PRACTICAL REAL ESTATE LAW

Sixth Edition

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New York State Supplement

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CHAPTER 1
INTRODUCTION TO THE LAW OF REAL PROPERTY

Laws That Govern Real Property Transactions

Textbook page 2

The laws governing real property transactions in the State of New York are primarily found in the following statutes: New York Real Property Law and the New York Real Property Actions and Proceedings Law. However, it should be noted that many other New York State statutes contain provisions regarding real property and its transfer, several of which are mentioned in this supplement. Further, case law also serves as a primary source of real property law.

Real Property versus Personal Property

Textbook page 2

Real property is narrowly defined to include “real estate, land, tenements, and hereditaments” whether tangible or intangible. N.Y. Gen. Constr. Law § 40.

Personal property is broadly defined as property that includes “chattels, money, things in action, and all written instruments themselves, as distinguished from the rights or interests to which they relate” or create and “everything, except real property which may be the subject of ownership.”

“Oil wells and all fixtures connected therewith, situated on lands leased for oil purposes and oil interests, and rights held under and by virtue of any lease or contract or other right or license to operate for or produce petroleum oil, shall be deemed personal property for all purposes except taxation.” N.Y. Gen. Constr. Law § 39.

Physical Elements of Real Property

Textbook page 3

Fixtures

Textbook page 3

The Uniform Commercial Code § 102(41) defines fixtures as “goods that have become so related to particular real property that an interest in them arises under real property law.”
Water Rights

Textbook page 5

New York follows the common law doctrine of riparian rights. In the case of Town of Hempstead v. Oceanside Yacht Harbor, 38 AD2d 263, 328 NYS2d 894 [1972], aff’d, 32 N.Y. 2d 859, 299 NE2d 895 (1973), the Court stated that “The defendant, as an upland owner, has a right of access to and from the channel over the plaintiffs’ foreshore (Town of Brookhaven v. Smith, 188 N.Y. 74, 80 N.E. 665) and that right follows the entire frontage of the defendant’s property (Tiffany v. Town of Oyster Bay, 234 N.Y. 15, 136 N.E. 224). The right of access comprehends the reasonable, safe and convenient use of the foreshore for navigation, fishing and such other purposes as commonly belong to the riparian owner, exercised in a reasonable manner (Tiffany v. Town of Oyster Bay, supra, p. 21). The scope of what is a reasonable, safe and convenient use of the upland owner’s riparian rights has been gradually defined on a case-to-case foundation.”

Inheritance and Devise

Textbook page 8

In New York, if an individual dies without a Will, the State provides for the manner in which property will be distributed among the decedent’s legal heirs. N.Y. Est. Powers & Trusts Law § 4-1.1. The law further provides that if a person dies without a Will and there are no identifiable legal heirs, the property escheats to the State and is held as abandoned property. N.Y. Est. Powers & Trusts Law § 4-1.5.

Adverse Possession

Textbook page 9

An adverse possessor occupies real property of another with or without knowledge of the other’s superior ownership rights for 10 years. N.Y. Real Prop. Acts. § 501[1–2]; N.Y. CPLR § 212 (a).

Occupancy must be adverse, under claim of right, open and notorious, continuous, exclusive, and actual. It must be such that it would give the owner a cause of action for ejectment. N.Y. Real Prop. Acts. § 501 [1].

A claim of right means a reasonable basis for the belief that the property belongs to the adverse possessor or property owner. A claim of right will not be required where the owner or owners of the real property cannot be ascertained in county records or registry or otherwise located by reasonable means for the 10-year statutory period. N.Y. Real Prop. Acts. § 501[3].

Where the adverse possessor occupies the land under a written instrument, occupation must be sufficiently open. Acts that are sufficiently open are those acts that (1) put a reasonably diligent owner on notice or (2) show a substantial enclosure or (3) without an enclosure, show the land has been used to supply fuel or fencing timber.

Where there is no written instrument, acts that are considered sufficiently open are those that (1) are sufficient to put a reasonably diligent owner on notice or (2) acts that

Recent case law in New York has held that land held by the state or a municipality cannot be acquired by adverse possession.

In *Kings Park Yacht Club, Inc., v. State of New York*, the court stated that “the proof adduced by the defendant State clearly established that the disputed acreage was held by the defendant in its public or governmental capacity.” (*West Center Congregational Church v. Efstadthiou*, 215 A.D.2d 753, 627 N.Y.S.2d 727; *Litwin v. Huntington*, 208 A.D.2d 905, 617 N.Y.S.2d 888, cf.; *Walsh’s Inc. County of Oswego*, 9 A.D.2d 118, 449 N.Y.S.2d 116). Once the court established this ruling, there was no need to decide the issue of adverse possession. 2006 NY Slip Op 1143; 26 A.D.3d 357; 809 N.Y.S.2d 551; 2006 N.Y. App. Div. LEXIS 1903.


And in the case of *City of New York v. Wilson & Co.*, the court held that when property of the State or city is inalienable, title cannot be obtained by adverse possession. 278 N.Y. 86; 15 N.E.2d 408; 1938 N.Y. LEXIS 1278.

**Ethics: Introduction**

*Textbook page 17*

Ethical rules that govern New York attorneys are called the “The New York Rules of Professional Conduct” and are found in the Joint Rules of the Appellate Division 22 NYCRR Part 1200. The full set of rules as modified in 2010 can be viewed in detail on the New York Bar Association’s Web site: [http://www.nysba.org](http://www.nysba.org)
CHAPTER 2
CONCURRENT OWNERSHIP

Types of Concurrent Ownership

Textbook page 21
New York recognizes three forms of co-ownership: tenancy in common, joint tenancy with rights of survivorship, and tenancy by the entirety. It does not recognize community property laws.

Joint Tenancy with Right of Survivorship

Textbook page 21
New York Real Property Law section 240-c states that a joint tenant may unilaterally sever a joint tenancy in real property without the consent of the remaining joint tenant or tenants. This can be done by execution and delivery of a deed conveying his interest to a third person or executing an instrument such as a contract or mortgage and stating an intent to sever the joint tenancy. These actions clearly demonstrate intent to sever the joint tenancy. N.Y. Real Prop. § 240-c.

The section provides further that it does not matter that the third party instrument requires that the interest be conveyed back to the severing joint tenant. For example, A and B are joint tenants. Tenant A proceeds to unilaterally sever the joint tenancy with B by conveying his half interest in the property to C with the stipulation that C will reconvey this interest back to A. Upon the re-conveyance, A will now hold the property interest with B as a tenant in common.

Under common law this would not have been permitted. A would have to convey his interest via the use of a “strawman” in the example above, and then the “strawman” in a separate instrument would convey back to B. This was required to break the four unities of interest, title, time, and possession of the joint tenancy between A and B. At this point, since the four unities were broken, B could convey to C.

New York statutory law removes the requirement of a “strawman” by stating that it does not matter whether or not the conveyance to a third party, C in the example above, is pursuant to an agreement to convey back the interest to the severing party, A in the example above. Intent to sever the joint tenancy is clear.

Section 240-c requires that a deed of conveyance by a joint tenant to a third party be filed and recorded in the county court in which the property is located during the severing tenant’s lifetime.

In the example above if A were to “secretly” convey to C without recording the instrument and B has no notice, either constructive or actual, that he has been divested of his survivorship rights in the property, B would not be divested of his survivorship rights. Tenant B’s survivorship right in A’s half share remains intact while A’s survivorship right in B’s half share is destroyed.
Without the recording requirement, the nonsevering tenant’s survivorship rights would have been destroyed without notice while the severing tenant would still maintain his survivorship rights in the property.

**Tenancy in Common**

*Textbook page 22*

In New York, a deed to two people who are not legally married to each other creates a tenancy in common, unless a joint tenancy is expressly indicated. EPTL § 6-2.2(a)

**Tenancy by the Entirety**

*Textbook page 25*

A transfer of real property to a husband and wife in the state of New York will create a tenancy by the entirety unless the deed expressly states a joint tenancy or tenancy in common. EPTL § 6-2.2(b)

**Dower and Curtesy**

*Textbook page 27*

New York abolished dower and curtesy rights for couples who were married after September 1, 1930, and replaced it with the Elective Share Statute discussed in the following section.

**Elective Share**

*Textbook page 27*

New York law provides in pertinent part that where a decedent dies on or after September first, 1992, and is survived by a spouse, the surviving spouse has a right of election equal to the greater of $50,000 or one half the net estate where there are no surviving children and one third of the net estate if there is at least one surviving child. N.Y. EPTL 5-1.1 & 5-1.1-A.

The elective share may be exercised by either a surviving husband or a surviving wife, irrespective of gender.
CHAPTER 3
SURVEYS AND LAND DESCRIPTIONS

Surveys and Land Descriptions

Textbook page 43
In New York, various methods are used for the legal description of real property; the most prevalent are the metes and bounds description and recorded plat otherwise known as block and lot description.

Practice Tips for Reviewing a Survey

Textbook page 57
One of the most important elements in the contract of sale or deed is an accurate description of the property. Street addresses are not legal descriptions. Not only must the buyer inspect the property she/he is purchasing, but she/he must know its exact location and size and be able to identify easements and encroachments. The buyer will want to visually note any structural changes as this could be a “red flag” and be sure the proper building permits and final certificate of occupancy were obtained. A survey that states “proposed dwelling” is not acceptable. Any structural changes or improvements to the property that are not shown on the existing survey may result in the buyer having to obtain a new survey. The actual dwelling and any additions should be noted in detail on the survey along with the boundaries of the property and other significant findings regarding the same.

When representing a seller in a real estate transaction, the existing survey should be reviewed as soon as possible. If the survey is complete and recently prepared, there might not be a need to have a new survey done; an “updated survey” may be sufficient. This will save the seller both time and money. However, if the seller has been in the home a number of years, or there have been physical changes to the property, the seller will most likely have to order a new survey. It will be up to the buyer’s attorney, lending company, and title insurance company to determine what will be considered to be an acceptable survey.
CHAPTER 4
PUBLIC REGULATION AND PRIVATE ENCUMBRANCES

Zoning

Textbook page 79
New York gives zoning powers to local government authorities. They determine the use to which a particular parcel can be put. All real property within a municipality is divided into certain zoning districts. In New York, zoning districts are usually identified by a letter of abbreviation: R (residential); C (commercial); and I (industrial). There are classifications within each of these categories, such as R-1 (single family residential) and C-1 (commercial-retail). Zoning can affect the building height, building size, type of structure, and so on. New York State and local governments also have regulations to preserve buildings in historic areas. These are called “landmark preservation districts,” and owners of properties in these areas may be restricted in their ability to alter the facade or even to choose which color paint will be used.

In New York, the various levels of government have planning commissions that prepare master plans and set out zoning districts. If an area is zoned for single-family residences, there may be a reason to request a variance, that is, a right to improve property in a way not authorized by existing zoning laws and regulations. It may involve placing a building closer to the building line than previously authorized, or it may require a change from commercial use to residential use. The zoning board of the local municipality would have a public hearing after giving notice to all neighboring property owners, and the board would decide whether to permit or deny the variance.

