) by check, or wire transfer immediately available federal funds to Seller (and/or such designee(s)), the portion of the Purchase Price payable at the Closing, as adjusted for apportionments under §12 and any other credits or adjustments provided in this contract.

§11.02. Deliver to Seller the Purchase Money Mortgage, if any, in proper form for recording, the note secured thereby, financing statements covering personal property, fixtures and equipment included in this sale and replacements thereof, all properly executed, and Purchaser shall pay the mortgage recording tax and recording fees for any Purchase Money Mortgage.

§11.03. Deliver to Seller an agreement indemnifying and agreeing to defend Seller against any claims made by tenants with respect to tenants' security deposits to the extent paid, credited or assigned to Purchaser under §10.01(c).

§11.04. Duly complete and sign all required real property transfer tax returns and all tax reports (such as RP-5217), and cause all such returns, reports and checks in payment of such taxes to be delivered to the appropriate officers promptly after the Closing.

§11.05. Deliver to Seller an agreement assuming all of landlord's obligations under the Leases and any subordination, nondisturbance and attornment agreement given by Seller to a subtenant from and after the Closing Date and indemnifying and agreeing to defend Seller against any claims made by tenants, subtenants, licensees or occupants with respect to any failure to perform such obligations.

§11.06. Deliver to Seller a certificate confirming that the warranties and representations of Purchaser set forth in this contract are true and complete as of the Closing Date (the statements made in such certificate shall be subject to the same limitations on survival as are applicable to Purchaser's representations and warranties under §5).

§11.07. Deliver to Seller an agreement assuming all Seller's obligations under the Union Contracts affecting the Premises from and after the Closing Date and indemnifying and agreeing to defend Seller against any claims made by the union(s) with respect to such obligations.

§11.08. Deliver to Seller an agreement assuming all Seller's obligations for brokerage commissions payable after the Closing with respect to leases entered into by Seller prior to the Closing to the extent such obligations have been disclosed to Purchaser in Schedule E.

§11.09. Deliver any other documents required by this contract to be delivered by Purchaser.

Section 12. Apportionments

§12.01. The following apportionments shall be made between the parties at the Closing as of the close of business on the day prior to the Closing Date:

(a) prepaid rents and Additional Rents (as defined in §12.03) and revenues, if any, from telephone booths, vending machines and other income-producing agreements to the extent collected;

(b) interest on the Existing Mortgage(s) and any Existing Mortgage escrow accounts to the extent assigned to Purchaser;

(c) real estate taxes, water charges and sewer rents, if any, on the basis of the fiscal period for which assessed, except that if there is a water meter on the Premises, apportionment at the Closing shall be based on the last available reading, subject to adjustment after the Closing when the next reading is available;

(d) wages, vacation pay, pension and welfare benefits and other fringe benefits of all persons employed at the Premises, whose employment was not terminated at or prior to the Closing;

(e) value of fuel stored on the Premises, at the price then charged by Seller's supplier, including any taxes, as shown on the invoices of Seller's supplier;

(f) charges under transferable Service Contracts or permitted renewals or replacements thereof;

(g) permitted administrative charges, if any, on tenants' security deposits;

(h) dues to rent stabilization associations, if any;

(i) Reletting Expenses under §6.02, if any;

(j) Accrued senior citizen exemptions, if any; and

(k) any other items listed in Schedule D, including assessments.

If on the Closing Date the Premises shall be affected by an assessment which is or may become payable in annual installments, all installments allocable to the period following the Closing Date shall be Purchaser's responsibility.

If the Closing shall occur before a new tax rate is fixed, the apportionment of taxes at the Closing shall be upon the basis of the old tax rate for the preceding period applied to the latest assessed valuation. Promptly after the new tax rate is fixed, the apportionment of taxes shall be recomputed. Any discrepancy resulting from such recomputation shall be promptly corrected, which obligation shall survive the Closing.

Any errors or omissions in computing apportionments at Closing shall be promptly corrected, which obligations shall survive the Closing.

