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COURSE MATERIALS FOR THE NEW YORK LAW COURSE AND
NEW YORK LAW EXAMINATION

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Course Materials for the New York Law Course and New York Law Examination
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PREFACE

The purpose of the New York Law Course and the New York Law Examination is to provide assurance that candidates who have passed the Uniform Bar Examination and are being certified for admission to the New York State bar have been exposed to and have knowledge of law that is specific to New York State. These materials have been prepared with that in mind. Although some topics may include general principles of law, either because of their importance or because they may be necessary to provide context, it is not intended that any topic will include everything a lawyer may need to know regarding that topic, especially to the extent that New York law comports with generally accepted principles, the common law or a model law or uniform code.

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ADMINISTRATIVE LAW

I. Rulemaking

A. Power to make

Under the separation-of-powers doctrine, the legislature cannot delegate its lawmaking power to an administrative agency. However, the legislature may endow administrative agencies with the power to fill in the gaps in the legislative product by prescribing rules and regulations consistent with the enabling legislation (*Nicholas v Kahn*, 47 NY2d 24 [1979]). There does not need to be a specific and detailed legislative expression authorizing a particular administrative act, as long as the basic policy decision has been articulated by the legislature, the administrative rule or regulation is not inconsistent with the statutory language or its underlying purpose, and the administrative agency is not engaging in broad-based policy determinations (*Gen. Elec. Capital Corp. v New York State Div. of Tax Appeals*, 2 NY3d 249 [2004]).

B. Statutory procedures: State Administrative Procedure Act (SAPA) 201, 202, 203

An agency rule or regulation must be enacted in substantial compliance with the procedural requirements of SAPA 202. Prior to the adoption of a rule, an agency must submit notice of the proposed rule to the Secretary of State for publication in the State Register and afford the public an opportunity to submit written comments on the proposed rule. The notice must include, among other information: a statement of the statutory authority for the rule; a complete text of the proposed rule or, if the rule exceeds a certain length, a description of the rule and the website address where the full text is posted; a regulatory impact statement and flexibility analysis; and the date, time and place of any public hearings (SAPA 202 [1] [f]). A public hearing is not required before the adoption of a rule unless a statute specifically requires a hearing (*Rochester Gas and Elec. Corp. v Public Service Commission of State of NY*, 71 AD2d 185, 191 (3d Dept [1979])). A rule is not effective until it is filed with the Secretary of State and the notice of adoption is published in the State Register (see SAPA 202 [5], 203).

II. Publication of Rules

A. New York Codes, Rules and Regulations (NYCRR); Executive Law § 102 (5)

The NYCRR is a published compilation of the rules and regulations of all state agencies.

B. The State Register (see Administrative Law, I.B.)

III. Adjudication

A. Statutory authority: SAPA 102, SAPA art 3, 301, 302, 303, 304, 305, 306, 307

If the relevant enabling statute specifies a hearing on the record, then SAPA demands an adjudicatory proceeding and all of the procedures of Article 3 are mandatory upon the agency (*Gruen v Chase*, 215 AD2d 481 (2d Dept [1995])). The agency must provide a party with a

hearing on the record before an impartial officer having the power to administer oaths and issue subpoenas, it must keep a complete record of the proceeding, and the final determination must be in writing and include findings of fact and reasons for the decision.

B. Required process

1. Due process requirements: SAPA 301

A party to an administrative proceeding must be afforded the due process protections of the Fourteenth Amendment and the New York State Constitution, i.e., a short and plain statement of the matters asserted, an opportunity for a hearing within a reasonable time, reasonable notice of such hearing, and an opportunity to present written argument on issues of law and evidence on issues of fact. Unlike the specificity requirements of an indictment in a criminal proceeding, the due process required for administrative misconduct need only be reasonably specific, in light of all the relevant circumstances, to apprise the party whose rights are being determined of the charges against him or her and to allow for the preparation of an adequate defense (*Block v Ambach*, 73 NY2d 323 [1989]).

2. Discovery: SAPA 305

Each agency may adopt rules for discovery and depositions to the extent and in the manner appropriate to its proceedings, and the parties to the proceeding are subject to these rules.

3. Hearing rules of evidence, burden of proof, and right to counsel: SAPA 306, 501

The formal rules of evidence contained in the CPLR do not apply to administrative hearings, but rules of privilege do, and a party has the right to cross-examination (SAPA 306). Except as otherwise provided by statute, the burden of proof is on the party who initiates an administrative proceeding (SAPA 306). All persons appearing at the hearing are accorded the right to be accompanied, represented and advised by counsel (SAPA 501).

C. Res judicata and collateral estoppel effect

These doctrines are generally applicable to quasi-judicial administrative determinations that are made pursuant to the adjudicatory authority of an agency employing procedures substantially similar to those used in a court of law (*Ryan v New York Tel. Co.*, 62 NY2d 494 [1984]). However, where a party is a nominal party or did not have a full and fair opportunity to litigate the material issue before the agency, the doctrines will not be applied.

D. Agency power to acquire information

1. Administrative investigations: Civil Rights Law § 73

Administrative agencies have the power in furtherance of an investigation to issue subpoenas to compel the attendance of witnesses or the production of evidence. In order to justify a subpoena issued in furtherance of an investigation, the agency must make a preliminary

showing that the information sought in the subpoena is reasonably related to a proper subject of inquiry and that there is some basis for inquisitorial action (*Levin v Murawski*, 59 NY2d 35 [1983]). Administrative hearings conducted in the course of an investigatory proceeding must comply with the due process procedures set forth in Civil Rights Law § 73.

Administrative inspections of private commercial properties are prohibited by the Fourth Amendment prohibition against warrantless searches and seizures. There is an exception for warrantless inspections of closely regulated businesses (*New York v Burger*, 482 US 691 [1987]).

2. Administrative subpoenas: SAPA 304; CPLR 2302

Officers presiding at administrative hearings are authorized to issue subpoenas at the request of any party (SAPA 304). Statutes governing adjudicatory proceedings before particular agencies may independently confer subpoena power, and if there is a specific statutory grant, the agency's power to issue subpoenas is derived solely from such grant (*Matter of Irwin v Board of Regents*, 27 NY2d 292 [1970]). In that absence of a statutory grant of subpoena power, agencies and attorneys of record for any party to the proceeding are granted the general subpoena power afforded courts and attorneys under CPLR 2302. A request to withdraw or modify a subpoena must first be made to the person who issued it, and motions to quash or enforce administrative subpoenas are not part of the hearing process and must be made in supreme court (CPLR 2304).

IV. Judicial Review

A. Preconditions to judicial review

1. Standing

Judicial review is available to persons who have suffered an unfavorable administrative decision and those that have a stake in the outcome of the administrative process, but whose injury is less direct. There is a two-step test for evaluating standing claims: (1) a party must show some harmful effect, whether economic or non-economic, and (2) the interest sought to be protected must be arguably within the zone of interest to be protected by the statute under which the agency has acted.

2. Exhaustion of administrative remedies

A party must attempt to obtain whatever administrative relief might be available before proceeding to the courts. The major exceptions are agency actions that are challenged as either unconstitutional or wholly beyond the agency's grant of power.

3. Ripeness

If a party to an administrative adjudication pursues all avenues of relief open within the agency without a satisfactory result, the case is ripe for judicial review. Pre-enforcement review is available only if the challenge is purely legal and further factual development would not contribute to the accurate resolution of the controversy.

4. Finality

A party must wait until all phases of the agency adjudication are complete before judicial review can be had. Interlocutory relief in the nature of prohibition is rarely available and requires grave or irreparable harm. Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to review becomes final and binding upon the petitioner (*see Civil Practice and Procedure, V.A.*).

B. Review of agency actions

1. Procedural basis of review: CPLR art 78, declaratory judgment action

Article 78 of the CPLR provides the judicial proceeding and procedure used to challenge agency determinations (*see Civil Practice and Procedure, XI.B.*) Proceedings under Article 78 are special proceedings, subject to specific procedural requirements (CPLR 7804). Actions for declaratory judgment under CPLR 3001 are generally not subject to the procedural strictures of Article 78 and are appropriate vehicles for challenging agency actions that cannot be reviewed by Article 78.

2. Determinations of law

A court's review of an agency's interpretation of law is limited. New York administrative agencies are entitled to deference in matters of statutory interpretation of legislation governing the agency and in issuing decisions within the agency's own special expertise (*Matter of Gruber [New York City Dept. of Personnel – Sweeny]*, 89 NY2d 225 [1996]). The standard of review is whether an agency's decision is supported by a rational basis (*id.*) or was affected by an error of law or was arbitrary and capricious or an abuse of discretion (CPLR 7803 [3]; *Matter of Incorporated Vil. of Lynbrook v New York State Pub. Empl. Relations Bd.*, 48 NY2d 398, 404-405 [1979]).

3. Findings of fact

Determinations of fact made after a formal adjudicatory hearing must be made on the record as a whole and be supported by substantial evidence (SAPA 307 [1]; CPLR 7803 [4]). Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support a conclusion (*Ridge Road Fire Dist. v Schiano*, 16 NY3d 494 [2011]); *Matter of Miller v DeBuono*, 90 NY2d 783 [1977]). It is less than a preponderance of the evidence or evidence beyond a reasonable doubt (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). Subsequent review is by the Appellate Division and is confined to the administrative record (CPLR 7804 [g]).

Agency determinations involving findings of fact made without a quasi-judicial hearing required by statute or law are also subject to a rational basis or arbitrary and capricious standard of review (*Colton v Berman*, 21 NY2d 322 [1967]). Once the court determines a rational basis exists for an agency's determination, its review is ended (*Matter of Sullivan County Harness Racing Assn. v Glasser*, 30 NY2d 269, 277-278 [1972]).

4. Discretionary determinations

An agency's discretionary acts and policy decisions may be set aside only if there is no rational basis for the exercise of discretion or the act complained of is arbitrary or capricious (*Peckham v Calogero*, 12 NY3d 424 [2009]). An action is arbitrary and capricious if it is "taken without sound basis in reason or regard to the facts" (*Peckham*, 12 NY3d at 431) [internal citations omitted]).

Administrative disciplinary penalties may be set aside only if such punishment constitutes an abuse of discretion (CPLR 7803 [3]). The penalty must be upheld unless it is so disproportionate to the offense in light of all the circumstances as to shock one's sense of fairness (*Matter of Pell v Board of Educ. of Union Free School Dist No 1 of Towns of Scarsdale & Mamaronek, Westchester County*, 34 NY2d 222, 232-234 [1973]).

V. Public Disclosure

A. Freedom of Information Law (FOIL): Public Officers Law §§ 86, 87, 88

Every "agency" (defined very broadly as "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature" [Public Officers Law § 86]) must make available for public inspection and copying all records, except those records or portions thereof that fall within certain enumerated exceptions (Public Officers Law § 87). Public Officers Law § 88 specifies the records that the state legislature must make available for public inspection and copying. Access to governmental records under FOIL does not depend on the purpose for which the records are sought (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267 [1966]).

B. Open Meetings Law: Public Officers Law §§ 103, 105

The Open Meetings Law requires public bodies (excepting judicial or quasi-judicial proceedings and political committees) to conduct all portions of any meeting in venues open to the general public on reasonable advance notice to the public, unless the public body calls an executive session (Public Officers Law § 103). An executive session may be called only by a motion on majority vote of the public body in public session, and the motion must identify the general topics to be discussed in the executive session (Public Officers Law § 105). The permitted topics include discussions regarding proposed or pending litigation, matters involving law enforcement and criminal investigations, employment and personnel matters, and the proposed acquisition of real property when publicity would affect the property's market value.

C. Reporting and recordkeeping requirements: Public Officers Law § 106

Minutes must be taken at all open meetings (including executive sessions), must include all matters voted upon, and must be made available to the public under FOIL.

BUSINESS RELATIONSHIPS
Business Corporations, Limited Liability Companies and Partnerships

Business Corporations

I. Formation and Nature

A. Certificate of incorporation: Business Corporation Law (BCL) 402

Formation of a corporation requires the filing of a certificate of incorporation with the Secretary of State containing certain detailed information, including the corporate name, the corporate purpose (which may be “to engage in any lawful activity”), the county where the office is to be located, specific information about the shares authorized to be issued, the duration of the corporation if other than perpetual, designation of the Secretary of State as agent for service of process, and, if desired, designation of a registered agent.

B. Adoption, amendment and repeal of by-laws: BCL 601

The initial by-laws are adopted by the incorporator or incorporators at an organizational meeting. Any by-law adopted by the incorporators is considered to be a by-law adopted by the shareholders. The by-laws may contain any provisions relating to the business of the corporation, the conduct of its affairs, and its rights and powers and those of its shareholders. Adoption, amendment or repeal of by-laws requires a majority vote of shareholders or, if provided in the certificate of incorporation or a by-law adopted by the shareholders, by requisite vote of the board of directors.

C. Business Corporation Law revision

The Business Corporation Law was substantially revised effective February 22, 1998, and now includes some provisions which are different for corporations depending on whether they were in existence on February 22, 1998, or formed after that date.

II. Management and Control

A. Shareholders

1. Right to dissent and be paid for shares: BCL 623, 806, 910

New York gives any dissatisfied shareholder of a domestic corporation who dissented from certain types of corporate action – a minimum ownership interest is not required – appraisal rights, specifically, the right to petition the courts for the fair cash value of his or her shares. The purpose is to allow a corporation to proceed with an action it views as beneficial, while protecting the rights of dissenting shareholders.

In particular, section 910 of the Business Corporation Law entitles a shareholder to appraisal rights if he or she opposed a plan of merger or consolidation to which the corporation is a party, subject to certain enumerated exceptions, including where the shareholder’s shares are

publically traded on a securities exchange. Appraisal rights are also available to a shareholder who opposed the transfer or disposition of all or substantially all of the assets of a corporation not in the regular course of business, other than a transaction for cash in combination with the dissolution of the selling company, and to the shareholder of a target company who opposed a share exchange.

Section 806 of the Business Corporation Law also grants shareholders appraisal rights if the shareholder opposed certain amendments to the certificate of incorporation that alter, abolish or impair shareholder preferential rights, redemption rights and preemptive rights, or that exclude or limit voting rights.

Dissenting shareholders must follow the procedures and time limits contained in section 623 of the Business Corporation Law. The shareholder must file a written objection to the action, including a demand for payment of the fair value of his or her shares if the corporate action is taken. Upon consummation of the corporate action, the corporation must timely make a written offer to each shareholder who has filed a notice of election to dissent to pay for his or her shares at a specified price, which the corporation considers to be their fair value. If the corporation fails to make a timely offer of payment, or if the dissenting shareholder fails to agree with the price specified in the offer, the corporation may initiate a special proceeding to fix the fair value of their shares; if it fails to do so, the shareholder may initiate the proceeding (BCL 634).

2. Minority shareholder's right to petition for judicial dissolution: BCL 1104-a

The holders of 20% or more of the outstanding shares of a closely held business corporation may seek dissolution of the corporation on the grounds that: (1) the directors have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholder; or (2) the assets of the corporation are being looted, wasted or diverted for non-corporate purposes by its directors or officers or those in control. The court in making a determination whether to involuntarily dissolve the corporation must consider whether liquidation is the only feasible means for a shareholder to obtain a fair return and whether liquidation is reasonably necessary for the protection of the rights of any substantial number of shareholders.

3. Deadlock among directors or shareholders: BCL 1104

The holders of 50% or more of the outstanding shares of a corporation may seek dissolution of the corporation on the grounds that: (1) the directors are so divided respecting the management of the corporation's affairs that the votes required for board action cannot be obtained; or (2) the shareholders are so divided that the votes required for the election of directors cannot be obtained; or (3) there is internal dissension, and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders.

4. Voting by shareholders: BCL 614, 803, 909

Any corporate action, other than the election of directors, taken by a vote of the shareholders, generally requires a majority of the votes cast at a meeting of shareholders by the

holders of shares entitled to vote thereon, unless otherwise provided by statute, the certificate of incorporation or a by-law adopted by the shareholders (BCL 614). Statutory exceptions include a majority of the total number of voting shares being required to approve an amendment to the certificate of incorporation and, for a corporation in existence on February 22, 1998, two-thirds of the votes cast to approve a merger or any sale, lease, exchange or other disposition of all or substantially all of the assets of the corporation, if not made in the usual or regular course of the business actually conducted by the corporation (BCL 803, 909).

Except as otherwise provided in the certificate of incorporation or a by-law adopted by the shareholders, an abstention shall not constitute a vote cast (BCL 614).

B. Directors

1. Number, election and removal: BCL 614, 702, 706

A board of directors may consist of one or more members (BCL 702). In the absence of a controlling provision in the by-laws or certificate of incorporation, directors are elected by a plurality of the votes cast at a meeting of shareholders by the holders of shares entitled to vote in the election (BCL § 614 [a]). Directors may be removed by vote of the shareholders for cause, and if the certificate of incorporation or by-laws so provide, without cause (BCL 706).

2. Quorum and voting: BCL 707, 708

A majority of the board constitutes a quorum for the transaction of business, unless a greater or lesser proportion is required in the certificate of incorporation or the by-laws, but not less than one-third (BCL 707). Board action requires the majority vote of the directors present at the time of the vote provided a quorum is present (BCL 708 [d]).

3. Interested directors: BCL 713

A contract or transaction between a corporation and one of its directors, or any other business entity in which a director is also a director or has a substantial financial interest, is not void or voidable by reason alone of the director's interest or by reason alone that such director is present at the meeting of the board which approves such contract (the interested director may be counted to establish a quorum) or that such director's votes are counted for such purpose if:

- The material facts as to such director's interest in such contract and as to any such common directorship or financial interest are disclosed in good faith or known to the board, and the board approves such contract or transaction by a vote sufficient for such purpose without counting the vote of such interested director, or, if the votes of the disinterested directors are insufficient to constitute an act of the board, by unanimous vote of the disinterested directors; or
- If the material facts as to such director's interest in such contract and as to any such common directorship or financial interest are disclosed in good faith or known to the

shareholders entitled to vote thereon, and such contract is approved by vote of such shareholders.

If an interested director contract is not approved as stated above, the contract is still not voidable if the party or parties establish affirmatively that the contract was fair and reasonable to the corporation at the time it was approved by the board or shareholders.

4. Loans to directors: BCL 714

Corporate loans to directors and guarantees of director obligations must be approved by a shareholder vote. A majority of the shares entitled to vote constitutes a quorum, but shares of directors benefited by the transaction may not vote or be included in the determination of a quorum. Alternatively, for corporations formed after February 22, 1998, and for other corporations if so provided in the certificate of incorporation, the board may determine that the specific loan or guarantee benefits the corporation and either approve the specific transaction or a general plan authorizing loans and guarantees.

C. Officers: election and removal: BCL 715, 716

Officers are typically elected by the board and may be removed by the board with or without cause (BCL 715, 716). If the certificate of incorporation permits, officers may be elected by shareholders instead of the board, and officers so elected may only be removed with or without cause by the vote of the shareholders, but an officer's authority to act as an officer may be suspended by the board for cause (*id.*).

D. Duties and liabilities of shareholders, officers and directors

1. Statutory liabilities of shareholders, officers and directors: BCL 630, 719, 720

The ten largest shareholders of closely held corporation are jointly and severally liable to its employees for all wages due them for services they performed for the corporation (BCL 630).

Directors are jointly and severally liable if they vote for or concur (a director is presumed to concur unless he or she expressly dissents) in a declaration of dividends or purchase of shares contrary to BCL 513 or a loan to a director contrary to BCL 714 (BCL 719). There is a cause of action against a director or officer for self-dealing or loss or waste of corporate assets (BCL 720).

2. Ordinarily prudent person standard and business judgment rule: BCL 715, 717

Pursuant to the business judgment rule (BCL 715, 717), officers and directors must perform their duties in good faith and with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances. In performing this duty, they are entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, in each case prepared or presented by:

- One or more other officers or employees of the corporation or of any other corporation of which at least 50% percent of the outstanding shares of stock entitling the holders thereof to vote for the election of directors is owned directly or indirectly by the corporation, whom the officer believes to be reliable and competent in the matters presented; or
- Counsel, public accountants or other persons as to matters that the officer believes to be within such person's professional or expert competence, so long as in so relying he or she shall be acting in good faith and with such degree of care, but the officer shall not be considered to be acting in good faith if he or she has knowledge concerning the matter in question that would cause such reliance to be unwarranted.

In addition, a director is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, presented by a committee of the board upon which he or she does not serve, as to matters within its designated authority, which committee the director believes to merit confidence, so long as in so relying he or she shall be acting in good faith and with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances, but a director shall not be considered to be acting in good faith if he or she has knowledge concerning the matter in question that would cause such reliance to be unwarranted (BCL 717).

An officer or director who so performs his or her duties shall have no liability by reason of being or having been an officer or director of the corporation (BCL 715, 717).

III. Professional Service Corporations

A. Requirements: BCL 1503, 1504

Individuals authorized by law to render the same professional service may form a professional service corporation for the purpose of providing that service. Formation of a professional service corporation requires the filing of a certificate of incorporation with the Secretary of State containing certain detailed information, including the profession and a list of the individuals who are to be its shareholders, directors and officers, all of whom must be licensed in the profession. Certificates of authority issued by the licensing authority must accompany the filing of the formation documents (BCL 1503). A professional service corporation may only render services through licensed individuals in the same profession, and any document generated by the corporation must bear the signature of the licensed individual in charge of such document (BCL 1504).

B. Professional relationships and liabilities: BCL 1505

Each shareholder of a professional service corporation is personally liable for any negligent or wrongful act or misconduct committed by him or her or any person under his or her direct supervision or control while rendering professional services on behalf of the corporation. Such shareholders are not liable for the negligence of any other shareholder or person if they did not supervise them or personally participate in the questioned actions with them, nor are they responsible personally for contractual debts and obligations. Each shareholder of a professional

service corporation continues to be governed by the same professional regulatory and licensing scheme applicable to the shareholder prior to formation.

Limited Liability Companies

I. Articles of organization, publication: Limited Liability Company Law §§ 203, 206

Formation of a limited liability company (LLC) requires filing of articles of organization with the Secretary of State containing certain detailed information, including the company name, the county where the office is to be located, designation of Secretary of State as agent for service of process, and, if desired, designation of a registered agent. An LLC is formed at the time of filing the initial articles of organization. At the time of formation, an LLC must have at least one member (Limited Liability Company Law § 203).

The LLC must, in accordance with detailed statutory requirements, publish a copy of its registration or a notice containing its substance in two newspapers (selected by the county clerk), in the county in which its principal office will be located, once a week over a period of six consecutive weeks, and it must file an affidavit of such publication with the Secretary of State within 120 days following the effective date of the LLC registration. In the event of a failure to comply with the publication requirements, the authority of an LLC to conduct business within the state is suspended and the LLC is unable to maintain in its name any action or special proceeding; however, it does not preclude the LLC from defending any action or proceeding brought against it, impair the validity of any contract or other act of the LLC, impair the rights or remedy of any other party by virtue of any contract of the LLC, or result in any member or manager of the LLC becoming liable for the LLC's contractual obligations (Limited Liability Company Law § 206).

II. Management

A. Operating agreement: Limited Liability Company Law § 417

The members of an LLC must adopt a written operating agreement, analogous to the by-laws of a business corporation or the partnership agreement of a partnership, before, at the time of, or within 90 days following the filing of the LLC's articles of organization, to be effective upon formation of the LLC or at such later time as provided in the operating agreement. The operating agreement may be amended from time to time, but no amendment may adversely affect a member without that member's consent.

B. By members or managers: Limited Liability Company Law §§ 401, 402, 408, 417, 609

LLCs may be managed by their members or by managers appointed or elected by the members. Unless its articles of organization provide that the LLC will be managed by managers, the LLC will be deemed to be managed by its members, in their capacity as members, in proportion to their shares of the LLC profits (Limited Liability Company Law § 401).

If the articles of organization provide for management by managers, such managers will hold offices and have responsibilities accorded them by members as provided in the operating agreement, and any action to be taken by a vote of the managers requires a majority vote (Limited Liability Company Law §§ 402, 408).

Members and managers are generally not personally liable for debts and obligations of the LLC or each other, whether arising in contract or tort, solely by reason of being a member or manager (Limited Liability Company Law § 609 [a]). The ten members of the LLC with the largest percentage ownership interest are jointly and severally liable to its employees for wages for services they performed for the LLC (Limited Liability Company Law § 609 [c]).

The operating agreement may eliminate or limit the personal liability of managers to the LLC or its members for money damages arising from breaches of the duty of care but not for acts taken in bad faith or for pecuniary gain (Limited Liability Company Law § 417).

III. Professional Service Limited Liability Companies

A. Requirements: Limited Liability Company Law § 1203

PLLCs may be formed to engage in any business or activity for which an LLC may be formed and provide more than one type of professional service except as noted below. If the PLLC engages in multiple permitted professions, at least one member of the PLLC must be licensed in New York to practice each such profession. All professional services must be rendered by licensed individuals.

