

# Advocating Your Way



into Adulthood

# Advocating Your Way Into Adulthood

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The purpose of this manual is only to provide you with factual information about the law and legal issues. It is not legal advice; the book does not take the place of an attorney. You should obtain a lawyer's advice when necessary, regarding the issues discussed in this manual.

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# Advocating Your Way Into Adulthood

## Introduction

What do you do if you order a burger with ketchup and mustard, but it comes, instead, with mayo? Do you return it or do you just scrape off the mayo and eat it as is? If you return it, you are exercising your rights as a consumer to get what you paid for. You are **ADVOCATING** for yourself. This is not always so easy. Certainly, advocacy is **NOT** instinctual. Rather, it is a learned skill. This manual is intended to teach high school students how to advocate for themselves (and others!) when stepping out into the world on their own, beyond purchasing burgers and fries. For instance, this booklet will provide guidance for making big consumer purchases – like a car or house, or for negotiating the terms of a job. Entering a new arena, such as the world of employment or home purchasing can be intimidating. But if you are armed with knowledge of your rights beforehand, the new experience will seem less intimidating, and you will find that you are quite capable of advocating for yourself. Think of it this way: Who is in a better position going to a car mechanic? Someone who is aware of the basic parts of a car and understands the way a car functions, or someone who has no clue whatsoever of how cars work? The person with some working knowledge of cars has better leverage than the person with no knowledge. This is because the person with no knowledge is completely at the mercy of the mechanic as to her diagnosis of the problem and plan for repair. The person with some car knowledge, on the other hand, is able to analyze the mechanic’s diagnosis, and speak (somewhat) intelligently with the mechanic about possible alternate means of repair (which might be cheaper).

Similarly, an employee who understands her rights and limitations in the workplace will be better able to negotiate terms of salary and benefits than an employee who is uninformed. You are naturally the best person suited to advocate for what you want and need as an employee.

This manual will guide you in advocating for yourself in the following situations: As a student, consumer, employee, citizen, and if disabled, harmed or involved in the criminal justice system.

But what IS advocacy? Think of “Advocacy” as: “Ad-ding your Voice for Change”; asserting your needs and wants. You can advocate in many ways, including speaking out, making phone calls, writing letters to the targets of your advocacy (e.g., the manager of your grocery store which doesn’t carry organic products), writing a letter to the editor of your local paper, signing a petition, protesting or lobbying.

When embarking on this lifelong journey of self-advocacy, you should take comfort in knowing that:

- a) there are laws and policies which offer protections to individuals in countless areas;
- b) in general, in the United States, you have the right to challenge rules, policies, laws or authority if you believe these protections are not being granted to you and if your rights are being violated. You just need to know how to do the challenging; how to assert yourself in a constructive, non-threatening way to get what you want, taking into account any options that exist and any pertinent time limits. Know this: **Self-advocacy is a required life skill** – a survival skill, like cooking, washing your clothes and swimming. You can’t afford **NOT** to advocate for yourself, now and throughout your life.

# Chapter I. Rights I Have As a Student

## Part 1: School Law<sup>1</sup>

### 1. Source of Rights

Every school district in New York State is required, under 8 NYCRR §100.1(1), to adopt a Student Code of Conduct, and must publish and distribute this to all students and their families. Basically, the United States Constitution sets the legal “floor,” to which the New York State Constitution and the New York State Education Law add. The New York Education Law cannot take away any of the rights the U.S. or New York Constitutions give to students, but it can increase the rights a student has. Finally, each school district in New York is required to write a **Code of Conduct** which can add to, but not subtract from, a student’s rights under the New York Education Law and the New York State and U.S. Constitutions.

**Codes of Conduct** generally cover:

- what is expected of students;
- what rights students have on and even off school grounds;
- what disciplinary measures may be taken against students and for what cause (including a range of penalties which may be considered)<sup>2</sup>;
- what legal rights students (and their parents/legal guardians) have when facing disciplinary measures (including what rights students have to be educated during a suspension and what rights parents/legal guardians have to participate in the decision-making process, to be heard through meaningful hearings and appeals);
- what procedures exist for identifying, educating and disciplining those students with special needs, including those with IEP’s (individualized education programs).

This Code of Conduct must be reviewed **yearly**, kept on **file** in all school buildings, and made **accessible** to the public.

### 2. Who is Covered By These Rights?

Under New York State law, children must receive a full-time education beginning with the school year in which they become six, through the year in which they become 17. If a student begins a school year having already reached the age of 17 (a “school year” in New York runs from July 1<sup>st</sup> to June 30<sup>th</sup>), the school does not necessarily (unless they have a written policy otherwise) have to continue to educate this student if the student is suspended or expelled during the year.

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1. The majority of the following material is reprinted from, “You Have The Right To Remain Involved’, A Parents’ Guide to NYS School Law,” by Annie Rody-Wright. See also, School Law, 33rd Edition, the New York State School Boards Association; the New York State Bar Association, 2010.

2. In this vein, students must remember that in school as out in the world, it’s all about ATTITUDE (one small word that can alter your life)! Attitude is critical to how you are disciplined at school, as well as how you are treated by police on the street or when pulled over in your car. Now that many schools have police officers on staff, it is more important than ever to adjust your attitude! That is: Be SMART: Act the part. If you walk the walk, worlds may open up to you. Adopt a belligerent attitude and doors will close in your face. Remember: Want some gratitude? Adjust your attitude!

In addition, in New York, for the purposes of criminal law, once a person attains the age of 16, he or she is treated as an adult. This means that, depending on the circumstances, which include the individual's past record and the nature of the crime, options of "juvenile offender status" and family court may well be unavailable. For example, a 16 year-old at a public high school in New York was denied juvenile offender status and was sentenced to multiple years in state prison for bringing a loaded handgun to school. This is because the student had prior offenses on his record and the handgun offense was itself considered a violent offense, even though the student never took it out of the backpack.

**Parents/Guardians** also have certain rights. It deserves mention here that school districts have varying policies regarding **visitors**, usually defined as all non-staff, non-students on campus. In some schools, for example, visitors must report to the office upon arrival at the school, sign the visitor registry and receive a badge to be worn throughout the visit. The badge must be returned at the end of the visit. If a visitor to a school wishes to observe a particular class, arrangements must usually be made in advance with the teacher involved. Teachers are not supposed to use class time to discuss individual matters with visitors. Unauthorized persons will be reported to the principal and asked to leave. If necessary, the police may be called to deal with an unruly visitor, even if that visitor is a parent of a child in the school.

### 3. What Exactly Are These Rights?

#### Overview:

- Students who attend public schools in New York have certain civil rights.
- Students enjoy the **First Amendment** rights of free speech, freedom of religion and freedom to assemble peaceably.
- Students cannot be subjected to unreasonable searches and seizures, under the **Fourth Amendment**.
- Students possess the **Fifth Amendment** Right not to have to incriminate (tell on) themselves or have their property (including a public school education!), freedom or lives taken without first having a meaningful opportunity to defend themselves.
- "**Miranda**" rights (that a person has the right to remain silent; that anything the person says may be used against them in a court of law; and that the person has a right to an attorney) must be given to students in New York by the police when interviewing a student who has been detained –whether on or off school grounds.

#### A. First Amendment:

Many students mistakenly believe that the First Amendment allows them to say or do whatever they want to whomever they want. Although students do have the right to free speech and non-verbal expression, there are limits placed on this right. For example, hate crime laws restrict freedom of expression by imposing higher penalties for crimes motivated by hate or intolerance for a person(s) based on their race, religion, sexual orientation or some other "protected" status. Laws or rules regarding public health and safety will generally be enforced at the risk of squelching a student's or group of students' free expression because ensuring the good of the school community is seen as more important than ensuring the free speech of a few. Policies prohibiting lewd or disruptive speech ("disruptive speech" includes wearing inappropriate clothing) or speech or actions which "interfere with a school's basic educational mission," are further examples of limits on students' First Amendment rights.

Students have been disciplined for being rude and disrespectful to teachers because such speech disrupts the educational process and detracts from the mission of the school, even if it was a matter of the student expressing his/her opinion. In 1988, the United States Supreme Court decided that administrators of public schools may censor what students say or print or perform or exhibit if they believe the speech (or action) to be "inappropriate" or "harmful" (*Hazelwood School District v. Kuhlmeier*).

Students have also been ordered to change their clothing if it is deemed inappropriate. Beyond “short” shorts and spaghetti-strap tops, students in certain school districts are banned from wearing “RIP” (“rest in peace”) T-shirts, depicting a murdered student or family member because the shirts are considered possibly “gang related,” but at the least, disruptive to the teaching process. Likewise, depictions of guns on T-shirts – even with accompanying anti-gun slogans – have been prohibited from some schools, as are T-shirts with profanity.

The United States Supreme Court came to the opposite conclusion in 1969, in a critical “free speech” decision called *Tinker v. Des Moines Independent Community School District*. In *Tinker*, high school students like you, back in the Vietnam era of the late 1960s – 1970s decided to mount a silent protest against the war by wearing black armbands to school. They were suspended from school for their perceived “disloyalty” to the U.S. government. However, they claimed victory when the Supreme Court ruled that the public school students could not be disciplined for wearing the black arm bands to school in protest. The Court was not convinced that the wearing of the arm bands was disruptive. It held that, although the school administrators may not have agreed with or approved of the anti-war sentiment of the students, the students’ free speech rights outweighed the small risk that the bands could have caused a disruption.

In 2007, a different set of circumstances led to a distinctly different result in what has become known as the “Bong Hits 4 Jesus” case. The Supreme Court, in *Morse v. Frederick*, agreed with Juneau, Alaska high school Principal Deborah Morse’s decision to suspend student Joseph Frederick after he unfurled a 14-foot banner that read, “Bong Hits 4 Jesus.” The banner was unrolled during a school sponsored event in which the students joined with the citizens of Juneau, Alaska, as the Olympic torch wound its way through the streets en route to Salt Lake City, Utah. Although Frederick maintained that the message was purely nonsensical and was meant only as a joke, his principal believed it was a pro-drug message that interfered with the school’s educational mission. The Court, making sure not to set a precedent which would allow widespread future squelching of students’ free speech, held that the real question was whether or not Principal Morse could have reasonably believed that the message in question could be interpreted as promoting illegal drug use. The Court decided that this was a reasonable interpretation.

Some schools prohibit the wearing of certain colors, hats or beaded jewelry to eliminate the possibility of these being used as a means of gang affiliation. One school in New York suspended a student in 2010 for wearing the rosary beads of his dead brother, since “bandanas, colors, flags or beads” were among the items listed in the district’s dress code as representative of gangs or were “deemed to be gang related.” The school offered to let the student wear the beads under his shirt, away from view, but the student refused. After civil rights’ organizations got involved, and filed a federal lawsuit, a federal judge ordered the school to allow the student to return to class, wearing the beads, pending the outcome of the case. Before the case could be heard, however, in late August of 2010 – prior to the beginning of the new school year – the boy’s school district publicly announced that they were revising their dress code and would allow this student (and presumably others) to openly display rosary beads. What an important lesson that young man taught his classmates and all of us! He disagreed with a policy that he saw as an infringement of his rights; he found a way to protest the policy in a non-violent way; he welcomed publicity of the issue; people realized that this was an example of a perhaps well-intentioned policy gone awry, and ... this student made change happen. The outcome of his challenge potentially altered his school’s regulations, and may have impacted those of schools in other districts and even in other states. As Mahatma Gandhi said, “Be the change you want to see in the world.” Advice well taken.

Similarly, in February of 2012, a student in Maryland was required to bring a Rabbi’s note to the principal of his school, in order to wear his yarmulke (Jewish religious head covering) to class. After

much protest by his parents and community, the school apologized and said from that point on, a note from a parent would suffice to enable a student to wear a religious head covering. It should be noted, however, that schools in New York City tend not to make exceptions for religious head coverings, requiring a complete ban on all head coverings as a safety precaution for the student body. Albany City public schools, on the other hand, make exceptions from the “no hats” ban for religious head coverings.

Worthy of mention in a discussion of free speech rights is that students may not be forced to say the Pledge of Allegiance in public schools, but may stand or sit silently during the pledge, as they wish.

In the realm of free speech/free establishment of religion cases, the Supreme Court ruled in 1962-63 that organized “prayer” is not allowed in public schools, but to this day, this subject has remained controversial. For instance, in 2002, the Supreme Court ruled – in a case from upstate New York – that it is constitutional to allow a bible study group to meet on public school grounds after regular school hours (like any other after school organization or club). Similarly, over the years, the Supreme Court has ruled that students can pray on their own in public school, if not disruptive to others; that students can share their faith with other students; and that teachers can pray with other teachers outside of class, although not in front of students during school hours. Student prayers at public school graduations and football games are routinely challenged. When courts have been asked to decide their constitutionality, they are typically ruled unconstitutional, especially if broadcast over a loudspeaker to a captive audience.

Recently in New York City, there has been high drama over the issue of the constitutionality of renting public school space to religious organizations on the weekends. In June of 2011, the federal Appeals Court for New York outlawed weekend rental of public schools by religious organizations, warning that such use amounted to a “subsidy of religion,” and that the school building “became the church” when church services were held there, in violation of the constitutional separation of church and state. Religious organizations in New York City were given until February 2012 to relocate. However, a temporary “injunction” (a ban, a stop) was placed on the directive to relocate by a federal district court judge in New York. Finally, on June 29, 2012, this same federal district court, in Bronx Household of Faith v. Board of Education of the City of New York, issued a permanent injunction, forbidding the New York City Board of Education from enforcing the ban against religious organizations renting public school buildings on weekends. The court ruled that churches can continue to rent space and hold worship services in New York’s public schools on the weekends. Undoubtedly, much focus will remain on this issue in the months and years to come, as the City of New York has already announced plans to challenge this ruling.

On the other hand, while students have the right to “peaceably assemble” on school grounds, they may be prohibited from gathering together for a meeting or to protest something if the school administration can articulate why the gathering is harmful in some way to the education process, or threatens the health and safety of students and/or staff.

An important point to make here is that while school districts have rules and regulations, schools are not the final decision-makers of what is legal and what is not. That is the job of the judicial system – the courts. **IT MUST BE EMPHASIZED THAT JUST BECAUSE A POLICY IS WRITTEN IN A STUDENT HANDBOOK, THE PRINTING OF IT DOES NOT, IN AND OF ITSELF, MAKE IT LEGAL.** This will be important to remember as you receive employee manuals as an employee, or landlord/tenant contracts. We will discuss illegal clauses in contracts and employment manuals in future chapters.



## B. Fourth Amendment:

- 1) Locker Searches: The main rule to remember here is that **students don't own their lockers; the school does**. Students have **no reasonable expectation of privacy** in their lockers, desks or other school storage places. You should not place anything in your locker which you would not want a principal to find. This includes contraband (such as: drugs, weapons, ammunition, hate literature, pornography). Students should be discouraged from sharing lockers with friends, because the student who is assigned to the locker is potentially responsible for any contraband found in the locker, even if placed there by a friend. School officials have the right to search a student's locker, even without prior warning to the student, although generally, there must be "reasonable suspicion" that contraband exists for a school official to conduct a search. Random group searches conducted in a non-discriminatory way have also been declared legal. For example, it would be legitimate to search every ninth grader's locker, but it would not be legal to search only lockers registered to Asian students.
- 2) Police Dogs: In New York, the law is not completely clear about the use of trained narcotics dogs to search for drugs or other contraband in schools based on a "hunch" (or less). The underlying question is whether a "dog sniff" constitutes a "search" and is protected by the Fourth Amendment. Generally speaking, the trend nationwide is that the answer has to do with the "degree of intrusiveness" of the sniff. The idea is that inanimate objects (e.g. backpacks) are less deserving of Fourth Amendment protections than are persons. Therefore, inanimate objects may be sniffed for drugs without, or with very little, suspicion because doing so would not be considered a "search." On the other hand, for a student to be sniffed by a narcotics dog in a public school requires at least reasonable suspicion (and maybe more). The law is fairly clear that police dogs may enter schools if: (1) a request has been made by school officials; (2) police have a warrant for a student's arrest (an "arrest warrant"); (3) there is a search warrant; or (4) a crime has been committed (in other words, if there is "probable cause").
- 3) Search of Person: A person may be searched in New York public schools, when "sufficient cause" for the search exists. Metal detectors have been upheld by the courts as "reasonable" searches, since the goal of assuring the health and safety of students and staff is seen as more important than the individual right not to be searched, if there was no underlying suspicion. On the extreme other end, to conduct a strip search of a particular student would require probable cause and must be done in private.
- 4) Search of Belongings: Generally, in order to search a particular student's belongings, such as his or her backpack or purse, the school would need to have "reasonable suspicion" that the student was carrying contraband.
- 5) Urine Samples: New York does permit schools to conduct drug tests when a student is suspected of drug use and the school has prior parental consent. Results are shared with the student's parents as well as with the Department of Social Services. The results are not permitted to be shared with law-enforcement. In 2002, the Supreme Court of the United States went beyond a prior ruling allowing random drug testing of student athletes, and upheld random drug testing



of all middle and high school students participating in competitive extracurricular activities. To date, the Supreme Court has not permitted random drug testing of the general student population. Testing can be done by urine or hair samples, saliva and even a sweat patch, with school districts choosing based on the reliability of the method, range of substances testable by the method, and method cost. The presence of alcohol can certainly be detected by a breathalyzer test, and would be permissible “drug testing” under the Supreme Court’s ruling. However, because alcohol stays in the system for a relatively short period of time, some schools may have decided that the equipment needed to detect it is not worth the expense. Other schools rely on breathalyzer equipment, especially to screen students before they are allowed admission into such events as school dances.

### C. Fifth Amendment:

- 1) Miranda Rights: When questioned by police, on or off school grounds, students have rights under the Fifth Amendment which include not sharing the details of a particular situation with police. Frankly, if police are merely seeking information from witnesses to a crime, for example, it might be wise to answer an officer’s questions. But if the questions are focused on the potentially criminal actions of the individual being questioned, it would be wise for that individual to remain silent until after speaking with an attorney. If a student is 15 or younger and criminal charges are pending against him or her, the student’s parent/guardian must be notified by police as soon after the student is in police custody as possible (usually at the police station, prior to questioning). In this situation, having an attorney by a student’s side would be more critical than having a parent there. Of course, persons 15 or under may have both an attorney and parents/guardians present when questioned by police.

Remember, even if the police officer is someone a student knows and trusts, such as an on-campus officer, the officer has an obligation to report to the District Attorney’s office any statements a student makes in a criminal investigation. These statements can be used to prosecute the student. Therefore, students need to be aware of this fact as well as of their right to remain silent. Students should consider very carefully whether to give up this right not to speak to police prior to speaking with a lawyer.

Note: Some schools have a Code of Conduct that requires the principal (or someone designated to act for her) to attempt to notify a student’s parent/guardian before a student is questioned or searched by police on school property or at a school function. The idea is that the parent/guardian should be given the opportunity to be present during the police contact. Of course, if the situation is so urgent that parental notification is impossible or unreasonable (for example, if another student’s life is in danger) the principal would be relieved of the obligation to notify parents/guardians beforehand. Absent urgent circumstances, if the principal is unable to contact the parent/guardian, the search or questioning of a student must wait. Further, the principal, or person designated by the principal, must be present during any police questioning or search of a student on school property or at a school function.

- 2) Right to an Education: Students may not be deprived of the right to an education without due process of law (i.e., the chance to be heard). That means that if a student is facing suspension or expulsion from public school, the student and his/her family must first have the right to challenge this decision in a meaningful way, with appropriate hearings and appeals. Further, certain procedures must be followed and certain provisions made for the student to receive an education elsewhere. These procedures and provisions will be detailed below.

## 4. Possible Penalties: What Can Happen If a Student Breaks the Rules

### A. Overview:

The penalties a school district may impose on a student vary, depending on the district, but must not be more severe than state law permits. The list of penalties must be made clear in the school district's written Code of Conduct. Penalties may include: verbal warnings, written warnings, written notification to parents/guardian, reprimand, detention, suspension from athletic events, social or extracurricular activities or other privileges, temporary or permanent termination of enrollment in a particular class, in-school suspension, suspension from transportation, suspension from school for five days or less, suspension from school for more than five days, and temporary or permanent expulsion.

Illegal penalties would include: lowering a student's grade or GPA as a result of a disciplinary infraction (unless the infraction involved cheating on a test, etc.) and any form of corporeal punishment (unless used by a staff member in self-defense or in defense of others or of school property).

The Code of Conduct for the district should specify what violations result in which forms of discipline, and what procedures must be followed prior to, during and, if applicable, subsequent to enforcing a particular penalty on a student. This would include the school's responsibility to educate a student during his or her suspension, discussed below.

### B. Suspensions

#### 1) Sufficient Cause to Suspend

A student may be suspended for: insubordination, disorderly conduct or a physical or mental condition which jeopardizes the safety and welfare of him/herself and/or others.

In addition, because New York complies with the **Federal Gun-Free Schools Act** (Education Law §3214[3][d]), students found with a gun (the definition includes silencers and other explosive devices) must be suspended for a calendar year (not merely a 10-month school year). School district superintendents have the ability to modify a suspension under this law. Factors considered by a superintendent when determining whether to modify the suspension would be: the student's age, grade in school, prior disciplinary record; the superintendent's belief that other forms of discipline may be more effective; input from parents, teachers, or others; and other extenuating circumstances. As well, superintendents' determinations may be appealed to the school board and the Commissioner of Education.

In addition to the Federal Gun-Free Schools Act, New York schools have a "**Zero Tolerance**" policy concerning all forms of weapons and illegal drugs, and varying terms of suspension can be expected for violating this policy. While general guidelines are in place to aid superintendents in determining the length of a suspension, all cases turn on their own set of facts, including whether the student has been in trouble before; whether the student harmed or attempted to harm him/herself or others; the student's age and maturity level; other mitigating or extenuating circumstances; input from parents, teachers and others.

#### Special Note on Students with Disabilities:

If the conduct of a student is believed to be related to a known or suspected disability, the student must be referred to the Committee on Special Education. Discipline for students with disabilities must be meted out in accordance with the district's code of conduct for disciplining students with disabilities.

### **Truancy:**

A student may not be suspended for **truancy**, but other disciplinary measures taken can be quite serious. Usually, a truant student is first reprimanded by teachers or the principal, but eventually, parents/guardians are notified, detention can be given, and ultimately, the student can end up in Family Court, faced with a PINS (“Person in Need of Supervision”) Petition.

### 2) Parties Who May Suspend

Unless a school board has a policy allowing school principals to suspend students, only the school board, the district superintendent, and the BOCES (Board of Cooperative Educational Services) district superintendent can suspend a student. In certain districts, school principals do have the ability to suspend a student. However, **even if a principal is granted the power to suspend, he/she may not suspend a student in excess of five school days.** No teachers, coaches, assistant principals or office staff may make the decision to suspend a student; although input from these persons would be considered by the decision-making body in determining whether or not to suspend a student.

### 3) Limitations on Length of Suspension; Due Process Rights

#### a) **In-School Suspension:**

An “in-school” suspension means that a student is removed from his/her classes on a temporary basis, and placed in another part of the school to do his/her coursework each day. A “substantially equivalent” education must be provided students in this situation. Basically, merely providing a student with a study hall does not meet the standard of “substantially equivalent” education (see more on “substantially equivalent,” below). When a student receives “in-school” suspension, he is not given as many legal protections and legal ways to challenge it, as a student facing an out-of-school suspension (see below). However, at the least, the student facing in-school suspension and his/her parent/guardian must be given a reasonable opportunity to have an informal conference with the person(s) imposing the suspension, so that the conduct in question and the proposed penalty can be discussed.

*An in-school suspension should not appear on a student’s permanent school record.*

#### b) **Less Than Five Day Suspension:**

[Remember to check with your school district’s Code of Conduct for particulars, but your code must afford at least the following legal protections, and it may afford more generous provisions.]

If a student is to be suspended for less than five days, the school district needs to notify the student’s parent or guardian immediately. Notification must be in writing, delivered by personal messenger, express mail or an “equivalent means reasonably calculated to assure receipt” within 24 hours (Education Law §3214[3][b]). The district must attempt to notify a parent or guardian verbally as well, if the district has the appropriate telephone numbers of the parent/guardian. Note: Both the written and oral communication must be in the parent/guardian’s dominant language. **Informal conferences may be arranged** by the parent/guardian with the school/district to discuss the conduct in question as well as the proposed penalty.

Suspensions of this kind will appear on a student’s permanent school record. Therefore, it is absolutely critical that a student’s parent/guardian meets with the school/district to discuss the situation, including possible alternatives.

### **\*\*Special Note About Students' Records\*\***

Parents/guardians have the right to see their child's records and to "request deletion of inaccurate, misleading or inappropriate data." If the school and parent/guardian cannot agree regarding the removal of certain data from the record, parents/guardians can request a hearing conducted by a hearing officer designated by the school superintendent.

#### **c) Suspension in Excess of Five Days: Hearing and Notice Required**

Students may not be suspended in excess of five days unless **the student and his/her parent/guardian have had an opportunity for a Disciplinary Hearing after reasonable notice**. What is "reasonable notice"? Notice is, at the least, notification in writing. "Reasonable" notice is written notification within 24 hours, in the parent/guardian's dominant language that:

- + explains why the student faces suspension, specifying the incident(s) at issue;
- + advises when and where the suspension hearing will take place;
- + informs the student that he/she has the right to bring a parent and/or an attorney to the hearing;
- + states that the student may testify, present witnesses and submit other evidence on his/her own behalf; and
- + makes clear that the student may cross-examine the school's witnesses.

A hearing officer, appointed by the superintendent and school board conducts the hearing. It is important to note that the hearing officer's report is only "advisory" in nature. The superintendent or school board is permitted to accept it or reject it, in whole or in part.

**At the hearing, the student will be presumed innocent of the charges against him/her, unless the school, which has the burden of proving otherwise, can demonstrate such proof.**

Relevant evidence considered by the hearing officer would include: student transcripts, live or written statements of persons familiar with the student who can vouch for the student's good character (teachers, clergy, coaches, employers, neighbors, relatives, friends), examples of extracurricular activities and community work in which the student has been involved, etc. Parents may also suggest possible alternate discipline responses, less harsh than suspension or expulsion, such as counseling, conflict resolutions and guidance counselor interventions. Since 2007, New York University Law School, and now many of the law schools in New York, have offered free legal representation in the form of trained law students to low-income students facing long-term suspension or expulsion. The Suspension Representation Project of NYU Law School can be contacted at: (212) 998-6753. Legal Aid Offices in New York also offer this service, and can be reached online at: <http://www.legal-aid.org/en/ineedhelp/ineedhelp/self-help/education/suspensions.aspx>

Parents/guardians have the right to a transcript of the hearing. A transcript is a written record of the hearing. This right is extremely important if a student wishes to appeal the determination, because the transcript will form the basis of the appeal.

If an appeal is made to the board of education and the board agrees with the superintendent/school board, and "confirms" the decision, the student and his/her parents/guardian can launch a second appeal – this time to the Commissioner of Education.

Students and parents/guardians may, depending on the circumstances, choose to waive (give up) the right to a hearing and accept the school district's determination.

**Remember:**

***IT IS A MISTAKE TO TAKE A SUSPENSION HEARING LIGHTLY. THIS HEARING (AND APPEALS OF THE HEARING) IS EXTREMELY IMPORTANT. IT WILL AFFECT YOUR PERMANENT SCHOOL RECORD, AND YOUR CHANCES OF GETTING INTO A GOOD COLLEGE. IF YOU ARE FACING CRIMINAL CHARGES AS WELL, IN RELATION TO THE INCIDENT(S) AT ISSUE, THE OUTCOME OF A SUSPENSION HEARING COULD HAVE BEARING ON THE CRIMINAL SITUATION. YOU SHOULD NOT GO TO THIS HEARING UNPREPARED. AT THE LEAST, YOU SHOULD SPEAK TO AN ATTORNEY BEFORE ATTENDING THE HEARING TO GET SOME POINTERS, IF YOU ARE NOT ABLE TO BRING AN ATTORNEY WITH YOU.***

**d) Expulsions:**

Generally, expulsions are reserved for extraordinary circumstances, where it is determined that a student poses safety risks to him/herself and others. The same notice and hearing requirements which apply to suspensions in excess of five days would certainly apply to expulsion situations.

Note: See below regarding options you have if you are given insufficient or no meaningful opportunities to be heard in a suspension/expulsion situation.

**5. The Right to be Educated: Post-Suspension Rights of Students:**

Schools in New York must provide students under the age of 16 (or, arguably, who have turned 16 during the school year in question) who have been suspended from school – regardless of the number of days – a “substantially equivalent” education. This must be done immediately. Courts are increasingly strict about the length of time a school district has to comply with this. To be safe, schools should be ready with an alternate but “substantially equivalent” educational option practically instantaneously.

The alternative education offered must be adequate to enable students to complete the course work required of them. The education offered is often in the form of a day or evening educational option, off-site.

Be aware that “substantially equivalent” is loosely defined. The educational options are often completely inadequate. There have been reports of situations in which students are left in a classroom with packets of work to complete from all of their teachers. The only person in the classroom to offer assistance is a faculty member who does not know the student(s) and has no familiarity with the material covered in the packets. This faculty member is not teaching, but is there to maintain order, while the students engage in a study hall. Courts have ruled that a study hall does not meet the “substantially equivalent” test. If this is happening to you, you need to challenge the arrangement.

Parental/guardian involvement at this stage is critical. If a parent/guardian is seen as unwilling to cooperate in arranging an alternate educational situation for a child, or if a parent/guardian is reported to have ignored teacher efforts to communicate about a student’s work, progress or needs, this can prejudice the school/school district against a child, and cause the school/district to be less willing to accommodate the situation and help arrange a better alternate educational solution.

**6. Legal Options If the System Fails You:**

Remember: “The opportunity of an education ... is a right which must be made available to all on equal terms.” (*Brown v. Board of Education* [1954]). No matter your race, ethnicity, religion, sex, sexual orientation, financial level, or disability, all students are deserving of the same opportunities, privileges and treatments as all others in the United States. Sometimes, students may need to assert their rights to equal treatment.

### **A. Lack of Procedural Due Process:**

A student can request an order of the Commissioner of Education directing his/her reinstatement into school, after a proper hearing and determination, on the grounds that: a) no hearing was given the student, who was facing a suspension in excess of five days; or b) insufficient notice of the hearing was provided; or c) a student's family believes the hearing was "arbitrary and capricious" (only for show, a charade, and/or the decision was not based on the facts or the law). If a student can prove that he/she was otherwise injured by having been deprived of the legal rights due him or her, additional damages could conceivably be awarded.

### **B. Civil Rights Violations:**

A federal lawsuit, under 42 USC §1983, can be brought against a school district and its personnel if the school can be found to have shown "deliberate indifference" to the constitutional rights of students. This could be demonstrated by evidence of a: (1) persistent, widespread pattern of unconstitutional conduct of the school's employees, which can include not only evidence of illegal acts, but in addition, consistent attempts to conceal the truth of such acts and repeated attempts to discourage students from complaining of illegal conduct, by threatening students or belittling the importance of the illegal conduct at issue; (2) deliberate indifference (turning a blind eye) to this conduct; (3) tacit approval of it even after the conduct is brought to light (i.e., not speaking out against a policy or particular conduct, thereby seeming to approve of it); and (4) evidence that the person complaining has been injured (physically or otherwise) as a result of the conduct. For example, if a school consistently requires only African American students to go through a metal detector upon entering the building and no staff or faculty member ever speaks out against this, knowing it is unconstitutional, that employee can be said to be "deliberately indifferent" to the illegal conduct and/or to "tacitly" approve or condone it.

Alternatively, a 42 USC §1983 action can be brought against a school district and its employees if the school/employee(s) can be found to have a "special relationship" with the complaining student, such that this particular student was owed an "affirmative duty of care," and this "duty" was violated. An example might be a student who goes to the principal for help because he's being bullied by a certain classmate. The principal assures the student that she will "take care of it" and keep the student safe. The student complains several more times to the principal about this classmate. The principal asks the student's teachers to keep the two students apart. The teachers neglect to do this and the bullying classmate punches the complaining student in the nose, breaking it, when they are seated next to each other in class the next day. While most states' courts (including New York) have generally refused to hold schools responsible, finding them liable only for "foreseeable" injuries to a student that are closely related to the alleged inadequate supervision of the school staff, certain New York courts have found that a duty of care does exist and subjects a school district to legal responsibility, if the district fails to protect a student facing an unreasonably increased risk.

With bullying and cyberbullying of students (and even bus monitors!) prominently featured in the news these days, along with the Jerry Sandusky sex abuse case (former Penn State football coach convicted of abusing numerous children under his supervision on and off campus), we can expect many states to enact laws to provide more punishment to bullies and more protection to students who seek help from school authorities against bullies and sexually abusive teachers and coaches.

### **When In Doubt:**

If you are facing a difficult situation with school (whether it be academically, or socially, or with family issues that are interfering with school work), it is usually a good idea to "nip the problem in the bud"

and make an appointment with your guidance office. The counselors there are educated and trained to deal with many issues students face. They can offer suggestions and assistance before a situation gets out of hand. The consequences of not dealing with a potentially volatile situation may be disastrous.

Remember: YOU ARE NOT ALONE on this journey! School counselors can help!

**Resources for Parents:**

Center for Law & Justice, Inc. (427-8361)

New York Civil Liberties Union

New York State Bar Assn., ask for “Education Law” attorneys (463-3200)

New York State Education Website: [www.nysed.gov](http://www.nysed.gov)



**Part 2: College!**

This very word may cause you to tremble, and understandably so, as the process of applying to college can be daunting. This section will attempt to demystify the process and provide you with the knowledge you need to take control of this next exciting step in your life.

First, a few questions to consider:

- Why should I go to college?
- Is there a college for me?
- What are my career goals? (What if I don't know what my career goals are?)
- How do I apply for college (obtain applications, teacher recommendations, take the SAT's, SAT2's, ACT's, write essays)?
- Do I need to spend money on an SAT prep course?
- How do I finance college (what options are available such as government scholarships, scholarships from the college I choose [need based? merit based?], loans, work-study)?
- What resources are out there to teach me all this, to give me information, insights and ideas?

Basically, every student should try to envision him/herself going to some form of college or technical school. In this terrible economy, you really cannot afford to deprive yourself of the competitive advantage that a college or technical school degree affords you. The basic rule is this: (1) set your sights high; (2) apply to a number of schools – some “reach” schools and some “safe” ones, based on grades, SAT scores, activities and recommendations; (3) and worry about the finances afterwards. Do not let finances prevent you from aiming high and pursuing your dreams.

First, there are scholarships and student loans out there if you know how and where to look. Some of the most expensive colleges offer the best financial aid! Second, if you go to a good college and get a great education, you have a better chance of landing a great job which might allow you to pay off your loan faster than a job from a mediocre college, with a less great reputation, which happened to cost less



to attend. That is NOT to say that the more you pay for college, the better the quality of the education! But don't delude yourself: The better known and respected the college, the more "clout" your degree will carry. The fact that you attended a college with a great reputation puts you in a different league with an interviewer at a potential place of employment. Seeing that you went to Julliard to study music, for instance, when you are applying for a job with the New York Philharmonic Orchestra is going to carry a lot more weight. Seeing RPI or MIT on your resume is likely going to be more attractive to a nanotech firm seeking an engineer than would be a degree from a college that didn't offer an engineering degree.



In sum, price should not be THE determining factor of where you choose to go to college. Certainly, it is *A* factor. Just don't let it be *THE* factor. Many, many schools will work with prospective students to enable them to afford attending. Be sure to be aware that a grant does not have to be paid back, but a college loan does. Most financial aid packages contain both types of assistance.