Real estate tax refunds, abatements and credits received after the Closing Date which are attributable to the fiscal tax year during which the Closing Date occurs shall be apportioned between Seller and Purchaser, after deducting the expenses of collection thereof, which obligation shall survive the Closing.

Prior to the Closing Date Seller shall use commercially reasonable efforts to obtain from the agency of the City of New York having jurisdiction thereof readings of all water meters at the Premises within the 30-day period preceding the Closing Date.

§12.02. If any tenant is in arrears in the payment of rent on the Closing Date, rents received from such tenant after the Closing shall be applied in the following order of priority: (a) first to the month preceding the month in which the Closing occurred; (b) then to the month in which the Closing occurred; (c) then to any month or months following the month in which the Closing occurred; and (d) then to the period prior to the month preceding the month in which the Closing occurred. If rents or any portion thereof received by Seller or Purchaser after the Closing are payable to the other party by reason of this allocation, the appropriate sum, less a proportionate share of any reasonable attorneys' fees, costs and expenses of collection thereof, shall be promptly paid to the other party, which obligation shall survive the Closing.

§12.03. If any tenants are required to pay percentage rent, escalation or pass-through charges for real estate taxes, operating expenses, or other charges, cost-of-living adjustments or other charges of a similar nature ("Additional Rents") and any Additional Rents are collected by Purchaser after the Closing which are attributable in whole or in part to any period prior to the Closing, then Purchaser shall promptly pay to Seller Seller's proportionate share thereof, less a proportionate share of any reasonable attorneys' fees, costs and expenses of collection thereof, if and when the tenant paying the same has made all payments of rent and Additional Rent then due to Purchaser pursuant to the tenant's Lease, which obligation shall survive the Closing. If any tenant is or becomes entitled to a refund of overpayments of Additional Rent which are attributable in whole or in part to any period prior to the Closing, Seller shall pay to Purchaser an amount equal to the amount of such refund attributable to any such period within 10 days after notice from Purchaser, which obligation shall survive the Closing.

Section 13. Objections to Title, Vendee's Lien, Remedies for Purchaser's Default, Procedure on Termination of Contract by Purchaser

§13.01. Purchaser shall promptly order an examination of title and shall cause a copy of the title report to be forwarded to Seller's attorney upon receipt. Seller shall be entitled to a reasonable adjournment or adjournments of the Closing for up to 60 days or, if Purchaser's obligation to close is conditioned on the issuance of a loan commitment, until the expiration date

of any written commitment of Purchaser's institutional lender delivered to Purchaser prior to the scheduled date of Closing, whichever occurs first, to remove any defects in or objections to title (other than Permitted Exceptions) noted in such title report and any other defects or objections (other than Permitted Exceptions) which may be disclosed on or prior to the Closing Date.

§13.02. If Seller shall be unable to convey title to the Premises at the Closing in accordance with the provisions of this contract, Purchaser, nevertheless, may elect to accept such title as Seller may be able to convey without any credit against the monies payable at the Closing or liability on the part of Seller. If Purchaser shall not so elect, Purchaser may terminate this contract, which termination shall be subject to the provisions of §13.07. Seller shall not be required to bring any action or proceeding or to incur any expense in excess of the Maximum Expense specified in Schedule D to cure any title defect or to enable Seller otherwise to comply with the provisions of this contract, but the foregoing shall not permit Seller to refuse to pay off at the Closing, to the extent of the monies payable at the Closing, mortgages or other liens on the Premises which can be satisfied or discharged by payment of a sum certain, other than Existing Mortgages.