Certain professionals may only join in single-purpose PLLCs, including lawyers, doctors, dentists, veterinarians, engineers, land surveyors, architects, licensed social workers, and various professions in the mental health field.

Generally, the formation requirements of the Limited Liability Company Law applicable to LLCs are applicable to PLLCs, including the filing of articles of organization with the Secretary of State containing certain detailed information, proper publication of a copy of its registration or a notice containing its substance, and the adoption of an operating agreement. Certificates of authority for the licensed individuals issued by the licensing authority must accompany the filing of the formation documents.

B. Professional relationships and liabilities: Limited Liability Company Law § 1205

Each member of a PLLC is personally liable for any negligent or wrongful act or misconduct committed by him or her or any person under his or her direct supervision or control while rendering professional services on behalf of the PLLC, but such members are not personally liable for the negligence of other members or persons if they did not supervise them or personally participate in the questioned actions with them, nor are they responsible personally for the contractual debts and obligations of the PLLC or any other member. Each member of a PLLC continues to be governed by the same professional regulatory and licensing scheme applicable to the member prior to formation.

Partnerships - Formation and Nature

I. General Partnerships: Partnership Law §§ 2, 10, 11, 24, 25, 26

A partnership is an association of two or more persons to carry on as co-owners a business for profit (Partnership Law § 10). For this purpose, “person” includes individuals, partnerships, corporations, and other associations (Partnership Law § 2).

Section 11 of the Partnership Law sets forth the rules for determining the existence of a partnership. Participation in the profits is *prima facie* evidence of a partnership. When there is no written partnership agreement between the parties, whether a partnership in fact exists is determined from the conduct, intention, and relationship between the parties. Factors to be considered in determining the existence of a partnership include sharing of profits as well as sharing of losses, ownership of partnership assets, joint management and control, joint liability to creditors, and the intention of the parties (*Brodsky v Stadlen*, 138 AD2d 662 [2d Dept 1988]).

All partners are jointly liable for debts and obligations of the partnership (Partnership Law § 26) and jointly and severally liable for loss or injury to a third person chargeable to the partnership because of a partner’s wrongful act or omission or for a partner’s breach of trust (Partnership Law §§ 24, 25).

II. Limited Partnerships: Partnership Law (Revised Limited Partnership Act) § 121-201

A limited partnership is a partnership formed by two or more persons having as members one or more general partners and one or more limited partners. Limited partners are not personally liable for the obligations of the partnership and may not participate in the management of the limited partnership’s business without potentially losing their limited liability status. The general partner of a limited partnership has unlimited liability for all debts and obligations of the limited partnership.

Formation of a limited partnership requires the execution by the general partners of a partnership agreement and the filing of a certificate of limited partnership with the Secretary of State containing certain detailed information, including the name, the county in which the partnership office is located, the name and address of each general partner, its duration, designation of the Secretary of State as agent for service of process, and, if desired, designation of a registered agent. A limited partnership must meet the same statutory publishing requirements as an LLC.

III. Registered Limited Liability Partnerships: Partnership Law §§ 26, 121-1500

A general partnership engaged in professional service activities may form a registered limited liability partnership (RLLP). Each of its partners must be a professional, and at least one of them must be authorized by law to render such professional service within New York. The authorizations and restrictions for an RLLP to engage in multiple permitted professions are the same as for a PLLC (*see* Business Relationships, III.A.).

Formation of an RLLP requires the filing of a certificate of registration with the Secretary of State containing detailed information, including the name, the address of its principal office, the profession to be practiced, designation of the Secretary of State as agent for service of process, and, if desired, designation of a registered agent. An RLLP must meet the same statutory publishing requirements as an LLC.

A RLLP must file a status statement with the Department of State every five years to maintain its status as a RLLP, containing among other things, the name of the RLLP, the address of its principal office, the post office address to which the Secretary of State would send a copy of any process against the RLLP served upon him, and a statement that it is eligible to register as a RLLP.

Each partner in an RLLP is personally liable for any negligent or wrongful act or misconduct committed by him or her or any person under his or her direct supervision or control while rendering professional services on behalf of the RLLP, but such partners are not liable for the negligence of other partners or persons if they did not supervise them or personally participate in the questioned actions with them. Nor are they responsible personally for the contractual debts and obligations of the RLLP except to the extent at least a majority of the partners have otherwise agreed. Each partner in an RLLP continues to be governed by the same professional regulatory and licensing scheme applicable to the partner prior to registration.

CIVIL PRACTICE AND PROCEDURE

I. Organization of New York's Court System and Subject Matter Jurisdiction of New York Courts

A. Principal appellate courts

1. Court of Appeals: NY Const art VI, § 3

The Court of Appeals is the highest court in the court system. It has no original jurisdiction but exercises only appellate jurisdiction without regard to the amount in controversy. Its jurisdiction is generally limited to questions of law.

2. Appellate Division of Supreme Court (First, Second, Third and Fourth Judicial Departments; *see* Appendices A, B); NY Const art VI, § 4

The appellate division is a single statewide appellate court, divided into four judicial departments, and is the principal intermediate appeals court. Pursuant to the doctrine of *stare decisis*, trial courts in a given department are required to follow precedent set by another department until the Court of Appeals or the department in which the trial court sits pronounces a contrary rule. The appellate divisions should accept the decisions of sister departments as persuasive authority, but they are free to reach a contrary result (*Mountain View Coach Lines, Inc. v Storms*, 102 AD2d 663 [2d Dept 1984]).

3. Appellate Terms of the Supreme Court: NY Const art VI, § 8

Appellate Terms of the Supreme Court exist in the First Judicial Department (consisting of two counties within New York City) and Second Judicial Department (consisting of three counties within New York City and seven other counties)(*see* Appendix B). The Appellate Terms hear appeals from the Civil and Criminal Courts of New York City and the Appellate Term of the Second Department also hears appeals from district, county (except felony cases), city, town and village courts.

B. Principal trial courts

1. Supreme Court: NY Const art VI, § 7

The Supreme Court has general original jurisdiction of all cases in law and equity without monetary limitation unless its jurisdiction has been specifically proscribed. In some cases its jurisdiction is concurrent with that of other courts. It has exclusive subject matter jurisdiction over matrimonial actions and wrongful death claims. In New York City, the Supreme Court hears all felonies.

The Commercial Division of the Supreme Court handles claims meeting a minimum monetary threshold and involving a multitude of commercial disputes (22 NYCRR § 202.70 [a], [b]. Shortly after commencement of an action, any party may seek assignment of his commercial

case to the Commercial Division and upon transfer, the parties are subject to the specific rules of practice for the Commercial Division (*see* 22 NYCRR § 202.70 [g]). The Rules dictate, among other matters, electronic submission and form of papers, attorney appearances, limitations on discovery, discovery of electronically stored information (*see* Civil Practice and Procedure, X.A.), adherence to discovery schedules and discovery disputes, motions, and trials.

2. Court of Claims: NY Const art VI, § 9; Court of Claims Act

The Court of Claims has exclusive jurisdiction over tort and contract claims against the State of New York. The Court of Claims may not exercise equitable jurisdiction and does not have jurisdiction over non-state actors.

3. County Court: NY Const art VI, § 11

County Courts exist only in the Second Department outside New York City and Long Island and the Third and Fourth Judicial Departments (which include counties that are all outside New York City). County Courts have jurisdiction over all criminal matters, but hear primary felonies. They have limited jurisdiction over civil cases where the amount to be recovered does not exceed \$25,000 and have jurisdiction over summary proceedings to recover possession of real property. They also have jurisdiction over appeals from city, town and village courts.

4. Surrogate's Court: NY Const art VI, § 12; Surrogate Court Procedure Act (SCPA)

The Surrogate's Court has jurisdiction over all proceedings relating to the affairs of decedents, probate of wills, administration of estates, and guardianship of the property of minors. It also has concurrent jurisdiction with the Family Court over adoptions and concurrent jurisdiction with Supreme Court over the administration of a decedent's estate (although such matters are generally disposed of in the Surrogate's Court) and over the allocation and distribution of the proceeds of wrongful death actions. The Surrogate's Court has full equity powers in matters over which it has jurisdiction.

5. Family Court: NY Const art VI, § 13; Family Court Act (FCA)

The Family Court has jurisdiction over child abuse and neglect proceedings, spousal and child support proceedings, proceedings to determine paternity, proceedings for the permanent termination of parental rights, person-in-need-of-supervision (PINS) proceedings, family offense proceedings (concurrent and simultaneous with the criminal courts), juvenile delinquency proceedings, adoptions, and custody and support proceedings when referred by the Supreme Court.

C. Other courts

1. New York City Civil Court; New York City Criminal Court: NY Const art VI, § 15

The New York City Civil Court has jurisdiction within the City of New York over monetary actions where the amount to be recovered does not exceed \$25,000 and over summary proceedings to recover possession of real property. The New York City Criminal Court has criminal jurisdiction within the City of New York over misdemeanors and violations.

2. District, city, town and village courts: NY Const art VI, §§ 16, 17; Uniform Court Acts § 202

District Courts (established only in Nassau and Suffolk Counties located in the Second Judicial Department) and city courts have jurisdiction over monetary actions where the amount to be recovered does not exceed \$15,000. Town courts and village courts have jurisdiction over monetary actions where the amount to be recovered does not exceed \$3,000. All of these courts have criminal jurisdiction over misdemeanors and violations.

II. Commencement of Action and Service of Process

A. Commencement by filing, including electronic filing: CPLR 304, 22 NYCRR §§ 202.5-b, 202.5-bb

Except in town and village courts, actions are commenced by the paper filing or, where authorized, electronic filing of a summons and complaint or summons with notice with the clerk of the court in the county where the action is brought. A special proceeding is commenced by the paper filing or, where authorized, electronic filing of a notice of petition and petition with the clerk of the court in the county where the special proceeding is brought.

In some counties, as to certain types of actions, commencement by electronic filing is mandatory (22 NYCRR §§ 202.5-b, 202.5-bb). In some other matters, e-filing is authorized. Information about New York State Courts Electronic Filing System (“NYSCEF”) can be found on the website of the Uniform Court System at <https://iapps.courts.state.ny.us/nyscef/HomePage>.

B. Service of process: CPLR 303, 306-b, 308, 310, 311, 311-a

A nondomiciliary who commences an action in New York, even if he or she is not otherwise subject to personal jurisdiction in New York, submits himself or herself to personal jurisdiction in any separate action brought against him or her by any party to the pending action and is deemed to have designated his or her New York attorney as an agent upon whom process may be served in such separate action (CPLR 303). A defendant can use CPLR 303 to acquire jurisdiction over the plaintiff in a separate action instead of interposing a counterclaim.

Upon commencement by filing, service in an action must be made within 120 days (CPLR 306-b). If the particular method of serving process requires two acts, such as deliver-and-mail service or affix-and-mail service pursuant to CPLR 308 (2) or (4), both acts must be performed within the 120-day period prescribed by CPLR 306-b. In an action or proceeding in which the statute of limitations is four months or less, as for example, a CPLR Article 78 proceeding, service of process is to be made no later than 15 days after the date on which the relevant statute of limitations expires (CPLR 306-b).

If service is not timely made, the court, upon motion, must dismiss the action without prejudice as to the defendant not served, or upon good cause shown or in the interest of justice, extend the time for service. If the applicable statute of limitations has since expired, the plaintiff must make a motion (or raise the issue in response to a defendant's motion to dismiss) for an extension of time to serve while the action or proceeding is still pending or commencement of a new action will be time-barred (CPLR 306-b; *Sottile v Island Home for Adults*, 278 AD2d 482, 484 (2d Dept 2000]). There are two separate standards by which a court may measure an application for an extension of time to serve. Good cause requires a threshold showing of reasonable diligence in attempting to effect service on the defendant. The interest of justice standard is a broader and more flexible ground for extension. Diligence in effecting service is one factor the court may consider along with other relevant factors, including the expiration of the statute of limitations, the meritorious nature of the claim, the length of delay and promptness of the request, prejudice to the defendant, and any other relevant factors (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95 [2001]).

Personal service in an action upon a natural person must be made pursuant to CPLR 308 subsections (1) personal delivery, (2) deliver-and-mail service, (3) service upon an agent, (4) affix-and-mail service, or (5) court-ordered service. Each method of personal service requires adherence to the particular provisions of the relevant subsection of CPLR 308. For example, service under CPLR 308 (2) requires delivery of the process to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the defendant, mailing the process to the defendant at his or her last known residence or actual place of business, and thereafter filing proof of service. Service under CPLR 308 (4) requires affixing the process to the door of the actual place of business, dwelling place or usual place of abode of the defendant, mailing the process to the defendant at his or her last known residence or actual place of business, and thereafter filing proof of service. Service under CPLR 308 (4) is not available unless service under subsections one and two cannot be made with due diligence.

Personal service upon a partnership is made pursuant to CPLR 310 by serving the process on any one of the partners (CPLR 310 [a]). A partnership may also be served by serving the managing or general agent of the partnership or the person in charge of the partnership office within the state at such office, mailing the process to the partner intended to be served by first class mail to his or her last known residence or the partnership place of business, and thereafter filing proof of service (CPLR 310 [b]).

If a particular method of service requires filing of proof of service, such filing is a prerequisite to the completion of service, and service is complete ten days after the filing. The defendant's time to respond does not begin to run until service is complete.

Personal service upon a domestic or foreign corporation is made pursuant to CPLR 311 by serving an officer, director, managing or general agent, or cashier or assistant cashier, or by service upon a registered agent or the Secretary of State (BCL 306, *see* Business Relationships, Business Corporations, I.A.).

Personal service upon a domestic or foreign limited liability company (LLC) is made pursuant to CPLR 311-a by serving the process on any member of the LLC, if the management of the LLC is vested in its members, or any manager of the LLC, if the management of the LLC

is vested in one or more managers, or by service upon the Secretary of State (Limited Liability Company Law § 303, *see* Business Relationships, Limited Liability Companies, I.).

C. Service outside New York: CPLR 313

Any person domiciled in the state or subject to personal jurisdiction under the long-arm statute may be served outside the state in the same manner as service is made within the state by the same parties authorized to make service within or without the state. Generally, papers may be served by any person over the age of 18 who is not a party in the action (CPLR 2103).

III. Personal Jurisdiction

A. Traditional bases for jurisdiction: CPLR 301

Neither CPLR 302 nor any similar provision which deals with acquisition of jurisdiction in particular situations supersedes or operates as a limitation upon acquisition of jurisdiction over persons, property or status as previously permitted under common law and judicial decision. Jurisdiction over persons, property and status is divided into three categories: in personam, in rem and quasi in rem (CPLR 301). With respect to in personam jurisdiction, New York recognizes five potential bases: presence, consent, domicile, doing business and “long-arm jurisdiction.” The first four of these bases fall within CPLR 301.

1. Constitutional limits

Under New York law, for a plaintiff to demonstrate personal jurisdiction over a defendant, the plaintiff must have either general jurisdiction under CPLR 301 or long-arm jurisdiction under CPLR 302 (*see* Civil Practice and Procedure, III.B). General jurisdiction permits a court to hear all claims against an entity, whereas specific jurisdiction permits a court to hear only those claims that arise out of the entity’s contacts within the state.

Historically under CPLR 301, a foreign corporation is subject to general personal jurisdiction in New York if it is present and doing business in the state, that is, if it is engaged in “continuous, permanent, and substantial activity in New York” (*Landfill Res. Corp. v Alexander & Alexander Servs., Inc.*, 918 F2d 1039, 1043 [2d Cir 1990]).

Pursuant to the landmark decision of *Daimler v Bauman* (571 US 117 [2014]), general personal jurisdiction can no longer be asserted against a foreign corporation based solely on the corporation’s continuous and systematic business activity in New York. Due process limits the exercise of general jurisdiction to a state in which the corporation is “at home.” If a corporation is not incorporated in New York or maintaining its principal place of business here, New York courts will only exercise general personal jurisdiction in the exceptional case — when the foreign corporation’s operations are “so substantial and of such a nature as to render the corporation essentially ‘at home’” (*Daimler*, 571 US at 139).

B. Long-arm jurisdiction: CPLR 302

Whereas the traditional jurisdictional bases of presence, domicile and doing business, confer “general jurisdiction,” the state long-arm statutes confer only “specific jurisdiction,” meaning that the cause of action must arise out of the defendant’s state-connected activity. CPLR 302 contains a list of specific state-directed activities that permit the assertion of *in personam* jurisdiction as to a cause of action arising from those acts. As to causes of action arising from the enumerated acts, the New York courts may exercise personal jurisdiction over a non-domiciliary who in person or through an agent:

- Transacts any business within New York or contracts to supply goods or services here;
- Commits a tortious act within New York, except as to a cause of action for defamation;
- Commits a tortious act outside New York that causes injury within New York (the injured person or damaged property must be located in the state at the time of the injury or damage), except as to a cause of action for defamation, if the defendant (i) regularly does or solicits business, or engages in any other persistent course of conduct in New York, or derives substantial revenue from goods used or consumed or services rendered in New York, or (ii) expects or reasonably should expect the act to have consequences in New York and derives substantial revenue from interstate or international commerce; or
- Owns, uses or possesses real property within New York.

CPLR 302 (b) also confers personal jurisdiction over a non-resident defendant in a matrimonial action if certain prerequisites are satisfied (*see* Matrimonial and Family Law, II.C.).

Even if a plaintiff’s case falls within a particular statutory grant of long-arm jurisdiction, the particular assertion of long-arm jurisdiction must not exceed the limits imposed by the due process clause of the United States and New York Constitutions.

IV. Venue and Forum Non Conveniens

A. Proper venue for various types of actions: CPLR 503, 504, 507

The place of trial is the county in which either the plaintiff or defendant resides at the time of commencement of the action, the county in which a substantial part of the events or omission giving rise to the claim occurred, or if neither party resides in the state, any county designated by the plaintiff (CPLR 503). A corporation is a resident of the county in which its principal office is located. A partnership is deemed a resident of the county in which it has its principal office as well as the county where the partner suing or being sued actually resides (CPLR 503).

The place of trial of all actions against municipal defendants is the county in which such municipal defendant is located (CPLR 504).

The place of trial of any action in which judgment would affect title to real property is the county where the real property is situated (CPLR 507).

B. Change of venue: CPLR 510

A court upon motion may change venue upon the grounds that venue was improperly placed, an impartial trial cannot be had in the proper county, or if the convenience of material witnesses and the ends of justice will be promoted by the change.

C. Forum non conveniens: CPLR 327

A court is permitted, even though it has jurisdiction, to decline to entertain the action after examining all the relevant factors of private inconvenience and public interest, including whether the chosen forum is significantly inconvenient for the trial of the action and whether a more appropriate forum is available. Note that, New York, unlike federal courts, does not necessarily require an alternative forum as a precondition to a forum non conveniens dismissal (*see e.g. Islamic Republic of Iran v. Pahlavi*, 62 NY2d 474, 480-81 [1984] (*cf. Piper Aircraft Co. v. Reyno*, 454 US 235 [1982])). In New York, the court may stay or dismiss the action, in its entirety or in part, upon any conditions that may be just. Such conditions may include, for example, waiver of defenses such as lack of jurisdiction or statute of limitations. If the alternate venue is another New York court, the court may not transfer the case, unlike federal procedure which permits such a transfer (28 USC § 1404 [a]).

V. Limitations of Time

A. Statutes of limitations for various types of actions: CPLR 201, 202, 203, 212, 213, 214, 214-a, 215, 217, 217-a; EPTL 5-4.1

An action must be commenced within the limitations period specified in Article 2 unless a different time is prescribed by law or a shorter time is prescribed by written agreement. A court cannot extend the time limited by law for the commencement of an action (CPLR 201).

Under New York's borrowing statute, if a nonresident plaintiff's claim accrued outside of New York, the claim must be timely under both the law of New York and that of the place of accrual. An out-of-state claim that accrues in favor of a New York resident will be governed by the New York statute of limitations regardless of whether the other state's statute of limitations is shorter than that of New York (CPLR 202).

The plaintiff must interpose the claim within the applicable statute of limitations. In all courts except justice courts, a claim is deemed interposed when the initiatory papers are filed with the clerk (CPLR 203).

If there are several defendants and they are united in interest, commencement as to one will preserve the action as against the others (CPLR 203 [c]). Under the united-in-interest doctrine, the assertion of a claim against a defendant after expiration of the statute of limitations will relate back to the commencement date of a timely action against a related party under the following circumstances:

- The claims against the parties arose out of the same conduct, transaction or occurrence;
- The defendant reasonably should have known that the plaintiff made a mistake in failing to timely identify the proper parties; and
- The defendant and the party originally sued have such a unity of interest that, by reason of their relationship, the defendant can be charged with such notice of the action that he or she will not be prejudiced in defending the case.

A defense or counterclaim is interposed when a pleading containing it is served, and it is not barred if it was not barred at the time the claims asserted in the complaint were interposed. If the defense or counterclaim arose from transactions or occurrences upon which a claim in the complaint depends, the defense or counterclaim is not barred to the extent of the demand in the complaint, even if time-barred at the time the claims asserted in the complaint were interposed (CPLR 203 [d]).

A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed provided the original pleading gave notice of the same conduct, transaction or occurrence (CPLR 203 [f]).

Where a limitations period is measured from discovery of the wrong, the action must be commenced within the stated limitations period from the wrong itself or two years from the discovery of the wrong, whichever is longer (CPLR 203 [g]).

The precise limitations periods for various types of actions are generally contained in the CPLR. Common limitations periods are set forth here; however, this list is not exhaustive.

CPLR 212 outlines claims that are subject to a ten-year limitation period, including adverse possession claims.

CPLR 213 sets forth the types of actions to be commenced within six years including:

- An action for breach of contract, express or implied, except as otherwise provided;
- An action based upon fraud (the greater of six years from the time the fraud was perpetrated or two years from the time the fraud was discovered or could with reasonable diligence have been discovered); and
- An action for which no limitation is specifically prescribed by law.

CPLR 214 delineates the types of actions to be commenced within three years, including:

- An action to recover damages for personal injuries;
- An action to recover damages for injury to property; and
- An action to recover damages for malpractice, other than medical, dental or podiatric malpractice, regardless of whether the underlying theory is based in contract or tort.

Medical, dental or podiatric malpractice actions must be commenced within two years and six months of the alleged act, omission or failure (CPLR 214-a). If there is continuous treatment

for the same illness, injury or condition that gave rise to the alleged act or omission, the statute is tolled until the date of the last treatment. If the action is based upon discovery of a foreign object left in the patient's body (excluding devices placed in the patient for ongoing treatment), the commencement period is tolled until the earlier of one year of the date of discovery or of the date of discovery of facts which would reasonably lead to discovery. If the action is based upon the failure to diagnose cancer or a malignant tumor, whether by act or omission, the commencement period is tolled until the later of either (i) when the person knows or reasonably should have known of the act or omission and knows or reasonably should have known that the act or omission has caused injury (but no later than seven years from the act or omission) or (ii) the date of the last treatment where there is continuous treatment.

CPLR 215 sets forth the types of actions to be commenced within one year, including:

- An action to recover damages for intentional torts, such as assault and defamation; and
- An action upon an arbitration award.

Unless a shorter time is provided in the law authorizing the proceeding, a special proceeding under Article 78 must be commenced within four months after the determination to be reviewed becomes final and binding (CPLR 217).

Actions against municipalities to recover damages for personal injury or property damage, other than for wrongful death, must be commenced within one year and 90 days after the cause of action accrues (CPLR 217-1; General Municipal Law § 50-i).

Wrongful death actions must be commenced within two years after the decedent's date of death (EPTL 5-4.11; General Municipal Law § 50-i; *see Torts and Tort Damages, I.H.*).

B. Claims against municipalities: General Municipal Law §§ 50-e, 50-i; CPLR 217-a

An action may not be maintained against a municipality, fire district or school district to recover damages alleged to have been sustained by reason of the negligence or wrongful act of the defendant unless a notice of claim has been served in accordance with General Municipal Law § 50-e (General Municipal Law § 50-i). The notice of claim must be served within 90 days after the claim arises or, in the case of wrongful death, 90 days from the appointment of a representative of decedent's estate. The notice of claim must be in writing, sworn to by or on behalf of the claimant, and shall set forth:

- The name and address of the claimant and his or her attorney, if any;
- The nature of the claim;
- The time when, place where and manner in which the claim arose; and
- The items of damage or injuries claimed to have been sustained.

The court, in its discretion, may extend the time to serve a notice of claim, but the extension shall not exceed the statute of limitations for commencing the action against the

municipality or other public corporation, i.e., one year and 90 days after the happening of the event or, in the case of wrongful death, within two years of the death of the decedent (General Municipal Law §§ 50-e, 50-i). In determining whether to extend the time to serve a notice of claim, the court must consider whether the municipality or its insurance carrier had actual knowledge of the facts constituting the claim within 90 days of the event, and all other relevant factors, including whether the claimant was an infant or incapacitated, whether the claimant justifiably relied upon settlement representations of a representative of the municipality, and whether the delay in serving the notice of claim substantially prejudiced the municipality in maintaining its defense on the merits (General Municipal Law § 50-e [5]). The statutory factors are a non-exhaustive list of factors the court should weigh (*Williams v Nassau County Med. Ctr.*, 6 NY3d 531 [2006]).

