NEW YORK STATE BAR ASSOCIATION

Journal

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The Law of Halloween

by Daniel B. Moar

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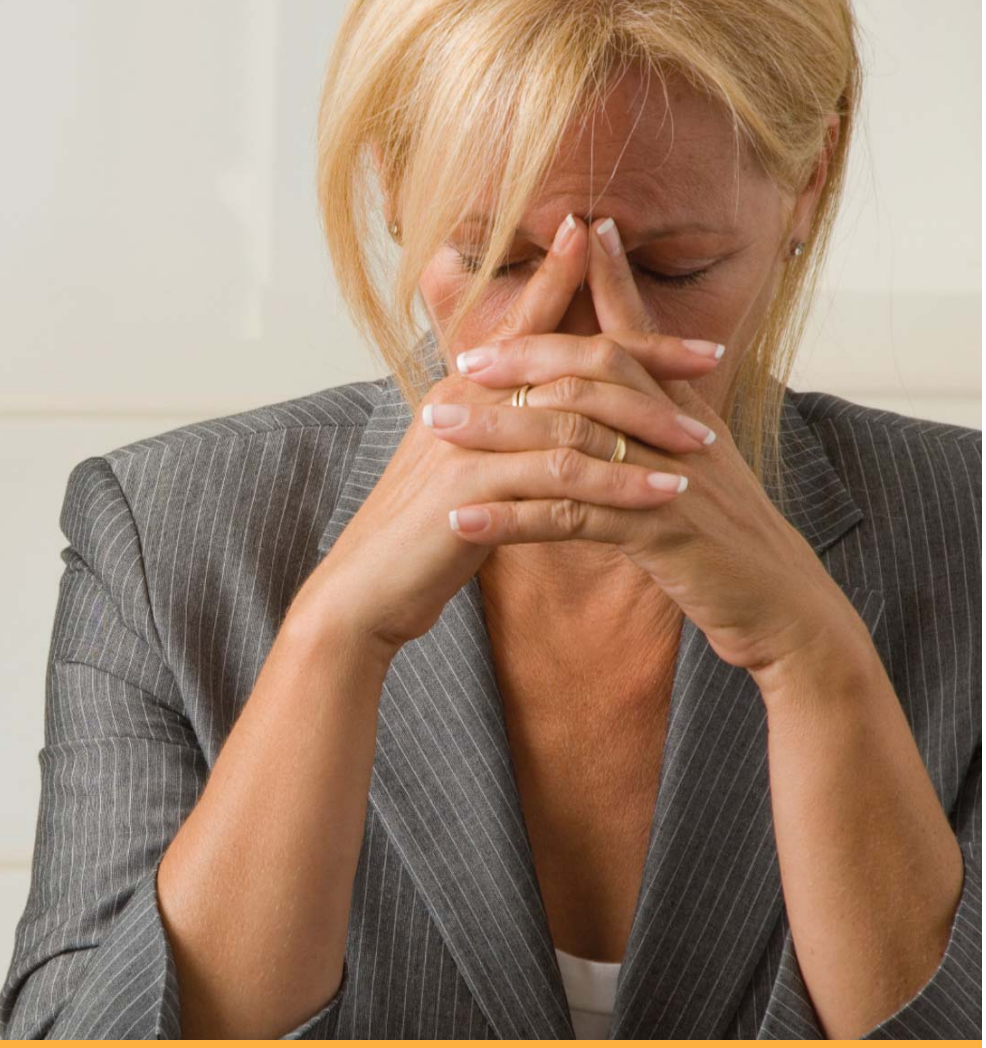

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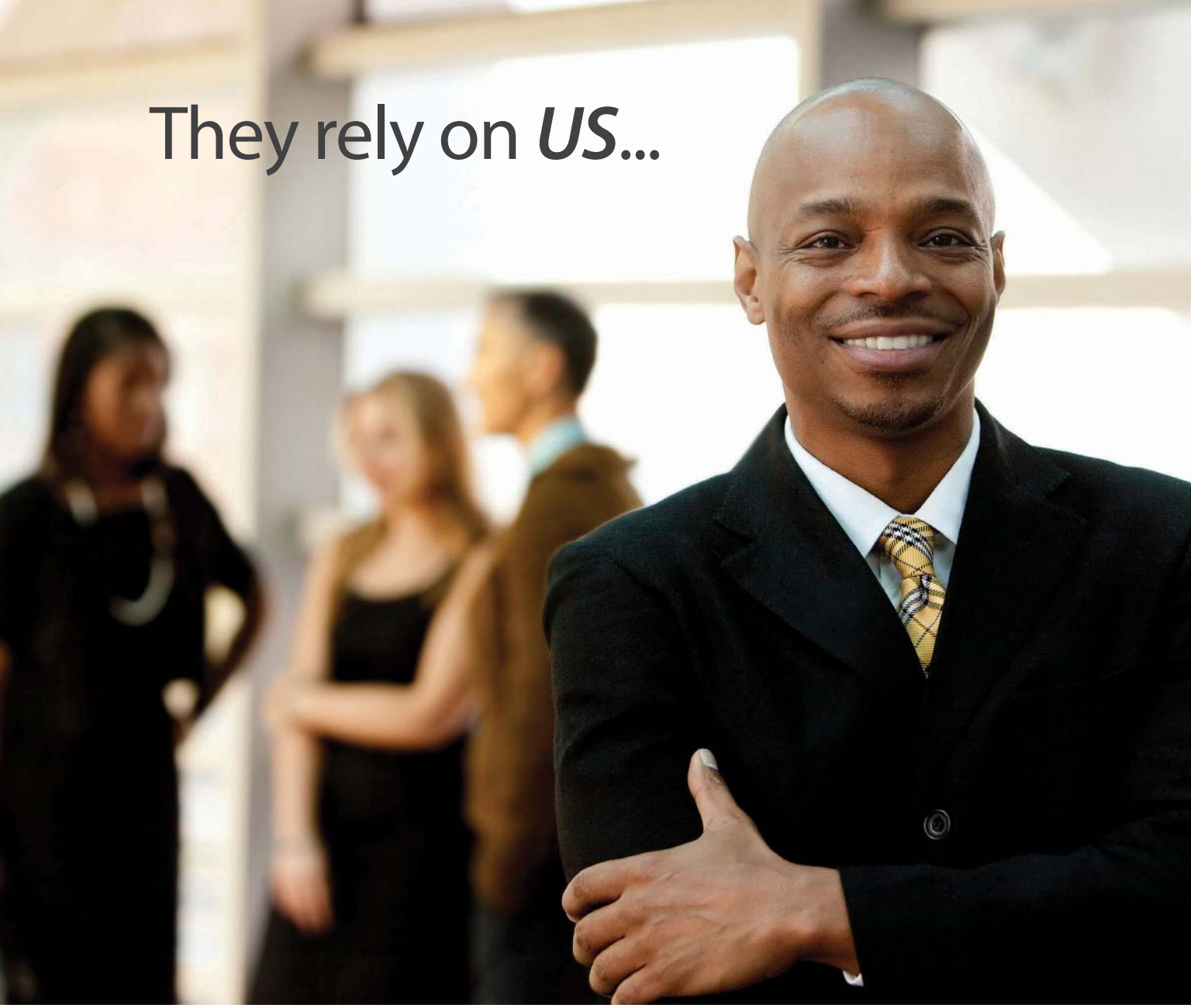

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VINCENT E. DOYLE III

Promoting Fairness in Immigration Matters

Our theme this year is "Justice for All," and we have been working toward that goal with several initiatives aimed at improving access to justice for individuals who face unique challenges in our legal system. Helping lawyers represent those who do not share our language or culture is an important part of that effort and we have created the Special Committee on Immigration Representation to address some of the complex difficulties involved in immigration proceedings and the need for additional qualified representation around New York State.

The stakes in immigration proceedings are very high, and the individuals involved in these cases often face significant obstacles. Respondents may be incarcerated or detained and face deportation and likely permanent expulsion from the United States with no right to government-funded legal representation. Language issues, limited English proficiency and cultural barriers can render them vulnerable to exploitation by unscrupulous individuals who exact exorbitant fees to provide inadequate services. In some cases, respondents receive advice that actually harms their cases and makes it more difficult for a court to grant discretionary relief. Some respondents cannot afford to retain adequate legal services, or they simply may not know where to turn for help.

A recent study by the Katzmann Immigrant Representation Study Group, led by U.S. Second Circuit Court of Appeals Judge Robert A. Katzmann, found that having legal representation is one of the two most important variables in obtaining a successful outcome in an immigration proceeding. Unfortunately, there is insufficient legal representation available in many areas throughout New York State. And even when lawyers are involved in these cases, they are sometimes overwhelmed or lack the specialized knowledge necessary to provide proper assistance and legal representation. These challenges leave already overburdened immigration judges to fill in the gaps, as they do their best to ensure that the individuals involved receive fair and equitable treatment.

We have formed the Special Committee on Immigration Representation to untangle these complex issues; study the challenges presently facing respondents, attorneys, and the courts; and suggest some possible solutions. The Special Committee will solicit input from judges, advocates, government officials and attorneys with experience in the area and generate a report and recommendations to improve the quality and availability of legal representation in these important matters.

The Special Committee will consider solutions, such as providing specialized training and CLE for attorneys who wish to get involved in these cases, creating pro bono opportunities, and helping to educate the public about immigration law. It will explore ways to improve referral services statewide to connect respondents in need of assistance with attorneys who have the specialized knowledge and training necessary to help them. The Special Committee also will consider drafting written standards for representation in immigration matters to clarify what is expected of attorneys practicing in this complicated and rapidly changing area.

As a nation, we pride ourselves on our dedication to the rule of law and our emphasis on justice and equality. Those who come to our country seeking a better life should be treated fairly. It is my hope that the Special Committee's work will help to remove some of the obstacles facing individuals in these difficult situations, and I look forward to seeing the results of that work in the coming months. ■

VINCENT E. DOYLE III can be reached at vdoyle@nysba.org.

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Practical Skills – Basic Matrimonial Practice
October 3 Syracuse
October 4 Westchester
October 5 Albany; Buffalo
October 6 Long Island; New York City

Risk Management for Attorneys 2011 – Protecting Your Practice
(9:00 a.m. – 1:15 p.m.)
October 3 Westchester
October 5 Long Island
October 6 Albany

New York Appellate Practice
October 4 Albany
October 26 Long Island
October 27 Rochester
November 18 Westchester
December 2 New York City

Law School for Insurance Professionals
This program DOES NOT carry CLE credit
October 6 Long Island
October 12 New York City

Henry Miller – The Trial
October 6 Rochester
November 3 Long Island
November 16 New York City

Workers' Compensation Law Update
October 7 Albany; Buffalo
October 18 Rochester
October 21 New York City

Successfully Handling Custody and Vocational Expert Witnesses in Your Matrimonial Practice
(9:00 am – 12:35 pm)
October 14 Syracuse
October 28 Long Island
November 18 Buffalo
December 2 Albany
December 9 New York City

2011 Special Education Law Update
October 19 Long Island
October 20 Buffalo
October 25 New York City
October 26 Albany
October 27 Syracuse

The Art of Deposition in the Digital Age
October 20 Albany; Long Island
October 21 Buffalo
October 27 New York City
October 28 Syracuse; Westchester

Practical Skills – Introduction to Estate Planning
October 24 Albany; New York City; Syracuse
October 25 Long Island; Rochester
October 26 Buffalo
October 27 Westchester

Update 2011
(live program)
October 25 Syracuse
November 1 New York City

Fourth Corporate Counsel Institute
October 27 New York City

Representing the Landowner in a Conservation Easement Transaction
October 28 New York City

Tax Aspects of Real Property Transactions
November 2 Long Island
November 4 New York City; Syracuse
November 10 Albany; Buffalo

Building a Successful Solo and Small Firm Practice
November 3 New York City

Motor Vehicle Accident Litigation – The Road Less Travelled
November 8 Long Island
November 9 Albany
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November 15	Albany
December 1	Long Island
December 14	New York City

Drafting Organizational Documents for LLCs and Corporations
(9:00 a.m. – 1:00 p.m.)

November 9	New York City
November 15	Long Island
December 13	Albany

Practical Skills – Basics of Civil Practice

November 15	New York City; Syracuse
November 16	Albany
November 17	Buffalo; Long Island; Westchester

†Ninth Annual Sophisticated Trusts and Estates Institute
(two-day program)
November 17 – 18 New York City

†Update 2011
(video replay)

November 30	Corning; Jamestown
December 1	Canton; Ithaca
December 2	Binghamton; Buffalo
December 6	Plattsburgh; Poughkeepsie
December 7	Albany; Long Island
December 13	Westchester
TBD	Watertown

Avoiding Ethical Dilemmas in Day-to-Day Practice
(9:00 am – 12:35 pm)

November 30	Syracuse; Westchester
December 1	Albany
December 5	Buffalo; Long Island
December 8	Rochester
December 12	New York City

Employment at Will and New York State Exceptions – A Guide to New York Law
(10:00 am – 1:00 pm)
December 2 Brooklyn

Construction Site Accidents in New York

December 2	Long Island; Syracuse
December 9	Albany; New York City

†Advanced Real Estate Practice Institute
December 8 New York City

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Case Law From the Crypt

The Law of Halloween

By Daniel B. Moar

Daniel B. Moar (dmoar@goldbergsegalla.com) is an associate in the Buffalo, New York office of Goldberg Segalla, LLP and former confidential law clerk to the Hon. William M. Skretny and the Hon. John T. Elfvin of the United States District Court for the Western District of New York. Mr. Moar is a graduate of Canisius College and received his law degree from the Georgetown University Law Center.

The scariest part of Halloween for most people might be having their car toilet-papered or getting a little egg in the face. For lawyers, however, All Hallows' Eve presents its own unique legal challenges.

To start, Halloween presents legal cases that simply do not exist at any other time of the year. For example, in one recent case, a plaintiff alleged that her neighbor's Halloween lawn decorations were defamatory, harassing, and caused emotional distress. The decorations included an "Insane Asylum" directional sign pointed towards the plaintiff's house and a homemade Halloween tombstone purporting to reference the plaintiff, which read:

At 48 She had
No mate No date
It's no debate
She looks 88
She met her fate
in a crate
Now We Celebrate
1961–2009.[1]

In another recent case, an appellate court considered whether a hospital violated state labor law by ordering union nurses to remove the black t-shirts they had worn for Halloween. The shirts depicted a skeleton with the words "Skeleton Crew" on the front and complaints about staffing levels being "cut to the bone" on the back.[2]

In addition to such factually unique cases, the substantive law actually changes to reflect expectations of "normal" Halloween behavior. One court aptly noted the distinction as applied to the duty of care in the tort context:

> On any other evening, presenting a frightening or threatening visage might be a violation of a general duty not to scare others. But on Halloween at trick-or-treat time, that duty is modified. Our society encourages children to transform themselves into witches, demons, and ghosts, and play a game of threatening neighbors into giving them candy.[3]

This article provides an overview of these issues with a detailed discussion of the intersection between the law and Halloween.

Haunted Houses

Perhaps the most infamous haunted house case is *Stambovsky v. Ackley*, where a New York appellate court held that a house was haunted as a matter of law.[4] The plaintiff had commenced an action to rescind a real estate purchase after he discovered that the house he bought was possessed by ghosts. Believing that it could not award the buyer a remedy, the trial court dismissed the complaint.[5]

The appellate court disagreed, finding that the "unusual facts . . . clearly warrant a grant of equitable relief to the buyer."[6] The seller had repeatedly reported to the media the presence of ghosts roaming the house. As a result, the appellate court found that the seller was "estopped to deny their existence and, as a matter of law, the house is haunted."[7] Additionally, instead of acknowledging that ghosts simply do not exist, the court noted that even "the most meticulous inspection" would not have discovered their presence and put the buyer on notice.[8]

While courts might be willing to find a house to be haunted in real estate disputes, courts are less indulgent where a criminal defendant tries to claim that a house was haunted as a "defense" against vandalism. For example, in *Hayward v. Carraway*, the court rejected the argument that children were justified in damaging a home because they believed it to be haunted.[9] In that case, a group of children entered the home and broke windows, tore up floorboards, and caused other extensive damage. Rather than being haunted, the house was actually a historic plantation home undergoing extensive renovation. In holding that the children's belief was "of no consequence," the court noted that "the intention of a party committing vandalism does not affect the right of recovery of the injured party."[10]

The most common context of haunted house cases are personal injury cases involving patrons injured while attending seasonal haunted houses. Haunted house personal injury cases are exceptional because the courts recognize that haunted houses are intended to scare people, and that limited lighting and startling surprises are necessary to accomplish this intent. This in turn modifies the duty of care owed to haunted house patrons.

For example, in *Mays v. Gretna Athletic Boosters, Inc.*, the plaintiff was so startled by a haunted house "monster" that she ran straight into a cinder block wall, crushing her nose.[11] The plaintiff argued that the lack of lighting and darkened wall presented an unreasonably dangerous condition that the defendant owed a duty to protect her from. The court disagreed, noting that the conditions complained of were the very attributes of a haunted house:

> The very nature of a Halloween haunted house is to frighten its patrons. In order to get the proper effect, haunted houses are dark and contain scary and/or shocking exhibits. Patrons in a Halloween haunted house are expected to be surprised, startled and scared by the exhibits but the operator does not have a duty to guard against patrons reacting in bizarre, frightened and unpredictable ways.[12]

Similarly, in *Bonanno v. Continental Casualty Co.*, the court noted that a haunted house patron "had to realize that the very nature of the attraction was to cause patrons to react in bizarre, frightened and unpredictable ways."[13] There, the plaintiff claimed that she was injured by other patrons trying to get away from a make-believe devil. The court rejected the plaintiff's claim that the haunted house owners were negligent in failing to supervise, noting that "[i]t would be inconsistent in this case for this court to allow plaintiff to recover for damages which resulted from her being frightened, precisely the effect that the 'Haunted House' was calculated to produce."[14]

The court reached the same result in *Galan v. Covenant House New Orleans*, where the plaintiff was so startled by a chainsaw-yielding "Jason" that she fell down and struck her head.[15] The plaintiff tried to distinguish her case from the prior haunted house precedent by arguing that the defendants were negligent because Jason had been placed after the exit door of the haunted house in an alleyway where patrons would believe the scares were over. In rejecting this argument, the court noted the similar refrain that "the very purpose of a haunted house is to frighten its patrons."[16]

While haunted house defendants may avoid liability for injuries caused by patrons becoming scared, liability

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can still be imposed for injuries occurring for other reasons. For instance, in *Holman v. Illinois*, the court awarded damages to a grandmother who was injured when she walked into a misplaced low-seated bench while following her grandson around a darkened haunted house.[17] Similarly, in *Fairchild v. Drake*, the court found a triable issue of negligence where the plaintiff tripped over a low-hanging rope guardrail at a haunted house.[18] Finally, two trial court judgments were affirmed in favor of the plaintiffs injured by defective slides within haunted houses.[19] Notably, in each of these cases the injuries that occurred were not due to the scary nature of the haunted house but instead due to physical defects.

Chainsaw Maniacs

In the "real world," courts quite naturally tend to show little regard for people who menace others with chainsaws. For instance, in one recent case, a court affirmed an assault conviction against a defendant who escalated a violent domestic confrontation with his girlfriend by menacing her with a chainsaw while she was trapped inside his car.[20] Another court confirmed an assault conviction against a stepfather who startled his sleeping stepson by starting a chainsaw and holding it one foot above the boy.[21] In a third case, dealing with a confrontation between neighbors over a land dispute, a court affirmed a finding of civil assault against the plaintiff who brought a pair of chainsaw-bearing friends to his neighbor's property and yelled for them to "[b]ring on the chainsaws!"[22]

In contrast, on Halloween, when chainsaw wielding is the norm even for people not engaged in intimidation or lumberjacking, courts show far more indulgence to chainsaw maniacs – particularly those dressed as the horror-movie icon Jason Voorhees.

For instance, in addition to the *Galan v. Covenant House New Orleans* decision noted above, another court absolved a chainsaw-wielding Jason of liability in *Durmon v. Billings*.[23] There, the plaintiff encountered Jason when she was taking her church youth group to a corn maze.[24] While walking through the maze prior to her encounter with Jason, the plaintiff had heard the sound of a chainsaw running. Nonetheless, when Jason approached her with the running chainsaw above his head, the plaintiff turned to run but fell and broke her leg.[25]

The plaintiff alleged the maze owners were negligent both for the muddy condition of the maze and for allowing Jason to utilize an instrument that could have injured her.[26] The court, however, found that the muddy condition was obvious to all and that the plaintiff had paid to be scared – therefore, the defendants owed no duty to protect her from Jason.[27]

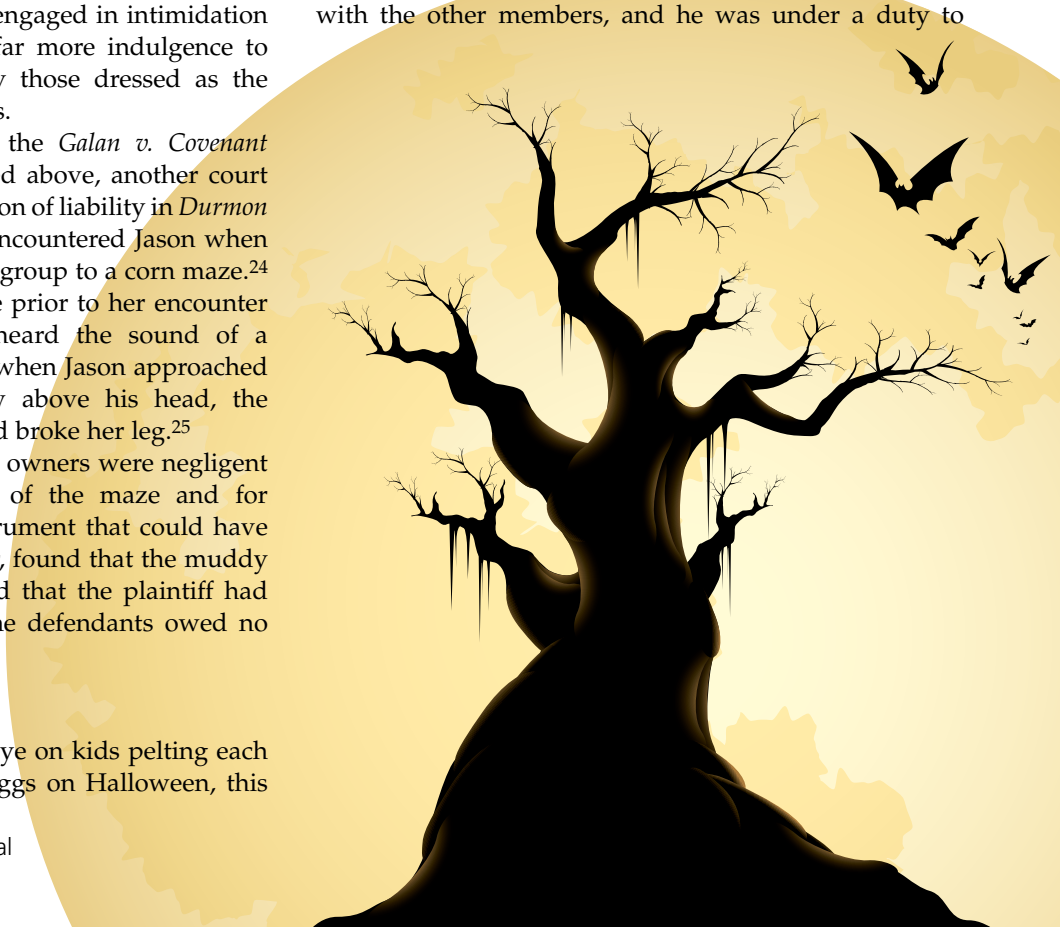
Shaving Cream and Eggs

While many adults cast a blind eye on kids pelting each other with shaving cream and eggs on Halloween, this conduct has not gone unnoticed by the courts.[28] Indeed, in one recent case, a court found questions of fact as to whether the parents were liable for negligent supervision for providing kids with shaving cream and socks filled with talcum powder at a Halloween party, where one child was punched following a shaving cream melee.[29]

Courts have also imposed civil and criminal liability on egg throwers. For example, in one case a married couple made the ill-advised choice to ignore trick-or-treaters that visited their house, with the inevitable result that their house was then pummeled with eggs.[30] However, the couple identified one of the egg throwers as a neighborhood child (specifically, the child who lived directly next door to them).[31] The child was convicted of felony vandalism and ordered to pay civil restitution.[32]

Courts have even cracked down on defendants who may not have actually thrown eggs, but were instead parts of groups engaged in Halloween horseplay.[33] For example, in one case, the defendant was part of a group that had thrown eggs, firebombs, and M-80s at houses and had placed a stop sign on one homeowner's front porch. The police had repeatedly broken up the group and ordered them to disperse, which they would, briefly, until the police left the area. The group, however, continued to engage in such conduct and even struck a police officer with an egg.[34]

The defendant was arrested even though he was not directly accused of any of the unlawful conduct. Instead, the defendant was charged with, and convicted of, unlawful assembly. The appellate court affirmed the defendant's conviction "because he knowingly assembled with the other members, and he was under a duty to



disassociate himself from the group after other members of the group committed unlawful acts."[35]

Court cases are not limited to prosecutions against people who throw eggs. A number of personal injury suits have been filed by people struck by eggs.

For example, in one case a bus patron was struck in her eye by an egg thrown through the bus window.[36] The patron sued the bus authority, arguing that it was negligent in failing to warn her of the foreseeable risk of eggs flying through the open bus windows on Halloween. The court, however, disagreed, finding that the bus authority owed no duty to warn of such an unanticipated and unforeseeable act.[37]

A number of insurance cases have also addressed coverage disputes arising from Halloween hooliganry. For example, in one case, a court found that an automobile insurance policy covering injuries arising out of "the use of" the automobile provided coverage where one of the car's occupants tossed an egg into a pedestrian's eye while the car drove by at 40 miles per hour.[38] In another case, however, the court held that a homeowner's insurance policy did not provide coverage because of the intentional injury exception, which applied when the homeowner's son shot an egg thrower in the eye with a paintball gun.[39]

Little Bo Peep and Her Flammable Sheep

Courts have also encountered tort cases arising from costume-related injuries. This has led to the development of a split of authority on the duty to warn people of the flammability of cotton balls used to make sheep costumes.