Building Codes and Subdivision Regulations

Textbook page 80
New York State, along with local governments, has specific building standards called building codes. These codes require certain materials for electrical wiring and so on. Before one can build, he or she must get a building permit from the local municipality; municipal officials will verify that the proposed building is in compliance with building codes and zoning ordinances. After the structure is built, the appropriate official will then issue a certificate of occupancy (commonly referred to as a “C of O”).

The official Compilation of Codes, Rules & Regulations of the state of New York govern building requirements. Where a local municipality does not establish its own code, the New York State code Title 19 establishes the procedures for building code enforcement. Section 1202 requires a permit from the Department of State before a structure is erected, constructed, enlarged, altered, improved, relocated, removed, or demolished. Nonresidential farm buildings are excepted structures.

The building permits are obtained from the Department of State after submission of an application, which contains the following documentation: the signature of the applicant; a description of the site on which the work is to be done; a statement of use or occupancy of the land and proposed structure; a brief description of the proposed work;
the full name and address of the owner and the applicant; three sets of plans and specifications for the proposed work (unless the work is menial); and the fee specified.

When issued, the permit must be prominently displayed on the property. As the work progresses, it must meet the set code standards or else the permit may be revoked. The permit expires 2 years after the project is commenced, and a renewal is required if the project is not finished. Upon its completion, the Department of State issues a certificate of occupancy or certificate of completion, whichever occurs first. Renewals may be issued for 1-year periods provided the permit has not been revoked or suspended, all information is up to date, and all required fees are paid.

Any swimming pool, constructed or modified after December 14, 2006, on real property that is designed to contain 24 inches of water or more, must be equipped with a pool alarm capable of detecting a child entering the water and sounding off an audible alarm. N.Y. Comp. Codes R. & Regs. Tit. 19 § 1228.2(a) (2006).

Environmental Protection Laws/CERCLA

Textbook page 80

New York State has environmental conservation laws to protect the environment. The purpose of these laws is “to conserve, improve, and protect its natural resources and environment and control water, land, and air pollution, in order to enhance the health, safety, and welfare of the people of the state and their overall economic and social well being.” N.Y. Envtl. Cons. Law § 1-0101.

New York State is a participant in the EPA’s Brownfield Program. The Environmental Protection Agency’s definition of a Brownfield Property “….is a property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.”
http://www.epa.gov/brownfields/about.htm

The properties generally pose an environmental and financial concern for the community. The Brownfield Program supports revitalization and redevelopment of these properties.

New York offers incentives in the form of technical and financial assistance, as well as liability relief, to encourage the cleanup and reuse of contaminated sites.
http://www.dec.ny.gov

In July of 2008, the Brownfield Cleanup Program (BCP) was reformed. The reforms in pertinent part balanced the tax credits offered for remediation and redevelopment of certain contaminated sites. Furthermore, the 2008 legislation transferred the administration of the program from the Department of Environmental Conservation (DEC) to the Department of State. www.state.ny.gov/governor

Power of Eminent Domain

Textbook page 85

In New York, once the government has determined that private property is needed for a public purpose, the property owner has no choice but to sell. The process of taking private property for a public good is governed by the New York Eminent Domain Procedure Law.
The DEC is authorized to identify lands and waters in New York State that harbor plants, animals, and ecological communities that are rare. If the DEC determines that it is in the public interest to create environmental easements for the protection of human health and the environment and furthermore, that remediation of contaminated sites is necessary, and the state may acquire the land through eminent domain.

Title 36 § 71–3605 of the Environmental Conservation law provides that environmental easements may be obtained notwithstanding certain common law easement rules. The section states that it is no defense for the owner of the property that (a) it is not appurtenant to an interest in real property, (b) it is not of a character that has been recognized traditionally at common law, (c) it imposes a negative burden, (d) it imposes affirmative obligations upon the owner of any interest in the burdened property.

**Taxation**

*Textbook page 86*

In New York, the local municipalities impose taxes on real estate, and these pay for many local services such as fire, police, schools, libraries, and water and sewer districts. These taxes are imposed on real estate based upon the property’s assessment. Property is periodically reevaluated and a uniform tax rate for the municipality is applied. More and more municipalities are moving to full assessment. The more traditional method would assess the property for a fraction of its value then the tax rate would be based on that fractional share. In full assessment, the property is assessed for its fair market value and the tax rate is based on that fully assessed amount. This is thought to be more equitable, with more valuable properties having higher taxes. Each year the property owner has a period of time to protest the assessment (i.e., file a grievance) and if the assessment is not changed, the property owner may begin a lawsuit to reduce it.

As of 2009 the STAR Rebate program was discontinued in New York. This program allowed a partial exemption from property taxes for veterans, religious organizations, as well as low-income citizens and senior citizens over the age of 65.

County, city, town, and village taxes are collected in January of each year; school taxes are due in September of each year. When representing a buyer in a real estate transaction, it is important to make sure that all taxes are paid to date; otherwise, any taxes owed will become a priority lien upon the real property. Further city and county tax liens are not subject to a statute of limitations and remain valid until paid. N.Y. Real Prop. Tax Law § 902.

**Judgment Liens**

*Textbook page 87*

In New York State, a judgment lien is good for 10 years and can be renewed. N.Y.CPLR § 5203. A judgment may be executed by forcing the sale of the debtor’s property.
Mechanics’ and Materialmen’s Liens

In New York, mechanics’ and materialmen’s liens are governed by the New York State Lien law. Any contractor, subcontractor, or supplier/sub-subcontractor can file a lien on real property for services rendered or materials supplied. N.Y. Lien Law § 3. In the State of New York, it is important to distinguish whether the work is to be (or was) performed on privately owned real property or on public property. If the work is to be (or was) performed on private property, the lien will attach to the real property itself and will be used as a guarantee for payment. If the work is to be (or was) performed on publicly owned property, the lien will attach to money set aside by the appropriate governmental authority for the public improvement. N.Y. Lien Law § 5.

In New York, a notice of a mechanics’ or materialmen’s lien must contain the statutory information that follows:

1. The name and residence of the lienor (the contractor, subcontractor, or supplier); and if the lienor is a partnership or a corporation, the business address of such firm, or corporation, the names of partners and principal place of business; and if a foreign corporation, its principal place of business within the state;
2. The name and address of the lienor’s attorney, if any;
3. The name of the owner of the real property against whose interest therein a lien is claimed and the interest of the owner as far as known to the lienor;
4. The name of the person by whom the lienor was employed, or to whom he or she furnished or is to furnish materials; or, if the lienor is a contractor or subcontractor, the person with whom the contract was made;
5. The labor performed or materials furnished and the agreed price or value thereof, or materials actually manufactured for but not delivered to the real property and the agreed price or value thereof;
6. The amount unpaid to the lienor for such labor or materials;
7. The time when the first and last items of work were performed and materials were furnished;
8. The property subject to the lien, with a description thereof sufficient for identification; and if in a city or village, its location by street and number, if known N.Y. Lien Law § 9.

Once prepared, a Notice of Lien is filed in the Office of the Clerk of the county in which the real property is located. N.Y. Lien Law § 10. The notice may be filed at any time but no later than 4 months after completion of the work or supplying of materials for a single-family dwelling and eight months on all other properties. N.Y. Lien Law § 10. The lien attaches immediately upon filing. Within 30 days of filing the Notice of Lien with the appropriate county clerk, a copy of the Notice of Lien must then be served on the property owner (and, if appropriate on the contractor—if the lien was filed by a subcontractor). Within 35 days of filing the Notice of Lien, the lienor must file an affidavit of such service with the county clerk. N.Y. Lien Law § 11. Failure to file an affidavit of service of the Notice of Lien within the requisite time frame will be fatal to the lien. If the lienor follows the appropriate statutory requirements, the lien will be good for 1 year and may be renewed. N.Y. Lien Law § 17.
CHAPTER 5
EASEMENTS AND LICENSES

Express Grant

Textbook page 102
Easements created by express grant in the State of New York are prepared with the same formalities required for deeds. N.Y. Real Prop. Law § 243.

However, in a recent Court of Appeals decision, Lake George Associates, Inc. v. State of New York, a property owner claimant brought an action against the State for consequential damages stating that he had lost his rights of egress and ingress to his property because the State never expressly conveyed access rights by instrument.

The Court of Appeals, affirming the Appellate Division, held that no formal deed was necessary to establish legal access rights in claimant. Quoting the Appellate Division the court noted that permanent easements in favor of the state over the neighboring properties provided legal access to claimant—regardless of whether defendant deeds that right-of-way to the condemnee. Lake George Associates, Inc., 7 N.Y.3d 475, 824 N.Y.S.2d 196, 2006 N.Y. Lexis 3198, (2006).

Preparation of a Formal Grant of Easement

Textbook page 102
New York does not require consideration be exchanged in the granting of an easement. A written recital of value received signed by the grantee is sufficient.

Prescriptive Easement

Textbook page 106
Similar to obtaining property via adverse possession, a prescriptive easement in the State of New York must meet the requirements of open, adverse, and notorious use for 10 years. N.Y. Real. Prop. Acts. Law § 521.
CHAPTER 6
CONTRACTS

Contracts

Textbook page 119

Almost all real estate transactions begin with an agreement called a contract. Contracts are used to bind the parties and may provide the basis for the purchaser obtaining a mortgage. The contract is one of the most important documents in the real estate transaction, as it dictates the contents of the “deal.” When problems arise, the parties go back to see what the contract provided for. New York requires all contracts for the sale of real property to be in writing to be enforceable.

New York adopted the “plain language law” for contracts, which requires that certain written agreements for the sale or lease of residential property be written in a clear and coherent manner using everyday words.

All sellers of residential real property in the State of New York (other than those exempted by statute) must provide a signed Property Condition Disclosure Statement to the buyer prior to entering into a purchase contract. If the buyer and seller then enter into a contract, the buyer must, as well, sign the statement that will be attached to the back of the purchase and sale contract. N.Y. Real Prop Law §§ 462, 463.

The statute requires the seller to inform the buyer of the property’s condition as is known to the seller at the time of contract; in other words, the seller is not required to undertake an inspection of the real property or to search public records for information regarding the same. A copy of the statutory form of the statement is found in Appendix A of this supplement.

Legal Capacity to Contract

Textbook page 120

To enter into a binding contract for real estate in New York, a person must be 18 years old and of sound mind. Persons younger than 18 may enter into a valid contract, but it is voidable by the minor until a reasonable time after reaching the age of 18.