The time limits for service of a notice of claim and for commencing an action, as set forth in General Municipal Law §§ 50-e and 50-i, apply also to actions for property damage, personal injuries or wrongful death against any political subdivision of the state, state agency, public authority or public benefit corporation that is entitled to receive a notice of claim as a condition precedent for the commencement of an action (CPLR 217-a).

C. Tolling: CPLR 207, 208, 210

When a cause of action accrues against a defendant and the defendant is absent from the state, the limitations period is tolled until the defendant returns. If the defendant leaves the state after a cause of action accrues and remains out of state continuously for four months or more, the period of absence is not part of the limitations period (CPLR 207). The absence of the defendant will not suspend the running of the statute of limitations if there is statutory authority for obtaining jurisdiction over the defendant by some manner other than by personal delivery of process within the state, where there is a resident agent that may be served, or if jurisdiction over the person of the defendant can be effected out of state pursuant to long-arm jurisdiction (see Civil Practice and Procedure, II.C.; CPLR 207 [1] – [3]).

Infancy and insanity are disabilities which may toll the applicable statute of limitations. Under CPLR 208, if the applicable statute of limitations is less than three years, the statute of limitations does not run during the entire period of disability. If the applicable period is three years or longer, a plaintiff will have at least three years to sue from the time the disability ceases. CPLR 208 applies only when the plaintiff is under such disability at the time the cause of action accrues. The maximum toll permitted in the case of insanity is ten years, as it is for an infant's cause of action for medical, dental or podiatric malpractice. In other cases involving an infant, there is no ten-year maximum limit.

Where a plaintiff dies before the expiration of the limitations period, his or her executor or administrator has the greater of that limitation period or one year from the death in which to sue (CPLR 210 [a]). When the defendant dies before suit, 18 months are tacked onto whatever limitations period remains (CPLR 210 [b]).

D. New action following termination: CPLR 205 (a)

If an action is timely commenced and terminated in any manner other than a final judgment on the merits, a voluntary discontinuance, neglect to prosecute, or lack of personal jurisdiction, and the statute of limitations has or is about to expire, the plaintiff may nonetheless commence a new action upon the same transaction or occurrence within six months after the termination, provided service upon the defendant is effected within such six-month period. Application of such six-month period is not needed if the statute of limitations has not run when the new action is commenced.

VI. Appearances and Pleadings

A. Defendant's appearance: CPLR 320, 321 (a)

A defendant appears in an action by serving an answer, making a motion which has the effect of extending the time to answer, or serving a notice of appearance. If the defendant was served by personal delivery within the state of New York, the time to appear is no later than 20 days from the delivery. In most other cases, including service outside the state and service under CPLR 308 (2) through (5), the time to appear is not later than 30 days after service is complete (CPLR 320 [a]).

An appearance by the defendant confers jurisdiction over the defendant's person unless an objection to jurisdiction is raised in a motion or answer in accordance with CPLR 3211 (a) (8) or the defendant makes a limited appearance in actions based on quasi-in rem or in rem jurisdiction (CPLR 320 [b]; [c][1]-[2]).

Any party may appear in an action through an attorney (CPLR 321 [a]).

B. Change or withdrawal of attorney: CPLR 321 (b)

Once a party appears in an action through an attorney, the attorney of record may be changed by filing a consent to change attorneys signed by the retiring attorney and signed and acknowledged by the party. Notice of the change of attorney must be given to the attorneys for all parties. An attorney of record may also withdraw or be changed by court order upon motion on notice to the client, to the attorneys of record for all other parties to the action, and to any unrepresented parties.

C. Types of pleadings: CPLR 3011

The pleadings that are permitted in an action are a complaint, an answer, which may include a counterclaim and a cross-claim, a reply to a counterclaim labeled as such, a third-party complaint, an answer to any interpleader complaint or third-party complaint, and an answer to a cross-claim that contains a demand for an answer. If no answer is demanded, the cross-claim is deemed denied. No other pleadings are permitted without court order.

D. Responsive pleadings: CPLR 3018

A party in its answer must either deny statements known or believed to be untrue and/or specify statements of which he or she lacks knowledge or information sufficient to form a belief. An allegation not addressed by either kind of denial is deemed admitted. A party must specifically raise as an affirmative defense any matter which, if not pleaded, would be likely to take the adverse party by surprise or would raise fact issues not appearing on the face of a prior pleading. The statute contains a list of the traditional affirmative defenses, such as collateral estoppel, release, res judicata, statute of frauds, and statute of limitations. These affirmative defenses, among others, are waived if not raised in the answer or a pre-answer motion to dismiss (CPLR 3211 [e]). Culpable conduct claimed in diminution of damages is likewise an affirmative defense to be pleaded and proved by the party asserting the defense (CPLR 1412).

E. Cross-claims and counterclaims: CPLR 3019

A counterclaim is a cause of action asserted by a defendant against a plaintiff. It need not arise out of the transaction or occurrence out of which the plaintiff's claim arises, nor otherwise be related to the plaintiff's claim. It can be any cause of action the defendant has against the plaintiff, legal or equitable. Every counterclaim in New York is permissive, even if its subject matter relates to plaintiff's claim.

A cross-claim is a cause of action by one defendant against another. A cross-claim may be asserted between defendants for any cause of action at all, whether or not related to the plaintiff's claim.

F. Verification of pleadings: CPLR 3020

A verification is a statement by a party under oath that a pleading is true to the knowledge of the deponent. With minor exceptions, pleadings need not be verified, but if a pleading is verified, each subsequent pleading must be verified, unless the matter to be verified is privileged. If a counterclaim or cross-claim in an answer is separately verified, it is given the same effect as if it were a separate pleading (CPLR 3020 [a]).

Verification of a complaint in a matrimonial action (*see* Matrimonial and Family Law, II. E.) and of a petition in an Article 78 proceeding (*see* Civil Practice and Procedure, XI.B.) is mandatory.

G. Amended and supplemental pleadings: CPLR 3025

Amendments to a pleading may be made once without leave of court within 20 days after its service or any time before the time to respond expires or within 20 days after service of a pleading responding to it. Thereafter, a party may amend a pleading or may supplement it by setting forth additional or subsequent transactions or occurrences only by leave of court or stipulation of the parties. An answer or reply to an amended or supplemental pleading must be served within 20 days after service of the pleading to which it responds.

H. Bill of particulars: CPLR 3041, 3042, 3043, 3044

The purpose of a bill of particulars is to amplify the pleadings (not to obtain evidence) and is available between parties in an action (CPLR 3041).

The procedure to secure a bill of particulars is to serve a written demand on the party from whom the particulars are sought. The party on whom the demand is made must serve a timely response, and if any particulars are objectionable, include in the response a statement of objections for the particulars not being responded to “with reasonable particularity” (CPLR 3042 [a]). “The assertion of an objection to one or more of the items in the demand shall not relieve the party on whom the demand is made from the obligation to respond in full within [30] days of service of the demand to the items of the demand to which no objection has been made” (*id.*).

A party may amend a bill of particulars once without leave of court before a note of issue is filed (CPLR 3042 [b]). If a party fails to timely respond or fails to comply fully with a demand, the party seeking the bill of particulars may move to compel compliance, or if the failure is willful, seek penalties (CPLR 3042 [c], [d]). If a court determines that a demand for particulars, or any part thereof, is improper or unduly burdensome, it may vacate or modify the demand, or make such order as is just (CPLR 3042 [e]).

In a personal injury action, the items that may be demanded have been codified (CPLR 3043 [a] [1] - [a] [9]). In a personal injury action, a party may serve a supplemental bill with respect to claims of continuing special damages without leave of court at any time up to 30 days prior to trial (CPLR 3043 [b]). No new cause of action may be alleged or new injury claimed, and the other party may seek discovery regarding such continuing special damages and disabilities.

If a pleading is verified, any bill of particulars in respect of it must also be verified. In a negligence case, the bill of particulars must be verified whether or not the pleading is verified (CPLR 3044).

VII. Parties

A. Necessary and proper parties: CPLR 1001, 1002, 1003

A necessary party is a person who ought to be a party if complete relief is to be accorded between parties to the action or who might be inequitably affected by a judgment in the action (CPLR 1001). Necessary parties must be joined in the action if they are subject to the jurisdiction of the court. If they are not subject to and do not consent to the jurisdiction of the court, the court, when justice requires, may allow the action to proceed without them.

The permissive joinder of claims by multiple plaintiffs as well as the joinder of multiple defendants by a plaintiff is permitted if the claims:

- Arise out of the same transaction, occurrence, or series of transactions or occurrences; and
- Have in common any question of law or fact

(CPLR 1002 [a], [b]).

Nonjoinder of a necessary party may be a ground for dismissal, but misjoinder of a party is not (CPLR 1003). Parties may be added at any stage in the action by leave of court or stipulation of all parties who have appeared, or one time without leave of court within 20 days after service of the summons or within the time period for responding to the summons, or within 20 days after service of a pleading responding to it.

B. Third-party practice: CPLR 1007, 1008, 1009

“Impleader” or third-party practice is a procedure whereby a defendant is permitted to proceed against a person not a party, who is or may be liable to the defendant for all or part of the plaintiff’s claim against the defendant, by bringing that person into the lawsuit so that the original claim and the related claim against the added person may be decided in a single suit. The original party defendant is called the third-party plaintiff, and the impleaded party is called the third-party defendant. A party may commence a third-party action after service of his or her answer.

The third-party summons and complaint must be filed with the clerk of the court and served, together with all prior pleadings, on the plaintiff and the third-party defendant within 120 days of such filing (CPLR 1007).

Thereafter, the third-party defendant must serve an answer upon the third-party plaintiff that may contain any defenses he or she has against the plaintiff’s claims or the third party’s claims. The third-party defendant’s answer may also assert any counter-claims or cross-claims the third-party defendant has against any party to the action (CPLR 1008).

Within 20 days after service of the answer to the third-party complaint, the plaintiff may amend his or her complaint without leave of court to assert against the third-party defendant any claim plaintiff has against such party (CPLR 1009).

VIII. Provisional Remedies

A. Attachment: CPLR 6201, 6212, 6213

Attachment is a form of seizure of a defendant’s property by the sheriff, who holds the property for potential satisfaction of a judgment in plaintiff’s favor, helping secure the enforcement of a money judgment. Attachment is available only in an action for a money judgment and only upon motion demonstrating one of the grounds in CPLR 6201. The most recognized grounds are:

- The defendant is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in the state;
- The defendant resides or is domiciled in the state and cannot be personally served despite diligent efforts to do so; or

- The defendant, with intent to defraud his or her creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts

(CPLR 6201 [1] – [3]).

The plaintiff making a motion for an order of attachment must show through affidavits and other evidence a probability of success on the merits. The plaintiff must also provide an undertaking in an amount set by the court. The plaintiff must file the order of attachment and the papers upon which it was based, including the summons and complaint, within ten days of the granting of the order (CPLR 6212).

In the event the order of attachment is granted before service is made, the summons and complaint must be served within 60 days, subject to an extension upon application to the court upon good cause shown (CPLR 6213).

B. Injunction: CPLR 6301, 6311, 6312, 6313

A preliminary injunction is a court order that seeks to safeguard rights asserted by the plaintiff in a pending action or special proceeding to preserve the status quo until the case can be fully adjudicated on the merits. Preliminary injunctive relief may be granted upon two grounds:

- The defendant threatens to harm plaintiff's rights in the subject of the action and such harm could render the judgment ineffectual;
- The plaintiff seeks a judgment restraining the defendant from injurious conduct that would also injure the plaintiff if committed during the course of the action.

A preliminary injunction is not available, however, in an action seeking solely money damages.

The procedure for getting a preliminary injunction is a motion in a pending action, which must be made on notice to the defendant (CPLR 6311). The notice of motion may be served with or after the summons or at any time before a final judgment.

Supporting affidavits and other evidence must show that the underlying action falls within one of the grounds for a preliminary injunction specified in CPLR 6301 (CPLR 6312). In addition to the specified statutory requirements, courts also require a showing of:

- The likelihood of success on the merits of the action,
- The threat of irreparable injury, and
- A balance of equities in plaintiff's favor

(W.T. Grant Co. v Srogi, 52 NY2d 496 [1981]).

Before getting a preliminary injunction the plaintiff will have to submit an undertaking in an amount set by the court so that if it is finally determined that the plaintiff was not entitled to

such relief, he or she will pay the defendant all damages and costs which were sustained by reason of the injunction (CPLR 6312 [b]).

A temporary restraining order provides immediate injunctive relief while the court determines a motion for a preliminary injunction (CPLR 6301). To obtain a temporary restraining order, which may be granted without notice, a plaintiff must demonstrate that immediate and irreparable injury, loss or damages will result unless the defendant is restrained before a hearing on the motion for a preliminary injunction can be held (CPLR 6313 [a]). An undertaking is discretionary with the court (CPLR 6213 [c]).

C. Notice of pendency: CPLR 6501, 6512

A notice of pendency may be filed in an action in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property (CPLR 6501). It prevents a potential transferee or mortgagee of the property from acquiring the status of innocent purchaser for value while the action is pending by placing a cloud on the marketability of the defendant's title for the duration of a lawsuit.

On or after commencement of an action, the notice of pendency is filed in the office of the clerk of the county where the property is located, without notice to the defendant, without an undertaking, and before or after service of process; ; however, once filed, the summons must be served on the defendant within 30 days (CPLR 6512).

IX. Motions

A. Motion to dismiss: CPLR 3211

A party may move for a judgment dismissing one or more causes of action asserted against the party. There are 11 grounds listed in CPLR 3211 (a) on which a party may move to dismiss a complaint or cause of action. A party may also move for a judgment dismissing a defense on the ground that the defense is not stated or has no merit (CPLR 3211 [b]). A motion to dismiss may be treated by the court, after adequate notice to the parties, as one for summary judgment (CPLR 3211 [c]).

CPLR 3211 (e) permits a motion to dismiss a cause of action under CPLR 3211 (a) to be made before service of the responsive pleading is required. Thus, if the defendant has 20 days to answer the complaint and wishes to make a pre-answer motion to dismiss the complaint under CPLR 3211 (a), he must make the motion within that time. Only one pre-answer motion to dismiss may be made.

If the defendant makes a pre-answer motion to dismiss, the defendant may raise any of the 3211 (a) grounds to dismiss available to the defendant. However, if the defendant makes a pre-answer motion and fails to include a defense based upon lack of personal jurisdiction (paragraph 8) or lack of jurisdiction where service was made under CPLR 314 or 315 (paragraph 9), those defenses are waived.

A defense based upon one of several enumerated grounds in CPLR (e) is waived if not raised by a pre-answer motion or as a defense in the answer. These grounds include: documentary evidence (paragraph 2), lack of legal capacity to sue (paragraph 3), another action pending (paragraph 4), or defenses such as collateral estoppel, release, res judicata, statute of limitations or statute of frauds (paragraph 5).

An objection based upon lack of subject matter jurisdiction (paragraph 2), failure to state a cause of action (paragraph 7), or failure to join a necessary party (paragraph 10) may be raised at any time by motion or in a subsequent pleading. These objections may be raised even if a pre-answer motion was served and the defense was not included and even if an answer was served without raising the defense.

An objection that the initial pleading was not properly served is waived if, having raised such an objection in the responsive pleading, the objecting party does not move for judgment on such ground within 60 days after serving the pleading (CPLR 3211 [e]).

Service of a notice of motion to dismiss a cause of action before a responsive pleading is due extends the time to serve a responsive pleading until ten days after service of notice of entry of the order determining such motion (CPLR 3211 [f]).

On a motion to dismiss pursuant to CPLR 3211, the court affords the pleading a liberal construction, accepts all facts as alleged in the pleading to be true, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

B. Motion for summary judgment: CPLR 3212

A party may move for summary judgment in any action. The earliest time for the making of a motion for summary judgment is the joinder of issue (service of defendant's answer) and the latest time is 120 days following the filing of the note of issue (*see Civil Practice and Procedure, XIII.A.*). The court may set an earlier date but not earlier than 30 days after the filing of a note of issue. The court can set aside the time restriction and allow a late summary judgment motion if "good cause" is shown (CPLR 3212 [a]). "Good cause" requires a showing of good cause for the delay in making the motion. That the delay is non-prejudicial and the motion is meritorious is not good cause that will permit a late filed motion to be heard (*Brill v City of New York*, 2 NY3d 648 [2004]).

The party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law. CPLR 3212 (b) requires that the moving party attach a complete set of the pleadings and submit affidavits made by one with knowledge of the facts, and all other available evidentiary proof in admissible form showing that there is no defense to the cause of action or that the cause of action or defense has no merit. Conclusory assertions or assertions and allegations based solely upon information and belief are insufficient to obtain summary judgment. An attorney's affidavit as to the facts is insufficient, if not based on personal knowledge. To defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (*Zuckerman v City of New York*, 49 NY2d 557,

562 [1980]). The court may search the record and, if it appears that any party other than the moving party is entitled to summary judgment, the court may grant such judgment without the necessity of a cross-motion (CPLR 3212 [b]). Summary judgment is granted if upon all the papers and proof submitted judgment is warranted for one side or the other as a matter of law.

C. Motion for relief from judgment or order: CPLR 5015

Any party may move to vacate a judgment or order upon the grounds set forth in CPLR 5015, which are excusable default, newly-discovered evidence, fraud, misrepresentation or other misconduct of an adverse party, lack of jurisdiction to render the judgment or order, and reversal, modification or vacatur of a prior judgment or order upon which the current judgment or order is based. If the ground is the party's "excusable default," there is a one-year time limitation for the making of the motion (CPLR 5015 [1]). Motions to vacate on the other grounds must be made within a "reasonable time" (*Nash v Port Auth. of N.Y. & New Jersey*, 22 NY3d 220, 225 [2013]). A court may vacate a judgment or order upon such terms as may be just, empowering the court to impose conditions when it vacates a judgment or order. An application to vacate a default judgment requires an excuse for the default and an affidavit of merits, demonstrating a meritorious defense.

D. Motion practice: CPLR 2214 (motion papers); 22 NYCRR § 202.6 (request for judicial intervention); 22 NYCRR § 202.7 (affirmation of good faith)

A motion requires a notice of motion specifying the time and place of the motion, the papers on which it is based, the relief sought, and the ground upon which the movant believes itself entitled to the relief (CPLR 2214).

The time and place of the hearing of the motion can be set only after the movant has filed a Request for Judicial Intervention ("RJI") and a judge has been assigned to the action (see 22 NYCRR § 202.6).

If a motion pertains to disclosure or a bill of particulars, it must contain an affirmation that, prior to making the motion, counsel has conferred with opposing party's counsel in a good faith effort to resolve the issues raised by the motion (22 NYCRR § 202.7).

X. Disclosure

A. Scope of disclosure: CPLR 3101; 3103

The general scope of the right to disclosure extends to all matters material and necessary in the prosecution or defense of an action regardless of the burden of proof (CPLR 3101 [a]). Such disclosure is obtainable from any party, including an officer, director, member, agent or employee of a party.

Disclosure from a nonparty is obtainable if the person is about to depart from the state or is outside the state, residing more than 100 miles from the place of trial, too sick or infirm to attend trial, or is the treating doctor or trial expert of the party demanding disclosure. Otherwise,

disclosure from a nonparty must be upon notice stating the circumstances or reasons such disclosure is sought or required (CPLR 3101 [a] [4]; *Kapon v Koch*, 23 NY3d 32 [2014]).

Immune from disclosure are privileged matter (subdivision [b]) (absolute immunity), work product of an attorney (subdivision [c]) (absolute immunity) and material prepared for litigation (subdivision [d] [2]) (conditional immunity - “only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent by other means”).

Upon request, each party must identify each person whom the party expects to call as an expert witness at trial and disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness, and a summary of the grounds for each expert’s opinion (CPLR 3101 [d]). The expert’s report need not be disclosed nor may a deposition of the expert be taken in the absence of a court order issued upon a showing of special circumstances and subject to such restrictions and provisions as the court deems appropriate (CPLR 3101 [d] [iii]). However, a party, without court order, may depose a person authorized to practice medicine, dentistry, or podiatry who is the party’s treating or retained expert, in which case the other party is entitled to full disclosure regarding that expert.

Special rules apply to experts in a medical, dental or podiatric malpractice actions (CPLR 3101 [d] [i] – [iii]).

Any party may obtain a copy of his or her own statement (CPLR 3101 [e]).

A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial (CPLR 3101 [f]).

Written accident reports prepared in the regular course of business operations or practices of any person, firm, corporation, association or other public or private entity must be disclosed, unless prepared by a police or peace officer for a criminal investigation or prosecution and disclosure would interfere with a criminal investigation or prosecution (CPLR 3101 [g]).

A party must amend or supplement a response previously given to a request for disclosure promptly upon the party’s thereafter obtaining information that the response was incorrect or incomplete when made, or that the response, though correct and complete when made, no longer is correct and complete, and the circumstances are such that a failure to amend or supplement the response would be materially misleading (CPLR 3101 [h]).

A party may obtain full disclosure of any films, photographs, video tapes or audio tapes, including transcripts or memoranda thereof, involving another party (CPLR 3101 [i]). Disclosure under this section covers all portions of such material, including out-takes, rather than only those portions a party intends to use.

Although the CPLR does not specifically address the discovery of electronically stored information (ESI), e-discovery is generally permissible and the “material and necessary” requirement contained in CPLR 3101 applies to ESI (*Matter of Nunz*, 36 NYS3d 346, 350 [2015]). Both the Rules of the Commercial Division of the Supreme Court and New York’s Uniform Rules for the Trial Courts specifically contemplate discovery of ESI in an action and contain a list of relevant factors in determining the method and scope of electronic discovery (22 NYCRR § 202.70; 22 NYCRR § 202.12 [b]). These factors include identifying the potential types of ESI and the relevant time frame, the manner in which ESI is maintained and whether it is reasonably accessible, implementing a preservation plan for relevant ESI, the scope and form of production, the identification of privileged or confidential ESI, and the anticipated cost and burden of data recovery and the proposed allocation of such cost (22 NYCRR § 202.70 [g]; 22 NYCRR § 202.12 [c] [3]). Some courts and bar associations have also provided working guidelines for discovery of ESI (see e.g., New York State Supreme Court, Commercial Division, Nassau County, Guidelines for Discovery of Electronically Stored Information [ESI]), effective June 1, 2009, II[c][4]), Best Practices in E-Discovery in New York State and Federal Courts, Version 2.0, Report of the E-Discovery Committee of the Commercial and Federal Litigation Section of the New York State Bar Association at 20 [Dec 2012], see also *Tener v Cremer*, 89 AD3d 75 [1st Dept 2011]).

The scope of discovery may include information from social media websites, such as Facebook. A party may not prevent disclosure of social media data by “employing ‘privacy’ settings or curating the materials on the public portion of the account.” (*Forman v Henkin*, 30 NY3d 656 [2018]). Rather, discovery of social media data that is designated as private is permitted, so long as the request for such discovery is reasonably calculated to lead to evidence that is “material and necessary” to the litigation. Requests for social media data should be tailored to the nature of the controversy at issue and limited in time, as appropriate to the specific circumstances of the case (see *Doe v The Bronx Preparatory Charter School*, 160 AD3d 591 [1st Dept 2008]).

CPLR 3103 (a) permits any party or non-party from whom discovery is sought to move for a protective order denying, limiting, conditioning or regulating the use of any disclosure device to prevent “unreasonable annoyance, expenses, harassment, disadvantage, or other prejudice.”

B. Use of interrogatories: CPLR 3130

Any party in an action may serve upon any other party written interrogatories, subject to two limitations: (1) interrogatories cannot be used if a bill of particulars is demanded of the same party; and (2) in an action seeking damages for personal injury, property damage or wrongful death predicated solely on a cause of action for negligence, interrogatories cannot be used without leave of court if a deposition is conducted of the same party. Special rules apply in matrimonial actions.

XI. Special Proceedings

A. Generally: CPLR 401, 402, 403, 404, 408

A special proceeding is used to establish a right or enforce an obligation in a civil matter in an expedited fashion. Statutory authorization must exist for the use of a special proceeding. The most common special proceedings are proceedings against a body or officer (CPLR Article 78) and the first application arising out of an arbitrable controversy (CPLR Article 75).

The party who initiates a special proceeding is called the petitioner and the adversary, if any, is the respondent. Leave of court is required to join any other parties (CPLR 401).

The pleadings are a petition, answer, and a reply. Any additional pleadings require leave of court (CPLR 402).