Sometimes, students choosing between several schools can use this to their advantage, telling school "P" that school "Q" has offered a better financial package, which may result in your attending school "Q." Often, this results in an improved financial offer from school "P." So, when considering schools, be sure to think beyond the price tag to the quality of the education, the reputation of the faculty, the courses and special majors offered, the size of the school, the on-campus resources, the resources of the town or city in which the college is located, the climate, and the distance from family and friends.

Many students opt for a two-year community college to begin their studies. Many students then transfer to a four-year college program. The lower cost of community college is certainly attractive to those who cannot afford a four-year college, at least initially. But beyond its bang-for-the-buck value, community college is a great idea if you are a marginal student who needs more time to mature and develop studying skills before attending a four-year program, or if you are not sure what course of study to pursue in college and you want to have an opportunity to explore different options at a lower price tag.

Guidance counselors are there to assist with choosing appropriate schools, signing up to take the SATs, SAT2s and ACTs, gathering teacher recommendations, and discovering what scholarship and financial aid options exist. College resource guides such as Fiske's, Princeton Review, Barron's, Peterson's, the College Board and the College Prowler are available for purchase in bookstores and the book sections of "big box" stores and many have online resources. They are also available in most school and town libraries. These guides give you snapshots of what individual colleges seek in an applicant (in terms of scores, activities, diversity), as well as what they offer applicants (which may include areas of study, specific courses, internship opportunities, degrees conferred, size and diversity of student body, location, resources, amenities, financial aid).



In researching colleges, you need to take the reins and be your own advocate. Strategize as to what your career goals are – not what others want them to be. Do research in your school or local library to discover which colleges offer majors in your field(s) of interest. Most liberal arts colleges will offer majors in many fields, ranging from medicine to math, religion, art, literature, sociology, psychology, anthropology, foreign languages, the law, urban studies, accounting and business. Be proactive and request information from schools that interest you. Visit as many as possible. The “feel” of the place may be much different than how the school appeared on paper. Just because your best friend’s brother loves a particular college does not mean you will feel the same way. Research local business, non-profit organizations and government institutions which offer internships (for pay, school credit or just to gain experience and reap a great recommendation!) in order to gain experience in your field(s) of interest to see if it’s actually what you want to study. For instance, you might discover that, while you always dreamed of being a nurse or doctor, the smell of hospitals or the sight of blood sickens you, or watching people in physical or emotional pain is too upsetting to you. Network: Talk to adults you know who work in the field of your interest. If you don’t know any, start asking parents, relatives, teachers, neighbors, coaches and religious leaders in your community if they know anyone practicing in your field of interest.

Borrow or buy SAT/ACT prep books and put yourself on a study schedule (i.e., do as many of the timed practice tests as possible). You may want to set aside an hour or two each weekend day to test yourself. Success on the SAT/ACT practice tests is strongly related to how comfortable you are with the format of the exam and how familiar you are with the types of questions asked. While many students do sign up for SAT prep courses, these can be fairly costly. Most students do not take these courses, but, rather work with study guides – either independently or in groups – to prepare for the SATs. Many, if not most, students take the SATs more than once, as the final “score” looked at by colleges can be a composite of your best math and best English scores, even if from separate exam dates. Do not place unnecessary stress on yourself about these tests. Many colleges operate on the assumption that the most reliable predictor of how well a student will do in college is not the SAT/ACT scores, but a student’s high school grades. Remember to work hard in high school to keep your grades up!

Gather teacher recommendations. Start by cultivating relationships with teachers by participating in class, speaking to teachers after class about issues raised in class. Try to become the student you would want to recommend to a college. Prove that you are interested in what the teacher is teaching and are motivated to learn, by coming prepared to class with good questions from the reading or homework assigned.

Sit down with your parents or guardians and discuss financial constraints as well as financial options for college. Guidance counselors are wonderful sources of information regarding scholarships and financial aid. As noted, certain colleges also offer aid packages to incoming students. Harvard, Yale, Stanford, MIT and Dartmouth colleges at one point erased or greatly minimized tuition for incoming students from families earning less than \$75,000. The Federal government offers aid in terms of Pell Grants and the Tuition Assistance Program. Certain banks offer low or no-interest educational loans. Some private companies and non-profits, including, perhaps, your high school, offer scholarships for motivated, musically talented, or athletically gifted students, or students choosing to pursue a certain major.

The best plan is to start saving for college early, such as with the 529 savings plan available in New York. (529 is the number of the section of the Internal Revenue Code which authorizes such plans.) A person deposits money into a 529 account, the money is invested by the fund manager, the money grows (hopefully) and is distributed tax free to the student to be used for higher education. Coverdell Education Savings Accounts can be set up for students to use for college, graduate school, elementary or secondary school. These accounts can be established on behalf of a student by someone with a yearly

adjusted gross income of less than \$110,000 (or a couple, filing taxes jointly, whose combined adjusted gross income is less than \$220,000 a year).<sup>3</sup> Only \$2,000 maximum may be withdrawn per account, per year for this purpose. Stafford loans from the federal government allow students – even without demonstrating financial need – to borrow money. In 2012-2013, \$5,500 was available to dependent freshman applicants, \$6,500 to dependent sophomores, and \$7,500 to dependent juniors and seniors. If students are independent from parental resources, the borrowing limits are increased: \$9,500 for freshmen, \$10,500 for sophomores and \$12,500 for juniors and seniors.

In addition, federal loans are forgiven to a certain extent or altogether, if students enter certain “service” professions, under the “Public Service Loan Forgiveness Program.” Any remaining student loan debt will be erased after 10 full-time years of employment in public service with an “eligible employer” (such as the federal, state, local government, military, public school system, or certain non-profit organizations). Partial loan forgiveness is available for as little as three years of full-time public service. Government education loans often carry lower interest rates than private bank loans, and the repayment terms are often more generous, such as permitting deferment of loans in the case of job loss. Some students enter the military after high school, which then pays for college, or after college, to pay for, e.g., medical school. A few helpful websites to consider for college financing assistance are: [www.FinAid.org](http://www.FinAid.org), [www.Fastweb.com](http://www.Fastweb.com), [www.savingforcollege.com](http://www.savingforcollege.com) and [www.SimpleTuition.com](http://www.SimpleTuition.com) (especially “TuitionCoach” on this website). The basic rule of thumb is that your total financial debt upon graduation from college should not exceed your expected starting salary upon graduation.

When sorting through all the details and considerations of applying to college, the main point is to BE ORGANIZED! PLAN FOR SUCCESS! Applying to college can be scary and overwhelming because of the enormity of the task and the numerous deadlines to keep straight. Be smart: keep a log of what you need to complete and when, so that you don’t close the door on any opportunities. It would be a mistake to miss out on the chance for a huge scholarship because your essay was turned in late! Remember: Your guidance counselors have many students to assist. Your parents may be preoccupied with your siblings, their parents, jobs, bills and household maintenance. Perhaps your parents never went to college and don’t know HOW to help you. When applying to college, you need to be you own best advocate on the macro and micro levels – from your general career aspirations, to your application deadlines. This may be the most grown-up thing you’ve ever done – perhaps the first time you’ve felt completely responsible for your own fate. Know that there are teachers, counselors, family and friends who can assist you, but that, ultimately, you need to run this show, yourself. And that is an empowering thing!

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3. These are 2011 figures.

## Activities:

### **Part A: Students' Rights in School:**

- 1) Role play a locker search to discuss when and how such searches can legally be conducted (go through various legal and illegal scenarios); analyze the legality of any locker searches you know of from your school;
- 2) Discuss how you would set up a peer mediation council and try it out!
- 3) Role play a superintendent's hearing for a student disciplinary issue;
- 4) Examine examples of proposed "substantially equivalent" education options for a suspended student;
- 5) Strategize how you, as a school administrator, would try to accommodate a child with special needs;
- 6) Read and discuss important student free speech cases to determine what speech would be permissible or impermissible in your school;
- 7) Discuss any free speech issues which may have occurred in your school or community.
- 8) Come up with team strategies for preventing and dealing with bullying of classmates. Create public awareness of the dangers of bullying. Make your school a "bully-free" zone.

### **Part B: The College Application Process:**

- 1) Discuss college financial loan options;
- 2) Work in small groups on sample college applications to become familiar with the experience;
- 3) Practice drafting college essays and have them critiqued by classmates and your teacher;
- 4) Attend sessions set up by your teacher/school where college representatives discuss what they seek in potential applicants;
- 5) Ask college students you know, or who your teacher knows, what they wish they'd done differently while applying to college, or what they were especially glad they DID do;
- 6) Ask your teacher to regularly devote a portion of class time for students to share information and insights about schools, scholarship options, financial aid and application assistance, as well as to support each other through shared experiences (the good and the dreadful!);
- 7) Make a chart of your interests, talents and trained skills. Then add columns to the chart of your needs (e.g., that you want to study only on the east coast; that you need a school that is within a 2-hour radius by car; that your school have a student population of under 2,000), values (e.g. that you want to live in a small, rural area; that your college be near mountains to allow for hiking on the weekends; that everyone at your college lives on campus), and limitations (physical, financial, emotional, geographic, communicatory, etc.). Make a list of possible occupations that match your interests. Get out a college guide book or go online to see which colleges offer degrees in your area of interest. Eliminate colleges from your list if they cannot accommodate your needs and limitations, or do not support your values.<sup>4</sup>

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4. Helpful websites for deciding what and where to study are: <http://www.columbia.edu/cu/augustine/study>(for study skills); [www.nacacnet.org](http://www.nacacnet.org) (National Association for College Admissions Counseling); [www.nycareerzone.org](http://www.nycareerzone.org) (NY Career options and tools to get students thinking about a career); [www.ed.gov/index.jsp](http://www.ed.gov/index.jsp) (U.S. Dept. of Education); [www.labor.ny.gov](http://www.labor.ny.gov) (The New York State Labor Department, including what positions are available and "Career Zone," a tool to find a position that matches your skills and interests); [www.labor.ny.gov/youth](http://www.labor.ny.gov/youth); [www.labor.ny.gov/jobs](http://www.labor.ny.gov/jobs); [www.rileyguide.com](http://www.rileyguide.com) (employment and career info); [www.bls.gov](http://www.bls.gov) (US Department of Labor, contains a handbook listing requirements needed for certain careers); [www.disability.gov](http://www.disability.gov) (info and resources for those differently abled); [www.careeronestop.org](http://www.careeronestop.org) (US Department of Labor). The following websites are just a sampling of those available which list ; [www.albanycounty.com](http://www.albanycounty.com); [www.cs.ny.gov](http://www.cs.ny.gov) (NYS Civil Service jobs); [www.acinet.org](http://www.acinet.org); <http://nyjobsources.com/nyinterns.html> (internships)

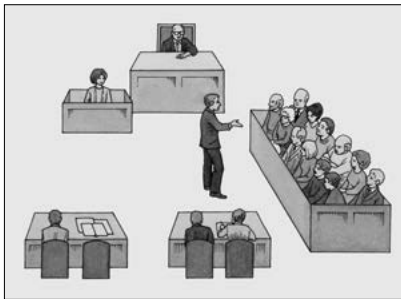
## Chapter II. Rights I Have As a Citizen

A government “of the people, by the people, and for the people.” What did Abraham Lincoln, our 16<sup>th</sup> president, mean by this? We, as citizens of the United States, and of our individual states, cities and towns, have an extraordinary number of rights and responsibilities. Indeed, both the Declaration of Independence and the Preamble to the U.S. Constitution make it clear: As citizens, we have certain “unalienable” rights; among them, to enjoy our lives, to live freely and to strive for – to pursue – happiness. But the right to enjoying these largely indefinable concepts does not come “free of charge,” so to speak. As citizens, along with our democratic government, we have inherited the responsibility to keep these rights, available for ourselves, our neighbors, our fellow U.S. citizens and generations of citizens to come.

### Citizens’ Duties:

This chapter will review the ways in which citizens must, by law, participate in government, as well as the ways citizens may choose to exercise their voices to seek change. One thing is certain: Being a citizen may carry with it certain responsibilities, but the amount of free choice one has in how he/she exercises these responsibilities and the satisfaction derived from participating and making change happen, are strong incentives to keep citizens perpetually actively engaged.

So what ARE the basic, non-negotiable responsibilities of citizenship? We covered, in the chapter on students’ rights, that New York State’s laws require schooling for students be provided between age six and seventeen. State laws also require that we be law-abiding and conform to certain rules of conduct. For example, one cannot drink and drive. One cannot leave a three year-old home alone. One cannot walk into another’s home uninvited. These rules will be discussed in more depth in the chapter on criminal justice.



One must serve on a jury, if asked and if eligible (as described, below). In general, jury duty is only required once every so many years, as determined by the county in which you live. Jury duty can last a day or many months, depending on the case to which you are assigned. Jurors may not lose their jobs while serving on jury duty and are paid to a certain extent. More information on jury duty can be found online at the *New York Unified Court System’s* site. Jurors have to be U.S. citizens, they must live in the county in which they perform jury duty, must be 18 or older, cannot have a felony on their record and must be able to understand and communicate in English. The county in which a juror serves will pay up to \$40 a day for each day she/he serves. However, if you are serving on a jury, and your employer is paying you, the county will only chip in the amount needed to bring you up to \$40 per day. If you are called for jury duty and your employer has more than 10 employees, your employer must pay during for the first three days of jury service, the lesser of your regular wage or \$40.00.

Don’t even THINK of ignoring a jury summons (the written notification that informs you of your jury service date[s]). That’ll land you in criminal court, as well as subject you to civil penalties.

Another obligation of citizenship is that one must pay taxes. The New York State Department of Taxation and Finance has a fairly friendly website accessible for specific information at [www.tax.ny.gov](http://www.tax.ny.gov)

Finally, U.S. citizenship requires that 18 year old males register with the military, although since 1973, there has been no formal military draft. Proposals requiring that all citizens fulfill some type of

community or civil service have been introduced into Congress for years, but, thus far, have not been adopted. Frankly, the responsibilities of citizenship are meager, compared to the rights citizenship confers – namely rights which permit us to participate in our own governance and well-being, and in charting our own futures.

**Citizens’ Rights:**

What rights do we have as citizens? One principle right we have is the right to vote. We elect representatives, ideally, to create, change and rescind laws as necessary, based on public opinion at a particular point in time, for the benefit of the people they serve – that is, us! Who can vote? How does one vote? While this book was in its first draft, contests in two congressional districts – one in upstate New York and one in Minnesota — were so close that the absentee ballots had to be counted again and again, to ensure accuracy. The race in upstate New York between incumbent Republican Jim Tedisco and Democrat Scott Murphy was so close, the difference between winning and losing came down to about 400 votes out of approximately 164,700 cast! So, do not ever think your vote does not count!

In New York, anyone who will be 18 years old or more by election day (the first Tuesday in November), who is not currently serving a felony sentence or on parole for a felony, or who has not been deemed “mentally incompetent” by a judge, has the right to register to vote. You cannot simply walk up to a polling place in New York on election day and expect to vote. In New York, your registration with the Board of Elections must be filed prior to the primary election in September, in order to vote in November in the general election. You can contact the Board of Elections to register by calling 1-800-FOR-VOTE , or download a form in English or Spanish from its website: [www.elections.ny.gov](http://www.elections.ny.gov). You can also register at the same time you renew your license or motor vehicle registration (the so-called “motor-voter” law).



Just be aware that once you are convicted of a felony, your right to vote disappears until you finish your sentence, including any parole time you might have to complete. Once you have completed your sentence, including any parole time, your right to vote is restored, but not your registration. You must take the affirmative step of re-registering to vote once your registration has lapsed for any reason. Individuals on felony parole may apply for a “Certificate of Relief of Disabilities” from the Department of Parole, which, if granted, would allow voting rights even while on parole.

If you know you will be away from your home voting district on the date of an upcoming election, you can contact the Board of Elections for an “Absentee Ballot.” You may be able to make this request on your city or town’s website. Once you receive the absentee ballot, be sure to complete and return it prior to the election. This requires you to be organized enough to request the absentee ballot well in advance of the election, so it has time to come to you, be filled out, and returned before the election. Even persons in jail serving misdemeanor sentences or awaiting trial can register to vote and request absentee ballots. They can register in their home district or in the district in which the jail sits, and then request an absentee ballot, if they think they will still be in jail on the date of the election.

Beyond voting, how can we make our voices heard by our representatives so that our opinions and desires can be accommodated, so that laws can be created and policies changed to suit our changing needs and new information and technology? How do we have an impact on the running of the society we inhabit? In other words, how do we participate in our own governance?

One excellent way to participate is to organize around an issue of concern to you, with other like-minded citizens. For instance, you might educate your community and community leaders on the dangers or benefits of hydrofracking, the reasons to collect bottle deposits on sports drinks and juices in addition to water and soda, the environmental benefits of receiving town news via email rather than on paper or of forbidding school buses from “idling” for long periods of time in front of schools, allowing harmful gases and fumes to escape into the air. A decade ago, active, invested citizens were educating their communities and leaders about the benefits of basic recycling, of smoke-free restaurants, and of buying hormone-free milk. Being an active citizen is sort of the membership “dues” one must pay for the privilege of living freely in one’s own town in the United States of America. With the changing times, there is, naturally, a change in focus. Whereas decades ago interracial couples fought for equal rights, today, lesbian, gay, bisexual and transgender couples fight for the rights to marry, adopt, inherit, obtain health care, and other rights which heterosexual couples enjoy. Just as your grandparents marvel that there is a vaccine for chicken pox and cervical cancer, your children will someday laugh when they learn that certain rights in controversy during your youth today were ever questioned.

So, what’s the secret? How DO you organize a community around an issue near and dear to your heart? On the theory that many voices speak louder than one, community organizing is an extremely important “weapon” for citizens to use to bring about change. Indeed, we have all witnessed how the “Occupy” movement, which spread like wildfire from Wall Street in New York City across the U.S. and even beyond in 2011, spurred enormous discussion and some changes in how our policymakers vote and govern. When people feel a part of their community – when they see themselves as stakeholders – they are more likely to become involved in bettering the place. Recently in a small city in NY, a new police chief was selected, largely due to tremendous citizen input about the type of police chief residents wanted. Despite the fact that the mayor’s first choice may have been a different candidate with a totally different policing philosophy, when faced with overwhelming public support for the philosophy and ideas of a different candidate, the mayor agreed with the selection of the public. Significantly, some of the loudest and best organized of the voices were local college students who wanted a role in choosing who their next police chief would be. So too, some of the most vocal and effective “Occupiers” were those in their 20s.

Communities might come together to boycott a local restaurant that refused to seat a gay couple, or might gather signatures, door to door, on a petition to require that the town library be opened at 9 a.m. on Sundays, instead of 1 p.m. The ignition for the boycott or petition might start with two friends over pizza or parents on the sidelines of a soccer game who discover something they think needs improving. Community organizing around an activity often starts with the, “you know? We should . . .” idea. But then it takes several other critical ingredients to transform that broad idea into the change you seek. Namely:

- (1) an agreed upon specific change (e.g., we need a dog park);
- (2) an agreed upon (hopefully attention-grabbing) “vehicle” to give voice to the idea, to inform and attract the support of the general public (e.g., a leashed dog walk around city hall to broadcast the need for a dog park; or, more generally, a tent-city occupation of a park, a picket, protest march, letter writing campaign or boycott);
- (3) an agreed upon strategy to make the “vehicle” (e.g., the leashed dog walk) known; such as, for instance, having all the organizers email at least 20 different dog owners in the community about the event, post fliers at libraries, grocery stores, in the town paper, give a “proclamation” to the town supervisor of the proposal, with a dog bone shaped balloon attached);

- (4) motivated individuals to organize and implement the activity chosen;
- (5) good media coverage of the event (with protestors informing the media, if possible, which footage or photos to take to get the point across); and finally
- (6) more motivated individuals to move the issue from the attention-getting event to the submission of the policy-changing proposal to the town board, city council or mayor.

In 1994, in upstate New York, a group of mothers changed history. This is how: A young mother was breastfeeding her infant son at a food court in a mall. A security guard asked her to stop breastfeeding or to use the bathroom to do so. She refused and said she was eating her lunch, as was her baby. The security guard insisted that the mother could not breastfeed in the public food court because she was “offending” the other patrons. Eventually, this first-time mother, unnerved and upset, left. But she knew she and her baby had been wronged. She also knew that, by breastfeeding, she was doing what was best for her baby.

So she called La Leche League and the New York Civil Liberties Union. Within days, and after many meetings and phone calls, including to the media, a huge protest was planned by a core group of nursing mothers. On the agreed upon date and time, about 85 women, babies in tow, met at the very food court which had been so inhospitable to the nursing mother. They sat down on the ground in the food court and, with television cameras rolling, all began to breastfeed their babies. The incident captured national attention, the mother and a lawyer from the New York Civil Liberties Union were flown to Los Angeles to appear on a California talk show, numerous radio shows across the country interviewed the mother, National Public Radio interviewed the lawyer, and best of all, months later, New York adopted a new section of the Human Rights Law which makes it official that women have the right to breastfeed in public in New York. Several states have since modeled their breastfeeding laws on New York’s, and to this day, “nurse-ins” have been staged in communities across the nation to protest anti-breastfeeding policies.

Similarly, continuous, organized protests across New York State succeeded, in 2009, in dismantling the Rockefeller Drug Laws. The Rockefeller Drug Laws mandated extremely harsh punishments for drug possession and sale, sending those convicted to prison for decades – even for small amounts of drugs and even for a first offense. Judges were unable to choose which persons got harsh sentences. No exceptions could be made. The results were tragic, as many thousands of young persons, mostly black, mostly men, were sentenced to spend a good portion of their lives in prison, under these draconian laws. Governor David Patterson, prior to becoming Governor, was arrested in 2007, for protesting against the Rockefeller Drug Laws. However, he had the last laugh two years later, signing into law drastic legal reforms which pulled the “fangs” out of the law, and gave judges back the discretion to sentence offenders to drug treatment and shorter sentences than the original Rockefeller Drug Laws demanded.

**Can I be arrested for protesting in public?**

The answer is yes and no. For the most part, public speech is protected under the First Amendment to the Constitution, as discussed in Chapter One, on students’ rights. Therefore, peaceful, non-threatening anti-war protest marches to City Hall and anti-gun rallies near a gun store would usually be protected speech. But as with almost all things, there are exceptions to the rule. In this case, there are limits to the protections. Speech (which, you may remember from Chapter One, includes “action”), that threatens or harms others is not permitted





under the First Amendment (e.g., cross burnings on lawns, breaking windows of a store in protest; shouting “fire” in a crowded movie theatre, calling publicly for a leader’s death), nor is speech protected if considered “offensive,” such as public lewdness or the use of certain “swear” words on TV or the radio.

The Constitution and Bill of Rights (the first Ten Amendments to the Constitution) grant many other rights to us as citizens, such as the right to be treated equally, without regard to race, ethnicity, age or gender, among other things (5<sup>th</sup> and 14<sup>th</sup> Amendments); the right to be free from cruel and unusual punishment (8<sup>th</sup> Amendment); the right to be free from illegal search and seizure (4<sup>th</sup> Amendment); the right to be free from self-incrimination (5<sup>th</sup> Amendment) and the right to counsel (i.e., a lawyer) (6<sup>th</sup> Amendment). These rights will be discussed in detail, in subsequent chapters.

Sometimes a citizen is protected by local, state or federal laws which are not necessarily in the Constitution – such as in the example given, of the New York State Human Rights Law permitting breastfeeding in public. The basic rule is that a federal, state or local law can give an individual more rights than the United States Constitution, but it cannot take away any rights the Constitution confers. So, in our example, while the Constitution does not explicitly state that women have the right to breastfeed, it does say that people cannot be discriminated against based on gender. Breastfeeding is a gender-specific issue, since men cannot physically breastfeed. The New York Human Rights law that specifically permits breastfeeding in public is not only in accord with the constitutional ban on gender discrimination, it even gives MORE generous rights to women in this way than the Constitution. If New York State passed a law that no woman could work if more than three months pregnant, that would undoubtedly be struck down by a court(s) because it would conflict with, rather than expand, the federal constitutional rights afforded women. States may not take away from the rights we all enjoy as U.S. citizens.

### **Personal Rights:**

#### **When can I live on my own, work, drive a car, drink alcohol, enter into a contract and marry?**

New York law allows individuals to live on their own at 18, although you can apply to a court for “emancipation” as early as 16, and be granted the right to live on your own. Rules regarding marriage are discussed later in this chapter. With certain restrictions on wages and hours, and only if you have the consent of a guardian or parent, you can get a work permit as early as 14 years of age in New York. By age 18, you can work in all types of jobs, enter into a contract and apply for credit in your own name.

You can obtain a drivers’ license at age 16 in New York, but the license is only probationary for the first six months. If you are found guilty of a traffic infraction within the first six months of obtaining your license, the Department of Motor Vehicles has the right to suspend or even revoke your license! Notice that the wording is “has the right to.” What this means is that the suspension of your license under such a circumstance is discretionary. In other words, when faced with such a situation, the DMV will determine, on a case by case basis, whether the particular facts merit your losing your license or not. What if a drunk driver ran into YOU? It would hardly be justifiable to suspend YOUR license for someone else’s error in judgment. If you are ever faced with a possible license suspension or revocation, you should understand that you have the ability to challenge that suspension! Assert yourself and present your “defense” (the facts and arguments that tend to show your innocence).

Remember that every car in New York needs to be covered by general liability insurance, or the owner faces suspension of his license and registration. Drivers found guilty of three or more speeding tickets within 18 months risk suspension of their license.

### Drinking, Drugging, Driving

The drinking age in New York, as in every state, is 21 for alcoholic beverages. Though in one's own home, with a parent's or guardian's consent (e.g., for a religious ceremony), an underage individual could drink without risking criminal prosecution. This is not the case with marijuana or cocaine or any other illegal substances. Using these substances is NEVER legal under ANY circumstances. Medical marijuana, as of the writing of this text, is still not legal in the state of New York. So, even that is not a possible exception to the rule!



Be aware that recent cases make clear that parents who provide alcohol to underage drinkers, who allow underage drinkers to drink openly in their home, or who look the other way instead of stopping teenagers from drinking in their home, may indeed face criminal penalties, including prison time. Hosting a party is an enormous responsibility. Beyond making sure you have prepared enough food and that the place is reasonably presentable, the host (the tenant or homeowner) incurs legal responsibility for the safety of his/her guests on the premises as well as while they are returning home. In other words, if you host a party and people are drinking alcohol – even if you don't personally supply the alcohol and even if those drinking are over 21 and legally doing so – and leave your home drunk or impaired, you can be held legally responsible if they cause an accident on the way home (either because they drove while drunk or impaired or because, impaired, they walked into the road and another driver hit them). Therefore, you need to be vigilant, when hosting a party, about not letting guests who are drinking leave on their own, either to drive or walk. Call and pay for cabs for your guests, if you need to do so, or designate a few non-drinking drivers before the night begins. It is simply NOT worth it to go to jail (for vehicular manslaughter) and/or be sued for millions of dollars in civil court because you helped cause a person's drunkenness – even if at arm's length.

Bartenders, by the way, are similarly responsible for the behavior of their customers, once they leave the bar, pursuant to the "Dram Shop Act." As of 2004, New Yorkers can bring home the unused portion of a single wine bottle from a restaurant where a full meal has been ordered. However, the restaurant must place the bottle in a special transparent, tamper-proof, sealed bag. If a customer is stopped on the way home from the restaurant by a police officer and the seal on the bag is broken, the officer will ticket the person for having an open container of alcohol. Worse, the person may be tested for DWI and will be charged if he/she fails the BAC (blood alcohol content) and/or sobriety test(s).



Beyond sending intoxicated party guests out into traffic, each single decision to drive while intoxicated (DWI) can be a fatal one. Alcohol-related crashes are the leading cause of death for young Americans between the ages of 16 and 24.<sup>5</sup> In 2008, 25% of drivers aged 15-20 who died in a car crash were legally drunk (with a BAC of .08 or more). Of the nearly 12,000 people who were killed by a drunk driver on our country's roads in 2008, 1,510 of these were killed by an underage drunk driver.

5. All of these statistics come from the National Highway Traffic Safety Administration, the Department of Transportation, and the Center for Disease Control.

If you are stopped for a possible DWI or DWAI (driving while ability impaired), and refuse a breathalyzer or blood test, you will automatically lose your driver's license for six months, whether or not you are ultimately convicted of the DWI or DWAI charge, and irrespective of any suspension or revocation time a conviction brings. If you are convicted of "unreasonably refusing" a blood or breath test, you will lose the right to drive for 12 months. Under New York's "zero tolerance" law, if you are under 21 and have a BAC between .02% and .07%, your driver's license will be suspended for six months and you will be fined \$125.

Driving while intoxicated by drugs or alcohol can land you up to 12 months in jail and a \$1,000 fine. Your license will also be suspended for 90 days. If you are convicted of another DWI or DWAI within 10 years, the punishment increases from a misdemeanor to a felony (a more serious crime), carrying a fine of up to \$5,000 and up to four years in prison! Also, your driver's license would be suspended for a year.

If you are under 21 and convicted of DWI due to alcohol or drugs, even for a first offense, you might receive jail time and will absolutely lose your license for one year. A second DWI conviction under age 21 will land you a felony charge and the loss of your license for at least one year, or until you become 21, whichever is longer. In late 2009, New York passed the "Child Passenger Protection Act," otherwise known as "Leandra's Law," making it a crime to drink and drive with children under the age of 16 in the car. New York is now one of at least 36 states to have such a law. Those convicted under Leandra's Law can expect up to four years in prison, plus an automatic suspension of their license and will have an ignition interlock system installed into their vehicle for at least six months. That's for a first offense! If the child in the car is seriously injured, the driver can receive up to 15 years in prison and if the child is killed, as was the law's namesake, Leandra, up to 25 years in prison. Further, if the driver is a parent, guardian or legal custodian (e.g., a hired babysitter) of the child, that person will be reported to the Statewide Register of Child Abuse and Maltreatment, to be monitored by that agency, as well.

Drinking and driving is a fatal combination. It is a split second decision that can have permanent, deadly consequences – killing you, those you love – or maybe even those you never knew, who had families who loved and cherished them deeply. Drinking and driving is irresponsible and reckless. The impact of your drinking and driving will be felt by many, and will forever change many lives. Don't do it! Call a cab or a friend or parent to come and get you, if you have been drinking and need to leave. Anyone who loves you would rather pick you up at 3 a.m., than lose you forever. Put a number on your cell phone speed dial NOW of a person you can count on, to come to your aid when you shouldn't drive. It may be the most important call you ever make!

On to drugs: To reiterate the obvious, no matter what the age of your guests, no amount of marijuana, cocaine, or any other illegal drug is legal, just because it is in your home. Illegal drugs are illegal, no matter who is using, no matter where. Period!

In May of 2012, Governor Andrew Cuomo proposed new legislation legalizing the possession, but not the use of a small amount of marijuana. The reason for this legislation was that in New York, since 1977, the possession of less than 25 grams of marijuana subjected a person to a ticket and a fine, but if the same amount of marijuana was burning or in public view, the person could be charged with a misdemeanor and possibly a lifelong criminal record. Governor Cuomo's legislation did not become law, but it would have legalized even public possession of less than 25 grams of marijuana. You may wonder: What could be the reason for this seemingly trivial distinction between public and private possession? Why would Governor Cuomo bother? The answer may surprise you, but it's a great lesson in politics and policy-making. When a police officer stops someone and frisks them, the officer typically asks the person to "turn out" his pockets,

making any “private” possession of marijuana suddenly public. Public possession would be regarded as a misdemeanor and the person would be burdened with a criminal record that could impede his future success in life. Since studies show that police “stop and frisk” policies unfairly impact blacks and Latinos (that is, blacks and Latinos are stopped and frisked more often than whites by police), Governor Cuomo was attempting to reduce or eliminate the chance that blacks and Latinos would be overrepresented in the criminal justice system due to being arrested so much more often for “public” possession of marijuana.

Since Governor Cuomo’s legislation did not pass, the current state of the law is that (non-public) possession of less than 25 grams of marijuana is a criminal “violation” and can result in a fine of \$100 for a first offense. But if an officer tells you to turn out your pockets and your less than 25 grams of marijuana becomes public, you will be subject to a misdemeanor. Additional offenses can result in fines of \$250 and 15 days in jail. If you possess greater than 25 grams of marijuana, the fine is even steeper and you could end up doing a number of years in jail.

Despite the fact that the Rockefeller Drug Laws (discussed in the previous chapter) were reformed in 2009, ending decades of harsh, mandatory, lengthy sentences for drug offenses, the sentences which New York judges currently have the choice to confer on drug offenders (and especially for repeat offenses) are nevertheless harsh, and can involve heavy prison time. Drug sales/deals which occur across state lines are even riskier, as defendants are then charged with federal drug crimes, receive longer sentences (in federal prisons) and have no chance of parole.

### **Marriage:**

In New York, a person can get married as young as 16, with a guardian’s or parent’s consent. Without such consent, one can marry at 18. A marriage is a legal contract which lasts until the parties (the two people married) get divorced or one dies. To be legally married, you need to go to the town/city /village clerk where you live and complete an application for a marriage license. You will need photo ID and, if one or both of you was previously married, you’ll need proof that that prior marriage ended (i.e., divorce decree, annulment papers, death certificate of former spouse). Once you obtain the marriage license, you need to wait at least 24 hours to be married, but must do so within 60 days or the license becomes null and void. New York does not currently require blood tests for a couple to wed, although some states do. Be sure to check the requirements before going to apply for a marriage license, including what, if any, fees are charged. To be legally wed in New York does not require that you have a ceremony performed in a church, synagogue or temple. But you do need to have the ceremony performed by someone licensed to perform weddings in New York. Judges and certain other officials (listed in New York’s Domestic Relations Law) may legally perform civil ceremonies.

Passed by the legislature and signed into law by Governor Andrew Cuomo on June 24, 2011, and effective July 24, 2011, New York’s same-sex marriage law catapulted New York into the elite club of states (among them: Iowa, Massachusetts, Connecticut, New Hampshire and Vermont, as well as Washington, D.C.) which permit gay couples to marry and enjoy all the rights and benefits that heterosexual married couples enjoy – such as access to health care benefits of the spouse, inheritance rights if a spouse dies and custody rights if a couple divorces. In 2009, the same-sex marriage bill was introduced by then New York Governor David Patterson, who claimed it was a “civil rights issue whose time had come.” Maryland and Washington State approved same-sex marriage laws in 2012, but both states’ laws will be put to public vote. Several other states (Delaware, Hawaii, Illinois, New Jersey and Rhode Island) recognize “civil unions,” meaning, gay couples – while unable to legally marry -- can still enjoy many of the rights of married couples, including those related to health insurance benefits, custody and inheritance. California has a very complicated history with this issue. Same-sex marriages were

legal in California at certain points between 2004 and 2008, but are not presently permitted. Domestic partnerships continue to be recognized in California. California is one of 30 states which continue to have prohibitions against gay marriage in their state constitutions.

### **Divorce:**

Until 2010, New York was the only state which did not allow some form of “no-fault” divorce. This means that prior to 2010, couples in New York had to either live separately from each other for a full year before being permitted to file for divorce, or they could file for divorce immediately, but they had to claim that one of the members of the couple committed adultery, abandoned the other, or treated the other cruelly and inhumanly, etc. Prior to the no-fault law being passed in New York, it was the only state without some form of no-fault divorce. Now, couples in New York can divorce without attaching blame to an individual or stigma to the relationship.

Most of the time, especially when the custody of children is involved, it is extremely beneficial to obtain a lawyer to represent you and your interests in a divorce. What you don’t know can truly hurt you in a divorce, and a divorce lawyer can best protect your interests. For instance, if you have a spouse who is emotionally abusive to you and you decide one day to walk out the door and never come back, that decision may come back to haunt you – especially if you left children behind. You could be seen as having abandoned the marriage and the children, and could risk losing custody of the children you left in the hands of this abusive person, as well as losing rights to much or all of the property in the house you left behind. You might not have been aware of the consequences of “walking out” before seeking the advice of a lawyer.