Corporations

Textbook page 121

A contract entered into by a corporation must be signed by the corporate officer as follows: XYZ Corp. by DJK, President. As noted in the main text at page 120, the attorney will want to ensure that the party entering into a contract on behalf of the corporation is authorized to do so by the Board of Directors. Without this authorization, the contract may not be binding on the Corporation. The corporate resolutions authorizing the officer should be reviewed and copied for the file on the transaction.
Partnerships

Textbook page 121

A general partner of a partnership in New York may enter into a contract for the partnership unless the partnership agreement provides otherwise. In general, a review of the partnership agreement should be done. It is not necessary for all of the partners to join in.

Limited Liability Companies

Textbook page 122

A member of a limited liability company in New York may enter into a contract for the company unless the operating agreement provides otherwise. A review of the operating agreement should be completed. All LLCs formed or authorized to do business in New York after June 1, 2006, are required to publish a notice of formation in two newspapers, once each week, for 6 consecutive weeks. N.Y. LLC § 206. The publication will be designated by the county clerk, and it must include the address of the principal business location. One newspaper must be published weekly and the other daily. Failure to comply with these publication rules may result in a suspension of the LLC’s right to carry on or conduct business.

Personal Representatives

Textbook page 122

A fiduciary may be an executor or an administrator. The fiduciary’s authority to act should be verified. An executor of an estate will present “letters testamentary,” which authorize him to act in a fiduciary capacity on behalf the deceased testator. Where decedent dies without a will, an administrator is appointed by the court and “letters of administration” are issued providing the fiduciary with the authorization required to carry on the affairs of the estate.

Trustees

Textbook page 122

In 2001, New York adopted the Prudent Investor Act. N.Y. Est. Powers & Trusts Law § 11-2 (a), which provides that trustees may consider the trust portfolio in its entirety and look to its total return in determining how to invest trust funds distributable between present and future beneficiaries. Under New York’s “prudent man rule” the trustee was required to focus on individual low risk or safe investments, with a focus on careful preservation of the remainder interest.

The 2001 Estate Powers & Trusts Law provision states generally that the purpose of the act is to encourage a comprehensive investment strategy, which would allow a trustee to invest for the benefit of present and future beneficiaries while keeping in mind that which is best suited for the portfolio as a whole. N.Y. Est. Powers & Trusts Law § 11-2.3 (b)(3)(a).
Agents

Textbook page 122

A New York principal may authorize his agent to enter into real estate transactions on the principal’s behalf. These actions include power to acquire either ownership or possession of any estate or interest in land as well as the power to dispose of any estate or interest in land. N.Y. G.O.L. § 5-1502A.

New York rules governing powers of attorney are found in the New York General Obligations Law § 5-1501. A power of attorney is “durable” and survives the principal’s incapacity unless it provides that it is terminated by incapacity of the principal. N.Y. G.O.L. § 5-1501A. Where a guardian is appointed due to the incapacity of a principal, the agent of the Power of Attorney will account to the guardian for any actions. N.Y. G.O.L. § 5-1501A.

In a direct effort to prevent abuses in elder care and estate planning, the law was changed to ensure that the principal understands the nature of the power he is giving his agent and that the agent understands his fiduciary responsibility to the principal.

As of 2009 the law requires that a Power of Attorney be signed, dated and acknowledged by the agent as well as the principal. N.Y. G.O.L. § 5-1501B subd 1(c). The Power of Attorney is deemed effective on the date the agent’s signature is notarized. N.Y. G.O.L. § 5-1501B subd. 3(a).

If it is a “springing power of attorney,” that is, it is to take effect upon the happening of an event, then the power of attorney will take effect only upon the notarization and the happening of the event that must be stated in the Power of Attorney. N.Y. G.O.L. § 5-1501B subd. 3(b). The statutory short form Power of Attorney can be found in §1513 of the General Obligations Law. (see Appendix B to this supplement)

Written Agreements

Textbook page 125

All contracts for the transfer of real property (other than a lease for less than 1 year in duration) in the State of New York must be in writing. N.Y. Gen. Oblig. Law § 5-703.

Real Estate Broker

Textbook page 130

The New York Secretary of State, through the Division of Licensing Services, has proscribed the laws for the employment of a real estate broker. The manual issued by the Department of State states that a real estate broker’s license does not give one the right to give legal advice or to draw up legal documents.

There are standard forms for real estate transactions, but one must have legal knowledge to fill in the blanks, to delete clauses, and to choose additional clauses. Traditionally, real estate brokers fill in contract forms that have been approved by local bar associations.

Regulation of the powers and duties of New York State’s Real Estate Board are listed in section 442-k of the RPL. In all residential real estate transactions, a disclosure statement regarding the dual agency of an agent or broker is required. N.Y. Real Prop. Law § 443(2).
Listing Agreements

Textbook page 133

There are three forms of listings in New York: (1) open listing; (2) exclusive agency listing (if you, the property owner, find a buyer, you will not have to pay a commission to the broker); and (3) the exclusive right to sell (if you, the property owner, find a buyer for your house or if another broker finds a buyer, you must pay the agreed upon commission to the broker). New York does not allow the use of an automatic extension of a listing agreement.

Federal Income Tax on the Sale of a Home

Textbook page 139

A real estate transfer tax is imposed on the seller grantor of residential real property in New York. The tax is computed at a rate of two dollars for each $500 of consideration or fractional part thereof. Where the home costs $1,000,000 or more and the consideration paid is one million dollars or more an additional tax of 1% of the total consideration or fractional part thereof must be paid by the purchaser grantee. Where the purchaser is exempt, the grantor must pay the additional tax. N.Y. Tax Law § 31-1402 (a).

Where the conveyance is for less than $500,000 and the property is being sold with a lien, there is deduction for the lien, and the transfer tax is only on the remainder. For example, if the property is sold for $450,000 and there is a $200,000 mortgage that going to be assumed by the purchaser, the amount on which the transfer tax is based is $250,000.

Where the purchase price is $500,000 or greater, the transfer tax to be paid is on the full purchase price of the property despite a continuing lien if there is one.
Preparation and Review of a Real Estate Contract

*Textbook page 144*

Many times an attorney’s initial notification of representation of a client in a real estate transaction occurs when the purchase and sale contract is faxed to his or her office. The attorney will generally have 5 business days to review the same and send an approval letter to the other party’s attorney.

The Property

*Textbook page 147*

The property is generally identified by its common description: 121 Elm Street, Victor, New York and by its structural features: a single family dwelling with an attached garage. The primary aim of the description is that the property in question is clearly identifiable from all other real property.

Any personal property to be included in (or excluded from) the sale should be described in detail; for example, the contract might state, “Items to be included in the sale are as follows: dining room drapery, kitchen microwave, and front porch swing; items to be excluded from the sale are as follows: dining room crystal chandelier.” The more detailed the description of such personal property, the less likely there will be confusion as to what will stay and what will go at closing.

The Method of Payment

*Textbook page 149*

In New York, the most common method of payment is by certified or cashier’s check at closing, made payable to the seller. If the purchaser is seeking FHA or VA financing, the contract must state that. If the purchaser is not seeking VA or FHA financing, the mortgage contingency will provide for a conventional loan.

Seller Financing

*Textbook page 149*

If seller takes back a mortgage, the contract should indicate who will prepare the mortgage documents.
Possession of the Property

*Textbook page 152*

In New York, prepossession by buyers or postpossession by sellers is somewhat common. In these situations, the attorneys generally draft a separate agreement that provides the parties with additional protections in the unfortunate event that a closing fails to occur or sellers refuse to vacate.

Closing or Settlement Documents

*Textbook page 152*

Generally, the contract sets a closing date, which is interpreted, to be “on or about” such date, and the parties normally have a reasonable period, usually 60 days, to close. Closing rarely takes place on the date called for in the contract. Further, the contract will provide a location for the closing to occur. Once again, closing rarely takes place at the location specified, which is usually the county clerk’s office. The closing is more likely to occur at the lender’s attorney’s office.

Condition of the Property and Risk of Loss

*Textbook page 155*

New York follows the Uniform Vendor and Purchaser Risk Act, which provides that the seller (vendor) must bear the loss from destruction or a taking by eminent domain, which occurs before the title passes to the purchaser or the purchaser takes possession, whichever is earlier. N.Y. Gen. Oblig. Law § 15-1311.

Time is of the Essence

*Textbook page 159*

As stated previously, a real estate closing rarely, if ever, takes place on the date indicated in the contract. However, if the contract or some later memorandum states “time is of the essence,” then the closing date is crucial and the contract must be performed on or before that date. Whoever refuses to close on or before the specified date is in default and is liable for damages. *Zahl v. Greenfield*, 162 A.D. 2d 449, 556 N.Y.S. 2d. 393 (Second Dept., 1990). This type of clause could penalize either side and should be used with caution.

Contingencies

*Textbook page 161*

Contract clauses that are conditional, such as one conditioned on the purchaser obtaining a mortgage commitment, are truly “escape” clauses for the buyer. The seller always wishes to limit these. In New York, many contracts are sold “subject to” a satisfactory engineer’s report, termite report, septic report, water report, or radon report. These
conditions normally must be satisfied within a short period, that is, the purchaser has 2 weeks to obtain such reports and notify the seller if they are acceptable.

**Execution**

*Textbook page 164*

In New York, signatures of the buyer and seller on real estate contracts are customarily witnessed.
CHAPTER 8
DEEDS

Types of Deeds

Textbook page 220
Commonly, the types of deeds found in New York are Deed with Full Covenants (General Warranty Deed), Bargain and Sale Deed (Limited Warranty Deed), Quitclaim Deed, Executor’s Deed, Referee’s Deed in Foreclosure, and the Referee’s Deed in Partition.

Basic Requirements of a Valid Deed

Textbook page 224
The requirements for a valid deed in New York are an identifiable grantor and grantee, recital of consideration (generally the consideration mentioned in the deed is not actual but a nominal amount such as $10.00), a granting clause (using words of conveyance, such as “I hereby grant, covenant and demise”), proper designation of the real property in question (generally the legal description of the same); and a signature and acknowledgement of the grantor. NY Real Prop. Law § 291; N.Y. Real Prop. Law § 243; Cohen v. Cohen, 188 A.D. 933, 176 N.Y.S. 893 (Second Dept., 1919); McGurl v. Burns, 192 Misc. 1045, 81 N.Y.S.2d 51 (Supreme Ct., Kings Co., 1948).

If the deed is to be recorded in the appropriate county clerk’s office, it must contain the addresses of both the grantor and the grantee. N.Y. Real Prop. Law § 333. Finally, in order to properly transfer the property, the deed must be delivered to the grantee and the grantee must accept the same. Diamond v. Wasserman, 8 A.D.2d 623, 185 N.Y.S.2d 411 (Second Dept., 1959).
CHAPTER 9
FINANCING SOURCES IN REAL ESTATE TRANSACTIONS

Types of Loans

Textbook page 260

Along with the various types of loans mentioned in the main text, the State of New York Mortgage Agency (SONYMA) is an important source of money for New York homebuyers. SONYMA’s sale of tax-exempt and taxable bonds allows it to finance mortgages for qualified New York homebuyers at a lower interest rate and with a lower down payment than would otherwise be available to them. Homebuyers must not exceed income guidelines, and the property in question must not exceed certain predefined limits. This program is generally available to first-time homebuyers or those buying in qualified areas within the state. Further information about SONYMA’s programs can be found on its Web site: http://www.nyhomes.org

Subprime Lending

Textbook page 261

In 2009 New York was one of the hardest hit states with mortgage fraud; there were 217 reported cases as per the Mortgage Asset research Institute, Twelfth Periodic Mortgage Fraud Case Report, April 2010.