§13.03. Any unpaid taxes, assessments, water charges and sewer rents, together with the interest and penalties thereon to a date not less than two days following the Closing Date, and any other liens and encumbrances which Seller is obligated to pay and discharge or which are against corporations, estates or other persons in the chain of title, together with the cost of recording or filing any instruments necessary to discharge such liens and encumbrances of record, may be paid out of the proceeds of the monies payable at the Closing if Seller delivers to Purchaser on the Closing Date official bills for such taxes, assessments, water charges, sewer rents, interest and penalties and instruments in recordable form sufficient to discharge any other liens and encumbrances of record. Upon request made a reasonable time before the Closing, Purchaser shall provide at the Closing separate checks for the foregoing payable to the order of the holder of any such lien, charge or encumbrance and otherwise complying with §2.02. If Purchaser's title insurance company is willing to insure both Purchaser and Purchaser's institutional lender, if any, that such charges, liens and encumbrances will not be collected out of or enforced against the Premises, then, unless Purchaser's institutional lender reasonably refuses to accept such insurance in lieu of actual payment and, discharge, Seller shall have the right, in lieu of payment and discharge, to deposit with the title insurance company such funds or assurances or to pay such special or additional premiums as the title insurance company may require in order to so insure. In such case the charges, liens and encumbrances with respect to which the title insurance company has agreed so to insure shall not be considered objections to title.

§13.04. Notwithstanding anything to the contrary contained herein, if Purchaser shall default in the performance of its obligations under this contract, the sole remedy of Seller shall be to retain the Downpayment as liquidated damages for all loss, damage and expense suffered by Seller, including without limitation the loss of its bargain, subject, however, to Seller's rights under §14 and §17.04.

§13.05. If Seller shall willfully default in the performance of its obligations under this contract, Purchaser shall have the right to seek specific performance of such obligations or damages for all loss, damage and expense suffered by Purchaser, including, without limitation, the loss of its bargain, excluding consequential or punitive damages.

§13.06. Purchaser shall have a vendee's lien against the Premises for the amount of the Downpayment and the interest earned thereon, but such lien shall not continue after default by Purchaser beyond any notice and cure period under this contract or after deposit of the Downpayment in court by the Escrowee.

§13.07. If (a) Purchaser shall have grounds under this contract for refusing to consummate the purchase provided for herein, or (b) Purchaser or Seller terminates this contract pursuant to a provision that refers to this Section, the sole liability of Seller shall be to refund the Downpayment to Purchaser and to reimburse Purchaser for (i) the cost of title examination, but not to exceed the amount charged by Purchaser's title company therefor without issuance of a policy, (ii) the cost of updating the existing survey of the Premises or the cost of a new survey of the Premises if no existing survey was delivered to Purchaser by Seller or the existing survey was not capable of being updated and a new survey was required by Purchaser's institutional lender and (iii) the cost of departmental searches. Upon the giving of the termination notice and Seller's refund of the Downpayment, this contract shall be null and void and the parties hereto shall be relieved of all further obligations and liability other than any arising under §14 and §17.04.

Section 14. Broker

§14.01. If a broker is specified in Schedule D, Seller and Purchaser mutually represent and warrant that such broker is the only broker with whom they have dealt in connection with this contract and that neither Seller nor Purchaser knows of any other broker who has claimed or may have the right to claim a commission in connection with this transaction, unless otherwise indicated in Schedule D. The commission of such broker shall be paid pursuant to separate agreement by the party specified in Schedule D. If no broker is specified in Schedule D, the parties acknowledge that this contract was brought about by direct negotiation between Seller and Purchaser and that neither Seller nor Purchaser knows of any broker entitled to a commission in

connection with this transaction. Unless otherwise provided in Schedule D, Seller and Purchaser shall indemnify and defend each other against any costs, claims or expenses, including reasonable attorneys' fees, arising out of the breach on their respective parts of any representations, warranties or agreements contained in this paragraph. The representations and obligations under this paragraph shall survive the Closing or, if the Closing does not occur, the termination of this contract.

Section 15. Notices

§15.01. All notices under this contract shall be in writing and shall be delivered personally with receipt acknowledged or shall be sent by (i) prepaid certified mail, or (ii) prepaid nationally recognized overnight courier for next business day delivery with receipt acknowledged, or (iii) legible facsimile transmission (with copy acknowledged), in each case addressed as set forth in Schedule D or as Seller or Purchaser shall otherwise have given notice as herein provided. Notice sent by certified mail shall be deemed received on the third business day following mailing. Notice sent by overnight courier shall be deemed received on the first business day following delivery to the overnight courier. Notices sent by facsimile transmission shall be deemed received on the date received (or, if the date of receipt is not a business day, on the first business day following date of receipt). Notices under this contract may not be given by e-mail or other electronic system. Any notice under this contract may be given by the attorneys of the respective parties who are hereby authorized to do so on their behalf.