The commencement of a special proceeding requires a petition and either a notice of petition or order to show cause. The notice of petition serves to notify the respondent of the time and place of the return date on the petition (CPLR 403 [a]). In addition to specifying the return date, the notice of petition must identify the affidavits, if any, that are being submitted in support of the petition. As an alternative to a notice of petition, CPLR 403 (d) allows the use of an order to show cause. An order to show cause is a judicial order, obtained *ex parte*, that specifies the date and place of the hearing.

The respondent may raise an objection in point of law - a defense that can produce a summary dismissal of the proceeding - either in the answer or in a motion to dismiss made within the time allowed for answer (CPLR 404).

Pretrial disclosure is generally not available without leave of court, except for a notice to admit under CPLR 3123 (CPLR 408).

B. Proceeding against body or officer: CPLR 7801, 7803, 7804

Article 78 of the CPLR governs the procedure for judicial review of matters that were recognized at common law under the prerogative writs of certiorari, mandamus and prohibition. Article 78 is the vehicle for judicial review of most administrative action in New York. The determination sought to be reviewed must be final, and the petitioner must exhaust his or her administrative remedies before seeking judicial relief (CPLR 7801).

CPLR 7803 contains a list of issues that may be raised in an Article 78 proceeding:

- Whether a body or officer has failed to perform a duty enjoined by law;
- Whether a body or officer has proceeded, is proceeding or is about to proceed without or in excess of jurisdiction;
- Whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion; or
- Whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

An Article 78 proceeding is a special proceeding and is governed by the procedures of CPLR Article 4 unless inconsistent provisions are found in Article 78.

An Article 78 proceeding must be commenced in supreme court (CPLR 7804 [b]). It is commenced by filing a petition with the clerk of the court of the county in which the proceeding is commenced (CPLR 7804 [d]). The statute of limitations for an Article 78 proceeding is four months after the determination to review becomes final and binding upon the petitioner unless a shorter time is provided in the law authorizing the proceeding (*see Civil Practice and Procedure, V.A.*).

The petition and answer in an Article 78 proceeding must be verified (CPLR 7804 [d]). The petition may be accompanied by affidavits or other written proof. The answer must state the facts showing the grounds for the respondent's action of which the petitioner complains. A certified transcript of the record of proceedings being challenged by the petitioner must be filed with the answer. Affidavits or other written proof may be submitted as evidentiary support for the respondent's position. A reply must be served in response to any new matter raised in the answer.

Objections in point of law may be raised either in the answer or in a motion to dismiss made within the time allowed for the answer (CPLR 7804 [f]).

On the return date of the petition in an Article 78 proceeding, the court is to dispose of the case as it would a motion for summary judgment. If the pleadings, affidavits and other written proof submitted by the parties raise no triable issue of fact, the court should decide the case on the papers and grant judgment as a matter of law for the prevailing party. If a triable issue of fact is raised, the court shall try it (CPLR 7804 [g] – [h]). Pursuant to CPLR 7804 (g), Article 78 proceedings commenced in the supreme court that challenge whether an agency's determination, made as a result of a hearing held at which evidence was taken, was supported by substantial evidence are transferred to the Appellate Division for resolution.

XII. Alternative Dispute Resolution

A. Arbitration: CPLR 7501, 7502, 7503, 7506, 7510, 7511

Arbitration is a procedure for resolving a dispute by referring the dispute to an impartial arbitrator (or panel of arbitrators) chosen by the parties to hear evidence and arguments from each side and then decide the outcome. Arbitration is less formal than a trial and may either be binding or nonbinding.

Written agreements to submit a controversy to arbitration are enforceable and will be enforced by the courts without regard to the merits of the underlying claim (CPLR 7501). A party seeking to resist arbitration may do so only upon three grounds: (1) whether a valid agreement to arbitrate was made; (2) whether any conditions precedent in the agreement have been complied with; and (3) whether the claim is barred by the statute of limitations. In the absence of one of the above enumerated defenses to arbitration, the court shall direct the parties

to arbitrate. Courts are expressly prohibited under CPLR 7501 from determining whether a claim sought to be arbitrated is tenable, or otherwise passing upon the merits of the dispute.

A special proceeding is used to bring before the court the first application arising out of an arbitrable controversy (CPLR 7502 [a]).

A party initiates arbitration by serving upon the other party a demand for arbitration or notice of intention to arbitrate complying with CPLR 7503 (c) or by applying to the court for an order compelling arbitration (7503 [a]).

A party wishing to resist arbitration may apply to stay the arbitration upon any of the three enumerated defenses, and if the party has been served with a demand to arbitrate/notice of intent to arbitrate compliant with CPLR 7503 (c), the opposing party must timely move for a stay raising the said grounds or they are waived (CPLR 7503 [1]), except that a limitations defense may still be asserted before the arbitrator, who has the discretion whether or not to apply the bar (CPLR 7502 [b]). If the limitations defense is decided by the arbitrator, it cannot be later asserted as a basis to vacate or modify an award. If the demand for arbitration fails to comply with the formalities of CPLR 7503 (c), and the aggrieved party did not participate in the arbitration, the said defenses are not waived and can still be raised in a motion to vacate an award (*Blamowski v Munson Transportation, Inc.*, 91 NY2d 190 [1997]).

The provisional remedies of attachment and preliminary injunction are available in connection with a pending arbitration, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief (CPLR 7502 [c]).

The arbitrator must be sworn before hearing a dispute, and the parties are afforded the right to be heard, to present evidence and to cross-examine witnesses. Arbitrators are not bound by the rules of evidence that apply in judicial proceedings (*Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 308 [1984]). Each party has a non-waivable right to be represented by counsel throughout the arbitration proceeding (CPLR 7506).

An application to confirm an award, if desired, must be made within one year after delivery of the award to the moving party (CPLR 7510). An application to vacate or modify an award must be made within ninety days after delivery to the moving party (CPLR 7511[a]).

Judicial review of arbitration awards is extremely limited, and an award will not be vacated for an arbitrator's errors of law and fact (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471 [2006]). CPLR 7511 governs the grounds for moving to vacate or modify an arbitration award. Where the aggrieved party participated in the arbitration or was served with a notice of intention to arbitrate, and was prejudiced by the particular impropriety, there are four narrow grounds for vacating an arbitration award (misconduct, bias, excess of power, and procedural defects (CPLR 7511 [b] [1])). If the aggrieved party did not participate in the arbitration, was not served with a notice of intention to arbitrate, or the notice did not comply with CPLR 7503 (c), the grounds for vacatur include all of those mentioned above and the added

defenses of nonarbitrability, noncompliance with the arbitration agreement and the statute of limitations (CPLR 7511 [2]). Upon vacating an award, the court may order a rehearing.

B. Mediation

Mediation is a form of alternative dispute resolution used to resolve disputes between two or more parties. A third party neutral mediator does not decide the case, but assists the parties to reach a mutually acceptable agreement. Mediation may be inappropriate if one party is unwilling to compromise or has a significant advantage in power or control over the other party, such as if the parties have a history of abuse. The process is private and confidential. Mediation is less formal than a trial, allows the parties to communicate freely and participate fully in the process, and is less expensive than litigation. It may be court-ordered in some cases and in some courts.

C. Other forms of alternative dispute resolution

Other forms of ADR include neutral evaluation, collaborative law, and summary jury trials (see http://www.nycourts.gov/ip/adr/What_Is_ADR.shtml).

In neutral evaluation, the parties present their case to an evaluator, who is often an expert in the subject matter in dispute. The evaluator gives an opinion of the strengths and weaknesses of each party's evidence and arguments and offers an opinion of the likely outcome in court.

Collaborative law is a legal process enabling married couples who have decided to divorce a way to do so in a cost-efficient manner without going to court, while retaining the professional guidance of their own attorney. The couples bind themselves to the process and disqualify their respective lawyers in the event either party decides to go to court.

Summary jury trials permit adversaries to present their case in an abbreviated form to a mock jury which reaches a verdict that is advisory only, unless the parties agree to make it binding. A summary jury trial gives litigants a preview of a potential verdict should the case go to trial.

XIII. Trial By A Jury

A. Note of Issue and Certificate of Readiness: 22 NYCRR 202.21

In order to proceed to a trial in a civil action or inquest in a special proceeding, a party must file a note of issue and certificate of readiness with the clerk of the court, pay the required fee, and serve the documents on all parties. By filing a note of issue, the party is representing to the court that discovery is complete and the case is ready for trial.

B. Demand and waiver of trial by jury: CPLR 4101, 4102

CPLR 4101 (1) provides that issues of fact on causes of action for money only are triable by jury, unless a jury trial is waived. Any party may demand a trial by jury by serving upon all other parties and filing a note of issue containing a demand for trial by jury. Any party served

with a note of issue not containing such a demand may demand a trial by jury by serving upon each party a demand for a trial by jury and filing such demand in the office where the note of issue was filed within 15 days after service of the note of issue (CPLR 4102 [a]). If no party demands a trial by jury, the right to trial by jury is deemed waived by all parties.

C. Number of jurors and verdicts: CPLR 4104, 4113

A jury in a civil case must consist of six persons (CPLR 4104). A verdict must be rendered by not less than five-sixths of the jurors constituting a jury (CPLR 4113).

D. Peremptory challenges, challenges for cause, and alternate jurors: CPLR 4106, 4109, 4110

Pursuant to CPLR Article 41, each party has a right to interpose both peremptory challenges and challenges for cause (CPLR 4109, 4110). A peremptory challenge is an objection to a prospective juror for which no reason need be assigned. Peremptory challenges are limited in number and cannot be used to exclude a juror for discriminatory reasons.

A challenge for cause, which may be made as often as necessary, is an objection that a prospective juror is unable to be impartial for a particular reason. Lawyers may stipulate to excuse a juror challenged for cause or the challenge is decided by the court. CPLR 4110 (a) enumerates the following grounds for challenge, which grounds are not exhaustive:

- That a juror is in the employ of a party to the action;
- If a party to the action is a corporation, that the juror is a shareholder or a stockholder therein; and
- In an action for damages to person or property, that the juror is a shareholder, stockholder, director, officer, or employee, or in any manner interested in any insurance company issuing policies for protection against liability for damages for injury to persons or property.

At the time of jury selection, one or more alternate jurors are chosen to participate in the trial to the same extent as a regular juror and serves until the submission of the case to the jury. When the case is submitted, the court may retain the alternate jurors to ensure availability if a regular juror becomes unable to perform the duties of a juror, or may dismiss the alternate jurors (CPLR 4106).

XIV. Appeals

A. Scope of review: CPLR 5501

An appeal from a final judgment brings up for review any non-final judgment or order which necessarily affects the final judgment (incidental orders that do not have any impact on the final judgment are excluded). An appeal also brings up for review all incidental rulings made at the trial, including evidentiary rulings, provided the appellant objected or there was no opportunity to object. Generally, the scope of the power of the Court of Appeals on appeal is

limited to the review of questions of law, whereas the intermediate appellate courts on an appeal review questions of law and fact.

B. Time to take appeal: CPLR 5513

The times within which to take an appeal are mandatory and strictly enforced.

An appeal as of right must be taken within 30 days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry (CPLR 5513 [a]). A motion for permission to appeal must also be made within 30 days, computed from the date of service by a party upon the person seeking leave to appeal of a copy of the judgment or order to be appealed from and written notice of its entry (CPLR 5513 [b]).

C. Taking an appeal: CPLR 5515

An appeal is taken by serving on the adverse party a notice of appeal and filing it in the office where the judgment or order of the court of original instance is entered. Where an order grants permission to take an appeal, the appeal is taken when such order is entered. A notice of appeal must contain the name of the party taking the appeal, the judgment or order appealed from and the court to which the appeal is taken.

D. Appeals to the Court of Appeals: CPLR 5601, 5602

An appeal may be taken to the Court of Appeals as of right from any order of the Appellate Division that finally determines an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims, or an administrative agency, where there is dissent by at least two justices on a question of law (CPLR 5601).

An appeal as of right to the Court of Appeals is also available from an Appellate Division order that finally determines the action where there is directly involved the construction of the New York or federal constitution (CPLR 5601 [1]) or that finally determines an action where the only question involved on the appeal is the constitutional validity of a New York or federal statute (CPLR 5601 [2]).

An appeal may be taken to the Court of Appeals by permission of the Appellate Division, or by permission of the Court of Appeals upon refusal by the Appellate Division, or upon direct application to the Court of Appeals, from any order of the Appellate Division that finally determines an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims, or an administrative agency (CPLR 5602).

E. Appeals to the Appellate Division: CPLR 5701

Almost all final and non-final judgments and intermediate orders are appealable as of right to the Appellate Division if the non-final order results from a motion made on notice.

CONFLICT OF LAWS

I. Application in Specific Areas

A. Torts

In the context of tort law, New York uses an interest analysis to determine which of two competing jurisdictions has the greater interest in having its law applied. Under the interest analysis, courts assess two factors: (1) “what are the significant contacts and in which jurisdiction are they located; and (2) whether the purpose of the law [at issue] is to regulate conduct or allocate loss” (*Padula v Lilarn Props. Corp.*, 84 NY2d 519, 521 [1994]).

Conduct-regulating rules govern conduct to prevent injuries from occurring. Loss-allocating rules prohibit, assign, or limit liability after the tort occurs.

If conflicting conduct-regulating laws are at issue, the jurisdiction where the tort occurred has the greatest interest in regulating conduct within its borders.

If conflicting loss-allocating rules are at issue, other factors are taken into consideration, namely the parties’ domicile. In *Neumeier*, the Court of Appeals adopted three rules that apply to loss-allocation cases.

Under the first rule, when the parties to the lawsuit share a common domicile, the loss-allocation rule of the common domicile will apply.

Under the second rule, where the parties are domiciled in different states and the local law favors the respective domiciliary, when a defendant’s conduct occurred in the state of his or her domicile and that state would not impose liability, the defendant should not be exposed to liability under the law of the victim’s domicile. Conversely, when the plaintiff is injured in the place of his or her domicile and would be entitled to recover, the defendant should generally be unable to interpose the law of his or her domicile to defeat recovery.

The third *Neumeier* rule provides that most of the time the governing law will be that of the place where the accident occurred, unless “displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multistate system or producing great uncertainty for litigants” (*Neumeier v Kuehner*, 31 NY2d 121, 128 [1972]).

B. Contracts

In New York, courts have applied a flexible “center of gravity” or “grouping of contacts” inquiry to conflict of law questions relating to contracts (*Auten v Auten*, 308 NY 155, 156 [1954]). Under this approach, the “spectrum of significant contacts” is considered in order to determine which state has the most significant contacts to the particular contract dispute (*Matter*

of Allstate Ins. Co. [Stolarz-New Jersey Mfrs. Ins. Co.], 81 NY2d 219, 226 [1993]). In general, significant contacts involve:

- The place of contracting, negotiation and performance;
- The location of the subject matter of the contract; and
- The domicile or place of business of the contracting parties.

In addition, when “the policies underlying conflicting laws in a contract dispute are readily identifiable and reflect strong governmental interests,” those governmental interests may be considered (*id.*).

C. Estates: EPTL 3-5.1

In matters relating to wills that dispose of real property, or the manner in which such property descends in intestacy, the law of the jurisdiction where the real property is located governs (EPTL 3–5.1 [b] [1]). In matters relating to wills that dispose of personal property, or the manner in which such property devolves in intestacy, the law of the jurisdiction in which the decedent was domiciled at death governs (EPTL 3–5.1 [b] [2]). If an issue arises as to whether property is real or personal, the law of the state where the asset is located is determinative.

II. Defenses against Application of Foreign Law

A. Substantive/procedural dichotomies

When New York is the forum state, its own law normally determines whether a foreign law is procedural or substantive and the foreign jurisdiction’s designation of the rule as procedural or substantive is not dispositive (*Davis v Scottish Re Group Limited*, 30 NY3d 247 [2017]). Under New York’s choice of law rules, if the foreign law is determined to be procedural, New York courts will not apply it because procedural rules are governed by the law of the forum. If the foreign law is determined to be substantive, the New York courts will be required to apply it. Thus, if a time limit is a substantive law of another state, New York courts should apply the time limit of the other state, whereas if a time limit is a procedural rule of another state, New York should apply its own procedural rule.

A New York court will also apply New York choice of law principles to determine whether a foreign state time limit is a substantive or procedural rule (*Tanges v Heidelberg N. Am.*, 93 NY2d 48 [1999]). A substantive law that imposes a time limit may be defined as a “statute of repose,” whereas a time limit as a procedural rule may be defined as a “statute of limitations.” A statute of repose blocks a cause of action before it may accrue, whereas a statute of limitations prevents a plaintiff from delaying an action to the detriment of a potential defendant. If a statute creates a cause of action and integrates into it a time limit to bring an action, so as to qualify the right, the time limit is an ingredient of the cause of action and, thus, a substantive rule.

B. Local public policy

In cases of conflict between foreign legislation and New York public policy, New York public policy prevails. Likewise, a statute or rule of another state that gives the courts of that state exclusive jurisdiction over certain cases does not divest New York courts of jurisdiction (*Sachs v Adeli*, 26 AD3d 52 [1st Dept 2005]). The public policy exception permits the court to refuse to enforce otherwise applicable foreign law that would violate some fundamental principle of justice, prevalent conception of good morals, or deep-rooted tradition of the common weal (*Loucks v Standard Oil Co. of N.Y.*, 224 NY 99 [1918]).

CONTRACTS

I. Mutual Mistake vs. Unilateral Mistake

Generally, a contract entered into under a mutual mistake of fact by the parties is voidable and subject to rescission or reformation (*Matter of Gould v Board of Educ. of Sewanhaka Cent. High School Dist.*, 81 NY2d 446 [1993]). The mistake must be so material that it goes to the foundation of the agreement. The mutual mistake must exist at the time the contract is entered into and must be substantial, and any court-ordered relief is reserved only for “exceptional situations” (*Simkin v Blank*, 19 NY3d 46, 52 [2012]).

A unilateral mistake alone is an insufficient basis for reformation or rescission, in the absence of a showing of fraud, duress or similar inequitable conduct (*Barclay Arms v Barclay Arms Assoc.*, 74 NY2d 644 [1978]). The party alleging the mistake must also show:

- that the mistake was material;
- that it was made unknowingly despite the exercise of ordinary care in entering the contract;
- that enforcement of the contract would be unconscionable and would result in unjust enrichment of one party at the expense of the other;
- that the parties can be returned to the status quo without prejudice

(*Long v Fitzgerald*, 240 AD2d 971 [3d Dept 1977]; *Morey v Sings*, 174 AD2d 870 [1991]; *Desiderado v N & A Taxi, Inc.*, 190 AD2d 250 [1993]; *Cox v Lehman Bros.*, 15 AD3d 239 [2005]).

II. Inability to Consent, including Infancy: GOL § 1-202, 3-101

In New York, a person who is under the age of 18 is an infant (GOL 1-202; 3-101). A contract entered into by an infant is not void, but voidable at the infant’s election and until an infant disaffirms his or her contract, it is binding on the infant and the other contracting party. An infant may disaffirm his contract during infancy or within reasonable time after coming of age (*Horowitz v Manufacturers’ Trust Co.*, 239 AD 693 [1st Dept 1934]).

The common-law right of infants to disaffirm has also been modified by various statutes (*Shields v Gross*, 58 NY2d 338 [1983]); Civil Rights Law § 51 (infant’s contract consenting to the use of their name or image for advertising purposes); General Obligations Law § 3-101 [3]) (infant’s contract to borrow money to purchase a home); General Obligations Law § 3-102 (married infant’s obligation for hospital, medical and surgical treatment and care for infant or infant’s children); Education Law § 281 (infant’s contract for college loan); and Arts and Culture Law § 35.03 (infants’ contracts for actors, dancers and professional athletes).

III. Unconscionability and Illegality: General Business Law § 349; GOL §§ 5-401, 5-501, 5-321, 5-322.1, 5-323, 5-325, 5-326

The determination of unconscionability is a matter of law for the court to decide. In general, unconscionability requires some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. The party must demonstrate that the contract was both procedurally and substantively unconscionable when made.

The substantive aspect considers whether the contract terms are unreasonably favorable to one party. The procedural aspect looks to evidence of the contract formation process. In order to determine whether there has been procedural unconscionability in the contract formation process, a court must assess such factors such as:

- The size and commercial setting of the transaction,
- Whether there was a “lack of meaningful choice” by the party claiming unconscionability,
- The “experience and education of the party claiming unconscionability,” and
- Whether there was “disparity in bargaining power”

(*Gillman v Chase Manhattan Bank*, 73 NY2d 1, 11 [1988]).

Under New York law, agreements that are contrary to public policy are generally unenforceable. For example, General Business Law § 349 prohibits deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service. To establish a claim under section 349, a plaintiff must allege that a defendant is engaging in consumer-oriented conduct which is materially deceptive or misleading, and, as a result, the plaintiff has been injured. Deceptive acts are defined as those that are likely to mislead a reasonable consumer acting reasonably under the circumstances.

General Obligations Law § 5-501, New York’s usury statute, provides that loans carrying annual interest rates of more than 16 percent are prohibited, subject to limited exceptions.

Likewise, in New York, contractual exemptions from liability for negligence are disfavored. General Obligations Law § 5-321 provides that a landlord cannot exempt itself from liability for negligence in the operation or maintenance of its premises, regardless of whether the premises is residential or commercial. However, where the liability is to a third party, the statute does not preclude an indemnification provision in a commercial lease negotiated at arm’s length between two sophisticated parties.

Additionally, General Obligations Law § 5-322.1 provides that an agreement related to construction, alteration, repair, or maintenance of a building that purports to exempt owners/contractors from liability caused by their own negligence is against public policy and void. Likewise, agreements exempting building service or maintenance contractors from liability for negligence are void and unenforceable (GOL § 5-323). Businesses providing garages, parking lots, or similar places for the housing, storage, parking, repair, or servicing of vehicles may not exempt themselves from liability for damages for injury to persons or property resulting from their negligence in the operation of vehicles or in the conduct or maintenance of such business (GOL § 5-325). General Obligations Law § 5-326 provides that the owners or

operators of pools, gymnasiums, and places of amusement or recreation may not exempt themselves from liability for damages caused by their negligence.

IV. Consideration: GOL §§ 5-1103, 5-1105, 5-1107, 5-1109

Section 5-1103 of the General Obligations Law states that an agreement to modify or discharge an obligation shall not be invalid for lack of consideration if expressed in a writing signed by the party against whom enforcement is sought.

Section 5-1105 provides that a promise based on past consideration is enforceable if there is a writing signed by the party to be bound, and “the consideration is expressed in the writing and is proved to have been given or performed and would be a valid consideration but for the time when it was given or performed.”

Under section 5-1107, consideration is not required for any assignment if it is in writing and signed by the assignor.

Under General Obligations Law § 5-1109, when an offer to enter into a contract is made in a writing signed by the offeror stating that the offer is irrevocable during a stated period of time, the offer is not revocable during such period because of the absence of consideration. If such a writing states that the offer is irrevocable but does not state any period or time of irrevocability, the offer is irrevocable for a reasonable time.

V. Statute of Frauds: GOL §§ 5-701, 5-703; State Technology Law § 304

The statute of frauds provisions are contained in the General Obligations Law. Generally, every agreement, promise, or undertaking is void unless it is in writing and signed by the party to be charged, if it is:

- By its terms, not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime;
- A special promise to answer for the debt, default, or miscarriage of another person;
- Made in consideration of marriage, except mutual promises to marry;
- A subsequent or new promise to pay a debt discharged in bankruptcy; or
- A contract to pay compensation for services rendered in negotiating a loan or in negotiating the purchase, sale, exchange, renting, or leasing of any real estate or interest therein. However, a signed writing is not required if the contract is to pay compensation to an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman

(GOL § 5-701).

An estate or interest in real property, except for a lease not exceeding one year, or any trust or power over or concerning real property, cannot be created, granted, assigned, surrendered, or declared unless by act or operation of law, or by a deed or conveyance in writing.

signed by the person creating, granting, assigning, surrendering, or declaring the same, or by a lawful agent, authorized by writing to do so (GOL § 5-703 [1]).

A contract for the leasing of any real property for more than one year, or for the sale of any real property or an interest therein, is void unless the contract is in writing, signed by the party to be charged (GOL § 5-703 [2]). A contract to devise real property or establish a trust of real property, or any interest in or right with reference to real property, is void unless the contract is in writing and signed by the party to be charged (GOL § 5-703 [3]). Notwithstanding, courts may compel specific performance in cases of part performance (GOL § 5-703 [4]).

Section 304 of the State Technology Law provides that the use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand.

VI. Third-Party Beneficiary Contracts, including Intended vs. Incidental Beneficiaries

Under New York law, a party seeking to enforce a contract as a third-party beneficiary must establish:

- The existence of a valid contract between other parties,
- That the contract was intended for its benefit, and
- That the benefit was direct rather than incidental

(*Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783 [2006]).