### **A Note on the Children of a Divorcing Couple:**

Even when the parents of a child are not married, they are responsible for a child’s support, care and education until the child reaches the age of 21, unless the child has been “emancipated” (discussed earlier) or is married. Blood tests are sometimes ordered by a court to prove paternity, if contested, by a parent. The driving force in assigning custody during a separation or divorce proceeding is “the best interests of the child.” While the courts do try to award joint or shared custody, so that children can continue to interact meaningfully with both parents, circumstances may dictate that it would be in the “best interests of the child” not to associate with a particular parent. This might be the case if the parent was a substance abuser or very violent.

At times, a judge may “phase in” custody by first allowing a parent short segments of “supervised visitation,” so the child can spend time with the parent on a specified day and time of the week or month with another adult present (usually a social worker) to assure that things go smoothly and that the child is safe. This might be a judge’s strategy if a parent has recently completed drug rehabilitation and is trying to get his/her life back together; or if a parent with a mental disorder recently found a medication which stabilizes his moods enough to interact with others without incident. After months of this type of supervised visitation, longer supervised periods might be arranged and then, ultimately, unsupervised visits. The point is to allow the parent into the child’s life without putting the child in physical or emotional danger. The ultimate goal is to have parents share custody, if this would best serve the interests of the child.

A judge determines who pays child support and how much is paid, in accordance with the Child Support Standards Act. A judge may order that, rather than have the support-paying parent send a check directly to the custodial parent (the parent with the child[ren] the majority of the time), he or she send the check instead to the state’s support collections unit, which then sends the check to the

custodial parent. If court ordered payments are not being made, the support collections unit can assist the custodial parent to obtain these payments, even garnishing (automatically taking directly from the paycheck) a portion of the supporting parent's wages, if necessary. To refuse to pay court-ordered child support is a violation of the court order to pay support and may result in the non-compliant parent's driver's license being suspended, income tax refund being withheld or garnished and applied to the amount owed, and even with a jail sentence. If a parent is sentenced to jail or prison (whether related to non-payment of child support or to some other crime), the obligation to pay child support continues, despite the fact that most people behind bars have no means to pay. Thus, many parents leave prison with enormous accrued child support debt. If you are ever imprisoned and cannot afford to make your child support payments, you should, as soon as possible, apply to the court for a "downward modification" of child support payments. The least amount possible is \$25 per month, so the amount accruing while you are imprisoned is decreased.

#### **Your Right to Information:**

The "Freedom of Information Act" or "FOIA" governs "FOIL," the "Freedom of Information Law." This law permits citizens to obtain information from government bodies that would not otherwise be public knowledge. For instance, suppose your surgeon botched your surgery and replaced the wrong knee. You might want to sue for malpractice. It would be a stronger case if you could show that this particular surgeon had been sued in the past for malpractice, been suspended from the practice or dropped from his insurance due to excessive malpractice claims, or been brought up on disciplinary charges for unprofessional acts. You would have the right to obtain this otherwise undisclosed information by "FOIL"ing the bureau of the state government responsible for licensing physicians. A "FOIL" request takes the form of a fairly standard letter seeking specified information. The state agency applied to has five days to respond either with the information requested, an explanation of costs involved in copying the information to be provided, or a denial with explanation (e.g., that you've contacted the wrong agency, that the information you seek is "classified" and unavailable, etc.). Citizens receiving a complete or partial denial have the right to appeal the decision within 30 days. Further information on how to file a FOIL request or appeal may be found in "Your Right to Know," a pamphlet published by the Committee on Open Government in Albany, New York. They can be contacted by phone: (518)474-2518, or you can visit their website at: <http://www.dos.ny.gov/coog/>

#### **Health Care Coverage & Welfare:**

Universal health care was signed into law by President Obama in 2010, providing among other things, for all children in the U.S. to be carried on their parents' health plans until age 26 and requiring everyone to obtain health insurance by 2014 or pay a penalty. Chief Justice John Roberts, writing for the majority stated, "The federal government does not have the power to order people to buy health insurance. The federal government does have the power to impose a tax on those without health insurance." Although the Affordable Health Care Act was challenged as unconstitutional, the United States Supreme Court on June 28, 2012, in a major decision, upheld nearly all of the act as legal. The Supreme Court disallowed as "overstepping" the provision in the Act which would have forced states to provide Medicaid payments for all eligible residents, or lose federal funds.

Preventative health measures will soon be in place as well, covering such things as contraception, pregnancy care, well-baby visits, hepatitis (and other) vaccines, flu shots, tests for HIV and cancers of the breast and colon, screening for depression and alcoholism, and smokers' counseling. Further, under the Act, health insurers won't be able to deny coverage or charge more for those with pre-existing health problems.

New York has for many years provided for the children of the uninsured, allowing them to receive health care through the “Child Health Plus” program. This is a good example of how a state can provide more generous benefits than the federal government mandates, but cannot provide less. Medicaid is medical insurance available to legal U.S. residents who are below a certain income bracket. Medicare is medical insurance available to older legal U.S. residents.

Welfare benefits are supplemental funds available through the Department of Social Services for individuals and families in need. Disability income, food stamps, WIC (women, infants, children) monies, and temporary financial assistance (such as for rental payments and security deposits) are some of the types of needs funded through social services.

## Activities:

- 1) set up a voter registration table at school, with information available as to who is eligible to vote;
- 2) make sure all eligible class members are registered to vote (bring in registration forms and help them to fill them out);
- 3) attend a city council meeting or public hearing to learn how it is run and how community members can participate. Propose a new law as a group that will greatly impact teenagers. Divide your class into factions and hold your own hearing on the proposed new law (perhaps with city council members presiding over the hearing, and with the involvement of special interest groups, teachers, students);
- 4) learn the value of civic activism: poll fellow students in each grade in your school about what ONE thing they would most like to change about the school; discuss responses as a class to determine which were most frequently made and which could most conceivably be implemented; plan a "campaign for change" within the class which could involve the entire student body; lobby and peaceably demonstrate before the administration for this change!
- 5) within your class, discuss a listing of scenarios of what would and would not be protected free speech in school and on the street (you can even read facts from various Supreme Court speech cases) and vote before revealing what lines the Supreme Court has drawn to date;
- 6) visit a local civil court to watch how a jury is empaneled;
- 7) make a FOIL request for information the class votes to obtain;
- 8) make a list of your monthly expenses to see how much money it takes an emancipated teen to live independently.



## Chapter III. Rights I Have in the Criminal Justice System:

In New York, you are considered an adult for criminal justice purposes at age 16, although in certain cases of extreme violence, children as young as 13 have been tried and convicted as adults. Classifying a person as an adult or child for criminal justice purposes is a critical distinction. Adults are tried in criminal court, receive harsher sentences and go to prison with other adults. Children are dealt with in family court, receive lesser sentences – often with records sealed (see explanation, below) – and, if necessary, are placed in special juvenile detention centers without adult prisoners, until they reach adulthood. The New York State Division of Criminal Justice Services maintains a “rap” sheet on each person convicted of a crime and these records are permanent. However, the records may be sealed (unavailable to employers, schools, etc., but still viewable to police and the FBI) if the person was 19 or under at the time the crime was committed, and was otherwise eligible to be granted “youthful offender status” by the judge. As will be discussed shortly, such conviction records may have a very negative impact on your ability to obtain employment throughout your life. Unlike many other states, New York does not provide for the expunging (erasure) of criminal convictions (but note that, under the 2009 Rockefeller Drug Law reforms, certain drug crimes may be expunged).

New York and North Carolina are the only states in the nation where a 16 year old who commits a crime (and a younger person who commits a violent crime) starts off in adult criminal court rather than juvenile or family court, and can only be “waived down” to family court by a judge’s order.

Now that you know how serious entering into the New York State criminal justice system is, let’s go back to the basics: What protections do you have, as a citizen, in the criminal justice system? If you don’t know what rights you have, you cannot utilize them to protect yourself and your loved ones. The Bill of Rights of the Constitution provides us all with certain “unalienable” rights. Three of these rights are central to a discussion of how you can expect to be treated in the criminal justice system. They are precious and to be guarded carefully as they are so easily “given away,” if you are not knowledgeable of what they are and how they can protect you.

The **Fourth Amendment** to the Constitution provides:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

To paraphrase, the Fourth Amendment protects citizens from illegal search and seizure. In other words, police officers cannot just search you, your car or your home and take or “seize” your possessions without good reason. They must either have: (1) your permission – your “consent”; (2) a search warrant signed by a judge and specifying what they seek; (3) “probable cause” (something beyond mere suspicion that leads them to believe that you committed, or are in the act of committing, a crime, such as witnessing you commit a crime); (4) you have already been arrested (a search “incident to arrest”); or (5) there was an “exigent” or emergency situation (e.g. someone was in danger of serious harm, someone was fleeing from police, evidence was about to be destroyed).

So, if a police officer knocks on the door and asks if she can come in, the **FIRST** question you need to ask is: (1) Do you have a search warrant? You **MUST** demand to see this. Without a warrant, (or your permission or an emergency situation), the officer has no right to be in your home.

But what IS a warrant? A **warrant** is a piece of paper, dated, signed by a judge, obtained by the district attorney's office and/or the police, specifying exactly what item(s) is/are sought. The warrant must also contain the homeowner's name and the address of the residence being searched. It must be executed (acted upon) by the police within 10 days of issuance (i.e., 10 days from the time the judge signs it) and during reasonable hours (e.g., not at 2 a.m., unless extraordinary circumstances prevail). The officer(s) executing the search warrant must look for the item(s) they seek ONLY where those items could legitimately be. In other words, an officer cannot look under a pillow for a stolen bicycle. However, if the warrant is for drugs or drug paraphernalia, the officer could look almost anywhere – even in a jewelry box, a freezer, or under a couch cushion. But here's the tricky part: let's say the officer is looking for a stolen bicycle and is only looking where a bike could legitimately be. He opens the bathroom door – but instead of a bike, he sees a whole bunch of drug paraphernalia and drugs. In New York, this would cause the warrant to automatically expand – instantly, to include drugs as well as a bike. Now, the officers could legitimately go back to the bedroom and look under the pillow and in the jewelry box for drugs.

Of the other search warrant exceptions, "consent" and "exigency" (emergency) deserve attention. **Consent** is a bit tricky, so you need to be careful. You could be in the kitchen making coffee and your friend who is visiting could answer the door and give legal consent to an officer to come in, even though your friend does not live there. A five year old could NOT reasonably be seen as capable of giving consent, but since the law in New York does not specify the age at which one can give legal consent for these purposes, an astute 13 year old may be assessed by a judge as capable of having given consent to a police entry which produced arrest-worthy evidence. Especially if you are hosting a party, you need to be the one to answer the door in case the police arrive. You do not want your guests to be consenting to a search of your home without your knowledge.

**Emergency or exigent circumstances** which can give rise to a legal police entry in the absence of a warrant are: someone is in danger of "life or limb," someone has escaped from prison or jail and the police are chasing him (the "fleeing felon" exception), the police are in hot pursuit of a perpetrator who rushes into your home and the police follow; the police have knowledge that you are harboring a criminal in your home; the police believe there is imminent danger of evidence being destroyed if they do not enter immediately.

The **Fifth Amendment** to the Bill of Rights protects citizens against self-incrimination:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

This means that you always have the right to remain silent – and you do not have to tell on yourself – in a courtroom, in a police car, on the street or anywhere. Have you ever watched a police drama where someone in a courtroom says, "Your honor, I plead the Fifth"? If so, you witnessed a person invoking their Fifth Amendment right to be free from self-incrimination. If you know that your answer to a particular question of a police officer, judge or the attorney not representing you (the prosecuting attorney) might incriminate you, remember that you have the right to remain silent. Similarly, if a police officer pulls your car over and asks you, "Do you know why I pulled you over?" You should not respond, "I guess I was speeding." To do so would be giving up your Fifth Amendment right NOT to

incriminate yourself. Moreover, in that situation, you have no idea why the officer pulled you over. You might have a broken taillight, for all you know – and you would have just given the officer another reason to ticket you! The proper response would be either to remain silent, or to ask the officer, “I don’t know, officer, why did you pull me over?”

The **Sixth Amendment** to the Bill of Rights gives citizens the right to counsel, that is, to a lawyer, if they cannot afford one on their own, when faced with the possibility of incarceration:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.”

The right to counsel is critical. Indeed, it may be your most important right. If you are being questioned at the police station beyond the biographical information needed to book you, you should ask for a lawyer before you answer any of the police officers’ questions, even if you have no reason to believe you have committed any criminal act. Many completely innocent people have been convicted of crimes and spent years in prison. Over 130 innocent people in the United States have been sentenced to death, and then, prior to execution, determined to be innocent. So innocence is not always a complete defense, and does not always ensure a not-guilty verdict. Speaking to any attorney before responding to police questions which go beyond biographical information about you is simply good advice.

**Miranda rights** which must be read to you by police when you are: (1) in custody; and (2) are being questioned about what the police are investigating, are a combination of your Fifth and Sixth Amendment rights.

“You have the right to remain silent. Anything you say can and will be used against you in a court of law.” (It will be used against you, so don’t talk.) You have the right to an attorney. If you cannot afford one, the state will provide one for you.”

Not only before you answer questions, but importantly, before signing anything at the police station, you need to speak with an attorney – whether your own private lawyer or one the state (or county) provides for you (i.e., a public or conflict defender). State politely that you would like to speak with an attorney.

There are many reasons for this. First, a police officer might offer to write down a statement which you dictate to him or her of what happened (a confession). But if you don’t reread the statement the officer wrote, you won’t know if what you stated has been accurately captured in writing by the officer. Sometimes there may be legal terms in the written charges against you that you don’t understand, or there might be crimes listed which you didn’t commit. Sometimes, confessions written by police for defendants to sign also contain legal terms and additional criminal activity. You must have an attorney read the statement and go over it with you before you sign it. Finally, having an attorney at your side before signing a statement or confessing to a crime is critical because it might be that you had a legal defense to the crime of which you were not aware. Your lawyer will be able to advise you of any legal defenses you might have.



For instance, let's say you were driving your dad's car and he'd left his prescription Valium in the car. When your car was stopped because you were speeding, the officer ordered you out of the car and searched it, finding your father's prescription. You are charged with having an illegal prescription. You might have been about to sign a confession that you had the prescription drugs in question (even though they were not yours). But when your attorney hears the story of how you were apprehended and your car searched, she might tell you that you should not sign the confession because the entire episode of the car search was illegal. If the search was illegal, then the discovery of the prescription drugs was illegal. The drugs were the "fruit of the poisonous tree" (the illegal search) and your attorney will take the appropriate actions to have them excluded from evidence. Had you not consulted with your attorney, you would have confessed to the entire thing and may have been found guilty. Be aware that having a parent or guardian by your side while being questioned by police is fine, but it is NOT a substitute for an attorney, unless your parent is an attorney. Many parents are as unaware of the tremendous, permanent legal ramifications of their child's incriminating statements, as the child is, himself. Remember: In general, once you sign something, you "own" it and must live with the consequences.

Let's talk more about street and car searches, beginning with how the police stop you on the street or in your car.

## **Street Confrontations:**

### **The "Approach and Question"**

The police can "approach and question" you on the street for any legitimate reason, such as to ask you what time it is, if that dog roaming around without a leash is yours, or why you're on the street at 11 a.m. when school is in session and you look like a high school student. The police may legally ask for further information if they suspect that a crime is being committed. But in general, in an "approach" situation, you have the right to walk away. By the way, if an officer asks your name on the street, you do not have to give it, but if you don't, you will only make them suspicious. It is better to give your name (your real name; otherwise you've committed the crime of "criminal impersonation") and, if asked, your address and date of birth, but nothing else (without a lawyer there with you).

### **The "Stop"**

The police have the right to "stop" you on the street if:

- They have a "reasonable suspicion" (more than a hunch) that you have a weapon, that their own safety is in jeopardy, or that you are about to commit a criminal act, are in the process of committing a crime, or already committed a criminal act;
- They believe you have familiarity with the persons or crimes they are investigating and they want to talk to you;
- They have a warrant for your arrest.
- Unlike an "approach," if the police have formally stopped you, you do not have the right to leave.

### **Knowing the Difference Between an Approach & Stop**

- If an officer points a gun at you: you've been stopped;
- If an officer restrains you: you've been stopped;
- If an officer blocks you in with his car, horse or bike: you've been stopped;
- If an officer yells for you to "stop": you've been stopped.

Remember, a lot of what happens to you in a police interaction has to do with your ATTITUDE.

## Always:

- Remain polite and respectful.
- Maintain a calm demeanor and be cooperative.
- If asked, give your name, address and birth date. You can also ask, politely, why the officer(s) stopped you.<sup>6</sup>
- Keep your hands where the police can see them. If told to do something, let the police know what it is that you are doing (e.g., “I’m reaching in my back pocket for my wallet for my ID, officer”).
- Make clear that you do not consent to being frisked or searched (this will be covered in more detail in the next few pages). Say, politely, “Officer, I want you to know that I’m not consenting to this search.”
- Let the police know that you are not resisting arrest if they frisk or search you pursuant to an arrest. Say, “Officer, I am not resisting arrest.” This is crucial because officers are allowed to use “only the force necessary” to make an arrest. So the more you resist, the more force they can legally use to control you. You may need to repeat this statement over and over again, loudly, especially if officers are using force on you. The reason for this is that you want to make sure anyone witnessing the interaction understands that you were not resisting and, yet, were being handled roughly.
- Most Importantly: NEVER RUN FROM THE POLICE! (Bullets travel faster than your feet!) Always walk with your hands visible and, if possible, empty, so the police do not perceive you as a threat. Officers want to go home at night to their families. If they feel threatened, they have to make a split-second decision whether or not to protect themselves (or others in the vicinity).

## The Frisk

If the police stop you, they want to be sure they are safe while they question you. Thus, they have the right to “frisk” (pat down) the outside of your clothes if they “reasonably suspect” that you are armed or that their safety is in jeopardy. They can also frisk you if you consent to it (give them permission), of course. If the police feel what they believe could be a weapon, they are permitted to reach into your pocket to find out what it is. They may also remove drugs while frisking you, through the “plain feel” exception (e.g., a bag of marijuana that, by “plain feel,” they know to be marijuana). Either a weapon or illegal drugs would give them the right to arrest you on the spot. The only exception to this would be if the officers found less than 25 grams of marijuana in your pocket (i.e., private possession), as mentioned earlier, which would result in a ticket and a fine, but no arrest.

Police “stop and frisks,” especially in New York City (and Philadelphia) has been continually in the news since about 2009. Criminal Justice data consistently reveals that the New York City police department is stopping and frisking hundreds of thousands of people per year, many of whom are stopped multiple times. The concern raised is two-fold: (1) that these stops are made without the required “reasonable suspicion” of wrong-doing, and (2) that the stops are racially discriminatory, or a result of “racial profiling.”<sup>7</sup> In 2011, police in New York City stopped nearly 700,000 people, 87% of whom were black or Latino.<sup>8</sup> More than half of the 700,000 were also frisked and these persons were overwhelmingly

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6. This is important, because if the officer(s) have stopped you to see if you may have witnessed a crime, you might want to share information with her/them. However, if the officer(s) have stopped you because she/they think you might be involved in a crime, you would be best advised not to speak to her/them about the incident in question until after speaking with a lawyer.

7. Racial Profiling, according to the American Civil Liberties Union is when law enforcement targets individuals for suspicion of crime based on their race, ethnicity, religion or national origin.

8. These numbers come from a New York Times article, June 18, 2012 by John Leland.

blacks and Latinos. According to the American Civil Liberties Union, the number of police stops of African American males ages 14-24 in New York City in 2011 was greater than their total population. News of this, and related statistics, prompted wide-spread citizen protests.

The police department has consistently maintained that the stop and frisk program is necessary to ensure public safety. But some have questioned this explanation, since the nearly 700,000 stops last year by the New York City police yielded very few weapons (less than 2%, with more weapons seized from white persons than blacks or Latinos) and very few arrests (less than 9%). Ironically, although 87% stopped were black or Latino, and only 13% were white, the percentages of those actually arrested were roughly equivalent! To some, this is evidence that the police unfairly target blacks and Latinos for stop and frisks.

The New York City police department was recently sued by the New York Civil Liberties Union for, among other reasons, retaining files on people stopped, even if they weren't ultimately arrested. This practice is no longer allowed under New York State Law. In July of 2010, then New York Governor David Patterson signed into law a ban on the electronic retention of stop-and-frisk data for those persons stopped by police but not ultimately charged with a crime or violation. As Governor Patterson noted, "There is a principle -- which is compatible with the presumption of innocence, and is deeply ingrained in our sense of justice -- that individuals wrongly accused of a crime should suffer neither stigma nor adverse consequences by virtue of an arrest or criminal accusation not resulting in conviction."

Cries of racial profiling were raised against the New York City police department in 2011 for an alleged program of targeting Muslims -- in mosques, neighborhoods, stores, and Muslim student organizations at certain colleges. Clearly, these issues are certain to remain in the news, and in courtrooms, in the months and years to come.

### **The Search**

- More intrusive than a frisk, a search of your person is legal if:
- You give the police your permission (your "consent")
- Police feel a weapon on you during a frisk;
- Police have "reasonable suspicion" that a crime has been committed and that evidence of this crime is on you somewhere;
- You are arrested ("search incident to arrest")
- Police have a search warrant to search you;
- There is an emergency situation: someone's life is in danger, someone is fleeing police pursuit; police believe you are about to destroy evidence.

Male police officers may frisk males and females, but male officers are not supposed to deep-pocket search females. Only female police officers are supposed to deep pocket search females. Male police officers are supposed to ask for female backup or take females to the police station so they can be searched by female officers. Female officers, on the other hand, can frisk and deep-pocket search males.

### **If You Believe That You Have Been the Victim of Police Misconduct:**

- Keep a written record of the incident. Note the officer's name and/or badge number during your interaction, and then, as soon as possible afterwards, write down a detailed description of the police officer(s) involved.
- If you have any injuries or property damage, take photographs. If you repair the damaged property or visit a doctor keep all receipts, bills, etc.

- If possible, keep a list of the names, addresses, and phone numbers of any witnesses. NEVER UNDERESTIMATE THE POWER OF A WITNESS STATEMENT! A credible (believable) witness statement can completely destroy a case against a defendant, or, on the flipside, it can be the linchpin in a defendant's conviction. If you are in a police interaction, or are in the wrong place at the wrong time when a crime is being committed, a witness can corroborate (support by adding additional facts or evidence) your innocence. An alibi witness can attest to your whereabouts in a place other than the crime scene at the time of the crime.
- Fill out a citizens' police review board complaint form (or the equivalent in your town or city). These are usually available at the police station and at other locales as well. Be sure to keep a copy of your complaint for your own records.
- Consult an attorney or contact the Government Law Center (518-445-2329) or Civil Liberties Union (212)607-3300; (518)-436-8594), from anywhere in the state, for assistance in filing a police complaint. The New York State Bar Association ([518] 463-3200 [general number]; [800]-342-3661 [lawyer referral service]) or a county bar association, can assist you with an attorney referral, if needed.

## Car Searches

If the police have "reasonable suspicion" that the driver (or someone in the car) has either broken the law or committed a traffic violation, they may stop your car. You may not ignore an officer's attempt to pull you over, or you will face additional charges. However, if it is nighttime and you are unsure of your safety or the police officer's legitimacy, you could put on your flashers and proceed to the nearest police station before pulling over.

The police may also stop your car during routine traffic checks, such as DWI roadblocks, seatbelt checks, etc., as long as the traffic checks are not conducted in a discriminatory fashion (e.g., the police would not be allowed to stop and check cars driven only by Latino males). If you have been pulled over, first turn off your car. Then, when the police officer first approaches your car, you should immediately place your hands on the wheel, in order to give the officer the signal that your hands are free of weapons and you have no plan to harm him. **NEVER** start to open the car door, as the officer may well interpret this as aggression on your part. When the officer asks for your license, proof of registration and insurance card, narrate what you're doing as you locate the cards (e.g., "Officer, I'm reaching in my back pocket for my wallet for my license. I'm reaching in my glove compartment for my insurance card.>").

If you are driving someone else's car, be sure you know where they keep their insurance card and registration. You should always have your own driver's license on you. If you cannot produce proof of insurance or registration (or that you have a license), you will receive a ticket and must appear in traffic court to furnish proof (to have the violation dismissed). You may still have to pay court costs and a fine, take off from school or work to appear in court, and may even have to pay for an attorney to assist you. The point is, this can all be avoided if you make sure you know where these cards are before you start the ignition. It is always a good idea to take a minute before driving to take a quick survey: If I were to be stopped by the police, would I pass inspection? Are my license, registration and insurance cards within reach? Is my car free of drugs or alcohol, weapons or ammunition? Am I wearing a seatbelt? Is my cell phone off (or in the trunk!), so I am not tempted to text while driving? And, if you are a new driver, less than 18: Do I have a permissible number of passengers in my car? Am I driving beyond a new driver curfew time?

After pulling over a car, the police have the right to perform a “limited visual search” of the car from the outside of the car. It is basically the equivalent of a pat frisk of a person on the street. Any contraband, (illegal drugs, weapons, ammunition, open alcohol, unopened alcohol if you’re underage, stolen goods, etc.) in “plain view” may be seized. The sight of contraband raises the officer’s mere “reasonable suspicion” to have pulled the car over, up to “probable cause,” a legal level of evidence sufficient to permit the officer to order everyone out of the car and search the car. As well, since “plain view” includes “plain smell,” if the officer smells alcohol or marijuana when you hand your ID cards through the window, that also raises reasonable suspicion to probable cause, sufficient to get everyone out and search the car. Note that the “plain view” rule does not allow the police to get into your car. It also forbids police from opening the glove compartment or trunk (which are called “closed containers” under the law), unless you give them your consent, they have probable cause because they found contraband elsewhere in your car already via the plain view rule, they have a warrant, or exigent (emergency) circumstances exist.

Be Aware: there is a presumption under the law that any illegal drugs or weapons found in a car during a legal search belong to EVERYONE in the car. In other words, EVERYONE can be charged with having possession of any contraband that is found, even if they were not aware of its existence. Be careful who you ride with – make sure they are friends you trust and who aren’t breaking the law.

### **What is a Subpoena?**

A subpoena is a piece of paper, signed by a judge, demanding your presence in court (or that you produce certain documents or evidence) at a specific date, time and place. If you do not abide by the subpoena and appear (or produce the documents requested) at the designated time and place, you will be in “contempt of court” (i.e., you are not obeying what the court directed you to do) and a warrant will be issued for your arrest. Therefore, heeding a subpoena is non-negotiable. One exception is that you cannot be subpoenaed to appear in your own grand jury hearing (a threshold hearing which determines if there is enough evidence against a defendant to indict [formally charge] him or her with the crime[s] in question). The decision to appear or not to appear in your own grand jury hearing is a tactical one, and should be made upon the advice of a lawyer.

### **Orders of Protection:**

An order of protection is a piece of paper, signed by a judge, forbidding certain specified contact between certain specified individuals for a certain specified length of time. Orders of protection can forbid illegal contact only, or they can be complete “stay away” orders, preventing any contact – even phone, mail or intentional eye contact! Most orders of protection last for two years, but they can be extended in five-year increments. Violations of orders of protection are considered felonies and are punishable by imprisonment.

### **What if I’m Arrested?**

If you were ever to be arrested, you would be booked (processed): fingerprinted, photographed and questioned. In New York, your parents (or guardian) must be called if you are under 16. If you are 16 or over, (remember, no longer a minor for criminal justice purposes in New York), the police are not obligated to notify your parents/guardian, but you are allowed one phone call. In this situation, you’d need to call someone trustworthy, who can help you. Don’t say anything over the phone at the police station, other than that you have been arrested and need the person you called to come to the station to meet you. The phones at the police station are tapped. If you do not want to hear your voice coming back to you at your trial saying something incriminating, don’t talk about your situation on the phones at the police station.



As noted earlier in this chapter, you should never answer the questions posed by police about the crime they are investigating until your lawyer gets there. If you don't have a lawyer or the funds to hire one, request that the police produce a public defender (a free lawyer) for you, and don't talk until that person arrives. You have the absolute right to stop a police interrogation at any time. Within 24 hours of being arrested, you will appear before the judge. You will then be informed of the charge(s) against you, an attorney may be appointed for you, if you don't already have one, and the judge may set bail.

### **Bail**

Bail is an amount of money used to guarantee the defendant's appearance at her trial or next court date. Judges have great leeway in setting an amount of bail for a defendant, but the amount cannot be "excessive" or "arbitrary," and must be based on the defendant's circumstances, such as his reliability, mental status, work history, criminal record, ties to the community, and the risk that he might flee. If the judge deems a defendant to be a flight risk or a threat to the community, she will not set a bail or bond, and the defendant will need to remain in custody, pending his next court appearance. If the judge trusts that the defendant will return to court on his own for his next court appearance, she may release the defendant "on his own recognizance" ("ROR" him), without even requiring bail.

If the judge does set bail, the defendant's family and friends have the option of "bailing him out." They can do this by paying the entire amount of the bail to the court, which they would get back after the defendant's matter concludes, or they can pay 10% of the amount of bail set (e.g., \$500 for \$5,000 bail) to a bail bondsman. The bail bondsman guarantees to the court that the defendant will appear when scheduled to do so, or the bondsman will pay the full amount of the bail. The family and friends never recoup the 10% of the bail paid to the bondsman. If the judge sets "cash bail," it requires the defendant's family and friends to pay the full amount of the bail to the court. The use of a bondsman would not be an option in such a case. Sometimes, even though bail is set, a defendant's family and friends cannot afford to bail him out and he must remain in custody, despite the option to leave and return for trial. If the defendant's family bails him out but he does not show up for court, the family loses the money spent and a bench warrant is issued for the defendant who, when caught, will have to contend with new charges of "failing to appear."

### **Charges**

In terms of charges a defendant could face:

- A violation is a relatively minor infraction for which a person can spend up to 15 days in jail and/or receive a fine.
- A misdemeanor (e.g., criminal possession of marijuana in the fourth degree [2-8 ounces], criminal impersonation in the second degree, or making graffiti) carries jail time of up to a year and a fine of up to \$1,000.
- A felony (e.g., grand larceny, arson, rape, murder, large drug sales, drug/weapon possession) carries anywhere from a year to life in prison and a fine of over \$1,000. While the death penalty technically exists in New York, it has been ruled "unconstitutional" by the State's highest court, the Court of Appeals. But even when it did exist in New York, no one under the age of 18 when the crime in question was committed, could be put to death. That is now federal law, as is the fact that no one with an IQ of 70 or below can be put to death in the U.S.

At the initial appearance before a judge, a person being charged with a misdemeanor will be advised of the charges he faces through the District Attorney's "information." The District Attorney is the lawyer who works for the county, and is otherwise known as the prosecutor. This is the person who

brings criminal charges against defendants on behalf of the citizens, the “people” of the county. The “information” is the formal document that specifies the type of crime(s) with which the defendant is being charged, as well as the circumstances surrounding the crime[s]. Once the defendant is presented with the information, he will be asked to plead guilty or not guilty. Sometimes the District Attorney will offer a “plea deal” to the defendant. This is an agreement to entice the defendant to plead guilty – that is, to admit guilt – and to waive (give up) the right to trial and to appeal, in exchange for perhaps a lesser charge and /or less time than the defendant would face if he took the case to trial and lost. Before a defendant is allowed to accept a plea deal, however, the judge is required to ensure, on the record (i.e., out loud, in court and recorded by the court stenographer or tape recorder) that the defendant understands the consequences of accepting the plea and that the defendant is accepting the plea of his own free will and with full knowledge of all the details and ramifications of the plea. If the defendant does not wish to plead guilty, the case will go to trial.

A person being charged with a felony will be advised of the charges he faces, but does not enter a plea until a later time, at the “felony arraignment.” If a defendant is charged with a misdemeanor, he is not entitled to a preliminary hearing (also called a “probable cause” hearing). The reason for a preliminary hearing is to find out if there is enough evidence to require a defendant to go to trial. A defendant charged with a misdemeanor is not entitled to a grand jury hearing, either. A grand jury, referenced previously, is a group of 16-23 eligible voters who must decide if there is enough evidence in a particular case to find that the defendant in question committed the crime(s) in question and should be tried for this/these crime(s). If there is enough evidence, the grand jury issues an “indictment,” formally charging the defendant with the felony or felonies in question.

After a defendant is indicted for a felony or charged with a misdemeanor based on the prosecutor’s “information,” the defendant must enter a plea in court – either guilty or not guilty. If a “guilty” plea is entered, the judge will set the date for sentencing. If a “not guilty” plea is entered, a trial date will be set and the felony defendant can decide whether to have a jury or bench (judge only) trial. The misdemeanor defendant who opts to take her case to trial does not have the right to a jury trial, but will have a bench trial. While all criminal defendants are presumed innocent until proven guilty and are entitled to a trial, juvenile defendants, like all misdemeanor defendants, are only entitled to a bench (non-jury) trial. Juvenile defendants do not have an automatic right to bail. The judge may or may not set bail. Juveniles are entitled: to an attorney, to be notified of the charges against them, to remain silent, and to confront and examine witnesses.

Criminal defendants must be found guilty “beyond a reasonable doubt” in a unanimous decision by the jury, after fully and fairly deliberating (analyzing, weighing, discussing) the issues. This means the defendant cannot be found “possibly” guilty. Rather, the jury must be unanimously convinced of the defendant’s guilt. If the jury does not reach a unanimous decision to convict or not to convict, it is called a “hung” jury, and the judge must declare a “mistrial,” forcing the prosecutor to have to decide if it would be in the state’s best interest to spend the resources to re-try the case. If the prosecutor decides not to retry the case, the defendant is set free.

If a jury convicts the defendant, the defendant may receive a sentence of: “time served” (meaning the person has already served the length of his sentence by remaining in custody up to that point, and may be released), a fine, a jail or prison term (including life in prison [although not if the defendant was younger than 18 at the time the crime was committed, and there was no death associated with the crime]), both a fine and a jail or prison term, probation, or some alternate punishment like shock incarceration (basically, a six month boot camp), drug treatment program or community service.

The purposes of punishment are: to deter the defendant and others from committing crimes, retribution (making the defendant pay with his time or life or money, or a combination of these), rehabilitation of the defendant, incapacitation of the defendant, and to ensure the public is safe. If the defendant is 19 or younger and committed a misdemeanor or non-violent felony, did not possess a deadly weapon during the crime, and has not been previously convicted of a felony or ever received a youthful offender felony determination in the past, the court must find the defendant to be a “**youthful offender.**” This is a designation a defendant wants to receive, as:

- 1) it guarantees that the defendant’s record of this crime is sealed;
- 2) the defendant might do his/her time in a special state facility which is not an adult prison;
- 3) this youthful offender offense will not be included as a prior felony in any “predicate felony” conviction; and
- 4) the maximum allowable sentence is greatly reduced from what adults would face for the same crime.

## Classifications of Juvenile Offenders

A **juvenile offender** is a youth who commits an act which, if an adult committed it, would be illegal; specifically: (a) a 13-15 year old who commits murder in the 2<sup>nd</sup> degree or (b) a 14-15 year old who commits any of a long list of serious, violent crimes in the 1<sup>st</sup> or 2<sup>nd</sup> degree (e.g., arson, rape, assault, kidnapping, burglary, robbery). These are handled in the Supreme or County Court (that is, criminal court and not family court). A **juvenile delinquent** is someone who is at least seven years of age but less than 16, who commits an act which, if committed by an adult would be a crime. These are dealt with in family court. A **status offender** is a person less than 16 who commits an act which, if committed by an adult, would not be illegal (e.g., drinking alcohol, skipping school, running away from home). A juvenile delinquent is most often sentenced to probation, but because rehabilitation is the main goal, other types of “punishment” may be meted out, such as: curfews, counseling, “no contact” orders to protect certain persons; mandated schooling and mandated jobs. Juvenile delinquents’ records as juveniles are sealed. However, no records are sealed to the government. Therefore, if someone who had a record as a juvenile delinquent were to apply to be a police officer someday, the person(s) screening applications would be able to see the juvenile record.