Section 16. Limitations on Survival of Representations, Warranties, Covenants and Other Obligations

§16.01. Except as otherwise provided in this contract, no representations, warranties, covenants or other obligations of Seller set forth in this contract shall survive the Closing, and no action based thereon shall be commenced after the Closing.

§16.02. The delivery of the deed by Seller, and the acceptance thereof by Purchaser, shall be deemed the full performance and discharge of every obligation on the part of Seller to be performed hereunder, except those obligations of Seller which are expressly stated in this contract to survive the Closing.

Section 17. Due Diligence Period

§17.01. During the period (the "Due Diligence Period") commencing on the date hereof and ending at 5:00 P.M. Eastern Standard Time on the ____ day following the date hereof, Purchaser shall have the right to have the Premises inspected during reasonable hours, after reasonable notice to Seller, and to obtain the following inspection reports with respect to the Premises, at Purchaser's sole cost and expense:

(a) An inspection and report (the "Environmental Report") from a licensed environmental inspection laboratory or a licensed engineer (the "Inspection Company") with respect to the presence or absence of hazardous or toxic substances or conditions at the Premises including, without limitation, asbestos, mold, polychlorinated biphenyls, petroleum products and those hazardous substances defined in the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq*. and all amendments thereto, the Superfund Amendments and Reauthorization Act, 42 U.S.C. § 9601 *et seq*., and the rules and regulations promulgated thereunder, New York State Environmental Liability Review Act, New York Environmental Conservation Law (ECL) §§8-0101 et seq., and the New York State Water Pollution Control Act, ECL §§17-0101 *et seq*. (collectively, "Hazardous Substances"); and

(b) An inspection and report (the "Engineering Report") from a licensed engineer and other appropriate professionals (collectively, the "Engineer") with respect to the structural and general physical condition of the Premises, all mechanical systems and utilities servicing the Premises, curtain walls, roofs, wells, septic and drainage systems, and compliance with the Americans with Disabilities Act (collectively, "Building Conditions").

§17.02. Purchaser shall cause copies of the Environmental Report and Engineering Report (collectively, the "Reports") to be delivered to Seller prior to the expiration of the Due Diligence Period. Purchaser may elect to cancel this contract, by written notice (the "Termination Notice") to Seller delivered on or before the last day of the Due Diligence Period, if the Environmental Report or the Engineering Report is unacceptable to Purchaser. If Purchaser so elects to terminate this contract, such termination shall be subject to the provisions of §13.07 except that Purchaser shall not be entitled to reimbursement from Seller of any of the costs listed in clauses (i), (ii), or (iii).

§17.03. During the Due Diligence Period, Seller agrees to cooperate in all reasonable respects with Purchaser and agrees to make available to Purchaser and its agents all of the books, files and records relating to the Premises which are in the possession or under the control of Seller. Notwithstanding the foregoing, Purchaser shall not have the right to conduct a Phase II Environmental Assessment or make any other intrusive tests without Seller's prior written consent, which shall not be unreasonably withheld, delayed or conditioned.

§17.04. Purchaser hereby indemnifies and agrees to defend and hold Seller harmless from all loss, cost (including, without limitation, reasonable attorneys' fees), claim or damage caused by the inspection of the Premises by Purchaser, its agents, consultants or representatives.

§17.05. TIME SHALL BE OF THE ESSENCE WITH RESPECT TO PURCHASER'S ACTIONS PURSUANT

TO THIS SECTION 17. If Purchaser shall (i) fail to have the Premises inspected prior to the expiration of the Due Diligence Period, (ii) fail to deliver a copy of the Reports to Seller prior to the expiration of the Due Diligence Period or (iii) fail to give the Termination Notice prior to the expiration of the Due Diligence Period, Purchaser shall be deemed to have waived the right to cancel this contract as provided in §17.02.