The Home Equity theft Prevention section of the Real Property Law was enacted as a result of findings by the legislature that homeowners who are in default on their loans are susceptible to fraud, deception, and unfair dealing by home equity purchasers. N.Y. Real Prop. Law § 265-a.

New York has enacted antipredatory legislation, which prohibits lenders from offering high-cost loans to subprime borrowers unless certain requirements are met. Generally, high-cost loans are defined as residential mortgage loans with interest rates well above the prime rate available to borrowers with good credit or loans the cost of which exceeds a certain percentage of the loan amount. N.Y. Banking Law § 6-L.

Lenders and brokers of high-cost loans are required to advise the borrower that credit counseling is available and moreover, they must supply a list provided by the New York State Banking Department of counselors available to advise the borrower. N.Y. Banking Law § 6-L.

In the event a lender seeks to foreclose a high-cost loan, it must assertively state in the complaint that the loan terms comply with the antipredatory lending law and that it has complied with all disclosure requirements as well. Real. Prop. Acts § 1302.

A borrower may bring an action against a lender or broker for violation of the law within 6 years from the date of loan origination. Violations of the law by the lender may be raised at any time in a foreclosure action. If the broker or lender is found guilty, he may be liable for actual damages, attorneys’ fees, and statutory damages.
New York statutorily regulates contracts of consulting firms that offer services to consumers in financial distress and at risk of losing their property. These firms are enlisted by debtors to find solutions to their financial problems. N.Y Real Prop. Law § 265-b.

For intentional violations of the law by the lender, the loan may be rendered void and the borrower may recover any payments made under the agreement. N.Y. Banking Law §§ 6 & 7.

**Permanent and Construction Loans**

*Textbook page 263*

In furtherance of the objectives of predatory lending legislation, home improvement contractors must disclose to all parties involved in a home improvement contract any benefit of value he will receive or be paid in connection with the financing of the home improvement contract. Furthermore, he must obtain agreement to such activity or payment from all the parties involved in writing. N.Y. Gen. Bus. Law § 771(a).

**Payment Plans**

*Textbook page 265*

New York recognizes “reverse” mortgages. N.Y. Banking Law § 6-h; N.Y. Real Prop. Law § 280; N.Y. Real Prop. Law § 280-a. These mortgages do not amortize but are future advances of principal and deferred interest. The loan generally matures when the borrower dies. This allows the elderly to get access to equity that has built up in their home and enables them to live more comfortable lives. The homeowner gets a monthly payment. With each payment, the debt rises and interest is deferred until the loan is paid off.
CHAPTER 10
LEGAL ASPECTS OF REAL ESTATE FINANCE

Mortgages, Deeds of Trust, and Security Deeds

Textbook page 294
New York recognizes all three types of security instruments.

Cancellation or Satisfaction of Mortgage

Textbook page 299
Once a mortgage has been paid in full, the mortgagee must sign a satisfaction of mortgage, deliver the same to the mortgagor, and file it in the appropriate county clerk’s office. N.Y. Real Prop. Law § 275.

Section 275 permits, but does not require, an assignment of mortgage in lieu of a satisfaction for mortgages transferred in the secondary mortgage market. 767 Third Ave. LLC v. Orix Capital Mkts., LLC, 26 A.D. 3d 216, 812 N.Y.S.2d 8, 2006 N.Y. App. Div. LEXIS 1868 2006 N.Y. Slip Op. 1119 (1st Dept. 2006). The section allows borrower to save money on recording taxes since taxes due will only be on the difference between the old mortgage and new mortgage and not the full amount of the full mortgage.

For example, Borrower has an existing mortgage with “A” bank for $100,000 with a principal balance of $95,000. He decides to refinance with “C” Bank and borrow another $50,000. “C” bank will pay off the balance owed to “A” bank ($95,000) on the existing mortgage, and borrower will now have a new loan with “C” bank for $145,000 ($95,000 plus $50,000).

A satisfaction of mortgage will be issued to borrower by “A” bank for the first mortgage, and borrower will now have to record the new mortgage with “C” bank. Suppose the county mortgage tax on this new mortgage will be 1.25% of $145,000 ($1,812.50). Borrower typically pays 0.75% of this amount or $1,359.38, and lender will pay the other 0.25% or $453.13.

If borrower can negotiate an assignment of the mortgage with “A” bank and have the old mortgage assigned over to C in lieu of a satisfaction, he will save money on the 1.25% mortgage tax imposed since he will be required to pay on the difference between the old and new mortgage money only and not on the full amount of the new mortgage. In other words, borrower will pay three fourths of 1.25% on $50,000, not on $145,000. He will pay $468.75 instead of $1,359.38.

Types of Foreclosure

Textbook page 302
New York recognizes both judicial foreclosures and power of sale foreclosures; however, the former is the more widely used method as there are strict limitations on the latter. N.Y. Real Prop. Acts. §§ 13 & 14.
After a default on the payment of the debt the mortgage secures, the mortgagee may foreclose. A lawsuit is commenced against the defaulting party. Further, any other interested parties (tenants, secondary mortgagors, mechanic lienors, etc.) must be brought into the lawsuit as proscribed by statute. N.Y. Real Prop. Acts. § 1311. They are served with a summons and complaint, and the parties are given an opportunity to raise any defenses.

If the defendant does not submit an answer within the proscribed statutory time frame, he or she will be in default. If the defendant does submit an answer or otherwise appear in the action within the requisite time, the case will proceed to trial. Whether there is a default or the plaintiff prevails at trial, the court will enter a judgment of foreclosure and sale and direct that the mortgaged premises be sold to satisfy the debt. N.Y. Real Prop. Acts. § 1351.

In New York, a judicial foreclosure requires a Notice of Sale to be published once a week for 4 successive weeks or twice a week for 3 consecutive weeks in a newspaper in the county where the property is located. N.Y. Real Prop. Acts. § 231. The statute’s requirements regarding publication are exact and must be followed accurately. It should be noted here that the New York Court of Appeals has held that there is a distinct difference between a notice of foreclosure that is “undeliverable” and a notice of foreclosure that is “unclaimed.”

In a 2005 case, the municipality served notice of foreclosure by regular mail and certified mail to the mortgagor and published notice of foreclosure as well. The certified mail, only, was returned as “unclaimed.” The issue became whether “unclaimed” meant the same thing as “undeliverable.” Reversing the Appellate Division, the Court of Appeals held that the two terms are distinctively different. Delivery of the notice satisfied due process; the fact that the mortgagor did not claim the notice does not mean he did not receive it as might be the case where notice was undeliverable. Harner v. County of Tioga, 5 N.Y.3d 136, 833 N.E.2d 255, 800 N.Y.S.2d 112, 2005 N.Y. LEXIS 1470.

At the foreclosure sale, the court appointed referee will conduct the sale by reading the terms of sale out loud. N.Y. Real Prop. Acts. § 231. The lender may bid on the amount outstanding on its loan, and the highest bidder will prevail. After the sale, the court appointed referee will execute a Referee’s Deed. N.Y. Real Prop. Acts. § 1353. If, at the foreclosure sale, the debt is not paid off, the lender may get a deficiency judgment for the balance, provided the sale results in less money than the judgment in foreclosure. N.Y. Real Prop. Acts. § 1371. The purchaser at a foreclosure sale takes title clear of any claims of the parties to the foreclosure action. N.Y. Real Prop. Acts. § 1353.

In 1998 New York adopted the power of sale form of foreclosure. However, because of the absence of judicial oversight, this form of foreclosure has strict statutory requirements that must be followed precisely to assure the mortgagee that the sale will not be invalidated. N.Y. Real Prop. Acts. Article 14. A power of sale foreclosure is not available to most mortgages securing residential real property as provided in the following statutory section:

(a) a residential building containing less than six dwelling units, including structures and improvements appurtenant thereto, or
(b) a residential condominium unit in a residential building owned in a condominium form of ownership, or
(c) a residential building, including structures and improvements appurtenant thereto, owned by a qualified cooperative apartment corporation, or
(d) a building located in a city with a population of one million or more where the number of units occupied by residential tenants is equal to or greater than 65 per centum of the total number of units in the building, containing a provision that, upon a default of the mortgage, or the note, bond, or other obligation secured thereby, the mortgagee shall have the right to sell the mortgaged property where:

(1) Default has occurred under the mortgage and the outstanding indebtedness has been declared immediately due and payable by written notice to the mortgagor given in the manner required by the mortgage.
(2) An action has not been brought to recover the debt secured by the mortgage, or any part thereof, or to foreclose the mortgage under article thirteen of this chapter; or, if an action on the debt has been brought, it has been discontinued or dismissed without prejudice against the plaintiff, or an execution, issued upon a judgment rendered therein in favor of the plaintiff, has been returned wholly or partly unsatisfied.
(3) The mortgage has been duly recorded in accordance with article nine of the real property law in the land records in the county where the property is situated.
(4) The first notice of sale has been published within the time in which an action could be commenced to foreclose such mortgage.

The law further provides in pertinent part that a nonjudicial foreclosure by power of sale is not available to a mortgagee seeking to foreclose a property containing residential apartment units where such foreclosure would modify, terminate, or impair a tenants leasehold rights. N.Y. Real Prop. Acts. § 1401.

**Effect of a Valid Foreclosure Sale**

*Textbook page 303*

The right of redemption is extinguished upon the sale of property at foreclosure, and the successful bidder owns the property. N.Y. Real Prop. Acts. §§ 1352 & 1410. All necessary parties to the transaction must have been notified of the foreclosure. Where a necessary party is not given notice and joined in the action, his right of redemption is not extinguished.


The actual foreclosure must have taken place to bar a claimant’s right of redemption. Where there is no delivery of a deed, there is no transfer of title. Although New York CPLR § 5240 grants the court great discretionary power to allow a claimant’s right of redemption prior to a foreclosure sale, the section is not applicable to a foreclosure that has already taken place and the property has already been sold to a bona fide purchaser. Matter of Hoffman v. Senuik, 88 A.D.2d 954, 451 N.Y.S.2d 191, 1982 N.Y. App. Div. LEXIS 17322 (N.Y. App. Div. 2d Dep’t 1982).
CHAPTER 11  
MORTGAGE FORMS AND PROVISIONS  

Security Agreement and Financing Statement  

Textbook page 361  
If the Uniform Commercial Code-1 (UCC-1) Statement is filed as a fixture filing, it will be filed in the appropriate county clerk’s office where the real property to which it refers is located. However, if the UCC-1 Statement is not to be filed as a fixture filing, it must be filed with the Secretary of State located in Albany. UCC § 9-501.
CHAPTER 12
TITLE EXAMINATIONS


BONA FIDE PURCHASER FOR VALUE RULE

Textbook page 381
In New York, all instruments affecting the chain of title must be recorded in the appropriate county clerk’s office or be void as to any subsequent bona fide purchaser for value. N.Y. Real Prop. Law §§ 266 & 291; Doyle v. Lazzaro, 33 N.Y. 2d 981, 309 N.E. 2d 138, 353 N.Y.S. 2d 740 (1974).