In *Ferlito v. Johnson & Johnson*, the plaintiff attended a Halloween party dressed as a sheep while his wife dressed as Little Bo Peep.[40] The plaintiff's costume was covered with Johnson & Johnson's cotton batting product. When the plaintiff attempted to light a cigarette, his costume caught fire and he was engulfed in flames.[41]

The plaintiff brought suit against Johnson & Johnson on a failure to warn theory. While the jury found the plaintiff to be 50% at fault, he was still awarded $550,000 in damages while his wife received $70,000. The district court, however, granted the defendant's motion for judgment notwithstanding the verdict.[42]

On appeal, the Sixth Circuit affirmed the district court's decision to set aside the jury verdict, finding that the failure to warn was not the proximate cause of the plaintiff's injuries. The Sixth Circuit noted that the plaintiff was aware that the product was flammable and that neither he, nor his wife, testified that they would not have used the cotton had they been warned.[43] The court expressly avoided deciding whether a warning was required, though it noted in dicta that cotton "is a simple product with all its essential characteristics apparent, including flammability."[44]

In contrast, a New York appellate court found a triable issue of fact in a negligence case premised on defendant's failure to warn of the flammability of its cosmetic puffs.[45] In that case, the plaintiff glued cosmetic puffs all over her eight-year-old daughter's pajamas to create the appearance of white fur. The girl later leaned over an electric stove and was set aflame.[46]

> Perhaps the most infamous haunted house case is *Stambovsky v. Ackley*, where a New York appellate court held that a house was haunted as a matter of law.

While the appellate court acknowledged that the plaintiff's use of the cosmetic puffs was not intended by the manufacturer, the court found that it was not unforeseeable as a matter of law. The court concluded that if the jury found that the misuse was reasonably foreseeable, the defendant would have a duty to warn of its cosmetic puffs' flammability.[47]

The court also found significant the fact that, contrary to the plaintiff's initial belief, the cosmetic puffs were not made of cotton but were instead made from rayon.[48] The court's emphasis on this issue appears largely to be its way of sidestepping the defendant's argument that it had no duty to warn because the plaintiff had believed the puffs were made of cotton, and the flammability of cotton is open and obvious. This sidestep, however, seems to avoid the proximate cause issue because the court offers no explanation for why the specific composition of the cosmetic puffs would matter if the plaintiff already believed that they were flammable.

Sexy Kittens, Naughty Nurses and Other Provocative Halloween Costumes

Lawsuits arising from Halloween costumes are also prevalent in employment law disputes. A number of suits have arisen from people wearing risqué Halloween costumes to work.

In *Devane v. Sears Home Improvement Products, Inc.*, a female sales employee filed a sexual harassment lawsuit based in part on comments made by a male manager regarding her doctor costume.[49] Specifically, upon seeing the employee's costume, the manager unbuckled his pants and while pointing to his groin, said "here Doctor. It hurts here."[50] The Court of Appeals of Minnesota affirmed the district court's judgment against the employer for sexual harassment and hostile work environment.

Other cases have also dealt with sexual harassment arising from supervisor comments about employee costumes. For example, in *Taylor v. Renfro Corp.*, the plaintiff alleged that she was fired in retaliation for complaints she made about a manager's comments, including telling one female employee in a cat costume about "liking her tail."[51] The court found a triable issue of fact on the plaintiff's Title VII retaliation claim.

While costumes normally can be trouble for employers, in one case an employer actually successfully defended against the plaintiff's claims by pointing to her provocative Halloween costumes. In *Dahms v. Cognex Corp.*, the plaintiff brought sexual harassment and hostile work environment claims against her employer.[52] The employer argued, however, that the plaintiff's seductive dress, including a Halloween costume described as "a see-through Empire State Building," was probative to show that the plaintiff was not subjectively offended by her work environment or by an officer's comments.[53] The court rejected the plaintiff's argument that this was inadmissible character or propensity evidence and affirmed the judgment against her.

Additionally, the Halloween costume cases where employers have been found liable generally involve significant conduct beyond the Halloween costume incidents.

Courts are unlikely to find liability for isolated costume-related incidents.

For example, in *Baker v. Pro Floor, Inc.*, the plaintiff alleged that she was fired for complaining about sexual harassment.[54] Specifically, the plaintiff complained about the posting at her workplace of "a picture of a man in a Halloween costume feigning sex with a sheep."[55] The court, however, dismissed her allegation as relating to "boorishness in the workplace," not sexual harassment.[56]

Finally, courts have been less dismissive of public officers wearing racially insensitive costumes even outside of the workplace. For example, in one case a court suspended a Louisiana judge for six months for dressing in a prison uniform, blackface and an afro.[57] In another case, a court affirmed a 30-day suspension of a police officer for wearing blackface, overalls, a black, curly wig, and carrying a watermelon.[58]

The Constitutional Right to Insult Your Neighbors With Tombstone Displays

In addition to litigation involving inappropriate or offensive costumes, courts have also litigated cases involving unsettling Halloween decorations. For instance, in *Purtell v. Mason*, the Seventh Circuit considered a homeowner's First Amendment right to display tombstones meant to insult his neighbors.[59]

Purtell started as a petty dispute among neighbors. After the husband and wife plaintiffs parked a 38-foot RV in the front yard of their suburban Chicago home for a year, their neighbors petitioned for an ordinance to ban homeowners from maintaining campers on their property. The plaintiffs retaliated against the petition, however, by placing six tombstones along the front of their property.[60] As expected, the tombstones caused further acrimony between the plaintiffs and their neighbors.

The tombstones referenced the petitioning neighbors by name, and each contained a date of death based on that neighbor's address. For example, one tombstone referencing a neighbor named Betty Gargarz stated:

Bette wasn't ready,
But here she lies
Ever since that night she died,
12 feet deep in this trench,
Still wasn't deep enough
For that wenches stench!
1690

Another tombstone referencing a neighbor who owned a crimping shop stated:

Old Man Crimp was a
Gimp who couldn't hear.
Sliced his wife from ear to ear
She died . . . He was fried.
Now they're together
Again side by side!
1720

One tombstone even referenced the woman who lived directly next door to the plaintiffs.[61]

When the plaintiffs did not remove the tombstones after Halloween, neighbors called the police to complain. While an officer was speaking with the husband, the next-door neighbor arrived at his home. Clearly angry about his wife's name appearing on a tombstone, the next-door neighbor confronted the husband and, in a display of machismo, the men chest-butted.[62]

The officer then separated the men and directed the husband to remove the tombstones or be arrested for disorderly conduct. While the husband initially refused, upon being handcuffed, he agreed to dismantle the display. The plaintiffs then sued the police officer under 42 U.S.C. § 1983 for violation of their constitutional rights.[63]

The Seventh Circuit recognized the validity of the plaintiffs' First Amendment claim. While the court noted that the tombstones were intended to elicit "an emotional response" from the neighbors, they were not "the sort of provocatively abusive speech that inherently tends to incite an immediate breach of the peace" such that they would be considered unprotected speech under the "fighting words" doctrine.[64] However, the court also held that the issue was a close call such that the officer did not violate "clearly established rights" and was therefore entitled to qualified immunity.[65]

Finally, the court took a parting shot at the plaintiff's counsel for burdening the court with a case of such trivial significance:

> In closing, a few words in defense of a saner use of judicial resources. It is unfortunate that this petty neighborhood dispute found its way into federal court, invoking the machinery of a justice system that is admired around the world. The suit was not so wholly without basis in fact or law as to be frivolous, but neither was it worth the inordinate effort it has taken to adjudicate it – on the part of judges, jurors, court staff, and attorneys (all, of course, at public expense). We take this opportunity to remind the bar that sound and responsible legal representation includes counseling as well as advocacy. The wiser course would have been to counsel the plaintiffs against filing such a trivial lawsuit. . . . Not every constitutional grievance deserves an airing in court. Lawsuits like this one cast the legal profession in a bad light and contribute to the impression that Americans are an overlawyered and excessively litigious people.[66]

Scary indeed.

1. *Salama v. Deaton*, 10-CA-00310 (Fla. 13th Cir. Ct.), Amended Complaint; Jessica Vander Velde, *Tombstone Maker Denies Harassment*, St. Petersburg Times, Mar. 12, 2010, at 8. Notably, the plaintiff was born in 1961. *Id.*
2. *Massachusetts Nurses Ass'n v. Commonwealth Emp't Relations Bd.*, 77 Mass. App. Ct. 128 (Mass. App. Ct. 2010).
3. *Bouton v. Allstate Ins. Co.*, 491 So. 2d 56, 59 (La. Ct. App. 1986).
4. 169 A.D.2d 254 (1st Dep't 1991).
5. *Id.* at 256.
6. *Id.*
7. *Id.*
8. *Id.* at 259.
9. 180 So. 2d 758 (La. Ct. App. 1965).
10. *Id.* at 763.
11. 668 So. 2d 1207, 1208 (La. Ct. App. 1996).
12. *Id.* at 1209.
13. 285 So. 2d 591, 592 (La. Ct. App. 1973).
14. *Id.*
15. 695 So. 2d 1007, 1008 (La. Ct. App. 1997).
16. *Id.* at 1009.
17. 47 Ill. Ct. Cl. 372, 376–77 (Ill. Ct. Cl. 1995).
18. 1991 Ohio App. LEXIS 5327 (Ohio Ct. App. Oct. 29, 1991).
19. *See Downs v. E.O.M. Entm't, Inc.*, 997 So. 2d 125 (La. Ct. App. 2008); *Burton v. Carroll Cnty.*, 60 S.W.3d 829 (Tenn. Ct. App. 2001).
20. *Washington v. Shores*, 2010 Wash. App. LEXIS 405, 2010 WL 703268 (Wash. Mar. 2, 2010).
21. *United States v. Brooks*, 2007 CCA LEXIS 166, 2007 WL 1704348 (N.M. Ct. Crim. App. May 16, 2007).
22. *Sides v. Cleland*, 648 A.2d 793 (Pa. Supr. Ct. 1994).
23. 873 So. 2d 872 (La. Ct. App. 2004).
24. *Id.*
25. *Id.* at 874.
26. *Id.* at 878 n.3.
27. *Id.* at 879.
28. Nor have the victims of Halloween eggings always reacted rationally. For example, in one case a man was convicted of aggravated assault for pulling a shotgun on a 15-year-old who pelted his car with eggs, *see South Dakota v. Waters*, 529 N.W.2d 586 (S.D. 1995), while a number of criminal defendants actually shot people who threw eggs at them. *See, e.g., Connecticut v. Sotomayor*, 765 A.2d 1 (Conn. App. Ct. 2001); *Johnson v. State*, 380 So. 2d 1017 (Ala. Ct. Crim. App. 1980). Perhaps the most infamous reaction to being egged was that of former baseball all-star Albert Belle, who attempted to drive down two youngsters with his car. *See* Bonnie DeSimone, *Unwrapping Belle's Rap Sheet*, Chicago Tribune, Nov. 19, 1996, at 4; *Judge Fines Belle $100*, N.Y. Times, Nov. 29, 1995, at B20.
29. *See Fairbanks v. Kushner*, 2009 N.Y. Misc. LEXIS 5537 (Sup. Ct., Suffolk Co. Oct. 7, 2009).
30. *See In re Brittany L.*, 99 Cal. App. 4th 1381 (Cal. Ct. App. 2002).
31. *Id.* at 1384.
32. *Id.*
33. *Missouri v. Mast*, 713 S.W.2d 601 (Mo. Ct. App. 1986).
34. *Id.* at 603.
35. *Id.* at 604.
36. *Daniels v. Manhattan & Bronx Surface Transit Operating Auth.*, 261 A.D.2d 115 (1st Dep't 1999).
37. *Id.* at 116.
38. *Nat'l Am. Ins. Co. v. Ins. Co. of N. Am.*, 74 Cal. App. 3d 565 (Cal. Ct. App. 1977).
39. *Alarco v. N.Y. Cent. Mut. Fire Ins. Co.*, 2008 NY Slip Op. 30882U (Sup. Ct., Nassau Co. Mar. 18, 2008).
40. 983 F.2d 1066 (table) (6th Cir. 1992).
41. *Id.* at *2.
42. *Id.* at *1.
43. *Id.* at *6.
44. *Id.* at *4 n.3.
45. *Trivino v. Jamesway Corp.*, 148 A.D.2d 851 (3d Dep't 1989).
46. *Id.* at 852.
47. *Id.*
48. *Id.* at 853.
49. 2003 Minn. App. LEXIS 1514 (Minn. Dec. 23, 2003).
50. *Id.* at *7.
51. 84 F. Supp. 2d 1248, 1250 (N.D. Ala. 2000).
52. 914 N.E.2d 872 (Mass. 2009). Also significant was the conduct of the defendant's CEO during his depositions. The CEO showed up at his depositions each day wearing a different Halloween costume, including a priest costume with a garlic necklace and a Mr. Peanut costume, complete with top hat. *See* Zach Lowe, *Ropes, Eckert Lawyers Remember Strange Halloween Costume Case*, The Am Law Daily, Oct. 29, 2009, *available at* http://amlawdaily.typepad.com/amlawdaily/2009/10/ropes-eckert-lawyers-remember-strange-halloween-costume-case.html.
53. 914 N.E.2d at 881 n.20, 882.
54. 2005 U.S. Dist. LEXIS 627 (W.D. Wis. Jan. 6, 2005).
55. *Id.* at *3.
56. *Id.* at *14–*16.
57. *See In re Judge Timothy C. Ellender*, 889 So. 2d 225 (La. 2004).
58. *See Tindle v. Caudell*, 56 F.3d 966 (8th Cir. 1995).
59. 527 F.3d 615 (7th Cir. 2008).
60. *Id.* at 617–18.
61. *Id.* at 619.
62. *Id.*
63. *Id.*
64. *Id.* at 625.
65. *Id.* at 626. The court also held that because of the chest-butting incident the officer had probable cause to arrest the husband for disorderly conduct and, therefore, there was no Fourth Amendment violation. *Id.* at 626–27.
66. *Id.* at 627.

BY DAVID PAUL HOROWITZ

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All in the Family

Introduction

Lawyers, even disreputable ones, guard their reputations zealously, and all will parrot that "my reputation is my stock in trade." All people are concerned about their own reputation, and we live in a society today where information concerning the reputation of individuals, businesses, professionals, and schools is readily available.

Google's recent acquisition of Zagat illustrates that reliable reputation information has a tremendous value. The importance of reputation evidence in day-to-day decision making, and the premium people will literally pay for meaningful reputation evidence, is exemplified by the many websites offering, for a fee, reviews by patrons of a local restaurant, hotel, or contractor. The people submitting reviews form a community of reviewers, and their individual reviews are often aggregated, and a weighted score encompassing all the individual reviews is often offered.

Reputation evidence is also valuable in the context of a criminal trial, and a recent Court of Appeals decision addressing the role of family as a community from which reputation evidence may be derived is the topic of this column.

Reputation Evidence

The character of a criminal defendant may be inferred from testimony concerning his or her reputation in the community:

> It goes without saying that a defendant in a criminal prosecution may introduce evidence that his character is such as to render it improbable that he committed the crime of which he is accused. While the nature of the defendant's character is the object of the proof, reputation – the aggregate tenor of what others say or do not say about him – is the raw material from which that character may be established. Perhaps the most impressive measure of the respect the law accords the community's ability to judge character is that the reputation of an accused for traits which, in the common experience of mankind, would tend to make it unlikely that he committed a particular offense may in and of itself give rise to a reasonable doubt of guilt where none would otherwise exist.[1]

What may constitute an appropriate community must be considered:

> The rule, however, is subject to a number of qualifications of which here relevant is the limitation that the reputation be specific to a particular community. In the relatively immobile societal climate in which the rule originally developed, the inhabitants of the geographical area in which a defendant resided were assumed to comprise the only community in which the general opinion of him would be a reliable gauge of character. However, the law has not been static in this regard. In harmony with the dynamics of modern social organization, particularly the phenomenon of urbanization, it came to recognize that an individual may have multiple and varied bases around which a reputation might form. So, he might be better known in the community of his employment and in the circle of his vocational fellows, where opportunities to evidence the traits at stake may occur with greater frequency than in the environs of his dwelling place, nestled in the anonymity of a large city or suburb.[2]

Reputation testimony of key opposing witnesses for truth and veracity is also admissible:

> We have long held that "a party has a right to call a witness to testify that a key opposing witness, who gave substantive evidence and was not called for purposes of impeachment, has a bad reputation in the community for truth and veracity." Indeed, a "trial court must allow such testimony, once a proper foundation has been laid, so long as it is relevant to contradict the testimony of a key witness and is limited to general reputation for truth and veracity." The purpose of this rule is to "ensure[] that the jury is afforded a full picture of the witnesses presented, allowing it to give the proper weight to the testimony of such witnesses."[3]

Family as Community

In *People v. Fernandez*,[4] the defendant was charged with multiple counts of sexual abuse of a child, who was 11 years old at the time of trial. At trial, the defendant's parents testified to corroborate certain facts, and the defense sought to have both parents, who considered the complainant to be their grandchild, testify about the complainant's reputation for untruthfulness among family and friends:

> To that end, Collazo testified that he had known complainant for all of her life and that he had regular

contact with her. Collazo also testified that he had heard practically all 25 to 30 members of his family, many of whom he identified, discuss complainant during the time he knew her. Although he could not specify the number of conversations that he overheard, he was aware of complainant's reputation for truthfulness among the family. When defense counsel asked Collazo to state that reputation, County Court sustained the People's objection to this question on the ground that defense counsel had not laid a proper foundation.

Similarly, Ramona Fernandez testified that she knew complainant since birth and that all of her family members, including her sisters and nieces, watched her grow up. She explained that her family and family friends "always talk[ed] about the children" when they were around and that, at times, they specifically discussed complainant's reputation for truthfulness. Again, when defense counsel asked the witness to state what that reputation was, the People objected and argued both improper foundation and that complainant's family members and friends did not constitute "a community at all." County Court sustained the objection, precluding further testimony.[5]

The Appellate Division reversed:

"County Court improperly precluded [defendant] from presenting testimony of two family members regarding the complainant's reputation in their family for untruthfulness." Specifically, the court reasoned that, contrary to the trial court's conclusion, the testimony elicited from Collazo "provided an adequate foundation for the reputation testimony." Moreover, the court noted that the trial court erred in precluding Ramona Fernandez's testimony "on the basis that the family was not a community for purposes of reputation testimony." Finally, the Appellate Division observed that the error in precluding such testimony was not harmless since the People's case hinged on complainant's credibility.[6]

The Court of Appeals examined the question of whether the complainant's family could be a "community":

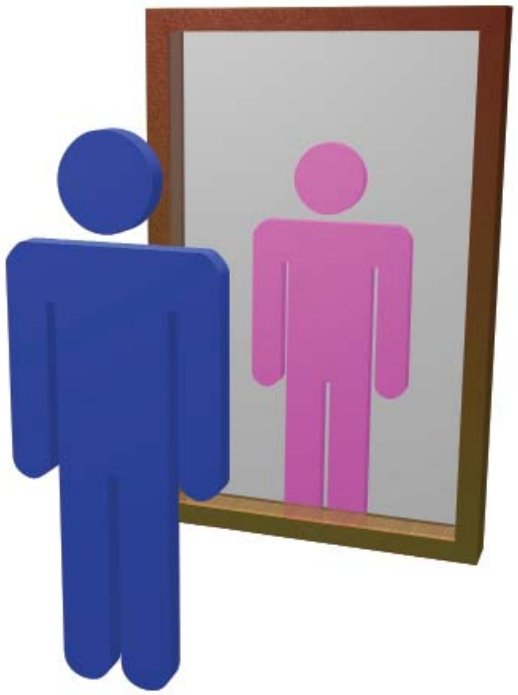
> In *People v Bouton*, we rejected the notion that one's community was restricted to "one's residential neighborhood." Rather, we observed that "[a] reputation may grow *wherever* an individual's associations are of such quantity and quality as to permit him to be personally observed by a sufficient number of individuals to give reasonable assurance of reliability." For example, we have concluded that a witness' bad reputation for truth and veracity at his place of employment "can be probative and reliable."
>
> Once the party seeking admission of reputation evidence has laid the proper foundation, it is for the jury to evaluate the credibility of the character witnesses who testify, and to decide how much weight to give the views reported in their testimony. While "a reasonable assurance of reliability" is necessary for a proper foundation, such reasonable assurance exists where the testifying witnesses report the views of a sufficient number of people, and those views are based on sufficient experience with the person whose character is in question. Reputation evidence may be reliable within the meaning of *Bouton*, but still questionable from a credibility standpoint. This possibility, however, is not a proper basis for exclusion of reputation evidence. Reliability – whether a character witness has established a proper basis for knowing a key opposing witness' general reputation for truth and veracity – is a question of law for the court. By contrast, the credibility of such character witness – whether that witness is worthy or unworthy of belief or is motivated by bias – is a factual question for the jury. We caution that trial courts should not use reliability as a ground for excluding evidence it believes is not credible.
>
> Applying these principles, we begin by emphasizing that the material issue at trial was complainant's credibility. After all, complainant's testimony regarding the sexual abuse was the only proof adduced by the People to establish that defendant sexually abused complainant. To undercut complainant's version of events, defendant sought to introduce evidence, through his parents, that complainant had a bad reputation for truth and veracity among her family. Until today, we have never had occasion to decide whether family and family friends could constitute a relevant community for purposes of introducing testimony pertaining to an opposing witness' bad reputation for truth and veracity. Assuming the proper foundation has been laid, we conclude that family and family friends can constitute a relevant community for such purpose.[7]

The Court, acknowledging that the reputation witnesses could be cross-examined for bias, reversed, holding that the trial court's decision to exclude the testimony on foundational grounds was an abuse of discretion as a matter of law.[8]

Conclusion

While reputation evidence offered by family members may make for awkward family gatherings following trial, permitting the family community to testify concerning a member's veracity, subject to cross examination to expose any potential bias, may afford jurors with critical information to aid in fact finding. ■

1. *People v. Bouton*, 50 N.Y.2d 130, 138–39 (1980) (citations omitted).
2. *Id.* at 139 (citation omitted).
3. *People v. Fernandez*, 17 N.Y.3d 70, 76 (2011) (citations omitted).
4. *Id.*
5. *Id.* at 74.
6. *Id.* at 75 (citations omitted).
7. *Id.* at 76–77 (citations omitted).
8. *Id.* at 78.



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Planning Considerations for the Transsexual Client

By Caryn B. Keppler

With the enactment of the New York Marriage Equality Act on June 24, 2011, New York State has officially "gone gender-neutral" with respect to marriage. The bill signed into law by Governor Cuomo specifically states that "[w]hen necessary to implement the rights and responsibilities of spouses under the law, all gender-specific language or terms shall be construed in a gender-neutral manner in all such sources of law."[1] The historic focus of the marriage equality movement has been to extend the rights and obligations of marriage to gay and lesbian couples. But what about a marriage where one party is a transsexual?

When it comes to gender, we still live in a binary society. We are all expected to be categorized as male or female. But gender is not "black and white." Many of us do not meet societal definitions of what it means to be "male" or "female" either because we are too "feminine" or too "masculine," do not identify with our chromosomal makeup or were born with ambiguous genitalia – the latter two categories being transsexuals and inter-sexed individuals.

The identity and status of an individual has enormous impact on issues of estate planning. Is your client a "spouse"? A "parent"? A "son"? A "daughter"? For the transsexual individual, the answers to these questions may differ depending on where he or she was born, transitions and/or how he or she chooses to live his or her life.

Transsexuals are individuals who do not identify with the biological sex assigned to them at birth because the sex-related structures of their brain are incongruent with their physical genitalia. To put it in layperson's terms, a transsexual is a person whose mind is trapped in the body of the opposite sex.[2] A transsexual is not a cross-dresser or transvestite – a person who gains sexual satisfaction from appearing as the opposite sex – because a cross-dresser or a transvestite has no need to redress a physical incongruity. Both transsexuals and transvestites may be "transgender" – a general label used to categorize any individual who does not conform to accepted social rules of gender expression.

There are various estimates of the number of transsexuals in the general population. The most frequently quoted estimate of prevalence is from the Amsterdam Gender Dysphoria Clinic.[3] The data presented in 1997, which was collected over the more than four decades in which the clinic treated roughly 95% of Dutch transsexuals, gives figures of 1 in 10,000 assigned males and 1 in 30,000 assigned females. Other estimates present the prevalence of male to female (MTF) transsexuals to be as high as 1 in 1,000 and female to male (FTM) transsexuals as 1 in 1,250.[4]

Treatment options for the transsexual individual may include hormone treatment for suppression of secondary sex characteristics of the sex assigned at birth and/or production of secondary sex characteristics of his or her identified gender and sexual reassignment surgery. Many transsexuals, however, choose not to undergo treatment options for many reasons including, but not limited to, the cost (genital or sexual reassignment surgery for an MTF transsexual can cost up to $75,000 or for an FTM transsexual up to $150,000), lack of satisfaction with current medical results and lack of desire to have surgery. Instead, for many transsexuals, "transition" can simply mean choosing to live one's life as best as possible in their preferred and identified gender with little or no medical intervention.[5]

Unfortunately, the transition to one's congruent gender is complicated by issues of legal identity and the legal identity of a transsexual individual is critical to determining his or her status. Status, in turn, affects whether the transsexual can enter into a valid marriage, and the availability of a valid marriage has a direct impact on almost every aspect of the transsexual's life under the law, including but not limited to whether he or she may inherit, designate a guardian for a minor child, sue for wrongful death or medical malpractice, make funeral and burial plans, demand an autopsy, and make medical and financial decisions for a spouse or partner if he or she becomes incapacitated or incompetent. This article will address some of these issues and, it is hoped, provide some guidance to the legal advisor attempting to create an enforceable estate plan for the transsexual client.

Identification Documents

As a first step, the transsexual individual needs to confirm his or her own identity on legal documents. This includes a legal change of name and gender on state and federally issued documents, such as birth certificates, driver's licenses and passports. Most states have established legal procedures for name changes. Once a court has issued an order for a name change, the amendment of birth certificates, passports and driver's licenses to reflect the new name is relatively simple. Court-ordered name changes are accepted by the U.S. Passport Office for the amendment of passports and by the Social Security Administration for the assignment of Social Security numbers.

Changing the reference to one's gender on legal documents is not as simple. Three states specifically forbid or have no statute or policy authorizing birth certificate amendments even after sexual reassignment surgery.[6] Forty-seven states and the District of Columbia, either by statute or administratively, authorize the amendment of birth certificates in some form but not necessarily for purposes of gender identification. Every state that authorizes amendments requires evidence of the successful completion of irreversible sexual reassignment surgery before a person's sex can be changed on a birth certificate.[7] Similarly, the Social Security Administration requires the successful completion of sexual reassignment surgery prior to changing a gender marker on official documents. The U.S. Passport Office has two procedures: one provides a limited passport for those who have a physician's letter stating they have begun transition, and the other provides a full passport for those who have a physician's letter stating they have completed transition. Surgery is not a requirement. The judgment as to what is required for the purpose of completing medical transition is in the hands of the treating physician.[8]

But even if one can change gender identity on legal documents, what effect, if any, does that have on marital status? Can a transsexual enter into a valid marriage in his or her new gender? And if he or she can enter into a marriage in one jurisdiction, will that marriage be recognized in another jurisdiction?