A party is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either:

- The performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary, or
- The circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance

(*LaSalle Nat'l Bank v Ernst & Young, LLP*, 285 AD2d 101, 108 [1st Dept 2001]). A third party will be deemed an intended beneficiary where the anticipated benefit is “sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [the third party] if the benefit is lost” (*Mendel*, 6 NY3d at 784). An incidental beneficiary is a beneficiary who is not an intended beneficiary (*Fourth Ocean Putnam Corp. v Interstate Wrecking Co.* 66 NY2d 38 [1985]).

An intention to benefit a third party must be derived from the contract as a whole. Thus, where performance is rendered directly to a third party, it is presumed that the third party is an intended beneficiary of the contract (*Logan-Baldwin v L.S.M. Gen. Contrs. Inc.*, 94 AD3d 1466 [4th Dept 2012]).

VII. Constructive Trusts

A constructive trust is an equitable remedy, and its purpose is prevention of unjust enrichment (*Sharp v Kosmalski*, 40 NY2d 119 [1976]). Unjust enrichment does not require the performance of any wrongful act by the one enriched (*Simonds v Simonds*, 45 NY2d 233, 242 [1978]). New York law generally requires four elements for a constructive trust:

- A confidential or fiduciary relationship,
- A promise, express or implied,
- A transfer of the subject res made in reliance on that promise, and
- Unjust enrichment

(*Bankers Sec. Life Ins. Socy. v Shakeridge*, 49 NY2d 939 [1980]; *Sharp*, 40 NY2d at 121).

Constructive trust doctrine is not rigidly limited and the absence of any one factor will not itself defeat the imposition of a constructive trust when otherwise required by equity (see *Simonds*, 45 NY2d at 241-242). “What is required, generally, is that a party hold property ‘under such circumstances that in equity and good conscience he ought not to retain it’” (*Simonds*, 45 NY2d at 242 [internal citations omitted]).

VIII. Employment Contracts

The employment-at-will doctrine provides “that where an employment is for an indefinite term it is presumed to be a hiring at will which may be freely terminated by either party at any time for any reason or even for no reason” (*Murphy v American Home Prods. Corp.*, 58 NY2d 293, 301-302 [1983]). Thus, New York does not recognize a claim for wrongful discharge of an at-will employee.

However, there are some exceptions to the at-will doctrine. If assurances of job security are made by the employer, coupled with express provisions in an employee manual limiting an employer’s ability to terminate at will, and the employee relies on these assurances, a contract may be implied (*Weiner v McGraw-Hill, Inc.*, 57 NY2d 458 [1982]). The Court of Appeals has also held that there exists an implied duty of good faith on the part of the employer which limits its ability to terminate an employee (*Cruz v HSBC Bank, USA, N.A.*, 5 F Supp 3d 253 [ED NY 2014], citing *Wieder v Skala*, 80 NY2d 628 [1992]). To date, the *Wieder* exception has not been extended to a business or profession other than the practice of law.

IX. Admissibility of Extrinsic Evidence and Parol Evidence Rule

Generally, “when parties set down their agreement in a clear, complete document, their writing is enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing” (*W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162 [1990]). In other words, extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and unambiguous on its face. Whether a writing is ambiguous is a question of law to be resolved by the courts.

CRIMINAL LAW AND PROCEDURE

I. Criminal Court Subject Matter Jurisdiction

The Criminal Procedure Law divides New York courts into two categories: superior courts (which include Supreme Court and County Court) and local criminal courts (which include city courts, town courts, district courts and the New York City Criminal Court). Violations and misdemeanors are generally tried in local criminal courts and felonies are tried in County Court or Supreme Court. A felony may be initiated by the filing of an information or complaint in a local criminal court. However, in order try a defendant for a felony, it must ultimately be prosecuted by an indictment filed by the grand jury or a defendant's consent to waive indictment and proceed by a superior court information (*see NY Const art I, § 6*).

A. Supreme Court: NY Const art VI, § 7; CPL 10.20, 10.30; *People v Correa*, 15 NY3d 213 (2010).

The Supreme Court, a court of general jurisdiction, can exercise jurisdiction over all criminal proceedings. In practice, it exercises criminal jurisdiction only over felonies in New York City.

B. County Court: NY Const art VI, § 11

County Courts exist only in the Second Judicial Department outside New York City and Long Island and in the Third and Fourth Judicial Departments. County Courts have jurisdiction over all criminal matters, but hear primarily felonies.

C. New York City Civil Court; New York City Criminal Court: NY Const art VI, § 15

The New York City Criminal Court has criminal jurisdiction within the City of New York over misdemeanors and violations.

D. District, city, town and village courts: NY Const art VI, §§ 16, 17; Uniform Court Acts § 202

District Courts (established only in Nassau and Suffolk Counties located in the Second Judicial Department), and city, town and village courts, have criminal jurisdiction over misdemeanors and violations.

II. General Principles

A. Mental culpability

1. Culpable mental states: Penal Law § 15.05

A defendant must act intentionally, knowingly, recklessly or with criminal negligence in order to be held criminally liable for a crime. A person acts “intentionally” with respect to a result or conduct when his or her conscious objective is to cause such result or engage in such conduct. “Knowingly” requires that a person be “aware” that his or her conduct is of the nature described by the offense or that a circumstance described by the offense exists. A person acts “recklessly” with respect to a result when he or she is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur. “Criminal negligence” requires that a person fail to perceive a substantial and unjustifiable risk that a certain result will occur.

2. Mistake of fact or law: Penal Law § 15.20

A person is generally not relieved of criminal liability for conduct because he or she engages in such conduct under a mistaken belief of fact unless the factual mistake negates the culpable mental state required for the commission of the offense or the statute defining the offense expressly provides that a factual mistake constitutes a defense. Additionally, a person is generally not relieved of criminal liability for conduct because he or she engages in the conduct under the mistaken belief that it does not constitute an offense, unless the mistaken belief is based upon an official statement of the law.

B. Defenses related to mental culpability

1. Mental disease or defect: Penal Law § 40.15

In any prosecution for an offense, it is an affirmative defense that when the defendant engaged in the proscribed conduct, he or she lacked criminal responsibility by reason of mental disease or defect. Such lack of criminal responsibility means that at the time of such conduct, as a result of mental disease or defect, he or she lacked “substantial capacity to know or appreciate” either:

- The nature and consequences of such conduct, or
- That such conduct was wrong.

Lacking a substantial capacity to “know or appreciate” is “designed to permit the defendant possessed of mere surface knowledge or cognition to be excused, and to require that he have some understanding of the legal and moral import of the conduct involved if he is to be held criminally responsible” (*People v Adams*, 26 NY2d 129, 135 [1970]).

2. Extreme emotional disturbance: Penal Law §§ 125.25 (1) (a), 125.27 (2) (a)

It is an affirmative defense to murder in the first and second degree that the defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse. The defense reduces the degree of criminal culpability for acts that would otherwise constitute murder; it is not a defense to the crime of manslaughter or any other crime. The defense, if successful, does not result in an acquittal but reduces the charge to manslaughter in the first degree.

The defense must be supported by proof that the defendant ““suffered from a mental infirmity not rising to the level of insanity at the time of the homicide, typically manifested by a loss of self-control”” (*People v Diaz*, 15 NY3d 40, 44-45 [2010] [internal citations omitted]). It requires evidence “of a subjective element, that defendant acted under an extreme emotional disturbance, and an objective element, that there was a reasonable explanation or excuse for the emotional disturbance” (*id.*).

3. Intoxication: Penal Law § 15.05, 15.25

Intoxication is not a full defense to a criminal charge, but in any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negate an element of the crime charged. Voluntary intoxication may not negate a “reckless” culpable mental state (Penal Law § 15.05 [3]).

C. Affirmative and ordinary defenses

1. Burden of proof: Penal Law § 25.00

There is a fundamental distinction between an ordinary defense and an affirmative defense. The People have the burden of disproving an ordinary defense beyond a reasonable doubt; all that is required is evidence of the defense, which if credited, is sufficient to raise a reasonable doubt. When an affirmative defense is raised at trial, the defendant has the more demanding burden of establishing such a defense by a preponderance of the evidence (*People v Butts*, 72 NY2d 746 [1988]).

2. Alibi

An alibi is not an affirmative or exculpatory defense which the defendant has the burden of proving (*People v Victor*, 62 NY2d 374, 377-378 [1984] [internal citations omitted]). Rather, it is simply evidence that will require an acquittal if when all the evidence is considered a reasonable doubt is raised as to defendant’s guilt (*id.*). In order to avoid confusion and ensure that the jury understands that the People must always meet their burden of proving that the accused actually committed the crime, an alibi is treated for practical purposes the same as a statutory defense even though it is not so defined in the Penal Law. Thus, the People have the burden of disproving an alibi beyond a reasonable doubt.

3. Entrapment: Penal Law § 40.05

In any prosecution for an offense, it is an affirmative defense that the defendant engaged in the proscribed conduct because he or she was induced or encouraged to do so by a public servant. Inducement or encouragement requires active inducement or encouragement; conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

Pursuant to *People v Isaacson* (44 NY2d 511 [1978]), although an entrapment defense may fail because of a defendant’s predisposition to commit the offense, if the government’s

conduct was “so egregious and deprivative” as to constitute a violation of the due process clause of the New York State Constitution, the defendant would be entitled to dismissal of the charges.

4. Justification; defense of self or another: Penal Law art 35

In any prosecution for an offense, justification, as defined in this section of the Penal Law, is a defense. Conduct that would otherwise constitute an offense is justifiable when the conduct is authorized by law or is necessary as an emergency measure to avoid imminent injury.

An actor may use physical force against another person if the actor reasonably believes it necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by such other person. He may not do so if he provoked the other person’s conduct with intent to cause him physical injury or if he was the initial aggressor and has not effectively withdrawn from the encounter.

However, an actor may not use deadly physical force unless he reasonably believes the other person is using or about to use deadly physical force and he cannot retreat with complete safety. There is no duty to retreat if the actor is in his own home and was not the initial aggressor (Penal Law § 35.15).

In determining whether a defendant acted reasonably in perceiving and defending against impending harm, New York permits the defendant to introduce evidence of the victim’s prior acts of violence only if such were known to the defendant at the time of the incident (*Matter of Robert S.*, 52 NY2d 1046 [1981]; *People v Miller*, 39 NY2d 543 [1976]).

5. Renunciation: Penal Law § 40.10

In any prosecution for an offense, other than an attempt to commit a crime, in which the defendant’s guilt depends upon his or her criminal liability for the conduct of another, it is an affirmative defense that the defendant withdrew from participation in such offense prior to the commission of the offense and made a substantial effort to prevent the commission of the crime.

III. Crimes

A. Assault and related offenses: Penal Law art 120

The traditional elements of assault are the specific intent to cause physical injury and the causing of such injury. The degrees of assault depend on such factors as whether physical or serious physical injury was caused, whether a deadly weapon or dangerous instrument was used, the status of the victim (i.e., police, other public servants, children, senior citizens), and the actor’s mental culpability. Assault crimes can involve intentional, reckless and criminally negligent actions.

Several assault crimes are relatively new to the current Penal Law such as Vehicular Assault (Penal Law §§ 120.03, 120.04, 120.04-a), Gang Assault (Penal Law §§ 120.06, 120.07) and Stalking (Penal Law §§ 120.45, 120.50, 120.55, 120.60).

B. Murder, manslaughter and criminally negligent homicide: Penal Law art 125; § 15.05

Homicide is conduct which causes the death of a person under circumstances constituting murder, manslaughter or criminally negligent homicide (Penal Law § 125.00). The various degrees of homicide depend on how the death was caused, who the victim was, and the mental state of the actor. In order to be criminally responsible for homicide, the defendant's actions must be a sufficiently direct cause of the ensuing death (*People v DaCosta*, 6 NY3d 181 [2006]).

The basic definitions of intentional murder in the first degree and in the second degree are the same, i.e., "with intent to cause the death of another person, he or she causes the death of such person, or of a third person" (Penal Law §§ 125.24 [1], 125.27 [1]). Intent requires a "conscious objective" or "purpose" to cause a particular result, or to engage in particular conduct (Penal Law § 15.05 [1]). A person acts with intent to cause the death of another when that person's conscious objective or purpose is to cause the death of another (Penal Law § 125.25 [1]). The Model Penal Code § 210.2 (1) (a) differs from New York law in that, under the Code, a person is guilty of murder if he or she has killed another person "knowingly," which is defined under the Code as an awareness that it is practically certain that the conduct will cause death.

In addition to requiring an intentional killing, the first-degree murder statute requires that the defendant's conduct include one of the numerous separate aggravating factors listed in the statute, many of which involve the status of the victim (e.g., police officers, peace officers and employees of correctional facilities, various persons, who, as part of their official duties, respond to emergencies, witnesses to crime and their immediate family members, judges and officers of the court)(Penal Law § 125.27 [1] [a]).

The rule of transferred intent is incorporated in each of the intentional homicide crimes. Under that rule, "where the resulting death is of a third person who was not the defendant's intended victim, the defendant may nonetheless be held to the same level of criminal liability as if the intended victim were killed" (*People v Dubarry*, 25 NY3d 161 [2015]), citing *People v Fernandez*, 88 NY2d 777, 781 [1996]).

Murder in the second degree includes depraved indifference murder, which occurs when "under circumstances evincing a depraved indifference to human life, [one] recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person" (Penal Law § 125.25 [2]). Depraved indifference has been judicially defined as a culpable mental state (see *People v Feingold*, 7 NY3d 288 [2006] overruling *People v Register*, 60 NY2d 270 [1983], compare Model Penal Code § 210.2 [1] [b]).

Felony murder, also second degree murder, occurs if during or in immediate flight from the commission or attempted commission of a statutorily specified felony (e.g., robbery, burglary, kidnaping, arson, rape, escape), a participant in the crime causes the death of a person other than a participant (Penal Law § 125.25 [3]). Each participant in the crime, irrespective of whether they caused the death, may be guilty of felony murder under such circumstances.

Manslaughter in the first degree occurs when with the intent to cause serious physical injury to another person, the defendant causes the death of such person or of a third person; or with the intent to cause the death of another person, he causes the death of such person or of a third person under the influence of extreme emotional disturbance (Penal Law § 125.20 [1], [2]; *see* Criminal Law and Procedure, I.B.2).

A person is guilty of manslaughter in the second degree when he or she recklessly causes the death of another (Penal Law § 125.15). Recklessly is a defined culpable mental state (Penal Law § 15.05 [3]). A person acts “recklessly” when that person engages in conduct which creates or contributes to a substantial and unjustifiable risk that a result will occur or a circumstance defined by statute exists, and when that person is aware of and consciously disregards that risk. Reckless manslaughter is aggravated to second degree murder when a “grave” risk of death is evident under circumstances evincing a “depraved indifference to human life.”

A person is guilty of criminally negligent homicide when, with criminal negligence, he or she causes the death of another (Penal Law § 125.00). A person acts with criminal negligence when that person engages in conduct which creates or contributes to a substantial and unjustifiable risk that a result will occur or a circumstance defined by statute exists, and when that person “fails” to perceive that risk “in a situation where the offender has a legal duty of awareness” (Penal Law § 15.04 [4]).

C. Sex Offenses: Penal Law art 130

It is an element of every offense defined by Article 130 that the sexual act was committed without the victim’s consent (Penal Law § 130.05 [1]). Generally, lack of consent results from forcible compulsion or the incapacity of the victim to consent (Penal Law § 130.05 [2]). A person is deemed incapable of consent when he or she is less than 17 years old, mentally disabled or incapacitated, physically helpless, or in the care and custody of the Department of Corrections and Community Supervision or a hospital and the actor is an employee of the Department or hospital.

D. Burglary and related offenses: Penal Law art 140

A person is guilty of trespass when he or she knowingly enters or remains unlawfully in or upon premises (Penal Law § 140.05).

Burglary requires that a person knowingly enter or remain unlawfully in a building with an intent to commit a crime therein (Penal Law § 140.20). Factors determining the degree of the crime of burglary include whether the building was a dwelling and whether a participant possessed or used a deadly weapon or instrument or caused physical injury to a non-participant (Penal Law §§ 140.25, 140.30).

E. Larceny: Penal Law art 155

Penal Law § 155.05 (1) contains the general definition of larceny for all degrees of the crime: a person commits larceny when, with intent to deprive another of property, he or she

wrongfully takes property from the owner thereof. Penal Law 155.05 (2) includes all of the common-law larceny offenses, together with several statutory offenses not previously considered larceny, but it does not enlarge the scope of the crime or encompass acts not otherwise specifically prohibited by the statute. A significant factor in determining the degree of the crime of larceny is the value of the stolen property (*People v Foster*, 73 NY2d 596, 605 [1989]).

F. Robbery: Penal Law art 160

The statutory definition of robbery is a forcible stealing. A robbery occurs when in the course of committing a larceny, a person “uses or threatens the immediate use of physical force upon another person” (Penal Law § 160). The use or threat of force must be “for the purpose” of preventing or overcoming resistance to the taking of the property or “for the purpose” of compelling another to deliver up the property. In *People v Smith* (79 NY2d 309 [1992]), the Court of Appeals decided that the “for the purpose” language required that the defendant intend one of the alternatives, rather than that the force used have one of the alternative effects.

G. Anticipatory offenses

1. Criminal solicitation: Penal Law art 100

In general, a person is guilty of some degree of criminal solicitation when, with intent that another engage in criminal conduct, he or she solicits, requests, commands, importunes, or otherwise attempts to cause such other person to engage in such conduct. The crime is completed by the communication to another to commit a crime; no resulting action by the person being solicited is necessary (*People v Lubow*, 29 NY2d 59 [1971]).

2. Conspiracy: Penal Law art 105

In general, a person is guilty of some degree of conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct. It is essential for a conviction for conspiracy that there be proof of an overt act committed by one of the conspirators in furtherance of the conspiracy (Penal Law § 105.20). An overt act must be an “independent act that tends to carry out the conspiracy” (*People v McGee*, 49 NY2d 48, 58 [1979]). New York has adopted the unilateral theory of conspiracy such that a defendant may be convicted of conspiracy even though the illicit agreement is with a party who is not criminally liable due to lack of intent (e.g., an undercover police officer) or other impediments (e.g., acquittal of the alleged co-conspirator) (Penal Law 105.30).

3. Attempt to commit a crime: Penal Law art 110

A person is guilty of an attempt to commit a crime when, with the intent to commit a crime, he or she engages in conduct which tends to effect the commission of such crime (Penal Law 110). New York, unlike the Model Penal Code, requires “intent” to commit the particular crime. If a specific intent to commit a crime is inconsistent with the required mental culpability of the crime, New York does not recognize an “attempt.” Thus, a person cannot be charged with

an attempt to commit second-degree (reckless) manslaughter, or depraved indifference murder, or felony murder, or reckless/criminally negligent assault (see e.g., *People v Martinez*, 81 NY2d 810 [1993]; *People v Foster*, 19 NY2d 150 [1967]; *People v Acevedo*, 32 NY2d 807 [1973]; *People v Campbell*, 72 NY2d 602 [1988]; *People v Hendrix*, 56 AD2d 580 [2d Dept 1977]).

4. Criminal facilitation: Penal Law art 115

Criminal facilitation occurs when a person, believing it probable that he or she is rendering aid to a person who intends to commit a crime, engages in conduct that provides another person the means or opportunity for the commission of a crime and that in fact aids such person in the commission of the crime (Penal Law § 115.01). While knowingly aiding the commission of a crime, the facilitator does not necessarily possess the mental culpability required for commission of the crime and is therefore not within the statutory definition of an accomplice.

IV. New York Constitutional and Procedural Protections

A. Detention and warrantless arrest: CPL 140.10

In general, CPL 140.10 allows a police officer to arrest a person for a crime, i.e., a felony or a misdemeanor, as opposed to an offense, without a warrant where the police officer has reasonable cause to believe that a person committed a crime, whether or not in his or her presence. The seminal case is *People v De Bour*, 40 NY2d 210 (1976) adhered to in *People v Hollman*, 79 NY2d 181 (1992). In *De Bour*, the Court set out a four-tiered method for evaluating the propriety of encounters initiated by police officers. If a police officer seeks simply to request information from an individual, that request must be supported by an objective, credible reason, not necessarily indicative of criminality. The common law right of inquiry is activated by a founded suspicion that criminality is afoot and permits somewhat greater intrusion. Where a police officer has reasonable suspicion that a particular person was involved in a crime, the officer is authorized to forcibly stop and detain the person. Where the police officer has probable cause to believe that a person has committed a crime, an arrest is authorized (*People v Johnson*, 66 NY2d 398, 402 [1985]).

On what constitutes an unlawful seizure of a citizen, there are differences between federal law (*U.S. v Drayton*, 536 US 194, 200-202 [2002]) and New York law (*People v Bora*, 83 NY2d 531, 535-36 [1994]). Under federal law, a seizure requires either physical force or, if there is no physical force, a submission to the assertion of authority. Under New York law, the State Constitution does not require that an individual be physically restrained or submit to a show of authority before finding a seizure. Rather, the test is whether a reasonable person would have believed under the circumstances that the officer's conduct was a significant limitation on his or her freedom (*Bora*, 83 NY2d at 535).

Under both the State and Federal Constitutions, the protective pat-down exception to the warrant requirement authorizes a limited search of lawfully detained suspects to determine whether a weapon is present (see *Terry v Ohio*, 392 US 1 [1968], *People v Rivera*, 14 NY2d 441 [1964]). Unlike federal law, which permits a warrantless seizure of contraband detected through a police officer's touch during a *Terry* pat-down (*Minnesota v Dickerson*, 508 U.S. 366 [1993]),

New York law narrowly limits the scope of the intrusion authorized during a pat-down to what is necessary to ascertaining the presence of weapons (*People v Diaz*, 81 NY2d 106 [1993] [during a frisk the officer felt in the defendant's pocket what appeared to be a bunch of vials used to package a controlled substance; the warrantless seizure of the vials was not permitted]; *Matter of Marrhonda G.*, 81 NY2d 942 [1993] [on moving a bag of a runaway who had been detained, an officer felt what he believed to be the butt and trigger guard of a gun; the warrantless opening of the bag, which revealed weapons and ammunition, was not permitted]; *Matter of Andy E.*, 81 NY2d 948 [1993] [a warrantless search of a brown bag, which felt like it had hard objects inside, was not permitted]).

B. Search and seizure

1. With a warrant: CPL 690.05, 690.10, 690.15, 690.35

A local criminal court may, upon application of a police officer or a district attorney, issue a search warrant: (1) directing the officer to search a designated premises, vehicle or person for the purpose of seizing designated property and delivering it to the court which issued the warrant; or (2) directing the officer to search a designated premises for the purpose of arresting a person who is the subject of an arrest or bench warrant where the designated premises is the dwelling of a third person who is not the subject of the arrest warrant (CPL 690.05).

Personal property is subject to seizure pursuant to a search warrant if there is reasonable cause to believe that it is:

- Stolen;
- Unlawfully possessed;
- Has been used, or is possessed for the purpose of being used, to commit or conceal the commission of an offense; or
- Constitutes evidence or tends to demonstrate that an offense was committed

(CPL 690.10).

A search warrant must direct a search of a designated or described place or vehicle or person and may also direct a search of any person at or in the place or vehicle (CPL 690.15).

An application for a search warrant may be made in writing or orally, subject to certain requirements outlined in CPL 690.35. The application must contain among other information:

- The name of the court and the name and title of the applicant for the search warrant;
- A statement that there is reasonable cause to believe that property may be found in the designated place, vehicle or person, or reasonable cause to believe that a person who is subject to the warrant may be found in the designated premises; and
- Allegations of fact supporting such statement based upon personal knowledge of the applicant or based upon information or belief. If the factual allegations are based upon information and belief, the source of such information and grounds for such belief must be stated

(CPL 690.35).

The cases of *People v Griminger* (71 NY2d 635 [1988]) and *People v Bigelow* (66 NY2d 417 [1985]) define unique differences between the United States Supreme Court and the New York Court of Appeals on the requirements of a search warrant.

In *Griminger*, the Court of Appeals declined to follow the United States Supreme Court in applying a “totality-of-the-circumstances” rule for reviewing the sufficiency of an informer’s information for probable cause. Under the federal rule, an undisclosed informant’s tip may be sufficient to support a search warrant if, under the totality of the circumstances, there exists probable cause supporting the warrant. The New York Court of Appeals decided to adhere to the more exacting requirement that the application for the search warrant must demonstrate both: (1) the veracity or reliability of the source of the information, and (2) the basis of the informant’s knowledge.

In *Bigelow*, the Court of Appeals declined to follow the United States Supreme Court, which did not suppress evidence seized under a deficient search warrant when it was seized in “good faith” i.e., the warrant was signed by a judge and was believed valid by the police who executed it (*U.S. v Leon*, 468 US 897 [1984]).