### Of Special Mention:

#### **Texting, Sexting, Text Bullying and Facebook:**

All students need to be aware of the ways in which technology can destroy your career and future. Make no mistake: There are very real consequences to posting things on Facebook and other social networking sites which either paint an “unflattering” picture of you, or depict you committing downright illegal acts. Many an adult has lost a job opportunity for which he/she was competing when Facebook or Myspace pictures of drinking, drugging, partying or nudity surfaced. Sometimes, Facebook photos posted have “done in” a criminal defendant who is shown committing incriminating acts, or, in some cases, by “partying” after having just supposedly suffered the loss of a family member (who it later turns out, the defendant is charged with killing!). You must be extremely careful what you post and what you allow your friends to post about you (i.e., tagging



you in photos that are incriminating). Criminal cases have been lost when prosecutors search a defendant's Facebook page and find bragging references to the crime in question or learn on a victim's Facebook page that she has concocted the crime in retaliation for something. **You should just assume that when you put anything on Facebook, the police will see it and that it will become public information.** In this way, you will train yourself to be hyper-sensitive to the content of what you post.

Sexting, sending text messages containing explicit sexual images, is also a serious legal concern. Like computer pornography, sexting is a felony. As noted in a prior section, just in the past year or so, cyberbullying has become a national problem and, in some cases, has resulted in serious criminal charges being brought against bullies after their victim(s) committed suicide. There is debate going on right now about whether cyberbullying should be a federal crime. This would bring with it harsher federal sentences. On July 9, 2012, Governor Andrew Cuomo signed into law requirements that, as of July 1, 2013, school districts in New York must have in place systems to curb online bullying, including the designation of a point-person to receive complaints, and a strict timetable relating to the investigation of the complaint. The law falls short of creating a specific criminal charge for cyberbullying.

In sum: BE SMART! Think of your future. Use discretion! Ask yourself before you post or send a message: "Would I want my parents to see this?" Keep your private thoughts and images private! Also remember that more and more states have adopted laws making it illegal to text while driving, and to talk on a cell phone while driving, without a hands-free car phone. Fines are stiff, but more importantly, the reason behind these laws is that texting while driving and using a cell phone while driving have proven, time and again, to be recipes for disaster for the driver, the other passengers and for innocent pedestrians or persons in other cars. **DON'T DO IT. YOUR LIFE IS WORTH MORE THAN ANSWERING THAT NEXT TEXT! DON'T THROW YOUR LIFE AWAY FOR A TEXT!**



### Defenses to Charges

Certain defenses, called "mitigating factors," can be introduced by the defendant to avoid punishment altogether or to try to convince the judge to lessen the severity of the punishment rendered. Such factors include:

- 1) the claim that the defendant suffers from some mental incapacity or defect;
- 2) the fact that the defendant is too young to be held accountable;
- 3) the assertion that the defendant committed the act under duress, coercion or fear;
- 4) the claim that the defendant committed the crime in self-defense only;
- 5) the notion that the defendant had been abused or neglected in the past – by the victim or not, and cannot, therefore, be held accountable for acting the way he/she did.

Of course, other defenses, based on DNA evidence or other forensic evidence (fingerprints, gunpowder residue), or having an alibi witness who can attest to the defendant's whereabouts (at a place other than the crime scene at the time of the crime) can lead to a defendant's acquittal (being found not guilty).

Certain "due process" (legal procedural and substantive) rights granted defendants by the United States Constitution are: the right to a speedy and public trial; the right to an impartial (unbiased) jury; the right to be informed of the nature and cause of the charges faced; the right to confront one's accuser(s); the right to call supporting witnesses; and the right to an attorney.

## Appeal Rights

Defendants who lose at trial have the right to appeal or challenge the verdict by filing a “notice of appeal” within 30 days of the sentencing. Then, the defendant has approximately four months to file the actual appeal. Defendants who cannot afford a private attorney to file the appeal should apply for a court appointed “appellate” attorney. If a defendant doesn’t lose at trial but is convicted because he pleads guilty to the crime(s), he waives (gives up) his right to appeal.

### How do I find a lawyer to represent me?

- If you cannot afford a private lawyer in a criminal matter, as discussed, you may be eligible for a “public defender.” A “public defender” is an attorney, employed by the county, who represents low-income clients in criminal matters for free. You apply to be represented by a public defender at the public defender’s office in the county in which you are being criminally charged. If you can afford an attorney but do not have a referral to one from a family member or friend, you can always call the New York State Bar Association’s Lawyer Referral Service at: 1-800-342-3661 from any county in New York. The State Bar Attorney Referral Program only operates in about 2/3 of New York’s 62 counties. In the other 1/3 of the counties, local or county bar programs provide the attorney referrals. The New York State Bar can provide contact information to these local or county bar programs.

Be prepared to tell the Lawyer Referral Service what type of lawyer you are seeking (e.g., one that specializes in criminal law, constitutional law, real estate, family/domestic relations, contracts, employment, corporate law, DWI, etc.). The Referral Service will give you the names of attorneys in your geographic area who practice the type of law you need. You then call those attorneys to make an appointment. Attorneys referred by the Bar Association charge clients a first time, ½ hour consultation fee of only \$25. After that, if you want to hire this attorney, you and the attorney will need to decide on a fee arrangement, which you should be sure to get in writing. Fees, especially in criminal cases, are usually fixed at an hourly rate. Sometimes attorneys will charge one rate for “in court” time and another rate for “in office” time spent on your case. Attorneys often ask for a considerable amount of money up-front, called a “retainer fee,” before starting a case, so that they have money to draw from to fund their research costs, hiring of experts, transportation, filing fees, etc.

Attorneys have an obligation to keep anything you discuss with them confidential, unless they perceive that you intend to commit a crime or that someone’s life is in danger. In these discrete situations, lawyers may be able to share information a client has confided to them. Understand that at all times, you are the consumer here. If you do not feel that your attorney is representing you to the best of his/her ability, even after discussing this with him/her, you can always hire a different attorney. You will need to work out whether your original attorney owes you money that you paid as a retainer, or whether you owe your attorney any money for the work he/she has done up to that point in the case. If you are extremely unhappy with your attorney and believe the attorney has harmed your case in any way either through negligence or on purpose, you can file a complaint against the attorney with the Committee on Professional Standards in Albany. You can call them and request a form at: (518)474-8816. You also have the option of filing a law suit against an attorney for malpractice if you believe the attorney damaged your case. In any case, you should be aware of the following Rights and Responsibilities you have, in hiring an attorney:

## STATEMENT OF CLIENT’S RIGHTS<sup>9</sup>

1. You are entitled to be treated with courtesy and consideration at all times by your lawyer and the other lawyers and personnel in your lawyer’s office.
2. You are entitled to an attorney capable of handling your legal matter competently and diligently, in accordance with the highest standards of the profession. If you are not satisfied with how your matter is being handled, you have the right to withdraw from the attorney-client relationship at any time (court approval may be required in some matters and your attorney may have a claim against you for the value of services rendered to you up to the point of discharge).
3. You are entitled to your lawyer’s independent professional judgment and undivided loyalty uncompromised by conflicts of interest.
4. You are entitled to be charged a reasonable fee and to have your lawyer explain at the outset how the fee will be computed and the manner and frequency of billing. You are entitled to request and receive a written itemized bill from your attorney at reasonable intervals. You may refuse to enter into any fee arrangement that you find unsatisfactory. In the event of a fee dispute, you may have the right to seek arbitration; your attorney will provide you with the necessary information regarding arbitration in the event of a fee dispute, or upon your request.
5. You are entitled to have your questions and concerns addressed in a prompt manner and to have your telephone calls returned promptly.
6. You are entitled to be kept informed as to the status of your matter and to request and receive copies of papers. You are entitled to sufficient information to allow you to participate meaningfully in the development of your matter.
7. You are entitled to have your legitimate objectives respected by your attorney, including whether or not to settle your matter (court approval of a settlement is required in some matters).
8. You have the right to privacy in your dealings with your lawyer and to have your secrets and confidences preserved to the extent permitted by law.
9. You are entitled to have your attorney conduct himself or herself ethically in accordance with the Code of Professional Responsibility.
10. You may not be refused representation on the basis of race, creed, color, age, religion, sex, sexual orientation, national origin or disability.

## STATEMENT OF CLIENT’S RESPONSIBILITIES<sup>10</sup>

“Reciprocal trust, courtesy and respect are the hallmarks of the attorney-client relationship. Within that relationship, the client looks to the attorney for expertise, education, sound judgment, protection, advocacy and representation. These expectations can be achieved only if the client fulfills the following responsibilities:

1. The client is expected to treat the lawyer and the lawyer’s staff with courtesy and consideration.

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9. As adopted by the Administrative Board of the Courts and as reprinted in “Now that You’ve Turned 18” published by the New York State Bar Association

10. As adopted by the Administrative Board of the Courts and as reprinted in “Now that You’ve Turned 18” published by the New York State Bar Association

2. The client's relationship with the lawyer must be one of complete candor and the lawyer must be apprised of all facts or circumstances of the matter being handled by the lawyer even if the client believes that those facts may be detrimental to the client's cause or unflattering to the client.
3. The client must honor the fee arrangement as agreed to with the lawyer, in accordance with law.
4. All bills for services rendered which are tendered to the client pursuant to the agreed upon fee arrangement should be paid promptly.
5. The client may withdraw from the attorney-client relationship, subject to financial commitments under the agreed to fee arrangement, and, in certain circumstances, subject to court approval.
6. Although the client should expect that his or her correspondence, telephone calls and other communications will be answered within a reasonable time frame, the client should recognize that the lawyer has other clients equally demanding of the lawyer's time and attention.
7. The client should maintain contact with the lawyer, promptly notify the lawyer of any change in telephone number or address and respond promptly to a request by the lawyer for information and cooperation.
8. The client must realize that the lawyer need respect only legitimate objectives of the client and that the lawyer will not advocate or propose positions which are unprofessional or contrary to law or the Lawyer's Code of Professional Responsibility.
9. The lawyer may be unable to accept a case if the lawyer has previous professional commitments which will result in inadequate time being available for the proper representation of a new client.
10. A lawyer is under no obligation to accept a client if the lawyer determines that the cause of the client is without merit, a conflict of interest would exist or that a suitable working relationship with the client is not likely."

**Reentry: Life in Transition:**

Those reentering the community with criminal records have a very tough road ahead. With employment at record lows across the country, the job market is already incredibly tough these days, and trying to land a job with a criminal record on your resume is an extremely frustrating, humbling, demoralizing experience, no matter what your training or education. First, federal financial aid for college and graduate school is suspended -- in certain circumstances -- indefinitely, for drug convictions relating to sale or possession. Further, the following careers are off-limits to persons with certain types of convictions (mostly in the felony category) on their record: Banking, New York State Civil Service jobs, Corrections, Notary Public, Security System Installation and Maintenance, Private Investigators, Bail Enforcement Agents, Private Security Agencies, Security Guards, Child Care and Hospital/Nursing Home/In-home Health Care.

New York Human Rights Law (§296.15) and New York Corrections Law (§§752, 753) provide protection against employment discrimination to those who have been convicted of a crime. But the "Criminal Background Check Law," passed in 2005 requires the non-hiring of certain employees with criminal pasts by certain employers. Under this law, employers regulated by the Department of Health may not hire or retain anyone who committed any of a list of felonies within the prior 10 years. Under this same law, the Department of Mental Health and OPWDD (Office for People with Developmental Disabilities) have the ability to screen out anyone from employment who has committed one or more of that same list of felonies within the past 10 years. They also have the discretion, upon an employee's challenge of the employment denial, to hire that employee, despite the grounds for denial. It has come to light that some

OMH- and OPWDD-licensed employers have used this law as a shield not to hire and not to promote, and a few have even used it as a sword to fire employees. Certain civil rights organizations have raised the concern that this law may have created an atmosphere where employers are afraid to take the risk of hiring a new employee or retaining a current employee if she was previously incarcerated. This is because if this employee commits a new crime, especially of the same nature as her prior crime, the employer may be held accountable to a certain extent, since he was or should have been “on notice” of the employee’s “tendency” to commit crimes, especially of a certain nature.

Aside from employment discrimination, those with criminal records face discrimination in housing (certain felonies create permanent bars to public housing), education, the ability to receive certain governmental benefits and services, and in society in general, where they are often stigmatized. Many of these types of discriminatory practices are able to be addressed in court; however, often, such practices are so subtly used against the person as to go undetected. The previously incarcerated individual may think he didn’t get the job or the apartment because a better qualified applicant applied. Sometimes being “better qualified” means an otherwise equal applicant who has no criminal record.

**TIP:** In New York, an employer may not legally ask you on an employment application if you have ever been arrested. However, an employer may ask if you have ever been convicted of a crime in New York. If you have a criminal record in New York, you must be truthful on the application about your record. You can explain the details of your situation during the employment interview. Employers appreciate honesty and openness as well as clear determination in an applicant to turn his/her life around. Lying on any employment application is grounds for non-hiring and for dismissal if already hired. Some employers perceive applicants on parole as “safer” hires than those with criminal records who are not on parole, because an applicant on parole is living under the strict supervision of a parole officer. Parole officers have the power to send a parolee back to jail if the parolee does anything illegal or violates a parole condition (such as staying out after curfew, associating with certain persons, possessing a weapon, etc.).



## Activities:

- 1) Participate in your teacher's role-playing of a police interaction that moves from reasonable suspicion to probable cause to arrest;
- 2) Participate in your teacher's role-playing of a police station interrogation for a crime;
- 3) Compare and contrast confessions and apologies from sample defendants and discuss any observations;
- 4) Watch online "48 Hours Mystery" episode of "Who Killed the Beauty Queen?" to see how one can nearly lose his freedom by "giving away" his 5<sup>th</sup> and 6<sup>th</sup> Amendment rights;
- 5) Examine samples of arrest and search warrants;
- 6) Examine sample orders of protection and see if you understand what behaviors these would allow and disallow (e.g. answering the phone when the order is for your protection against the person calling);
- 7) Watch videos of street arrests, car searches, home searches; locate examples of these on YouTube to see if you think the police acted within their rights, and if the persons being searched helped the situation or made it worse;
- 8) Research gun violence (including ballistics and medical information about devastating effects of gun shot injuries, statistics revealing numbers of youth shot per year and survival rates of those shot [and what permanent, debilitating injuries they received]);
- 9) Interview someone you know who spent time in prison, to see what their experience was like, and what barriers they faced when transitioning back home. Interview parents or family members of children killed by gun violence;
- 10) Take a field trip with your class to a county jail;
- 11) Observe a criminal trial.



## Chapter IV. Rights I Have to Enter into a Contract

Employment contracts, rental agreements, insurance contracts, phone service contracts, car lease contracts, mortgage agreements, marriage contracts, student loan agreements, consumer purchase agreements, contracts for repair services... all of these are contracts into which you might enter at some point in your life – some of these sooner than others.



But what is a contract, anyway? A contract is, simply, an agreement between two or more individuals or organizations that binds them to each other, creating obligations for each. The landlord who offers to rent you an apartment expects you will pay the rent in return. You expect a decent place to live. A contractor who fixes the roof of your house also expects payment, and the homeowner expects a repaired roof. What makes something a contract is that there is a discernable offer from one person or organization (one “party”), an acceptance of the offer by the other, and some incentive, called “consideration” to seal the deal.

For the most part, in New York, you have to be 18 to enter into a binding (i.e., “legal”) contract. However, an employment contract of an 18 year old waiter in New York must specify that he/she cannot serve alcoholic drinks to customers until age 21. Similarly, to engage in a car rental contract, you must be 21 in New York. Here’s the interesting thing: contracts do not have to be in writing unless there is some local, state or federal law requiring it, although putting an agreement in writing (“formalizing” the agreement) is safer for both parties. This is because when contract terms (obligations of the parties, expectations, benefits) are put in writing, each side knows exactly what is expected of him/her and of the other party. A written contract makes it easier for a judge to determine which side wins if there is a dispute between parties somewhere along the line. For the most part, people do not enter into a contract expecting to be dissatisfied with the outcome. But when that happens – and it very often does – having the contract terms in writing protects both sides.

Certain contracts must be in writing, such as:

- 1) real estate contracts, including apartment leases, for greater than one year,
- 2) contracts for the purchase of items beyond \$500,
- 3) contracts in which one party agrees to assume or “take on” the debt of another and pay off this debt,
- 4) contracts requiring the performance of some service or services that will take longer than a year to complete.

Another thing about contracts is that even the most carefully written ones also carry “implied” (non-written), rather than “express” (specifically written) terms. Express terms are those spelled out, literally, or made clear verbally. Implied terms are those which exist “between the lines,” and which are assumed, rather than explicitly stated. For example, when you rent an apartment, you expect, and it should be assumed, that the apartment is habitable, livable. It cannot be roach-infested with bashed in windows and a door that doesn’t lock. A landlord who takes your money and in return, presents you with such an unsafe apartment has “breached (broken/violated) the implied warranty (guarantee) of habitability (livability),” and should be taken to court. Similarly, a tenant who moves into a New York City apartment with three pigs and a flock of chickens is most likely violating the implied terms of acceptable tenancy (and may well be in violation of zoning laws, besides!). A babysitter who takes a nap while her

young charges play in a swimming pool has breached the implied obligation of careful supervision of the young children in her care. An employee who spends hours on Facebook rather than doing her work is likely violating employer policy, even if not breaching any contractual obligation under New York's "employment at will" law (explained further in employment chapter).

But be careful: While buying a new or used car from a dealership or commercial seller also carries an implied warranty (that the car runs and has the mileage apparent on the odometer) a car sold by a private party (such as a person selling his car through an ad in the newspaper or on Craigslist) does not carry such a warranty! Make sure that if you are thinking of buying a car from a private party, you have YOUR mechanic check it out FIRST, hood to trunk. The purchaser is not likely to win in court claiming that the private seller claimed this or that about the car which turned out not to be true.

Clearly, parties to a contract can be sued for violating implied terms of a contract. When an express term of a contract is illegal, that particular clause (section) of the contract is voided (wiped out), but the contract as a whole is saved, if possible. For example, let's say the contract with the catering company for your wedding contains a clause that you agree to their using a 16-year-old bartender as part of their services. In New York, 16 year olds cannot prepare or serve alcoholic beverages, so this illegal clause would need to be severed (voided and removed) from the contract, leaving the rest of the contract intact. If the caterer refuses to void this clause and replace the server with one 21 years or older, you need to find another caterer. However, if an entire contract hinges on an illegal activity (e.g., you are hired to "cook the books" for a doctor's office which regularly bills Medicare), the removal of one clause will not "cure" the illegality and the entire contract will be void (and beyond that, in this scenario, you might be going to prison!).

Examples of illegal contract terms (otherwise known as: "learning to smell a rat in a contract") are:

- 1) "Tenants must pay rent, whether or not the landlord repairs and maintains the dwelling in habitable condition" [this would violate the warranty of habitability].
- 2) "Tenant understands that the landlord may enter the tenant's premises at any time, for any reason, without prior notice" [this would violate the 4<sup>th</sup> Amendment rights to privacy and the right to be secure in your own home].
- 3) "The tenant agrees not to hold the landlord liable for any injuries the tenant and/or her family and guests suffer as a result of the landlord's negligence" [this is unenforceable; a landlord cannot shield himself in this way from the obligations to keep the building in a safe/hazard-free state].
- 4) "Employees under the age of 16 driving company vehicles may only do so on secondary roads" [this is sanctioning an illegal activity, so it is void].<sup>11</sup>
- 5) "Employees who engage in union organizing of any kind will be terminated" [this is a violation of the National Labor Relations Act].<sup>12</sup>
- 6) "Whistleblowers will be disciplined as follows..." [this threat to those employees who would bring an unsafe or illegal employment practice or condition to light is a violation of the standards set forth by the Occupational, Safety & Health Administration].<sup>13</sup>

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11. This clause would only pertain to those employees in New York who have actual employment contracts. Most employees, and certainly most entry-level employees in New York are employed "at will," without an actual contract. This will be explained in more detail in the employment section.

12. See footnote 10.

13. See footnote 10.

- 7) "Pregnant employees may only remain on site until the 2nd month" [this would violate Title VII of the Civil Rights Act of 1964, as well as the Pregnancy Discrimination Act of 1978, unless the pregnant employees affected are otherwise accommodated off-site and if the policy is for legitimate safety reasons, like the leaching of chemical toxins which had been shown to harm fetuses, etc.].
- 8) "No employee may accept a position at an engineering firm within 500 miles for 10 years after leaving this firm" [this would be a much too restrictive "non-compete" clause, which must be reasonable in time and general scope to be allowed].

Other reasons a contract could be cancelled include:

- You entered the contract at too young an age for the contract to be legal;
- You were not of sound mind when you entered the contract;
- When the contract was created, the parties were mistaken about a material or key fact to the contract;
- You were coerced or forced or blackmailed to enter into the contract (against your will);
- The other party misrepresented something critical to the contract to induce you to agree, or committed an outright fraud;
- The contract required one or more illegal acts to be committed;
- The contract's terms are unconscionable (such as a car lease with a ridiculously high interest rate).

Be aware, however, that in certain situations, there are time limits within which a contract must be voided, if this is to be done at all. So what do you do if you enter into a contract that isn't necessarily voidable, but which just goes sour? What if the other party doesn't deliver at all on her part of the agreement, or delivers in a way you find unsatisfactory (the paint job is sloppy; your math tutor keeps falling asleep during your sessions and you're not learning anything; the landlord promised to fix the front door lock, but hasn't done so in a reasonable time; all of the wedding photographer's photos came out blurry)? You may have the right to get out of the contract (and your obligations under the contract) if the other party breaches (breaks, violates the terms of ) the contract. You may also have the right to money damages, to force the other party to perform the contract as agreed, or to rescind or "take back" or "cancel" the contract. Money damages can be sought in court in an amount that would make the harmed party "whole" again. So if a contractor puts in a new toilet and does such a poor job that the toilet leaks and causes damage to the house, you would have the right to the money it would take to fix the problem with a new contractor, and to replace any damaged furniture.

Just be mindful, however, that damages are the name of the game. Think about it: If you have a lease contract with a car dealership and they breach the contract by not providing the exact car they promised, but, instead, offer you a more expensive, larger, more fuel-efficient car, they've "cured" the breach they committed and you have not suffered any damages for which a court could order compensation. Thus, such a breach, absent other circumstances, would not be "actionable" and you would likely lose such a lawsuit against the dealership.

You could seek a "specific performance" remedy, to force the other party to perform his part of the agreement. If a trash company was hired to haul away your old junk and didn't show up, a judge could order them to do the job as agreed. Finally, you could ask a judge to rescind the contract, which would cancel any future obligations of the parties to each other.

## How to Protect Yourself

So, what can you do to protect yourself from being harmed financially or otherwise, when entering into a contract?

- 1) Never, ever sign a contract which has language, terms or conditions you do not understand. Meet with a lawyer – or at the very least, an adult you trust – to go over the terms and conditions before you sign;
- 2) Do not be pressured into signing a contract, under such circumstances, as: “this is a time-limited offer;” “sign today and you get cash back,” etc;
- 3) Be sure that anything agreed to orally makes it into the written contract. For example, let’s say your landlord offers that because the apartment building has just been renovated and the gas hasn’t been turned on for the stove, he’ll allow you to purchase a microwave for the apartment at his expense. You’d absolutely want that provided in writing, including: (1) who will purchase the microwave; (2) if it is to be you, the tenant, how much you may spend that the landlord will reimburse; (3) by what date he’ll reimburse you; (4) by what means he’ll reimburse you (discounted rent, cash, check, money order, etc.); and (5) who gets to keep the microwave when you move out of the apartment. Don’t be afraid to ask for these terms to be specified. This is your right! This is what well-educated, savvy consumers do to protect themselves!
- 4) Make sure that all changes made on the contract are initialed by both parties on all copies of the contract;
- 5) Make sure to keep a copy of the contract;
- 6) Don’t sign any contract with blank spaces. Be sure all blanks are filled in before signing;
- 7) Negotiating terms and conditions is common practice (e.g., “I get to leave work at 3pm on Thursdays to get my sister off the bus;” “I can only lift 50 pounds;” “I will assume driving responsibilities when I receive my license, anticipated in January, 20\_\_;” “I don’t clean windows”). Just be sure unwanted terms are crossed out thoroughly and initialed on all copies;
- 8) You may wish to bring a friend, parent or a lawyer with you when signing a contract;
- 9) Just as you would never purchase a used car without having a licensed mechanic inspect it, do not sign a contract, even if you think you understand the terms, without a lawyer looking it over first, if at all possible;
- 10) When signing a contract for an apartment or home, be sure to do a walk-through of the property first, with a contractor or knowledgeable handyperson, if possible. Take pictures of any noticeable damage already existing – such as carpet stains, holes in the wall, broken windows, doors that don’t quite close, so that you will not be charged for these later (NOTE: There will be more information on landlord/tenant law in the chapter involving your right to own or lease a home);
- 11) Get receipts for any deposits you may make when signing a contract.

## **Activities:**

- 1) See if you can determine which terms are legal and which are illegal in a series of sample contracts your teacher provides (apartment lease, car loan, phone service plan, building contractor);
- 2) Role-play pretending to rent an apartment, buy a car, etc., with different contracts to decipher;
- 3) Role play a contract negotiation with terms that need tweaking;
- 4) Come up with a list of “implied” terms for an apartment lease, a marriage contract, a contract with a bathroom remodeling company, a contract with a day care center to watch your child. Now come up with a list of possible express terms for these same contracts.

## Chapter V: My Rights as a Consumer

This chapter overlaps, to a certain extent, the chapter on entering into contracts, since when you enter into a contract – for a car, an apartment or a repair – you are acting as a consumer. That is, you are exercising your right to buy, rent and sell commodities. You are also entitled to certain consumer protections which exist in law and in practice. Even when you accept a new job, many of the choices this job will bring you are consumer-related, such as your salary terms, choice of health care and other benefits, financial plan and retirement plan. The main objective of this chapter is to: (a) teach students how to make sense of all the financial information surrounding consumer purchasing; and (b) educate students about how to get help if they feel they've been taken advantage of, or swindled. In short, the goal is to help you become savvy consumers.



Starting with the absolute basics, such as what you should know before purchasing an item, you will learn how to become a critical scrutinizer of ads, even the ones that proclaim: “You may have already won a million dollars!” Studying the jargon of purchasing is crucial. You must be able to translate and fully comprehend the meaning of “handyman special” [needs a ton of work and we want to unload it. Make your best offer!], “as is” [no warranty or guarantee that it’ll work], “well-loved” [used a lot and a bit worse for the wear], “exclusive” [not including something], “like new” [not new], “nearly new” [used], “charming” [small], “lake view” [not lake front], “lake front” [the property abuts a lake, but you may or may not be able to see the lake from the structure built on the property].

You will also learn about payment options and terms, including interest rates, APR, acceleration clauses, balloon payments and usurious rates. A course on consumer rights would not be complete without a discussion of identity theft – how to avoid it and what to do if you become a victim.

The dangers of consumerism: default, debt collection, bankruptcy and foreclosure, to name a few, will also be explored in this chapter. You will be made aware of the local, state and federal governmental and non-governmental consumer protection agencies that exist (including the Food & Drug Administration (FDA), Federal Communications Commission (FCC), Department of Transportation (DOT), United States Postal Service (USPS), New York Public Interest Research Group (NYPIRG), Homeless and Travelers’ Aid Society (HATAS), Hunger Action Network of New York State (HANNYS), Empire Justice Center, Correctional Association of New York, American Civil Liberties Union (ACLU), Center for Law & Justice and the Attorney General’s Office (AG). We will introduce the option of suing an individual or agency in court. Finally, Small Claims Court, the consumer’s court, will be investigated in detail, so that students know how to access it and make use of it, if ever necessary.

But before launching into how to make a wise consumer purchase, you need to remember something about building up your bank account: A penny saved today is a chunk of change (maybe even enough to go on vacation or buy a needed appliance or used car) tomorrow. According to literature published by Sunmark Federal Credit Union, if you save just 50¢ a day in loose change, you would save \$15/month, or \$180/year. Not convinced? What about eating out two less times a month, for a possible savings of \$30/month or \$360/year? If you take your lunch to school or work, instead of buying, you could save something like \$60/month or \$720/year. Now that’s a lot of money!

If you have adequate savings to make a consumer purchase, what “homework” should you do before buying? First: BE SMART and educate yourself about the item you want. Research the item to decide

which size, model and brand is best for you and learn the “lingo” of the business. Publications such as Consumer Reports magazine are valuable sources of information on a wide variety of products and their costs. If you’re buying a laptop, you’re going to need to understand “gigabyte” capacity, “megapixels,” “RAM,” and “charge duration.” If you’re buying a car, you need to be conversant in automechanic-ese beyond “VIN number,” “chassis,” “vehicle load,” “V-4” versus “V-6” cylinder engine, “anti-lock brakes,” “automatic” versus “standard,” “RPM,” “ethanol,” “hybrid” and “timing belt.” Certainly, once you decide what you want to purchase, you need to comparison shop to locate the best one of these items available. Thus you need to do online research, make phone calls to stores, talk to friends, read the local papers for ads and even visit stores for unadvertised specials in order to get the best priced item out there.

Beware of ads trying to sell you the moon! Remember: If it looks too good to be true, it is! Always ask yourself, when evaluating an ad, why the merchant or company selling the product would be making this “too good” deal. No one is trying to put him or herself out of business – quite the contrary! Always, always force yourself to consider: What is the catch, here? If you believe you’ve been the victim of false or fraudulent advertising, unfair pricing or mislabeling, you would need to file a complaint with the Federal Trade Commission (FTC).

### **Consumer Protection Agencies**

The FTC also regulates mail order sales. Be careful with mail order agreements. One thing you should know is that any unordered items received for free in exchange for a subscription or membership is considered a free gift, under federal law, but read the fine print to be sure it is “unordered.” The U.S. Postal Service investigates and regulates mail fraud. While on the subject of agencies protecting consumers, the Consumer Protection Agency and the Consumer Products Safety Commission, in part through the Consumer Product Safety Act, regulate the quality, safety and reliability of goods and services, including the creation and enforcement of safety standards. The Department of Transportation regulates safety standards on trains, airplanes, cars and buses. The Food and Drug Administration regulates the safety of food, drugs and cosmetics. The “Consumer Nutrition Labeling and Education Act” is one example of an act of Congress meant to assist consumers to make informed decisions when buying packaged food at stores by requiring the items be labeled with specific nutritional information, such as ingredients, grams of fat, grams of trans fats and sugar content. Local legislators can enhance these regulations by requiring even more. For example, in New York City there is a “trans fat” ban (a ban on the use of trans fatty oils) on foods prepared in bakeries and restaurants and New York City’s Mayor, Michael Bloomberg, has announced a plan to ban the selling of sodas larger than 16 ounces in restaurants and movie theaters. Both of these actions are the Mayor’s attempts to curb the obesity epidemic.

The Federal Communications Commission regulates consumer practices and interactions over the phone, internet, TV and radio. If you believe you have been a victim of consumer fraud or been harmed by a product you purchased, you can contact the New York State Attorney General’s office (Consumer Frauds Division), or the Governor’s Office of Consumer Affairs. They would investigate your complaint and if it is believed to have merit, could take action, including: suing the company at fault; ordering a cease and desist (stop work or stop illegal action) order, creating a consent decree (an agreement which spells out how the parties have decided to “fix” a situation, signed by the parties involved), and collecting restitution for you (enough money to make you “whole” again).

Federal, state and local governments are not the only consumer protection agencies out there. The Commission on Judicial Conduct monitors the actions of judges, and the Committee on Professional Standards does the same regarding lawyers. Other state licensing boards regulate the standards for



certain occupations, establish rules, create and hold exams, grant and refuse professional licenses, investigate complaints and suspend or rescind professional licenses. Then there are lobbying groups that seek to sway public opinion and ultimately, change public policy, by revealing information about certain issues they champion. For example, the American Medical Association recommends health care policies and practices. The New York Public Interest Research Group educates the public on various consumer issues (many of them health and environment-related). The Correctional Association monitors prison policies and conditions.

Price is only one factor to consider when spending your hard earned money. A cheap price combined with a weak warranty or limited repair options or expensive delivery or shipping costs, or restrictive return policies can be a deal breaker. But what IS a warranty? Essentially, a warranty is a guarantee made by someone or some company to the person buying some item that the item purchased is of a certain quality and/or that it will last at least a certain amount of time. Having a warranty on an item confers upon (gives) the buyer certain rights. These rights are important and should factor into any buying decision.

Just as there are express and implied terms in contracts, there are express and implied warranties. Express warranties are written or verbal statements or non-verbal actions that a seller makes regarding an item's quality or operation. Implied warranties are as they sound – promises about an item that exist even if they are unwritten and even if the seller makes no stated guarantee about the item. An example of this would be, as discussed in the previous chapter, the “implied warranty of habitability” which every landlord confers to his/her tenant about the apartment rented. There is an implied guarantee that the apartment is in livable condition – free of rodents, with a front door that locks and with heat and running water. An “implied warranty of merchantability” means that the item you purchased comes with the guarantee that it is of at least average quality for that particular kind of item. So if you purchase a bike from a store and the gears don't shift, you would have the legal right, for example, to demand the seller take the item back and return your money, or fix the bike so it works properly. An implied warranty of title guarantees that your ability to take title (full and complete legal ownership) of a car, for instance, is free and clear and that there are no other persons owning it.

Be aware: *Caveat Emptor*: Let the buyer beware! If the seller has sold an item to you “as is” or if it is the “floor model,” he/she may be able to avoid liability (responsibility) for the non-merchantability of the item. In other words, there may be no warranty of merchantability conferred in these situations. Also, there is no implied warranty of merchantability for goods sold at garage sales or through classified ads by so-called “casual” sellers. This is so even for used car purchases! Finally, if you inspect the item before you purchase it and don't find any flaws, or if you fail to examine the item, there will be no implied warranty as to any non-working parts that could have been discovered upon careful inspection.

By the way, just because a warranty is written, it doesn't mean the warranty is legitimate. It must, by law, be in language that is understandable, including a clear list of what is and is not promised, and it must have been given to the purchaser before the money was exchanged. Further, the law requires that the warranty state whether it is “full” or “limited.” A “full” warranty is one that guarantees the item will be repaired within a “reasonable” period of time at no cost. If, after a “reasonable” number of attempts are made to repair the item, the item is still not working properly, the purchaser can receive a full refund or a replacement item. If the warranty is “limited,” it means that the seller has the choice of which promises to make regarding the product. For example, a five-year limited warranty on a bicycle might include the repair of normal wear and tear on brakes and gears, but would not include hammering out a bent wheel frame from a bike accident or a burst tire from putting three people on a bike meant for one.

In sum, before you make an expensive consumer purchase, make sure you have:

- 1) learned the jargon of the industry
- 2) read product reviews, asked experts, consulted friends
- 3) scrutinized ads
- 4) read the fine print
- 5) compared prices
- 6) weighed warranty options
- 7) checked out delivery details, if applicable
- 8) investigated repair policies
- 9) clarified return policies
- 10) slept on it (i.e., delayed your decision, if possible, to allow for reflection).

**Don't impulse buy!!** Remember the "3 R's" of consumer purchasing:

- 1) **Research:** the item, price and warranty options;
- 2) **Read:** ads, any contracts involved, applicable exchange and refund policies;
- 3) **Review:** the total purchase price including shipping, handling, delivery and any interest payments involved.