Section 18. Miscellaneous Provisions

§18.01. Purchaser shall not assign this contract or its rights hereunder without the prior written consent of Seller, which consent may be withheld in Seller's sole discretion. No permitted assignment of Purchaser's rights under this contract shall be effective against Seller unless and until an executed counterpart of the instrument of assignment shall have been delivered to Seller and Seller shall have been furnished with the name and address of the assignee. The term "Purchaser" shall be deemed to include the assignee under any such effective assignment.

(b) Notwithstanding anything to the contrary in §18.01(a), if Seller or Purchaser is or may in the future be under contract with a qualified intermediary for the purpose of effecting a tax-deferred exchange in accordance with Section 1031 of the Internal Revenue Code of 1986, as amended, each party consents to the assignment of this contract to such intermediary. Each party shall cooperate with the other and with the qualified intermediary to accomplish such exchange and shall perform any acts and execute any and all documents reasonably necessary to assist in such exchange, provided that neither party shall be required to accept title to any property other than the Premises, expend any additional amounts of money above those amounts for which it is obligated under this contact or extend the Closing Date, and Seller's time to close under this contract shall not be reduced. Seller and Purchaser shall each defend, indemnify and hold the other harmless from and against expenses, costs and damages of any kind (including reasonable attorneys' fees) suffered by either resulting from the performance of, or failure to perform, any acts of cooperation necessitated by this Section.

§18.02. This contract embodies and constitutes the entire understanding between the parties with respect to the transaction contemplated herein, and all prior agreements, understandings, representations and statements, oral or written, are merged into this contract. Neither this contract nor any provision hereof may be waived, modified, amended, discharged or terminated except by an instrument signed by the party against whom the enforcement of such waiver, modification, amendment, discharge or termination is sought, and then only to the extent set forth in such instrument.

§18.03. This contract shall be governed by, and construed in accordance with, the law of the State of New York.

§18.04. The captions in this contract are inserted for convenience of reference only and in no way define, describe or limit the scope or intent of this contract or any of the provisions hereof.

§18.05. This contract shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs or successors and permitted assigns.

§18.06. This contract shall not be binding or effective until properly executed and delivered by Seller and Purchaser.

§18.07. As used in this contract, the masculine shall include the feminine and neuter, the singular shall include the plural and the plural shall include the singular, as the context may require.

§18.08. If the provisions of any schedule or rider to this contract are inconsistent with the provisions of this contract, the provisions of such schedule or rider shall prevail. Set forth in Schedule D is a list of any and all schedules and riders which are attached hereto.

§18.09. This contract may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall be one instrument.

§18.10. For purposes of this contract, an "institutional lender" is a bank, savings bank, trust company, savings and loan association, credit union or similar banking institution whether organized under the laws of the State of New York, the United States or any other state; a foreign banking corporation licensed by the Superintendent of Banks of New York or the Comptroller of the Currency to transact business in New York State; a mortgage banker licensed pursuant to Article 12-D of the Banking Law; any instrumentality created by the United States or any state with the power to make mortgage loans; an insurance company, pension fund, annuity company, pension plan or pension advisory firm, a mutual fund, a real estate investment trust, a real estate mortgage investment conduit ("REMIC") or similar vehicle, so long as the mortgage held by the REMIC or similar vehicle is serviced by an entity that is a rated servicer, and an investment bank.

IN WITNESS WHEREOF, the parties hereto have executed this contract as of the date first above written.

Seller:

Purchaser:

Receipt by Escrowee

The undersigned Escrowee hereby acknowledges receipt of $_____, by check subject to collection, to be held in escrow pursuant to §2.06.