The federal Defense of Marriage Act (DOMA),[9] passed and signed into law in 1996, defines marriage, for federal purposes, as the "legal union between one man and one woman as husband and wife." A "spouse" refers only to a person of the opposite sex who is a husband or a wife. In addition, DOMA provides that no state "shall be required to give effect to any public act, record, or judicial proceeding of any persons of the same sex that is treated as marriage under the laws of such other State . . . or claim arising from such relationship." As of the date of this article, only seven jurisdictions (New York,[10] Massachusetts, Connecticut, Iowa, Vermont, New Hampshire and the District of Columbia) authorize marriages between same sex couples.[11] Various other jurisdictions, including California, Oregon, Nevada, Washington and New Jersey, recognize, for some or limited purposes, same sex marriages validly entered into in other jurisdictions and/or authorize the separate but not necessarily equal quasi-marital relationships of civil unions or domestic partnerships.

The majority of states have enacted their own mini-DOMAs[12] – specifically legislating the non-recognition of same sex marriages. However, neither DOMA nor the mini-DOMAs make any provision for the recognition of marriages where one or both of the parties is transsexual, and there are few decisions considering the validity of marriage in which one or both parties is a transsexual. Of those states that have considered the issue, only New Jersey has specifically provided some legal recognition to the marriage of a post-surgical transsexual.[13] In *M.T. v. J.T.*, the marriage of a MTF transsexual, who was married to a male after sexual reassignment surgery, was recognized in an action for support and maintenance. The court noted that the plaintiff was female for marital purposes; she was "physically and psychologically unified and fully capable of sexual activity consistent with her reconciled sexual attributes of gender and

anatomy." Similarly, in *In re Lovo-Lara*, one of the spouses had undergone sexual reassignment surgery, and her birth certificate had been amended to reflect her gender as female.[14] The Board of Immigration Appeals held that, for immigration purposes, North Carolina must recognize the marriage as valid and heterosexual.

Other reported decisions in this area are much more rigid – decreeing that despite medical procedures to the contrary, a person's sex is determined at birth, and gender cannot be changed.[15]

In *Kantaras v. Kantaras*, a custody case, the Florida District Court of Appeals invalidated the 10-year marriage of an FTM transsexual to a female.[16] The court noted that Florida expressly banned same-sex marriage and found that the Florida statutes did not authorize a post-operative transsexual to marry in his re-assigned sex. The court further emphasized that until the legislature expressly addressed the matter, for purposes of marriage gender is determined by biological sex at birth and can never be changed.

Similarly, an Ohio probate court denied the application of an MTF transsexual and her male partner for a marriage license on the grounds that the MTF was a male at birth.[17] In New York, the marriage of a man to a MTF transsexual was declared invalid where the Court found that at the time of the marriage ceremony the "wife" was male; post-ceremony sexual reassignment surgery was irrelevant.[18]

Thus, even if the marriage of a post-surgical transsexual and his or her spouse is authorized under the laws of one jurisdiction, there is no guarantee that the marriage will be recognized in a different state. And although under principles of full faith and credit a marriage between a pre-surgical transsexual to a person of the opposite biological gender should remain viable after one party undergoes sexual reassignment surgery, the decisions in these cases are few, and the results are inconsistent from jurisdiction to jurisdiction.[19]

So how do we protect our transsexual clients? Without full recognition of legal status in all jurisdictions, every transsexual contemplating marriage should enter into a pre- or post-nuptial agreement with the proposed spouse and execute basic estate planning documents, including but not limited to wills, beneficiary designations, powers of attorney, health care proxies, and designations of guardians of their minor children.

Inheritance Rights

Inheritance rights, taken for granted by most of us, cannot be assumed by the transsexual person. To the transsexual client, a valid marriage does not guarantee that he or she will be considered a spouse under the laws of any particular jurisdiction. Thus, so long as DOMA remains in force, the transsexual client cannot rely on state intestacy statutes and/or spousal inheritance rights such as the right of election or for the right to sue for wrongful death or loss of consortium.

In *In re the Estate of Gardiner,* the Supreme Court of the State of Kansas denied letters of administration to the post-surgical MTF transsexual spouse of a biological male despite the fact that the spouse had a validly issued birth certificate from another state that reflected her new sex.[20] The court found that the marriage was void as against public policy.

Similarly, in *Littleton v. Prange,* the Texas Court of Appeals found that the marriage of a man to an MTF transsexual was invalid, and that the surviving MTF spouse had no standing to bring a claim for wrongful death as the surviving spouse.[21] The plaintiff had undergone sexual reassignment surgery, officially changed her birth certificate to reflect her sex as female and was married to the decedent (who knew she was a transsexual) for over seven years. Nevertheless, the court refused to be bound by the plaintiff's amended birth certificate and ruled that, as a matter of law, the plaintiff was a male because at the time of her birth she was "a male, both anatomically and genetically."[22]

In a more recent case, a Texas judge nullified the marriage of a transgender woman, Nikki Araguz, to her firefighter husband, Thomas Araguz, who was killed in the line of duty in 2010. Mrs Araguz was sued by her husband's ex-wife, Heather Delgado, for $600,000 in death benefits and assets. Delgado argued that the inheritance should go to Thomas Araguz's two sons from his marriage to Delgado. In an order issued on May 26, 2011, Judge Randy Clapp decreed that Thomas Araguz was not married on the date of his death and that "any purported marriage" between Thomas and Nikki Araguz prior to his death was "void as a matter of law."[23]

The *Gardiner*, *Littleton* and *Araguz* decisions all emphasize the need for proper planning. In all three of those cases the results might have been completely different if the parties had executed appropriate estate planning documents that provided for the appointment of each spouse as the representative and beneficiary of the other spouse's estate.

In addition to making sure that transsexual clients (and their spouses) have basic estate planning documents that reflect their wishes, the estate planning practitioner must be aware of the unique issues facing the transsexual client (and his or her family).

- Even in states where your transsexual client may enter into a valid marriage, make sure that your transsexual client and his or her spouse or partner enter into a written agreement clearly defining their rights in each other's property and estate. Although doing so cannot ensure that the marriage will be recognized in another jurisdiction, a properly executed agreement can provide a clear and enforceable expression of intent with respect to those rights. To avoid the non-transsexual party (or his or her family) from later claiming that he or she was unaware that the other party was a transsexual

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States' Laws at a Glance

U.S. jurisdictions with trans-specific laws or regulations permitting a change of sex on a birth certificate:

Alabama: Ala. Code § 22-9A-19(d)
Arizona: Ariz. Rev. Stat. Ann.§ 36-337(A)(3)
Arkansas: Ark. Code Ann. § 20-18-307(d)
California: Cal. Health & Safety Code § 103425
Colorado: Colo. Rev. Stat. § 25-2-115(4)
Connecticut: Conn. Gen. Stat. § 19a-42
Delaware: Del. Code Ann. Tit. 16, § 3131
District of Columbia: D.C. Code § 7-217(d)
Georgia: Ga. Code Ann. § 31-10-23(e)
Hawaii: Haw. Rev. Stat. § 338-17.7(a)(4)(b)
Illinois: 410 Ill. Comp. Stat. § 535/17(1)(d)
Iowa: Iowa Code § 144.23(3)
Kansas: Kan. Admin. Regs. § 28-17-20(b)(1)(A)(i) (*but see In re Gardiner* discussed herein)
Kentucky: Ky. Rev. Stat. Ann. §213.121(5)
Louisiana: La. Rev. Stat. Ann. § 40:62(A)
Maryland: Md. Code Ann., Health-Gen § 4-214(b)(5)
Massachusetts: Mass. Gen. Laws ch. 46, § 13(e)
Michigan: Mich. Comp. Laws § 333.2831(c)
Missouri: Mo. Rev. Stat. § 193.215(9)
Montana: Mont. Admin. R. 378.106(6)
Nebraska: Neb. Rev. Stat. § 71-604.01
Nevada: Nev. Admin. Code § 440-130
New Hampshire: N.H. Code Admin. R. Ann. [He-P] 7007.03(e)
New Jersey: N.J. Stat. Ann. § 26:8-40.12
New Mexico: N.M. Stat. § 24-14-25(D)
North Carolina: N.C. Gen. Stat. § 130A-118(b)(4)
North Dakota: N.D. Admin. Code § 33-04-12-02
Oregon: Or. Rev. Stat. § 432.235(4)
Utah: Utah Code Ann. § 26-2-11
Virginia: Va. Code Ann. § 32.1-269(E)
Wisconsin: Wis. Stat. § 69-15
Wyoming: Wyo. R. & Reg. Hlth VR Ch. 10 § 4(3)(iii)

The following U.S. jurisdictions have laws or regulations permitting changes or corrections to incomplete or inaccurate birth records but do not specifically authorize a change of sex on a birth certificate:

Alaska: Alaska Stat. § 18-50-290
Florida: Fla. Stat. § 382-016 (*but see Kantaras v. Kantaras* discussed herein)
Indiana: Ind. Code § 16-37-2-10(b)
Maine: ME Rev. Stat. Ann. Tit. 22, § 2705
Minnesota: Minn. Stat. § 144.218
Mississippi: Miss. Code Ann. § 41-57-21
New York: N.Y. Pub. Health Law § 4138
Oklahoma: Okla. Stat. tit. 63, § 1-321
Pennsylvania: 35 Pa. Cons. Stat. § 450-603
Rhode Island: R.I. Gen. Laws § 23-3-21
South Carolina: S.C. Code Ann. § 44-63-150
South Dakota: S.D. Admin. R. 44:09:05:02
Texas: Tex. Health & Safety Code Ann. §§ 191.028 and 192.011
Vermont: Vt. Stat. Ann. Tit. 18, § 5075
West Virginia: W. Va. Code § 16-5-24).

as of the date of the agreement, include a provision acknowledging the gender status of both parties at the time of the execution of the agreement.

- Take care to ensure that the validity of estate planning documents will not be called into question because of the competency of the client or issues of undue influence. Many transsexuals have less than cordial relationships with their blood relatives. Make sure you have a full history of your client's family relations and recognize that any family member may institute a will contest.
- In addition, because transsexuals undergoing transition to their identified gender are required to undergo some form of psychotherapy,[24] take special care to prevent or minimize any potential challenges to estate planning documents based on claims of incompetency. Make sure that the client understands the provisions of his or her will and that the witnesses can, if necessary, attest to the client's competency.
- Consider testamentary substitutes – such as jointly held property, payable on death accounts (Totten trusts) and revocable trusts – to effectuate the estate plan. Although also subject to attack on the grounds of incompetency and undue influence, a revocable trust is better insulated from attacks by unhappy family members because it avoids the notice requirements of probate and allows for more privacy.
- Make sure that your client and his or her spouse properly execute beneficiary designations for their non-probate property such as retirement plans and life insurance policies. You may also consider having your client and his or her spouse refer to each other by name and not by status, i.e., "spouse," "husband" or "wife," "son" or "daughter," since that may have undesirable consequences.
- If the transsexual client and his or her spouse appear to have differing views of their estate plans, much like with more traditional couples, make

sure each has separate representation. At the very least, make sure both parties sign waivers of your continued representation of both, including the possibility of full disclosure to both clients.

Burial Instructions

Do not allow your transsexual client to rely on word of mouth regarding his or her burial instructions. Some states, such as New York,[25] allow an individual to designate another person to make funeral and burial arrangements and to otherwise dispose of his or her remains. Putting instructions for the donation of organs and other remains and/or for burial in a will is usually futile because the body is long gone before someone looks at the will. Instructions for the funeral and inscriptions on a headstone can also be given to the agent who, absent legal designation as a burial agent, may or may not have legal standing to make those decisions.

Guardianship and Custody of Minor Children

Paternity is not a given when one party to a marriage is transsexual. In *In re Marriage of Simmons,* the marriage of an FTM transsexual to a woman was deemed invalid because Illinois law did not recognize same-sex marriage.[26] As a result of the invalidity of the marriage, the Illinois Appellate Court determined that there was no presumption of paternity to children born during the marriage and, therefore, Mr. Simmons could not be a father and had no custody rights to the children born during the marriage.[27]

In addition, at least one court has terminated a transsexual parent's parental rights. In *Daly v. Daly*, the Nevada Supreme Court characterized a MTF transsexual parent as "selfish" and terminated parental rights, stating that "[i]t was strictly Tim Daly's choice to discard his fatherhood and assume the role of a female who could never be either mother or sister to his daughter."[28] In *In re Darnell*, a mother's parental rights were terminated on the grounds that it was detrimental to the best interests of the child, because she continued her relationship with her former husband, an FTM transsexual, and his parental rights had been terminated in an earlier proceeding.[29]

Other courts have granted custody or visitation to transsexual parents only when the parent agreed to hide his or her transsexual status.[30]

Make sure that your transsexual client and his or her spouse state, in writing, their wishes regarding the guardianship and/or custody of minor children born of the marriage. In addition to the designation in a will, the parties may consider stating their wishes in an agreement. Remember, however, that as with heterosexual couples, although the designation of a guardian is an indication of intent, your client's wishes may not be binding on a court.

Powers of Attorney

In the absence of a validly executed power of attorney, even a spouse or a registered domestic partner may not be able to make financial decisions for a person who is incapacitated. Again, the family of a transsexual member may make attempts to exclude the spouse, or the family of the non-transsexual member may make attempts to the exclude the transsexual spouse. Having a validly executed power of attorney should ensure that the client's wishes are carried out with respect to financial matters. In addition to handling financial matters, include specific powers granting the attorney-in-fact the authority to implement or complete any plans for changing name and gender identity on various legal documents.

Paternity is not a given when one party to a marriage is transsexual.

Health Care Decision Making

A validly executed instructive directive or health care proxy helps avoid any issues raised with respect to the implementation of medical decisions, including whether the agent has rights of visitation in a hospital – often denied to persons not considered spouses under local law. It should also enable the agent to continue and maintain medical treatment for transition.

Additional Documents for All Clients

Whether your client is transsexual or not, a full estate planning package should also include a living will, a HIPAA release, hospital visitation documents and a pre- or post-nuptial agreement (and in the case of a transsexual client, one which acknowledges that both spouses are aware of each party's gender status).

Conclusion

The gender identity issues faced by transsexual clients are unique. The states do not always consider the complexity of our society in drafting their legislation. Despite the prevalence of transsexual individuals in our society, courts are reluctant to give transsexuals accommodation for the complexity of issues that they face. Without clear legislative direction that is consistent from state to state, transsexuals are quite literally in a "no-person's land." Careful planning for transsexual clients is necessary to ensure that their wishes are respected and carried out. ■

1. New York State Assembly Bill No. A8354 §10-a.
2. The latest science indicates that there may be genetic predispositions for transgenderism.

3. Transgender Mental Health, *The Prevalence of Transgenderism* http://tgmentalhealth.com/2010/03/31/the-prevalence-of-transgenderism.
4. Femke Olyslager & Lynn Conway, *On the Calculation of the Prevalence of Transsexualism*, presented in 2007 at 20th International Symposium of the World Professional Association for Transgender Health (WPATH).
5. The World Professional Association for Transgender Health (WPATH) has set Standards of Care for the treatment of persons with "gender dysphoria." The WPATH Standards of Care are widely accepted as the appropriate medical standards and provide that sexual reassignment surgery is not required for a successful transition. Rather, transition is complete when a person completes the "real life experience" – that is when the transsexual individual begins living, working and dealing with relationships in the desired gender role. *See* WPATH Standards of Care for the Treatment of Gender Identity Disorders, 6th Version, Section IX.
6. Ohio (*See In re Ladrach*, 513 N.E.2d 828 (Ohio Prob. Ct. 1987), and Tennessee (*see* Tenn. Code Ann. § 68-3-203(d)(2004). Idaho has no statute or official policy authorizing the amendment of birth certificates).
7. However, as a result of decisions discussed herein, Texas, Florida and Kansas (despite specific statutory authority) remain problematic with respect to the recognition of amendments made to birth certificates even after the successful completion of sexual reassignment surgery.
8. *See* U.S. State Department Foreign Affairs Manual, 7 FAM 300 Appendix M: Gender Change, *available at* http://www.state.gov/documents/organization/143160.pdf.
9. Pub. L. 104-199, 110 Stat 2419 (1996) (codified as amended at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2010)
10. The New York Marriage Equality Act became effective on July 24, 2011.
11. The Coquille Native American Tribe located in Southern Oregon also extends to gay and lesbian couples all available tribal benefits of marriage.
12. Some mini-DOMAs are classifiable as "super-DOMAs" since they ban not only same-sex marriage but recognition of any relationship between persons deemed to be of the same sex. Nineteen states have ratified amendments to their state constitutions banning recognition of all forms of relationship rights (i.e., marriage, civil unions, domestic partnerships, reciprocal benefits, etc.) for same-sex couples. Those States are Alabama, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia and Wisconsin.
13. See *M.T. v. J.T.*, 140 N.J. Super. 77, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976).
14. 23 I&N Dec 746, 2005 WL 1181062 (BIA 2005).
15. The first reported trans-marriage case was *Corbett v. Corbett*, 2 All. E.R. 22 (P. 1970) in which a British court held that a post-operative MTF transsexual was a man. Although overturned by legislation in Britain, relating to the recognition of the correction of sex designation, and earlier by way of the European Court of Human Rights, this case has been repeatedly cited in most transsexual marriage cases in the United States.
16. 884 So. 2d 155 (Fla. Dist. Ct. App. 2004).
17. *In re Ladrach*, 513 N.E.2d 828 (Ohio 1987).
18. *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971).
19. We have limited our discussion to methods of effectuating the dispositive provisions of a client's estate plan. Although we have not addressed the issue of the availability, in a transsexual marriage, of the federal estate and gift tax marital deduction, we note that the availability of the marital deduction may have an enormous impact on estate planning.
20. *In re the Estate of Gardiner*, 42 P.3d 120 (Kan. 2002).
21. *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999).
22. In response to the decision in *Littleton v. Prange*, in 2009, Section 2.005 of the Texas Family Code was amended to include a certified court order of sex change as proof of identity to obtain a marriage license. A bill introduced in March 2011 by Texas Senator Tommy Williams seeks to eliminate that provision.
23. On June 24, 2011, Nikki Araguz filed a motion for reconsideration and a new trial.
24. Ongoing and consistent psychotherapy by a qualified mental health professional is recommended under the WPATH Standards of Care for the Treatment of Gender Identity Disorders, 6th Version, Section VI.
25. N.Y. Pub. Health Law § 4201.
26. *In re Marriage of Simmons*, 825 N.E.2d 303 (Ill. App. Ct. 2005).
27. However, see *Vecchione v. Vecchione.* (Orange Cty. Cal. Superior Ct. (Nov. 26, 1997), Civ. No. 96D003769), another custody battle in which a FTM transsexual was legally recognized as a male for purposes of the marriage. The wife had asked the trial court to declare the marriage invalid on the grounds that it was a same-sex marriage and to waive her husband's parental rights. The husband had undergone sexual reassignment surgery 20 years prior to the marriage, and the wife claimed that she was unaware of the surgery.
28. *Daly v. Daly*, 715 P.2d 56 (Nev. Sup. Ct. 1986), *overruled by In re Termination of Parental Rights as to N.J.*, 8 P.3d 126 (Nev. Sup. Ct. 2000).
29. *In re Darnell*, 619 P.2d 1349 (Or. Ct. App. 1980).
30. *See J.L.S. v. D.K.S.*, 943 S.W.2d 766 (Mo. Ct. App. 1997); *B. v. B.*, 184 A.D.2d 609 (2d Dep't 1992).

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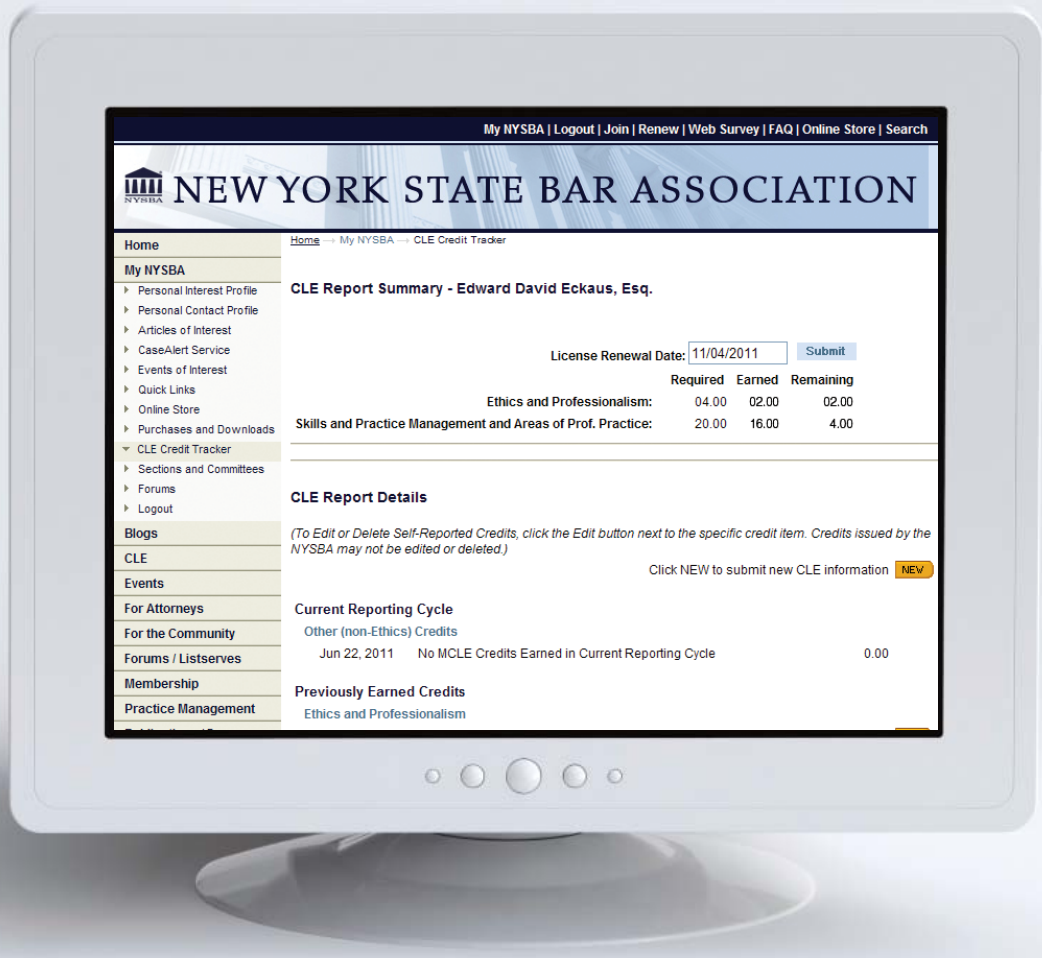

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The Mortgagee Formerly Known As…

By Vincent G. Danzi

In New York State, recording a mortgage can be an expensive affair. Depending on the county where the mortgage will be recorded, the potential mortgage tax due can range from substantial to prohibitive. Fortunately for the consumer, and for the lenders, real estate agents, title companies, and the industries that depend upon the seasonal flows of mortgage activity like the ancient Egyptian farmers depended upon the Nile, the New York State Mortgage Tax need not completely exhaust consumers' available settlement funds. New York title and real estate law professionals have been structuring mortgage recordings using consolidation and modification agreements for years to avoid re-paying mortgage tax on that portion of a new mortgage's total indebtedness which is already secured by a recorded mortgage upon which mortgage tax has already been paid.

The process is largely mechanical. Section 255 of the New York Tax Law allows the recording of a "Supplemental Instrument" or "Supplemental Mortgage," for the purpose of "correcting or perfecting any recorded mortgage" or "imposing the lien thereof upon property not originally covered by . . . such recorded primary mortgage," for the purpose of further securing the principal indebtedness.[1] Such supplemental mortgages and instruments are not subject to taxation unless they increase the *principal* indebtedness secured and/or spread the lien onto property located in a county or municipality where a mortgage tax not previously collected is due.

In the typical refinance, the usual method by which such instruments are used to save on mortgage tax is by recording a "new money mortgage" in the face amount of the difference between the currently owed principal on the mortgage note being refinanced and the new face amount of the total, or consolidated, note. Mortgage tax is paid on the "new money mortgage," but no tax will be due on the supplemental instrument: the consolidation, extension, and modification agreement (otherwise known as the "CEMA"). The CEMA is sent to the county clerk and is accompanied by an affidavit which explains, among other things, that the currently recorded mortgage is now held by the same lender that is (concurrently with the CEMA) taking the new money mortgage. As such, the CEMA can be recorded as a "supplemental instrument," which merely "perfects" the mortgages upon which mortgage tax is, or was, paid.

This process can break down, however, when there is an incomplete trail of ownership by assignments of the recorded mortgages. For example, a mortgage originated

and recorded in the name of Countrywide Bank, NA, in 2005, and which has not been assigned from that entity or its successors by merger, will be held, as of this writing, in Bank of America, NA. Should this recorded mortgage be further consolidated with a future mortgage, it will be necessary to construct a mortgagee or assignee recital that allows the county clerk personnel to link the recorded mortgage with the new money mortgage. Of course, while the need to do so may seem mechanical, inappropriate use of terms such as "successor in interest" and "formerly known as" can result in creating false documents. These are terms of art and they, respectively, imply that either a merger or a name change has occurred. This article will explain how to determine which has occurred in most instances and will enable you to properly recite a chain of mergers and name changes so as to link a last mortgagee of record with the name of the entity that currently holds the security instrument.

Implicit in the above process is a linking of old documentation with new documentation. In this day and age, where large financial institutions are increasingly mercurial and where the entities themselves are frequently changing hands or changing identities, properly reciting ownership of a mortgage recorded even just five years ago, an age now lost in the mists of time, can be difficult.

The complexity of keeping track of, and properly reciting, name changes and mergers of defunct lending institutions is compounded by several factors. For one, the need to make these recitals in the first place is due to the machinations required in New York State to obtain a mortgage tax credit against mortgage taxes already paid. Other states that impose a tax upon the recording of a mortgage usually have a procedure for obtaining a partial credit, often based upon the current balanced owed, just as we do here, but in New York State that credit comes relatively grudgingly. If one were to put states on a spectrum of difficulty in this regard, states such as Maryland[2] (where a simple statement on the security instrument is often sufficient), would be situated at one extreme and states like New York would be at the other. States like Georgia[3] and Virginia,[4] which require a common lender, would be found in between. However, New York is special, even among the more documentation-heavy states, because of the need to preserve the former security instrument's utility via consolidation. When you refinance with a CEMA in New York, you do not *replace* your security instrument. Staff of a lender based out-of-state will oftentimes have limited (if any) knowledge of the documentation requirements of this New York State-specific procedure. One can easily imagine the assignment and consolidation documentation requirements of New York's CEMA refinances as an odd appendage to a national lender's nationally focused refinance process. In other words, it is not just that New York State requires a *variation* on a national process; it requires its own, *extra* step.