### **Paying Up: Cash & Credit**

So, now that you've decided which exact item to purchase, how do you pay for it? The options are many. You could pay in cash, by check or money order, by debit card, by credit card, or you could take out a loan and pay back over time, with or without interest. Sometimes, you can pay using a combination of these methods. A money order can be used just like cash, but if stolen, cannot be cashed without identification. Therefore, you buy a little protection for yourself when you purchase a money order. You can get a money order from a bank or post office in exchange for cash, for a small fee, but it is safer to carry around and can be sent through the mail or wired electronically to others. In a typical situation, a family member in crisis on the other side of the country or globe can be quickly wired a money order by your paying for it on your end.

When paying for an item by credit card, you are essentially borrowing from a credit card company now, with the promise that you will pay back the money in the future, for a fee, if you are late. This "fee" is called an interest payment and different credit cards charge different interest rates. You should definitely shop around for the best interest rates offered before applying for a particular credit card. The APR or Annual Percentage Rate is the percentage cost of credit over a year, and is calculated the same way by all lenders. Thus, the APR is the figure to compare across credit cards when choosing one – not the "interest rate," which is calculated differently by different lenders. A typical APR at present is 19%. This means that if you use a credit card to buy a fancy pair of earrings for a friend for \$100 but can only pay \$40 of it when you receive your credit card bill at the end of the month, the unpaid \$60 will be multiplied by .19%, and that amount (\$11.40) – the interest "accrued" – will be added to the remaining balance (\$60) next month. If the next month, you pay another \$40, the remaining \$20 will be multiplied by .19% and added to the \$20 balance for the next month's bill. In this way, a \$100 pair of earrings can easily cost you much more than the original \$100.

Lesson learned: Be aware of interest charged on credit cards. Try to spend only per month on your credit card what you can pay off per month, so you do not accrue interest charges. Generally, the rule of thumb is this: If you spend more than 20% of your take-home pay to pay off your debts – not including your mortgage – you are spending too much on credit. Also, if you are skipping payments to cover living expenses or take out new loans to cover old ones, you are using too much credit.

Be aware of hidden fees and restrictions when choosing a credit card. Some are free and some have yearly fees. Some offer a very low interest rate at first, which rises quickly over a few months. Most have a credit limit of a maximum amount you can charge per month. This limit can rise or be extended as the consumer makes known his/her ability to pay each month and the credit card company sees the consumer as a “good risk.” Some people sign up for “credit card monitoring services” to help them keep track of possible fraud and unauthorized use of their account. These services (such as Equifax Complete, Bank of America, Citi Bank, TransUnion, Experian, Intersections, Inc.) charge per month and are not, in the view of some consumers, worth the price. Many financial analysts advise instead that consumers be vigilant about monitoring their own accounts and take advantage of a yearly free credit report (discussed later in this chapter) to reveal possible problems.

Reviewing monthly credit card bills is essential to keeping track of erroneous charges or identity theft (discussed later in this chapter). Luckily, under the Fair Credit Billing Act, if a person complains in writing about an error in a credit card bill within 60 days of the date the credit card statement is mailed to him/her, the creditor (the person/store to whom you owe money) must acknowledge and respond to the complaint within 90 days.

If you do not pay off your credit card bills, the credit card company, which allowed you to borrow money to purchase your goods in the first place, has certain rights to repossess the goods. Further, non-payment can lead to credit card debt, a negative credit rating (which will greatly diminish your chances of being approved for home, car or student loans), and even job application rejections, due to having a poor credit rating.

Luckily, new consumer protections went into effect in 2010 for credit card users. First, credit card companies may no longer charge fees that are bigger than the consumer’s non-payment. For instance, if you owe \$25 on a credit card purchase, and are late paying it, the company cannot charge you more than \$25 as a penalty. If you exceed your credit limit by \$15 the company cannot charge you more than \$15 as a penalty. Further, credit card companies can no longer charge “inactivity fees” for failure to use a card, and can only charge one penalty fee per consumer infraction (violation of the payment rules). In addition, if a company raises the interest rate charged for use of their credit card, they must inform you and tell you why they have done this. Any rate increase has to be reevaluated every six months and if the evaluation reveals that you should have the rate lowered, the credit card company must do so within 45 days of the evaluation. Finally, all gift cards purchased are now good for at least five years.

If you pay for an item by check, it means you have a checking (or savings) account at a bank or credit union. Comparison shop for your bank as you would for a credit card or a car! Banks charge different fees and provide sometimes vastly different interest rates from one another on savings and checking accounts. Some banks charge per check written. Some banks require a minimum balance (amount) in the account at all times, or penalties are incurred (i.e., they charge you a fee). Certain banks provide free overdraft protection from one account to another. Thus, if you have a savings account with \$2,000 in it and you write a check to someone for more money than you have in your checking account at the same bank, your bank account with overdraft protection would cover you and use money from your savings to pay off the check you wrote from your empty checking account. This is technically called a “bounced” check (when you have insufficient funds in your account to pay for a check you wrote), and many banks charge a large fee for overdrafts. Typically, banks will try two times to draw money from an account (spaced a day or more apart) before charging a customer a fee for a bounced check. That way, if the customer wrote a check and then realized he did not have sufficient funds in the account to cover the check, he could have an extra day or so to deposit money into the account without incurring a penalty.

It may seem unfair, but the person who receives a bounced check (e.g., the drycleaner, the babysitter, the grocer) may well be fined by their own bank when depositing the bad check into their account. The injured party in this situation should seek reimbursement from the person who gave them the bad check for (1) the penalty charged, as well as (2) the amount of the check (since the money it represented was never received).

As with credit card bills, it is always a good idea to review your monthly banking statements – or to even monitor account activity online more frequently, for errors. As a side note, but worthy of mention, is the “stop payment” situation. You rent a summer home for a week after email correspondence with the owner, after having seen photos of the place online. You send a check and then, two days later, you take a road trip to see the property you rented. Much to your horror, the place looks nothing like it was represented on the internet. In fact, it’s a dump! What can you do to “self-help?” Answer: Ask your bank to put a “stop payment” on your check. You could also “stop payment” if you, as a bank account holder believe a check may have gotten into the possession of a third party rather than the intended party. If done before the check is presented for payment by the person it was intended for or a third party, a stop payment would cause the bank to refuse payment to the person presenting the check. Ordering a “stop payment” almost always incurs a fee from the bank in which the account is located. However, paying a \$15 fee is nothing compared to paying \$2,000 for a dump of a rental cottage.

### **Identity Theft**

What if your credit card is stolen or you think you are the victim of identity theft (in other words, someone may be using your personal information, such as your Social Security number, license number, bank account numbers and/or credit card numbers to open up new credit card accounts and bank accounts or to purchase homes, cars, jewelry, trips and other consumer goods). First, don’t panic! Keep your credit card account number(s) as well as the credit card companies’ phone numbers in a safe place, in case of this event. You might even want to make a photocopy of the cards to keep in a safe place in your home. Contact the credit card company immediately to notify them. Many companies will waive the federally permissible \$50 maximum fee for unauthorized charges made before notifying the company, and by federal law, the cardholder bears no responsibility for charges incurred after the credit card company is notified. Note that stolen ATM cards do not come with as much protection for the consumer. For instance, if a bank is notified within two days of the loss of an ATM card, they may charge the account holder up to \$50. If the account holder notifies the bank within 60 days, the customer could be charged up to \$500 to cover the bank’s losses, and if over 60 days have passed from the time the ATM card is lost, misplaced or stolen? The account holder might incur unlimited liability (costs). Certain banks may provide more consumer protections than this, however.

If you believe you are the victim of identity theft, contact the “fraud help lines” of each of the three major credit bureaus to alert them of your predicament: TransUnion, Experian and Equifax. It is critical that you also tell these companies that you need a “fraud alert” to be placed on your account. These “alerts” typically last for 60-90 days but can be extended upon request and force credit card companies to call you for permission before opening any new accounts in your name. The contact information for the three credit bureaus is:

- 1) TransUnion Fraud Victim Assistance Department: P.O. Box 6790, Fullerton, CA 92834; (800)680-7289; [www.transunion.com](http://www.transunion.com)
- 2) Experian Consumer Fraud Assistance: P.O. Box 9532, Allen, TX 75013; (888)397-3742; [www.experian.com](http://www.experian.com)
- 3) Equifax Consumer Fraud Division: P.O. Box 740241, Atlanta, GA 30374-0241; (800)525-6285; [www.equifax.com](http://www.equifax.com).

As a victim of credit fraud, you can request a free copy of your credit report from the three credit bureaus, according to federal law. Whether a victim or not, all consumers may obtain one free credit report per year from each of the three credit reporting agencies. As a final note, it is important to remember not to carry your Social Security card on you unless absolutely necessary, such as when needed as proof at the Department of Motor Vehicles for an enhanced driver's license. The theft of your Social Security number leaves you vulnerable to considerable damage to your credit and finances. Never write your Social Security number on a check! Many stores offering in-store credit cards which ask for your Social Security number on the application will allow you to by-pass that requirement, if you ask.

#### **New York State Security Freeze Law:**

Under New York law, consumers can now protect themselves against identity theft by placing a "security freeze" on their credit report by requesting it in writing by certified mail or overnight mail to the credit reporting agency. A security freeze prevents your file from being shared with potential creditors. Once you request a security freeze, the credit reporting agency cannot share your credit report or any information from it without your written authorization. There is no fee for this if you are the victim of identity theft. If you are not the victim of identity theft, the first "freeze" request is free and further requests cost \$5 each.

If you think someone has stolen your Social Security number, you need to report it ASAP, by calling the Social Security Administration at: (800)269-0271. You can also obtain information from the Social Security Administration's website at: [www.ssa.gov](http://www.ssa.gov).

The basic advice from the Attorney General's Office in New York is, if you are unfortunate enough to be the victim of identity theft: BE ORGANIZED about your paperwork and phone calls. Documenting your efforts to regain your good name will serve you well, especially if you end up having to go to court to defend your good name (for example, if you are sued for non-payment of your credit card bill, which is full of charges you didn't incur). This would include gathering and maintaining records such as: police reports; a detailed, dated journal of events as they occurred (including notes on phone calls made while attempting to clear your name); credit card receipts and applications that show that someone else was using your identity; credit reports (every three months is recommended while you are working through this); any court papers; statements given to police; your expenses (including time you had to take off from work to deal with the identity theft situation, legal costs, court costs, phone calls, postage, etc.).



#### **Let's Focus On:**

#### **Buying & Financing Some Wheels**

So, you need some wheels to get to work or to look for work. How do you know whether to buy a new or used car? How can you be sure that you're getting a good deal? Should you buy or lease? The number one rule to buying a new or used car is: Do Your Homework First!

#### **Buying New:**

Before buying any car, you need to research the safety, reliability, quality, fuel economy, repair ratings – oh, and price! – of the vehicle. Consumer Reports is an excellent source of information, as are [www.edmunds.com](http://www.edmunds.com) ; and [www.kbb.com](http://www.kbb.com) (Kelley Blue Book). The U.S. Department of Transportation's National Highway Transportation Safety Administration, [www.nhtsa.dot.gov](http://www.nhtsa.dot.gov) compare crash and rollover tests, as well as tire information.

According to the New York Attorney General's office, people who do their homework and research car prices pay, on average, 5% less for their cars than those who do not bother. Don't ever think of the sticker price as the true cost of the vehicle. Otherwise known as the "MSRP" (manufacturer's suggested retail price), the sticker price is merely the dealer's starting point to negotiate a price with you, the purchaser. Most cars are NOT sold at the MSRP. Do not be tricked into thinking that the dealer has paid the listed "invoice price" to a manufacturer. Typically, dealers get all kinds of rebates, discounts and incentives from manufacturers, and so have not actually paid the listed "invoice price." Dealers usually make 10-20% profit per car sold. That's the difference between the MSRP and invoice price (or, wholesale price, for a used car). So if the salesperson tells you that he'll have to check with his manager to see if they can sell you the vehicle you want for the "rock bottom" price you're trying to negotiate, because they've: (1) "never sold a car for such a low price, and it might not be possible;" and (2) in fact, they would "actually LOSE money on the transaction," don't believe them. These are sales tactics to make you feel you are getting a fantastic deal, so you do not attempt to bargain for an even lower price! If the dealership didn't want to sell you a car, they could always "just say no!" and spare you the drama.

To choose a car dealer, peruse ads in the newspaper and ask trusted friends and family for recommendations. Go and visit various dealerships to see if you like the salespeople as well as the selection and price. If you think the salespeople are too pushy (using high-pressure tactics like "one-time" deals), or sexist (does the salesperson address all "car talk" to the male purchaser, ignoring his female companion?) or aren't telling you the truth, don't do business with them! Speak with your feet, as they say, and leave! **You are the consumer and you are in charge of where you do business and with whom.** To earn your business, the dealer must be respectful, honest and reasonable. The Better Business Bureau can tell you whether a particular dealer has a good or poor reputation.

Definitely test drive the car(s) that interest you. Make sure it "feels" just right for you, physically – not too big and not too small, with comfortable seats – and that you have good visibility and can reach the controls easily. Check out the acceleration from a dead stop and when transitioning from local street to highway speed. Take it up steep inclines, if possible, and see if, when coming down, it remains easy to control. Slam on the brakes to test how reactive they are. Notice stopping distance, blind spots, air bags, features such as air conditioning, heat, audio player and radio, sunroof, etc. Remember: Testing all aspects of a car you may purchase is time very well spent!

Once you decide to buy a new car, and have negotiated a fair price based on your research, you will be signing a purchase contract and, very possibly, a loan agreement. About the purchase contract: Be careful to check that all "promises" have been put in writing in the contract – even the original car pick up or drop-off details, any "freebie" items or services (e.g., free oil changes for the first year), any rebates, etc. Don't be pressured into hurrying through the contract. Buying a car is a serious commitment! This is your only chance to read all the terms to which you are agreeing, and you need to be given ample time to do so thoroughly. Finally, before you sign a purchase contract, just be certain that the serial number of the car you're buying is the same as the one listed in the contract you are signing.

We discussed "warranties" earlier in this chapter. Your car dealer might offer an "extended warranty" (basically, a guarantee that the car will remain in working order beyond the time/mileage covered in the standard warranty) on your new car for an additional (usually substantial) cost. Be skeptical. Conditions of the warranty coverage and the cost are negotiable – just like the car's price! The dealer must give you a copy of the warranty terms, conditions and cost. Be aware that warranties can be voided (broken, made useless) if scheduled car maintenance is ignored or if the car is not used as intended. Think about it: The company offering the warranty is saying, "If you buy this extended

coverage for your car, we'll ensure that your car performs as it should, all throughout this extended period (i.e., above and beyond the general warranty time, automatically given with a new car purchase). The company doesn't want to take on this burden without your partnership!

You must take your car in for routine maintenance, such as oil and other fluid changes, brake checks, tire rotations, etc., to do your part under the agreement. If you do not do this, you will have violated the warranty agreement and the company would have the right not to hold up their end of the bargain and insure your car for the extended period. Warranties can only be rescinded (cancelled) within a short period of time after signing, so be very sure you want to sign up for the extended warranty before you do it. Any dealership providing such a warranty must be registered with the New York State Insurance Department (1-800-342-3736). It may be a better idea to obtain an extended warranty from a nationally known service contract company (e.g., Geico, Allstate, Prudential) than from your dealership.

### **Buying Pre-owned:**

If you are planning on buying a pre-owned car (i.e., used), there are some additional points to consider:

- 1) Before buying, you **MUST** have the car checked out by a mechanic you trust (or a mechanic who was referred to you by someone you trust. If you don't, you may be throwing your money away on a terrible car.
- 2) Use the VIN (vehicle identification number) to find out through [www.carfax.com](http://www.carfax.com) that the title (legal ownership) to the car is "clear" (that is, that no one else, other than the person selling it to you, owns it or has a lien [a legal hold] on it) and that there are no problems with the car. Be wary that many damaged used vehicles will be placed on the market from recent storms and floods in the Northeast.
- 3) Make sure the price of the vehicle is reasonable, given its model, make, age and mileage. Compare prices just as you would for a new car, using the Kelley Blue Book and Edmunds.com sites (given above, in this chapter). Remember, used car prices are almost always negotiable!
- 4) Be careful to check repair histories of cars of this same model, make and year in Edmunds.com or Consumer Reports.
- 5) The Department of Motor Vehicles has a brochure with helpful hints for car buyers, called: "Let the Buyer Beware" on its site [www.dmv.state.ny.us](http://www.dmv.state.ny.us). If you have a terrible experience buying a car, this site will also teach you the steps needed to file a complaint.
- 6) Used car dealers (not casual, independent sellers) are required to place a "Buyer's Guide" in the car's window that tells: (a) whether the car comes with an express warranty or is being sold "As Is" (with no warranty); (b) to get all promises in writing; (c) to have the car inspected by a mechanic before buying it.

### **Leasing a Car:**

Some people choose to lease a car, instead of buying it. They pay a monthly charge to drive the car, but do not ever own the car. Every couple of years or so, they are permitted to exchange their vehicle for a new one. Monthly lease payments are often lower than monthly purchase loan agreement payments. Generally, leases restrict mileage and wear and tear on cars and charge penalty fees if these restrictions are violated. The Federal "Consumer Leasing Act" gives consumers the right to obtain information on costs and terms of vehicle leases. Some on-line sites for comparing leasing and buying cars are: [www.edmunds.com](http://www.edmunds.com), [www.leaseguide.com](http://www.leaseguide.com), [www.autos.aol.com/calculators](http://www.autos.aol.com/calculators), <http://www.bankrate.com/calculators.aspx>, [www.autopedia.com/html/LeaseCompare.html](http://www.autopedia.com/html/LeaseCompare.html).

### **Trade in:**

If you are hoping to trade in a vehicle when making a purchase, understand that you may well get a much better price for the car you are trading if you sold it yourself on Craig's List or in the classified ads in the newspaper. N.A.D.A. ([www.nada.com](http://www.nada.com)) is the official used car guide for values of trade-ins and the resale of used cars. Some people donate an old car to a charity, such as the Heart Association, and use this for a tax deduction (based on the fair market [current] value of the car). The charity then sells the car and uses the proceeds. You would need to contact the charity to make sure they want your vehicle and that it meets their specifications.

### **Paying Up: Loans**

You could also choose to pay for a significant consumer purchase by taking out a loan, such as a car loan, a home equity loan (generally charges a lower interest rate than a mortgage, and is often taken out to help finance some form of home improvement project, like adding a garage, putting on a new roof, reconfiguring an outdated kitchen), a mortgage loan, or a student loan. Typically, a loan is paid back over time with interest, the "cost" you pay for the service of borrowing the money from the bank to make your purchase NOW! Charging interest is one of the main ways that banks make money. If banks didn't charge interest, and allowed consumers to simply spread payments over a 15 – 30 year period (the typical length of a mortgage payment) you could buy a \$100,000 home and simply pay back the bank the equivalent of \$100,000 divided by 180 months (for a 15 year loan) or by 360 months (for a 30 year loan). The reality is, if you want to purchase a \$100,000 home, but don't happen to have access to that amount of money at the moment, you would "put down" (pay) a certain percentage of the cost as a "down payment" on the house (most lenders want at least 3-10% of the purchase price) and then finance the rest by taking out a mortgage loan. Thus, instead of the house only costing you \$100,000, by paying it off over 15 to 30 years to a bank, you end up paying \$100,000 plus interest per month, on the amount financed.

Let's take an example: If you took out a \$100,000 mortgage at an interest rate of 5%, you would pay \$536.82 monthly over a 30-year period, for a grand total of \$193,255.20. If, instead, you took out a 15-year mortgage and paid the higher per-month cost of \$790.79, at the end of 15 years, you would have paid \$142,342.20. Over the life of the loan, by taking out a 15-year mortgage, instead of a 30-year mortgage you would have saved \$50,913.

If you take out a fixed rate mortgage, the interest rate is "fixed," it does not fluctuate, and you end up paying the same amount per month, over the life of the loan, as in our example. If, on the other hand, you take out a "variable rate" mortgage, life is not so stable as the interest rate fluctuates month to month, within certain limits. The main cause of the mortgage foreclosure crisis, which really hit an all time high in America in 2008-2009, is that homebuyers, lured in by very low interest rates on variable mortgages, opted to take out such mortgages, but then got squeezed when the interest rates jumped much higher in a rather short period of time. Many thousands of variable mortgage holders could not pay their new, soaring monthly costs and so defaulted on their loans (i.e., they couldn't pay the bank back for their loans). With banks as the "lien holders" on all of these houses (i.e., banks actually own and can repossess a house until the mortgage holder pays off the mortgage completely), and American consumers unable to make further payments, banks were foreclosing on thousands of houses (literally, repossessing and selling the houses at auction). So you see, variable loans are invariably risky!

### **Financing a Car:**

Buying a car – especially a new car – is a costly endeavor. Therefore, as with houses, most people do not pay for their automobiles (especially new ones) straight out in full with cash, check or credit card. Instead, they pay off the price in stages or "increments," over time. The typical car payment is once



monthly, for a term of one to five years, depending on the agreement. Financing is available through car dealers, banks, credit unions and finance companies. Shopping for financing is as important as shopping for the best car price. Dealerships may offer a less or more competitive rate than a bank or credit union. Once again, negotiation over the price is expected! Just know that in terms of financing, interest rates for new cars are generally lower than for used cars, and can be spread out over a longer period of time. If you are considering buying a car and financing it, just as with a home mortgage, you will ultimately spend less money with a shorter-term loan which requires a higher price per month, than on a long-term loan with smaller monthly payments. This is because interest paid per month adds up! So the more months you need to pay off your loan, the more money you pay to the finance company, bank or dealership.

Before signing a loan agreement, be sure you know the answer to the following questions:

- 1) If I pay off the loan early, am I penalized (charged a fee)? If you think about it, a bank wouldn't make as much money off of a consumer who paid off the loan quickly and avoided months of interest charges! Some loans permit up to one extra payment per year, but not more. Some loans have no restrictions on additional payments.
- 2) If I pay off the loan early, am I able to recover any financing charges?
- 3) When are payments due each month? Is this measured by post mark date (date sent) or date of receipt?
- 4) Is there a grace period (a built-in number of extra days to pay off a monthly loan) for getting my payment in each month (e.g., payment is due on the first of the month, but late fees/interest is not charged until the 16<sup>th</sup> of the month)? By federal law, mortgage payments must have a built-in "grace period" before late payment fees are assessed.
- 5) What is the amount charged for a late payment?
- 6) If I miss a single payment, does the entire balance of the loan automatically become due (an acceleration clause)?
- 7) Is there a "balloon payment" at the end of the loan period, where, after having paid small amounts each month so far, the payments become huge and inflated (and sometimes unmanageable) by the end of the loan period?
- 8) Are there any other hidden payments?
- 9) What happens if I lose my job and cannot continue to make payments? Can I renegotiate the terms? Will I be penalized for this? If so, to what extent?
- 10) Are there terms/conditions of the finance agreement which require me to perform in a certain way (i.e., keep my car in excellent shape; purchase insurance on my house; maintain a B average in school)?
- 11) If I cannot and do not make payments as required in the agreement, will the finance company come and repossess the car? After how many missed payments? Will I be notified first? By what means?

If you default on (don't pay) your car loan, the bank or dealership with the lien on your car will dispatch a "repo" man/woman to "repossess" the car and the bank or dealership will likely hold an auction and sell it. If the car brings in enough at auction to pay off your debt, you might only have to pay the costs of the repossession and sale. If the car makes money, even after costs are paid, you are entitled to the excess. If the car makes less money at sale than you owe the bank, you need to pay the difference to the bank. This amount is not excused or wiped away.

The **Fair Debt Collection Practices Act** of 1978 was the first tool consumers had to hold repo-men/ women (and other debt collectors) to certain legal standards, implementing rules for acceptable time, place and manner of debt collection. If you believe you have been the victim of “unscrupulous” debt collection practices, you can complain to the Federal Trade Commission (FTC) about this. Recent amendments to the Fair Debt Collections Practices Act have created even harsher penalties for debt collectors who fail to abide by the regulations. For instance, section 813 of the FDCPA subjects collection violators to a \$1,000 fine per violation (i.e., per harassing phone call!).

### **Predatory Lending:**

“Predatory lending” is the term used to describe the lending practices some businesses employ with unsuspecting consumers. They usually focus in on people who have little or no access to credit, but who want big ticket items like gigantic big-screen TV’s, cars and homes. They typically offer financing arrangements with extremely high rates of interest, sometimes using the purchaser’s current home to secure the loan (“equity stripping”). This, then, puts the home in jeopardy! It’s a great idea to seek advice from a lawyer before entering into a loan, but in any case, according to the New York State Attorney General’s Consumer Frauds Division, you must watch out for the following, when entering into a loan:

- Lenders who guarantee they will approve a loan, no matter what your credit rating or history;
- Pressure tactics to hurry before the loan offer disappears;
- Pressure tactics that make you feel embarrassed to read the entire contract – like you are doing something wrong!
- Loan applications with blank spaces that could be filled in after you sign, with undesirable terms – like more fees and penalties, less time to pay back, etc;
- That you have been given and have looked over and understood all papers necessary to seal the loan – making sure that all loan terms are identical to what you had been promised and that there are no other fees and/or penalties attached which hadn’t been discussed;
- That you’ve inquired not only about interest rates, but about fees and points (a once-only charge paid to the bank or other mortgage lender for the privilege of securing the loan. A loan that requires one point charges 1% of the loan amount. Two points charge 2% of the loan amount, etc. Usually, as the points on a loan increase, the interest rate on the loan decreases).
- That the loan isn’t being “flipped” (that is, you aren’t refinancing an unpaid loan with a higher cost, longer term loan, with new fees and points);
- Hidden terms that could bite you – like charges for services you don’t need (“packing” the loan), penalties for paying the loan off early (“prepayment penalties”), balloon payments and acceleration clauses;
- That the monthly payments you are agreeing to are affordable (for mortgages, less than or equal to 29% of your yearly gross salary [your salary before taxes and medical insurance costs, etc. are subtracted]);
- That if you are agreeing to a “variable” interest rate as opposed to a “fixed” one, you are aware of the amount the rate could change/vary and you know what affects when and how the rates fluctuate;
- Finally, check out your lender/loan broker with the State Banking Department, to make sure they are licensed (1-800-522-3330).

When in doubt about a particular lender or broker, or about a particular loan agreement itself, contact the Attorney General’s Consumer Frauds Division at: 1-800-771-7755.

**Student loans** can come from banks, from the government or from the school itself (the college or university or technical school you are attending). Certain student loans are interest-free, meaning you only need to divide the actual amount borrowed by the months in the loan period (e.g. 10 months) and pay that amount each month. Most student loans, however, are NOT interest free. Sometimes loan “forgiveness programs” are offered where the remaining balance of a loan -- or part of it -- is “forgiven” (expunged, wiped out) in exchange for the borrower’s promise to give something back, such as a medical student performing medical services in a poor, urban area in exchange for not having to pay back her \$50,000 in school loans.

The FTC (Federal Trade Commission) is the agency you would complain to if you had disputes with the lending practices of finance companies, retail stores, oil companies, travel companies, entertainment companies or credit card companies. The FRB (Federal Reserve Board) is the agency to complain to about lending practices of banks or bank credit card companies.

### **Consumer Recourse:**

Just know this: Even when you have done everything possible to make a wise consumer decision, sometimes you purchase a lemon of a product – one that just doesn’t work well or perhaps, at all. What then? The first rule of thumb is: Don’t try to repair the item yourself, as you may invalidate the warranty. You should probably contact the store where you purchased the item and then mail a complaint letter to the product manufacturer. Be sure to include relevant facts, such as the date of purchase, place of purchase, model and serial numbers (if applicable), the nature of the problem and how you want the problem remedied (e.g., do you want a full refund or a new version of the item purchased?) Never ever send original product receipts or other documents, but do send copies. Be sure to keep a copy of your complaint letter and the originals of any attachments sent. You should send it “return receipt requested,” requiring the recipient’s signature, so that you have proof that the company or seller was put “on notice” of the problem and of your dissatisfaction. It would also be a great idea to “cc”(send a copy, noted at the bottom of your letter) to the relevant consumer protection agency, as well (e.g., AG’s office, Better Business Bureau [monitors business activities of private businesses and tries to promote a high standard of ethics]).

Sometimes, in order to be heard and get the result you seek, it is necessary to contact (or even just threaten to contact) the media (TV, newspaper, radio). Many TV stations and newspapers have consumer advocates who deal with exactly these types of issues. Typically, businesses do not want to receive negative publicity and will be more willing to resolve the issue amicably if a newspaper or TV station publicizes the problem. As discussed in the chapter on citizens’ rights, petitions, boycotts and picketing can be effective means of getting your voice heard. When certain grocery chains were selling out-of-date items, picketing and boycotting was a most effective means of getting them to change their policies.

### **What About if You Buy a Lemon of a Car?**

Let’s say you did everything right: You researched, compared, tested and then carefully negotiated price and loan terms of your new car. But then, the car arrives and in no time, things start to go sour. The engine floods, the wipers snap off, the roof leaks, the door sticks, there’s a whistling noise even though all the windows are shut. What do you do? Luckily, for NEW car buyers, there’s a “Lemon Law.” The Lemon Law protects New Yorkers from having to suffer with a lemon of a car. You are protected, in New York, against all “material defects” for 18,000 miles or two years (whichever ever comes first). You can only use the Lemon Law if you are the original purchaser, lessee (person leasing the car), or person being transferred the car during the warranty period.

Any problems you notice with your new car must be reported ASAP to the manufacturer or dealer, who must fix the problem(s) at no cost. If, after four or more tries, the same problem cannot be fixed, or if the car is useless for 30 days or more, there may be a chance of a refund or a new car! The Attorney General's office in New York has a "New Car Lemon Law Booklet" which can be obtained, for more information, free of charge, by calling: 1-800-771-7755.

One last point: If you place a deposit on a car, committing yourself to buying it, and then decide not to buy the car, there is a very good chance you will not get the deposit back. Only if you were told that the deposit is refundable, do you have a legal right to it. However, if you haven't yet signed a finance (i.e., loan) agreement the dealer arranged, and haven't yet received the car, you may cancel the agreement (and receive a refund of any monies deposited).

### **Formal Legal Action**

Consumers could also take formal legal action:

- 1) suing in civil court for a faulty product or fraudulent sale, for example, could win you money (expectation damages [the difference between what was promised and what was delivered] or restitution [pay back what was paid out]) or an order for "specific performance" (an order forcing the contractor, for example, to make the repairs promised in the contract, or ordering a rock band to play at the senior prom, as scheduled), or rescission [an end to the contract].
- 2) suing in criminal court for having committed criminal fraud, such as when a contractor knowingly misrepresents what he/she plans to deliver, and does so intending to fool or defraud you and cause you harm (either physically, emotionally or monetarily).
- 3) suing in small claims court for money damages only, and up to a maximum of \$5,000.

### **More on Small Claims Court:**

While you can only be awarded money in Small Claims Court, this money can be a sum total of different damages suffered as a result of one party's failure to act as promised (that is, one party's "breach" or violation of the contract). So, if a rock band fails to show up and perform at the senior prom, as agreed, a Small Claims Court judge could NOT order specific performance (that the band play at a make-up prom), but could award the amount of "damages" suffered by the senior class's: (1) having to refund ticket sales, (2) losing the caterer's deposit, (3) wasting money on decorations, (4) losing the deposit from the hotel where the prom was to be held, etc.

Small Claims Courts are found in all city courts and most town and village courts in New York. There is at least one Small Claims Court in each of New York's 62 counties and each one has a clerk or at least a judge, who can offer assistance as to filing and presenting a case. Keep in mind when filing that you can only sue someone or some organization where they live, work or have a place of business. So choose your Small Claims Court location carefully. Small Claims Court is a very attractive option for consumers as it is cheap to file a case (about \$10-\$20, depending on the amount of your claim) and can be argued by you, without having to pay a lawyer (although having a lawyer is still preferable, if you can afford one) is informal in nature, and happens quickly (cases don't drag on for months or years). A person can bring a suit for up to \$5,000 in small claims court in a city or \$3,000 in a town or village small claims court.

It is a very good idea to observe a few sessions of small claims court before you present your case, especially if you are not bringing a lawyer with you. When you go to file your case, you need to take with you the names and addresses of the people/companies/organizations you are suing because the court needs to notify them of the fact that they are being sued, and needs to inform them of the court

date. You'll also need to be able to state on the form the reason you are suing and how much you are suing for, up to \$5,000. You will be assigned a hearing date.

Remember to dress in a respectful manner – no jeans, no boxers hanging out of your falling down jeans, no torn or skimpy clothes, no cleavage showing. It would probably also be advisable not to wear any earrings in your nose or eyebrows or chin or tongue, if possible. The fad fashions don't go over well in court. It is also extremely important to act respectfully towards the judge, addressing him or her as "Your Honor," not cursing, making good eye contact with the judge, thanking the judge for allowing you to present your case.

Be on time, and if, for some reason, you are running late (such as a traffic jam), call the court and notify them or they might get to your case, see you are not present, and dismiss the case you filed "with prejudice" (meaning you cannot re-file). If you are the person being sued in small claims court, and you are not there when they call the case, the person who filed against you will be awarded a "default judgment" against you (that is, they will win and you will have to pay the amount for which they sued you – up to the limit of \$5,000). So, because your being on time is so critical, prepare for the possibility that you might be late and take the phone number of the court with you when you leave your home or office that morning. If ahead of the court date, you need to seek an extension of time (an adjournment) because you have a serious conflict, contact the court to seek a postponement. Be sure to find out from the court clerk when you call if you can make a request for an adjournment by mail or email, or if you must show up on the original scheduled date to seek the adjournment in person. The judge may or may not grant your request for an adjournment, as postponements are inconvenient to the court. Therefore, seek an adjournment only if you have a truly serious need. Typically, in small claims court, parties will be allowed one adjournment request only.

Special Note: If you ever receive a notice from small claims (or any other) court advising you that you are being sued and demanding your appearance in court on a particular date, be sure to show up! In small claims and civil court, as noted, if you do not show up ("appear"), you will lose by default. In criminal court, a warrant will be issued for your arrest.

When your case is called in Small Claims Court, be ready to briefly summarize the situation in a sentence or two. Then, be prepared to state the facts and show any evidence you may have in the form of receipts, contracts, notes promising payment ("promissory notes"), photos, x-rays, doctor's notes, etc. You may bring and question witnesses to help present your case. If you need to question a person who does not wish to cooperate and attend court, the court can help you to obtain their appearance by issuing a subpoena (a court ordered summons to appear). Be prepared with what you want to ask your witnesses, even mentioning to them what you plan to ask so they can practice responding. Be careful not to manufacture a story or try to hide the truth, as this will work against you when the truth is learned. To understand this, you need only observe a few episodes of "Judge Judy" on TV to see how counter-productive it is to anger a judge by deliberately lying about a situation. A well-planned case will be obvious to the judge and will impress him or her that you are very serious about your claims. Always remember the trial lawyer's golden rule: Don't ever ask a witness a question if you don't know the answer he/she will give. It is simply too risky. For example, in our scenario with the rock band that neglected to show up and perform at the senior prom, you wouldn't want to ask the senior class president on the witness stand if she'd received any call or text or email from the band the day of the prom, alerting her to the fact that their bus had crashed and they couldn't perform, if you don't know the answer to that question. What if she had received just such a call? That could change the entire picture, and might well lose you your case.

Also, be aware of the fact that the person or organization you are suing (the defendant) may have a legitimate reason to sue you, as well, especially if the matter involves a contract, and the dispute is in “good faith” (meaning both parties are trying to perform under the contract and neither party is acting with bad intent towards the other). When the defendant replies to your claim by arguing that the dispute is your fault, the defendant has entered a “counterclaim,” to which you may, but are not required to, respond in a formal reply. Almost always, the judge will ask you and the party you are suing to try one last time to settle the case before he/she hears it. Sometimes court mediators are present to assist the parties to come to a mutually agreeable decision which they would then present to the judge for his/her approval. The judge needs to have the final word, because even if both parties agree to a solution, it may not be a legal or fair or enforceable one.