_____

Schedule A

DESCRIPTION OF PREMISES

(to be attached separately and to include tax map designation)

Schedule B

PERMITTED EXCEPTIONS

1. Zoning and subdivision laws, regulations and ordinances and landmark, historic or wetlands designations, which are not violated by the existing structures or present use thereof.
2. Consents by the Seller or any former owner of the Premises for the erection of any structure or structures on, under or above any street or streets on which the Premises may abut.
3. If Schedule C provides for the acceptance of title by Purchaser subject to one or more Existing Mortgage(s), the Existing Mortgage(s) and financing statements, assignments of leases and other agreements ancillary thereto.
4. Leases and Tenancies specified in the Rent Schedule and any new leases, tenancies, occupancy agreements and licenses not prohibited by this contract.
5. Unpaid installments of assessments not due and payable on or before the Closing Date; and real estate taxes that are a lien but are not yet due and payable.
6. Financing statements, chattel mortgages and liens on personalty filed more than 5 years prior to the Closing Date and not renewed, or filed against property or equipment no longer located on the Premises or owned by Tenants.
7. Rights of utility companies to lay, maintain, install and repair pipes, lines, poles, conduits, cable boxes and related equipment on, over and under the Premises, provided that none of such rights imposes any monetary obligation on the owner of the Premises or interferes with the existing use of the Premises or the following proposed use of the Premises: _____.
8. Encroachments of stoops, areas, cellar steps, trim cornices, lintels, window sills, awnings, canopies, ledges, fences, hedges, coping and retaining walls projecting from the Premises over any street or highway or over any adjoining property and encroachments of similar elements projecting from adjoining property over the Premises.
9. Revocability or lack of right to maintain vaults, coal chutes, excavations or sub-surface equipment beyond the line of the Premises.
10. Any state of facts that an accurate survey would disclose, provided that such facts do not render title uninsurable without additional premium or charge or is a Permitted Exception. For the purposes of this contract, none of the facts shown on the survey, if any, identified below shall be deemed to render title uninsurable or unmarketable, and Purchaser shall accept title subject thereto: _____.

Schedule C

PURCHASE PRICE

The Purchase Price shall be paid as follows:

(a)	By check subject to collection, the receipt of which is hereby acknowledged by Seller (the Downpayment):	$
(b)	By check or checks delivered or wire transfers of federal funds to Seller or Seller's designee(s) or the holder of any Existing Mortgage being assigned pursuant to §2.04 at the Closing in accordance with the provisions of §2.02:	$
(c)	By acceptance of title subject to the following Existing Mortgage(s): _____	$
(d)	By execution and delivery to Seller by Purchaser or its assignee of a note secured by a Purchase Money Mortgage on the Premises:	$
(e)	Total Purchase Price:	$

Schedule D
MISCELLANEOUS

1. Address of Premises:
2. Title insurer designated by Purchaser (§1.02):
3. Last date for consent by Existing Mortgagee(s) (§2.03(b)):
4. Prepayment Date on or after which Purchase Money Mortgage may be prepaid (§2.05(c)(1)):
5. Maximum Interest Rate of any Refinanced Mortgage (§2.05(b)):
6. Seller's tax identification number:
7. Purchaser's tax identification number:
8. Scheduled time and date of Closing (§3.01):
9. Place of Closing (§3.01):
10. Assessed valuation of Premises (§4.10):
    Actual Assessment:
    Transition Assessment:
11. Fiscal year and annual real estate taxes on Premises (§4.10):
12. Tax abatements or exemptions affecting Premises (§4.10):
13. Assessments on Premises (§4.13):
14. Maximum Amount which Seller must spend to cure violations, etc. (§7.02):
15. Maximum Expense of Seller to cure title defects, etc. (§13.02):
16. Broker, if any (§14:01):
17. Party to pay broker's commission (§14:01)
18. Address for notices (§15.01):
    If to Seller:
    with a copy to Seller's attorney:
    If to Purchaser:
    with a copy to Purchaser's attorney:
19. Additional Schedules or Riders (§18.08):

Schedule E
RENT SCHEDULE
(to be attached separately)

Schedule F
FORM OF ESTOPPEL LETTER
(to be attached separately)

Schedule G
INSURANCE POLICIES

Schedule H
EMPLOYEES

Schedule I
SERVICE CONTRACTS

Schedule J
CERTIFICATE OF OCCUPANCY

Schedule K
PURCHASE MONEY NOTE AND MORTGAGE

So the Servicer Accepts Payment After Maturity . . .