Recording Statutes

Textbook page 383
New York is a “race-notice” jurisdiction. Therefore, the first to record without notice of any previous conveyance by seller to another, of the same property, is owner of the property. For example, A sells to his neighbor B for valuable consideration on Monday. On Tuesday, A sells the same property for valuable consideration to neighbor C. Neighbor C records the deed of conveyance before B without notice of the previous transaction between A and B. As between C and B, C is the owner of the property in New York.

However, if C records the deed before B, with notice of the previous conveyance from A to B, he will not be acting in good faith and his rights to the property will not supersede B’s rights where B records second to C. Where good faith is lacking, the purchaser who records first will not defeat the rights of a bona fide purchaser who subsequently records. Priority is established by the date of recording, not the date on the deed or document. Therefore, it is important that all documents are recorded promptly. N.Y. Real Prop. Law §§ 291 & 317.

New York has recently amended the law with respect to recording a satisfaction of mortgage by the mortgagee. The law states that a mortgagee has 30 days in which to record the satisfaction of mortgage from the time it is signed by the mortgagee. N.Y. Real. Prop. Law § 275 (1). Failure to file the satisfaction timely will result in a $500 fine against the mortgagee and if the satisfaction is not filed within 60 days, mortgagee may be liable for a fine of up to $1,000.

Practice Tips for Ordering a Title Examination

Textbook page 386
Although it is best to order a title examination as soon as possible, this is usually not done until the client obtains a mortgage commitment. Since most closings are contingent upon purchaser obtaining a mortgage commitment, ordering a title examination in advance is not
cost efficient. At the closing, the title agent calls in to make certain there are no changes in the quality of title. Title reports are brought up to date at this point in the closing.

As stated, the title agent will call the county records department to check whether encumbrances that appear on the title have been cleared. If they have not been cleared, the title agent will require documents from seller at closing such as a satisfaction of mortgage, proof of taxes paid, and any other documents that would clear title defects. New York title companies insure the gap between the closing and the recording of the instruments.

New York prohibits a mortgage broker or mortgage banker from requiring the purchase of title insurance from a particular title company or agency as a condition to obtaining a mortgage. N.Y. Banking Law § 595-a(4) (2001). Federal Law, under RESPA § 2607 (c)(4) (West 2001), allows lenders to require the purchaser to obtain insurance from selected companies provided they disclose to the borrower their business affiliation; provide the range of cost; and do not require that a particular closing (settlement) agent of the lender be used.

Information Needed to Do an Examination

*Textbook page 386*

Along with the information needed to order a title examination suggested by the main text, many New York counties require owners to have a document called an “Abstract of Title.” An Abstract is a certified compilation of the documents recorded at the appropriate county clerk’s office that affect the premises.

An Abstract is created by searching the county clerk’s office records and must begin with a warranty deed. Attorneys examine the Abstract of Title to determine the status of the title to the premises. An Abstract is updated or continued each time a transaction occurs with respect to the premises. Either attorneys or title insurance companies may prepare updates of the Abstract of Title.

Period of Examination

*Textbook page 386*

In New York, a search usually goes back 40 to 60 years. If a problem is discovered with the title, it may go back even further. The search will begin in either the grantor/grantee index or the lot and block index, depending on the county being searched.

Judgments

*Textbook page 390*

Money judgments in New York are good for 20 years. N.Y. CPLR § 211. The title company does an update of the title search up to the time that title closes to make sure that no last minute judgments have been filed.
Probate Court Records

Textbook page 391

Probate Court is called “Surrogate’s Court” in New York. The laws governing probate are the “Surrogate Court and Procedures Act” (Surr. Ct. Proc. Act) and “Estates, Powers, and Trust” (Est. Powers & Trusts) laws.

Role of a Paralegal and Practice Tips

Textbook page 401

A paralegal will generally order, and may conduct, the title search at the county clerk’s office; however, the actual title examination will be done by the attorney.
CHAPTER 13
TITLE INSURANCE

Owner’s Policy

Textbook page 409
In New York, when a mortgagee title insurance policy is being issued, all borrowers must be notified that they have the right to purchase an owner’s title insurance policy, which equals the amount of the market value of the property in question at the time of the discovery of the title defect. N.Y. Ins. Law § 6409 (c).

New Insured Risks Under the 2006 Policy

Textbook page 413
TIRSA (Title Insurance Rate Service Association, Inc.), an agent of the New York State Insurance Department, receives, compiles, and submits statistical financial data related to title insurance. In 2006, TIRSA filed with the Insurance Department for approval to issue the 2006 ALTA (American Land Title Association) forms, and their issuance was approved to be effective as of May 1, 2007.

As of June 17, 2006, the new ALTA policies will be considered the official forms. (See textbook pages 443 to 465.) The 1992 ALTA forms had been designed to limit the instances in which the insurer would be liable, while the 2006 ALTA policy is designed to provide the insured with more coverage.

Commitments for Title Insurance

Textbook page 427
After the commitment, but no later than the closing, the title company runs a “continuation” search to make sure there are no new judgments or liens affecting the premises. In New York, the legal assistant reviews the title report and makes sure all the exceptions can be satisfied prior to or at closing.

In the New York City area, law firms do not generally act as title agents. In upstate New York, attorneys often act as agents for title insurance companies and prepare the title insurance binder, handle the recording of closing documents, mark up the title binder at closing, and then issue the final policy, postclosing.

New York does not require title agents to be licensed. There is presently legislation before the assembly and senate of New York proposing that licensing requirements be enacted. The proposed law would govern nonattorney agents only. The purpose of the bill is to monitor the activities of title agents since they are often acting in a fiduciary capacity for lenders and sellers and borrowers.

The legislation calls for minimum standards of education and technical proficiency as well as rules of conduct. Violations of the law, if enacted, would result in penalties and/or a suspension or revocation of the agent’s license. An Act to Amend the Insurance Law, in

**Ethics: Personal Conflict of Interest**

*Textbook page 431*

When a New York attorney is acting as an agent for a title insurer and providing title insurance to his clients, the attorney can receive compensation only for core title services and he must provide a credit for any duplicated title work. The client should sign and acknowledge receipt of the disclosure form giving his informed consent. *(see Appendix C to this supplement)*

Where the attorney is also providing title insurance to the borrower’s lender, the fees must not be excessive and the client must consent. Where an attorney owns a mortgage brokerage and title abstract business, he may not represent the buyer or seller in the same transaction. Furthermore, it must be disclosed to the client that the attorney-client privilege does not apply to activities done by the attorney in his capacity as title insurer.
CHAPTER 14
REAL ESTATE CLOSINGS

Real Estate Closings

Textbook page 511
Closing, settlement, transfer of title—all of these refer to the day the buyer pays the entire purchase price and gets a deed. All the promises made in the contract must be completed. The deed is exchanged for money. Usually the mortgage loan closes at the same time as the transfer of title.

Customarily, closings take place at the lending institution or the office of the seller’s attorney, but it can be anywhere the parties agree. Attendees generally include the bank representative and/or bank attorney, buyer and seller, their respective attorneys, and, on occasion, the real estate brokers.

Within 24 hours prior to the closing, the buyer will generally check the premises with a thorough “walk-through.”

Contact with Seller, Purchaser, and Broker by the Paralegal

Textbook page 522
The paralegal is the lifeline of any real estate closing. He or she will make contact with the client, determine and prepare whatever documents are needed for the closing, track down all needed information, and coordinate the date and time of closing with the attorney, the client, and all other parties involved.

Ordering the Title Examination

Textbook page 522
In New York, once the parties know the deal is firm—that the mortgage commitment has been obtained—the seller’s attorney orders the title search performed and an updated Abstract of Title to be prepared, both of which will then be forwarded to the buyer’s attorney.

Ordering the Survey

Textbook page 523
The seller will be responsible for ordering the survey. However, the buyer must inform the seller as soon as possible as to whom the certifications on the survey must be made. Generally, the certifications are made to the buyers, the buyers’ attorney, and the mortgage company. This way, if the survey is not accurate, the named individuals to whom the survey was certified can proceed against the surveyor. If there is already a complete survey of the property, the purchaser and/or mortgagee may be satisfied with an updated survey, which can be obtained for a lower fee than a brand new survey.
Ordering Hazard and Fire Insurance

Textbook page 523

If the buyer is to obtain a loan for the real property, the mortgage company will require proof of paid hazard and fire insurance on the real property at the time of closing in the form of an insurance binder.

Obtaining the Termite Clearance Letter or Bond

Textbook page 525

In the State of New York, there is no requirement that the seller produce a termite clearance letter or bond.

It is a good idea to obtain a recent mortgage statement from the seller, which will contain the lender’s name and telephone number, as well as the account number and approximate outstanding balance. This information will be helpful for requesting a “payoff” letter. A payoff letter is requested in advance of the closing date.

The lender will state the amount required to pay off the loan on the day of closing. If the closing does not take place on the specified date, per diem interest on the balance will accrue for each day past the closing date. Borrower should be aware of these fees to avoid surprise at closing.

If there are unpaid taxes, they will need to be satisfied. If there are judgments of record, check to see if they are against the seller. They may simply be judgments against a party by the same name, that is, there are many Sarah Smiths in the area. If they are not against the seller, the title company will take an affidavit to that effect. If they are against the seller, they must be satisfied and paid prior to or at the closing.

The Closing and Aftermath

Textbook page 539

Once the closing date is set, the paralegal must then begin determining the financial adjustments to be made to the purchase price. This is done on a “closing statement.” The closing statement is one of the most important documents prepared for the closing (secondary to the deed, note, and mortgage) because it contains all the financial information for the transaction. Approximately 1 to 2 days prior to closing, the paralegal for the seller and the paralegal for the buyer will review the “numbers” for closing.

That is, they will make sure that all credits have been made to their respective clients, they will prorate any outstanding costs, and they will insure they have an identical dollar amount to be paid by the buyer for the seller at closing. The buyer must then be advised to bring a certified check or money order to the closing in that amount.

On the date of closing, the paralegal for the buyer and the seller should make sure the file is ready for the attorney, with all necessary paperwork. Further, there should be several blank checks included in the file in the event that the attorney must make disbursements on behalf of the client.