Second, it is not hard to imagine that the vocabulary used to describe mergers and name changes can sound vague to the mostly non-attorney personnel who often assist attorneys with the mechanical tasks of drafting the proper documents. Terms such as "successor in interest" and "now known as" may sound similar, particularly when documentation using these terms inappropriately has been successfully recorded for years. In Virginia, which also imposes a mortgage tax, one clerk found such inappropriate use of terminology (in connection with Virginia's "same lender" mortgage tax credit) worthy of a bulletin on the subject.[5]

Third, the frequency with which lending institutions have sold their assets, merged out of existence, or consolidated subsidiaries has increased to the point where proper recitations of one entity can stretch for multiple lines of text, requiring compound sentences that can take on the sound of encryption rather than description.

In recent times, we have all seen the importance of the accuracy of mortgage loan-related documentation and how technical defects have been the recent subject of headlines. In this article, we will explore two free online resources that are available to anyone and which can provide clarity on how to draft the security instruments upon which the lenders and our clients rely.

Step-by-Step Guide to Finding Bank Predecessors and Subsidiaries . . .

For this example we are going to assume that Bank of America, National Association, desires to extend to John Q. Public a mortgage loan in the amount of $500,000. We are going to further assume that the parties intend on getting credit for the mortgage tax Mr. Public already paid on two mortgages which are already recorded, one of which is last of record in the mortgagee name of Merrill Lynch Credit Corporation and the other in the mortgagee name of Countrywide Bank, NA, both of which were relatively recent acquisition targets. Last, for our fictional example, assume that the loan originator maintains that since Merrill Lynch Credit Corporation, and Countrywide Bank, NA, were both acquired by Bank of America Corporation, that no assignments should be necessary when Bank of America, National Association, consolidates its new money mortgage with the two above mortgages.

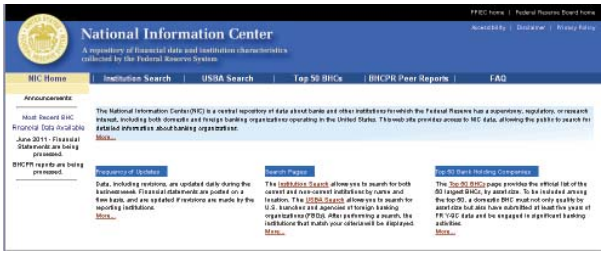
To tackle this scenario and verify whether assignments will actually be needed, we first need to establish the relationship between the mortgagees recited on the two mortgages (Countrywide Bank, NA, and Merrill Lynch Credit Corporation) which are already recorded, and the issuer of the new money mortgage and consolidation (Bank of America, National Association). Fortunately there are two free public websites that, used together, will provide the answers, if we know how to look for them.

We begin by establishing the relationship between Merrill Lynch Credit Corporation and Bank of America, National Association, and whether an assignment from

one to the other is necessary. A useful place to start is by looking for Merrill Lynch Credit Corporation on the Federal Reserve System's National Information Center website.

Step 1

The National Information Center's website can be found here: http://www.ffiec.gov/nicpubweb/nicweb/NicHome.aspx. If you follow this link, you should see the following page:

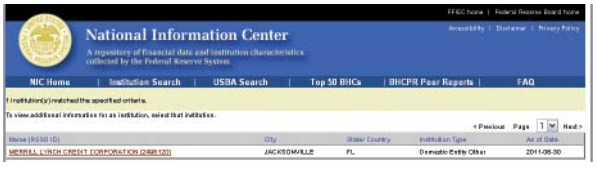


Step 2

Click on "Institution Search." Then enter "Merrill Lynch Credit Corporation," as shown below in the screen that will appear:

Step 3

Click "Submit," and you should see this:



Step 4

Click on "MERRILL LYNCH CREDIT CORPORATION (2496120)," and you should see this:

Step 5

Click on "Organization Hierarchy," and you should see this:

Step 6

Click the bullet next to "Parent(s) of MERRILL LYNCH CREDIT CORPORATION" and click "Submit" and you should be presented with a lengthy .pdf report of the parent company of Merrill Lynch Credit Corporation, which is Bank of America Corporation. The beginning of the report will look like the following:


Report created: 9/15/2011

BANK OF AMERICA CORPORATION (1073757)

as of 06/30/2011

Hierarchy report with the following institution types: Commercial Bank, Cooperative Bank, Credit Union, Edge/Agreement Corporation, Financial Holding Company, Holding Company, Industrial Bank, Insurance Co. Broker/Agent/Underwriter, Nondepository Trust Company, Other Company, Savings Bank, Savings and Loan Association, and the Securities Broker/Dealer/Underwriter

Seq Num	Name (RSSD ID)	Parent Seq	City	State or Country	Entity Type
1	* BANK OF AMERICA CORPORATION (1073757)		CHARLOTTE	NC	Financial Holding Company - Domestic
2	-* FLEET FINANCIAL CORPORATION (709770)	1	PROVIDENCE	RI	Finance Company
3	-* FLEET VENTURE RESOURCES, INC. (1113523)	1	CHARLOTTE	NC	Domestic Entity Other
4	-* BAC CAPITAL TRUST XIII (3658813)	1	CHARLOTTE	NC	Domestic Entity Other

Note: We just went through several steps, but let's stop and summarize what we've done up to this point: We visited the National Information Center's site and performed a search for the name of the lender we were looking for. That search led us to a report that provided a link to a complete hierarchy of that lender's topmost parent company. The following tasks will help us find the lender's position within that corporate hierarchy.

Step 7

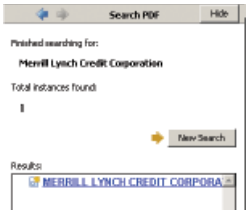
As we saw from the previous screen, Bank of America Corporation was listed as a parent of Merrill Lynch Credit Corporation. However, that does not mean that Merrill Lynch Credit Corporation is directly owned by the parent Bank of America Corporation. The report we have just been provided should show us all of Bank of America Corporation's subsidiaries, and the subsidiaries of those subsidiaries, and so on. We will use this report to work from Merrill Lynch Credit Corporation to Bank of America, National Association, which, incidentally, is itself a child entity of Bank of America Corporation.

When I downloaded the report, it came in at a hefty 177 pages. Fortunately, we can use the common "Find"

tool provided in Adobe Acrobat to find our entity amongst the thousands of legal entities in this report that are all listed under the main holding company: Bank of America Corporation. It is a good idea to save this report to your hard drive, both to document where you got the information and also because it will make it unnecessary to repeat the above steps if you need to leave the current web page.

Assuming that you have saved the above report to your computer, open it up in Adobe Acrobat (the free "reader" version is acceptable). Depending upon how you have your toolbars set up, you should see an icon depicting a pair of binoculars. I have circled this icon below:

Click this icon and type "Merrill Lynch Credit Corporation" into the search box. Then click "Search." Doing so should yield the following results:



Step 8

Click on that entry, and you will be brought about 100 pages into the report. The Merrill Lynch Credit Corporation entity should be highlighted as below:

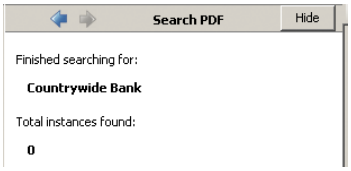
Step 9

The above entry tells us several things. The first column indicates that Merrill Lynch Credit Corporation has a sequence number (Seq Num) of 1874. The second column shows the name of the entity followed by its certificate number, in parentheses. The third column gives us the Seq Num of this entity's immediate parent: 1572. Since the entities are presented to us in this report sequentially by Seq Num, we should scroll backward through the pages until we get to the entry for Seq Num 1572. As of January 6, 2011, that entry looks as follows:

1572 — BANK OF AMERICA, NATIONAL ASSOCIATION (480228) 1874 CHARLOTTE NC NATIONAL BANK

So, we see that Merrill Lynch Credit Corporation is a direct subsidiary of Bank of America, National Association. Incidentally, you may also notice that Bank of America, National Association, also has a Parent Seq, which you could use to recursively trace the ownership of that parent company back up to the top-level holding company: Bank of America Corporation. However, since we have arrived at the entity we were looking for (Bank of America, National Association), we can turn our attention to the other entity: Countrywide Bank, NA.

While this report is still open, try performing a search for "Countrywide Bank, NA." Note that you may just want to search for "Countrywide Bank" to cast a wider net without causing the results to be filtered by a trailing acronym such as "NA" versus "National Association." The following shows what such a search yielded:

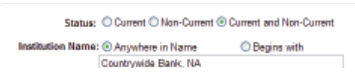


Our search of this report produced no results, which indicates that there is no current subsidiary, or sub-subsidiary, or sub-sub-subsidiary, etc., among these thousands of subsidiaries, named any permutation of

"Countrywide Bank." However, your client assures you that Countrywide Bank, NA, was acquired by Bank of America in some fashion. In any case, whether we need to get an assignment of this mortgage or not, we first need to understand what happened to Countrywide Bank, NA, and what institution acquired it and how.

Step 10

Let's go back to the National Information Center website's Institution Search page that we saw in Step 2. This time we will search for "Countrywide Bank, NA," just as we previously searched for Merrill Lynch Credit Corporation.



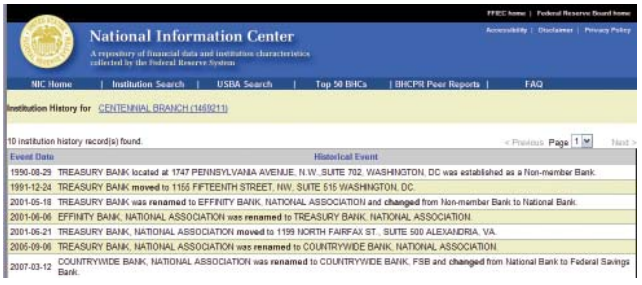
Step 11

Upon clicking "Submit," we get the following result:

Step 12

If we click this entry, we will see the following:

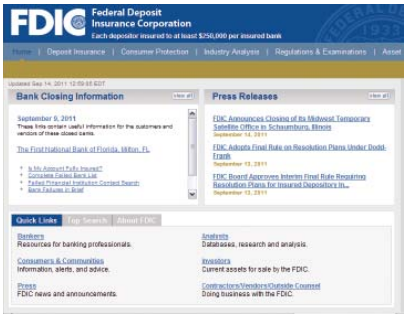
So, we are told that Countrywide Bank, National Association, is now a branch of Bank of America, National Association. This is helpful information and shows that our client is not wrong about there having been an acquisition of Countrywide Bank, NA; but we do not know how that happened. For that additional information, click on "Institution History." Doing so should yield the following result:



We now know that on March 12, 2007, Countrywide Bank, National Association, changed its name (and charter) to Countrywide Bank, FSB. Then, on April 27, 2009, Countrywide Bank, FSB, was acquired by Bank of America, National Association. This is useful because it informs us that there was a name change, and it informs us that Countrywide Bank, FSB, was, in turn, "acquired," by Bank of America, National Association. However, as explained above, an acquisition can occur via merger where the institution acquired disappears, or it can occur in such a way that the acquired institution remains an independently viable existing subsidiary. These methods of acquisition are not equivalent. To find out whether the acquisition resulted in the merging out of existence of Countrywide Bank, FSB, we can use another free online resource: the Federal Deposit Insurance Corporation's Institution Directory.

Step 13

You can get there by going to the FDIC website at http://www.fdic.gov/ and then clicking on "Bankers" under the "Quick Links" section, as shown below:

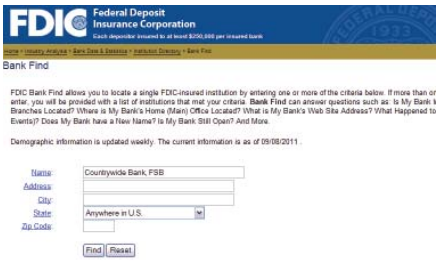


Then choose "Institution Directory" under "Top Picks," as shown below:

Then choose "Bank Find," as shown below:

Step 14

Enter the name "Countrywide Bank, FSB," into the Name box and click "Find."



You should see something like the following:

Step 15

Click on "Historical profile," and you should see this:

We now have our answer. Countrywide Bank, FSB, merged into Bank of America, National Association. No assignment is therefore necessary. To tie together everything we have seen, let's pretend we are going to draft a CEMA for this very transaction and we need to create the verbiage to refer to the current mortgagee which holds our two mortgages.

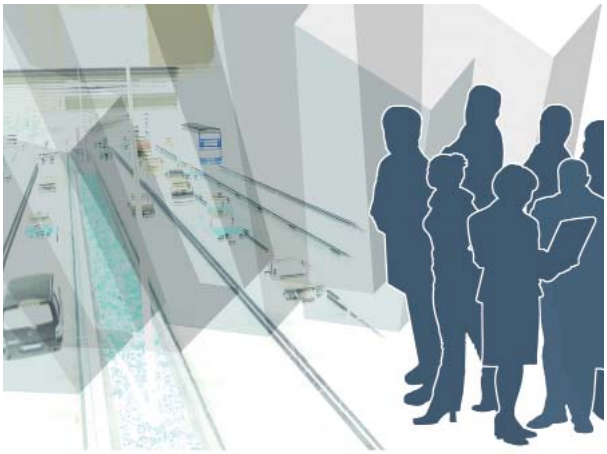
If Bank of America, National Association, is the new lender and Merrill Lynch Credit Corporation is a direct subsidiary of Bank of America, National Association, then we will need an assignment from Merrill Lynch Credit Corporation, to Bank of America, National Association. Bank of America, National Association, is not the same legal entity as Merrill Lynch Credit Corporation, just as owning stock in a company does not give one direct ownership of the company's assets. To describe Bank of America, National Association, as "successor in interest" or "successor by merger," etc., to an asset of Merrill Lynch Credit Corporation would, therefore, be inaccurate.

On the other hand, Countrywide Bank, NA, did indeed undergo a merger . . . and a name change too. Countrywide Bank, NA, is no more and Bank of America, NA, is successor to its assets. Someone from Bank of America, NA, will have to sign an instrument of conveyance and that instrument will need to show continuity of ownership. One acceptable way that person could sign, and show the link, would be: Bank of America, NA, *successor in interest*, to Countrywide Bank, FSB, *formerly known as*, Countrywide Bank, NA.

The above websites are tools that you can use for free to help you identify the holders of security instruments and how to properly reference them. We do not yet know the extent of the "robo-signing" issues or what might eventually happen to "The Mortgagee (Formerly?) Known as MERS," but it certainly does not look like the importance of properly reciting ownership of security instruments is something that is going to be diminishing any time soon. Hopefully the above information will be of use to you. ■

1. N.Y. Tax Law § 255.
2. Md. Tax-Prop. § 12-108(g).
3. O.C.G.A. § 48-6-65(b).
4. Va. Tax Code § 58.1803(D).
5. *See* Letter from John T. Frey, Clerk of the Circuit Court of Fairfax, Fairfax, Va., "Land Records Patrons" (Mar. 12, 2009), http://www.vlta.org/images/cms_images/News%20Page/ReFi%20Same%20Lender%20Letter%20031609.pdf.

BY STEVEN C. BENNETT



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Privilege Logs and Emails

It is difficult to go through a modern business day without communicating through email. Yet, for lawyers, email can present unique and significant problems in discovery. This article discusses the challenges lawyers face when dealing with privilege issues in email strings, and the very limited discovery case law addressing these issues.

Under Rule 26(b)(5) of the Federal Rules of Civil Procedure, a party that withholds discoverable information on privilege grounds, such as attorney-client privilege or work product protection, must describe each document or category of documents well enough to permit an adversary to assess the privilege claim without revealing that privileged information.[1] This process, which generally includes preparing a privilege log, is important because, if a party fails to produce an adequate log, privilege may be waived and a court may impose sanctions.[2]

Although Rule 26(b)(5) does not precisely specify the level of detail required when producing a privilege log, the Comments to the Rule provide some insight, noting that the burden involved may play a role in choosing the level of detail.[3] The Rules and Comments, however, do not establish clear guidelines with respect to email strings containing attorney-client communications or work product, and related emails that are not independently privileged. Must each discrete email message contained in the string be logged as a separate entry? Or is it sufficient to simply list the general email as a single document? Courts divide on this issue, and there is no general authority on whether a privilege log must include separate entries for embedded emails within the same string.

Some courts have held that a party may list an email string as a single entry, as opposed to itemizing each embedded email separately. Under this line of cases, however, if the privilege log does not include enough information to demonstrate that each communication was limited to persons within the scope of the privilege, a party might lose the privilege with respect to that email and all attached emails.[4]

For example, the court in *Muro v. Target Corp.* held that separately itemizing each embedded email can produce confusion and runs the risk of disclosing confidential information that could breach attorney-client privilege.[5] But the court nevertheless found the privilege log at issue deficient, even though it listed each email string as a single document, because the log failed to identify all the recipients of messages and failed to describe their roles adequately.[6] Omitting the recipients' identities and job descriptions, and using cryptic titles, the log offered no way for the opposing party to assess whether the recipients were within the sphere of corporate privilege, as required for protection under Rule 26(b)(5). Accordingly, the *Muro* court held that the privilege log was deficient.

The court in *United States v. ChevronTexaco Corp.* came to a similar conclusion, holding that separately itemizing each email "does not accurately reflect what is communicated with that e-mail."[7] Separate itemization, the court noted, can be misleading where "each chronologically successive e-mail attached those that preceded it." Each email communication "consists of the text of the sender's message as well as all of the prior e-mails that are attached to it." The court thus rejected the notion that each embedded email is a separate and independent communication. To proceed otherwise, the court noted, would inaccurately reflect what was communicated in the email string.[8] Thus, under the *ChevronTexaco* and *Muro* rule, a party need not separately itemize emails forwarded as part of an email string. The privilege log need only include enough information to demonstrate that each privileged communication was limited to persons within the scope of the privilege.

Other courts have reached a varying conclusion, holding that each embedded email in an email string must be listed separately to enable the requesting party to determine whether each email in a string is entitled to privilege.[9] For example, in *In re Universal Service Fund*, the court strongly

encouraged, in *dicta*, that parties separately itemize emails, noting that treating "each e-mail strand on a topic as a single document, although arguably reasonable, was very risky" and could result in waiver of attorney-client privilege.[10] Without the detail of a single log entry for each embedded email, the court reasoned, it could be difficult to ascertain whether the emails contained in a string are subject to attorney-client privilege.[11] Even if burdensome, the court noted, separate logging ensures that privilege and work product protection are asserted only when appropriate. Otherwise, the court noted, there was the risk of "stealth claims of privilege which . . . could never be the subject of [a] meaningful challenge by opposing counsel or actual scrutiny by a judge."[12]

The *Universal* court nevertheless stated that where "each and every separate e-mail within a strand is limited to a *distinct and identifiable* set of individuals, all of whom are clearly within the attorney client relationship . . . listing the email strand as one entry on the privilege log might be regarded as sufficient."[13] Accordingly, under the *Universal* view, a single entry approach could be used as long as a proper privilege review is conducted to ensure that only emails where privilege has not been waived are listed on the log.[14]

Several courts have shared the *Universal* view. In *Rhoads Industries, Inc. v. Building Materials Corp. of America*, the court held that fair itemization of privilege claims would "require that each version of an e-mail string . . . be considered as a separate, unique document."[15] Accordingly, the court held that "each message of [an email] string which is privileged must be separately logged in order to claim privilege in that particular document."[16] Similarly, in *Baxter Healthcare Corp. v. Fresenius Medical Care Holding, Inc.*, the court considered embedded emails as separate communications and ordered a producing party to log each email separately, because the party could not "justify aggregating authors and recipients for all e-mails in a string and then claiming privilege for the aggregated e-mails."[17]

Courts have also grappled with concerns regarding whether attachments to emails should be listed as separate documents on a privilege log. Generally, an attachment must qualify on its own for attorney-client privilege and "must be listed as a separate document on the privilege log."[18] The *Muro* court, however, held that an attachment, although not automatically privileged by being included in a communication to an attorney, remains privileged when it is sent for the purpose of facilitating legal representation.[19] Thus, according to *Muro*, attachments should be listed as separate documents on a privilege log in order to preserve privilege.

Courts split on the issue of privilege logs and email strings. Under these circumstances, one solution may involve parties negotiating the form of a privilege log. Depending on the volume of materials, the amounts at issue, and other needs of the case, the parties may agree to greater or lesser degrees of specificity in the log (or in certain categories of materials reflected in the log).[20] Failing such agreement, an application to the court for guidance may help avoid undue cost, risk and surprise rulings in this area. ■

Some courts have held that a party may list an email string as a single entry, as opposed to itemizing each embedded email separately.

1. *See* Fed. R. Civ. P. 26(b)(5).

2. *See In re Universal Serv. Fund Tel. Billing Prac. Litig.*, 232 F.R.D. 669, 671 (D. Kan. 2005); *see also Felham Enters. (Cayman) Ltd. v. Certain Underwriters at Lloyd's*, No Cv.A. 02-3588 C/W 0, 2004 WL 2360159, at *3 (E.D. La. Oct. 19, 2004) (privilege waived where log did not adequately describe allegedly privileged communications); *Emp'rs Reinsurance Corp. v. Mid-Continent Cas. Co.*, No. Civ. A 01-2058-KHV, 2002 WL 1067446 (D. Kan. Apr. 18, 2002) (requiring production of supposedly privileged documents, due to inadequate log).

3. *See* Comments to Fed. R. Civ. P. 26(b)(5) ("details concerning time, individuals or general subject matter may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged and protected, particularly if the items can be described by categories").

4. *See, e.g., Muro v. Target Corp.*, 250 F.R.D. 350, 364 (N.D. Ill. 2007); *United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1074 (N.D. Cal. 2002).

5. *Muro*, 250 F.R.D. at 363.

6. *Id.* at 364.

7. *ChevronTexaco*, 241 F. Supp. 2d at 1075.

8. *Id.*

9. *See, e.g., In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 812 (E.D. La. 2007) ("Simply because technology has made it possible to physically link these separate communications . . . does not justify treating them as one communication and denying the demanding party a fair opportunity to evaluate privilege claims raised by the producing party.").

10. 232 F.R.D. at 672.

11. *Id.*

12. *Id.* at 673.

13. *Id.* at 672.

14. *Id.* at 673. Another district court, in *Stafford Trading, Inc. v. Lovely*, No. 05-C-4868, 2007 WL 611252 (N.D. Ill. 2007), implicitly addressed the issue of how to disclose email strings on a privilege log. The court, conducting an in camera review of purportedly privileged documents, treated an email that forwarded a second email as two separate communications. The judge held that privilege was waived as to both such "communications" if either was sent to a recipient not within the confines of the privilege. *Id.* at *8.

15. 254 F.R.D. 238, 240 (E.D. Pa. 2008). This decision, however, has been criticized as misapplying the *Muro* rule. *See, e.g.*, Lucius T. Outlaw III, *Separate Links or Whole Chain: Emails and Privilege Logs* (2009), *available at* http://www.mayerbrown.com/publications/article.asp?id=6849 ("This [*Rhoads*] conclusion directly conflicts with the language and intent of *Muro*."); Sue Seeley, *Privilege Logs: How to Effectively and Efficiently List Single E-mails That Include Earlier E-mail Text*, ALSP Update, May 2009, at 2, *available at* http://www.iediscovery.com/files/articles/Privilege%20Logs%205.09.pdf ("[W]e believe the *Rhoads* court misinterpreted the [*Muro*] decision, as it cited language that was quoted and rejected by the *Muro* court.").

16. *Rhoads Indus. Inc.*, 254 F.R.D. at 240–41.

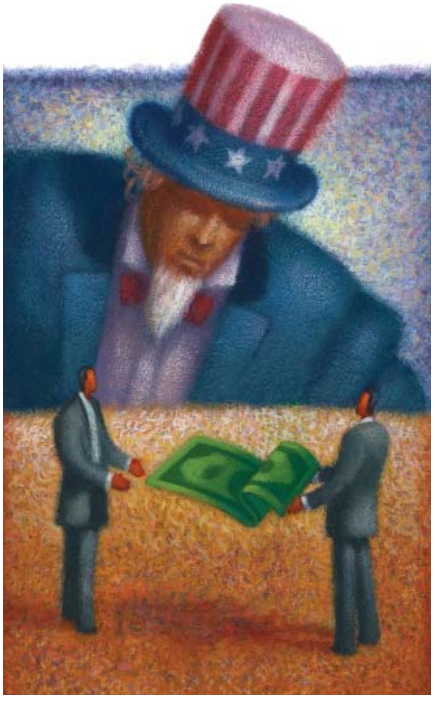
17. 2008 WL 4547190, at *1 (N.D. Cal. Oct. 10, 2008).

18. *O'Connor v. Boeing N. Am., Inc.*, 185 F.R.D. 272, 280 (C.D. Cal. 1999).

19. *Muro*, 250 F.R.D. at 363.

20. *See* The Sedona Conference Cooperation Proclamation (2008), *available* at www.thesedonaconference.org (suggesting cooperation as an essential means to fairness and efficiency in discovery).

BY ROBERT W. WOOD



Robert W. Wood (wood@WoodLLP.com), a tax lawyer with a nationwide practice, is the author of more than 30 books, including *Taxation of Damage Awards & Settlement Payments* (4th Ed. 2009 www.taxinstitute.com). This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.

What Every Lawyer Should Know About IRS Audits

No one likes IRS audits, and lawyers seem particularly to dread them. The mere thought that the Internal Revenue Service may commence poking into your books and perusing the financial affairs of your practice is downright unsettling. By its very nature, law practice is confidential, and keeping the client's confidence is of supreme importance.

It should be no surprise that clients who learn that the IRS is reviewing their lawyer's books may be concerned or even unnerved. If your clients get wind that you are undergoing an audit, they may voice concerns quite apart from your own. For that reason and many others, you should take any audit seriously and should attempt to minimize its financial and psychological impact. Audit risks are statistically low, but that is changing.

Indeed, the IRS has recently increased the ranks of its Revenue Agents, adding 3% in 2009 and 7% in 2010. The IRS audited 1,581,394 individual income tax returns in 2010, 342,762 of them in the field and 1,238,632 of them by correspondence. The same year, the IRS audited 29,803 corporate income tax forms (on Form 1120), 28,601 of them in the field and 1,202 of them by correspondence. Correspondence audits are far more easily controlled and far less threatening than field audits where the IRS visits you personally.

Get a Lawyer

A field audit begins with an IRS Revenue Agent sending a letter specifying the tax returns selected for audit, the day and time the audit is to begin, and the records the Revenue Agent wishes to examine. Rather than giving the Revenue Agent access to your office, hire a tax lawyer. The tax lawyer will likely move your records to his or her own office and have the IRS review the records there. That is far less disruptive for you, your staff and especially your clients.

In fact, as soon as you get any kind of IRS (or other) tax audit notice, a good first step is to consult with experienced tax counsel. You may have an accountant who regularly prepares tax returns for your practice or law firm. The accountant may well be able to handle the audit. However, consulting with a tax lawyer about the process and your particular facts can be a shrewd initial step.

In some cases it will pay to have a tax lawyer handle the audit from the start, rather than (as is common) waiting to bring in a tax lawyer at the conclusion of the audit for the ensuing administrative or court appeals. The tax lawyer may be able to head off trouble early and thus truncate the entire process. There is no universal answer to the question of who should handle your audit. Clearly, though, if the case involves potential allegations of fraud, a lawyer should represent you.