By Bruce J. Bergman

One of the mortgage foreclosure questions most frequently asked by lenders and servicers is: Do we waive our rights in accepting payments after a mortgage matures? The answer should absolutely be "no," and recent case law finally supports this, although not quite as unequivocally as would be preferred. The issue is worthy of exploration.

First, a moment of perspective. A mortgage matures in one of two ways. Using a 15-year mortgage as an example (it could, of course, be any duration), should the borrower default at some moment prior to the end of the 15th year, the lender or servicer could accelerate the balance and thereby declare an earlier maturity of the mortgage. Or, a mortgage can mature at the end of its normal term, in this instance, after 15 years. The discussion here focuses upon this latter example of maturity.

Perhaps the most common scenario for the inquiry is the instance of an interest-only mortgage. Although the maturity date arrives, the borrower does not submit all the principal due, but instead continues remitting monthly installments of interest. Or, there is balloon mortgage, and when that final lump sum becomes due, only monthly interest payments are forthcoming.

How does such a situation remain unresolved and in limbo? Sometimes the mortgage lender or servicer may not be readily cognizant of the maturity and might silently accept the payments. (This could happen, for example, where the lender is a bank and the borrower makes payments through a branch.) Alternatively, the borrower might request time to pay the principal balance. "Please take my interest payments for a while and in ____ months I will have all the money for you," says the borrower. It sounds reasonable, and so some mortgage lenders or servicers might be inclined to wait.

Under such circumstances, the mortgage lender or servicer asks: Is the right to receive the balance waived by accepting only the interest for some period of time (or even interest plus some principal)?

Because these lesser payments do not cure the default, there should be no issue of waiver—and there is case law which, in part, says just that. [*P.T. Central Asia, New York Branch v. Ho Ho Ho Realty Co.*, 273 A.D.2d 212, 709 N.Y.S.2d 116 (2d Dep't 2000)]. This is most welcome indeed.

But the cited case *also* observed that the borrower could not reasonably have believed that its partial payments would result in a waiver of the lender's rights because numerous letters from the lender advised that full payment was a prerequisite to consideration of an extension of the loan, and absent an extension the lender would enforce all its rights. (Of course, just because a lender might continue to accept interest upon maturity should hardly lead anyone to believe that the lender no longer wants its principal!)

So, while the lender in that case sagely protected itself with helpful correspondence, where does this leave the status of the law? Would the court have been so resolute in rejecting the borrower's waiver claim in the absence of the lender's cautionary letters? From the case it is hard to say.

On to the final word. When a mortgage matures, mortgage holders would believe that it makes no sense for a court to find waiver and deny the ability to collect the outstanding balance merely because post-maturity payments are accepted without protest. But there is no case in New York which says *exactly* that and that alone. Consequently, mortgage lenders and servicers will always be wise to send the protective or explanatory letter. Then there should be no doubt that all rights will have been preserved.

Mr. Bergman, author of the three-volume treatise *Bergman on New York Mortgage Foreclosures* (Matthew Bender & Co., Inc., rev. 2004), is a Partner with Berkman, Henoch, Peterson & Peddy, P.C., Garden City, New York; an Adjunct Associate Professor of Real Estate with New York University's Real Estate Institute, where he teaches the mortgage foreclosure course; and a special lecturer on law at Hofstra Law School. He is also a member of the USFN and the American College of Real Estate Lawyers.

Scenes from the Real Property Law Section

Summer Meeting

Hotel Hershey • Hershey, PA
July 24–27, 2008

Photos by Harry Meyer



















Section Committees & Chairs

The Real Property Law Section encourages members to participate in its programs and to volunteer to serve on the Committees listed below. Please contact the Section Officers or Committee Chairs for further information about the Committees.

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This *Journal* is published for members of the Real Property Law Section of the New York State Bar Association.

SSN 1530-3918 (print) ISSN 1933-8465 (online) **Cite as: *N.Y. Real Prop. L.J.***

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