After the closing, any checks made payable to the attorney or law firm must be deposited as soon as possible in the appropriate account. Further, the paralegal will prepare a formal closing statement to be mailed to the client.
CHAPTER 15
GOVERNMENT REGULATION OF REAL ESTATE CLOSINGS

Government Regulation of Real Estate Closings

Textbook page 562

The Dodd-Frank Wall Street Reform and Consumer Protection Act (The Financial Reform Act), which has broad ramifications for the real estate practitioner, was signed into law in July of 2010. Under this law, a consumer Financial Protection Board (hereinafter the "Board") will be created as a watchdog to monitor the financial system overall and look for potential as well as actual abuses. The Federal Reserve will oversee the Board.

Mortgages presently regulated by HUD will now be regulated by the Board. Under the new law, real estate appraisals may not have to be ordered according to the specific lender’s direction but one appraisal may satisfy all lenders; there will no longer be stated income loans allowed, that is, all borrowers will have to provide evidence of income and show a reasonable ability to pay; adjustable rate mortgage loans will no longer have prepayment penalties; mortgage brokers will not be entitled to a higher fee based on the loan terms exacted from the borrower; mortgage loan originators must disclose their license information on all documentation, and treble damages will be afforded the borrower for a lender’s violation of the act.

Mortgage Fraud

Textbook page 575

In 2009 New York was one of the hardest hit states with mortgage fraud; there were 217 reported cases as per the Mortgage Asset research Institute, Twelfth Periodic Mortgage Fraud Case Report, April 2010.

Section 187.00 subsection 4 of New York’s Penal Law states that a “New York Residential mortgage fraud is committed by a person who, knowingly and with intent to defraud, presents, causes to be presented or prepares with knowledge or belief that it will be used in soliciting an applicant applying for underwriting or closing a residential mortgage loan or filing with a county clerk of any county in the state arising out of and related to the closing of a residential mortgage loan, any written statement which (a) contains materially false information concerning any fact material thereto; or conceals, for the purpose of misleading, information concerning any fact material thereto.”
CHAPTER 16
REAL ESTATE CLOSING FORMS AND EXAMPLES

Affidavits

Textbook page 584

Law firms tend to have their own personalized affidavits that are used to satisfy the legal requirements for the closing. In addition, the New York State Bar Association publishes Residential Real Estate Forms, which is available for purchase. The residential real estate practice forms have a complete selection of real estate documents (see Practice Forms). You can find more information regarding the same at http://www.nysba.org
CHAPTER 17
CONDOMINIUMS AND COOPERATIVES

Condominiums and Cooperatives

Textbook page 653
In New York during the 1970s, many owners of buildings decided to change the ownership of these buildings and convert them to condominiums or cooperatives. To do this, the sponsor (generally the property owner) prepares an offering plan that must follow in detail the regulations prescribed by the New York State Attorney General and the New York General Business Law. A copy of this proposal is then submitted to each tenant and the New York State Attorney General for review.

Once the Attorney General decides it is in compliance, the proposal is accepted for filing. The sponsor then issues a “black book” (black lettering on the cover) and the sponsor can begin to sell apartments. The building can be converted according to an “eviction” or “noneviction” plan. In an eviction plan, 51% of the tenants must purchase their units. Once 51% of the tenants purchase, the other tenants can be evicted after 3 years (the elderly and disabled are exempt from eviction by statute).

If the sponsor decides to offer a noneviction plan, the much more prevalent form today, the sponsor must sell only 15% of the apartments for the plan to be effective. Under this plan, no tenants can be evicted. N.Y. Gen. Bus. Law § 352-eeee.

Time-Shares

Textbook page 661
When a time-share is offered for purchase in the State of New York, the promoter of the timeshare must provide a buyer of the same with written disclosure of all restrictions and stipulations of such contract for sale within 5 business days of the date of the agreement. The contents of such disclosure are mandated by statute. Upon receipt of the written disclosure of the parties’ agreement, the buyer will have 3 days to rescind his or her consent to the same. N.Y. Gen. Bus. Law § 157-a.
CHAPTER 18
LEASES

Common Law and Leases

Textbook page 690

Leases are contracts between the landlord and tenant. Most residential leases are uniform; landlords use preprinted form and add riders if necessary. All residential leases in New York must be:

1) Written in a clear and coherent manner using words with common and everyday meanings;

The rights of tenants in New York State are protected under many different laws. The Multiple Dwelling Law (three or more apartments) applies to cities with a population of 325,000 or more.

N.Y. Mult. Dwell. Law § 3(1). The Multiple Residents Law applies to “all cities of less than three hundred twenty-five thousand population and to all towns and villages.” N.Y. Mult. Resid. Law § 3(1).

Every residential lease in New York contains an implied warrant of habitability, that is, the tenant is entitled to a safe and livable apartment. N.Y. Real Prop. Law § 235-b. The failure to provide heat, hot water, or to get rid of insect infestations are examples of violations of the warranty of habitability. If the landlord breaches this warranty, the tenant can sue for a rent reduction.

In New York, a lease may not restrict occupancy to just the named tenant. In residential buildings, use may include the named tenant, his immediate family, and one other person. N.Y. Real Prop. Law § 235-f. In 1989, the New York State Court of Appeals extended the definition of “family” in a lease to include those who, although they are not related by blood or by law, have a special relationship characterized by emotional and financial interdependence. Braschi v. Stahl Associates Co., 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989).

As of 2009 newly enacted legislation affords protection for the manufactured home park tenant from abusive or offensive actions by a manufactured home park owner. N.Y. Real Prop. Law § 233.

Rent

Textbook page 692

New York City and other select locations around the State of New York have rent control and rent stabilization laws, which are found under the Real Property Laws of the State of New York. These laws impose guidelines and limits to the amount of rent charged as well
as govern the rights and obligations of the tenants and landlords. Rent regulation is administered by the State Division of Housing and Community Renewal (DHCR).

In New York City, rent control laws arose because of the housing shortage that followed World War II, and they generally affect properties that were built before 1947. When an apartment is vacated, it moves under the rent stabilization laws or is completely removed from the rent control and stabilization laws.

Rent stabilization laws also apply to New York City dwellings and arose due to a shortage of affordable rental apartments. The law attempts to balance the needs of the landlord and tenant and generally affects buildings constructed between February 1, 1947 and January 1, 1974.

Outside New York City, rent stabilization applies to communities that adopted the Emergency Tenant Protection Act (ETPA). Where rent stabilization is in effect, maximum rent increases are set by the local rent stabilization boards.

More information on rent control/rent stabilization laws can be found on the Web at http://www.dhcr.state.ny.us

New York State Law prohibits discrimination in real estate transactions. A landlord may not refuse to lease property because of race, creed, color, national origin, age, sex, disability, marital status, or presence of children. N.Y. Exec. Law § 236. Owners of two-family homes who live in one of the units are exempt. N.Y. Exec. Law § 236.

In New York, security deposits are considered trust funds that must be put in an interest-bearing account. They cannot be commingled with the owner’s funds. N.Y. Gen. Oblig. Law § 7-103.

Landlord’s Remedies for Tenant’s Default

Textbook page 701

The following information applies to both residential and commercial lease proceedings. When a tenant breaches any lease provision, the landlord may sue. If the landlord breaches a lease provision, the tenant may similarly sue. In New York, the bases for which landlords can sue include nonpayment of rent, illegal use of premises, remaining in possession after the lease ends, and bankruptcy of the tenant. N.Y. Real Prop. Acts. § 711.

In order to evict a tenant the landlord must commence an eviction proceeding known as a “summary proceeding.” The law that governs such actions is found in the New York Real Property Actions and Proceedings Law. There are two different lawsuits that can be brought, and each requires notice to the tenant prior to commencing the lawsuit: (1) nonpayment action, where the landlord seeks to get the rent due; and (2) holdover proceedings, where the goal is to evict the tenant.

The tenant may have some defenses to an eviction proceeding, for example, if there are building code violations (after they have been reported and inspected), failure to provide heat, breach of warranty of habitability, or constructive eviction (if premises are not habitable).
Assignment, Subletting, or Mortgaging of the Leased Premises

*Textbook page 706*

Generally, the lease says the tenant may assign or sublease with the landlord’s consent. New York Real Property Law has detailed requirements that a tenant must follow to make a written request to sublet or assign. N.Y. Real Prop. Law § 226-b.

Under § 226-b the landlord may not unreasonably withhold consent to a sublet. In a recent case, the tenant followed all the proper requirements in making a request to sublet her rent stabilized apartment for 11 months to take a temporary college level teaching position in Texas. The court held that landlord’s refusal was arbitrary and improper since it raised no objections to the proposed subtenant, and the contention that tenant may be permanently residing in Texas was purely speculative. *Condor Funding LLC, v. Miles*, 2007 N.Y. Misc. LEXIS 3585.
APPENDIX A
PROPERTY CONDITION DISCLOSURE STATEMENT

Name of Seller or Sellers: __________________________________________________

Property Address: _________________________________________________________

The property condition disclosure act requires the seller of residential real property to
cause this disclosure statement or a copy thereof to be delivered to a buyer or buyer’s
agent prior to the signing by the buyer of a binding contract of sale. Purpose of statement:
this is a statement of certain conditions and information concerning the property known
to the seller.

This disclosure statement is not a warranty of any kind by the seller or by any agent
representing the seller in this transaction. It is not a substitute for any inspections or tests,
and the buyer is encouraged to obtain his or her own independent, professional
inspections and environmental tests and is also encouraged to check public records
pertaining to the property.

A knowingly false or incomplete statement by the seller on this form may subject the
seller to claims by the buyer prior to or after the transfer of title. In the event that a seller
fails to perform the duty prescribed in this article to deliver a disclosure statement prior to
the signing by the buyer of a binding contract of sale, the buyer shall receive upon the
transfer of title a credit of $500 against the agreed upon purchase price of the residential
real property.

“Residential real property” means real property improved by a one- to four-family
dwelling used or occupied, or intended to be used or occupied, wholly or partly, as the
home or residence of one or more persons, but shall not refer to (a) unimproved real
property upon which such dwellings are to be constructed, or (b) condominium units or
cooperative apartments, or (c) property on a homeowners’ association that is not owned
in fee simple by the seller.

Instructions to the seller:

(a) Answer all questions based on your actual knowledge.
(b) Attach additional pages with your signature if additional space is required.
(c) Complete this form yourself.
(d) If some items do not apply to your property, circle “na” (nonapplicable). if you do not
know the answer circle “unkn” (unknown).

Seller’s statement: the seller makes the following representations to the buyer based upon
the seller’s actual knowledge at the time of signing this document. The seller authorizes
his or her agent, if any, to provide a copy of this statement to a prospective buyer of the
residential real property. The following are representations made by the seller and are not
the representations of the seller’s agent. General information.
1. How long have you owned the property?

2. How long have you occupied the property?

3. What is the age of the structure or structures? *Note to buyer*—if the structure was built before 1978, you are encouraged to investigate for the presence of lead-based paint.