In fact, audits of lawyers may be especially sensitive. No lawyer wants to keep clients in the dark about the risk that their identity has been disclosed to the IRS. Yet no lawyer wants to risk having clients bolt by telling them the IRS has their names. Any interaction with the IRS will be an inconvenience, but it could be expensive or even carry grave consequences. (Some believe the IRS unfairly targets lawyers, recalling the IRS's "Project Esquire" of several decades past.)

The Audit Guide

More recently, the IRS has released a new audit guide directing its agents how to audit lawyers.[1] It contains interesting points even for lawyers who have no fear of dealing with the IRS and who would not expect an audit of their practice to give rise to any problems. Even those very secure in their practice and in its administrative and financial aspects may want to peruse it. Doing so will be unsettling for some.

Indeed, after reading this guide, some lawyers will find that they should beef up their internal controls and documentation. Lawyers

may want to segregate records they consider protected by attorney-client privilege from those that clearly are not. One of the primary messages of the IRS audit guide for law practices is that lawyers are expected to have good internal accounting and a good system of recording costs and expenses. Many lawyers, especially in small offices, feel they have little need for such systems. That may be a mistake.

The IRS expects billing software, of course, and will want to examine it as well as its results. The IRS is particularly interested in seeing the adjustment log that reconciles the output of the time and billing system to the appropriate accounts in the general ledger. This too is noteworthy. The IRS will want the accounting and general ledger to tie together. If it does not, the IRS may want to go through bank records in excruciating detail.

That brings up lawyer trust accounts. Even if reviewing bank records isn't necessary to cross-check receipts and reported income, the IRS audit guide tells Revenue Agents that lawyer trust accounts are *vital* sources of information. Here, most lawyers are careful, although precisely what the IRS looks for may surprise some. Many lawyers have too much in their trust account and are slow to withdraw amounts from the trust account to which they are entitled.

Yet it is clear that if a lawyer is entitled to fees in his trust account, they represent income to the lawyer for tax purposes. It does not matter if the lawyer waits to actually withdraw the fees from the trust account until the following tax year. Many lawyers incorrectly assume that when a case settles and funds are wired to the lawyer's trust account in December, it is not income until it is disbursed to the lawyer in January.

Attorney-Client Privilege

The IRS devotes significant attention to attorney-client privilege in its audit guide. There is good reason for this, since claims of privilege are common in audits of lawyers. Lawyers are a cautious lot and do not want to risk violating privilege by giving the IRS too much.

The IRS correctly instructs its agents that the privilege is the clients', not the lawyers'. Even so, of course, lawyers commonly assert the privilege on behalf of their clients, knowing that the client is the only person who can waive it. Yet precisely what kind of information is privileged?

The IRS audit manual states firmly that the identity of clients and their fee arrangements are almost never considered privileged. There is some case law on this point, but the IRS is correct that lawyers generally cannot fail to turn over the names of clients, the amounts they pay or the particulars of their fee arrangements if it is material to the audit.

Another more general potential objection to a request for such information would be relevancy. Material is generally relevant in an audit if it might have some bearing upon the correctness of the taxpayer's return. The IRS encourages auditors not only to issue Information Document Requests (IDRs) to the lawyer but to conduct personal interviews as well.

In addition to IDRs, the IRS is likely to issue summonses if the auditors have any difficulty getting documents they request. The lawyer can respond in court and try to quash the summons based, for example, on privilege. Overbroad or burdensome summonses may not be enforced, but the lawyer may need to take any dealings with the IRS seriously, including hiring counsel.

Criminal Referral

Fortunately, most examinations of lawyers will be uneventful. Yet it is worth noting that problems can sometimes escalate. For example, a majority of criminal tax cases still originate through referrals from civil auditors in normal IRS civil audits. If an IRS auditor discovers something suspicious the

auditor can simply notify the IRS's Criminal Investigation Division.

The IRS is not obligated to tell the taxpayer that this criminal referral is occurring. Normally the civil auditors simply suspend the audit without any explanation. Thus, the taxpayer might assume that the audit is over or, more likely, that the IRS is busy and will eventually pick up where they left off. The taxpayer may have no idea that the IRS believes there has been a criminal violation and that it is building a criminal case until a criminal investigation is well under way.

For an example of a tax nightmare, consider the indictment of Tennessee lawyer John Threadgill for tax evasion. His primary alleged crime was paying personal expenses from his law firm accounts. Threadgill is alleged to have used his law firm bank and payroll accounts to issue checks to third parties for personal expenditures; maintained ledgers concealing the true nature of his personal expenditures; established bank accounts for nominee trusts to disguise assets; and titled personal residences in the names of nominee trusts to disguise their ownership and put them beyond IRS.

The indictment alleges that from 1986 to 2004, Threadgill evaded $1.4 million in federal income tax. It alleges he paid $245,000 from his law firm for family educational expenses, $213,000 in personal real estate purchases, $69,000 for his daughter's wedding, and $52,000 for personal travel.

Having a business pay the owner's personal expenses is hardly unique to the practice of law. It occurs across a wide spectrum of small businesses. In fact, it is probably one of the reasons that individual tax returns with a Schedule C – on which sole proprietors report their business income and loss – are *the most likely* individual tax returns to be audited.

An aggressive mixing of or simply a sloppy differentiation between what is business and what is personal is probably more common among solo or small-firm practitioners than in the larger law firms. Many solo and small firm practitioners may see little reason to have written procedures and internal controls. An IRS audit can do much to change their minds.

However, a lax differentiation between business and personal is dangerous. Upon encountering the problem, the IRS usually redresses it by disallowing the claimed expenses and imposing civil penalties in addition to the taxes on the disallowed amounts. Of course, an assessment of tax or penalties also accrues interest. Sometimes, however, the matter can become criminal, as occurred in Threadgill's case.

In criminal tax cases, the IRS can pursue a felony charge of filing a false tax return.[2] This provision requires the IRS to prove beyond a reasonable doubt that the defendant filed a false tax return and did so willfully. Conviction is punishable by fine of up to $100,000 and imprisonment of up to three years.

An even more serious felony charge is tax evasion under 26 U.S.C. § 7201, as is being pursued against Threadgill. This provision requires proof of the same two elements for the crime of filing a false tax return, plus an affirmative act of tax evasion. Conviction is punishable by fine of up to $100,000 and imprisonment of up to five years.

Some lawyers facing criminal tax charges think the government will not be able to show they acted willfully. This requires the government to show the accused knew the tax returns were false, as by claiming deductions for obviously nondeductible items. But the government usually relies upon circumstantial evidence to prove the evidence of willfulness. Indeed, by the time the government has gathered enough information for an indictment, there is likely to be plenty of evidence sufficient to establish willfulness.

Thus, although most lawyers certainly should not fear the IRS, many might benefit from conducting their own internal audit of how they would fare if the IRS came calling. Many would probably discover that they should make some improvements. After all, even civil audits can be daunting, expensive and distracting. Be careful out there. ■

1. *See* IRS Attorneys Audit Technique Guide (Mar. 2011), *at* http://www.irs.gov/businesses/small/article/0,,id=241098,00.html.

2. *See* 26 U.S.C. § 7206(1).

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New York Residential Landlord-Tenant Law 101 for the Transactional Attorney

By Margaret B. Sandercock and Gerald Lebovits

Introduction

A transactional attorney whose client wants to acquire a building occupied by residential tenants must have answers to many important questions. These questions include whether existing tenants have rights of continued occupancy and to the issuance of renewal leases; whether the tenants' leases are enforceable and whether other enforceable agreements with the tenants, apart from their leases, will bind the purchaser; whether there are impediments to collecting rent; whether the purchaser will face financial liability for the prior owner's actions, such as rent overcharges; and whether the purchaser will be able to continue any landlord-tenant proceedings the prior owner commenced.

The building's suitability for the purchaser's purposes and the fiscal advisability of the purchase might hinge on the attorney's answers to these questions. The parameters of pre-purchase due diligence, the contract provisions necessary to protect the purchaser's interests, and the steps the purchaser should take at the closing and immediately post-closing will require a basic knowledge of landlord-tenant law.

This article spots some of the most common landlord-tenant issues that transactional attorneys should recognize so that they can assess the proposed purchase, consult with a landlord-tenant specialist if necessary, and take action required at closing. The attorney's pre-purchase research, which may be conducted pre-contract or during a due-diligence period with a right of cancellation after the contract is signed,[1] should be conducted simultaneously with other due diligence and will supplement an engineering report and physical inspection of the entire building.[2]

Due Diligence Issue #1: Do the Tenants Have the Right to Stay?

Customarily, the contract of sale for an occupied residential building will contain a schedule of the unit numbers, the rent amounts, and the security deposits, if any. Leases to which the contract is subject (those that will continue

after closing) may be attached to the contract or provided during a post-contract due-diligence period. The purchaser's attorneys should seek a contract representation that the leases the seller provides are the only written agreements with the tenants.

Absent an option to renew, a lease provision terminating the lease on sale of the building, or some other written agreement with the prior owner, residential tenants not subject to New York's rent-regulatory laws may remain for the balance of their lease but need not be given a renewal lease.[3]

A rent-regulated tenant, however, has the right to continue in possession with successive renewal leases, in the case of rent-stabilized status, or as a statutory tenant without a lease, in the case of rent-control or interim multiple dwelling (Loft Law) status.[4] These tenants' occupancy rights may not be terminated without a showing of good cause.[5] Some rent-regulated tenants' successors in interest also have the right to continued occupancy.[6] Tenants who meet the following requirements are rent-regulated.

Rent-Stabilized Tenants

Rent-stabilized tenants in New York City are those who live in buildings with six or more units built before January 1, 1974, and which are not subject to rent control, as well as the tenants of some newer buildings that became subject to rent stabilization because the owner participated in a real estate tax-abatement program.[7] Some localities in the counties of Nassau, Westchester, and Rockland also adopted the Emergency Tenant Protection Act (ETPA).[8] In those localities, a building with six or more units built before January 1, 1974, and which is not subject to rent control, is subject to rent stabilization.[9]

Purchasers of cooperative or condominium units occupied by rent-stabilized and rent-controlled tenants must be alert to a tenant's right of continued occupancy. If the building was converted under a non-eviction plan,[10] rent-regulated tenants who do not purchase their units retain their statutory rights.[11] Even if the building is converted under an eviction plan, rent-regulated tenants are entitled to continued occupancy for at least three years after the offering plan is declared effective.[12] The three-year limitation does not apply to senior citizens[13] (over 62) and the disabled,[14] who retain their statutory rights indefinitely.[15]

Courts in the First and Second Departments have recognized, in addition, that tenants who live in a commercial building with six or more residential units not subject to the Loft Law,[16] and located in an area where residential occupancy is permitted by zoning, might be subject to rent stabilization.[17]

To be rent stabilized in the First Department, a residential tenant in a commercial building must demonstrate that zoning requirements are complied with, that the building has six or more residential units, that the landlord knew or should have known of the residential occupancy, and that the unit is capable of being legalized.[18]

The standards are stricter in the Second Department, which has indicated its intent to limit rent-stabilized tenancies in commercial buildings.[19] In the Second Department, a residential tenant in a commercial building must establish not only compliance with zoning, that the building has six or more residential units, and that the landlord knew or should have known of the residential occupancy, but also that residential amenities were installed at the occupants' expense and that the landlord took affirmative steps to convert the premises to residential use during the pendency of litigation in which the tenants sought rent-stabilization protection.[20]

A count of six or more residential units, which invokes rent stabilization, may be arrived at in a number of ways: if there were six or more units when the building came under rent stabilization;[21] if six or more units are on the certificate of occupancy (C of O) of a building otherwise qualifying for rent stabilization, even if the building, as used, has less than six separate units;[22] or if the number of residential units in a building otherwise qualifying for rent stabilization is increased to six or more.[23] On the other hand, a building remains rent stabilized if it has six or more units and the number of units is subsequently decreased to five units or fewer.[24]

In some instances, a building might contain six or more units and be subject to rent stabilization even though it is not initially obvious that the requirement of six or more units is met. For instance, garden apartments in New York City are covered by rent stabilization.[25] Even if an individual building in the complex has fewer than six units, but so long as the complex in total has six or more units, the complex is covered by rent stabilization if it meets the other statutory requirements. Sometimes two or more physically adjacent buildings, none of which contains six or more units, will collectively be declared a horizontal multiple dwelling subject to rent stabilization if the buildings meet the other requirements of rent stabilization and are operated as a single enterprise under common ownership and share common facilities such as a boiler or water supply.[26]

An exception to rent stabilization coverage exists if the landlord, at the landlord's expense, substantially rehabilitated the property after January 1, 1974, without receiving a real estate tax benefit, such as "J-51" benefits.[27]

Some units that would presumptively be subject to rent stabilization are, on investigation, deregulated. One reason this might be the case is that the unit has consistently been owner-occupied.[28] Another reason is that the legal regulated rent rose to a figure exceeding $2,000 a month, either at a vacancy or if the tenant's annual income exceeded $200,000 for two years in a row.[29] This deregulation is called "luxury decontrol."

The Court of Appeals ruled in *Roberts v. Tishman Speyer Properties, L.P.*, that J-51 units cannot be deregulated under luxury-decontrol provisions if the landlord received J-51 benefits.[30] The Appellate Division, Second Department, recently held that *Roberts* is retroactive and that under some circumstances, tenants may claim rent overcharges if a unit has been improperly deregulated. The First Department also found that landlords may be precluded from collecting overcharges if they participated in the deregulation process.[31]

With the exception of residentially occupied commercial buildings that are rent stabilized due to case law and not by statute or regulation, a building's rent-stabilized status and the number and identity of registered units can be ascertained from the Department of Housing and Community Renewal (DHCR), the regulatory agency, by making a request to the DHCR's Public Information Unit. The seller's cooperation is required for all pre-closing DHCR investigations; the contract should require that cooperation. A DHCR investigation must be conducted, on the purchaser's behalf, of any building of six or more units in New York City, Nassau, Westchester, or Rockland counties. The purchaser's attorney should assume that all buildings in these areas meet the basic criteria for rent stabilization and that all units in these buildings should be registered, and should ask the seller to explain unregistered buildings and units.

Single Room Occupancies

Permanent tenants of single room occupancy facilities (SROs) in New York City are protected under rent stabilization if the building was erected before July 1, 1969, contains six or more units, and the rent charged was less than $88 a week or $350 a month on May 31, 1968.[32] Rent-stabilization protection for SRO tenants can also accrue because the building received a tax abatement.[33] Permanent tenants are those who have been in occupancy for six months or more[34] or who have been in occupancy for at least 15 days and have requested a lease.[35]

The New York City Department of Housing Preservation and Development (HPD) regulates New York City's SRO facilities. The New York City Department of Buildings (DOB) will not issue a building permit for a building known to it as an SRO if HPD does not issue a Certificate of No Harassment.[36] The "look back period" for a Certificate of No Harassment is three years.[37] Even if the building is vacant when the purchaser acquires it, HPD requires assurance that the former owner, in preparation for selling the building, did not harass the tenant to vacate. The purchaser's attorney, for any building that, by its age and physical configuration, could possibly have been used as an SRO facility, must review the DOB's records and contact HPD to see whether city records reflect it as an SRO. If so, existing single room tenancies meeting the rent-stabilization requirements might have to be continued. The seller should also be contractually bound by a condition of closing to obtain a Certificate of No Harassment if one is required.

Loft Law Tenants

Loft Law tenants are residential tenants who lived, between April 1, 1980 and December 1, 1981, or for 12 consecutive calendar months in 2008 or 2009 in formerly commercial buildings containing three or more residential units.[38] Loft Law buildings are regulated by the New York City Loft Board, located at 280 Broadway, third floor, New York, New York 10007, and must be registered with the Loft Board,[39] which maintains a website listing the buildings currently under its jurisdiction. In addition to the Multiple Dwelling Law's statutory provisions enacting the Loft Law, the Loft Board has a body of its own regulations and decisions, or Loft Board orders.[40]

The Loft Law is a transitional statute[41] under which landlords of rent-regulated buildings are statutorily required to obtain a Class A C of O for residential use,[42] a significant financial commitment. There are statutory time limits within which a C of O must be obtained, although under Loft Board regulations, a new owner may obtain a one-year extension if it misses a deadline.[43] When the C of O is obtained, Loft Law tenants become rent stabilized.[44] Some rent-stabilization provisions like luxury decontrol do not apply to Loft Law tenants.

The Loft Board website listing does not include buildings that have obtained their C of O or buildings in which all the Loft Law tenants have vacated. This is significant because if a building or unit is vacated pre-C of O and the landlord does not buy the Loft Law tenants' tenancy rights as statutorily permitted,[45] the unit remains subject to the Loft Law. If a Loft Law unit is vacated pre-C of O with a payment for tenancy rights, the sale must be reported to the Loft Board with a statement concerning the unit's intended future use. If the unit will be used residentially, the landlord is required to obtain a residential C of O.[46] If the Loft Board is advised that the unit will be used commercially but it becomes reoccupied residentially, in a building containing six or more residential units, the unit becomes rent stabilized.[47]

The prospective purchaser's attorney for a building known to have been subject to the Loft Law should make a Freedom of Information Law (FOIL) request to review all records concerning the building or arrange for a knowledgeable Loft Law practitioner to do so. If the Loft Law status is unknown, but the building's appearance and history suggest that it might have been subject to the Loft Law, a contract representation should be sought that the building and its units are not, and never have been, subject to the Loft Law.

Rent-Controlled Tenants

Rent-controlled tenants live in buildings containing three or more residential units, residentially occupied since February 1, 1947, or earlier, and occupied by the current

record tenant or lawful successor since at least July 1, 1971. Rent-control laws are effective in New York City, more than 50 municipalities throughout the state, and the counties of Albany, Erie, Monroe, Nassau, Oneida, Onondaga, Rensselaer, Schenectady, and Westchester. Rent control also applies to buildings of fewer than three units if the tenant or lawful successor has been in residence since at least April 1, 1953.[48]

Rent-controlled tenancies are registered with DHCR. Because of the age of many of these tenancies, DHCR's records are not always complete or accessible. Complicating the investigation of rent-controlled tenancies is that renewal leases are not issued. They need not be issued: rent-controlled tenants are statutory tenants. In any transaction concerning a residential building built before 1947, the attorney should seek a contract representation that there are no rent-controlled tenancies. Investigating this issue independently can prove difficult.

Immediate family members may succeed to the tenancy rights of rent-controlled and rent-stabilized tenants. To succeed to a rent-controlled or rent-stabilized tenancy, the family member seeking succession has the burden of proof to show by a fair preponderance of the credible evidence[49] that the protected tenant vacated due to death or permanent departure and that both the protected tenant and the family member seeking succession primarily resided in the unit together for two years (or one year where the tenant or spouse is over age 62 or disabled).[50] The following are immediate family members under rent stabilization and rent control: the protected tenant's husband, wife, son, daughter, father, mother, grandfather, grandmother, grandson, granddaughter, sister, brother, stepson, stepdaughter, stepfather, stepmother, father in law, mother in law, son in law, and daughter in law.[51]

The Court of Appeals in *Braschi v. Stahl Associates Co.*[52] expanded the concept of family to include nontraditional family members like homosexual couples. Regulations governing both rent-controlled and rent-stabilized tenants later adopted the *Braschi* standards. The New York City Loft Board issued an order that likewise adopted *Braschi*.[53] To succeed to a regulated tenancy, the nontraditional family member must satisfy the requirements for traditional family members (permanent vacatur of the regulated tenant and primary residence of the regulated tenant and the succeeding tenant for one or two years) and, in addition, demonstrate that the relationship was one of emotional and financial commitment and interdependence. This is a litigious area with numerous fact-specific precedents. A prospective purchaser or new owner who wishes to investigate tenancies that might fall under *Braschi* should seek specialized legal assistance.

In all cases it is advisable to obtain a contract provision stating that no litigation is pending in any court or administrative agency concerning the building or, in the alternative, listing all litigation so that it can be investigated.

Due Diligence Issue #2: Lease and Rent Issues

After determining whether any residential tenant has a right of continued occupancy, the purchaser should ascertain whether the leases claimed to be in effect are enforceable;[54] whether rent can be collected; and whether the rent amounts in the leases are legally permitted.

Are the Leases Enforceable?

For residential tenancies, regulated and deregulated alike, courts will not enforce leases that are unconscionable[55] or against public policy. For instance, rent-stabilized leases giving unrestricted rights to sublease and assign, or waiving the obligation of primary residence at the premises, are unenforceable as against public policy.[56] Other examples of unenforceable leases include those that permit the landlord to breach the warranty of habitability[57] and in which rent-stabilized and rent-controlled tenants waive their rent-regulatory rights.[58]

Agreements between the prior landlord and a tenant conferring rent-stabilized status are enforceable[59] and bind successor landlords even if the agreement did not so provide, because these agreements run with the land.[60]

Can Rent Be Collected?

Even if the residential tenants are not rent regulated, rent may not be collected if the building does not have a C of O for residential use where a C of O is required.[61] This rule equally applies in the Second Department to situations in which residential tenants live in commercial buildings but do not qualify for rent-stabilization protection.[62] Rent may also not be collected from the residential occupants of portions of the building not covered by the C of O, such as extra units not reflected on the C of O.[63]

New York City buildings containing three or more residential units must be registered as multiple dwellings with HPD; this registration is known as a Multiple Dwelling Registration statement, or MDR. The consequence of failure to register is that rent may not be collected until registration.[64] This is true whether or not the occupants are rent regulated and whether or not the residential occupancy is legal.[65]

Rent regulated buildings must be registered with the proper regulatory authority, whether the DHCR or the Loft Board,[66] or rent may not be collected. If the registration for a stabilized unit is not kept current, the landlord may not charge in excess of the last registered rent. Rent may not be collected from Loft Law tenants in buildings in which the landlord has not complied with the code-compliance timetable set out in Multiple Dwelling Law § 284.[67]

Are the Claimed Regulated Rents Correct?

It is the nature of a deregulated tenancy that as long as the C of O corresponds with the use of the building and the building is registered where registration is required, the landlord may charge and collect any rent the tenant agreed to. A hallmark of a regulated tenancy is that although the landlord may charge the tenant less rent than the law permits, the rent may not exceed the regulated rent.

A rent-stabilized tenant's rent, which is less than the law permits, is a preferential rent. For leases post-2003, a preferential rent reflected as such in the tenant's lease need not be continued in lease renewals absent an agreement between the landlord and the tenant that the preferential rent will continue permanently throughout the tenancy.[68]

A rent-regulated tenant has the right to continue in possession with successive renewal leases, in the case of rent-stabilized status, or as a statutory tenant without a lease, in the case of rent-control or interim multiple dwelling (Loft Law) status.

The rents paid by rent-stabilized tenants must be registered with DHCR. Unless the stabilized tenant is paying a preferential rent, the legal regulated rent is calculated as follows: the initial legal registered rent (generally the first rent registered by the landlord after April 1, 1984);[69] plus the increases permitted for a one- or two-year lease;[70] plus any vacancy allowances that have accrued during vacancy between tenants;[71] plus any other permitted increases by virtue of Major Capital Improvements (MCI) or other improvements;[72] less any rent-reduction orders in effect for failure to provide required services.[73]

A landlord might be entitled to MCI increases for work to operate, preserve, or maintain a building, but not for ordinary repairs.[74] The work must be buildingwide, benefiting all tenants.[75] Building systems such as heating or intercom can result in an MCI increase only after they exceed their useful life as determined by a DHCR schedule.[76] MCI increases may not exceed the tenant's regulated rent by more than 6% a year.[77]

MCIs require an application to DHCR before the appropriate rent increase may be collected.[78] MCI applications must be supported by at least one of the following: cancelled checks for payment of the work; invoice receipts marked "paid in full"; a signed contract for the work; or a contractor's affidavit that the work was completed and paid in full.[79] DHCR might require additional proof if the relationship between the contractor and the landlord is not at arm's length.[80]

Work on an individual unit can result in what is known as a "1/40th increase."[81] Examples of work that might qualify for that increase include new kitchen cabinets and windows, but ordinary maintenance such as painting and finishing floors is ineligible.[82] Landlords most often perform the work between tenancies, with the cost passed along to the new tenant, who has the opportunity to file a Fair Market Rent Appeal (FMRA) to grieve the rent for a period of four years, if the landlord notified the tenant that work was done and that the rent increased in consequence.[83]

If a building is rent stabilized, the purchaser should require the seller to provide at least four years of leases and compare them with the rent registrations filed at DHCR for the same period. The purchaser should obtain a contract representation concerning all pending applications before DHCR and compare it with a printout that can be obtained from DHCR indicating open matters. The attorney should collect proof of performance of all work leading to 1/40th increases for at least the past four years as well as notice to the new tenant that a rent increase was based on this work. Likewise, the attorney should obtain all proof associated with MCI work for at least the past four years, together with an agreement to assist post-closing on pending MCI applications.

Rent-controlled rents are comprised of the initial base rent plus annual increases.[84] The DHCR annually sets rent increases for rent-controlled tenants outside New York City.[85] In New York City, since 1972, a procedure called the Maximum Base Rent (MBR) system allows rent-controlled rents to be increased.[86] Every two years, DHCR sets an allowable increase in the MBR for each rent-controlled apartment.[87] Rents can be increased by a maximum of 7.5% each year, but they are limited to the amount needed to reach the MBR.[88] To obtain an MBR increase, the landlord must apply to DHCR six months in advance for an order of eligibility, which requires the landlord to represent, among other things, that rent-impairing violations have been cleared, corrected, or abated.[89]

Senior citizens in both rent-controlled and rent-stabilized apartments may apply for a Senior Citizen Rent Increase Exemption (SCRIE) from future rent increases if the head of household is over 62, the family income is $29,000 a year or less, and the rent exceeds one-third the gross household income.[90]

Loft Law tenants do not pay regular, periodic rent increases.[91] The tenant's base rent under the Loft Law, which in almost all cases was established 20 or more years ago, is derived from a complex Loft Board formula that takes into account the date and percentage of the tenant's last rent increase.[92]

The only increases from the base rent for Loft Law tenants subject to the Loft Law as originally enacted in

1982 or the 1987 amendments to the law are associated with progress toward obtaining a C of O: for filing an alteration application (6%), obtaining a building permit (8%), and achieving temporary C of O standards (6%).[93] After a C of O is obtained, the landlord may apply to the Loft Board to pass along to the tenants, as a temporary rent increase over 10 or 15 years, the reasonable costs of obtaining the C of O,[94] as well as the New York City's Rent Guidelines Board-permitted loft increase for that year.[95] Loft Board rent regulations for tenants subject to the recent 2010 amendments to the law have not yet been enacted.