2. Without a warrant

New York law requires that for a warrantless emergency search, the search must not be primarily motivated by an intent to arrest and seize evidence (*People v Mitchell*, 39 NY2d 173 [1976]) (cf. *Brigham City, Utah v Stuart* (547 US 398 [2006] [eliminating this element as a matter of federal law]).

In *People v Belton*, the New York Court of Appeals drew a distinction between New York and federal law on when a vehicle could be searched pursuant to the automobile exception to the rule against warrantless searches. Where police have reason to believe that the vehicle may contain evidence related to the crime for which the occupant was arrested or that a weapon may be discovered or a means of escape thwarted, they may contemporaneously search the passenger compartment, including any closed containers found therein (*People v Belton*, 55 NY2d 49 [1982]; *People v Gokey*, 60 NY2d 309 [1983]). In deciding an earlier appeal in the same case, the United States Supreme Court had upheld the search on the exception for a search incident to a lawful arrest (*New York v Belton*, 453 US 454 [1981]). In 2009, the United State Supreme Court narrowed its own *Belton* decision and in doing so came closer to New York’s view (see *Arizona v Gant*, 556 US 332 [2009]).

C. Confessions and privilege against self-incrimination

1. Right to counsel; indelible attachment

The constitutional right to counsel attaches indelibly in two situations. The first, similar to the federal right, arises when formal judicial proceedings begin, whether or not the defendant

has actually retained or requested an attorney (*People v West*, 81 NY2d 370, 373-374 [1993]). The second, recognized only in New York, relates to uncharged individuals who have actually retained a lawyer in the matter at issue or, while in custody, have requested a lawyer (*id; see People v Ramos*, 99 NY2d 27 [2002]). The indelible attachment of the right to counsel means that such individual cannot be questioned in the absence of counsel (*see People v Lopez*, 16 NY3d 375 [2011]; *People v Bing*, 76 NY2d 331, 339 [1990] [internal citations omitted]; *People v Hobson*, 39 NY2d 479, 481 [1976]). More specifically, once the right has attached, a defendant in custody cannot be interrogated in the absence of counsel on any matter, whether related or unrelated to the subject of the representation (*People v Rogers*, 48 NY2d 167, 169 [1979]; *Bing*, 76 NY2d at 340, 350). In New York, once an attorney enters the proceeding, a defendant in custody cannot in absence of counsel waive his or her right to counsel (*Hobson*, 39 NY2d at 483).

2. Voluntariness

Procedurally, New York provides for a pre-trial hearing to resolve the question of the voluntariness of a defendant's admission/confession. If the statement is not suppressed, the defendant is permitted to re-litigate the issue at trial (*People v Huntley*, 15 NY2d 72 [1965]).

Under the New York State Constitution, a statement given subsequent to an arrest in one's home which was predicated on probable cause but without a warrant or exigent circumstances must be suppressed, absent attenuation (*People v Harris*, 77 NY2d 434 [1991]). Federal law is to the contrary (*see New York v Harris*, 495 US 14 [1990]).

D. Police-arranged identification procedures

1. Photographic identification: CPL 60.25, 60.30, 710.20

New York courts historically precluded testimony about a prior identification of a defendant by photograph (*see People v Lindsay*, 42 NY2d 9 [1977]). Amendments to CPL 60.25 and CPL 60.30 have abrogated the existing decisional law, and effective July 1, 2017, testimony about a prior identification of a defendant by photograph is admissible provided the photographic identification was conducted pursuant to a blind procedure. A blind procedure is one whereby the police conducting the array do not know which person is the suspect or where the suspect is in the array (CPL § 60.25 [1] [c]). New York has adopted a detailed standard protocol for the administration and documentation of photographic arrays (*see Executive Law § 837* [21]). Police failure to follow the blind procedures may result in preclusion of the photo identification as evidence in chief, but will not by itself require suppression of the in-court identification (CPL 60.25 [1] [c]). Suppression is nonetheless warranted any time the photo identification is unconstitutionally suggestive (CPL 710.20 [6]).

2. Corporeal (showup/lineup) identification

Showup identifications are strongly disfavored in New York but are permissible if exigent circumstances require immediate identification, or even in the absence of exigent circumstances, when they are spatially and temporally proximate to the commission of the crime

and not unduly suggestive (*People v Ward*, 116 AD3d 989 [2d Dept 2014], *lv denied* 23 NY3d 1069 [2014]).

Testimony regarding an identification made at a pre-trial lineup is properly admitted unless it is shown that the procedure was unduly suggestive. The People have the initial burden of showing the reasonableness of police conduct in a pre-trial identification procedure, but the defendant bears the ultimate burden of proving that the procedure was unduly suggestive (*People v Jackson*, 98 NY2d 555 (2002)). Evidence of an unduly suggestive, police-arranged pre-trial identification proceeding must be excluded at trial, as a matter of state, not federal, constitutional law (*People v Adams*, 53 NY2d 241, 250-252 [1981]).

An in-court identification may be permitted notwithstanding an unduly suggestive pre-trial identification procedure only if the People can demonstrate that a source independent of the pre-trial identification procedure exists for the witness's in-court identification (*People v Chipp*, 75 NY2d 327, 335 [2000]).

3. In-court identification: CPL 60.25, 60.30

A witness who is able to make an in-court identification - that he or she observed a perpetrator commit a crime and based on a present recollection, the defendant is the perpetrator – is also permitted to testify that he or she subsequently identified the defendant in a properly conducted lineup or photographic identification (CPL § 60.30). Under CPL 60.25, if a witness is unable to make an in-court identification based on a present recollection, the witness's prior identification in a properly conducted lineup or photographic identification may be established by a third party witness. Under CPLR 60.25 and 60.30, both the testimony of the prior identification and the photographic evidence constitute evidence in chief (CPL 60.30).

E. Speedy trial guarantees: CPL 30.20 (1), 30.30

CPL 30.20 provides that after a criminal action is commenced, the defendant is entitled to a speedy trial. CPL 30.30 requires that the People be ready and announce readiness for trial within a prescribed time frame. The time period for readiness varies with the severity of the offense and some offenses are excluded from the statute. Failure of the prosecution to be ready within the statutory period may require that the action be dismissed or that an incarcerated defendant be released from custody.

The New York Court of Appeals has articulated criteria to be balanced in determining when the right to speedy trial has been violated. The factors are:(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay (*People v Taranovich*, 37 N.Y.2d 442, 445 [1975]). It is a due process violation in the event prosecution is not initiated timely (*People v Singer*, 44 NY2d 241 [1978]; *People v Staley*, 41 NY2d 789 [1977]).

Under federal law, a defendant must show both that the government caused the delay in order to obtain a tactical advantage and that actual prejudice resulted (*see United States v Gouveia*, 467 US 180, 192 [1984]; *People v Decker*, 13 NY3d 12, 16 [2009]). Under New

York's more expansive approach, where the "delay is great enough there need be neither proof nor fact of prejudice to the defendant" (*People v Taranovich*, 37 NY2d 442, 445 [1975]).

F. Double jeopardy: CPL 40.10, 40.20, 40.30; NY Const, art 1, § 6; U.S. Const. Fifth Amendment

Both the New York and federal constitutions contain a Double Jeopardy Clause granting a defendant protection against a second prosecution for the same offense after acquittal or conviction (see NY Const, art 1, § 6; U.S. Const. Fifth Amendment). New York's Criminal Procedure Law 40.20 (1) tracks the constitutional provisions ("A person may not be twice prosecuted for the same offense). The meaning of "offense" is narrowly defined in CPL 40.10 (1) prohibiting "only prosecuting the same person twice under the same statute for the same act" (*Polito v Walsh*, 8 NY3d 683, 687 [2007], *cf. Blockburger v United States*, 284 US 299, 304 [1932] ["the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not"]).

CPL 40.20 (2) encompasses, but is broader than the protection on successive prosecutions in the New York and federal constitutions, and dictates that a "person may not be separately prosecuted for two offenses based upon the same act or criminal transaction," unless one of nine exceptions apply (CPL 40.20 [2]). "Restated, absent the statutory exceptions, no matter the number of statutory offenses technically violated, or the number of jurisdictions involved, an accused is not to suffer repeated prosecution for the same general conduct" (*People v Abbamonte*, 43 NY2d 74, 81-82 [1998]). New York is different from other jurisdictions in that it more broadly defines when a previous prosecution precludes a subsequent prosecution (CPL 40.20 [2], 40.30; *see Kaplan v Ritter*, 71 NY2d 222 [1978]).

G. Grand jury testimony/immunity: CPL 50.10, 190.40, 190.45, 190.50

New York permits a defendant charged by felony complaint to testify on his or her own behalf in the grand jury and to have his or her lawyer present. The decision whether to hear other witnesses on behalf of the defendant rests with the grand jury.

Every witness in a grand jury proceeding must give any evidence legally requested, regardless of any protest or belief on one's part that it may tend to incriminate oneself. Thus, a witness who testifies in the grand jury is granted immunity, unless the witness agrees to waive immunity or the testimony is not responsive to a question and is gratuitously given or volunteered with knowledge that it is not responsive. A waiver of immunity may be a precondition to testifying for certain witnesses (e.g., a target or a witness for the target) (CPL art 190).

A person in New York who receives immunity in the Grand Jury or at trial automatically receives "transactional" immunity as opposed to use immunity (CPL § 50.10 and art 190). Transactional immunity protects the witness from prosecution for the offense or offenses involved; use immunity only protects the witness against the government's use of his or her immunized testimony in a prosecution of the witness, except in a subsequent prosecution for perjury or giving a false statement.

H. Accomplice testimony: CPL 60.22

A defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of the offense (*see* Evidence, III.A.).

EVIDENCE

I. Judicial Notice

A. Judicial notice of law: CPLR 4511

Under New York law, every court must take judicial notice without a request being made of the following:

- The common law, constitutions, and public statutes of the United States and of every state, territory, and jurisdiction of the United States;
- The official compilation of the New York Codes, Rules, and Regulations of the state (NYCRR); and
- All local laws and county acts.

Under CPLR 4511 (b), the court must take judicial notice of certain laws if a request is made by a party. Certain conditions must be satisfied before a party's request to take judicial notice of the laws specified in subdivision (b) will become mandatory on the court (CPLR 4511 [b]). The court has discretion to take judicial notice on its own motion of, among other things, private acts and resolutions of the United States Congress and the New York State Legislature; and ordinances and regulations of agencies or governmental subdivisions and the laws of foreign countries.

B. Judicial notice of adjudicative facts

Judicial notice of adjudicative facts is where courts accept and adjudicative fact as true without the offering of evidence by the party asserting the fact (*Ptasznik v Schultz*, 247 AD2d 197 [2d Dept 1998]). New York limits judicial notice of adjudicative facts to those incapable of dispute because they are either:

- Generally known within the community where the court sits or
- Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

II. Relevancy

A. Character evidence: CPL 60.40

In a criminal case, a defendant may establish his or her good character only by showing his or her general reputation in the community (*People v Barber*, 74 NY2d 653 [1989] [dissenting opinion]). The opinions of those who know the defendant personally and have firsthand knowledge of his or her character are inadmissible (*id.*). If a defendant through the testimony of a witness called by him offers evidence of his good character, the prosecution may independently prove any previous conviction of the defendant tending to negate the trait in issue (CPL 60.40 [2]).

In a civil case, evidence of good character may be admitted only after a person's good character has been directly called into question by evidence of bad character (*Kravitz v Long Is. Jewish-Hillside Med. Ctr.*, 113 AD2d 577 [2d Dept 1985]).

Evidence of a person's character is never admissible for the purpose of proving that the person acted in conformity therewith or had the propensity to do so (*Fanelli v diLorenzo*, 187 AD2d 1004 [4th Dept 1992]).

B. Uncharged crimes

In a criminal case in New York, evidence of a defendant's prior uncharged crimes is inadmissible to prove criminal propensities, but may be admitted under certain circumstances where the probative value of the proof outweighs its possible prejudicial effect. Evidence of uncharged but similar acts is therefore admissible to establish:

- Motive,
- Intent,
- Absence of mistake or accident,
- Identity, and
- Common scheme or plan

(*People v Molineux*, 168 NY 264 [1901]). A two-part inquiry is required to determine the admissibility of evidence of a defendant's uncharged crimes or prior bad acts. First, the proponent must identify some material issue to which the evidence is relevant. Second, the court must weigh the probative worth of the evidence against its potential for prejudice.

C. Habit

Evidence of habit or custom and practice may be admitted in a civil action to establish that a person performed a certain act. The party seeking to introduce such evidence must establish that the habit or custom or practice is "a deliberate and repetitive practice by a person in complete control of the circumstances" (*Rivera v Anilesh*, 8 NY3d 627, 633 [2007], citing *Halloran v Virginia Chems.*, 41 NY2d 386 [1977]), as opposed to "conduct however frequent yet likely to vary from time to time depending upon the surrounding circumstance" (*Halloran*, 41 NY2d at 389).

III. Witnesses

A. Competency of witnesses: CPLR 4512, 4513, 4519; CPL 60.20, 60.22; FCA 343.1 (2)

CPLR 4512 provides that one spouse is competent to give testimony against the other spouse. Thus, under New York law, a witness-spouse is not excused from giving testimony about matters that might be damaging to the party-spouse; however, spouses are entitled to

invoke a privilege for confidential communications in any type of proceeding (CPLR 4502; *see* Evidence, IV.A).

CPLR 4513 prescribes that a conviction of a crime does not render a witness incompetent. However, a witness's convictions may be used on cross-examination to impeach his or her credibility (*see* Evidence, III.B.2.). Impeachment is limited to crimes, i.e., felonies or misdemeanors. If the witness denies the conviction, it can be proven by extrinsic evidence.

Under New York's Dead Man's Statute, any person "interested in the event" may not testify in his or her own behalf against the executor/administrator/survivor of a deceased person or the committee of a mentally ill person concerning a transaction or communication with the decedent or mentally ill person (CPLR 4519). However, an interested person is not incompetent to testify as to the facts of an accident in an action involving a claim of negligence in the operation of a motor vehicle.

CPL 60.22 provides that a defendant may not be convicted upon the testimony of an accomplice without the support of corroborative evidence tending to connect the defendant with the commission of the offense. The Court of Appeals held that corroborative evidence need not rest upon evidence independent of the testimony of the accomplice; rather, it may be found in evidence which so "harmonizes" with the testimony of the accomplice "as to have a tendency to furnish the necessary connection between [a] defendant and the crime" (*People v Reome*, 15 NY3d 188, 194 [2010]).

Both Family Court Act § 343.1 (2) and CPL 60.20 (2) establish a rebuttable presumption that a child less than nine years old is incapable of giving testimony under oath. To overcome the rebuttable statutory presumption, the infant witness must demonstrate sufficient intelligence and capacity to justify the reception of his or her testimony, and that he or she knows, understands and appreciates the nature of an oath before the trial court may permit the sworn testimony (*People v Nisoff*, 36 NY2d 560 [1975]). If a witness cannot rebut the presumption or is under a mental defect, the court may nonetheless permit the witness to give unsworn evidence if the court is satisfied that the witness possesses sufficient intelligence and capacity to justify receipt of the evidence.

B. Impeachment

1. Inconsistent statements: CPLR 3117 (a) (1), 4514, 4517; CPL 60.35

Under CPLR 3117 (a) (1), at the trial of a civil action, the deposition of a deponent — party or nonparty — may be used by any party "for the purpose of contradicting or impeaching" the deponent. Likewise, CPLR 4517 provides that the prior trial testimony of a witness may be used by any party to contradict or impeach that witness if he or she testifies in a subsequent civil action involving the same parties and subject matter, so far as admissible under the rules of evidence.

CPLR 4514 provides that any party may introduce proof that any witness has made a prior statement inconsistent with his or her testimony if the statement was made in a writing

subscribed by him or her or was made under oath. Similarly, CPL 60.35 allows impeachment by a party of that party's witness via the witness's prior written statement or oral statement made under oath where the prior statement contradicts the testimony upon a material issue which tends to disprove the position of the party.

2. Conviction of a crime: CPLR 4513; CPL 60.40

In a civil proceeding, use of a prior conviction to impeach a witness is governed by CPLR 4513. It provides:

“A person who has been convicted of a crime is a competent witness; but the conviction may be proved, for the purpose of affecting the weight of his or her testimony, either by cross-examination, upon which he or she shall be required to answer relevant questions, or by the record. The party cross-examining is not concluded by such person’s answer.”

In a criminal proceeding, CPL 60.40 (1) authorizes the prosecution to independently prove a defendant's prior conviction if, when asked, the defendant denies it or equivocates.

A criminal defendant who chooses to testify may be cross-examined concerning prior convictions or “criminal, vicious or immoral acts” that bear logically on that individual's credibility as a witness (*People v Sandoval*, 34 NY2d 371 [1974]). A defendant may seek an advance ruling on what prior criminal, vicious or immoral acts the prosecution will be permitted to inquire about if the defendant takes the stand. In making such a ruling, the trial judge must balance the probative worth of evidence of prior specific criminal, vicious or immoral acts on the issue of the defendant's credibility, with the risk of unfair prejudice to the defendant.

3. Specific instances of conduct

In general, evidence of prior criminal acts to prove intent should be precluded where intent may be inferred from the commission of the act itself. Guilty knowledge of a defendant may be proved by evidence of his or her complicity in similar offenses so as to support the inference that the act charged was not innocently or inadvertently committed (*People v Schwartzman*, 24 NY2d 241 [1969], *cert denied* 396 US 846 [1969]). Admission is warranted only where evidence of the acts involved in the crimes charged is equivocal so that intention is not easily inferred from the acts alone. “In such cases it is recognized that proof of intent is often unobtainable except by evidence of successive repetitions of the act” (*id.*).

4. Character for truthfulness

In general, a party who is cross-examining a witness cannot introduce extrinsic documentary evidence or call other witnesses to contradict a witness's answers concerning collateral matters solely for the purpose of impeaching that witness's credibility (*People v Pavao*, 59 NY2d 282 [1983]). Where, however, the cross-examiner does not seek to contradict specific answers given by a witness, but attempts only to show that the witness has a bad

reputation in the community for truth and veracity, other witnesses may be called to testify with respect to the witness's reputation for untruthfulness.

C. Expert testimony

1. Expert opinions

Opinion testimony of an expert is admissible where the conclusions to be drawn from the facts depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence. "For testimony regarding both the ultimate questions and those of lesser significance, admissibility turns on whether, given the nature of the subject, 'the facts cannot be stated or described to the jury in such a manner as to enable them to form an accurate judgment thereon, and no better evidence than such opinions is attainable'" (*People v Cronin*, 60 NY2d 430, 432 [1983] [internal citations omitted]). The admissibility and bounds of expert testimony are in the trial court's discretion.

Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his or her opinion and reasons without first specifying the data upon which it is based. Upon cross-examination, the expert may be required to specify the data supporting his or her opinion (CPLR 4513).

2. Scientific evidence

The introduction of new scientific evidence requires a determination of its reliability. Such a determination is made using the *Frye* test, which asks whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community. *Frye* holds that "while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs" (*Frye v United States*, 293 F 1013, 1014 [DC Cir 1923]). New York has not adopted the more relaxed standard for admissibility of expert testimony, of relevance and reliability in the federal courts, as adopted by the Supreme Court in *Daubert v Merrell Dow Pharms.*, 509 US 579 (1993).

The *Frye* inquiry is a separate and distinct question from the admissibility question — whether there is a proper foundation to admit the evidence (*Parker v Mobil Oil Corp.*, 7 NY3d 434 [2006]).

IV. Privileges

A. Marital communications: CPLR 4502, 4512

Although spouses are competent to testify for and against one another (CPLR 4512), a spouse shall not be required, or without the consent of the other spouse, be allowed to disclose a confidential communication made by one spouse to the other spouse during the marriage (CPLR 4502 [b]). To qualify for privilege, the communication between the spouses may be oral, written,

or tape-recorded (*see Matter of Vanderbilt*, 57 NY2d 66, 73-74 [1982]). The confidential communications must be induced by the marital relationship and made in confidence: the privilege will not attach to communications made by the spouses in the known presence of outsiders (*People v Ressler*, 17 NY2d 174 [1966]). The spousal privilege for confidential communications applies in all civil and criminal proceedings.

B. Attorney-client: CPLR 4503

Unless the client waives the privilege, where legal advice is sought from the client's lawyer, all communications relating to that purpose that are made in confidence by the client are protected by the attorney-client privilege and cannot be disclosed by the lawyer. The presence of or transmittal through an employee of the attorney, such as a secretary or law clerk, will not destroy the privilege. For the privilege to apply, communications must be made for the purpose of providing legal advice or services in the course of a professional relationship (*Rossi v Blue Cross & Blue Shield of Greater N.Y.*, 73 NY2d 588 [1989]).

The attorney-client privilege extends to the attorney's own communications to the client. Likewise, corporations may invoke the attorney-client privilege for confidential communications with attorneys relating to their legal matters. For the privilege to apply when communications are made from client to attorney, they must be made for the purpose of obtaining legal advice and directed to an attorney who has been consulted for that purpose.

C. Physician/psychologist-patient: CPLR 4504, 4507

Unless the patient waives the privilege, CPLR 4504 prohibits disclosure of any information acquired by a physician, registered or practical nurse, dentist, podiatrist or chiropractor "in attending a patient in a professional capacity, and which was necessary to enable him [or her] to act in that capacity." The privilege applies to information communicated by the patient and obtained from observation of the patient, unless the information would be obvious to laymen. The privilege applies to information contained in a patient's medical files and expert testimony sought to be introduced at trial. A personal injury plaintiff impliedly waives the privilege as to medical conditions for which damages are sought. Details about an accident communicated by a personal injury plaintiff to a medical professional that are unrelated to treatment or diagnosis are not privileged.

Under CPLR 4507, confidential communications between a psychologist and a patient are placed "on the same basis" as under the attorney-client privilege (*see Evidence, IV.B.*).

D. Self-incrimination: CPLR 4501

A witness may not refuse to testify on the ground that the testimony might expose the witness to civil liability. A witness is, however, entitled to avoid testifying to self-incriminating facts. The objection may be raised only to specific questions that the witness believes would require incriminating answers.

V. Hearsay and Circumstances of its Admissibility

A. Definition of hearsay

Oral or written out-of-court statements offered for the truth of the matters they assert are hearsay. They may be received into evidence only if they fall within one of the recognized exceptions to the hearsay rule, and provided the proponent demonstrates that the evidence is reliable. In determining reliability, a court must decide whether the declaration was spoken under circumstances which render it highly probable that it is truthful (*Nucci v Proper*, 95 NY2d 597 [2001]).

B. Admissions

An admission is defined as an act or declaration of a party which constitutes evidence against the party at trial. “[A]dmissions by a party of any fact material to the issue are always competent evidence against him [or her], wherever, whenever or to whomsoever made” (*Reed v McCord*, 160 NY 330 [1899]). The hearsay statement of an agent is admissible against his or her employer under the admissions exception to the hearsay rule only if the making of the statement is an activity within the scope of his authority (*Loschiavo v Port Auth. of NY & NJ*, 58 NY2d 1040 [1983]). Note that admissions are admissible under an exception to the rule against hearsay in New York; under the Federal Rules of Evidence, admissions are non-hearsay (Fed.R.Evid. 801 [d]).

C. Present sense impressions

The present sense impression exception to the hearsay rule is available when the statement describes or explains an event or condition and was made while the declarant was perceiving the event or condition, or immediately thereafter, and the content of the statement is corroborated by independent proof (*People v Brown*, 80 NY2d 729 [1993]). In New York, a “marginal time lag” is allowed between the event and the description by the declarant (*see People v Vasquez*, 88 NY2d 561 [1996]). The corroboration offered to support admission of the statements must serve to support the statements’ substance and content; the corroboration element cannot be established merely by showing that the statements were unprompted and were made at or about the time of the reported event (*People v Vasquez*, 88 NY2d 561 [1996]). What corroboration is sufficient depends on the circumstances of each case. The declarant’s descriptions need not be corroborated by a witness at the scene with an equal opportunity to perceive the event, but there must be some evidence to assure the court the statement sought to be admitted was made spontaneously and contemporaneously with the event described (*Brown*, 80 NY2d at 730).

D. Statements for purposes of medical diagnosis and treatment: CPL 60.10

Hospital records fall within the business records exception to the hearsay rule as long as the information relates to the diagnosis, prognosis or treatment of a patient or the records are otherwise helpful to an understanding of the medical or surgical aspects of the hospitalization (CPL 60.10). In determining the admissibility of statements in medical records, the inquiry is

whether the statements at issue were relevant to diagnosis and treatment of the patient (*People v Ortega*, 15 NY3d 610 [2010]).

E. Business records: CPLR 3122-a, 4518, 4539; State Technology Law §§ 305, 306

Under the business records hearsay exception, a business record may be admitted to prove the truth of its contents. The requirements under this exception are as follows:

- The document must be “made in the regular course of any business,”
- At the time of the act or occurrence recorded or within a reasonable time thereafter,
- Where it was the regular course of such business to make that record, and
- The person who made the record must have had actual knowledge of the act or occurrence or must have received his or her information from someone within the business who had actual knowledge and was under a “business duty” to report the event. The lack of personal knowledge by the maker may affect its weight but not its admissibility

(CPLR 4518; *Johnson v Lutz*, 253 NY 124, 126 [1930]).