4. Does anybody other than yourself have a lease, easement, or any other right to use or occupy any part of your property other than those stated in documents available in the public record, such as rights to use a road or path or cut trees or crops?
   (a) Yes  (b) No  (c) Unknown  (d) N/A

5. Does anybody else claim to own any part of your property?
   (a) Yes  (b) No  (c) Unknown  (d) N/A

   (If yes, explain below)

6. Has anyone denied you access to the property or made a formal legal claim challenging your title to the property?
   (a) Yes  (b) No  (c) Unknown  (d) N/A

   (If yes, explain below)

7. Are there any features of the property shared in common with adjoining landowners or a Homeowners’ association, such as walls, fences, or driveways?
   (a) Yes  (b) No  (c) Unknown  (d) N/A

   (If yes, describe below)

8. Are there any electric or gas utility surcharges for line extensions, special assessments, or homeowner or other association fees that apply to the property?
   (a) Yes  (b) No  (c) Unknown  (d) N/A

   (If yes, explain below)

9. Are there certificates of occupancy related to the property?
   (a) Yes  (b) No  (c) Unknown  (d) N/A

   (If no, explain below)

**ENVIRONMENTAL**

*Note to seller*—In this section, you will be asked questions regarding petroleum products and hazardous or toxic substances that you know to have been spilled, leaked, or
Petroleum products may include, but are not limited to, gasoline, diesel fuel, home heating fuel, and lubricants. Hazardous or toxic substances are products that could pose short- or long-term danger to personal health or the environment if they are not properly disposed of, applied, or stored.

These include, but are not limited to, fertilizers, pesticides, and insecticides; paint including paint thinner, varnish remover, and wood preservatives; and treated wood, construction materials such as asphalt and roofing materials; antifreeze and other automotive products; batteries; cleaning solvents including septic tank cleaners, household cleaners, and pool chemicals; and products containing mercury and lead.

*Note to buyer—*[AP_NTXL]If contamination of this property from petroleum products and/or hazardous or toxic substances is a concern to you, you are urged to consider soil and groundwater testing of this property.

10. Is any or all of the property located in a designated floodplain?
   (a) Yes  (b) No  (c) Unknown  (d) N/A
   (If yes, explain below)

11. Is any or all of the property located in a designated wetland?
   (a) Yes  (b) No  (c) Unknown  (d) N/A
   (If yes, explain below)

12. Is the property located in an agricultural district?

13. Was the property ever the site of a landfill?
   (a) Yes  (b) No  (c) Unknown  (d) N/A
   (If yes, explain below)

14. Are there or have there ever been fuel storage tanks above or below the ground on the property?
   (a) Yes  (b) No  (c) Unknown  (d) N/A
   (i) If yes, are they currently in use?
      (a) Yes  (b) No  (c) Unknown  (d) N/A
   (ii) If yes, where are their location(s)?
   (iii) Are they leaking or have they ever leaked?

15. Is there asbestos in the structure?
   (a) Yes  (b) No  (c) Unknown  (d) N/A
   (If yes, state location or locations below)
16. Is lead plumbing present?  
(a) Yes (b) No (c) Unknown (d) N/A  

(If yes, state location or locations below)  

17. Has a radon test been done?  
(a) Yes (b) No (c) Unknown (d) N/A  

(If yes, attach a copy of the report)  

18. Has motor fuel, motor oil, home heating fuel, lubricating oil, or any other petroleum product, methane gas, or any hazardous or toxic substance spilled, leaked, or otherwise been released on the property or from the property onto any other property?  
(a) Yes (b) No (c) Unknown (d) N/A  

(If yes, describe below)  

19. Has the property been tested for the presence of motor fuel, motor oil, home heating fuel, lubricating oil, or any other petroleum product, methane gas, or any hazardous or toxic substance?  
(a) Yes (b) No (c) Unknown (d) N/A  

[If yes, attach report(s)]  

**STRUCTURAL**  

20. Is there any rot or water damage to the structure or structures?  
(a) Yes (b) No (c) Unknown (d) N/A  

(If yes, explain below)  

21. Is there any fire or smoke damage to the structure or structures?  
(a) Yes (b) No (c) Unknown (d) N/A  

(If yes, explain below)  

22. Is there any termite, insect, rodent, or pest infestation or, damage?  
(a) Yes (b) No (c) Unknown (d) N/A  

(If yes, explain below)
23. Has the property been tested for termite, insect, rodent or pest infestation, or damage?
   (a) Yes  (b) No  (c) Unknown  (d) N/A

   [If yes, please attach report(s)]

24. What is the type of roof/roof covering (slate, asphalt, other)?

   (i) Any known material defects?
       (a) Yes  (b) No  (c) Unknown  (d) N/A

   (ii) How old is the roof?

   (ii) Is there a transferable warranty on the roof in effect now?
       (a) Yes  (b) No  (c) Unknown  (d) N/A

   (If yes, explain below)

25. Are there any known material defects in any of the following structural systems: footings, beams, girders, lintels, columns, or partitions?

   (a) Yes  (b) No  (c) Unknown  (d) N/A

   (If yes, explain below)

**Mechanical Systems and Services**

26. What is the water source (circle all that apply) well, private, municipal, other?

   (i) If municipal, is it metered?
       (a) Yes  (b) No  (c) Unknown  (d) N/A

27. Has the water quality and/or flow rate been tested?

   (a) Yes  (b) No  (c) Unknown  (d) N/A

   (If yes, describe below)

28. What is the type of sewage system (circle all that apply) Public sewer, private sewer, septic, or cesspool? If septic or cesspool, age? __________ Date last pumped? __________ Frequency of pumping? __________ Any known material defects?

   (a) Yes  (b) No  (c) Unknown  (d) N/A

   (if yes, explain below)
29. Who is your electric service provider? __________ What is the amperage? ________ Does it have circuit breakers or fuses? ________ Private or public poles? ________ Any known material defects? ________

(a) Yes  (b) No  (c) Unknown  (d) N/A

(if yes, explain below)

30. Are there any flooding, drainage, or grading problems that resulted in standing water on any portion of the property?

(a) Yes  (b) No  (c) Unknown  (d) N/A

(If yes, state locations and explain below)

31. Does the basement have seepage that results in standing water?

(a) Yes  (b) No  (c) Unknown  (d) N/A

(If yes, explain below)

Are there any known material defects in any of the following: (If yes, explain below. Use additional sheets if necessary)

32. Plumbing system?

(a) Yes  (b) No  (c) Unknown  (d) N/A

33. Security system?

(a) Yes  (b) No  (c) Unknown  (d) N/A

34. Carbon monoxide detector?

(a) Yes  (b) No  (c) Unknown  (d) N/A

35. Smoke detector?

(a) Yes  (b) No  (c) Unknown  (d) N/A

36. Fire sprinkler system?

(a) Yes  (b) No  (c) Unknown  (d) N/A
37. Sump pump?
   (a) Yes  (b) No  (c) Unknown  (d) N/A

38. Foundation/slab?
   (a) Yes  (b) No  (c) Unknown  (d) N/A

39. Interior walls/ceilings?
   (a) Yes  (b) No  (c) Unknown  (d) N/A

40. Exterior walls or siding?
   (a) Yes  (b) No  (c) Unknown  (d) N/A

41. Floors?
   (a) Yes  (b) No  (c) Unknown  (d) N/A

42. Chimney/fireplace or stove?
   (a) Yes  (b) No  (c) Unknown  (d) N/A

43. Patio/deck?
   (a) Yes  (b) No  (c) Unknown  (d) N/A

44. Driveway?
   (a) Yes  (b) No  (c) Unknown  (d) N/A

45. Air conditioner?
   (a) Yes  (b) No  (c) Unknown  (d) N/A

46. Heating system?
   (a) Yes  (b) No  (c) Unknown  (d) N/A

47. Hot water heater?
   (a) Yes  (b) No  (c) Unknown  (d) N/A

48. The property is located in the following school district __________
   (a) Yes  (b) No  (c) Unknown  (d) N/A

Note: The buyer is encouraged to check public records concerning the property (e.g., tax records and wetland and flood plain maps)
The seller should use this area to further explain any previous item. If necessary, attach additional pages and indicate here the number of additional pages attached. Seller’s certification: seller certifies that the information in this property condition disclosure statement is true and complete to the seller’s actual knowledge as of the date signed by the seller.

If a seller of residential real property acquires knowledge that renders materially inaccurate a property condition disclosure statement provided previously, the seller shall deliver a revised property condition disclosure statement to the buyer as soon as practicable.

In no event, however, shall a seller be required to provide a revised property condition disclosure statement after the transfer of title from the seller to the buyer or occupancy by the buyer, whichever is earlier.

Seller ___________________________ date _________________
Seller ___________________________ date _________________

Buyer’s acknowledgment: buyer acknowledges receipt of a copy of this statement and buyer understands that this information is a statement of certain conditions and information concerning the property known to the seller. It is not a warranty of any kind by the seller or seller’s agent and is not a substitute for any home, pest, radon, or other inspections or testing of the property or inspection of the public records.

Buyer ___________________________ date _________________
Buyer ___________________________ date _________________
APPENDIX B
DURABLE GENERAL POWER OF ATTORNEY, NEW YORK STATUTORY SHORT FORM THE POWERS YOU GRANT BELOW CONTINUE TO BE EFFECTIVE SHOULD YOU BECOME DISABLED OR INCOMPETENT

CAUTION:

§ 5-1513. Statutory short form power of attorney.

1. The use of the following form in the creation of a power of attorney is lawful, and, when used, and executed in accordance with subdivision one of section 5-1501B of this title, it shall be construed as a statutory short form power of attorney in accordance with the provisions of this title:

“POWER OF ATTORNEY
NEW YORK STATUTORY SHORT FORM

(a) CAUTION TO THE PRINCIPAL: Your Power of Attorney is an important document. As the “principal,” you give the person whom you choose (your “agent”) authority to spend your money and sell or dispose of your property during your lifetime without telling you. You do not lose your authority to act even though you have given your agent similar authority.

When your agent exercises this authority, he or she must act according to any instructions you have provided or, where there are no specific instructions, in your best interest. “Important Information for the Agent” at the end of this document describes your agent’s responsibilities. Your agent can act on your behalf only after signing the Power of Attorney before a notary public. You can request information from your agent at any time.

If you are revoking a prior Power of Attorney by executing this Power of Attorney, you should provide written notice of the revocation to your prior agent(s) and to the financial institutions where your accounts are located. You can revoke or terminate your Power of Attorney at any time for any reason as long as you are of sound mind. If you are no longer of sound mind, a court can remove an agent for acting improperly.