Unfortunately, winning your case in Small Claims Court and collecting the award are two very different things. Lawyers can take classes in “enforcing money judgments” – meaning, collecting the money for their clients that they were awarded in court. The court has the ability to assist the judgment creditor (the party owed money) to collect the judgment by requiring the judgment debtor (the party who owes money) to make known to the court any of his/her assets (money [cash, savings and checking accounts, stocks, mutual funds, personal property, real property [buildings, land]) prior to announcing the award. If the judgment creditor’s request for payment of the judgment from the judgment debtor goes unheeded, the judgment creditor may need to seek the assistance of the local sheriff or city marshal, who has the ability to garnish (seize) a portion of the debtor’s wages each paycheck until the award is paid, or to seize certain of the debtor’s bank accounts to pay off the judgment. The judgment of the court is good for 20 years, and attempts to collect the money due may be made by the judgment creditor over the 20 year span, if necessary!

#### **What if I Default on a Loan? (A Brief Word on Bankruptcy)**

We already discussed the “repo”-man/woman and mortgage foreclosure sales. We still need to touch upon bankruptcy (a dreaded word). If you have exhausted all avenues of paying off your debts (i.e., you’ve “downsized” your home, cut down on expenses, solicited monetary gifts or loans from friends and family, and sold jewelry, cars or property) you may need to consider filing for bankruptcy. Filing for bankruptcy should only be done as a last resort, as it can permanently negatively impact your credit rating (and, therefore, your ability to ever borrow money again from a bank). There are three main types of bankruptcy filings: Chapter 7, Chapter 11 and Chapter 13 of the Bankruptcy Code. In both Chapter 7 bankruptcy (individual bankruptcy) and Chapter 11 (bankruptcy of a business), the federal government takes over the filer’s finances and sells the filer’s assets (possessions worth money, even including land and homes) to pay off the people and organizations to whom the filer owes money. These people owed money are called “creditors.” Chapter 13 bankruptcy is slightly different, as it is a reorganization of finances and operations for a business, rather than a complete selling off or “liquidation” of assets. In Chapter 13, as in Chapter 7 and 11, however, the federal government oversees the process (as the business reorganizes and pays off debts over time). Bankruptcy debts that cannot be expunged or wiped out are: student loans, alimony (payment to an ex-spouse after a divorce), child support and taxes.

## Activities:

- 1) Pretend you are buying a new or used car and need to finance it; how would you do it? Would it be better to lease it or buy it? Identify sources of comparison regarding cars available. Compare interest rates and loan terms (are there acceleration clauses? Usurious rates?)
- 2) Pretend you are buying a home and need to choose a mortgage from various options available. Will you choose a 15 or 30 year mortgage? How much money will you use for a down payment? What percentage of your salary will you need to use to pay your mortgage each month? Will your budget allow this expense?
- 3) Become a savvy consumer: Scrutinize ads; look for the fine print. Bring in several ads from magazines and newspapers or that you've received in the mail that you can see are misleading to the average consumer;
- 4) Choose between credit cards by examining APR, costs and benefits;
- 5) Go through the motions of what to do if your credit cards are stolen; if you discover that you're a victim of identity theft;
- 6) Prepare a presentation about a consumer protection agency and tell what the agency does to help you. Also tell how and when a consumer could access the agency;
- 7) Contact an attorney from the Attorney General's office, Consumer Frauds Division, to speak to the class about what he/she does on the job and what types of consumer cases the AG's office accepts.

## Chapter VI: Rights I Have to Rent or Own a Home

Nothing quite says, “I’m an adult now” as when you are ready to move out on your own and rent your first apartment. This chapter will give you an overview of how to lease an apartment (with or without government assistance) or purchase a home. It will cover what rights and obligations you have as a tenant or homeowner, and what you can do if you believe your rights have been violated. Because most people start out renting an apartment or two (or 20!) before they have the means to buy a home, the majority of this chapter involves apartment rentals. However, home ownership will be touched upon towards the end of the chapter.

Renting enables a person to be mobile. If you are just starting out and looking for work, you’ll want the flexibility to move across the country if necessary, to accept a job offer. If you’ve purchased a home, it is not so easy to up and leave, because, among other things, you’ll have to sell or rent out your house first. Additionally, renting an apartment does not require you to pay separate property or school tax and demands little, if any, home maintenance costs.



Renting also lets you “buy” some time to save for a house! Before launching into how to rent wisely, let’s get comfortable with a bit of apartment rental vocabulary: [Note: A copy of a boilerplate lease will be placed on an adjacent page for reference]

A **lease** is a contract between a tenant (the person renting) and the landlord (the owner) which carries the “meat” of the agreement. It is basically the “who, what, where, when and how” of the agreement. Because a lease is a contract, leases are not binding (do not have legal control) on persons under the age of 18 (minors). Crazy enough, however, if a landlord enters into a lease with a minor, the landlord will be bound! If the minor signing the lease breaks the lease (discussed below), the landlord is out of luck – without legal options (i.e., without ways to enforce the agreement). Leases can be written down or they can be verbal (spoken) agreements, but a lease for a year or longer in New York must be in writing to be valid and enforceable (i.e., to be legal and protective of the rights of the landlord and tenant). Even if the lease is for less than a year, it’s a better idea to have it in writing, because often the tenant and landlord have different recollections about the details of the agreement. With a written lease, there is less chance for misinterpretation or misunderstanding between landlord and tenant. Also, it is important to remember that what is actually written in a lease will control and will supersede any discussions prior to the signing of the lease, especially if what was discussed with the landlord differs from the actual lease terms. It is not enough to have verbalized something which is then not reflected in the written lease.

When we studied contracts in a prior chapter, we discussed “express” or stated terms versus “implied” or unstated but known terms. Apartment leases also contain express and implied terms. **Express lease terms** include: (1) the names of the landlord and all tenants planning to occupy the premises (the “**parties**” to the lease); (2) the exact address being rented (including the apartment number); (3) the amount of monthly rent; (4) the date each month the rent is due to the landlord; (5) usually the means by which rent can be paid (cash, check, money order); (6) the duration or “**term**” of the lease (i.e., how long the rental is for – month to month, six months, one year, two years, etc.); and (7) the “**conditions**” or “**terms**” of the lease (rights and obligations of the landlord and tenant). Conditions include: whether or not utilities (heat, electricity, cable, Wi-Fi, water, sewer, phone) are included, whether pets are allowed, if trash and snow removal are included, whether subletting is permissible (discussed below), move-in and move-out dates, amount of security deposit required (discussed below), specified reasons why or how the rent could be raised during the lease period (an “**escalation clause**”) such as higher fuel costs or the



installation of a new security system (NOTE: without specifying reasons, raising the rent during a lease period is generally not allowed), information regarding the procedures to follow when repairs are needed in and around the apartment (e.g., Do you notify the landlord in writing? Is a verbal notification sufficient? Do you make the repair yourself and bill the landlord?), “**notice**” requirements for lease termination or renewal (i.e., how much advanced warning you need to give the landlord before you move out – usually 30 days – or announce that you’d like to extend or renew the lease. Make sure when signing a contract that you have crossed out any terms you don’t agree with and have put your initials by the cross-outs. The landlord must put his/her initials there, too. Make sure you do this to the original and all existing copies. Further, make sure any blank spaces in the contract are filled in or crossed out.

**Implied terms** of a lease include that you, as the tenant, agree to pay rent and agree to use the landlord’s property for the reason rented – such as a living space as opposed to a day care center or recording studio, or perhaps, for a small business and not as a living space. The landlord’s implied obligations include that the apartment is habitable (“live-able”; also called an implied “**warranty of habitability**”) and that you, as the tenant have the right to “quiet enjoyment” (discussed below) of the property. The implied warranty of habitability is an enormous “gift” the tenant purchases. It means that the landlord must keep the property safe; that is, free of rodents and insects, able to withstand wind and rain and snow, and up to safety codes. The landlord must also take care of the areas surrounding the space you are renting, providing for snow and trash removal, adequate exterior lighting, exterior doors that lock properly and provide protection, and elevators that function properly (especially in skyscrapers!).

If you are ever a tenant in need of assistance from your landlord for an apartment repair, be sure to inform the landlord in writing (keeping a copy for your own records) of the problem(s) in the apartment or building. If these are not fixed within a reasonable time, you have several options. First and foremost, you can always contact a local tenants’ rights association for advice. The tenants’ rights association may advise you to take some or all of the following steps: after following-up with the landlord and AGAIN having your request ignored, you have the right to have the problem or appliance repaired and deduct the cost from your next month’s rent. Be sure to get **three estimates** for the repair work before you proceed, in order to protect yourself from a landlord’s claim that you spent too much on the repair. You can also report the landlord to the local housing authority (such as the Albany Housing Authority) or Attorney General’s Office by calling to ask about the complaint process or by going on-line to find out how to complain.

Finally, if the unrepaired problem is serious enough, because it threatens your or your family’s health or safety, you can actually break the lease and leave, under the theory of “**constructive eviction.**” A tenant breaking a lease under the theory of “constructive eviction” must be able to prove that the harm he has suffered due to the landlord’s failure (despite adequate notice) to repair the apartment or building problem in question is equivalent to an eviction from the apartment because the apartment is unable to be used or is unsafe to use, as is. However, if the landlord did not know or have reason to know of the problem or dangerous condition, a tenant’s claim of constructive eviction will not be successful. Thus, tenants **MUST**, to protect themselves and their guests, make dangerous or serious conditions in the apartment or building known to the landlord as soon as possible.

The “**right to quiet enjoyment**” means that the tenant has the reasonable right not to be disturbed by the landlord or other tenants. The landlord has the right to enter an apartment to make repairs and collect rent, but this must be at reasonable times and with reasonable notice. A landlord may not enter a tenant’s apartment on a whim, just to snoop. Landlords do, however, have the right to enter apartments in an emergency, such as a fire, or with the police when they have a warrant and are investigating a crime, or with police even without a warrant if someone’s life is thought to be in danger.

When applying for a lease, you may expect to be asked for: a photo ID, biographical information, information regarding the source of your income (pay stubs are good proof), your social security number to run a credit check, addresses of previous homes/apartments you've rented, and references who can vouch for your responsible, (quiet!), good nature, and/or your ability to pay monthly rent on time and in full. If you are renting for the first time and lack a credit history and rental references, you might give the landlord the name of someone who can vouch for your "clean" living habits and responsible nature, such as an employer, coach, neighbor, relative or the resident advisor of your dorm in college. You could also ask the landlord if he/she would be willing to allow your parent or guardian to co-sign the lease as a guarantor, to cover the rent if you aren't able to do so.

You should know that it is illegal for a landlord to discriminate in renting based on an applicant's race, age, gender, ethnicity, sexual orientation or past criminal history. You can file a complaint if you have good reason to believe there is discrimination. Contact your local housing authority or the Attorney General's Office to find out how to do so. Public housing (discussed below) may screen against certain recent criminal history.

A **security deposit**, typically an amount equivalent to one month's rent of your apartment, but possibly as much as two months' rent, is often required by a landlord when renting an apartment. It is exactly what its name implies: "security" for the landlord, in case you (or your guests) damage the property, are late paying rent, or skip out before paying the last month's rent. While the law prohibits a landlord from charging a tenant for "**normal wear and tear**" (average, expected use) of an apartment, the landlord can dip into a tenant's security deposit for any damage exceeding the norm. Examples of this might be spelled out in your lease, but if not, might include: holes in walls, broken appliances, broken windows, cooking fires causing wall damage, leaks caused by overflowing tubs, mold or mildew on walls or ceilings (even in other tenants' apartments!) as a result of your overflowing tub, a broken-down door caused by police who raided your apartment for (and found) drugs, etc. Note that in this last scenario, if no drugs were found and your landlord feels you should pay for the door, you could contest this in small claims court. You might also take the police (and municipality) to small claims court for reimbursement.

It is worth mentioning here that more and more tenants are being charged a **non-refundable "redecorating fee"** before they are allowed to move in to an apartment. This fee is to allow the landlord to repaint and clean the apartment before the next tenant moves in, after you leave. There is a lot of controversy over this fee, as historically, the security deposit has been the **refundable** fee landlords have used for this very situation. Normal wear and tear has always been permitted, but in the past, if an apartment needed no new painting or cleaning after a tenant left, the security deposit was returned. This redecorating fee is never returned to the tenant.

While a lease is in place, the landlord is responsible for major repairs, and typically, the tenant is responsible for keeping the property in good condition and performing minor repairs. If the tenant harms the property by neglecting it – such as by going away and leaving the windows open one weekend, allowing torrential rains to pour through the windows that destroy the carpet and the wood floor beneath, the tenant is responsible for the repair. Of course, if the windows never shut properly, and the tenant had complained about this to the landlord who neglected to fix the problem, and that is why the damaging rains came into the apartment, the result could be very different. Each situation, each set of unique facts, requires a unique resolution under the law. The landlord must place your security deposit in an interest-bearing bank account and must return your security deposit, plus interest – or what is left of it after repairs are made to any "above-normal" damage that needed repairing -- within a specified time once the lease period has ended.

A note on photos and notes: To protect yourself when entering a lease with a landlord, it is critical to walk through the space with the landlord (and, if at all possible, with a companion who can later act as a witness, should any landlord-tenant disagreements or misunderstandings arise). While walking, be sure to take photos and jot down any repairs that are needed, any defects in the apartment or appliances, and any promises the landlord makes as to what repairs or new fixtures are needed, including the dates by which these will be fixed or installed and who will bear the costs. As a side note, before this walk-through, you should do your homework to find out if state or local laws require such things as window locks, fire escapes, or dead bolts on the door. If so, and these are not present, you need to have the landlord's promise in writing to install these, as soon as possible, at his/her cost, ideally prior to your move-in date. After walking through the apartment and taking notes, you need to have the landlord sign and date the notes as an agreed **addendum** (addition) to the lease. You should sign and date it as well. You need to do this to protect yourself, so that when you move out, the landlord doesn't accuse you of putting that hole in the wall or the mold on the bathroom ceiling that existed prior to your taking possession of the apartment.

Documentation is critical! This cannot be stressed enough! You need to go through this same walk-through process with the landlord, a witness, and your camera at the end of the lease period to protect yourself. Remember, landlords are often in a better financial position than the tenant to hire a lawyer if things go sour in a landlord-tenant relationship. So it is best to avoid the possibility of ending up in court by simply having the proof in hand, to challenge your landlord's claims. A typical "things gone bad" scenario involves a tenant giving notice that he or she is moving out at the end of the lease period and the landlord refusing to return the security deposit, claiming excessive wear and tear in general or certain specific damage(s) to the apartment or appliances. If you cannot prove that those conditions existed prior to your lease, you're sunk! In this scenario, you might take the landlord to small claims court for the return of your security deposit. The landlord might **countersue** (turn around and sue you) for additional monies to cover certain alleged extensive damages that even the security deposit would not cover. Thus, the situation can go from bad to worse! The bottom line is: Don't be caught empty-handed! Think ahead and think SMART when renting an apartment.

If you wish to alter your premises when renting, such as by installing a loft bed or built-in bookshelves, always check with your landlord first. Changes such as these, that alter the structure of the rental space, may be considered "**fixtures**" and remain with the property when you leave, for the landlord's use and enjoyment.

Let's talk about **roommates**. Many times people just starting out share an apartment with one or more roommates in order to share the costs. The two most important pieces of advice in a roommate situation are that: (1) all roommates should individually sign the lease for the protection of the others; and (2) the roommates should create a written roommate agreement. The roommate agreement needs to spell out who pays what portion of the rent, phone bill, cable and internet bills, etc. You should also include how much time or "notice" each roommate must give the other(s) before moving out (e.g., 30 days) and whether and to what extent the roommate moving out needs to assist in locating a substitute roommate to share the costs with the remaining roommates. Adding terms having to do with apartment cleaning responsibilities, the loudness of music, overnight guests (how many at once and for how long) and the sharing of food and drinks will prevent inevitable battles down the road. Landlords only need to sue one roommate for the rent or for damages to the property, under state "**joint and several liability**" laws, despite any agreements roommates may have made otherwise. This is because "joint and several liability" means that all tenants who sign a lease are individually responsible for upholding all terms of

the lease. So if one roommate splits, and leaves the other(s) “holding the bag,” the landlord can legally sue the remaining roommate(s) for the entire amount due! Then this unlucky roommate would have to separately sue or “implead” the other roommates (legally join them to the landlord’s suit).

**Subletting** an apartment is an attractive option for a tenant who needs to move prior to the end of his lease term. In a **sub-lease**, the tenant who needs to move, in essence, becomes a landlord to a new tenant, who is called a “sub-tenant.” The sub-tenant pays rent to the original tenant, who, in turn, pays the landlord. A tenant must get the landlord’s permission before subletting, unless the lease states otherwise. In New York, tenants in buildings containing four or more apartments have the legal right to sublet, as long as they obtain the landlord’s consent. If such a tenant has a lease that states that tenants may not sublet their apartments, the provision is illegal and void, as a matter of public policy. A landlord may deny a tenant’s sublet request, but the landlord must have a “reasonable basis” for the denial (such as: the number of tenants expected to sublet exceeds building code standards; the proposed sublet use is for a business purpose that does not comply with zoning laws [day care center, dog grooming business, dentist’s office]; or the particular tenant proposed is one the landlord has dealt with before and had to sue for non-payment of rent). If the landlord has a reasonable basis to deny a sublet request, the tenant will not be able to sublet and the landlord would not be legally required to allow the tenant to get out of the lease contract. The circumstances that amount to a “reasonable basis” will depend on the facts of each situation. If the landlord denies the sublet on unreasonable grounds, the tenant can sublet anyway, and can even be awarded court costs and attorneys’ fees if a judge later decides that the landlord’s sublet denial was unreasonable and in “bad faith” (i.e., that the landlord just didn’t want the tenant to sublet...period!).

The problem with subletting is, if the **sub lessee** (or “**subtenant**”) neglects to pay rent to the original tenant (or “**prime tenant**”), or damages or destroys the apartment in some way and refuses to pay, the original tenant is obligated to pay the landlord and “cure” (fix) any damages caused by the sub lessee. The prime tenant could then take the subtenant to small claims court (if \$5,000 or less is at stake), or regular civil court (if more than \$5,000 is involved), which is a much bigger deal, requiring a sizeable filing fee and so much paperwork that the prime tenant will likely need to hire an attorney.

It is critical to understand how to **terminate a lease**. If you are renting “**month to month**” (i.e., you don’t have a lease, but are planning to rent the apartment on a month to month basis, as long as you need it), landlords require 30 days written notice before you leave, unless the lease states otherwise. If you have a one or two year lease and do not wish to renew it when the lease period ends, you need to give 30 days written notice to the landlord before the lease period ends. If you break a lease, that is, you leave earlier than the lease period to which you agreed, you are still responsible for the remainder (the term) of the lease. The landlord can sue you for the amount of money he loses while the apartment is vacant, until the end of your original lease term, as well as any damage to the property above and beyond normal wear and tear. However, the landlord is actually required by law to try to re-rent the apartment to minimize his losses.

Breaking a lease is not to be encouraged, but if you do need to break a lease at some point (such as, you need to leave immediately to accept a job across the country), take precautions! The day you leave the apartment would be an incredibly crucial time to take photos of it, with the date printed on the photos, so that the landlord cannot claim that you caused certain damage that you know was not there when you left. Again, taking a witness with you when you walk through the apartment one last time would also be a very good idea, in case the landlord takes you to court over damages he or she claims you caused.

**Non-payment proceedings** allow a landlord to recoup losses if the tenant does not pay. A landlord can terminate a lease early if the tenant violates the lease by not paying rent. First, a landlord must give the tenant written notice to either pay the amount owed or leave the property. The tenant would then have three days to pay the landlord the amount owed. On day four, the landlord would have the right to start eviction proceedings in court. This is done by filing a “Notice of Petition” and a “Petition.” If the tenant can justify nonpayment because the landlord has failed to heed requests to fix housing code violations or other dangerous conditions in or around the property (i.e., “breach of the warranty of habitability”), the tenant needs to be able to prove that he/she gave the landlord sufficient notice of the needed repair. Just remember that if a tenant decides to stay and fight such a lawsuit, he/she will likely need to hire a lawyer, costing potentially thousands of dollars. Moreover, while contesting such a non-payment lawsuit, the tenant could potentially harm his/her good credit and may even negatively impact his/her ability to rent future properties in the area. If the landlord wins, the court will order payment by a certain date. If the tenant fails to pay within this time period, the landlord would have the legal right to **evict** the tenant (discussed below).

“**Holdover proceedings**” are another “tool” for landlords to regain possession of an apartment. Specifically, if a tenant is guilty of chronic (repeated, consistent) non-payment of rent, or of violating some other condition of the lease (such as keeping pets, running an unauthorized business on the premises, or consistently failing to keep music at a level tolerable to other tenants in the building), the landlord can get the court’s help to regain possession of the premises. The landlord must first give the tenant written notice of the reason he/she seeks to evict the tenant. The landlord must also obtain a court order giving him/her possession. Then the court will issue a “**warrant of eviction**” also known as a “**three-day notice**.” This gives the landlord the legal right to remove the tenant and his/her property from the apartment. However, only a sheriff, marshal or constable (police) can carry out a court ordered eviction. A landlord cannot threaten the tenant, remove the tenant’s possessions him/herself, lock the tenant out of the apartment, or shut off heat or water – even if the landlord says he/she can! Further, the landlord has to give the tenant a “reasonable” time period in which to gather and remove his/her possessions. If a landlord evicts a tenant by force or by some other illegal manner, the tenant can sue the landlord for “treble” (triple) damages! Without a warrant of eviction, a landlord does not have the right to seek the assistance of the law in putting a tenant out on the street.

What kinds of housing complaints can tenants bring? If a landlord refuses to make repairs or install fixtures required by local or state law (such as fire alarms, carbon monoxide detectors, window locks), the tenant can take the landlord to court to force the landlord to make the repair or installation. If you ever have an issue with your landlord, it is a good idea, as mentioned earlier, to get legal advice before you act. In New York, the Legal Aid Society, United Tenants Association, the Empire Justice Center, the Attorney General’s Office, the New York Civil Liberties Union, and the Division for Human Rights are all agencies able to hear your complaints and provide you with pertinent information.

### **Public Housing:**

Public Housing is primarily funded by the federal government. “**HUD**,” the Department of Housing and Urban Development, is the regulating agency. HUD gives money to state operated public housing authorities to run public housing developments (“project-based ‘**Section 8**’” housing). As such, public housing is regulated by local, state and federal laws. People who rent apartments in a public housing complex cannot be evicted without constitutional due process – that is, without the chance to grieve (to challenge) the situation and to have an administrative review (hearing) regarding the matter. In addition to “project-based” Section 8, individual, eligible, low-income families can receive Section 8 housing in

the form of rent subsidies. These are also called housing assistance payments or “vouchers.” They are given to a landlord to make up the difference between what the tenants can afford to pay and the rent the landlord is charging. Landlords are not obligated to accept Section 8 vouchers. In fact, landlords are often reluctant to do so because Section 8 requires them to adhere to many regulations, and subjects them to frequent governmental checks of their operations, management and finances.

**Be warned:** Public housing requires that tenants remain in strict compliance with the law. If a tenant or member of the tenant’s family living with the tenant is even suspected of using drugs, for example, the tenant and his/her family can be evicted. Likewise, tenants can be evicted if their guests commit crimes – such as possessing or using drugs – in the tenant’s apartment. Further, public housing agencies are relatively free to choose what they can require of potential applicants. An applicant in one county of a state might be ineligible for public housing within 10 years of a violent criminal conviction, whereas, in another county in the same state, an applicant is ineligible until 10 years after release from prison. This is an enormous difference! If a person serves 10 years in prison, the applicant in scenario number one could receive public housing as soon as he/she is released, while the applicant in scenario number two is not eligible for 10 more years! This can be a devastating difference if one has no means of support when leaving prison and needs financial assistance. Finally, the decision to accept a plea deal in criminal court in which a person pleads guilty to a crime will jeopardize and possibly eliminate his/her public housing eligibility. If you are ever in this situation, absolutely seek legal advice as to all the consequences of the guilty plea before pleading guilty!

### **Illegal Clauses:**

As with any contract, just because a lease contains a particular clause or statement, does not make that statement legal! If you see an illegal clause (such as one of those described below) on a lease YOU are provided, cross out the statement, initial it and get the landlord to initial it. Rewrite it, if necessary, to include the subject matter, making sure, again, to have both parties initial it. If you’ve already signed a lease and later realize it contains one or more illegal clauses, write to your landlord to ask that the clause be removed from the lease. If the landlord does not do this within a reasonable time, you can file in court to terminate your tenancy, receive any money you lost in the transaction (such as a security deposit) and prevent the landlord from using the provision in other leases.

The following is a list, though not an exhaustive one, of possible illegal lease clauses:

- (1) No single-sex couples are permitted to dwell on the premises (such a clause might also or instead refer to racial minorities, certain ethnic groups, elderly persons, persons with disabilities, etc.);<sup>14</sup>
- (2) The landlord may enter the premises any time for any reason, without notice;
- (3) Tenants must pay the rent only in cash;
- (4) The landlord is exempt from all liability for any injuries caused to tenant or guests of tenant on the premises, whether or not caused by the landlord’s negligence or carelessness;
- (5) No tenant may sublet the premises rented (in a building with four or more apartments);
- (6) The tenant waives the right to a clean, habitable dwelling;

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14. It would be unlikely to find a lease with such prohibitions actually stated in writing. However, renters should be aware of more subtle “de facto” discrimination, such as when a landlord consistently tells applicants of a certain race that no apartments are available, but then rents to an applicant of a different race. If you suspect that you have been discriminated against by a landlord, contact your local civil liberties union, the Attorney General’s Office, and the New York State Division for Human Rights.

- (7) The landlord reserves the right to raise the rent without notice, as necessary, during the lease period;
- (8) Tenant agrees to pay the cost of any legal actions against the tenant initiated by the landlord;
- (9) If tenant fails to pay rent on time, the landlord may declare the lease void and the tenant may be evicted without further proceedings;
- (10) If the landlord evicts the tenant, the landlord has the right to place the tenant's possessions on the street within 24 hours;
- (11) Tenants must pay rent whether or not landlord makes repairs or maintains the rented space;
- (12) If tenant terminates the lease early, the landlord bears no responsibility for finding a new tenant and the tenant will be responsible for payment of rent for the entire lease period, whether or not landlord obtains a new tenant.

### **Purchasing a Home:**

Because buying a home is an investment (presumably a home retains or increases its value, you can deduct your mortgage interest on your income tax, a home builds credit for you, and "roots" you into a community) there are many reasons to buy rather than rent a home. However, while buying may be financially and socially/emotionally savvy, it is simply not a possibility for most young adults right out of high school or college. With that in mind, not much time will be spent on home purchases here beyond the basics. But it is worthwhile to know a bit about home buying to have it in your head for the future.

Before you decide to buy a home and to commit to putting down roots in a particular area, be sure to look at a lot of homes, to get a sense of what your money can buy you. Work with a lender to decide how much you can afford to pay per month as a mortgage payment. The rule of thumb is that no more than 29% of gross monthly income (all your income, from whatever source, before tax deductions are taken) should go toward mortgage payments. In combination with other debts you owe (such as credit card debt, student and car loans), the debt-to-income ratio (i.e., the amount of debt you owe as a percentage of the income you earn) as a general rule should not be higher than 36%. You may remember we discussed loans in our chapter on consumer purchases. Most simply put, a mortgage is a loan from a bank or mortgage company that allows you to buy a house. You pay back the mortgage with interest. Until the house is entirely paid back, the bank holds a lien (has ownership rights) on the house.

Mortgage rates can be "**fixed**" or "**adjustable.**" Most people take out 15 or 30 year fixed mortgages, although other time periods are possible. In a 15-year fixed mortgage, a homeowner would pay more per month, but would save an enormous amount of money in interest payments (even possibly exceeding \$100,000 or more!) by shaving off 15 years of interest. Adjustable rate mortgages or "**ARMS**" have interest rates that change from time to time, depending on what the "adjustment period" is (typically, one to a few years). If you have a three-year ARM, your interest rate "locks in" for the first three years, at a certain rate, but then varies, along with current market rates, up or down, for the remainder of the life of the loan, sometimes – though not necessarily -- varying per additional "adjustment" period. ARMS ordinarily cannot rise above or below a certain point (i.e., they are "capped") from one adjustment period to the next, throughout the loan period. Usually the initial interest rate in an ARM is lower than a "fixed" interest rate, but because the interest rate can, after the "lock in" period, ultimately rise much higher than a fixed interest rate, it is often a less attractive option for home purchasers.

Fixed Rate Mortgages may be right for you if: current interest rates are low, but are expected to increase soon; you want to count on your monthly mortgage costs being consistent; you are planning to live in your

home for many years; you are close to the age of retirement and are concerned that your monthly income will decrease and cannot take the risk of increasing mortgage costs.

Adjustable Rate Mortgages may be right for you if: you are applying for a bigger loan; your finances are such that you need the initial, lower payments an ARM brings; market interest rates are expected to decrease in the near future and you don't want to "lock in" at a high rate; you are financially able to weather fluctuating, higher interest rates; you do not expect to be in the home for 10 years or more.

Aside from having enough money to pay your mortgage each month, buying a home requires some immediate, so-called "upfront" costs: [copies of an inspection report and a radon report will be included in this section]

Application fees: such as mortgage application fees, credit report fees (to assess your credit), pre-approval application fees (to be pre-approved for a loan, which sellers view extremely favorably), appraisal fees, fees to lock-in a certain rate on a mortgage, inspection fees (by a certified home inspector, to see if the home is safe and free from infestation, carbon monoxide leaks, radon, foundation cracks, water leaks, mold lead paint, asbestos, etc.);

Earnest money: what you add to your purchase price to signal to the seller your good faith intention to buy the home;

Down payment: a percentage of the purchase price that you pay upfront, usually at least 3%. As a typical homeowner needs to borrow the remainder of the home price in the form of a mortgage at considerable cost, there is great incentive to make as great a down payment as you can afford, especially if your money is not earning much interest in the bank;

Closing costs: these include other fees related to the home purchase, such as: real estate agent/broker fees, mortgage underwriting fees, costs for a real estate lawyer, if you use one, governmental fees (such as for radon certification, etc.), mortgage recording fees, and real estate taxes;

Points: this may or may not be applicable, but are a once-only fee, sometimes paid to a mortgage lender to obtain a loan. Certainly many loans have no points, and therefore no "point" fees, but if your loan does require points, each point requires that you pay, upfront, 1% of the amount borrowed. So if you borrow \$100,000 and the loan carries two points, you'll owe \$2,000 in points alone.

Home buying is much more complicated than renting, and requires considerable seriousness of intention on the purchaser's part. It is not something one enters lightly. If a homeowner "**defaults**" on her mortgage (i.e., she cannot pay back the lender/bank), serious consequences can occur, not the least of which is losing her home, seriously damaging her credit, and possibly, having to declare bankruptcy. Over the past decade in the U.S., there has been a home **foreclosure** crisis, an epidemic of lenders repossessing homes for non-payment. This has occurred for two main reasons: the recession (people are out of jobs and unable to pay) and unethical lenders who enticed purchasers into low introductory rate, sub-prime loans, knowing that the loan rates would skyrocket beyond what they could afford. If you do find yourself facing foreclosure, there are agencies that one can go to for free assistance. In New York, the Empire Justice Center, as part of the New York Subprime Foreclosure Prevention Services Program, administered by the New York State Division of Housing and Community Renewal/Housing Trust Fund Corporation; Legal Aid; the New York State Bar Association and the Legal Project are all good resources.

Home ownership can be fabulously rewarding, but it is not something to jump into spontaneously, on a whim. It is critical to be, above all, an educated consumer. Home-buying is complex and requires



careful attention to detail. It would be wise to seek help from a lawyer or legal services organization (mentioned above) to ensure that you understand every bit of the purchase contract and mortgage terms before you sign. Remember: once you sign a contract, you own it (and it owns you, in a sense, binding you to its provisions). Don't be afraid to ask questions, to be 100% sure this is a deal you can handle. You have a responsibility to know what you are signing, to read the fine print, to borrow only what you can afford to repay at a rate you can afford. Even if the bank offers a more attractive "package," with a rock-bottom mortgage interest rate at the start of the loan, take time to think about worst case scenarios, so you are prepared. You need to consider what would happen to your ability to pay your mortgage if you lost your job for a year or more. Taking these measures will help you avoid the frightening and frankly, demoralizing, experience of foreclosure or of owning a home worth less than you still owe on it (referred to as your home being "underwater").

## Activities:

- 1) Review various scenarios of landlord-tenant disagreements to decide who is at fault, and what possible remedies exist.
- 2) Review possible rental agreements for illegal or voidable terms.
- 3) Role play a pre-rental walk-through of an apartment, including asking the landlord to agree: to fix certain things by a certain date, to allow a sublease, to define the lease term (the period of the lease).
- 4) Research what landlords in your area are required to install in apartment buildings (with a few units; with many units) for tenants' safety (e.g., window locks? smoke detectors?).
- 5) Visit housing (or small claims) court to observe what issues are raised between landlords and tenants and the types of evidence introduced. Notice if one or both parties have lawyers. If only one side has a lawyer, notice if this seems to give them an advantage in persuading the judge. Try to observe what kinds of questions the judge asks or evidence she asks to see, so that you will be prepared if you are ever in this situation.
- 6) Look at your own finances to see how much rent or mortgage you could afford to pay each month, using the 29% guideline.
- 7) Create charts with your classmates of fixed versus ARM's to see comparative costs of loans. Then compare this chart to a rental chart.
- 8) Do an Internet search for home inspectors in your area to see what services they provide and rates they charge.
- 9) After dividing the class into small groups, draft sample roommate agreements and share them. See what kinds of issues different groups included, so that you will know how to do this when you have roommates.
- 10) Have a real estate agent speak to the class about some of the concerns you should have when renting or buying a home, and about apartment rental search strategies.



## Chapter VII: Rights I Have to Get and Keep a Job

### Part I: Getting the Job

Most of us, because we cannot get by on our good looks alone, will need to get and retain a job to survive. In this chapter, we will cover a lot of territory, discovering, among other things, how to: apply and interview for a job; find your “dream” job; land a job even if your dream job isn’t happening; negotiate an employment contract; blend into the work environment; understand your rights and responsibilities as an employee, know if you’ve been discriminated against; and how to take legal action to protect your rights.



#### **First things first:**

Remember when you were little and all you wanted to be was a firefighter or a police officer or a professional athlete or dancer or singer or movie star? While for some of us, those same dreams live on, for the majority of us, these goals no longer hold our interest or perhaps, they just don’t seem realistically attainable. What, then, do we want to do with our lives? How will we support ourselves and our families? Is there a way to support ourselves doing something (legal) that we love?

Thankfully, there are many opportunities in life to find a career or create a career that both stimulates and sustains you, mentally and physically. A good first step in finding a “dream” job or career is to sit down and write down who you are. This includes noting down your favorite pastimes and least favorite activities or types of activities, marketable skills (including technical skills), skill “gaps,” work experience, personal skills, social skills, social “issues” or limitations (including language or speech barriers), and physical limitations (e.g., epileptic seizures; can’t be on your feet for long periods of time). To get you started, here are some prompts: Do you love to travel or does it make you anxious? Do you have trouble sitting in a car for long periods of time or love to drive? Do you hate to read and/or write or is that something you do daily? Do you despise the thought of networking or socializing or do you reenergize yourself by socializing? Are you easy-going when you meet new people or shy? Do you work best on your own or in groups? Do you get too stressed out by constant deadlines or do you thrive on them and work best under pressure? Are you computer illiterate or a technology whiz?