Generally, original records must be produced absent proper foundation for the introduction of secondary evidence. The use of copies or reproductions of documents is permitted if the copies were also prepared in the regular course of business (CPLR 4539).

Section 305 of the State Technology Law provides that “[a]n electronic record shall have the same force and effect as those records not produced by electronic means.” Furthermore, “an electronic record or electronic signature may be admitted into evidence” subject to Article 45 of the CPLR (State Technology Law § 306).

CPLR 3122-a provides for a certification procedure when the records sought by a subpoena *duces tecum* are business records. The certification must be sworn in the form of an affidavit and signed by the custodian or other person charged with responsibility for maintaining the records. As of 2014, certification of a nonparty’s business records, as a substitute for in-court testimony, is permitted without the need for production pursuant to subpoena.

Former testimony, including depositions: CPLR 4517; CPL 670.10

The trial testimony of any witness taken at a prior trial involving the same parties and arising from the same subject matter may be used by any party to contradict or impeach that witness if he or she testifies in the subsequent civil action (CPLR 4517 [a] [1]).

A party’s prior trial testimony is admissible as evidence in chief when it is offered by any party who is “adversely interested” when the prior testimony is offered, including the prior trial testimony of any person who, at the time the testimony was given, was an officer, director, member, employee, or managing or authorized agent of a party (CPLR 4517 [a] [2]).

CPLR 4517 (a) (3) establishes a hearsay exception for testimony given at a prior trial of the same subject matter by a witness, provided the court finds:

- That the witness is not available because of death, age, sickness, infirmity or imprisonment;
- That the witness is more than 100 miles from the place of trial, or out of state, unless the absence was procured by the party offering the testimony;
- Attendance cannot be procured despite diligent efforts of the party offering the testimony; or
- Exceptional circumstances exist making its use desirable.

The prior testimony of a physician may be used by any party without the need to show unavailability or special circumstances, provided the admission of the prior testimony is not prejudicial under the circumstances (CPLR 4517 [a] [4]).

In the criminal context, CPL 670.10 provides that testimony given by a witness at a related prior criminal trial or preliminary hearing may be received into evidence at a subsequent proceeding or action when, at the time of such subsequent proceeding, the witness:

- Is unable to attend by reason of death, illness or incapacity,
- Cannot with due diligence be found, or
- Is outside the state or in federal custody and cannot with due diligence be brought before the court.

The “subsequent proceedings” at which such testimony may be admitted include “[a]ny proceeding constituting a part of a criminal action based upon the charge or charges which were pending against the defendant at the time of the witness’s testimony and to which such testimony related” and any post-judgment proceeding challenging conviction(s) based on that charge (CPL 670.10).

MATRIMONIAL AND FAMILY LAW

I. Getting Married

A. Same sex, void and voidable marriages and recognition of common-law marriage: DRL §§ 5, 6, 15, 15-a

A marriage that is otherwise valid is valid regardless of whether the parties to the marriage are of the same or different sex (DRL § 10-a). New York defines and declares void “incestuous” and “bigamous” marriages (DRL §§ 5, 6). Marriages in which either party is under the age of 17 are prohibited (DRL 15-a), and a person who is between the age of 17 and 18 may obtain a marriage license with the written consent of the parents and the written approval of a Supreme Court justice or judge of the Family Court (DRL 15). Marriages where either party lacks mental capacity or physical capacity, or consents to marriage due to force, duress or fraud, are also voidable (DRL § 7).

New York does not permit common-law marriages; however, as a matter of comity, it will recognize out-of-state marriages (domestic and foreign) and common-law marriages if validly entered under the laws of another state (*Mott v Duncan Petroleum Trans.*, 51 NY2d 289 [1980]). There are two categories of exception: (1) marriages prohibited by positive law in New York, and (2) marriages involving incest or polygamy (*Martinez v Cty. of Monroe*, 50 AD3d 189, 191-92 (4th Dept [2008])). Once a marriage is recognized as valid in New York, it is valid in all respects and is terminated only by annulment, divorce or death.

B. Pre-nuptial and post-nuptial contracts: DRL 236 (B) (3); GOL § 5-701 (a) (3)

Agreements made before the marriage (prenuptial) or during the marriage (post-nuptial or separation) are valid and enforceable provided they are:

- In writing;
- Subscribed by both parties; and
- Acknowledged or proven in the manner required to entitle a deed to be recorded

(DRL 236 [B] [3]; see *Galetta v Galetta*, 21 NY3d 186 [2013]).

II. Matrimonial Actions

A. Separation agreements: DRL 236 (B) (3)

Separation agreements, prenuptial contracts, post-nuptial contracts, and stipulations of settlement in an action determine the rights and obligations of each party to the other party under the Domestic Relations Law. Such agreements complying with DRL 236 (B) (3) are valid and enforceable in the same manner as an ordinary contract. Such agreements may include provisions:

- Making a testamentary gift of any kind or waiver of the right of election,
- Dividing separate and marital property,

- Setting the amount and duration of maintenance, and
- Relating to the custody, care, education and support of any child of the parties.

Based on the fiduciary relationship between husband and wife, such agreements are more closely scrutinized by the courts than ordinary contracts. Courts will, however, exercise their review authority sparingly, and will set aside an agreement only upon a showing of unconscionability or where the agreement is “manifestly unfair to a spouse because of the other’s overreaching” (*Christian v Christian*, 42 NY2d 63, 72 [1977]).

B. Grounds: DRL 170

A spouse seeking divorce in New York may do so under a number of statutory grounds (*see* DRL 170 [1] – [7]) including the “no-fault” ground of “irretrievable breakdown of the marriage” (DRL 170 [7]). To establish this ground, one spouse need only state under oath that the relationship has broken down irretrievably for a period of at least six months prior to the commencement of an action (DRL 170 [7]). Before a divorce may be granted based on this ground, all economic issues of equitable distribution, the payment or waiver of spousal support, the payment of attorney’s fees, and custody and visitation, must be resolved between the parties or determined by the court (*id.*).

D. Personal jurisdiction: CPLR 302 (b)

New York’s long-arm statute permits exercise of personal jurisdiction over a non-resident defendant in any matrimonial action involving a demand for economic relief, including equitable distribution of marital property (CPLR 302 [b]). The plaintiff must be a resident or domiciliary of New York and one of the following must be met:

- New York was the matrimonial domicile of the parties before their separation,
- The defendant abandoned the plaintiff in New York, or
- The claim for economic relief accrued under New York law.

C. Subject matter jurisdiction, durational residency requirements: DRL 230

In order to have jurisdiction over the marriage or marital res, New York requires as a prerequisite to commencement of a matrimonial action that:

- Both parties be residents (residence=domicile) of New York at the time the action is commenced and the cause of action occurred in New York, or
- One of the parties is a resident of New York for one continuous year immediately preceding the action if:
 - the parties were married in New York,
 - the parties resided as spouses in New York, or
 - the cause of action occurred in New York, or
- One of the parties is a resident of New York for two continuous years immediately preceding the action.
-

E. Pleadings and service of process: DRL 211, 232, 236 (B) (2) (b)

All pleadings in a matrimonial action must be verified (DRL 211). Service of process must be by personal delivery absent a court order authorizing substitute service (DRL 232). Defendants must be served with a copy of the “automatic orders” simultaneously with service of the summons (DRL 236 [B] [2] [b]). These orders, which remain in effect during the pendency of the action, prevent either party from unilaterally changing the economic status quo of the relationship by disposing of property, incurring debts, removing the other party or the children from existing medical insurance, or changing beneficiaries on existing insurance policies.

III. Equitable Distribution: DRL 236 (B) (4), 236 (B) (5)

Compulsory financial disclosure is required by both parties to a matrimonial action through a sworn statement of net worth (DRL 236 [B] [4]). Courts determining equitable distribution of marital property must consider 14 distinct factors and set forth in any decision which factors they relied upon in distributing marital property (DRL 236 [B] [5] [g]). There is no presumption of equal division. Courts may, in lieu of equitable distribution, make a distributive award to achieve equity between the parties (DRL 236 [B] [5] [e]) and make an order regarding exclusive use and occupancy of the marital home and its household effects (DRL 236 [B] [5] [f]).

A. Marital property: DRL 236 (B) (1) (c), 236 (B) (5)

Marital property is all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held (DRL 236 [B] [1] [c]; *O'Brien v O'Brien*, 66 NY2d 576 [1985]). Marital property includes inter-spousal gifts (DRL 236 [B] [1] [d]), pension benefits (*Majauskas v Majauskas*, 61 NY2d 481 [1984]), and professional practices (*Litman v Litman*, 93 AD2d 695 (2d Dept 1983), *affd* 61 NY2d 918 [1984]). Enhanced earning capacity arising from a license, degree, celebrity goodwill or career enhancement is not treated as a marital asset subject to equitable distribution (DRL 26 [B] [5] [d] [7]). However, in arriving at equitable distribution of marital property, a court must consider a spouse’s direct or indirect contributions to the enhanced earning capacity of the other spouse (*id.*).

B. Separate property: DRL 236 (B) (1) (d)

Separate property is not marital property and is thus not subject to equitable distribution. Separate property is defined as:

- Property acquired before the marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse;
- Compensation for personal injuries;
- Property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse; and
- Property described as separate property by a valid written agreement of the parties.

Property acquired during the marriage is presumed to be marital property, and the party seeking to overcome the presumption has the burden of proving that the property in dispute is separate property (*Fields v Fields*, 15 NY2d 158 [2010]). Separate property may be commingled with and transmuted into marital property through deposit into a joint account or into joint names (*Fessenden v Fessenden*, 307 AD2d 444 [3d Dept 2003]). Thus, if a spouse places his or her separate property into joint names, a presumption of gift arises which, unless rebutted, results in the conclusion that the property is to be treated as marital property (*id.*).

The appreciation in value of separate property during the marriage due to the non-titled spouse's direct or indirect contributions, as parent and homemaker, is also considered a marital asset (*Price v Price*, 69 NY2d 8 [1986]). However, if the appreciation is not due, in any part, to the efforts of the titled spouse, but to the effect of unrelated factors including inflation or other market forces, the appreciation remains separate property (*id.*).

IV. Support

A. Spousal maintenance: DRL 236 (B) (5-a), 236 (B) (6), 236 (B) (9)

Courts award both temporary and post-divorce maintenance employing a mathematical formula based upon the parties' respective incomes (up to an income cap adjusted periodically for inflation) (DRL 236 [B] [5-a], DRL 236 [B] [6]). There are two different formulas depending on whether or not there is also a child support obligation for the payor spouse. The court may adjust the guideline amount of temporary or permanent maintenance where it finds the guideline amount unjust or inappropriate, and award additional maintenance where there is income over the cap, based on one or more statutory factors (DRL 236 [B] [5-a] [h] [1], DRL 236 [B] [6] [e] [1]). Post-divorce maintenance terminates on the death of either party or the remarriage of the payee spouse (DRL 236 [B] [6] [f] [3]).

The court has discretion to determine the duration of post-divorce maintenance by reference to a schedule contained in DRL 236 (B) (6) (f) that is based on the length of the marriage. The schedule is advisory only and not exact. For example, if the parties were married for 12 years, the guideline would advise that maintenance be payable for 1.8. to 3.6 years duration. In making its determination, whether or not the court uses the advisory schedule, it must consider a number of statutory factors unrelated to the length of the marriage (DRL [B] [6] [e] [1]).

B. Child Support Standards Act: DRL 240 (1-b); FCA 413

Parents in New York are liable for support of a child until age 21 or earlier emancipation (DRL [1-b] [b] [2]; FCA 413). New York has adopted the Child Support Standards Act (CSSA) to provide uniform guidelines in the determination of child support awards (DRL 240 [1-b]; FCA 413) (Family Court Act 413 and DRL 240 [1-b] parallel each other and both were enacted as part of the CSSA). The CSSA sets forth a rigid formula for calculating child support by applying a designated statutory percentage, based upon the number of children to be supported, to combined parental income up to a statutory cap adjusted periodically for inflation.

Where both maintenance and child support are to be calculated, maintenance is to be calculated first, since the amount of maintenance is to be subtracted from the payor's income and added to the payee's income for child support purposes (DRL 236 [B] [6] [c] [1] [g]).

With respect to combined parental income exceeding the cap, the court has discretion to apply the statutory child support percentage or apply the factors set forth in DRL 240 (1-b) (f) (the "subparagraph f factors"), but it must set forth in a decision the reasons for its determination. The CSSA applies in shared custody situations (*Bast v Rossoff*, 91 NY2d 723 [1998]).

The basic child support obligation may be supplemented by "add-ons" such as child care expenses (DRL 240 [1-b] [c] [4]), health insurance premiums (DRL 240 [1-b] [c] [5]), and unreimbursed health expenses (DRL 240 [1-b] [c] [5] [v]). These expenses are divided between the parties pro rata based on each party's income. Educational expenses may also be awarded in the court's discretion (DRL 240 [1-b] [c] [7]). Marital fault is expressly excluded from consideration in the determination of child support (DRL 236 [B] [7] [a]).

Parents may not effectively release each other from the statutorily-imposed obligation to support children. The parties may "opt out" or deviate from the CSSA provisions so long as the decision is made knowingly and pursuant to DRL 240 (1-b) (h), which requires specific recitals in a written agreement. A court is not bound by an agreement that fails to provide for adequate support for the parties' children.

C. Modification of child support and maintenance: DRL 236 (B) (9) (b) (1), (B) (9) (b) (1) (2), 241, 248; FCA 413

A party seeking to modify a child support obligation derived from an agreement incorporated but not merged into a judgment of divorce prior to October 30, 2010 must establish that the agreement was unfair or inequitable when entered into; or that an unanticipated and unreasonable change in circumstances has occurred resulting in a concomitant need of the child; or that the needs of the child are not being adequately met (*Matter of Boden v Boden*, 42 NY2d 210 [1977], *Matter of Brescia v Fitts*, 56 NY2d 132 [1982]).

As to applications made after October 30, 2010, and with respect to child support agreements made after that date, the court may modify an order of child support, including an order incorporating without merging an agreement or stipulation of the parties, upon a showing of a substantial change in circumstances (DRL 236 [B] [9] [b] [2] [i]). In addition, unless the parties have specifically opted out in a validly executed agreement, the court may modify an order of child support where:

- Three years have passed since the order was entered, last modified or adjusted; or
- There has been a change in either party's gross income by 15 percent or more since the order was entered, last modified, or adjusted. A reduction in income shall not be considered as a ground for modification unless it was involuntary and the party has made diligent attempts to secure employment commensurate with his or her education, ability, and experience

(DRL 236 [B] [9] [b] [2] [ii]).

There can be no modification of child support, and the court may not reduce or annul child support arrears, for any reason or for any period prior to the initiation of an application for such modification (DRL 236 [B] [9] [b] [2] [iii]). Interference with visitation rights is not a defense to an application to enforce child support (DRL 241).

A party seeking to modify a prior order or judgment as to maintenance must establish the recipient's inability to be self-supporting; or a substantial change in circumstance, including financial hardship; or upon actual full or partial retirement of the payor if the retirement results in a substantial change in financial circumstances; or a termination of child support (DRL 236 [B] [9] [b] [1]). A party seeking to modify a maintenance award derived from an agreement must establish extreme hardship on either party. The court may not reduce or annul maintenance arrears that accrued prior to the date of the application to modify, except if the defaulting party shows good cause for failure to apply for relief from the order (DRL 236 [B] [9] [b] [1]). Interference with visitation rights can be the basis for the cancellation of arrears of maintenance and the prospective suspension of maintenance (DRL 241). The court may terminate maintenance in its discretion upon proof that the payee is habitually living with another person and holding himself or herself out as the spouse of such other person, although not married (DRL 248).

V. Filiation Proceedings

A. Presumption of legitimacy: FCA 417; DRL 24, 73, 175

A child born of parents who enter into a civil or religious marriage at any time prior or subsequent to the birth of the child is deemed the legitimate child of both parents, regardless of the validity of the marriage (FCA 417; DRL 24, 73). A child born of married parents or a child born to a married woman by means of artificial insemination with the consent of the woman and her husband is the legitimate child of both parents (DRL 24, 73; *see* Matrimonial and Family Law, XI.B.). The legitimacy of the child is not affected by a subsequent judgment of separation or divorce (DRL 175).

B. Establishing paternity: FCA 418, 532

A court, on its own motion or on the motion of any party, may order the mother, the child, and the alleged/putative father to submit to genetic marker or DNA tests (FCA 418). Such tests are admissible unless timely objection is made, and, if they show paternity to a degree of certainty of 95% or more, create a rebuttable presumption of paternity (FCA 418, 532).

C. Doctrine of equitable estoppel in paternity: FCA 418 (a), 532 (a)

Genetic marker or DNA tests will not be ordered if a court finds that it is not in the best interests of the child on the basis of the doctrine of equitable estoppel (FCA 418 [a], 532 [a]).

The paramount concern in such cases is the best interests of the child. “The purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted. The law imposes the doctrine as a matter of fairness” (*Matter of Shondel J. v Mark D.*, 7 NY3d 320, 326 [2006]).

The doctrine has been applied as both a sword and a shield (*compare Matter of Shondel J. v Mark D.*, 7 NY3d 320 [2006] [the respondent, who represented himself as the father of a child born out of wedlock, was equitably estopped from denying paternity even though a blood genetic marker test later confirmed that he was not the child’s biological father, and was required to pay child support, since the child justifiably relied on respondent’s representation of paternity by forming a bond with him to the child’s detriment] with *Matter of Juanita A. v Kenneth Mark N.*, 15 NY3d 1 [2010] [the respondent biological father was entitled to assert an equitable estoppel defense in paternity and child support proceedings brought by petitioner mother, when the mother had acquiesced in the development of a close relationship between the child and another father figure, and it would have been detrimental to the child’s interests to disrupt that relationship]).

VI. Child Protective Proceedings

A. Abuse and neglect: FCA 1012

Child neglect and abuse proceedings are governed by Article 10 of the Family Court Act and apply to any parent or other person legally responsible (i.e., child’s custodian, guardian, or any other person responsible for the child’s care at the relevant time) for a child’s care who is alleged to have abused or neglected a child under the age of 18. FCA 1012 contains definitions of an abused child and a neglected child.

B. Termination of parental rights: FCA 611; Social Services Law § 384-b

Family Court Article 6 governs the permanent termination of parental rights by reason of permanent neglect. A “permanently neglected child” is defined as a child who is in the care of an authorized agency and whose parent or custodian has failed for an enumerated period of time substantially and continuously to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency’s diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child (Social Services Law § 384-b [7] [a]). Once there is a finding of permanent neglect, all of the rights and obligations between the neglected child and his or her parent or custodian are severed and the child may be available for adoption.

VII. Family Offense Proceedings: FCA 812, 842; DRL 240 (3)

Acts which constitute a family offense include disorderly conduct, harassment, sexual abuse, stalking, criminal mischief, menacing, assault, and numerous other enumerated Penal Law crimes (FCA 812 [1]). The predicate act must occur between members of the same family or household (i.e., persons related by blood, persons who are married, persons who were formerly

married, and persons who have a child together) or persons who are or have been in an intimate relationship regardless of whether such persons have lived together at any time.

Where a family offense has occurred, the court may issue an order of protection directing the respondent to stay away from the home, school, business, place of employment or other location of any other party or the child or directing the respondent to refrain from committing a family or criminal offense against any other party or the child or from harassing, intimidating or threatening such persons (FCA 842). The duration of an order of protection may vary up to two years or longer under aggravating circumstances. Supreme courts may also enter orders of protection in any matrimonial action or custody or visitation proceedings (DRL 240 [3]).

The family court and criminal courts have concurrent jurisdiction over acts which constitute family offenses (FCA 812). In some counties, Integrated Domestic Violence (IDV) courts are established in supreme court to bring before a single judge criminal, family court and matrimonial disputes.

VIII. Juvenile Delinquency, Persons in Need of Supervision: FCA 301.2, 712

A juvenile delinquent (JD) is defined as a child less than 16 years of age who has committed acts which would constitute a crime if committed by an adult, but who is not criminally responsible for such conduct by reason of infancy and for whom the court determines that “supervision, treatment, or confinement” is required (FCA 301.2 [1], [7]).

A person in need of supervision (PINS) is defined as a person less than 18 years of age who is required by his or her age to attend school but is habitually truant or who is “incorrigible, ungovernable or habitually disobedient” and beyond the lawful control of a parent or who commits certain enumerated Penal Law offenses (FCA 712 [a]). Detention of a PINS in a secure detention facility is prohibited (FCA 712 [2]).

IX. Attorney for the Child: FCA 241, 242, 249; 22 NYCRR § 7.2

Minors who are the subject of family court proceedings should be represented by counsel. Generally, the appointment of an “attorney for the child” (formerly known as a “law guardian”) is mandatory in any proceeding involving JD (article 3), PINS (article 7) and Abuse and Neglect (article 10) (FCA 249). In any other proceeding, the appointment is discretionary. The sole criterion for appointment is whether “independent legal representation is not available” (*id.*). There is no financial means test for the child or for the parents and reimbursement by the parents to the state is not required.

The attorney for the child is subject to the same ethical requirements applicable to all lawyers in a case (22 NYCRR § 7.2). In JD and PINS proceedings, where the child is the respondent, the attorney for the child must zealously defend the child. In other types of proceedings where the child is the subject of the proceeding (i.e., custody, visitation, family offense, abuse and neglect), the attorney for the child must zealously advocate the child’s position. If the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child’s best interests. When the attorney for the child is

convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the attorney for the child would be justified in advocating a position that is contrary to the child's wishes. In these circumstances, the attorney for the child must inform the court of the child's articulated wishes if the child wants the attorney to do so, notwithstanding the attorney's position.

X. Adoption: FCA 641; DRL 114, 117, 122

The family court has original jurisdiction concurrent with the surrogate's court over adoption proceedings (FCA 641).

In any adoption proceeding, the court must be satisfied that the best interests of the child are being promoted (DRL 114). Adoption records are sealed and may be obtained only for good cause shown, except for the child's medical history and information as to the heritage of the biological parents.

Under Domestic Relations Law 117, the order of adoption has the effect of severing all of the legal ties previously existing between the adoptive child and his or her birth parents. The biological parents are relieved of all rights and obligations vis-a-vis the child, including the obligation of financial support and the right of contact. The legal effect of an adoption order is to make the adoptive child the child of the adoptive parents and divest the biological parents of their relationship to the child.

Surrogate parenting contracts, where a biological parent enters a written agreement to join in the creation of a child for purposes of adoption, are contrary to public policy, void and unenforceable in New York, whether or not the payment of compensation is involved (DRL 122).

A. Who may adopt: DRL 110

The following persons can adopt in New York:

- An adult single person,
- An adult married couple together, or
- Any two unmarried adult intimate partners.

The third category was added in 2010 to codify and broaden the ability of domestic partners to undertake a joint adoption. An adult or minor married couple together may adopt a child of either of them born in or out of wedlock (DRL 110).

B. Who may be adopted: DRL 110

Any person, minor or adult, may be adopted (DRL 110).

C. Required consent: DRL 111

For an adoption in New York, Domestic Relations Law 111 requires consents from the following individuals:

- Child if over the age of 14,
- Parents of a child conceived or born in wedlock,
- Mother of a child born out of wedlock,
- Father of a child born out of wedlock, or
- Any person or authorized agency having lawful custody of a child.

There is one test used to determine whether the consent of an unwed father is required where the child is more than six months old (DRL 111 [1] [d]) and a different test is applied where the child born out of wedlock is less than six months old (DRL 111 [1] [e]; *see Matter of Raquel Marie X.*, 76 NY2d 387 [1990], *cert denied* 498 US 984 [1990]). Consent is not required of a parent who has abandoned the child, i.e., an intent to forego parental or custodial rights as manifested by failure for a period of six months to visit or communicate with the child (DRL 111 [2] [a]). The ability to visit and communicate is presumed under the Domestic Relations Law (*id.*).

D. Sealing of adoption records: DRL 114

DRL § 114 directs the sealing of adoption records to prevent the birth parents from locating the child and interfering with the relationship between the child and the adoptive parents and to protect the privacy of the birth parents (*Matter of Estate of Walker*, 64 NY2d 354 [1985]). Access to the sealed records may be obtained only for good cause on due notice to the adoptive parents. The good cause necessary to obtain inspection of adoption records may be shown by a genuine medical necessity.

Adoptive parents are entitled to disclosure of the child's medical history and limited information pertaining to the biological parents at the time of birth, including heritage, education, general physical appearance, occupation, health and medical history (DRL § 114 [1]).