Your agent cannot make health care decisions for you. You may execute a “Health Care Proxy” to do this. The law governing Powers of Attorney is contained in the New York General Obligations Law, Article 5, Title 15. This law is available at a law library or online through the New York State Senate or Assembly websites, www.senate.state.ny.us or www.assembly.state.ny.us

If there is anything about this document that you do not understand, you should ask a lawyer of your own choosing to explain it to you.
(b) DESIGNATION OF AGENT(S):
I, _______________________________________________, hereby appoint:

name and address of principal ________________________________________________

_____________________________________________________ as my agent(s)

name(s) and address(es) of agent(s)

If you designate more than one agent above, they must act together unless you initial the statement below.

( ) My agents may act SEPARATELY.

c) DESIGNATION OF SUCCESSOR AGENT(S): (OPTIONAL) If every agent designated above is unable or unwilling to serve, I appoint as my successor agent(s):

_______________________________________________________________

name(s) and address(es) of successor agent(s)

Successor agents designated above must act together unless you initial the statement below. ( ) My successor agents may act SEPARATELY.

d) This POWER OF ATTORNEY shall not be affected by my subsequent incapacity unless I have stated otherwise below, under “Modifications.”

e) This POWER OF ATTORNEY REVOKES any and all prior Powers of Attorney executed by me unless I have stated otherwise below, under “Modifications.” If you are NOT revoking your prior Powers of Attorney, and if you are granting the same authority in two or more Powers of Attorney, you must also indicate under “Modifications” whether the agents given these powers are to act together or separately.

(f) GRANT OF AUTHORITY: To grant your agent some or all of the authority below, either

(1) Initial the bracket at each authority you grant, or
(2) Write or type the letters for each authority you grant on the blank line at (P), and initial the bracket at (P). If you initial (P), you do not need to initial the other lines.

I grant authority to my agent(s) with respect to the following subjects as defined in sections 5-1502A through 5-1502N of the New York General Obligations Law:

( ) (A) real estate transactions;
( ) (B) chattel and goods transactions;
( ) (C) bond, share, and commodity transactions;
( ) (D) banking transactions;
( ) (E) business operating transactions;
( ) (F) insurance transactions;
( ) (G) estate transactions;
( ) (H) claims and litigation;
( ) (I) personal and family maintenance;
( ) (J) benefits from governmental programs or civil or military service;
( ) (K) health care billing and payment matters; records, reports, and statements;
( ) (L) retirement benefit transactions;
(M) tax matters;
(N) all other matters;
(O) full and unqualified authority to my agent(s) to delegate any or all of the foregoing powers to any person or persons whom my agent(s) select;
(P) EACH of the matters identified by the following letters______________.

You need not initial the other lines if you initial line (P).

(g) MODIFICATIONS: (OPTIONAL) In this section, you may make additional provisions, including language to limit or supplement authority granted to your agent. However, you cannot use this Modifications section to grant your agent authority to make major gifts or changes to interests in your property. If you wish to grant your agent such authority, you MUST complete the Statutory Major Gifts Rider.

(h) MAJOR GIFTS AND OTHER TRANSFERS: STATUTORY MAJOR GIFTS RIDER (OPTIONAL) In order to authorize your agent to make major gifts and other transfers of your property, you must initial the statement below and execute a Statutory Major Gifts Rider at the same time as this instrument. Initialing the statement below by itself does not authorize your agent to make major gifts and other transfers. The preparation of the Statutory Major Gifts Rider should be supervised by a lawyer.

(SMGR) I grant my agent authority to make major gifts and other transfers of my property, in accordance with the terms and conditions of the Statutory Major Gifts Rider that supplements this Power of Attorney.

(i) DESIGNATION OF MONITOR(S): (OPTIONAL) I wish to designate ____________________, whose address(es) is (are)______________________________, as monitor(s). Upon the request of the monitor(s), my agent(s) must provide the monitor(s) with a copy of the power of attorney and a record of all transactions done or made on my behalf. Third parties holding records of such transactions shall provide the records to the monitor(s) upon request.

(j) COMPENSATION OF AGENT(S): (OPTIONAL) Your agent is entitled to be reimbursed from your assets for reasonable expenses incurred on your behalf. If you ALSO wish your agent(s) to be compensated from your assets for services rendered on your behalf, initial the statement below. If you wish to define “reasonable compensation,” you may do so above, under “Modifications.” ( ) My agent(s) shall be entitled to reasonable compensation for services rendered.

(k) ACCEPTANCE BY THIRD PARTIES: I agree to indemnify the third party for any claims that may arise against the third party because of reliance on this Power of Attorney. I understand that any termination of this Power of Attorney, whether the result of my revocation of the Power of Attorney or otherwise, is not effective as to a third party until the third party has actual notice or knowledge of the termination.

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(l) TERMINATION: This Power of Attorney continues until I revoke it or it is terminated by my death or other event described in section 5-1511 of the General Obligations Law. Section 5-1511 of the General Obligations Law describes the manner in which you may revoke your Power of Attorney and the events that terminate the Power of Attorney.

(m) SIGNATURE AND ACKNOWLEDGMENT:
In Witness Whereof I have hereunto signed my name on __________, 20__.

PRINCIPAL signs here: ==> __________________________
(acknowledgment)

(n) IMPORTANT INFORMATION FOR THE AGENT: When you accept the authority granted under this Power of Attorney, a special legal relationship is created between you and the principal. This relationship imposes on you legal responsibilities that continue until you resign or the Power of Attorney is terminated or revoked. You must:

1. act according to any instructions from the principal, or, where there are no instructions, in the principal’s best interest;
2. avoid conflicts that would impair your ability to act in the principal’s best interest;
3. keep the principal’s property separate and distinct from any assets you own or control, unless otherwise permitted by law;
4. keep a record of all receipts, payments, and transactions conducted for the principal; and
5. disclose your identity as an agent whenever you act for the principal by writing or printing the principal’s name and signing your own name as “agent” in either of the following manner:

(Principal’s Name) by (Your Signature) as Agent

or

(Your signature) as Agent for (Principal’s Name)

You may not use the principal’s assets to benefit yourself or give major gifts to yourself or anyone else unless the principal has specifically granted you that authority in this Power of Attorney or in a Statutory Major Gifts Rider attached to this Power of Attorney.

If you have that authority, you must act according to any instructions of the principal or, where there are no such instructions, in the principal’s best interest. You may resign by giving written notice to the principal and to any co-agent, successor agent, monitor if one has been named in this document, or the principal’s guardian if one has been appointed. If there is anything about this document or your responsibilities that you do not understand, you should seek legal advice.

Liability of agent: The meaning of the authority given to you is defined in New York’s General Obligations Law, Article 5, Title 15. If it is found that you have violated the law or acted outside the authority granted to you in the Power of Attorney, you may be liable under the law for your violation.
(o) AGENT’S SIGNATURE AND ACKNOWLEDGMENT OF APPOINTMENT: It is not required that the principal and the agent(s) sign at the same time, nor that multiple agents sign at the same time.

I/we, ___________________________________________, have read the foregoing Power of Attorney. I am/we are the person(s) identified therein as agent(s) for the principal named therein. I/we acknowledge my/our legal responsibilities.

Agent(s) sign(s) here:==>__________________________________________
(acknowledgment(s))
Appendix C

The New York State Bar Association has a suggested format for disclosure to clients. The purpose in drafting the disclosure was to give attorneys a format to use to make sure they are in compliance with the laws pertinent to attorney’s acting as title agents. The following form was published in the New York State Bar Association Real Property Law Journal:

Model Title Insurance Disclosure Form
Thank you for the opportunity to represent you in connection with your real estate matter. We are required by our code of ethics, the Lawyer’s Code of Professional Responsibility adopted by the New York State Bar Association, to disclose some important information to you regarding the requirements for title insurance in connection with your transaction. As a part of your real estate financing transaction, your mortgage lender will require you to obtain title insurance to protect the Lender’s interest in the property, but not your interest as owner.

[Optional: In addition, if you so elect, we will obtain an owner’s policy of title insurance to protect your ownership interest in the property]. We will make arrangements for this title insurance coverage and you will pay an insurance premium (which is a one-time charge payable at the closing) in the approximate amount of $________ for a mortgage policy based one mortgage amount of $________.

[Optional: Please note that there is a substantial discount should you elect to purchase the mortgage title insurance policy at the same time as you purchase an owner’s title insurance policy. Based on a purchase price of $________, the “simultaneous issue rate” for both policies would be $________.]

Title insurance premium rates throughout New York State are established in accordance with a rate schedule filed by title insurance companies and approved by the New York Superintendent of Insurance. In addition to representing your interests in this matter, we will serve as agent for the title insurance company.

The title insurance company will compensate us for our services rendered to it including, but not limited to, [Tailor to reflect services to be performed by attorney/agent: e.g., examining the title, issuing the title commitment, clearing underwriting objections, and preparing the final policy].

Our compensation from the title insurance company for performing the foregoing services and our assumption of responsibility as agent will be ___% of the estimated title insurance premium noted above (approximately $________ for the mortgage policy [Optional: and $________ for both an owner’s and mortgage policy]).
Our code of ethics prohibits us from being compensated twice for the same services if there is any duplication of services in the work we do for you and the title insurance company. Therefore, to the extent that there is any duplication of services, we are required to reduce our legal fee by the amount attributable to the same services for which we are also being compensated by the title insurance company.

This reduction will be reflected as a credit on your statement for legal services rendered. Although unlikely and we do not expect it, a situation may arise in which our representation of your interest in this transaction would create a conflict of interest with our obligations to the title insurance company. In most cases, conflicts can be readily resolved by communication between us and the title company.

However, if a conflict arises that cannot be resolved, we would withdraw from acting as title agent and would arrange for the title insurance to be issued by another insurance company. In the unlikely event that an actual conflict cannot be resolved by placing the title insurance with another title insurance company, we would be required by our code of ethics to withdraw from our representation of you and the title insurance company. It is important to us that our representation of you be based on a duty of undivided loyalty and zealous representation.

Should you have any questions about this arrangement, please feel free to contact us or another independent attorney to discuss our proposed arrangement. You have the right not to consent to this arrangement. However, if you elect not to proceed with this arrangement, you will still be required to obtain title insurance to protect your mortgage lender’s interest in the property.

[OPTIONAL: and, if you elect, we will still obtain title insurance to protect your interest in the property].

As a result, the overall cost of the title insurance will be unchanged regardless of whether or not you consent to this arrangement.

We look forward to representing you and to working with you in connection with your real estate transaction.
[LAW FIRM NAME]

By: ______________________________

Name:

Title:

By signing below, you acknowledge that you have read a copy of this disclosure and consent to the foregoing arrangements. In addition, in order to authorize us to obtain an owner’s policy of title insurance for you in addition to the mortgage title insurance policy required by your lender, please check the appropriate box on the enclosed copy of this title insurance disclosure, sign below and return it to us.

I/We want an owner’s policy of title insurance and authorize you to obtain such policy on my/our behalf.

I/We do not want an owner’s policy of title insurance. I/We acknowledge that you will not provide an opinion of title to me/us.

Dated: _________________________________
Name: __________________________________