Then, you need to write down, in general terms, what you want to do with your life, such as: travel around the world, live on a dairy farm, go into politics, make lots of money, fix cars, be an IT person, cure cancer, raise kids, be a newscaster, write novels, fight fires, be a professional shopper, design houses, drive trucks, coach track, paint, teach.... whatever.

Next, you’ll need to think about and list what parts of WHO you are or who you WANT to be that you want to incorporate into a job or career. For example: “I have to have a job that involves being with little kids;” “I have to have a job where I get to travel;” “I’d love it if I could shop for a living;” “I have to have a career where I’m allowed to use my sense of humor;” “I need to be able to use my artistic talent;” “I need to dance every day;” “I have to be able to be outside;” “I need to think and read and write;” “I’d like to be able to use my speaking skills;” “I need to be able to help people.”

After this, you need to think about what jobs or careers would utilize your talents, skills and desires. You may need to do some research here and even talk to a career counselor to help “channel” your interests. Try to find out what steps you’ll need to take to attain your goals (e.g., will you need a

plumbing certification, teaching degree post-college? go to medical school? law school? get a physical therapy degree? a welding certification? a commercial fishing license? a license to drive trucks?)

You should also develop a “B” list, and probably a “C” list as well, of jobs you can imagine doing, while you’re working on attaining your “dream” job. For instance, you might want, ultimately, to be a middle school social worker, to help kids with their problems at school and at home, but you’d settle, in the meantime, for being a camp counselor, afterschool recreation program counselor or mother’s helper. In this way, you could work towards a social work degree while still gaining valuable experience interacting with kids. Frankly, in this economy, you may need to flip a few burgers or bag groceries, if that’s what it takes to pay the rent and put food on the table. No matter what job(s) you do, remember that you are utilizing skills that you will always have with you, and that you can later highlight on your ever-growing resume. If you’re bagging groceries, you’re gaining time management skills, efficient packing skills, and interpersonal skills (dealing with other employees and customers, some of whom can be downright difficult!). Flipping burgers? You might not be gaining grocery packing skills, but you can cook, in large quantities, under considerable time pressure and deal with unpleasant customers. Babysitting? You’ve learned to manage children’s wants and needs, feeding, clothing, entertaining, and perhaps disciplining them, dealing with their moody behaviors (and diapers, runny noses, tears and tantrums) all without losing your cool.

This might be an appropriate place to talk about “working papers” or “work permits” for middle and high school students. Under New York State law, all minors -- those under 18 -- MUST obtain work permits or employment certificates (except for babysitters, golf course caddies, those doing yard work or household chores for persons or non-profit organizations, farm workers 16 and over, and school cafeteria workers). To get a work permit, you need to go to your school district or high school office, with proof of age, written consent of your parent or guardian, and a certificate of physical fitness (completed within the year from a health care provider). For a full-time work certificate, school records need to be presented, too. Schools can revoke a certificate of employment from a student “for cause” (if the student has failed four or more classes in a semester), considering: the student’s overall academic and attendance records; the student’s family’s financial needs; and the student’s agreement to participate in some form of work-study program that will allow the student to succeed in both areas. No employment certificate revocations are valid during July and August.

Where do you go to look for a job? It’s not as if someone walks door to door, inquiring if anyone inside is in need of a job! Finding a job is a job unto itself! It takes determination, guts and stamina! For starters, online services advertise jobs by field of interest and geographic location. You can also read the classified ads in newspapers, check out community bulletin boards at libraries, town halls, coffee shops and even some restaurants. Periodically, local job fairs are advertised in newspapers and on TV, featuring sometimes dozens to hundreds of employers. These fairs provide an excellent opportunity to find out about what jobs are out there and to give your resume to those businesses which interest you. Some towns advertise jobs for teens at a recreation department office or town hall. There is also nothing wrong with visiting local businesses in person to ask if there are any job openings. Just remember to look sharp when you go – no sagging jeans with your underwear showing. Make good eye contact and be polite. You should be prepared to fill out a job application. This way, a business owner can see that you are eager and willing to work. In short, you’ve got game!

Finally, networking, networking, networking is what it’s all about! The saying goes that landing a job is based 97% on who you know and only 3% on what you know (meaning your education, qualifications, and skills). It may sound sobering, but ask those employed around you how they got their current jobs. Many or most will mention a friend, family member or acquaintance who told them

about the job or put in a good word for them or got them “in the door” with an interview. That’s just simply the way the world works! So get in the habit of asking friends, neighbors and family members to be on the lookout for the type of job you hope to get. Many sets of eyes and ears are better than one when job hunting.

Developing a solid, eye-catching resume is the next item on the agenda. Your teacher or guidance office should assist you with resume writing workshops that focus on highlighting our strong points – skills, education, experience, awards – and de-emphasizing possible employer “red flags” such as a delay in your graduation from high school due to suspension, expulsion, criminal penalties, illness and family issues. You’ll also need to be able to provide names of a few personal or professional references on your resume, to vouch for your excellent work habits and personality. Be thinking about who you might ask, such as: a teacher who really liked your work, effort and creativity, a neighbor who paid you to water plants and feed the dog when she was away, a camp director who hired you as a volunteer one summer to help entertain kids.

**DO NOT FEEL OVERWHELMED** by the task of creating a resume! Help is available. If, for some reason, you are not comfortable going to your school guidance office for this, then seek out a professional who does resume-writing for a living. Many non-profit organizations offer such assistance for free.

Let’s say you get your resume ready and have found a few jobs online that sound attractive to you. You’ll want to send your resume tailored to the job in question with a “cover letter” to this person or place of employment. The resume should not be tailored in a way that falsifies your information, but rather, emphasizes certain of your skills or achievements which the potential employer(s) will value. For instance, if you have janitorial and babysitting experience, and are applying for a position at a day care center, you’d want to include the janitorial work experience, but “play up” or highlight your babysitting experience more (i.e., discuss it more, possibly provide more personal references from babysitting jobs).

Your cover letter should be short and well-written (with accurate spelling) and to the point. It just needs to introduce you, explain briefly why you’re applying for the job, mention that you are attaching your resume with references, and close with the fact that you look forward to meeting with them concerning the job and hope to hear from them soon. Your cover letter is meant to “whet the appetite” of the reader enough that they want to interview you to learn more about fabulous you! Again, teachers, counselors and outside professionals can help with cover letters. While short, cover letters are definitely challenging to write. You want to sound smart and confident, but not cocky, and very interested but not in a fake, overly-effusive way. Also, the letter must be succinct – not longer than the front of a page. If your cover letter is good enough – smart, intriguing and to the point, the employer will bother reading your resume. If your resume is decent enough, hopefully, you’ll land an interview!



What to wear to an interview is a delicate question. Certainly, over-dressing is preferable to under-dressing for the occasion. Think about it: It’s better to show up and be the only guy in a suit, rather than the only guy NOT in one. Overdressing is a sign of respect; under-dressing is a sign of lack of respect. If you have a friend or contact in the office, ask them how the employees dress. But again, err on the side of professional: a suit and tie for men, and a suit or tasteful dress or skirt for women.

Always get to your interview early. You only have one chance to make a first impression, and nothing could be worse than making a bad one by arriving late to your interview. What does that say to the

employer about your work ethic? Arriving late to an interview lets the employer know that you don't think they are important, and also clues them into the fact that you'll be late for work if hired! So don't do it! Be there 10 minutes early, with a copy of your resume (and a writing sample if they've mentioned wanting this) on hand. Bring a newspaper or book to read as well, so that you look studious and industrious – a person who uses his/her time well -- while you are waiting for the interviewer to arrive. **KNOW YOUR RESUME** before you go into an interview. Do not embarrass yourself by being unfamiliar with dates of employment and schooling that you list on your resume, because the interviewer will be asking you. Also be ready to answer to any "gaps" on your resume due to illness, family issues, incarceration, etc.

Then, think about questions you might ask the interviewer about the place of employment or tasks of the job in question. Do this **BEFORE** you go to an interview. Interviewers always ask if the interviewee has any questions. If you have none, it could be interpreted as disinterest, shyness/meekness, failure to pay attention, or maybe, that you're just not smart. None of these interpretations is going to help you get that job! Do your homework about the employer and his/her business before the interview, so you can ask good, informed questions. Remember that the interviewer will be interviewing possibly many candidates for the position, and you want to stand out in a good way! Nothing does this better than an intelligent, probative question. You want to convince the interviewer that you alone, out of all the candidates, deserve the job because you have the best background (skills, knowledge and experience) for it, the best personality, and a sufficient working knowledge of what the employer does, to enable you to be an asset to them. By the way, it bears mentioning that during the interview, you should make good eye contact with the interviewer in order to convey interest and attention. Looking away from the interviewer might be interpreted as disinterest or you trying to avoid some topic or some fact about yourself. It can create enough of a bad impression to cost you the job.

Be on time, dress the part, have your resume and questions ready (with a pad and pen to take notes studiously), and you're set to walk through the door with head held high and your outstretched hand ready to give a hearty shake. By the way, employers notoriously frown on limp handshakes. Practice to perfection, if necessary! **YOU CAN DO THIS!**

#### **What questions will an employer ask you?**



An employer will want to know why you have applied to work there and how your potential employment could benefit the employer. Be ready with some answers, drawing on your educational skills and experience. Role playing interviews is extremely helpful! If you do not do this in class, ask family members to role play with you. Even sitting in front of a mirror and forcing yourself to articulate exactly why you want this job, will be helpful to you.

#### **Are there questions an employer may not ask?**

Absolutely! By law, an employer may not ask about your: sexual orientation, age (although they may establish that you are no longer a minor!), race, ethnicity, religion, marital status, pregnancy status or health history. An employer could, though, legitimately ask if you would have trouble lifting 20 pounds over your head or if you have a valid driver's license, if such information were pertinent to performing the job in question. An employer may also ask if you've ever been convicted of a felony or misdemeanor, and may even inquire as to the crime(s) of which you were convicted. However, an employer may NOT ask if you've ever been "arrested" for a crime. This is because many arrests occur without charges ever being brought against a person. And even when a person is charged with a crime, it does not necessarily mean the person will be found guilty (i.e., convicted). An employer, while unable to discriminate against

a job applicant based on the person's criminal record, does have the right to protect him/herself from harm. So, if a person has a criminal record for stealing, a bank would have a legitimate reason not to hire that person, and a lawsuit against the bank for discrimination in hiring would fail. On the other hand, a coffee shop seeking to hire a lunch prep worker would probably not have a legitimate reason to eliminate a candidate who had a criminal record for stealing.

In addition to an employer's right to ask about felony and misdemeanor convictions, since 2005, every employer in New York State, regulated by the Department of Health (DOH), the Office of Mental Health (OMH) or the Office for People with Developmental Disabilities (OPWDD) must screen employment candidates with a criminal background check. Without going into too much detail, the Criminal Background Check Law allows employers to reject employment candidates or fire current employees if they have committed one (or more) of a certain list of felonies (misdemeanors are not included) within the past 10 years. The regulations for the DOH are the strictest, prohibiting an agency regulated under that department from hiring a person who meets these criteria. OMH and OPWDD are slightly more lenient, permitting the agency to consider hiring a person despite their having possibly met the "un-hire-able" criteria. An employee fired or a candidate not hired by DOH, OMH or OPWDD under the Criminal Background Check Law is granted an opportunity to challenge the decision, but overcoming such a decision is difficult. Since DOH, OMH and OPWDD hire people in the medical field, many RNs (registered nurses), CNAs (certified nurses' assistants), PAs (physicians' assistants), other hospital or nursing home aides, home health care workers, day care workers, and even some doctors have been prevented from using their skills and medical/childcare licenses while waiting for the nine-year clock to tick on their "sentence." Having a criminal record definitely puts a person at a disadvantage in the labor market! With so much unemployment and so many good and able candidates applying for every job, why would an employer choose a person with a criminal record over a person with a clean record? It doesn't happen often. It's just that simple.

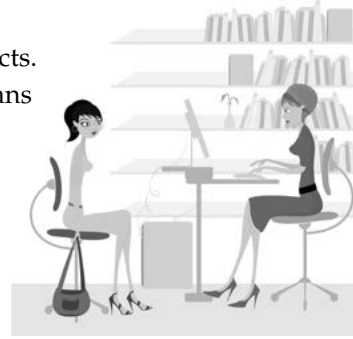
Another reason not to have a criminal record (as if you needed another reason), is that eligibility for federal financial aid for students is suspended for varying lengths of time (one year to indefinitely) for those convicted under state or federal law of selling or possessing controlled substances. Obviously, the length of time of a person's ineligibility for federal money depends on the amount of controlled substance the person was convicted of having and/or selling and the number of times the person has been convicted of such an offense. Further, persons who have prior felonies (and, in certain cases, even certain prior misdemeanors) can, by law in New York, be banned completely or limited from full employment in at least the following occupations: banking, state civil service jobs, corrections, notary public, security system installation and maintenance, private investigators, bail enforcement agents, private security agencies, security guards, child care, and, as mentioned previously, health care. Getting out of prison at the end of a prison sentence is hardly the major hurdle. Reestablishing one's life and being able to get a job that provides adequate pay and personal satisfaction is the true barrier to successfully reentering the community and remaining there, as a contributing citizen.

Back to our discussion about landing a job, suppose you completely "rocked" the interview, and are offered the job. Now what? What are your rights and what are your obligations to your employer, coworkers and clientele? Where can you turn if things go downhill?

## Part II: Keeping the Job

Let's start with some legal basics. In New York State, most people and especially young people do not have express written employment contracts. Their employment is covered by the "employment at will" rule. This means that

- An employer is free to terminate the employment relationship at any time, with or without notice (warning), for any reason or no reason at all, as long as it's not a discriminatory reason (explained in detail, below)



AND

- An employee is free to end the employment relationship at any time, with or without notice for any reason or no reason at all.

If you work for an employer whose employees are represented by a union, there will be a labor contract, also called a "collective bargaining agreement," which will govern the terms and conditions of your employment. In this case, the "employment at will" rule will not apply to you.

Most reputable employers do not act arbitrarily when making employment decisions. They base their decisions on legitimate business reasons. It is in an employer's interest to manage its workforce fairly so that its employees will be productive and happy allowing the business to prosper. A high rate of employee turnover is very costly to a business. If a business has to spend money and time training new employees all the time, it cannot focus on its core functions, whether that is caring for sick people or manufacturing auto parts. An employer will also have to justify its employment decisions under a number of different laws and it makes good business sense to have a good reason for its actions.

The employment at-will rule does not require an employer to have "just cause" for a termination decision or to go through certain steps before it disciplines an employee. It also gives employees the freedom to leave without giving the employer "notice" for a better job. There is no legal requirement that a person give his/her employer two weeks' notice before he/she resigns. However, there may be other good reasons to do so. For example, an employer may have a policy that states that employees who do not give two weeks' notice prior to leaving will forfeit any accrued, unused vacation time, and there is nothing illegal about this.

Many employers, but not all, have **employee manuals** that spell out the company's policies and procedures. Often an employee handbook will specifically state that it is not a contract of employment and that nothing in it changes the employment at will relationship between the employer and employee. **Read these manuals carefully as soon as you receive them.** They will contain important information about work rules, possibly including; whether there is a "probationary" period of employment, salary levels, holiday pay, dress code, codes of conduct in general, accruing (earning) vacation days and sick days, procedures for requesting time off for bereavement leave, vacation, sickness, or personal reasons, health care plans, retirement plans, rules of confidentiality, trade secret protections, non-compete or restraint of trade clauses (restricting an employee's right to work in the same field for a rival employer in a nearby location, within a certain period of time), disciplinary procedures, grievance procedures (how you file a workplace-related complaint) and termination procedures, etc.

Only in very rare circumstances will an employee manual be considered an "implied" contract of employment, however, an employee manual does contribute to the conditions of employment. These



conditions of employment are created by the totality of: your employment contract (if you are not an employee at will and actually have a contract), letter of job offer and acceptance confirmation, terms and policies in the employee handbook and any other written materials given to you and other employees, claims written on any fliers, classified ads or online sources advertising the job, verbal assurances given by authority figures at the place of employment, the patterns and practices of the office (e.g., two late morning arrivals are overlooked, but the third is penalized; employees can work from home with a sick child; lunch is eaten on-site and for 30 minutes only; no pets are allowed in the office), and federal and state laws.

Just because there may be a clause in an employee handbook that gives or takes away any employee rights, it does NOT mean that this clause is necessarily legal! An employer can put whatever clause she wants in an employee handbook, but whether or not the clause will be upheld in a court of law is a completely separate matter! If you, as an employee, are treated in a way that seems unfair, but which stems from a documented workplace policy (i.e., is included in the handbook), you would be wise to listen to your gut instincts! Speak to a lawyer to see if the policy “seemed” bad to you for a reason. Give yourself some credit for knowing what’s up! You may be 100% on target that your employer is taking advantage of his employees, right in front of your noses, and you don’t even realize it because the policy is in print! In short, you cannot legally agree – or be held to – a policy term that gives you less rights than you have by law!

This brings us to the point that, even though you may be an employee at will, you still have rights as an employee that come from federal, state and local laws, as well as from the “common law.” Sometimes there are federal, state and local laws addressing the same topic. Many times a state’s law provides more protection than the companion federal law. An employer must obey BOTH laws. Let’s look at some of the major labor and employment law topics a little bit more in depth.

### **The Employment Discrimination Laws**

#### **The Major Federal Employment Discrimination Laws: Title VII, ADEA and ADA**

Federal law makes it illegal for an employer to discriminate against an individual when making all kinds of employment decisions, including decisions about hiring, discipline, wages, benefits, and terminations (firing), based on a person’s race, color, religion, creed, sex, pregnancy and national origin, age (over 40) and disability. These protections are found in three very important federal laws: Title VII of the Civil Rights Act of 1964 (Title VII), The Age Discrimination in Employment Act of 1967 (ADEA), and the Americans With Disabilities Act of 1990 (ADA). All state and local government employers and private employers with 15 or more employees are “covered” employers under the ADA and Title VII. Covered private employers under the ADEA are those having 20 or more employees. This is true regardless of the state in which you work, and it is very likely you will hear about these federal laws in the workplace. These laws are all administered by a federal agency called the Equal Employment Opportunity Commission (EEOC [www.eeoc.gov](http://www.eeoc.gov)).

There are other federal laws that protect against discrimination. Some of these include: the Civil Rights Act of 1866 (protects against racial discrimination in contracts); the Equal Pay Act of 1963 (prohibits employers from paying unequal wages to men and women for equal work); the Pregnancy Discrimination Act of 1978 (makes clear that pregnancy is protected under the definition of gender discrimination in Title VII of the Civil Rights Act); the Family and Medical Leave Act (FMLA - provides 12 weeks of unpaid leave to an employee for the birth, adoption, foster care or medical care of a child, or for the care of an ill spouse or parent, or for the employee’s own illness); the Fair Labor Standards Act (FLSA - provides wage and hour regulations for workers); and the National Labor Relations Act (NLRA - protects labor unions and prohibits unfair labor practices).

Employment discrimination can be intentional, such as when an employee or group of employees is singled out for **disparate** (different, unequal) **treatment**. Or, discrimination can be unintentional, such as when, due to a particular policy or procedure, an employee or group of employees is disparately impacted as a result. For example, if a new work policy is that only those who can stand for eight hours can be cashiers, it would have a disparate impact on the employees who want to be cashiers, but who are in wheelchairs. An easy accommodation, which we'll discuss more in depth in the next chapter, would be to simply lower the cash register to allow for use by employees in wheelchairs.

Let's say you are female and notice that every time you are up for a promotion at your law firm, a less qualified (less experienced) male associate is chosen instead. Or perhaps you are African American and happen to see that the pay stub of a co-worker hired at the hospital at the same time as you, for equivalent work, reflects a salary considerably higher than yours. Maybe you are the only gay employee at a car dealership and return to your locker everyday to find new, lewd magazine photos taped there portraying gay couples. What if you are 55 and realize that every time someone at the manufacturing plant where you work is named "employee of the month," that person is 30 or younger? Imagine if you were the only Muslim employee at an advertising firm and two years in a row, they decide to have the annual office picnic at noon during the month of Ramadan, when you are fasting during the day. Think of how you might feel if you are one of two Asians at a particular department store and you are fired the day you return from an unexpected three-day sick leave, but you have witnessed many other, non-Asian employees return from even longer, unscheduled sick leaves without penalty, despite the fact that your boss is Asian.

Any of these situations could well be evidence of employment discrimination. Typically, it takes considerable "evidence" to prove a case of employment discrimination, where, as noted, employment rights are violated based on one's race, color, gender, age, religion, ethnicity, sexual orientation, disability, or other legally "protected" reason. Discrimination can be manifested in many ways, as illustrated in the examples above, including: unfair termination, assignment of undesirable shifts, demotion (opposite of promotion), denial of earned pay (even of the bonus that other "similarly situated" employees are getting), denial of pay equal to that of other employees of the same work status, denial of overtime pay or overtime opportunities, denial of promotion, excessive discipline, unequal discipline, denial of earned benefits (such as sick time or vacation time), denial or effective denial of fringe benefits (such as the office party you cannot attend due to your religious faith), failure to rehire if promised, termination after sick leave or injury, undesired and undesirable transfer, undesired work reassignments, intimidation tactics (e.g., you are told you must work a particular Sunday, even though you are not scheduled to do so, or you will lose your shift or your window office or your vacation days), reduction in pay, reduction in hours, reduction in "substance" of the work assigned, **sexual harassment** and "**hostile work environment**" evidence (discussed below). Discrimination against disabled or differently abled employees will be covered in the next chapter in detail.

In addition to prohibiting discrimination, these same federal laws make it illegal for an employer to "retaliate" against a person for exercising his/her rights under the laws. What exactly does this mean? An employer may not take adverse (negative) action against an individual who either: (a) participates in protected activity or (b) opposes employment practices that he/she in "good faith" believes violates the law.

Here are some examples. If you file a charge at the EEOC claiming that your employer's failure to promote you to a supervisor's job was based on your disability, you have participated in "protected

activity” and your employer may not turn around and fire you because you filed the charge. The same would be true if you were merely a witness in a case before the EEOC. If you believe that a manager is sexually harassing your female co-workers by constantly making crude jokes and comments about their bodies and you inform the Director of Human Resources about your concerns, you have “opposed” an employment practice that you, in good faith, believe violates the law. Once again, your employer may not legally fire you or assign you less overtime because you brought your concerns to the attention of higher management. In reality, illegal retaliation may occur. If you believe you are experiencing retaliation from an employer from engaging in protected activity, keep detailed notes on what you are experiencing and seek legal advice.

### **New York State Human Rights Law**

New York State’s Human Rights Law provides broader protection against employment discrimination than the federal law. It covers employers with few employees, includes more “protected” characteristics, and has broader definitions of certain characteristics, such as disability and age. A New York employer with at least four employees may not discriminate against individuals based on age (18 and up, as opposed to the federally protected 40 and up), race, color, religion, sex (includes sexual harassment), pregnancy, sexual orientation, marital status, military status, national origin, disability, and pre-existing genetic characteristics. Retaliation is also illegal. The Human Rights law is enforced by the New York State Division of Human Rights ([www.dhr.ny.gov](http://www.dhr.ny.gov)).

The New York State Human Rights Law also makes it illegal for an employer to deny employment to a person who has been convicted of a criminal offense or because an employer has concluded that he lacks “good moral character” due to the conviction. The Human Rights Law and the Corrections Law together provide rules about employment of those with a criminal conviction record.

An employer may not discriminate against applicants and employees who have been convicted of a criminal offense UNLESS:

- There is a “direct relationship” between the conviction and the employment sought or held (e.g., a person convicted of robbery applying for a position as a bank teller; a person convicted of child abuse applying to be a day care provider); OR
- Employing the person would involve an “unreasonable risk” to the property or to the safety or welfare of specific individuals or the general public.

An employer must consider a list of factors before making an employment decision on the basis of an individual’s criminal background. These factors are:

- The relationship between the prior offense and the individual’s ability to perform the specific job
- Seriousness of the offense
- Person’s age at the time of the offense
- The length of time elapsed since the offense
- Information produced about the individual’s rehabilitation and good conduct (this includes a “Certificate of Relief from Disabilities” and a “Certificate of Good Conduct,” obtainable from the Department of Criminal Justice Services (DCJS; [www.criminaljustice.ny.gov](http://www.criminaljustice.ny.gov)).

Remember, it is illegal in New York for an employer to ask you if you have ever been arrested or if anyone has ever made any criminal accusations against you. The fact is, many arrests do not lead to convictions, and many charges are dismissed or the individuals are not convicted. Therefore, it would not be fair to penalize individuals who are merely arrested or charged.

## **New York Recreational Activities Law**

An employer cannot discriminate against employees on the basis of their off-duty legal “recreational activities” such as dirt biking, legal use of consumable products such as cigarettes or alcohol, or an employee’s political activities, as long as these take place outside of work hours, off- premises and do not use the employer’s equipment or property.

### **What Do You Do If You Believe You Have Suffered Employment Discrimination?**

Most employers have an equal employment opportunity policy that contains a procedure for employees to follow if they have a complaint of discrimination or retaliation. It may be appropriate to submit your complaint to your employer (typically, by addressing the Human Resources Department), and hopefully your concerns will be addressed and resolved.

Except in cases of hostile work environment harassment, which are discussed later in this section, it is not legally necessary for you to first raise your complaint with your employer. You may file a charge with the EEOC ([www.eeoc.gov](http://www.eeoc.gov)) or the New York State Division of Human Rights ([www.dhr.ny.gov](http://www.dhr.ny.gov)). You could also file a complaint with the Civil Rights Bureau of the New York State Attorney General’s Office<sup>15</sup>. If you file a claim of employment discrimination with the EEOC, you can also, at the same time, file a state claim by including the New York State Division of Human Rights on the EEOC form. The EEOC will then share the complaint with the other offices. There are EEOC offices in Albany and New York City, as well as in other parts of New York.

If you want, ultimately, to file a lawsuit against your employer in federal court (which you’d need to do if asserting a claim under Title VII, the federal anti-discrimination statute), you would first need to file a complaint with the EEOC within 300 days of the last date the discriminatory act(s) occurred. Claims filed with the New York State Division of Human Rights must be filed within 365 days of the last discriminatory act(s).

It is important to be prepared when you meet with EEOC or Human Rights’ representatives to discuss your complaints. Bring notes describing when, where and how the alleged discrimination took place, as well as any other evidence of discrimination you may have (photos, printed emails, etc.). Even bringing a co-worker or friend who can back up your claims is a good idea.

The EEOC and Division of Human Rights will take information from you and then ask your employer to respond to your charge, and provide information supporting its position. Once a timely (within the time limits) claim has been filed, the agency must investigate the claim. Long waits are, unfortunately, notorious. Unlike the EEOC, which merely investigates complaints and issues a “right to sue” letter (discussed below), the State Division investigates and holds hearings on claims, but only if it determines that a particular claim has “probable cause” (i.e., that there was a reasonable basis for the claim[s] made) . If there is a finding of “no probable cause,” the claim will be dismissed. You can appeal such a dismissal to state court, but frankly, such appeals are seldom successful, as the employee has to prove that the “no probable cause” finding was the result of an “abuse of discretion” on the part of the agency. This is a high hurdle to overcome. If, on the other hand, probable cause is found, the claim will proceed to the discovery (fact-finding, investigative) phase, and then on to a hearing.

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15. Filing a complaint with the Attorney General’s Office does not affect court filing deadlines or the deadlines of any other administrative agencies. After first investigating a claim and then trying to resolve a situation with an employer, the Attorney General’s office might bring a case on behalf of the “people” of New York, as opposed to the individual employee, if the case could potentially have “wide application” (i.e., an impact on many New York employees). For example, the Attorney General’s Office might bring a case if a huge company routinely discriminates against female employees in New York when hiring for managerial positions.

If you file a complaint with the EEOC, it has 180 days to investigate. When the 180 days has run, you have two choices: you can either allow the EEOC to hold onto the complaint to investigate it further, or you can ask for a “**right to sue**” letter from the EEOC and file a claim in federal court. If you choose the former option, and the EEOC holds onto the complaint, it will eventually issue a “right to sue letter” along with a finding of “**probable cause**” or “**no probable cause.**” Whether or not the EEOC finds probable cause, once the right to sue letter is printed, you have 90 days to file a complaint in federal court that will begin the formal litigation process.

To recap, if you want to bring a federal claim(s) against your employer, you must first file a complaint with the EEOC. If you are not interested in bringing a federal claim(s), you can file a complaint with the State Division for Human Rights or, you could simply bring your case directly to state court to file a complaint of discrimination under New York State’s Human Rights Law.

If you choose to file in federal court, you can also add state and city law claims (but if you file in state court, you cannot add federal claims). The reason this is important to know is that each system provides different means of compensation or “damages.” For instance, state law claims would allow you unlimited amounts of monetary compensation for acts of discrimination suffered, such as the amount you would have earned over the past six years had you received that promotion you deserved. On the other hand, under Title VII, in federal court, there are limits to the amount of compensatory and punitive (monetary amounts purely to punish the employer for what he or she did) damages you can be awarded, based on the number of employees working there, but not less than \$50,000 and capped at \$300,000. Further, punitive damages can only be awarded in federal court if the employer can be shown to have acted with “malice” (evil intent) or “reckless indifference” to your rights. Under Title VII, you can receive **back pay**, with interest (compensation for amounts you didn’t receive if you were terminated unjustly or demoted, etc.), **front pay** (amounts not received because you weren’t hired or promoted), reinstatement to the job, lost benefits, other compensatory damages, punitive damages, and attorneys’ fees, among other damages.

By filing with the State Division, you can receive damages including back pay, with interest, front pay, reinstatement, lost benefits and unlimited compensatory damages, but not attorneys’ fees or punitive damages. It is of course important to understand that it is up to the discretion of the agency as to what kind(s) and what amount(s) of damages are awarded in any particular case.

Other types of legal actions a person could take in response to employment discrimination are:

- Tort claims (1-year time limit) such as for “intentional infliction of emotional distress” ([discussed in more detail in the chapter on torts]; purposeful emotional harm; requires proof of outrageous conduct –not “mere insults” –and must cause extreme distress) or “defamation” ([discussed in more detail in the chapter on torts]; publically “dis-ing” a person’s name and/or reputation by communicating a false statement about him/her verbally[slander] or in writing[libel] to one or more other persons);
- Breach of contract claims in state court (3-6 year time limit);
- Wage and hour law violation claims in state court (3-6 year time limit) or federal court (2-year time limit);

- New York State Workers' Compensation claims<sup>16</sup> (3-6 year time limit); and
- New York State personal injury claims (3-6 year time limit).

## **The Wage and Hour Laws**

### **The Fair Labor Standards Act**

The Fair Labor Standards Act (FLSA) is the federal law that requires an employer to pay you the federal minimum wage for all hours worked up to 40 in a work week AND overtime, time and one half of your regular rate of pay for all hours that you work over 40 hours in a work week. This law is enforced by the United States Department of Labor's Wage and Hour Division ([www.dol.gov](http://www.dol.gov)). As your career advances and you gain specialized skills, you may become exempt from the FLSA, but when you are first starting out, you will most likely be paid on an hourly basis and be eligible for overtime pay. There is no limit on the number of hours that a person over the age of 18 can work, but you must be paid for all hours worked.

### **New York's Labor Laws**

New York State's Labor Law contains many important protections for workers, including those on wages and hours. It is enforced by the New York State Department of Labor ([www.labor.ny.gov](http://www.labor.ny.gov)). New York's minimum wage is traditionally higher than the federal minimum wage.

New York's Wage Theft Prevention Act requires all New York employers to give each new hire and all existing employees by February 1<sup>st</sup> of each year, a written notice that states:

- The employee's rate of pay, and his/her overtime rate if the employee is eligible for overtime pay;
- How the employee is paid: by the hour, weekly, or on a commission basis (such as by the number of bikes or insurance policies sold);
- The regular payday
- The employer's official name; and
- Any allowances taken as part of the minimum wage (this could happen if you work in a restaurant and a portion of your wages is received in tips).

An employer must give you a new notice if your wage rate changes. Your pay stub could very well have the notice on it so read it carefully! If you have a question about your pay rate or any changes, ask your employer. The law protects against retaliation for making a complaint or opposing a practice that you, in good faith, believe violates the Labor Law. As always, if you suspect retaliation for a complaint you made, stand up for yourself and seek legal advice as to how best to proceed.

**Key Point:** Keep track of the days and hours you work so that you can review your paycheck to make sure it is accurate. Payroll companies make mistakes and payroll stubs can be confusing. If you believe there is an error, ask the human resources department or payroll manager about it as soon as you receive your check.

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16. Generally, workers' compensation is the remedy for workers when injured on the job. If any employee is injured, he should report the injury as soon as possible to the employer, as the timing of the report can affect how any necessary medical treatment is handled or billed. The employee then needs to fill out official paperwork regarding the injury or accident, attaching any medical reports, diagnoses and bills. "Workers' Compensation" or monetary compensation will be awarded to the employee by the State Workers' Compensation Board, based on the extent of the injuries, the projected amount of time the employee will be out of work recovering, and the employee's average weekly salary. Employers carry insurance to cover these costs, or they pay into a state fund to do so. Employees then receive a certain percentage of their salary while out on "sick" or "temporary disability" leave. In exchange for receiving workers' compensation, employees typically waive (give up) their right to sue the employer for the injuries suffered. Even if the employee's own negligence (lack of reasonable care) caused her to be injured, workers' compensation generally applies. However, if there is proof that the employee was drunk or high when the injury or accident occurred, the Workers' Compensation Board will likely deny any workers' compensation award.

### **Can My Employer Make a Deduction from my Paycheck?**

Let's say you are a cashier at a grocery store and your cash drawer is short at the end of your shift by \$3.21. You honestly don't know how it happened, but obviously there was some mistake. Your employer MAY NOT deduct the shortage from your pay. Section 193 of NY's Labor Law allows an employer to make deductions from an employee's wages only if the deductions:

- Are made by law (e.g., child support, alimony payments, etc.) or
- Are authorized in writing by the employee AND
- Benefit the employee (health insurance co-pays, retirement savings, charitable contributions, union dues).

Your cash drawer shortage does not qualify as a permissible deduction. And your employer may not ask you to give him/her the shortage in cash as a separate transaction. Of course, if your shortages continue, your employer may discipline you for performance reasons.

### **Do I Get a Rest Break or Meal Break on the Job?**

Neither federal nor New York State law requires an employer to provide coffee or snack breaks or rest periods. If an employer does provide rest periods or coffee breaks of short duration (up to 20 minutes), these must be counted as working time and you would get paid for them. However, generally, federal and New York State laws require a meal period to be given employees for at least 30 minutes. An employer can provide for a meal period of one hour if it desires. Meal periods are not considered working time and you do not get paid for them so long as you are completely free from duty for the purpose of eating a meal. New York Law also regulates the number of consecutive days a person can work without time off. It is worth noting that, depending on the employer, you may be required to remain on-premises during meal time, for various reasons. A good example of this is correctional officers at certain jails, who must eat in the employee cafeteria on-site, to be available in case extra back-up is needed in an emergency.

### **Time Away from Work**

New York Labor Law also provides for time away from work for a variety of different reasons. Aside from the well-known reasons of birthing a child or caring for a sick parent, spouse or child, other permissible causes include: jury duty, blood and bone marrow donation, adopting a child, and visiting with a spouse who is home on leave from military service. The law does not require your employer to give you vacation, sick or personal days. Most employers, however, provide for these types of paid time off. Be sure to read your employer's policies to learn about these benefits.

### **Nursing Mothers' Rights**

New York Labor Law also protects a nursing mother's right to express (pump) breast milk at work. Employers must permit employees to use paid break or meal time for this purpose for at least three years post birth and must make reasonable efforts to provide a private location. Nursing mothers, as referenced earlier in the chapter on citizens' rights, also won the right to breastfeed in public, under New York's Human Rights Law in the mid-1990s.