There are no SCRIE rent adjustments for Loft Law tenants, nor is there a Loft Law analog to a rent-reduction order.[96]

Loft Law tenants who believe they are being charged the incorrect rent because unpermitted increases were added to the rent in the past may apply to the Loft Board for a rent adjustment[97] or may advance the defense of rent overcharge in a nonpayment proceeding.[98] Unless a Loft Law tenant has disputed the rent at the Loft Board, in which case there will be a Loft Board order stating the outcome of the dispute, Loft Law tenants' rents are not registered with the Loft Board and often cannot be ascertained from Loft Board records. In purchasing a Loft Law building, therefore, the seller's contractual representations of permitted rent levels are particularly important.

What Are the Consequences of Collecting Rent When the C of O Does Not Match the Building's Use; When No MDR or Loft Law Registration Is Filed; or When Excessive Rent Is Collected From a Rent-Regulated Tenant?

A tenant may not recoup past-paid rent when the tenant paid rent not otherwise collectible because the building occupancy did not conform with the C of O; when the building was required to have an MDR but did not; or when the building was required to be registered with the Loft Board but was not.[99] The purchaser has nothing to fear if a predecessor collected rent under any of these circumstances.

This is not the case if a rent-stabilized or rent-controlled tenant has been overcharged. A rent-stabilized tenant may file an application with DHCR to recoup up to four years of rent overcharges[100] or may assert an overcharge defense in a nonpayment proceeding. The tenant may be awarded treble damages for up to two years before an overcharge application if the overcharge is willful. The landlord has the burden to disprove willfulness.[101]

Rent overcharges that do not concern the initial rent charged for the premises may be recaptured from a new landlord.[102] Court decisions anticipate that purchasers investigate the building's rent history and pending DHCR applications, negotiate a purchase price that reflects a potential overcharge liability, and, possibly, negotiate contract provisions for indemnification by the seller in the event of a determination of overcharge.[103] Treble damages are not awarded against a new owner who cannot produce rent records prior to the new ownership.[104] The tenant may recoup the overcharge either by means of forgiven past or future rent or by a cash payment.[105]

Rent overcharges stemming from the initial rent paid by the tenant may not be collected from a new owner.[106]

Although Loft Law tenants are subject to the four-year statute of limitations in collecting rent overcharges,[107] Loft Board regulations do not provide for treble damages in rent disputes with the landlord.[108]

Due Diligence Issue #3: Is Owner-Occupancy Possible?

Purchasers who want to occupy their own building may do so by declining to renew a deregulated tenant's lease.[109] If there are no deregulated units or if the deregulated units are unsuitable for the purchaser, one or more rent-stabilized or rent-controlled units can be taken for owner occupancy.[110] A nonrenewal notice must be served on the tenant between 90 and 150 days before the lease expires.[111] Assuming that the tenant does not vacate as the notice requires, the owner must bring a summary holdover proceeding.[112]

An owner-occupancy, or owner's-use, proceeding can be maintained only by an individual owner or one partner of a partnership.[113] The landlord bears the burden of proof to demonstrate a good-faith intent to occupy the unit taken as the owner's primary residence or the primary residence of an owner's immediate family member.[114] To prevail in an owner-occupancy case, the owner must offer the tenant moving expenses and comparable housing in the immediate vicinity[115] if seeking a unit of which the tenant or tenant's spouse is over the age of 62 or disabled.[116] If a rent-controlled tenant or household member has lived in the building for 20 years or more, an owner-occupancy eviction may not be maintained.[117]

The Loft Law and Loft Board regulations do not provide for owner occupancy.[118] An owner-occupancy case may not be brought in a Loft Law building until it passes into rent stabilization and the tenant's first or subsequent stabilized lease is ending.[119]

Issues Arising at Closing and After

If all goes well during the building investigation, the client decides that the building will suit the client's needs, and a contract is signed, it will soon be time to prepare a closing checklist and a "to do" agenda for the first days of ownership. Along with pro-rated rents for the month of the closing, security deposits for the existing tenants must be collected and handled properly after the closing. The purchaser should also be counseled about an owner's lead-paint responsibilities. There might also be existing

landlord-tenant proceedings that the purchaser may continue in many, but not all, cases.

What About Security Deposits?

When property is conveyed from one owner to another, the security deposits must be transferred to the new owner, who is responsible for maintaining the deposit and returning it to the tenant.[120] The seller is no longer liable to the tenants for their deposits.[121] Even if a purchaser fails to receive the tenants' security deposits from the seller, the purchaser will still be liable to the tenants.[122]

Tenant security deposits may not be commingled with the landlord's funds.[123] If the building contains six or more rental units, security deposits must be held in an interest bearing account.[124] The tenant is entitled to receive the interest annually, less a 1% administrative fee.[125]

Statutory rights concerning security deposits pertain whether or not the tenant is rent regulated.[126] Tenants subject to rent stabilization may not, however, be required to post a security deposit exceeding one month's rent.[127]

What Are the Obligations Concerning Lead Paint?

A landlord who has actual or constructive knowledge that a child under age seven resides in a unit is charged with notice of any hazardous lead condition in the unit.[128] A letter should be sent to all tenants to identify those units with children under seven.[129] The new landlord should schedule an inspection of all units from which a response is received and of any others of which the purchaser is aware, or becomes aware, that children are in residence.[130]

May the New Owner Maintain Landlord-Tenant Cases the Seller Began?

In general, landlord-tenant proceedings may be brought only by the building's landlord and owner. A prospective purchaser or contract vendee may not properly serve the predicate notices required before most summary proceedings may be brought, nor commence summary proceedings until after closing.[131]

Sometimes, however, at the time of closing the seller has already commenced one or more summary proceedings. In general, a new owner can be substituted, on consent or on motion, for the predecessor in a summary proceeding previously filed.[132] This is especially advantageous in cases such as primary-residence holdovers against rent-stabilized tenants, in which the predicate notice must be served 90–150 days before lease expiration and in which discontinuing a previously filed case will result in a long delay or recapture an appellant.[133]

If consent to the substitution cannot be obtained, the purchaser should demonstrate building ownership by a certified copy of the deed; registration of the property (MDR, DHCR, or Loft Board, as appropriate) in the new owner's name; and, in a proceeding involving rent, an assignment of rents.[134]

A new owner may not continue an owner-occupancy proceeding against a rent-regulated tenant.[135] Maintaining an owner-occupancy case is based on the qualifying person's good-faith intent to occupy the premises.

Conclusion

For most purchasers, acquiring a residential property designed for multiple occupancies is a major investment. There are some restrictions on the landlord's rights with respect to a residentially occupied building, even one that is not rent regulated. Occasionally a purchaser inadvertently acquires a property occupied by one or more rent-regulated tenants, and therefore subject to greater controls, through misunderstanding or lack of pre-purchase investigation. The landlord's rights are more limited than contemplated, and the financial implications might be disastrous. More frequently, the purchaser knows that tenants with leases occupy the property, or even that the tenants are rent regulated, but is not fully aware of the tenants' rights and the new owner's responsibilities to them.

Even if money is no object and the best and consummate experts conduct full due diligence, the purchaser and its representatives are often unable to speak with the tenants until after the closing. Where this article suggests obtaining contract representations, the purchaser and counsel might wish to request that certain contract representations by the seller survive closing, at least for a few months. This burden to the seller must be used sparingly and be tailored to the building in question (might it be a Loft Law building, an SRO, or something else?), and not to substitute for available due diligence. ■

1. *See generally* Bea Grossman & Ram Sundar, *The Importance of Due Diligence in Commercial Transactions: Avoiding CERCLA Liability*, 7 Fordham Envtl. L.J. 351, 377 (1996) (discussing the importance of the due diligence inspection team, both financially and legally). The attorney should try to obtain a post-contract due-diligence period. The required investigation for any given building might involve a great deal of work. But the purchaser might prefer to incur due-diligence costs post-contract when seller is under an obligation to the purchaser and the expense is less likely to be wasted.

2. *See 52 Riverside Realty Co. v. Ebenhart*, 119 A.D.2d 452, 453 (1st Dep't 1986) (explaining that the transferee of real property takes the premises subject to the conditions as to tenancy, including any waiver of rights that the predecessor has established if the transferee has notice of the existence of the leasehold; possession of the premises constitutes constructive notice to a purchaser of the possessor's rights) (citing *Phelan v. Brady*, 119 N.Y. 587, 591 (1890)).

3. *See* N.Y. Real Property Law § 291 (RPL) (explaining that every conveyance of real property, including leaseholds, for a duration in excess of three years is void against the person who subsequently purchases or acquires the real property). *See, e.g., Sam & Mary Housing Corp. v. Jo/Sal Mkt. Corp.*, 121 Misc. 2d 434, 439–40 (Sup. Ct., Queens Co. 1983), *aff'd on other grounds*, 100 A.D.2d 901, 901 (2d Dep't 1984) (holding that although a lease in excess of three years is a "conveyance of real property," neither statutes nor authorities require such to be recorded); *Gemrosen Realty Corp. v. Kadarkhan*, 288 A.D.2d 64, 64 (1st Dep't 2001) (finding that an unrecorded lease exceeding three years may be enforceable, notwithstanding RPL § 291, if the purchaser has notice or constructive notice by virtue of the tenant's presence on the

premises and filings with the Division of Housing and Community Renewal (DHCR)).

4. *E.g.*, 9 N.Y.C.R.R. § 2522.5(b)(1) ("For housing accommodations other than hotels, upon such notice as is required by section 2523.5 of this Title, the tenant shall have the right of selecting at his or her option a renewal of his or her lease for a one- or two-year term; except that where a mortgage or a mortgage commitment existing as of April 1, 1969 prohibits the granting of one- year lease terms or the tenant is the recipient of a Senior Citizen Rent Increase Exemption pursuant to section 26-509 of the Administrative Code of the City of New York, the tenant may not select a one-year lease.").

5. *See, e.g.*, 9 N.Y.C.R.R. § 2524.5 (providing grounds for refusing to renew a rent-stabilized tenant's lease); *Commercial Hotel v. White*, 194 Misc. 2d 26, 27 (Sup. Ct. App. Term 2d Dep't 2002) (finding that rent-controlled tenants can only be evicted pursuant to one of the grounds that the rent-stabilization code provides).

6. *See generally* 9 N.Y.C.R.R. §§ 2104.6(d)(3)(i), 2204.6(d)(2)(i), 2520.6(n), 2523.5(b)(1) (listing the immediate family members and nontraditional family members who may succeed to rent-controlled and rent-stabilized tenancies; the regulations provide identical succession rights for all rent-controlled and rent-stabilized tenants throughout New York state).

7. *See generally* Andrew Scherer, Residential Landlord-Tenant Law in New York § 4:31 (2010–2011 ed.) ("In New York City, as a general rule, residential rental units occupied as primary residences in buildings with six or more units that were built prior to January 1, 1974 and that are not subject to the Rent Control Law are subject to the Rent Stabilization Law, by operation of the Rent Stabilization Law and the Emergency Tenant Protection Act. However, many units that do not fit into this category are also governed by the Rent Stabilization Law because the owners have received certain tax benefits, loans or other assistance.").

8. Scherer, *supra* note 7 § 4:30 ("Outside New York City, Rent Stabilization applies to non-Rent Controlled housing units in buildings of six or more units that were built or converted to residential use before January 1, 1974 in localities that have adopted the Emergency Tenant Protection Act in Nassau, Westchester, and Rockland counties.").

9. *Id*.

10. *See generally* N.Y. General Business Law § 352-eeee(1)(b) (GBL) (defining "non-eviction plan"). Whether a conversion plan was eviction or non-eviction can be determined by examining the cover of the offering plan or from the New York State Attorney General's Real Estate Finance Bureau, located at 120 Broadway, New York, New York.

11. *See* GBL § 352-eeee(2)(c)(iii) ("Non-purchasing tenants who reside in dwelling units subject to government regulation as to rentals and continued occupancy prior to the conversion of the building or group of buildings or development to cooperative or condominium ownership shall continue to be subject thereto.").

12. *See* GBL § 352-eeee(2)(d)(ii) ("No eviction proceedings will be commenced against a non-purchasing tenant for failure to purchase or any other reason applicable to expiration of tenancy until the later to occur of (1) the date which is the expiration date provided in such non-purchasing tenant's lease or rental agreement, and (2) the date which is three years after the date on which the plan is declared effective. Non-purchasing tenants who reside in dwelling units subject to government regulation as to rentals and continued occupancy prior to conversion shall continue to be subject thereto during the period of occupancy provided in this paragraph. Thereafter, if a tenant has not purchased, he may be removed by the owner of the dwelling unit or the shares allocated to such dwelling unit.").

13. GBL § 352-eeee(1)(f) (defining "eligible senior citizens").

14. GBL § 352-eeee(1)(g) (defining "eligible disabled persons").

15. *See* Rules of the City of New York tit. 26, ch. 4, § 26-511 (R.C.N.Y.) (explaining that an owner shall not refuse to renew the lease of a rent-stabilized tenant who is an "eligible senior citizen" or an "eligible disabled person").

16. *See* N.Y. Multiple Dwelling Law §§ 280–286 (Mult. Dwell. Law).

17. *See Randall Assocs., LLC v. Fylypowcyz*, 16 Misc. 3d 1107A, 841 N.Y.S.2d 828 (N.Y. Civ. Ct., N.Y. Co. 2007) (providing an historical analysis of the rent-stabilization protections afforded to tenants who convert commercial space not subject to the Loft Law with six or more residential units).

18. *See Duane Thomas LLC v. Wallin*, 35 A.D.3d 232, 233 (1st Dep't 2006) (explaining that because a temporary residential certificate of occupancy covering the unit was obtained, the unit was capable of being legalized and may be subject to rent-stabilization).

19. *See S. Eleventh St. Tenants Ass'n v. Dov Land LLC*, 59 A.D.3d 426, 427 (2d Dep't 2009) (stating that Emergency Tenant Protection Act (EPTA) protections are available to tenants of illegally converted lofts not subject to the Loft Law only in very limited circumstances).

20. *See Caldwell v. Am. Package Co.*, 57 A.D.3d 15, 24 (2d Dep't 2008) (holding that tenants were not entitled to ETPA protection, because their assertion that the owner applied for and obtained a map change permitting residential occupancy of the building was not supported by copies of any public records or any additional evidence that the owner had taken measures to alter the permissible use of the premises during the pendency of the proceeding).

21. *See generally Fleur v. Croy*, 137 Misc. 2d 628, 629–31 (N.Y. Civ. Ct., N.Y. Co. 1987), *aff'd*, 139 Misc. 2d 885 (Sup. Ct. App. Term 1st Dep't 1988) ("The current rent stabilization structure was established by the Rent Stabilization Law of 1969 . . . which, with limited exceptions, applied to all buildings 'containing six or more dwelling units' built after 1947.").

22. *See Loventhal Mgmt. v. N.Y. St. Div. of Hous. & Cmty. Renewal*, 183 A.D.2d 415, 415 (1st Dep't 1992) (explaining that illegally converting two units into one will not exempt the premises from coverage under the Rent Stabilization Law when its certificate of occupancy and an inspection report showed that the premises were formerly comprised of six residential units).

23. *See Commercial Hotel v. White*, 194 Misc. 2d 26, 27 (Sup. Ct. App. Term 2d Dep't 2002) ("Plaintiff's addition of a sixth unit . . . brought all the units in the building under rent stabilization . . .").

24. *Fleur*, 137 Misc. 2d at 630–31 (holding that mere cosmetic work and a reduction in the number of units was insufficient proof of a substantial rehabilitation and thus did not destabilize a building under the ETPA).

25. New York City Administrative Code, tit. 26, ch. IV, § 26-505 (N.Y.C. Admin. Code) ("For purposes of this chapter a class A multiple dwelling shall be deemed to include a multiple family garden-type maisonette dwelling complex containing six or more dwelling units having common facilities . . . and operated as a unit under a single ownership on May sixth, nineteen hundred sixty-nine, notwithstanding that certificates of occupancy were issued for portions thereof as one- or two-family dwellings.").

26. *See* 9 N.Y.C.R.R. § 2520.11(d); *Salvati v. Eimicke*, 72 N.Y.2d 784, 791 (1988).

27. 9 N.Y.C.R.R. § 2520.11(e).

28. *See* 9 N.Y.C.R.R. § 2200.2(f)(11) (explaining that regulations of the City Rent and Rehabilitation Law shall not apply to housing accommodations rented after April 1, 1953, which were or are continuously occupied by the owner thereof for a period of one year prior to the date of renting); *see also Francis v. Rapee*, Loft Board Order #30 (Nov. 30, 1983) (stating that Loft Law owner-occupied units count toward the number of residential units required for the building to be subject to the Loft Law), *at* http://archive.citylaw.org/loft/arch1983/LBO-0030.pdf. (last visited Sept. 12, 2011).

29. *See* N.Y. Unconsolidated Laws ch. 249-B, § 5-a (Unconsol. Laws).

30. 13 N.Y.3d 270 (2009).

31. *Gersten v. 56 7th Ave., LLC*, 2011 WL 3611920, 2011 N.Y. Slip Op. 6300 (1st Dep't Aug. 18, 2011).

32. 9 N.Y.C.R.R. § 2520.11(g).

33. *See* Scherer, *supra* note 7, at § 4:48.

34. *See* 9 N.Y.C.R.R. § 2520.6(j).

35. *See, e.g.*, *Nutter v. W & J Hotel Co.*, 171 Misc. 2d 302, 305–06 (N.Y. Civ. Ct., N.Y. Co. 1997) ("[T]he purposes of these provisions of the rent stabilization laws indicate that the request for a lease, evincing an intent to accede to tenancy status, is what triggers the protection of the rent stabilization laws.").

36. *See* N.Y.C. Admin. Code tit. 26, ch. IV, § 27-2093 (certification of no harassment with respect to single-room occupancy multiple dwellings (SROs)); *see generally* R.C.N.Y. tit. 28, ch. 10, § 10-07.

37. *See* R.C.N.Y. tit. 28, ch. 10, § 10-01 ("'Inquiry period' shall mean (i) with respect to an application submitted pursuant to any provision of the Zoning Resolution, the period of time therein defined as the inquiry period, and (ii) with respect to an application submitted pursuant to Administrative Code § 28-107.1 *et seq.* and Administrative Code § 27-2093, a period commencing three years prior to submission of the application and ending on the date that HPD issues a final determination on the application.").

38. *See* Mult. Dwell. Law § 281(1)–(5).

39. *See* Mult. Dwell. Law § 284(2).

40. *See generally* R.C.N.Y. tit. 29, chs. 1–2, §§ 1-01–2-12. Loft Board orders can be researched in a database maintained by New York Law School, *at* http://www.nyls.edu/centers/harlan_scholar_centers/center_for_new_york_city_law/cityadmin_library (last visited Sept. 12, 2011). Old Loft Board orders not on the New York Law School website may be obtained by contacting the Loft Board, *at* http://www.nyc.gov/html/loft/html/contact/contact.shtml (last visited Sept. 12, 2011).

41. *See* R.C.N.Y. tit. 29, ch. 2, § 2-01(m).

42. Mult. Dwell. Law § 284 ("The owner of an interim multiple dwelling . . . shall take all reasonable and necessary action to obtain a certificate of occupancy as a class A multiple dwelling for the residential portions of the building or structure within thirty-six months from such effective date.").

43. R.C.N.Y. tit. 29, ch. 2, § 2-01(b)(1).

44. R.C.N.Y. tit. 29, ch. 2, § 2-01(m) (providing that fewer than six units in a Loft Law building does not preclude rent-stabilization coverage).

45. *See* Mult. Dwell. Law § 286(12) ("No waiver of rights pursuant to this article by a residential occupant qualified for protection pursuant to this article made prior to the effective date of the act which added this article shall be accorded any force or effect; however, subsequent to the effective date an owner and a residential occupant may agree to the purchase by the owner of such person's rights in a unit.").

46. *See generally* R.C.N.Y. tit. 29, ch. 2, § 2-07.

47. *See 315 Berry St. v. Hanson Fine Arts*, 39 A.D.3d 656, 657 (2d Dep't 2007).

48. Scherer, *supra* note 7, at §§ 4:26–4:28.

49. *See 1234 Pacific Mgmt. v. Jefferson*, 8 Misc. 3d 1022(A), 2005 N.Y. Slip Op. 51230(U), *3 (N.Y. Civ. Ct., Kings Co. 2005).

50. 9 N.Y.C.R.R. §§ 2104.6, 2204.6, 2520.6, 2523.5 ("Disabled" for this purpose is defined identically to the definition in GBL § 352-eeee(1)(g) set forth *supra* at note 14).

51. 9 N.Y.C.R.R. §§ 2520.6(o)(1), 2204.6(d)(3)(i).

52. 74 N.Y.2d 201 (1989).

53. *In re Snelham*, Loft Board Order #2029 (Nov. 26, 1996) (citing Loft Board Order #1625 (Sept. 29, 1994)), *at* http://archive.citylaw.org/loft/arch1996/Lbo-2029.pdf (last visited Sept. 12, 2011).

54. The purchaser should remember that sellers that provide leases might not provide them for all occupied residential units. For example, statutory tenants – rent-controlled and Loft Law tenants – do not have current leases; no current leases will be provided for these units.

55. RPL § 235-c ("If the court as a matter of law finds a lease or any clause of the lease to have been unconscionable at the time it was made the court may refuse to enforce the lease, or it may enforce the remainder of the lease without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.").

56. *See*, *e.g.*, *Rima 106 LP v. Alvarez*, 257 A.D.2d 201, 204–06 (1st Dep't 1999).

57. *See* RPL § 235-(b)(2) ("Any agreement by a lessee or tenant of a dwelling waiving or modifying his rights as set forth in this section shall be void as contrary to public policy.").

58. *E.g.*, *Georgia Props., Inc. v. Dalsimer*, 39 A.D.3d 332, 334 (1st Dep't 2007) (finding that "[d]eregulation of apartments is only 'available through regular, officially authorized means [and] not by private compact'") (quoting *Draper v. Georgia Props., Inc.*, 94 N.Y.2d 809, 811 (1999)).

59. *See 546 W. 156 St. HDFC v. Smalls*, 8 Misc. 3d 135(A), 2005 WL 1798344 (Sup. Ct. App. Term 1st Dep't 2007), *rev'd*, 43 A.D.3d 7, 14 (1st Dep't 2007) (reinstating the trial court's ruling and holding that the parties' stipulated agreement treating the premises as subject to rent-stabilization did not defeat the statutory exclusion from regulation under the Administrative Code of the City of New York and that the parties' stipulated agreement was enforceable only to the extent that it set the rental amount and only for the duration of any lease signed by the parties).

60. *See Carrano v. Castro*, 12 Misc. 3d 5, 7 (Sup. Ct. App. Term 2d Dep't 2006), *aff'd*, 44 A.D.3d 1038, 1040 (2d Dep't 2007).

61. Mult. Dwell. Law § 302(1)(b); *see Caldwell v. Am. Package Co.*, 57 A.D.3d 15, 22–23 (2d Dep't 2008) ("Multiple Dwelling Law § 302 prohibits the owner of a multiple dwelling for which there is no valid certificate of occupancy allowing residential use from collecting rent or the value of the use and occupancy of the premises.").

62. *See Caldwell*, 57 A.D.3d at 25–26 (holding that the trial court erred by not allowing the tenants to rely on Mult. Dwell. Law § 302 as a defense and therefore that the owner was not entitled to an award of the value of the use and occupancy of the premises).

63. *See*, *e.g.*, *Tan Holding Corp. v. Ecklund*, 33 A.D.3d 487, 487–88 (1st Dep't 2006) (holding that landlord had no claim against tenant for use and occupancy when landlord and its predecessors in interest acquiesced in the illegal conversion); *O'Connor v. Gallier*, 7 Misc. 3d 1016A, 2005 WL 991 3318 069, at *2 (Sup. Ct., Kings Co. 2005).

64. Mult. Dwell. Law § 325(2).

65. *See A Real Good Plumber v. Kelleher*, 191 Misc. 2d 94, 96 (Sup. Ct. App. Term 2d Dep't 2002) (holding that the landlord was required to have registered the leased premises as a multiple dwelling if landlord knew of, and acquiesced in, tenant's residential use of loft).

66. Loft Law buildings consisting of three or more units need not register as multiple dwellings; Loft Board registration is required instead of an MDR statement.

67. *See County Dollar Corp. v. Douglas*, 160 A.D.2d 537, 537 (1st Dep't 1990) (finding that a landlord cannot bring a nonpayment proceeding against loft tenants when the landlord has not complied with the legalization procedures of Mult. Dwell. Law § 284(1)).

68. 9 N.Y.C.R.R. § 2521.2; *see Aijaz v. Hillside Pl., LLC*, 37 A.D.3d 501, 501–02 (2d Dep't 2007) (holding that the landlord could not use the Rent Stabilization Law as an affirmative defense to tenant's rent overcharge claim because the renewal leases at issue were entered into and expired before the Legislature amended the Rent Stabilization Law, which amendment was to be applied prospectively).

69. Emergency Tenant Protection Act of 1974, Unconsol. Laws, ch. 5, § 8629(b); N.Y.C. Admin. Code tit. 26, ch. 4, § 26-513; 9 N.Y.C.R.R. § 2522.3. The initial legal regulated rent for units extensively altered is not based on the 1984 rent but on the first rent set after alterations. The initial legal regulated rent for units that pass from rent control to rent stabilization is based on the fair market rent, a value the landlord sets and which the first tenant may contest. The Loft Board sets the initial regulated rent for a Loft Law unit passing into rent stabilization. N.Y. Mult. Dwell. Law § 286(6).

70. *See*, *e.g.*, N.Y.C. Admin. Code tit. 26, ch. 4, § 26-510(b); 9 N.Y.C.R.R. §§ 2522.2, 2522.5(d)(1).

71. *See generally* Scherer, *supra*, note 7, at § 4:115 ("Under the statutory provision, if a vacant apartment is rented for a two-year lease, the landlord can charge a 20% vacancy increase. If a vacant apartment is rented for a one-year lease, the landlord may charge a 20% increase minus 'the difference between (a) the two year renewal lease guideline promulgated by the guideline board of the City of New York applied to the previous legal regulated rent and (b) the one year renewal lease . . . .'").

72. 9 N.Y.C.R.R. § 2522.4(a)(2)(i); N.Y.C. Admin. Code tit. 26, ch. 4, § 26-511(c)(6)(b), *at* http://24.97.137.100/nyc/AdCode/entered.htm.

73. *See generally* Scherer, *supra*, note 8, at § 4:118 ("DHCR issues rent reduction orders as a penalty for failure to maintain essential services. . . . A rent reduction order will offset an abatement of rent for breach of warranty of habitability.").

74. *See generally* 9 N.Y.C.R.R. § 2522.4(a)(2)(i); N.Y.C. Admin. Code tit. 26, ch. 4, § 26-511(c)(6)(b).

75. 9 N.Y.C.R.R. § 2522.4(a)(2)(i); *see Garden Bay Manor Assocs. v. N.Y. St. Div. of Hous. & Cmty. Renewal*, 150 A.D.2d 378 (2d Dep't 1989) (explaining that even an item depreciable under the Internal Revenue Code will not qualify for MCI treatment unless it is building-wide and constitutes an improvement to the building).

76. 9 N.Y.C.R.R. § 2522.4(a)(2)(i).

77. 9 N.Y.C.R.R. § 2522.4(e)(8).

78. *See* 9 N.Y.C.R.R. § 2502.4(a).

79. Elliot G. Sander, *Major Capital Improvements/Individual Apartment Improvements Confirmation of Costs/Payments*, Division of Housing and Community Renewal (1990), *at* http://www.nysdhcr.gov/Rent/Policy/Statements/orap9010.pdf (last visited Sept. 12, 2011).

80. *See id.*

81. *See* 9 N.Y.C.R.R. § 2522.4(a)(8) ("The increase in the monthly stabilization rent for the affected housing accommodations when authorized pursuant to

paragraph (1) of this subdivision shall be 1/40th of the total cost, including installation but excluding finance charges."); *see also* N.Y.C. Admin. Code tit. 26, ch.4, § 26-511(c)(13).

82. *See* 9 N.Y.C.R.R. § 2522.4(a)(2)(i).

83. *See* 9 N.Y.C.R.R. § 2522.4(a)(1) ("An owner is entitled to a rent increase where there has been a substantial increase, other than an increase for which an adjustment may be claimed pursuant to paragraph (2) of this subdivision, of dwelling space or an increase in the services, or installation of new equipment or improvements, or new furniture or furnishings, provided in or to the tenant's housing accommodation, on written tenant consent to the rent increase. In the case of vacant housing accommodations, tenant consent shall not be required."); N.Y.C. Admin. Code tit. 26, ch. 4, § 26-516(a) ("Where the amount of rent set forth in the annual rent registration statement filed four years prior to the most recent registration statement is not challenged within four years of its filing, neither such rent nor service of any registration shall be subject to challenge at any time thereafter.").

84. *See Perry v. N.Y. St. Div. of Hous. & Cmty. Renewal*, 281 A.D.2d 629, 631 (2d Dep't 2001) ("[T]he legal regulated rent is deemed to be the rent charged four years prior to the date of the initial registration 'plus in each case, any [subsequent] lawful increases and adjustments.'").

85. New York State Division of Housing and Community Renewal, Office of Rent Administration, *at* http://www.housingnyc.com/html/resources/dhcr/dhcr1.html (last visited Sept. 12, 2011).

86. *See City of N.Y. v. N.Y. St. Div. of Hous. & Cmty. Renewal*, 97 N.Y.2d 216 (2001) ("In 1970 the City passed Local Law 30, enacting a new maximum rent formula: Administrative Code of City of NY § Y51-5.0[a], now § 26-405[a]. Like the earlier State legislation, Local Law 30 provided both for the calculation of maximum rents and for adjustments to these rents."); *see also Mayer v. City Rent Agency*, 46 N.Y.2d 139 (1978) ("Local Law No. 30 . . . substantially revised the city rent control laws. By its provisions there was required to be established, effective January 1, 1972, a maximum base rent (MBR) ceiling for each rent controlled apartment . . . . The MBR was to be recalculated every two years thereafter to keep abreast of changes in operating costs."); *see also* Admin. Code tit. 26, ch. 3, § 26-405(a)(3).

87. *See* N.Y.C. Admin Code tit. 26, ch. 3, § 26-405(a)(4) ("the city rent agency shall establish maximum rents effective January first, nineteen hundred seventy-four and biennially thereafter by adjusted the existing maximum rent to reflect changes, if any, in the factors which determine maximum gross building rental under paragraph three of this subdivision . . .").

88. *See* N.Y.C. Admin Code tit. 26, ch. 3, § 26-405(a)(5) ("[W]here the period for which the rent is established exceeds one year, regardless of how the collection thereof is averaged over such period, the rent the landlord shall be entitled to receive during the first twelve months shall not be increased by more than seven and one-half percentum over the previous rent and additional annual rents shall not exceed seven and one-half percentum of the rent paid during the previous year.").

89. *See* N.Y.C. Admin Code tit. 26, ch. 3, § 26-405(h)(6) ("If at least six months before the effective date of any adjustment or establishment of rents pursuant to paragraph three or four of subdivision a of this section, the landlord has not certified to the agency having jurisdiction that (a) all rent impairing violations (as defined by section three hundred two-a of the multiple dwelling law), and (b) at least eighty percentum of all other violations of the housing maintenance code or other state or local laws that impose requirements on property that were recorded against the property one year prior to such effective date have been cleared, corrected, or abated, no increase pursuant to such paragraphs shall take effect until he or she shall have entered into a written agreement with the city rent agency to deposit all income derived from the property into an escrow or trust account pursuant to subparagraph (a) of paragraph four of this subdivision, in addition to the procedures set forth in this paragraph and all other applicable penalties and procedures under this chapter, such violation shall also be subject to repair or removal by the city pursuant to the provisions of article five of subchapter five of the housing maintenance code, the landlord to be liable for the cost thereof.").

90. *See* N.Y.C. Admin Code tit. 26, ch. 3, § 26-509 ("A tenant is eligible for a rent exemption pursuant to this section if: (i) the head of the household residing in the housing accommodation is sixty-two years of age or older. . . and is entitled to the possession or to the use or occupancy of a dwelling unit . . . (ii) the aggregate disposable income (as defined by regulation of the department for the aging) of all members of the household residing in the housing accommodation whose head of household is sixty-two years of age or older does not exceed. . . twenty-nine thousand dollars beginning July first, two thousand nine, per year, after deduction of federal state and city income and social security taxes. . . (iv)(a) in the case of a head of the household who does not receive a monthly allowance for shelter pursuant to the social services law, the maximum rent for the housing accommodation exceeds one-third of the aggregate disposable income, or subject to the limitations contained within item (c) of subparagraph (i) of paragraph three of this subdivision, if any expected lawful increase in the maximum rent would cause such maximum rent to exceed one-third of the aggregate disposable income").

91. *See* Mult. Dwell. Law § 286(2).

92. *See* Mult. Dwell. Law § 286(4).

93. *See* Mult. Dwell. Law § 286(2).

94. *See* Mult. Dwell. Law § 286(3).

95. *See id.*

96. *See* Mult. Dwell. Law § 286(2).

97. *See* Mult. Dwell. Law § 286(b).

98. *See Theoharidou v. Newgarden*, 176 Misc. 2d 97, 98 (Sup. Ct. App. Term 1st Dep't 1998) (explaining that the Rent Regulation Reform Act of 1997 amended the Rent Stabilization Law of 1969 to provide that "no determination of an overcharge and no award or calculation of an award . . . may be based upon an overcharge having occurred more than four years before the complaint is filed").

99. *See Goho Equities v. Weiss*, 149 Misc. 2d 628, 631 (Sup. Ct. App. Term 1st Dep't 1991) (holding that tenant who pays rent for a loft not in compliance with code-compliance timetable may not recoup rent). *See, e.g.*, *Commercial Hotel v. White*, 194 Misc. 2d 26, 27 (Sup. Ct. App. Term 2d Dep't 2002) (holding that tenant may not recoup rent for premises that lack certificate of occupancy); *Soalt v. Pulisic*, N.Y.L.J., Dec. 5, 1991, p. 30, col. 4 (Sup. Ct. App. Term 2d Dep't 1991) (holding that tenant may not recoup rent paid for illegal premises).

100. *See* N.Y.C. Admin Code tit. 26, ch. 4, § 26-516(a)(2).

101. *See* N.Y.C. Admin Code tit. 26, ch. 4, § 26-516(a).

102. *See* 9 N.Y.C.R.R. § 2526.1(f)(2) (providing that the treble damages the prior landlord incurs are also the new owner's responsibility).

103. *See Helfand v. Sessler*, 8 Misc. 3d 96, 97–98 (Sup. Ct. App. Term 1st Dep't 2005).

104. *Round Hill Mgmt. Co. v. Higgins*, 177 A.D.2d 256, 257 (1st Dep't 1991).

105. 9 N.Y.C.R.R. § 2522.3(d)(1); *see also Fullan v. 142 E. 27th St. Assocs.*, 1 N.Y.3d 211, 214–15 (2003).

106. *See Fullan*, 1 N.Y.3d at 214–15.

107. *See* CPLR 213.

108. *See* Mult. Dwell. Law § 286.

109. *See* 9 N.Y.C.R.R. § 2204.5.

110. *See, e.g.*, *id.*; *see also, e.g.*, 9 N.Y.C.R.R. § 2524.4(a)(2).

111. *See* 9 N.Y.C.R.R. § 2204.5.

112. *See id.*

113. *See id.*

114. *See* 9 N.Y.C.R.R. § 2204.5.

115. *Burke v. Joy*, 99 A.D.2d 952, 953 (1st Dep't 1984).

116. *See* 9 N.Y.C.R.R. § 2204.5; *see also* 9 N.Y.C.R.R. § 2520.6(q) (defining "disability" as "an impairment which results from anatomical, physiological or psychological conditions . . . which are expected to be permanent and which prevent such person from engaging in any substantial gainful employment").

117. *See* 9 N.Y.C.R.R. § 2204.5.

118. *See* Mult. Dwell. Law § 286; *Axelrod v. French*, 148 Misc. 2d 42, 44–45 (N.Y. Civ. Ct., N.Y. Co. 1990); *165 W. 26th St. Assocs. v. Folke*, 131 Misc. 2d 867, 869–70 (Sup. Ct., N.Y. Co. 1986).

119. *See* Mult. Dwell. Law § 286; *Axelrod*, 148 Misc. 2d at 44–45; *165 W. 26th St. Assocs.*, 131 Misc. 2d at 869–70.

120. *See* GBL § 7-105.

121. *See id.*

122. *See id.*

123. *See* GBL § 7-103.

124. *See id.*

125. *See* GBL § 7-105.

126. *See id.*

127. 9 N.Y.C.R.R. §§ 2525.4, 2505.4 (applying the ETPA regulations to certain tenants in counties outside New York City).

128. New York, N.Y., Local Law No. 1, *at* http://www.nyc.gov/html/hpd/downloads/pdf/lead-local-local1-2004.pdf (last visited Sept. 12, 2011). *See generally Peri v. City of N.Y.*, 44 A.D.3d 526, 527–28 (1st Dep't 2007), *aff'd*, 11 N.Y.3d 756 (2008); *see also* Gerald Lebovits, HP Proceedings: A Primer (Legal Update for Judges and Court Attorneys 2007), *at* http://ssrn.com/abstract=1299746 (last visited Sept. 12, 2011).

129. *See* Local Law No. 1; *see generally Peri*, 44 A.D.3d at 527–28; *see also* Lebovits, *supra* note 128.

130. *Id.*

131. The converse to a new owner's being allowed to maintain a proceeding is the obligation of a new owner to correct code violations existing when the new owner closed on the building and what happens to code-violation cases (called Housing Part, or HP, proceedings in New York City) pending against the old owner. The prior owner may move to dismiss any pending code proceeding. That motion will be granted because the occupant-petitioner no longer has standing to maintain the proceeding (although the occupant-petitioner may still move for contempt against a prior owner who did not comply with a stipulation or court order to effect repairs while it still owned the building). The Department of Housing, Preservation, and Development (HPD), or in granting the prior owner's motion to dismiss the judge, will then ascertain, with the prior owner's help, who is the new owner so that the occupant-petitioner in the code proceeding may file a new proceeding against the new owner. Regardless what happens in the proceeding, the new owner always has the obligation to correct violations that arose during the prior ownership and which exist during the current ownership. For more on this complicated area, see Lebovits, *supra* note 128.

132. *See id.*

133. *See id.*

134. *See id.*

135. *E.g.*, *MRG Realty Co. v. Bloomberg*, 58 A.D.2d 562, 562 (1st Dep't 1977).

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Randall Thomas Adams
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Lilja Dora Altman
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Thaddecia Jacintha Andrews
Juan Manuel Arciniegas
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David Emanuel Ashley
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Jihua Zhang
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Shihao Bao
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James Michael Conigliaro
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Joseph Francis Del Vecchio
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Cherisse Keller
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Yik Kong
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Ryan Charles Woodworth

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Ali Mohamed
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Shane-ray Johnathan Brown
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Stephen Michael Loewenthal
Ilyssa D. London
Melissa Hope Luckman
Jessica Marie Mannix
Douglas Wayne Marquez
Gary Albert Marshall
Vanessa Marie McGill
Kera Nicole Murphy
Talia Elizabeth Neri
Brooke Nuoffer
Alyssa Michelle Panaro
Jessica Lorraine Parada
Melissa Danielle Patzelt-russo
Eloy Antonio Peral
Anthony Ralph Perri
Laura Marie Pfeifer
Charles Norman Pizzolo
Jean Marie Post
Jason John Poulos
Armin Pourmehdi
David Isaac Rabinowitz
Amanda Lee Raimondi
Elizabeth Morgan Reitano
Arthur Rubin
Steven Gerard Sacco
Jeffrey Ian Saccone
Joshua Saidlower
Marianne Azmy Salib
Megan Catherine Sampson
Lynsay Ann Satriano
Scott Charles Sharinn
David Ethan Silverman
Vincent John Sommella
Sy Justin Sommer
Janet Cohen Sorrentino
James David Spithogiannis
Elana Margaret Stanley
Dennis B. Suh
Sonia Afrin Uddin
Joel Daniel Vago
Katherine Aine Ward
Steven Jason Werblowsky
Richard Chungkit Yam
Stefanie Yanick
Jason Zemsky
Jing Zhang
Derek Michael Zisser

ELEVENTH DISTRICT
Rehan Aindri Abeyratne
Jennifer Allim
Penelope Andrews
Shahrina Hoque Ankhi-krol
Sevan Abraham Aydin
Ohad Barkan
Justin I. Bernstein
Matthew Ross Birnbaum
Casey Bryant
Robert Dominick Bucella
Jose Manuel Campon
Yang Cao
Tudor Florin Capusan
Emily See-kate Chow
Stephanie Dudley Delia
Emer Forde
Tina Galani
Christopher Gilroy
David Nathaniel Glanzman
Eugenia Alejandra Gomez-Mendoza
Edward S. Gusky
David Laurence Haas
Jennifer Han
Kent Han
Jose Omar Hasbun
Juan Carlos Holguin
Nicole Elizabeth Holler
Gabriella Andrea Idrobo
Gregory Itingen
Sungmin William Jin
Parashos T. Kalaitzis
Michelle Lauren Kaszuba
David Kim
Katherine Sang Kim
Adam Kapelman Koblenz
Michael A. Kosak
Brian H. Kramer
Anna Kull
Tyler Holt Ladner
Cristina Mihaela Lipan
Fei Liu
Dean Masello
Amir Adel Matar
Laura Matthews-jolly
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Jonathan Ellery Neuman
Susan Michelle O'Connor
Emese Zsuzsanna Olah
Valery Paul
Mark Joseph Perry
Christine Ruth Quigley
Genna Lauren Rappaport
Yasmin Salama
Brian A. Sament
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Lantao Sun
Irina Svetlichnaya
Deniz Sadan Tamer
Curt Norbert Trisko
James Pierce Walsh
Qian Wang
Rena Wiener
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Min Xu
Jing-li Yu

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Steven David Ekechuku
Gustavo Gutierrez
Brian Alexander Jacobs
Michael Rodney Johnson
Ravi Kantha
Kevin Lee
Gabrielle Elizabeth Martin
Lauren Jill Numeroff
Meredith Lee Price
Trecia Colleen Pullin
Lindsey Joy Ramistella
Diana Patricia Smithens
Rhea Luane Thomas
Erin Rebecca Tomlinson

THIRTEENTH DISTRICT
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Oleg Babaytsev
Christopher Todd Carozza
Michelle Kristy Cordner
Ryan Cronin Harris
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Bonnie Cook Jerro
Stephen Anthony Lampo
Joshua Troy Richardson
Vincent Jeffrey Scamardella
Xiaoshu Wu

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Deirdre Anne Aaron
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Benyamin Yosef Abed
Dariel Jonathan Abrahamy
Edward Raymond Adams
Ateet Dilish Adhikari
Nina Kirsty Agate
Mukta Agrawal
Alia Maryam Ahmed
Caroline Grace Aiello
Hadley Tomlinson Ajana
Adam Wesam Al-joburi
Sarah Elizabeth Allison
Hussain Ali Almani
Ran An
Amanda Clare Andrews
Timothy James Anthony
Stephen Dana Argeris
Mayu Arimura
Robert Artz
Christopher John Asakiewicz
David A. Attisani
David Joseph Austin
Niceforo Luceno Avila
Marianna Babek
Bryan Joseph Bach
Elizabeth Anne Wang Bae
Devin Samuel Baer
Yong Bai
Biodun Liafis Bakare
Milan Nicole Ball
Daniel Ballon
Maria L. Banda
Elisabeth Jaffe Barek
Charlene Andree Barker
Kevin Gauntt Barker
Jennifer Lynn-marie Barrow
Naomi Deleeuw Barrowclough
Richard Brent Bates
Zahra Bazmjow
Angela Louise Beaumier
Taylor William Beaumont
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Alyssa Daniela Bell
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Rachelle Lynne Bergeron
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Valerie Louise Renee Bernard
Jarrod Neal Bernstein
Jason Wayne Billeck
Robert Michael Bilotta
Anthony Ray Bisconti
Sadie Rose Blanchard
Peter J. Bober
Samara Robbins Bober
Matthew Aaron Bock
Nicolas Louis Boittin
Jesse Mohan Boodoo
Terri Michelle Booker
David Ryan Borden
Michael Thomas Borgia
John Joseph Boscia
Jamie Lorraine Boucher
Lynette Maureen Boxall
Mary Boyd
Anastasiya Boyko
Marianne Bradshaw
Catherine Marie Bragg
Elizabeth Anne Braswell
Martin Dietrich Brauch
Guilherme Brenner Lucchesi
Lawren Heather Briscoe
Jonathan Hayden Brooks
Amy Kathryn Brown
Bradley Scott Brunken
Ciara Anne Brunton
Erin Leigh Buchanan
Daniel Patrick Buckley
Kelly Alden Buist
Andrew Robert Burroughs
John Michael Busino

In Memoriam

Richard A. Hennessy
Syracuse, NY

Michael L. Minasz
New York, NY

Leonard Siegel
Boca Raton, FL

Steven C. Kleinman
Jericho, NY.

Rajpattie Persaud-Billette
Montreal, QC

Forrest G. Weeks
Glenmont, NY

Daniel Witbro Butrymowicz
Johanna Maribel Cadena
Yiqi Cai
Bayo Ayaba Callender
Madia Camara
Edward Joseph Campbell
Christopher Thomas Canniff
Shang Cao
Maria Michelle Carboni
Theodore John Cardos
John Frederic Carey
Matthew Jude Carhart
Kerstin Bree Carlson
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Tyrone Nelson Collier
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Katharine Elizabeth Gregory
Sara Megan Gregory
John Michael Grochala
Edward Robert Grossi
Coline Marie-celine Gruat
Gisselle D. Guerrero
Yangting Guo
Maria Ximena Guzman
Richard Ha
Alina Saad Habba
Joshua Leigh Haber
Nathan Michael Haber
Irene Jean Hahn
Michael O'Malley Halas
Melanie Ann Hallas
Jung Hoon Ham
Chantal Nicole Lorine Hamlin
Shinbum Han
Matthew Lance Handler
Nels Christian Hansen
Andrew John Harrison
Gabrielle Hart
Matthew Louis Harte
Jennifer Chirstina Hartzler
Robert Duane Hatch
Leonard William Hatton
Thomas John Hayes
Aonghus Thomas Heatley
Rebecca Sue Hekman
Matthew Patrick Hendrickson
Panatda Hengboonyaphan
Eric Charles Henry
Dorothy Jean Hernaez
Thomas Joseph Hernandez
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Brett Eliot Heyman
Reda Marie Hicks
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H. Tim Hoffman
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Yu Huai
Youn Jee Huh
Chun Ying Hui
Leng-chia Hung
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David Michael Jaklevic
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Lawale Nicholas Ladapo
Sameer Haiderali Ladha
Bill David Laffan
Baruch Lam
Lei Lan
Caitlin Esther Lane
Richard Alan Lanzillo
Kirsten Elizabeth Lapham
Ruth Almaz Laryea
Kah Hee Lau
Margaret Grace Laufman
Peter Adel Lawrence
David Jason Lazarovic
Yui Le
Pierodavide Domenico Leardi
Ai Ling Lee
Hangli Lee
Jacqueline Mikyoung Lee
Jenna Paloma Lee
Yeh-fu Lee
Heather Lennox
Brooks Howard Leonard
Michael Seth Levenson
Scott Andrew Levine
Ryan Jon Lewis
Chen Li
Hong Li
Jingting Li
Wenjia Li
Yanying Li
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Shuekai Liang
Yaohai Liang
Vitaly Libman
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Deepinder Singh Mayell
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Jonathan Jacob Moses
Joshua Samuel Moskovitz
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Kenan Weil Mullis
Daniel Erik Mullkoff
Maurice Jakob Mult
Deirdre Murphy
Deirdre Mary Murphy
Laura Podd Murray
Dianna Kate Muth
Kazumasa Nagayama
Mai Naka
Juliette Yokoo Nakajo
Yoon Jung Nam
Emily Ann Nash
Meghan Elaine Nayak
Laura Lillian Nazzaro
Mark Robert Nelson
Michael Richard Nestor
Esther Sara Neuwirth
Aine Ni Riain
Nicholas D. Norcia
Hilary Anne Noskin
Erica Jaclyn Novich
Mark Laurence Novinsky
Donald Tyler Nurnberg
Nnamdi James Nwaneri
Christopher Roland Nygaard
Adam Jeremy O'Brien
James Howard O'Malley
Ryan Patrick O'Malley
Gregory Michael O'Neil
Timothy John O'Shea
Yuka Ochiai
Lorine Angelo Ogurkis
Yoori Oh
Koki Ohira
Hiroko Ohkawa
Angela Obiageli Nwabialunam Okafor
Shigeki Okatani
Janene N. Oleaga
Keith George Oliver
Rosa I. Ortiz
Stacy Ann Orvetz
Judit Katalin Otvos
Caitlin Mary Owens
Kent David Oz
Sarah Packington
Eunok Pauline Paik
Alissa Anita Palumbo
Nimrode Pantz
Ho Jin Park
Rowook Park
Yenala Park
Robert Ingalls Parker
George Joseph Parnham
David Nicholas Patariu
Komal Patel
Sheena Ashok Patel
Nemanja Pavlovic
Elizabeth Ann Pawelczyk
Leslie S. Payne
Andriy Roman Pazuniak
Brian Pearlman
Cecile Marie-claire Pellegrini
Sasha Mikaelle Pemberton
Beranger Paul Michel Joseph Pene
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Travis Alan Peoples
Nicholas Christopher Perros
Neill Warner Perry
Miroslava Emilova Pervazova
Tamara Sue Pester
Vito Petretti
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Magin Tomas Puig Monsen
Asha Puttaiah
Rong Qin
Xiaodan Qin
Edward Paul Quinn
Michael Patrick Quinn
Beatrice Raccanello
Alexa Michelle Racioppo
Melissa Ann Raggi
Mahesh Rai
Trace William Rakestraw
Manmeet Rana
Carolina Regales Bejarano
John Edward Reid
Barbara A. Resnick
Aidee Josefina Reyes
Jessica Blair Reyes
Gina Lynn Reynolds
Jonathane Ricci
Jonathane Michael Ricci
Stephanie Nichole Richter
Jennifer Lynn Robau
Lauren Rebecca Robbins
Jacqueline Iris Kim Roberts
Trevor Lee Roberts
Danielle Lee Robinson Briand
Typhaine Roblot
Karli Park Robyn
John Vincent Rodriguez
Peter Earl Roethke
Jennifer Kristen Rohrback
Paul Hill Roitshtein
Christopher Jeffrey Roman
David Mark Rosenfield
Karel Pierre Roynette
Joshua Nathaniel Ruby
Tara M. Rucker
Uri Rudelman
Claire Lucienne Marguerite Ruhard
Mark Thomas Rumold
Zachary Michael Ryan
Roberta Souza Sa
Edmundo Gabriel Saballos
Levent Sabanogullari
Dena Beth Sacharow
Henry Adam Sackler
Tatsuya Sagawa
Nidhi Sahay
Marie-noel Marie Saint-Hilaire
Stratigoula Sakellariou
Bojana Saletic
Adam Jeffrey Salzer
Adam Phillip Samansky
Shahram Samie
James Sammataro
Jose Luis Sampedro Mazon
Arvindpaul Singh Samra
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Marcio Adriano Almeida Dos Santos
Taryn Lynn Sardoni
Dionne T. Savage
Francesco Antonio Savoia
Maryam Sayyed
John Joseph Scaliti
Rachel Jean Schaffer
Matthias Schatz
Norka Maria Schell
Laura Anne Schierhoff
Elizabeth Ann Schneider
Jacob Stephens Schneider
Andrew Marten Schnitzel
Catherine Elizabeth Schulte
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Samuel Corin Scrimshaw
Mary Margaret Molly Scullin
Michael James Scurato
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Joshua Matthew Dubensky Segal
Meera Rajnikant Shah
Keith Alan Shandalow
Weihe Shang
Arvind Sharma
Dhawal Sharma
Lydia Durrett Sharp-white-gorrie
Holly Christine Shaw
Frances Maria Sheffield
Caifang Shen
Lili Shen
Xiajun Shen
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Kohmei Shimizu
Chang Min Shin
Clay Dalton Shorrock
Tali Shousterman
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Yu Shu
Pierre Sikorav
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Lisa Kaitlyn Smith
Sarah Naomi Smullin
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Matthew Ryan Solis
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Clayton Dowd Somers
Yafei Song
Rebecca Soquier
Russell Foster Spiegel
Debra Lynn Spinelli
William Joseph Sprouse
Jessica Kate Sribnick
Piyush Chand Srimal
Hema Srinivasan
Katherine Stadler
David Isaacs Stanish
Jenna Lee Statfeld
Jillian Tracy Stein
Marc S. Stein
Ruth Robin Stein
Jill Louise Steinberg
Barry Adam Steinman
Benjamin Oliver Stewart
Rona Barbara Stillman
Jeremy Stonehill
Gabrielle Marisa Strauss
John Gerard Stretton
Martinus Jacobus Theodorus Stuart
Krisztina Stump
Bryan McGlynn Sullivan
Katherine Moran Sullivan
Alison Jane Sutak
Shintaro Suzuki
Charles Addison Sweet
Ross Joseph Switkes
Melissa Lynn Szymansky
Shana Marie Tabak
Momoko Takanobu
Jennifer Danielle Talley
Matthew Patrick Tallia
Reiko Tanaka
Sarah Marie Tashjian
Alexander William Tausanovitch
Benjamin Brock Taylor
Geoffrey Branch Taylor
Jonathan Ellis Taylor
Nadea Bojrab Taylor
Haidi Teng
Akihiro Terai
Christos Theodoridis
Mary Sikra Thomas
Simple Thomas
Christopher Thompson
Christopher James Thompson
Daniel Christopher Tighe
Lia Marie Tisseverasinghe
Anastasios Tomtsis
Ai Tong
Linh Thi Ngoc Tran
Laura Susan Trice
Po-yen Tseng
Anne-sophie Tuffery
Rami Turayhi
Mary Lee Turk
Jacquelyn Angela Turvey
James John Uliano
Christopher R. Utecht
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Rika Valdman
Thijs Van Gammeren
Victor Theodoor Van Hoorn
Roya Vasseghi
Vimala Naga Veeramachaneni
Elizabeth Rochelle Veit
Sharon Emily Vella-hancock
Priya Verma
Bethany Grace Versical
Gregory Joseph Vetter
Diana Nicole Viggiano
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Andrew Rudisill Vinton
Joanna Lee Visser
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Kazuyuki Wakasa
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Liang Wang
Ningyuan Wang
Yi Wang
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Randall Sinclair Watts
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Limor Weizmann
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Carl Tucker Williams
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Nisha Gloria Williams
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Leonard Michael Winters
Amanda Elizabeth Wiss
Boris Karl Witt
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Gerry Chun Yi Wong
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Herschel Victor Woods
Julie Jones Woods
Michael Robert Worhach
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Ling Wu
Zhuang Hui Wu
Jing Xia
Wenbo Xu
Shujuan Yang
Yosuke Yashio
Haoran Ye
Cem Mustafa Yeniaras
Osawaru Yesufu
Yunling Yi
Weiliang Ying
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Xiaohao Yu
Jean Mary Zachariasiewicz
Sebastian Robert Zachow
Katherine Elizabeth Zdrojeski
Biyuan Zhang
Lu Zhang
Weibin Zhang
Yanqiong Zhang
Peiqi Zhao
Tuozhi Lorna Zhen
Haohao Zheng
Xinru Zhou
Erin Shannon Zimmerman
Chao Zou

> and, as to those matters, I believe them to be true.
> I declare under penalty of perjury that the foregoing is true and correct.
> Dated: [insert date].