### **Whistleblower Protection**

New York Labor Law prohibits retaliation against any health care employee who discloses or threatens to disclose to a supervisor or public body any activity, policy or practice that he/she, in good faith, reasonably believes constitutes improper patient care. The employee must:

- Bring it to supervisor's attention first; and
- Give the employer a reasonable opportunity to correct it.

Further, state and federal whistleblower laws protect employees of all kinds from being fired as a result of complaining about unsafe working conditions<sup>17</sup>.

### **Protection of Your Personal Information Law**

The Labor Law also prevents an employer from disseminating personal information about you to others and requires an employer to take certain precautions to safeguard your personal information. Personal information means your social security number, home address, home telephone number, personal e-mail address, and driver's license number.

### **Worker Safety and Health**

Both the federal "Occupational Safety and Health Act" (OSHA) and the New York State "Right to Know Law," as well as other state regulations, including building codes, require safety and health standards at places of employment to avoid illness, harm or death on the job.

### **Pensions**

The Employee Retirement Income Security Act (ERISA) is the federal law that regulates employee pensions and welfare benefit plans, such as 401k plans.

### **Business Closings and or Mass Layoffs**

Federal and state laws also require employers to provide advance notice of a plant closing or mass layoff. The federal Worker Adjustment Retraining Notification Act requires 60 days notice, while New York's Worker Adjustment Retraining Notification Act requires 90 days.

### **Unemployment Insurance Benefits**

If you have been laid off (temporarily) or fired, through no fault of your own, you have the right to file an application for unemployment benefits at the local office of the New York State Department of Labor. You can receive, depending on your state's law, a certain number of weeks of benefits so that you can survive while looking for new work. There is even some funding for worker retraining, if you need to learn new skills to get a new job. If you exceed the number of weeks of benefits permitted under your state's law while still searching for work, you will lose your unemployment benefits and need to go on welfare, otherwise known as public assistance. Welfare is federally funded (and in some states, like New York, also state-funded), and there is actually a lifetime cap (maximum) on how long a person is eligible to receive it. This maximum number of weeks has been increased in recent years, so it would be worth checking, if you need to go on welfare.

The way in which unemployment benefits work is that employers pay into an unemployment insurance fund, thereby providing a percentage of the amount an employee will receive as benefits. Therefore, the employer has a right to "contest" (challenge) an employee's unemployment claim, saying that the employee never worked for him, or didn't work for him the length of time claimed, or was fired for cause (e.g., because he was routinely late to work, or created constant disturbances in the workplace, etc.). If this happens, a predetermination hearing will be held to decide whether or not the employee will receive unemployment benefits. This makes sense, because employers could challenge the payment of every periodic claim to avoid having to pay a percentage of the benefit and to avoid any increase in the employer's unemployment insurance policy. With a predetermination hearing, an unbiased agency can decide if the employee is eligible to receive benefits or if the employer legitimately challenged the award because the employee resigned or the employee was fired for misbehavior or incompetence.

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<sup>17</sup>. See section on OSHA, below.



## **Unions and the Workplace**

The National Labor Relations Act (NLRA) is the federal law that governs union organizing and collective bargaining. It prohibits unfair practices by employers and unions. The NLRA is administered by the National Labor Relations Board ([www.nlr.gov](http://www.nlr.gov)).

## **Family and Medical Leave**

Many people will find that they need to be absent from work at some point in their careers because of medical or family reasons. You may be injured on the job or suffer a non-work related injury or illness that makes it impossible for you to work. You or your spouse may give birth to a child. You may have to take care of an ill parent or child. The federal Family and Medical Leave Act (FMLA) requires covered employers<sup>18</sup> to provide eligible employees (those who have been on the job for one year and worked a minimum of 1250 hours) with up to 12 weeks of unpaid, but job-protected<sup>19</sup>leave:

- To care for a newly born or adopted child
- To address his/her own serious health condition or that of a family member
- To deal with certain emergencies that may arise when a family member is in the Armed Services.

The FMLA also provides eligible employees with up to 26 weeks unpaid leave when they are caring for an injured family member who was in the Armed Services.

Even if you are not eligible or your employer is not covered by FMLA, your employer may have a policy or practice of providing leaves to employees for medical and/or personal reasons (e.g., all employees get three days unpaid leave for death of immediate family members, to attend funerals, etc.). Be sure to check with your human resources department.

If you are injured at work, as mentioned above, you may be entitled to Workers' Compensation benefits to replace some of your lost income while out of work. If your injury is not work-related, you may be entitled to disability benefits, which will also help you financially during your illness.

## **What is Work Place Harassment and How Do I Handle It?**

Sexual harassment receives the most news attention of all the forms of work place harassment, but employees can also be the victims of racial harassment, or harassment based on national origin, disability, or the fact that they have exercised their rights under the law (e.g., complained about unfair or unsafe worker policies). While we will focus on sexual harassment, the same legal standards apply to all forms of harassment.

Simply put, unwelcome conduct on the basis of sex that affects a person's job is sexual harassment. Sexual harassment is a form of sex discrimination and it violates federal and New York State law.

## **Did You Know?**

- A harasser can be any supervisor, co-worker, employer, employer representative (agent) or employer vendor
- A victim is anyone affected by the offensive conduct, not just the person to whom the conduct is directed (e.g., a co-worker stressed out by witnessing the conduct)
- The victim or harasser can be a man or woman
- It is not necessary to have suffered economic injury.

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18. "Covered" employers, as noted earlier in this chapter, refers to employers who are obligated to abide by this law because they have at least the minimum number of employees the law requires.

19. FMLA eligible employees have the right to be reinstated to their position or an equivalent one at the end of their leave. If you believe you have been reinstated to a non-equivalent position in terms of pay or responsibility, you need to complain to your Human Resources Department and seek legal advice, if necessary.

## **What is Sexual Harassment?**

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct:

- Explicitly or implicitly affects an individual's employment,
- Unreasonably interferes with an individual's work performance, or
- Creates an intimidating, hostile, or offensive work environment.

## **How Can You Tell If Conduct Is Unwelcome?**

- Conduct is unwelcome if the recipient did not initiate it and regards it as offensive.
- Some sexual advances are so crude and blatant that the unwelcome nature is obvious from the advance itself.
- Usually, however, whether the conduct is "welcome" will depend on the recipient's reaction to it.
- Consensual dating, joking, and touching, for example, are not harassment if they are welcomed by the persons involved. But remember: a person may consent to behavior but still find the conduct unwelcome, such as when a person feels pressured to consent to protect his/her job.

## **Types of Sexual Harassment**

There are two types of sexual harassment:

- Harassment that results in a Tangible Employment Action
- Hostile Work Environment

## **Only Supervisors Can Be Involved in Tangible Employment Action Sexual Harassment**

A supervisor is a person who has the ability to take or recommend tangible employment actions or is someone who directs an employee's daily work activities.

## **Examples of Tangible Employment Action include:**

- Hiring and Firing
- Promoting and Failing to Promote
- Demotions
- Undesirable Reassignment
- Decision Causing Significant Change in Benefits
- Compensation
- Significant Change in Duties

## **What is NOT a Tangible Employment Action?**

- Unfulfilled threats that do not impact a tangible employment action
- Insignificant changes such as a job title and nothing else

Let's say your supervisor asks you to have sex with him and you refuse. If he then recommends to the employer (his boss) that you be fired (for some reason he manufactures) and you are, in fact, fired, that is sexual harassment. Your supervisor is recommending a tangible employment action (firing you) based on your response to his (inappropriate) demands. An employer IS ALWAYS liable for a supervisor's harassment IF it ends in a Tangible Employment Action.

## Hostile Work Environment Harassment

A Hostile Work Environment exists when the work environment is so polluted with sexual innuendo, talk and references that it unreasonably interferes with people's ability to do their work. A supervisor and/or co-workers can be involved in hostile work environment harassment. Not every joke, comment or isolated incident amounts to a hostile work environment. Typically, the evidence is cumulative, portraying an atmosphere of objectively severe, pervasive harassment, sufficient to create a work environment that a reasonable person would find abusive.

How do we know if the conduct is severe or pervasive enough? We look at the following:

- How frequent is the conduct?
- How bad was the conduct?
- Was the conduct physically threatening or humiliating?
- Did the conduct unreasonably interfere with work performance?
- What was the effect on the employee's psychological well-being?
- Was the harasser a supervisor? A co-worker?

Examples of Behavior that Contributes to a Hostile Work Environment of any Kind

- Discussing sexual activities
- Relaying off-color jokes
- Commenting on physical attributes
- Using indecent gestures
- Unnecessary/Offensive touching
- Displaying sexually suggestive pictures
- Using crude or offensive language
- Sabotaging a victim's work
- Repeatedly requesting to go on dates
- Talking in a sexually suggestive manner in a confined work area
- Assaulting someone physically, based on gender
- Using frequent egregious racial epithets (slurs)
- Making age-related comments
- Displaying a noose

A hostile work environment does not have to involve face to face interactions. A hostile work environment can be created using:

- E-mail
- Cell phone texting
- Digital photographs
- Blogs
- Social networking sites
- Notes left on desks
- Office signs, posters, photos displayed on walls

## **You Should Avoid All Sexually Charged Conduct at Work**

If you are NOT SURE if any of YOUR behavior amounts to sexual harassment, ask yourself these questions:

- Am I exhibiting verbal or physical behavior of a sexual nature?
- Is my conduct offensive to the people who witness it?
- Is my behavior being initiated by me and I have the power over the other(s) at whom my behavior is aimed?
- Does the employee have to tolerate my conduct in order to keep his/her job?
- Does my conduct make the employee's job unpleasant?

If you are still not sure your conduct is sexual harassment, ask yourself these questions, to gain a new perspective:

- Would my behavior change if my mom or dad or family member were in the room?
- Would I want someone in my family to be treated like this?

If the person doing the harassing is a coworker and not a supervisor, the employer will only be held responsible for allowing the conduct to continue if the employer was made aware of it or should have been aware of it because it was so blatant, and did nothing to stop it, or trivialized it (i.e., made the complaining employee feel ridiculous that he/she bothered the supervisor with a matter so "insignificant"). If an overture is not wanted or invited, the employee has the right to stop it and say "no." Even if, as an employee, you believe you have developed feelings for a boss or coworker, it is very important to understand that acting on these feelings could get you in a lot of trouble. Simply, such behavior has no place in the workplace. It's too risky. If you develop feelings for a coworker or boss, you would be well-advised to discuss the situation with that person away from the workplace. You may even ask to be transferred to a different department if you do start a relationship with a coworker or boss. It may sound drastic and crazy, but especially if one of the couple is in a position of authority at the workplace, it is inadvisable, legally, to combine work with workplace romance.

## **What Are Your Obligations if You Have Been a Victim of Sexual Harassment or Any Type of Employment Discrimination?**

If you believe you have been discriminated against at work, first, start keeping a journal or log of the harassing or discriminatory acts. Note the date, time and place of the incident, the actors involved, and details of what happened. Names of witnesses of the incident and contact information for them, would be useful. Be sure to make note of any attempts you made to notify supervisors of the incident(s), including their responses, if any. Other items to keep track of are how the incident affected you. Did it cause you headaches, sleeplessness, high blood pressure, the need to see a psychologist? Did it lead to a divorce because of the stress you brought home with you from the job? All of these "costs" are important to document. Use any employer complaint mechanism or grievance system available to file a complaint about the conduct. Many employers have internal policies that address harassment and a special procedure to use to file complaints. Some may even have an 800 number to call. If you are unsure what to do, tell a supervisor, manager or the human resources director – it doesn't have to be your supervisor.

Your employer is not allowed to retaliate against you for filing a complaint. It has a responsibility to investigate complaints and take prompt action to correct the problem. You should absolutely log any instances of retaliation you experience for having complained (such as increased hostile treatment, a demotion, shift changes, an unwanted transfer, or even firing, etc.). If you are too shy or afraid to speak to the employer's supervisor or human resources department on your own, bring a trusted coworker,

family member or friend with you. Sometimes, employees have only told their parents or friends about harassment at work, but this is not enough. The employer must be told! No person should have to put up with harassment at work!

If your complaint is not resolved in a way that eliminates the problem, and/or if you believe you have been retaliated against for complaining about a problem, you may file a charge at the New York Division of Human Rights and/or the EEOC. Remember: complaining to a boss or supervisor or human resources department does NOT stop the clock from ticking on an employee's time limit to file a complaint with the EEOC or state agency. Whichever agency handles your charge, it will conduct an investigation and make a determination (as discussed earlier in this chapter).

### **What Are Your Responsibilities at Work?**

The most important thing that you can do to further your career and create a good future is to show up to work on time and give your job your very best effort every day that you are at work. Be a team player. Work cooperatively and effectively with your co-workers and supervisors. Follow your employer's policies at work. Don't be clueless to your environment at work. You are the "newbie," so take your feet off the desk and forget about being impressed with yourself that you got the job. Everyone else there did, too! You can celebrate at home. At work, you need to keep your ears and eyes to the rhythm of the office. Closely observe: the style of dress, whether the boss is referred to by first name or more formally, break times, whether employees eat at their desks for lunch or leave, and for how long; whether snacking is permissible at one's desk, if talking on cell phones or texting is tolerated; whether radio playing is allowed, if mp3 players are used while working, what happens to employees who are tardy, who takes out the trash; how early in the morning employees notify the boss if they are sick; whether the boss requires doctors' notes; how much in advance employees ask for vacation days; whether there is an office coffee maker, and how much and how often employees contribute to the coffee fund; etc. You will find that the faster you heed the rhythms of the office, the faster you'll blend into the mix (and the less chance there'll be for your office mates to resent any of your "foreign" behavior).

Remember: No job is free of concerns or conflicts, but when they arise, handle them in a respectful, professional manner.

## Activities:

- 1) Have everyone in the class read job listings in a local paper for a week to see what jobs are available for high school students versus college versus advanced degree applicants.
- 2) Conduct a resume workshop in your classroom, providing “challenges” as follows:
- 3) Create a resume for a person who was previously incarcerated;
- 4) Create a resume for a person with no formal job experience;
- 5) Create a resume for a person who took years off from working out of the home to raise children;
- 6) Create a resume skill list for someone who has years of janitorial experience; years of camp counselor experience; years of running errands for people in the neighborhood for pay.
- 7) Practice writing cover letters for various jobs, making sure to include a small law firm, a non-profit organization, a grocery store, a big software company, a doctor’s office, a hospital.
- 8) Have a professional career counselor speak to your class about learning how to translate talents and experience into marketable skills for a resume.
- 9) Make a list of your skills, talents, job interests, job goals; explore what you want to do with your life.
- 10) Role play interviewing from both sides of the desk (interviewer and interviewee).
- 11) Role play office etiquette in different scenarios.
- 12) Scrutinize fictitious job applicants by their resumes to see what makes a “stand-out” candidate.
- 13) Have speakers from the EEOC or the State Human Rights Division come to speak about employment discrimination, and what types of cases they hear about most often.
- 14) Discuss why the following employee manual clauses would be illegal:
- 15) “All salary payments to the employee will be in cash, and no written receipts will be given;”
- 16) “Employees who engage in union organizing of any kind will be terminated;”
- 17) “Whistleblowers will be disciplined severely;”
- 18) “Pregnant employees may only remain on site until the 6<sup>th</sup> month of their pregnancy;”
- 19) Read several famous employment discrimination cases in class to get a sense of the range of cases and the level of evidence needed to win a claim (*Griggs v. Duke Power Co.*, 1971; *Cleveland Bd. Of Ed. v. LaFleur*, 1974; *Oncala v. Sundowner Offshore Serv., Inc.*, 1987; *Bragdon v. Abbott*, 1998). The Department of Labor website is also an excellent way to learn about this topic: [www.labor.ny.gov](http://www.labor.ny.gov) (New York); [www.dol.gov](http://www.dol.gov) (U.S.).
- 20) Research the origin of various federal laws protecting workers (e.g., NLRA, Equal Pay Act, ADEA, FLSA, FMLA) to learn how an incident or series of incidents becomes an issue, which inspires legislation, which often becomes law (e.g., OSHA and the Triangle Shirtwaist Factory Fire).
- 21) See a film in class (various tutorials are available) about sexual harassment on the job so that you understand what it is, know how to handle it, and don’t commit it, unknowingly, yourself.
- 22) Go over sample paychecks/paystubs to understand what portion of an employee’s salary goes towards health insurance, retirement plan, state and federal taxes, child support, if applicable, etc.
- 23) Practice filling out tax forms given to every new employee for purposes of paying them, so you understand how many deductions to claim, if any.
- 24) Go over the paperwork involved in having your paycheck automatically deposited into your bank account (“direct deposit”). Discuss possible pros and cons of this.

## Chapter VIII: My Rights if I am Disabled

The law recognizes the significant talents and contributions that individuals with disabilities have made and continue to make to our society. In 1990, the Americans with Disabilities Act (ADA) was passed to remove barriers that individuals with disabilities face when attempting to participate in a variety of activities, including work. Places of public accommodation – our schools, libraries, restaurants, courts, office buildings, hospitals, etc. -- must be accessible to individuals with disabilities because of the ADA. Generally speaking, new construction and/or modifications to buildings must comply with the ADA's building requirements so that disabled citizens can enjoy a ballgame like the rest of us, and help their children with school shopping at the mall.

The ADA also prohibits discrimination in employment against a qualified individual:

- 1) With a disability
- 2) With a record of a disability, or
- 3) Who is regarded as disabled, and
- 4) Who is capable of performing the essential job functions with or without a reasonable accommodation.

The ADA has a specific definition of disability that is different from the way we think of a “disability” in everyday language. Under the ADA, a disability is a physical or mental impairment that substantially limits a major life activity. Major life activities are divided into two lists – those involving:

- 1) Walking, seeing, hearing, speaking, standing, lifting, thinking, concentrating, sleeping, bending, reading and communicating; and
- 2) Major Bodily Functions: normal cell growth, functions of the immune system, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.

To be a “qualified” employee or employment applicant under the ADA, a person must be able to perform the “essential functions” of the job with or without reasonable accommodation. So, if a postal clerk who can't stand for long periods of time can perform her job as long as she can sit on a stool behind the counter, she is a “qualified individual” under the ADA. If an applicant for a bowling alley attendant job is confined to a wheelchair and cannot readily go up and down and behind the lanes to collect lost bowling balls and pins, even with his wheelchair, this person would not be a “qualified individual” under the ADA, because he could not perform the essential functions of this job. On the other hand, he might be able to work the cash register at the bowling alley and might well be a “qualified individual” for that job.

The ADA requires employers to provide a reasonable accommodation to a qualified individual with a disability, unless such an accommodation would be an undue hardship on the operation of the business. Undue hardship means a significant difficulty or expense considering the employer's size, financial resources, and the nature and structure of its operation. Examples of reasonable accommodations include:

- Making existing facilities used by employees readily accessible to and usable by persons with disabilities;
- Job restructuring, modifying work schedules, reassignment to a vacant position;
- Acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials, or policies, and providing qualified readers or interpreters.

Reasonable Accommodation DOES NOT mean that an employer must:

- Lower quality or production standards
- Assign away essential job functions
- Provide personal use items such as glasses or hearing aids
- Favor a disabled applicant over others when making placement decisions

So, in our scenario with the bowling alley attendant applicant, the employer would not likely be held to have discriminated against the applicant for refusing to reconstruct his bowling alley complex so that each alley contained an adjacent wheelchair runway for easy ball and pin access. Imagine the time and expense involved in altering his business in this way. It would be unreasonable to ask a business owner to accommodate a prospective employee in this way. If, on the other hand, the only hurdle to a wheelchair-bound employee's ability to work at a particular job is the lack of an access ramp to the building, an employer refusing to put in an access ramp would likely be held to have discriminated against the qualified individual who can perform the essential functions of the job, but just can't get into the building.

It is worth noting that if an employee cannot perform the essential functions of the job without jeopardizing the health and safety of other employees, the employer need not accommodate the employee's disability. Along these lines, drug and alcohol addiction are considered disabilities under the ADA, protecting employees who are addicts, only if they are in recovery from addiction and are no longer using the substance(s). If an employee in addiction recovery relapses into addiction, she is no longer protected under the ADA.

Typically, employees in need of an accommodation must first request it. Employers, under the ADA, are not held to a standard of "prescience," where they must foresee an employee's needs. Rather, a verbal or written request is sufficient. Then, the employer and employee must, under the ADA, try to find a mutually suitable, reasonable accommodation. The employee might not get the exact accommodation she seeks. If these efforts fail, or if the employer refuses to even try to resolve the situation, the employee may file a discrimination claim with the EEOC within 300 days of the last incident of discrimination. Damages an individual can sue for, under the ADA, are the same as under Title VII (discussed in the prior chapter): front and back pay with interest, lost benefits, limited punitive and compensatory damages, attorneys' fees, reinstatement, promotion, or other remedial relief. Punitive damages, it should be noted, are only awarded if an employer is found to have acted with "malice" (evil intent) or with "reckless indifference" to an employee's rights.

Other state laws available to employees with disabilities who are victims of employment discrimination are New York's very broad and encompassing Human Rights Law (part of the NYS Executive Law), and New York's Civil Rights Law.



## Activities:

- 1) Discuss various employer/employee scenarios introduced by your teacher to see if the employee would have a right to an accommodation under the ADA, or not (either because the employee would not be covered under the ADA or the accommodation would pose an “undue hardship” to the employer).
- 2) Read employment cases where the employee with disabilities won his discrimination lawsuit and where he lost; see if you can understand why, in each case, the court decided as it did.
- 3) Decide whether the employee with disabilities has a right to sue under the ADA in various scenarios introduced by your teacher.
- 4) Have speakers from Disability Advocates, Center for Independence, or other organizations advocating for the rights of those with disabilities, come to speak to your class about the cases they have handled, and how certain situations were resolved before having to go to court.
- 5) Invite lawyers to speak to your class who represent employees in ADA cases. Invite lawyers to speak who represent employers. After hearing both sides of the “equation,” compare the different strategies the different lawyers use to represent their clients.
- 6) Research what types of accommodations (1) employers have been required to make for employees; and (2) apartment house landlords have had to make for disabled tenants. What accommodations have the courts not required?

## Chapter IX: Rights I Have if I'm Hurt or My Property is Damaged

It would be negligent to send you off into the world without discussing one last topic – that of torts. As opposed to the edible and delicious “tortes” with an “e,” a “tort” without the “e” is a legal action that you can bring if you or your property are hurt, damaged or destroyed by another person or by their property. Without going into too much detail – after all, you’re not in law school yet! – people and property can be damaged by accident or on purpose. Thus, it follows that a person can bring a legal action claiming an “**intentional tort**,” an “**unintentional tort**” or a “**strict liability tort**.”

Translating into English, if you or your property have been harmed by accident or as a result of someone else’s carelessness or “**negligence**,” you may have a claim for an unintentional tort, also called a “negligence” claim. If, on the other hand, the act that harmed you or your property was intentional or purposeful, you might have an “**intentional**” tort claim. “**Strict liability**” torts can be claimed if you or your property are harmed by activities deemed so dangerous by law that they pose a serious risk of harm to persons or property even if the actor is exercising extreme care. Examples of strict liability are: owners of “dangerous” animals (inherently dangerous, like tigers, or determined so by a judge, like a particularly vicious dog that has proven to be a danger), manufacturers and sellers of dangerous or defective products available for purchase, and people who participate in extremely dangerous activities, such as setting off fireworks, dynamite blasting, running plutonium plants, or research labs handling lethal bacteria or chemicals.

A person claiming a strict liability tort need only prove that the activity in question occurred and damages resulted, since the activity is already one deemed to be extremely dangerous. The only possible defense to a strict liability case would be, for example, in a consumer products case, if a doctor’s prescription led to serious injury or death, but the person who purchased it got ill or died because they misused the medication or deliberately ignored the safety precautions on the bottle. Similarly, if the owner of a dog that badly mauled someone had no prior clue, or warning, that the dog could ever be violent, the owner would have a defense.

Intentional torts can be those that injure persons or property. Intentional torts that injure people are: assault, battery, intentional infliction of emotional distress, false imprisonment and defamation. The definition of these concepts in tort law is not necessarily intuitive, so be sure to make note of these, as follows:

- An “**assault**” in tort law is not the same as an “assault” in criminal law. In tort law, someone can claim they were the victim of an “assault” if they simply fear that an immediate harmful or offensive contact was about to occur. “Mere words” are typically not enough to prove assault, but words plus an intentional scary action that creates fear in a person is enough to prove assault.
- A “**battery**” in tort law is, again, different from a “battery” in criminal law. In tort law, a “battery” is not necessarily a physical attack, though it can be. Rather, it is when a person intentionally causes a “harmful” or “offensive” contact with another. If a surgeon removes the wrong kidney, it is a battery (although it is not an assault, because presumably, the patient was not awake during the operation, and so couldn’t claim to have been fearful at the time). The actor causing the “offensive contact” -- whether or not it also includes an assault or even a criminal act – will be responsible under tort law, for all of the resulting damages – even including the resulting emotional distress.

- The “**intentional infliction of emotional distress**” (IIED) in tort law can be demonstrated if the conduct in question was: (1) outrageous and extreme, “beyond the bounds of decency;” (2) intended to cause or disregarded a likelihood of causing severe emotional distress; (3) what caused the injury; and the conduct resulted in (4) the suffering of actual severe emotional distress. Merely insulting someone is not enough to make out an IIED case. This type of action will no doubt be brought increasingly in cyberbullying cases, such as recently, where students who were bullied, stalked and harassed online were driven to the point of taking drastic action – including suicide.
- “**False Imprisonment**” involves intentionally confining someone without the right to do so, and against her will. While a store manager has the right to protect store merchandise, he does not have the right to handcuff a suspected shoplifter to a chair in the store’s back room for three hours. The restraint or confinement must be reasonable time-wise and restraint-wise.
- To understand “defamation,” think about all those TV and movie stars you read about in those tabloid magazines at the grocery store. Defamation is a false statement, communicated to another person or, in the case of tabloids, to many persons, which damages a person’s reputation. The false statement can be spoken out loud, as on the radio or TV, or it can be written, as in a tabloid magazine. Spoken defamatory statements are called “**slander.**” Written defamatory statements are called “**libel.**” But if the slanderous or libelous statement is true, or if it is clearly just the speaker’s or writer’s opinion and not a claim of fact, a defamation claim will not succeed. In sum, true statements and opinions are protected speech, under tort law. It bears mentioning that public figures, such as those tabloid stars, have an extra hurdle to overcome in proving defamation – a hurdle we private citizens do not have to clear. Public figures must not only show that a statement was false, published to others, and that it harmed their reputation, they must also prove that the writer or speaker acted knowing the statement was false or acted with “reckless disregard” for the truth.

Intentional torts can harm property, as well, including: “real” property (land or structures on the land); “personal” property (objects and pets a person owns) or intellectual property (creative work product). The intentional torts to property are classified as follows: trespassing, attractive nuisance, nuisance, conversion, patent infringement and copyright infringement.

- “**Trespassing**” onto someone else’s property is a tort, whether or not you cause any damage. Because property owner’s rights are considered to be fairly “sacred” under the law, property owners are said to enjoy “exclusive” rights to their own property. But what if there’s no sign indicating “no trespassing,” and so the trespasser had no idea he was trespassing when he walked onto the property in question? Even if the trespasser did not know he was trespassing and certainly did not intend to trespass, it would not matter. Under tort law, you may remember, “intent” means merely that the actor meant to do the act in question – in this case, walk somewhere – not necessarily that the actor meant to intrude on someone else’s right to the exclusive enjoyment of his property, or that he meant to scare or harm the other person.
- The “**attractive nuisance**” doctrine is the name of a theory of tort action based on children being lured to certain, enticing (attractive) dangers, such as swimming pools, on a homeowner’s property and being hurt, as a result. Children, the theory goes, cannot understand or appreciate danger. Therefore, even if a child trespasses on another person’s property and gets hurt because the homeowner had not thought to fence-in his pool or to lock the gate around his property, the homeowner, not the child, would be at fault. The “attractive nuisance” theory also imposes a

legal obligation or “duty” upon property owners and business owners to warn guests of any age of known dangers on their property. Business owners, in fact, have an even greater obligation than homeowners to inspect and maintain their premises regularly, to keep it safe for customers. So, for instance, a business owner cannot simply warn customers of a slippery floor if a ceiling leak caused water to be on the floor. The business owner would need to prevent access to the slippery floor until the problem is resolved.

- “**Nuisance**” is the tort claim that a person can bring if she believes there has been unreasonable interference with her use and enjoyment of her own property. So if your neighbor regularly mows the lawn on summer Sundays at 5 a.m., waking you and everyone in your house, you might well have a “nuisance” complaint. Courts can compensate people who bring nuisance complaints by having the tort-doer (“tortfeasor”) pay them money, and/or imposing a “cease and desist” order (forcing the tortfeasor to stop committing the offensive act) or an “injunction” (a temporary stoppage of the activity, pending a final decision).
- “**Conversion**” is the name of the tort a person can claim if someone has taken their personal property. For instance, if you put your college dorm furniture in a storage unit over the summer near campus, only to find that the furniture was sold, there’s a good chance you have a winning “conversion” action.
- “**Copyright Infringement**” and “**patent infringement**” are tort actions having to do with “intellectual” property, and are defined as the impermissible “taking” of someone else’s creative invention (patent infringement) and the impermissible taking of the form of someone else’s expression (copyright infringement). Patents must be applied for at the U.S. patent office, and once received, protect the inventor’s exclusive ownership of his invention for 20 years. Copyrights need not be applied for and protect the person copyrighting her book or song lyrics, for example, for her lifetime plus 70 years. Examples of copyright infringement are as follows: Once you buy a book or CD, you can resell it, but you cannot make copies of these and sell them to make money. Recent *Limewire* cases were based on the tort of copyright infringement, where *Limewire* users could share for free with other *Limewire* members, songs they themselves had paid to download. This caused the recording artists and studios to lose an enormous amount of money.

As noted previously, proving that someone intentionally harmed you or your property requires that you demonstrate only that they intended to do the act in question. You do not have to prove that they had evil intent or the desire to harm you or your property. If you are successful in proving that someone or some entity deliberately performed an act or series of acts that resulted in harm to you or your property, the court will try to make you “whole” again, or just as you were prior to the harm. Thus, you can be awarded “compensatory” damages, to cover such things as medical costs (current and future), pain and suffering, lost wages (even for wages you could potentially have earned in the future, with your education and experience and number of working years left), and property replacement costs. You can, in the alternative, be awarded “nominal” damages, which is mostly a symbolic penalty, a small amount of money to symbolize that the actor deliberately caused harm to the person suing, even if no substantial economic harm or injury resulted. Finally, you could sue for “punitive” damages, often hugely rewarded, purely to punish an actor’s outrageous, willful or evil acts.

To fend off an intentional tort claim, the accused actor could demonstrate: (a) that the person claiming harm consented to the act in question; (b) that the act in question was justifiable because the actor was privileged to conduct herself in the manner which caused the harm (e.g., police have a privilege to use

reasonable force to restrain citizens, if necessary, to maintain order); or (c) that the act in question was committed in self-defense (even “deadly force” may be used) or in defense of property (only “reasonable force,” not deadly force, is permitted).

People who wish to bring an unintentional or negligence tort claim against a person or business or governmental entity must, by a “**preponderance**” of the evidence (a much lower standard of proof than the criminal court standard of “beyond a reasonable doubt,” prove four components of negligence: **duty**, **breach**, **causation** and **damages**.

First, we all have a **duty**, under the law, to act “reasonably,” with “ordinary care and prudence” as someone of the same age, intelligence and experience. To prove negligence, a person needs to show that the person or entity committing the tort had a duty to treat others with care or to maintain her property so that it was safe for entry or use by others. Second, it must be proven that by acting or failing to act, the person committing the tort **breached** (failed to live up to) this duty. Third, it must be demonstrated that the fact that the person in question breached her duty, directly or “proximately” caused the harm claimed. If a person “**directly**” caused someone harm, (“**cause in fact**” harm) it means that had they not committed the wrongful act in question (had they not breached their duty), no harm would have been caused to the victim. An example of this would be if a 16 year old on his skateboard, riding fast near toddlers on a playground, accidentally but badly injures a two-year old who moved closer to watch him. “**Proximate cause**” harm is not direct harm, but it is **foreseeable** harm; that is, harm that results foreseeably from the act or acts of the person in question. To prove “proximate cause” harm, the person claiming harm must be able to demonstrate a close connection between the bad or harmful act and the damage caused. An example of this is if the teenager running the tilt-a-whirl ride at the amusement park forgets to buckle-in the riders of a particular “car,” they will get hurt when the ride takes off. Had he not failed to do his job, no injury would have been caused to the riders. If the harm that results was totally unforeseeable, the person accused of the tort will not be found accountable (“liable”) for the harm or damages claimed.

When assessing damages in a negligence tort claim, the judge/jury considers the “relative” fault (degree of fault) of each party involved, to arrive at the “**comparative negligence**” of the parties. The amount of monetary damages in question will be split according to the percentage of fault of the actors. So if the driver of one car in a two-car accident is deemed to be 60% at fault and the driver of the other car is 30% at fault and the jaywalking pedestrian is 10% at fault, the money damages will be split accordingly. The “**assumption of risk**” doctrine, used especially in sport injury cases, is a theory that if a person participates in a knowingly dangerous activity (e.g., skydiving, football, bungee jumping), that person cannot sue if hurt while performing, since he “assumed” the risk (i.e., he acted full-knowing he could be hurt; he understood the risks before participating).

**Liability Waivers:** Of course, the inability to sue is not absolute. Even a person who assumed such a risk could sue if the reason he was injured was due to a manufacturer’s defective equipment (see discussion, below, regarding waivers and defective climbing ropes).

Especially worthy of mention is “**liability waivers**.” In brief, you may be asked to sign many of these in your lifetime. They are “releases” requesting your signature and your consent not to sue if you get hurt while participating in some activity(ies) on the premises in question, or while undergoing some medical procedure(s). The truth is, these waivers are “scare tactics” to an extent, because they are unenforceable (i.e., useless) if the reason you are harmed is due to anything more than mere negligence on the part of the host. So, if you sign a waiver that you won’t sue the rock climbing gym if you get hurt, but your

rope is old and snaps and you break your leg, you can still sue, and the gym will likely not succeed in using the “liability waiver” you signed against you. This is because your harm is the result of worse than negligence. The gym knew or should have known the rope was old, and will, therefore, be held liable for an intentional tort. Similarly, if you sign a liability waiver that you understand the inherent risks of knee surgery, and are willing to accept that the operation might not work or could result in muscle damage to your knee, the waiver doesn’t protect the surgeon from being sued by you if he operates on the wrong knee!

## Activities:

1. Review scenarios of legitimate and illegitimate tort claims.
2. Watch "Erin Brokovich," Julia Roberts' film about toxic tort (strict liability tort) litigation and discuss.
3. Discuss the case out of Rochester, N.Y. where self-defense of a homeowner led to the death of an intruder (a teacher, in town for a party) who it turned out may have been sleepwalking.
4. Discuss scenarios regarding dangerous animals (did the owner know or should she have known?)
5. Prepare research projects on infamous products liability cases assigned by your teacher (thalidomide, alendronate, tobacco).
6. Research and discuss the *Limewire* (music downloading) case as a cautionary tale.
7. Review DWI laws, the seriousness of drinking and driving and liability that can ensue. Have MADD or SADD (Mothers/Students Against Drunk Driving) speakers visit the class to relay personal stories of drinking and driving consequences, to make an impact.
8. Research and discuss the increasing liability of parents who allow kids to host parties for underage friends.
9. Challenge the class to invent something as a group and apply for a patent.
10. Review how easy it is to copyright material; review importance of not plagiarizing, not infringing on others' intellectual property.







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