If the party demanding a bill of particulars from you objects to your bill or if you've failed to respond with a bill, that party should move under CPLR 3042(c) to compel you to comply. That party may seek penalties if you've willfully failed to comply. Penalties exist under CPLR 3042(d) and (e) for either party's improper behavior. Under CPLR 3042(c), the court isn't limited to issuing a conditional preclusion order; the court may sanction you if the court finds that your behavior has been willful. If you don't comply with the conditions the court delineates in its order, you'll be precluded from introducing documentary or testimonial evidence at trial. A conditional preclusion order gives you a second chance to comply before a court precludes you.[23] A conditional preclusion order is common in disclosure practice. But you might not always get a second chance. Under CPLR 3042(d), a court may also grant relief under CPLR 3126. Under CPLR 3126, a court may order any remedy it finds "just." A court may strike all or part of your pleading if you've failed to comply with the court's order. A court may stay the action or proceeding until you comply with the court order. The most severe remedy is that a court may dismiss the action or enter a default judgment against a disobeying party.[24]

Your demand for a bill of particulars shouldn't be voluminous, repetitious, or unrelated to the case.

If you need more time to prepare your bill of particulars, ask for more time from the party who sent you the written demand. If that party agrees to give you more time, prepare a stipulation listing the time frame. If that party refuses to give you more time, move the court to extend your time to prepare your bill of particulars.

If you don't sufficiently know the details to your case to prepare a bill of particulars, prepare a bill as completely as you can given your current knowledge. If a party is demanding information you don't know, state in your bill of particulars that you don't have that information. Answer the demand and state what information is missing and when you expect to obtain the information during disclosure. Once you've obtained the information, serve an amended or supplemental bill of particulars. For example, you might need to conduct an examination before trial (EBT) before you will know certain information to answer the demand. If that's the situation, state that in your bill of particulars.

Amending and Supplementing a Bill of Particulars

Under CPLR 3042(b), you're allowed to amend your bill of particulars one time as of right (no leave of court is needed) if you amend before the defendant files a note of issue.[25] If the defendant has already filed a note of issue, you'll need leave of court to change the bill of particulars. Or you may get the other side to agree and stipulate that you may amend the bill. If you've already amended your bill of particulars and need to amend it again, you'll need leave of court or the other side's permission to amend. To determine whether to allow you to amend, a court will use the same standard under CPLR 3025(b), which deals with when you'd amend and supplement your pleadings by leave of court

In a personal-injury case, you may serve a supplemental bill of particulars as of right under CPLR 3043(b), but only "with respect to claims of continuing special damages and disabilities." You may serve your supplemental bill even after the defendant filed the note of issue. Serve the supplemental bill of particulars at least 30 days before trial; don't add new grounds or theories to the bill.

If you're amending or supplementing your bill of particulars, you don't need to rewrite the entire bill or to point out what's different from the original bill.

If a plaintiff serves an amended complaint, a defendant may request a new bill of particulars. Likewise, if a defendant serves an amended answer with additional affirmative defenses, a plaintiff may request a new bill of particulars.

Including at the end of the bill of particulars a statement that you reserve your right to modify or amend the bill of particulars has no effect. Including this language won't give you time to modify or amend your bill beyond what the statute provides.

Don't go to trial on an outdated bill of particulars. A court may admit evidence at trial based on the matters you've set forth in your bill of particulars. If you've failed to particularize your bill of particulars, a court may preclude you from introducing evidence at trial.[26]

Writing the Demand for a Bill of Particulars

- Confine your demand for a bill of particulars to the issues on which your adversary has the burden of proof.[27]
- Your demand for a bill of particulars shouldn't be voluminous, repetitious, or unrelated to the case.[28] A court won't cull through your demand to preserve the proper demands from the improper demands. A court might reject your demand in its entirety if your demands are improper or burdensome.[29]
- Avoid boilerplate demands. Each case has different facts and issues. Tailor your demands to each case.
- In personal-injury actions, the items you may demand are codified under CPLR 3043(a). The items include

(1) the date and time of the occurrence; (2) the approximate location of occurrence; (3) the acts or omissions constituting the negligence claimed; (4) whether actual or constructive notice is claimed; (5) if actual notice is claimed, a statement of when and to whom notice was given; (6) a statement of injuries and a description of those injuries claimed to be permanent;[30] (7) the length of time confined to bed and to house; (8) the length of time incapacitated from employment; and (9) the total amount claimed as special damages for physicians' services and medical supplies, loss of earnings, name and address of employer, hospital expenses, and nurses' services.

• CPLR 3041 defines a bill of particulars to include "items of an account." If a party has pleaded that an account exists, the adverse party is entitled to demand a copy of the items of the account.

• You may demand particulars about items claimed as "special" damages, but only if special damages is sought in the complaint.[31] No need exists to plead general damages.

• Immediately after the caption to your case, the language that many practitioners use in a demand for a bill of particulars is the following:[32]

PLEASE TAKE NOTICE that the plaintiff demands that you serve on this office, within 30 days from the date of service of this demand, a bill of particulars with respect to the following matters:

• Number the items for which you seek particularization. Example:

1. State the date and time of the occurrence.
2. State the location of the accident in detail.
3. State the direction in which each vehicle was traveling.
4. State what part of each respective vehicle came into contact with the other.

• If you're seeking to amplify an affirmative defense, here are some examples:[33]

5. State with particularity the reasons this Court has no jurisdiction over the person of the defendant as stated in your _____ [number] affirmative defense.
6. State with particularly the acts or omissions that constitute the plaintiff's culpable conduct that you claim caused, in whole or in part, the plaintiff's injuries as you stated in your _____ [number] affirmative defense.
7. State with particularity the facts that support your _____ [number] affirmative defense in which you state that the plaintiff failed to use an available seat belt and other safety devices in the plaintiff's vehicle.

• At the end of your demand, practitioners use a variation of the following language:[34]

> PLEASE TAKE FURTHER NOTICE that if you fail to serve a bill of particulars as demanded, the undersigned will move for a court order precluding you from giving any evidence at the trial of this action concerning the items sought in the demand for the bill of particulars.

Writing the Bill of Particulars

• Confine your bill of particulars to those facts you have the burden of proving.

• Give the particulars to your claim even if the opposing party knows the particulars.[35]

• Answer each inquiry in the demand separately.

• Referring to a document instead of responding to an inquiry is insufficient.[36]

• Responding to an inquiry with phrases like "among other things" and "among others" is improper.[37] This type of vague response defeats the purpose of a bill of particulars. The purpose of a bill of particulars is to amplify and particularize, not to generalize.

• You can't use a bill of particulars to correct a defective pleading. For example, if you've forgotten an essential element of a claim in your complaint, you can't include it in your bill. In your bill of particulars, you can't add or substitute a new theory or cause of action from what you pleaded in the complaint.

• In a negligence case, you must specify the "acts of negligence as to each defendant."[38]

• You can't respond to an inquiry in a demand by referring to portions of your complaint or by referring to other portions of your bill of particulars.[39]

• Avoid boilerplate. If one or more defendants demand a bill of particulars from you, don't serve identical bill of particulars on them. They're different defendants making different demands.

• No need exists to disclose information in response to a demand for a bill of particulars relating to general damages.[40]

You can't use a bill of particulars to correct a defective pleading.

• If an inquiry in a demand is overly broad or repetitious, object on those grounds. If an inquiry in a demand seeks information that's privileged, object on that ground. If you have another substantive reason for objecting, state your objection with particularity.[41]

• At the beginning of their bill of particulars, practitioners include a variation of the following language:[42]

> The plaintiff, by and through the plaintiff's attorney, [name of plaintiff's attorney], sets forth the following verified bill of particulars in response to the defendant's demand that the defendant served on the plaintiff on [date].
>
> This verified bill of particulars is submitted under CPLR 3041.

• Because each case is different, your amplification of the pleading will be different.

Assume that the defendant crashed his car into the plaintiff, who was riding a motor scooter at the time of the crash. Assume that the defendant

injured the plaintiff. Although it's an incomplete bill of particulars, here's an example if you're the plaintiff responding to a demand for a bill of particulars:[43]

1. The crash occurred on [date] at approximately [time].
2. The crash occurred at [location], in [name of county], [name of state].
3. The weather conditions at the time of the crash were [indicate weather conditions].
4. The defendant violated the following statutes, rules, regulations, and ordinances, and the violations contributed to the crash: [set forth statutes, rules, regulations and ordinances violated].
5. The defendant's following acts and omissions constituted negligence and directly caused the crash: [set forth acts and omissions].
6. The nature and extent of the plaintiff's injuries are as follows: [describe injuries].
7. The plaintiff claims that the following injuries are permanent: [describe permanent injuries].
8. The name and address of each doctor who examined or treated plaintiff in connection with the injuries is set forth below: [set forth names and addresses].
9. The name and address of each hospital, clinic, institution, or medical facility where the plaintiff was examined or treated is set forth below: [set forth names and addresses].
10. On [date], the plaintiff was employed by [employer] at [address], [name of city], [name of county], [name of state].
11. The plaintiff's claimed lost earnings total [dollar amount].
12. The plaintiff claims the following damages for
    (a) physicians' services: [dollar amount];
    (b) medical expenses: [dollar amount];
    (c) nurses' expenses: [dollar amount]; and
    (d) hospital expenses: [dollar amount].

Except in matrimonial actions, you can't serve both a demand for a bill of particulars and interrogatories on the same party.[44] Interrogatories are a useful tool in disclosure. The next *Legal Writer* column will discuss interrogatories, including the differences between bills of particulars and interrogatories. ■

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1. David D. Siegel, New York Practice § 238, at 400 (4th ed. 2005).

2. *Id.* at § 238, at 401; J. Joseph Wilder & Laura A. Linneball, *Pleadings and Motions Directed to Their Faults*, How to Commence a Civil Lawsuit, N.Y. St. B. Ass'n 17, 97 (Cont'g Legal Educ. Prog., May 25, 2011).

3. *Nader v. General Motors Corp.*, 25 N.Y.2d 560, 565, 255 N.E.2d 765, 767, 307 N.Y.S.2d 647, 650 (1970) ("[T]hose particulars [in the bill of particulars] are, of course, to be taken into account in considering the sufficiency of the challenged causes of action.").

4. Wilder and Linneball, however, cite some cases in which courts have determined that demands that sought evidence were appropriate. Wilder & Linneball, *supra* note 2, at 109.

5. If the responding party isn't prejudiced, a court might allow a party to disclose evidentiary material in a bill of particulars to prevent delays in disclosure. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial § 29:30, at 29-11 (2006; Dec. 2009 Supp.).

6. Although demanding the names of witnesses is impermissible, one court allowed the names of witnesses to be identified because the witnesses had heard a slanderous comment. Wilder & Linneball, *supra* note 2, at 113 (citing *Bounds v. Mutual of Omaha Ins. Co.*, 37 A.D.2d 1008, 1009, 325 N.Y.S.2d 573 (3d Dep't 1971)).

7. *Id.* at 97, 109.

8. Siegel, *supra* note 1, at § 238, at 401.

9. Wilder & Linneball, *supra* note 2, at 108.

10. Siegel, *supra* note 1, at § 238, at 400.

11. Michael P. Graff, *The Art of Pleading — New York State Courts*, N.Y. City Bar Ctr. for CLE 1, 32 (Dec. 8, 2008).

12. Wilder & Linneball, *supra* note 2, at 98 (citing *Smith v. King*, 91 Misc. 2d 151, 152, 397 N.Y.S.2d 523, 524 (Sup. Ct. Albany County 1977) (holding plaintiff entitled to bill of particulars for co-defendant's cross-claim of indemnification)).

13. *Id.* (citing *Shapiro v. Town of Thompson, Sullivan County, New York*, 9 A.D.2d 995, 995, 194 N.Y.S.2d 748, 748 (3d Dep't 1959) (holding that plaintiff had to furnish bill of particulars to third-party defendant).

14. Barr et al., *supra* note 5, at § 29:01, at 29-9.

15. Siegel, *supra* note 1, at § 238, at 401.

16. *Id.* at § 238, at 402.

17. *Id.* at § 239, at 403.

18. CPLR 3042(a).

19. CPLR 3044. CPLR 3020(d) governs who may verify.

20. CPLR 3044.

21. CPLR 3020(d)(3).

22. 4 Am. Jur. Pl. & Pr. Forms § 142.

23. For more on conditional preclusion orders, see *Gibbs v. St. Barnabus Hosp.*, 16 N.Y.3d 74, 82–83, 942 N.E.2d 277, 281–82, 917 N.Y.S.2d 68, 72–73 (2010) (enforcing conditional preclusion order on plaintiff who failed to serve timely supplemental bill of particulars and failed to submit expert medical opinion evidence demonstrating meritorious basis for his medical malpractice claim); *Wilson v. Galicia Contracting & Restoration Corp.*, 10 N.Y.3d 827, 830, 890 N.E.2d 179, 181, 860 N.Y.S.2d 417, 419 (2008) (holding that defendant forfeited fraud defense when defendant ignored disclosure orders); *Lauer v. City of Buffalo*, 53 A.D.3d 213, 216–17, 862 N.Y.S.2d 675, 678 (4th Dep't 2008) (finding that defaulter had excuse for failing to comply with conditional order).

24. CPLR 3126(3); *Congleton v. United Health Servs. Hosps.*, 67 A.D.3d 1148, 1151, 889 N.Y.S.2d 701, 704 (3d Dep't 2009) (dismissing action after plaintiff failed to comply with court's conditional order; court determined that plaintiff's conduct was willful, and plaintiff's counsel did not offer reason for not complying with court order); *Rodriguez v. Zeichner*, 50 A.D.3d 999, 1000, 854 N.Y.S. 898, 899 (2d Dep't 2008) (affirming lower court's dismissal of complaint because plaintiff failed to serve a further bill of particulars within the time limit set in the court's conditional order of preclusion).

25. This rule applies in Supreme and County courts, not the lower courts. In the lower courts, a notice of trial is required, not a note of issue. Barr et al., *supra* note 5, at § 29:70, at 29-13.

26. Wilder & Linneball, *supra* note 2, at 125 (citing *Acunto v. Conklin*, 260 A.D.787 789, 687 N.Y.S.2d 779, 781 (3d Dep't 1999) (finding that arthritis was not a condition which "flow[ed] from the specific injuries set forth" in the bill of particulars and precluded plaintiff from introducing evidence of condition at trial because plaintiff had failed to amend his bill); *D'Angelo v. Bryl*, 205 A.D.2d 935, 936–37, 613 N.Y.S.2d 757, 758 (3d Dep't 1994) (precluding medical expert from testifying about plaintiff's bulging disc because the injury differed from the injuries specified in bill of particulars)).

27. Wilder & Linneball, *supra* note 2, at 100; Graff, *supra* note 11, at 32.

28. Wilder & Linneball, , *supra* note 2, at 112 (citing *Pucik v. Cornell Univ.*, 4 A.D.3d 686, 687, 771 N.Y.S.2d 921, 921–22 (3d Dep't 2004)); *Bardi v. Mo*sher, 197 A.D.2d 797, 602 N.Y.S.2d 974, 975 (2d

Dep't 1993) (vacating a 40-page demand that had 161 paragraphs).

29. Wilder & Linneball, *supra* note 2, at 113.

30. See CPLR 3043(a)(6) about additional information you may seek when plaintiffs are involved in motor-vehicle accidents, when plaintiffs suffer serious injuries, and when plaintiffs suffer economic loss greater than basic economic loss.

31. Wilder & Linneball, *supra* note 2, at 113 (citing CPLR 3043). Compensatory damages in tort cases come in two forms: general and special damages. General damages in tort cases are "those that the law implies or presumes to have occurred from the wrong complained of because they necessarily result from the injury." Special damages, however, "are those that are peculiar to the injured party's circumstances and condition They are the actual, but not the necessary, result of the injury complained of, and follow it as a natural and proximate consequence by reason of the particular circumstances of the case." 16 Lee S. Kreindler, Blanca I. Rodriguez, David Beekman & David C. Cook, New York Practice Series — New York Law of Torts § 21:5 (2011).

32. Adapted from Barr et al., *supra* note 5, CD-ROM, Forms, Chap. 29, Bill of Particulars & Interrogatories, 29-10: Demand for Bill of Particulars.

33. *Id.*

34. *Id.*

35. *Lonesome by Coleman v. Angel Guardian Home*, 146 A.D.2d 503, 504, 536 N.Y.S.2d 776, 777–78 (1st Dep't 1989) ("[P]laintiffs' proffered explanation for the delay, that much of the information sought by the bill of particulars was already within the knowledge and exclusive control of defendants, is unavailing, since '[t]he granting of a bill of particulars depends upon what the aggrieved party claims the facts are, and not upon the adversary's knowledge thereof, nor upon the actual facts.'"); *Draper v. Zamiara*, 126 A.D.2d 941, 941, 511 N.Y.S.2d 986, 987 (4th Dep't 1987) ("Plaintiff is not excused from answering the demands because of his claim that defendants have full knowledge of the facts.").

36. Wilder & Linneball, *supra* note 2, at 116.

37. *Id.* at 115.

38. *Id.*

39. *Id.* at 116.

40. *Id.* at 101.

41. Barr et al., *supra* note 5, at § 29:60, at 29-12.

42. Adapted from 4 Am. Jur. Pl. & Pr. Forms § 142.

43. *Id.*

44. Barr et al., *supra* note 5, at § 29:03, at 29-9.

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LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: The first sentence in a sidebar column of Floyd Norris's July 29 *New York Times* article read, "The company misled investors and its officers and its directors may be held liable." My question is, according to this sentence, exactly who would be held liable?

Answer: Your question is clear, but the sentence you quoted from the column is not. Adding a single comma to the sentence would make clear exactly who was liable, but that "crucial comma" was omitted.

The first clause of the sentence, "The company misled investors . . . ." is clear, but from then on, the sentence becomes foggy. Did "the company" mislead only its investors? If so, both "its officers and directors may be held liable." Or did the company mislead both "its investors and its officers"? If so, only "its directors may be held liable."

Without the crucial comma, only the drafter of the article knows exactly what he meant. But if you put a comma after the word *investors*, the sentence would clearly state that both the officers and directors of the company may be liable. However, with a comma after the word *officers*, the sentence would state that only the directors may be held liable. The placement of the comma is crucial.

The company misled investors, and its officers and its directors are liable.

The company misled investors and its officers, and its directors are liable.

Ambiguity caused by the omission – or addition – of one or more commas is more common than one would think. In the following sentence the absence of a comma makes the sentence ambiguous: "The defendant and two other men armed with guns entered the pharmacy and stole prescription medicines." (How many of the men were armed?) As it stands, it implies that all of the men had guns. The commas makes it clear that two men were armed: "The defendant, and two men armed with guns, entered the pharmacy and stole prescription medicines."

Other readers submitted ambiguous statements they have seen. Here are two: "An ordinance on the changes must be written and approved by the commission." The reader who sent this sentence pointed out that because the changes to the ordinance have obviously been made by someone other than the commission that must approve of them, there should be a comma after the word *written*. ("An ordinance on the changes must be written, and approved by the commission.") The sentence would be even more clear by adding some language: "An ordinance on the changes must be written by (whom?) and then approved by the commission."

Another reader sent a sentence showing the importance of a seriatim comma: "The plaintiff turned over all his holdings, houses and lands." Although the omission of a comma before *and* is now grammatically correct, without a comma before *and* in this sentence, implies that the plaintiff's total holdings were houses and lands. However, adding a seriatim comma before *and* makes it clear that the plaintiff's entire holdings include more than just houses and lands: "The plaintiff turned over his entire holdings, houses, and lands."

So disregard the lowly comma at your peril. You may end up in court if you omit it.

Question: I would appreciate your thoughts on the following minor, but fairly frequent, question: Which is correct, "Premises is" or "Premises are"? This question, sent by a Pittsfield, New York, reader who asked not to be identified, was one of four interesting questions he submitted to be answered in this space.

Answer: This question has been asked before, but bears discussing again. Both legal and lay dictionaries agree that although the word *premises* is in the plural, its meaning can be considered either plural or singular. For example, *Black's Law Dictionary* cites to cases in which it means either "the land and the buildings upon it" or "a building or part of a building." Lay dictionaries give a similar definition.

Given the flexibility of the noun *premises* one would expect a similar flexibility in the number of the verb accompanying it. But even if a singular noun is the reference, the plural verb is preferred. A single house is still usually referred to as "the premises," and the usual verb is plural: "The premises were occupied." So the plural usage is acceptable because it is an idiom.

Some opinion drafters avoid the problem of using a plural verb to refer to a singular noun by referring to *premises* as "a term." One court, for example, wrote "The term premises encompasses more than just a residence."

In a parallel context, Rochester attorney Jonathan H. Trost commented some time ago about the interesting practice of the media to refer to a funeral service as if it were a plural ("Funeral services for the deceased were held on . . . .") . Attorney Trost added that for his clients only one funeral service was generally held, so why the plural form?

One explanation might be that the word *service* might refer to a "defined service," that is, as a single ceremony like "a marriage service." On the other hand, the plural form *services* might refer to the performance of professional duties for a client, as in the term "marriage services." The media might, therefore, describe *services* to imply more than a single occurrence. (Compare, also, "medical services.")

And, finally, like the noun *premises*, the term *funeral services* is idiomatic. English speakers invariably choose semantics, not grammar, to decide on a singular or plural verb. So we add an "s" to both nouns because we think of both "premises" and "funeral services" as plural in meaning. ■

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BY GERALD LEBOVITS

Drafting New York Civil-Litigation Documents: Part X — Bill of Particulars

A bill of particulars isn't technically a pleading, although the provisions concerning the bill of particulars are located in Article 30 of the CPLR, which cover remedies and pleadings. Nor is a bill of particulars a disclosure device. A bill of particulars, instead, is "an amplification of a pleading."[1] It's an "expansion" of a pleading.[2] One party will make a demand for a bill of particulars from another party; the response to that demand is called a bill of particulars. A party demanding a bill of particulars seeks to amplify — or particularize — the claims, defenses, or both of an adversary's pleading. Although it's not pleading, courts may look to a bill when they consider whether a party has sufficiently pleaded a cause of action.[3]

A bill of particulars isn't meant for one party to obtain evidence.[4] It's not meant for one party to inspect documents or physical evidence[5] from another party. A bill of particulars isn't meant for a party to find a witness's name and address[6] or to locate collateral sources of payment.[7] A bill of particulars is designed to "offer a more expansive statement of the pleader's contentions rather than the evidentiary basis on which they rest."[8] It's meant to limit the issues and particularize each party's claims.[9] A bill of particulars is also intended to "limit the proof and prevent surprise at trial."[10]

Under CPLR 3041, any party to an action (or proceeding) may demand a bill of particulars. For example, a defendant may demand a bill of particulars from a plaintiff. A plaintiff may demand a bill of particulars from a defendant seeking to amplify the defendant's defenses and counterclaims.[11] A plaintiff may also demand a bill of particulars from a co-defendant about a cross-claim.[12] A third-party defendant may demand a bill of particulars not only from a defendant who impleaded a third-party defendant but also from a plaintiff.[13]

Defendants use bills of particulars in criminal cases to "amplify an indictment."[14] Parties also use bills of particulars in civil cases such as personal-injury actions.

At one time the New York legislature wanted to abolish the bill of particulars in the CPLR, but it never did.[15] The bill of particulars has been abolished in federal court, however. It's up to you to decide whether you'll demand a bill of particulars in your New York State litigation practice. If you're given no choice and must respond and write a bill of particulars, this column will explain some of the nuances of a bill of particulars.

Some Particulars About Bills of Particulars

CPLR 3041, 3042, 3043, and 3044 provide information about bills of particulars.

The demand for a bill of particulars and the bill of particulars will be specific to your case. The bill will particularize what the "pleading pleads."[16]

If you're seeking a bill of particulars, make a written demand. In your "Demand for Bill of Particulars," state the items about which you're seeking amplification. Defendants serve the demand with the answer or after the answer, but not before. Plaintiffs wanting a bill of particulars from defendants about the defendants' defenses may serve a demand any time after the defendants have served them with an answer to the complaint. Plaintiffs wanting a bill of particulars from defendants about defendants' counterclaims may serve a demand "with or after the reply."[17]

You have 30 days to respond to a demand for a bill of particulars. Once you've received a demand, you must determine what information you're willing to provide with particularity and what information you're objecting to in the demand. Answer all the items in the demand, even the objectionable ones. If you object, you must give your reasons "with reasonable particularity."[18] Don't delay or withhold your bill of particulars because you object to something. If you fail to respond to the demand for a bill of particulars, you'll be subject to penalties, as discussed below.

If a pleading is verified, the bill of particulars must also be verified.[19] An exception exists in negligence cases: Even if the pleading isn't verified, the bill of particulars must be verified.[20] An agent or the party's attorney may verify the bill of particulars.[21] Sample verification:[22]

> I, [insert the plaintiff's name], am the plaintiff in the above-referenced action. I have read the above bill of particulars and know its contents. The contents are true of my own knowledge, except as to those matters stated as being alleged on information and belief

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