The adopted child may not seek access to adoption records for purposes of identifying his or her birth parents. By statute, an adoption information registry is maintained by the New York State Department of Health and non-identifying information about the biological parents may be available to the adopted person at age 18 (Public Health Law § 4138-c).

E. Birth parents' rights post-adoption: DRL 112-b, 114

DRL § 114 does not explicitly permit the ordering of an "open" adoption, whereby the child, even after the adoption, will continue to have contact with members of the child's birth family. However, agreements for post-adoption contact with members of the biological family are recognized and may be judicially enforced if the terms of the agreement are incorporated into a written order and the court determines that the contact is in the child's best interests (DRL 112-b). In Family Court proceedings, the court does not have the discretionary authority to provide

for contact between the child and the biological parent once parental rights are terminated (*Matter of Hailey ZZ. [Ricky ZZ.]*, 19 NY3d 422 [2012]).

XI. Child Custody: DRL 240 (1); 25 USC §§ 1901, 1911 (Indian Child Welfare Act)

Neither parent has a *prima facie* right to custody (DRL 240 [1] [a]).

An Indian tribe has exclusive jurisdiction over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe. In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, must transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe. New York must give full faith and credit to the judicial proceedings of any Indian tribe applicable to Indian child custody proceedings (25 USC § 1911).

A. Best interests of the child standard: DRL 70, 240 (1)

Where custody between two parents is contested, the court in its discretion may determine custody "as justice requires, having regard to the circumstances of the case and the respective parties and to the best interests of the child" (DRL 240 [1] [a]).

Among the circumstances to be considered in determining the best interests of the child are the quality of the home environment and the parental guidance the custodial parent provides for the child; the ability of each parent to provide for the child's emotional and intellectual development; the financial status and ability of each parent to provide for the child; and the relative fitness of the respective parents, as well as the length of time the present custody has continued (*Eschbach v Eschbach*, 56 NY2d 167, 172 [1982]). The best interests of the child are determined by a review of the "totality of the circumstances, including the existence of [a] prior award" (*Friederwitzer v Friederwitzer*, 55 NY2d 89, 96 [1982]). A child's preference is not binding and just one factor to be considered by the court. A trial court in a custody proceeding has discretion to interview a child in the absence of his or her parents or their counsel (*Lincoln v Lincoln*, 24 NY2d 270 [1969]).

Where a party to an action concerning custody or a right to visitation alleges in a sworn pleading that the other party has committed an act of domestic violence against a family member, and such allegation is proven by a preponderance of the evidence, the court must consider the effect of such domestic violence upon the best interests of the child (DRL 240 [1] [a]).

B. Custody and visitation rights of de facto parents and others

A biological parent has a right to the care and custody of a child superior to that of all others. "The State may not deprive a parent of the custody of a child absent surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances" (*Bennett v Jeffreys*, 40 NY2d 543, 544 (1976)). If such extraordinary circumstances are present, only then may the court proceed to inquire into the best interests of the child (*Bennett*, 40 NY2d at 549).

Courts recognize the importance of regular and frequent visitation between the child and the noncustodial parent. “Absent exceptional circumstances, such as those in which it would be inimical to the welfare of the child or where a parent in some manner has forfeited his or her right to such access, appropriate provision for visitation or other access by the noncustodial parent follows almost as a matter of course” (*Weiss v Weiss*, 52 NY2d 170, 175 [1981]).

The Legislature has allowed certain non-parents – siblings and grandparents – the right to seek custody and visitation (see DRL 71, 72). Grandparents have standing to seek visitation where either or both of the grandchild’s parents are dead or in any circumstances which warrant the equitable intervention of the court (DRL 72). Once standing exists, visitation for the grandparent is appropriate if it is in the best interest of the child.

Aside from permission granted to certain non-parents by DRL 71 and 72, Domestic Relations Law 70 expressly permits only a “parent” to petition for custody or visitation. Historically persons lacking a biological or adoptive connection to a child have been denied standing to seek visitation and custody (see *Alison D. v Virginia M.*, 77 NY2d 651 [1991], *Debra H. v Janice R.*, 14 NY3d 576 [2010]). In 2016, the Court of Appeals reversed itself and held for the first time that a non-biological, non-adoptive parent does have standing under DRL § 70 to petition for custody and visitation if he or she can prove by clear and convincing evidence that he or she has agreed with the biological parent of the child to conceive and raise the child as co-parents (*Brooke S. B. v Elizabeth A.C.C.*, 28 NY3d 1, 28 [2016], overruling *Alison D. v Virginia M.*, 77 NY2d 651 [1991]).

C. Types of custodial arrangements

Custodial arrangements include sole custody, joint legal custody and joint physical custody. The Court of Appeals established the standard that joint custody should be reserved “for relatively stable, amicable parents behaving in mature civilized fashion.” (*Braiman v Braiman*, 44 NY2d 584, 589 [1978] [internal citations omitted]; see *J.R. v M.S.*, 55 NYS3d 873 [NY Sup Ct 2017] [analysis of how courts historically decided custodial disputes and a discussion of current trends]).

D. Enforcement: DRL art 5-A (UCCJEA)

New York has adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (Domestic Relations Law § 75). A child custody proceeding that pertains to an Indian child is not subject to the UCCJEA to the extent that it is governed by the Indian Child Welfare Act (25 USCA §§ 1901 et seq.).

E. Modification of custody, relocation: FCA 467, 652

Modification of an existing custody or visitation order is permitted upon a showing that there has been a change in circumstances such that modification is necessary to ensure the continued best interests of the child (FCA 467, 652; *Demille v Pizzo*, 129 AD3d 957 [2d Dept 2015], *lv denied* 26 NY3d 905 [2015]).

In determining whether relocation is appropriate, each “request must be considered on its own merits with due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child” (*Matter of Tropea v Tropea*, 87 NY2d 727, 738-739 [1996]). Relevant factors include the impact of the move on the relationship between the child and the noncustodial parent, economic necessity or a specific health-related concern justifying a proposed move, the demands of a second marriage and the custodial parent’s opportunity to improve his or her economic situation, the good faith of the parents in requesting or opposing the move, the child’s respective attachments to the custodial and noncustodial parent, the possibility of devising a visitation schedule that will enable the noncustodial parent to maintain a meaningful parent-child relationship, the quality of the lifestyle that the child would have if the proposed move were permitted or denied, the negative impact, if any, from continued or exacerbated hostility between the custodial and noncustodial parents, and the effect that the move may have on any extended family relationships (*id.*).

PROFESSIONAL RESPONSIBILITY

The New York Rules of Professional Conduct (RPC) were adopted by the Appellate Divisions of the New York State Supreme Court in 2009 and are published as Part 1200 of the Joint Rules of the Appellate Division (22 NYCRR 1200). Other statutes and court rules governing attorney conduct include: New York Judiciary Law, art. 15; the Rules of the Chief Administrator of the Courts (22 NYCRR Parts 118, 130, 137); and the Joint Rules of the Appellate Division (22 NYCRR Parts 1205, 1210, 1215, 1220 1300, 1400, 1500).

Interpretive resources of the RPC include the New York State Bar Association Comments (non-binding comments and suggestions about how the RCP should be interpreted [*see* www.nysba.org]) and ethics opinions issued by the New York State Bar Association (*see* www.nysba.org), the New York County Lawyer's Association (*see* www.nycla.org), and the Association of the Bar of the City of New York (*see* www.nycbar.org). The Commercial and Federal Litigation Section of the New York State Bar Association has also issued "Social Media Ethics Guidelines" to address the evolving interplay of social media communications and RPC, particularly in the areas of attorney advertising, furnishing legal advice, use of evidence, communications with clients, and the researching of social media profiles of prospective or sitting jurors (*see* [www.nysba.org/Social Media Guidelines/](http://www.nysba.org/Social%20Media%20Guidelines/)).

I. The Lawyer-Client Relationship

A. Scope of representation and allocation of authority between client and lawyer: Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.2 (e) - (g)

A lawyer may exercise his or her professional judgment to waive or fail to assert a client's right or position, but he or she should accede to reasonable requests of opposing counsel (e.g., scheduling matters, continuances or other small favors) as long as a client's rights are not prejudiced. A lawyer may refuse to participate in conduct the lawyer believes to be unlawful. Lawyers should avoid offensive tactics and should treat persons involved in the legal process with courtesy and consideration. While a lawyer must abide by a client's decisions on objectives, a lawyer is not obligated to play "hardball."

B. Communication with client: RPC rule 1.4 (a) (1) (iii)

A lawyer must promptly inform the client of material developments, including settlement or plea offers. It is the client's right to decide whether to accept a settlement offer or plea bargain.

C. Withdrawal: RPC rule 1.16 (b) (4)

A lawyer must withdraw from representation of a client when the lawyer knows or reasonably should know that the client is bringing the action, conducting the defense, asserting a petition, or taking other steps merely for the purpose of harassing or maliciously injuring any person.

II. Privilege and Confidentiality

A. Professional obligation of confidentiality: RPC rule 1.6 (a), (c)

A lawyer must maintain client confidence. Confidential information is information from any source gained during or relating to the representation that is protected by the attorney-client privilege, that is likely to be embarrassing or detrimental to a client if disclosed, or that the client has requested be kept confidential. A lawyer must also exercise reasonable care to prevent the lawyer's employees and associates from disclosing this confidential information.

A lawyer may not knowingly reveal confidential information or use such information to harm the client, help the lawyer or help a third person. Disclosure of confidential information is permitted if the client consents, or if disclosure is impliedly authorized to advance the best interest of the client and is either reasonable under the circumstances or is customary in the professional community.

B. Exceptions to confidentiality: RPC rule 1.6 (b)

A lawyer may disclose confidential information to prevent reasonably certain death or substantial bodily harm, prevent the client from committing a crime, to withdraw an opinion based on false information that is being relied upon by a third person or is being used to further a crime or fraud, to secure legal advice about compliance with the Rules, to defend the lawyer against an accusation of wrongful conduct, or to collect a fee.

III. Conflicts of Interest

A. Current clients: RPC rule 1.7

A lawyer cannot represent a person or entity when a current or former client or the lawyer personally has differing interests — interests that will adversely affect either the judgment or loyalty of the lawyer to the client. Notwithstanding the existence of a current conflict of interest, a lawyer may represent a client if the lawyer reasonably believes that he or she can provide competent representation, the representation is not prohibited by law and does not involve a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal, and both affected clients give informed consent, confirmed in writing.

B. Former clients: RPC rule 1.9

A lawyer who has formerly represented a client in a matter may not represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interest of the former client, unless the former client gives informed consent, confirmed in writing. The same rule applies if a law firm with which the lawyer formerly was associated had previously represented a client whose interests are materially adverse to the person the lawyer now seeks to represent and about whom the lawyer or any lawyer in the firm had acquired material confidential information.

C. Sexual relations with clients: RPC rule 1.8 (j)

Sexual relations with clients during the course of representation are not flatly prohibited, except in domestic relations matters, but are inadvisable and may lead to impairment of the lawyer's exercise of professional judgment, a conflict of interest, and breach of his or her fiduciary duties. A lawyer must not require or demand sexual relations with any person as a condition of entering into or continuing a professional relationship, or employ coercion in entering into sexual relations incident to any professional representation. In domestic relations matters, a lawyer may not enter into sexual relations with a client during the course of representation. Rule 1.8 (j) does not apply to ongoing consensual sexual relations that pre-date the initiation of the lawyer-client relationship.

D. Imputed disqualification: RPC rule 1.10

While lawyers are in the same firm, none of them may represent a client when any of them practicing alone would be prohibited from doing so under Rule 1.7 or 1.9. When a lawyer leaves a firm, the former firm may not represent a person with interests that the firm knows or reasonably should know are materially adverse to a client represented by the formerly associated lawyer and not currently represented by the firm if anyone remaining at the firm has confidential information material to the matter. When a lawyer joins a new firm, the new firm cannot represent a client in a matter that is substantially related to or the same as a matter that was being handled by the lawyer's former firm if the interests of the former firm's client are materially adverse to those of the new firm's client, unless the lawyer has not acquired confidential information material to the matter being handled by the new firm. These disqualifications may be waived by the affected client and/or former client if the lawyer determines representation is not prohibited under the conflict of interest rules involving current clients (*see* Professional Responsibility, III.A) and both affected clients give informed consent, confirmed in writing. In some cases, the risk may be so great that the conflict cannot be cured by client consent. A firm must keep detailed records of its client base and maintain a system for checking against any conflicts in representation.

E. Organization as client: RPC rule 1.13 (a), (b)

A lawyer for an organization represents the organization, not its constituents (i.e., officers, directors, employees and other constituents). If the interests of the organization and any of its constituents differ, the lawyer must make clear that he or she represents the organization. If a constituent is engaged or intends to engage in an action that either violates a legal obligation to the organization or violates a law (which violation may be imputed to the organization) and is likely to result in substantial injury to the organization, the lawyer must proceed as is reasonably necessary in the best interests of the organization. Any measure taken by the lawyer must be designed to minimize disruption to the organization and the risk of revealing information relating to the organization to persons outside of it and may include advising the constituent and asking for reconsideration of the matter, going to a higher authority, and/or requesting that a separate legal opinion be sought. If no change is achieved, the lawyer may resign, and he or she may also reveal confidential information if any of the exceptions to Rule 1.6 apply (*see* Professional Responsibility, II.B.).

IV. Client's Rights, Retainer Agreements and Fees

A. Statement of client's right, engagement letters and retainer agreements, rules in domestic relations matters: 22 NYCRR Parts 1210, 1215, 1400

Every lawyer must post in the lawyer's office, in a manner visible to clients, a statement of client's rights in the form set forth in 22 NYCRR 1210.1. This statement includes the right of the client to competent and courteous representation by the lawyer, the right to be charged reasonable fees and have them explained before or within a reasonable time of engagement, the right to be informed at the outset how the fee will be computed and the manner of billing, and the right to be kept informed of the status of the matter and have questions answered promptly.

Every lawyer who charges a fee for representation must provide the client prior to representation with a written letter of engagement that contains an explanation of the scope of the legal services to be provided, the attorney's fees to be charged, the expenses and billing practices, and the right to arbitrate fee disputes (22 NYCRR 1215.1). This letter may take the form of a retainer agreement. The requirements of 22 NYCRR 1215.1 do not apply if the expected fee is under \$3,000, where the services are the same as others previously rendered to and paid for by the client, in any domestic relations matter, where the attorney is admitted in another jurisdiction and has no office in New York, or where no material portion of the services are to be rendered in New York (22 NYCRR 1215.2).

In any domestic relations matter (i.e., divorce, separation, annulment, custody, visitation, maintenance, or child support), a more detailed statement of client's rights and a retainer agreement are required (22 NYCRR 1400.2, 1400.3). The client must be shown the statement of rights before representation and prior to executing a retainer agreement, and the client must sign an acknowledgment that he or she has received the statement of rights. Lawyers in domestic relations matters are not permitted to charge a contingency fee or collect a nonrefundable retainer fee, but they may enter into a minimum fee arrangement that provides for the payment of a specific amount below which the fee will not fall based upon the handling of the case to its conclusion (22 NYCRR 1400.4). Lawyers may not obtain a confession of judgment or promissory note, take a lien on real property or otherwise obtain a security interest from the client to secure payment of the lawyer's fee, unless the retainer agreement so provides, an application is made to the court, notice of application has been given to the client's spouse, and the court grants approval (22 NYCRR 1400.5).

B. Compromise of infant claims: CPLR 1207, 1208; 22 NYCRR 603.8 (Appellate Division, First Department); similar rule in other Departments

A lawyer must apply for court approval of a settlement of claim or cause of action belonging to an infant (*see* CPLR §§ 1207, 1208). Any sum collected by the attorney on behalf of the infant must be deposited in a special account apart from the attorney's personal account, and a statement of the amount received must be delivered (or sent by certified mail) to the infant's guardian. Payments from a special account may be made only pursuant to court order.

C. Prohibited fees: RPC rule 1.5 (d)

A lawyer cannot charge or collect a contingent fee in a criminal matter, a fee prohibited by law or court rule, a fee based on fraudulent billing or a nonrefundable retainer fee. A lawyer may charge a reasonable minimum fee if the retainer agreement containing a minimum fee clause defines in plain language and sets forth the circumstances under which the fee may be incurred and how it will be calculated. In domestic relations matters, the payment of a fee cannot be contingent upon the securing of a divorce, obtaining custody/visitation or in any way determined by reference to maintenance, support or equitable distribution.

D. Fee disputes: RPC rule 1.5 (f); 22 NYCRR Parts 137 and 1230

Generally, fee disputes between clients and lawyers, where the amount in question is between \$1,000 and \$50,000, may be resolved by arbitration pursuant to the detailed procedure set forth in Part 137 of Title 22 of the NYCRR. Arbitration of fee disputes is mandatory where the client requests it. The determination of the arbitration panel is final and binding, except that either party may request *de novo* review by the courts.

Mandatory arbitration of fee disputes does not apply: to representation in criminal matters, to disputes below \$1,000 and above \$50,000, to claims requesting relief other than the adjustment of fees, to claims involving substantial legal questions (including professional malpractice or misconduct), to claims where the attorney's fees are set by statute, rule or court order, where no services have been rendered by the attorney for more than two years, where the dispute involves an attorney not admitted to practice in New York and having no New York office, where no material service was rendered in New York, and where the request for arbitration is not made by the client or the client's legal representative.

V. Safeguarding Property and Funds of Clients and Others

A. Prohibition against commingling and misappropriation: RPC rule 1.15 (a)

A lawyer in possession of any funds or other property belonging to another person in connection with his or her practice of law is a fiduciary and must not misappropriate or commingle such funds with the lawyer's own funds.

B. Separate accounts: RPC rule 1.15 (b); Judiciary Law 497; 22 NYCRR Part 1300

A lawyer must keep funds received by the attorney in a fiduciary capacity and belonging to a client or beneficial owner incident to the lawyer's practice of law in a special account separate from any of the lawyer's (or the law firm's) business, personal or fiduciary accounts (e.g., accounts held as executor, guardian, trustee or receiver) (RPC rule 1.15 [b]). The account, the checks, and the deposit slips must all contain language identifying it as an "escrow" or "trust" account. Such funds must also be maintained in a bank that agrees to provide dishonored check reports to the Lawyer's Fund for Client Protection. Funds belonging in part to the lawyer and in part to the client must be kept in the separate account, but the lawyer may withdraw the part belonging to the lawyer unless the client disputes the lawyer's right to the funds, in which case the dispute must first be resolved.

The attorney has the discretion to determine whether such funds must be deposited in non-interest, or in interest bearing accounts (Judiciary Law 497 [4] [a]). Funds deposited in an “interest on lawyer account” (IOLA) are fiduciary funds, which, in the attorney’s judgment, are too small an amount, or likely to be held too short a time to justify a separate account in which interest would be paid to the beneficial owner. The State Finance Law establishes a state IOLA fund that receives the interest on attorney IOLA accounts to assist the funding of civil legal services for low income people.

All trust account withdrawals must be made only to a named payee and not to cash. If a firm dissolves, the former members must make appropriate arrangements to maintain these records.

C. Notifying of receipt of property; safekeeping: RPC rule 1.15 (c)

A lawyer must promptly notify a client or third party of receipt of funds in which the client or third party has an interest, safeguard the funds, maintain complete records of the funds, and promptly pay and deliver the funds to the client or third party that the client or third party is entitled to receive.

D. Bookkeeping and authorized signatories: RPC rule 1.15 (d), (e), (h), (j)

A lawyer must maintain and keep for seven years after the events that they record all records of any kind of deposits, withdrawals and disbursements of funds that concern the lawyer’s practice of law, retainer agreements, statements and bills rendered to clients, and copies of retainer and closing statements filed with the Office of Court Administration. The records must be produced in response to a notice or subpoena in connection with any investigation by the appropriate disciplinary authority. A lawyer who fails to maintain these records is subject to disciplinary proceedings. Only a lawyer licensed to practice in New York may be an authorized signatory on a trust account.

VI. Communication about Legal Services

A. Advertising: RPC rule 7.1

The rules governing attorney advertising have changed dramatically during recent years. In essence, advertising by lawyers is now broadly permitted as long as it is truthful and not deceptive or misleading. Lawyers may now make statements reasonably likely to create an expectation about results, comparing the lawyer’s services with the services of other lawyers and describing the quality of the lawyer’s services, provided such statements are not false, deceptive or misleading and can be factually supported by the lawyer as of the date on which the advertisement is published or disseminated. Lawyers can use testimonials of clients with their written consent. They can even use paid endorsements and actors, as long as that is disclosed. The advertising must be labeled “attorney advertising,” and must contain the disclaimer: “Prior results do not guarantee a similar outcome.” Fees set forth in advertising must be honored.

B. Referrals: RPC rule 7.2

Lawyers may not compensate any person or organization to recommend clients, but they may accept referrals from legal service organizations, bar associations and other non-profit organizations and can enter into arrangements with other lawyers to refer clients to each other.

C. **Solicitation:** RPC rules 7.3; 4.5

A lawyer may not solicit clients by in-person, telephone, or real-time computer-accessed communication unless the recipient is a close friend, relative or former or existing client. Other types of targeted communications to solicit clients are permitted, e.g., mailings, but must be filed with the appropriate attorney disciplinary committee (except for web sites and professional cards or announcements). No solicitation relating to a specific incident involving potential claims for personal injury or wrongful death may be disseminated before the 30th day after the date of the incident.

D. **Professional notices, letterheads and signs:** RPC rule 7.5

Lawyers may use web sites, professional cards, professional announcement cards, office signs, letterheads or similar professional notices provided they do not violate any statute or court rule. Lawyers may not practice under a trade name, a name that is misleading as to the identity of the lawyer, or a firm name containing names other than lawyers in the firm, including retired and deceased lawyers. Telephone numbers with domain names or monikers are permitted.

VII. Interaction with Third Persons

A. **Truthfulness:** RPC rule 4.1

In the course of representing a client, a lawyer must not knowingly make a false statement of fact or law to a third person. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false.

B. **Communication with represented person:** RPC rule 4.2

A lawyer may not communicate with a party that the lawyer knows is represented by another lawyer in the matter without the prior consent of that other lawyer, but the lawyer may direct a client to communicate with a represented person provided advance notice is given to the represented person's counsel.

VIII. Litigation

A. **Non-meritorious claims and contentions:** RPC rule 3.1 (b); 22 NYCRR Part 130; CPLR 8303-a

In civil matters, a lawyer may not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. A lawyer's conduct is frivolous if:

- The lawyer knowingly advances a claim or defense that is unwarranted under existing law (except good faith arguments to modify the law),
- The conduct has no reasonable purpose other than to delay or prolong the resolution of the litigation or to harass or maliciously injure another, or
- The lawyer knowingly asserts material factual statements that are false.

Every paper served on another party or submitted to the court must be signed by the lawyer, and that signature constitutes a certification by the lawyer that the paper or contentions therein are not frivolous. A lawyer whose conduct is found to be frivolous is subject to the imposition of expenses reasonably incurred and reasonable attorney's fees, as well as the impositions of sanctions not to exceed \$10,000. In personal injury, property damage and wrongful death cases, the penalty is limited to costs and attorney's fees not to exceed \$10,000 (CPLR 8303-a). Costs and sanctions up to \$2,500 may also be imposed in both civil and criminal cases for a lawyer's failure, without good cause, to appear in court at the scheduled time and place.

B. Delay of litigation: RPC rule 3.2

A lawyer may not use means that have no substantial purpose other than to delay or prolong the proceeding or cause needless expense.

C. Fairness to opposing party and counsel: RPC rule 3.4

Fair competition in the adversary system prohibits a lawyer from the following conduct:

- Suppressing evidence that the lawyer is legally obligated to produce,
- Advising or causing a person to hide for purposes of making the person unavailable as a witness,
- Knowingly using perjured testimony or false evidence,
- Disregarding rulings of a tribunal, except in good faith to test the validity of such ruling,
- Asserting before a tribunal personal knowledge of facts in issue except when testifying as a witness,
- Asking any question that the lawyer has no reasonable basis to believe is relevant and that is intended to degrade a witness or other person, and
- Threatening to present criminal charges solely to obtain an advantage in a civil matter.

A lawyer may not offer to pay a witness contingent on the content of the witness's testimony or the outcome of the matter. However, a lawyer may pay reasonable compensation to a witness for loss of time and reasonable related expenses incurred in testifying and may pay a reasonable fee for the professional services of an expert.

IX. Regulation and Responsibilities of the Legal Profession

A. Registration of attorneys: Judiciary Law § 468-a; 22 NYCRR Part 118.1

All lawyers must file a registration statement with the Office of Court Administration every two years. Lawyers who are not retired from the practice of law must pay a registration fee (currently \$375) with each filing. These statements are available for public inspection (except for home addresses, social security numbers and race and gender categories). A lawyer must certify in the registration statement that he or she is in full compliance with continuing legal education requirements (including the retention of certificates of attendance), the reporting of pro bono services and contributions, and any outstanding child support obligations. An applicant for admission to practice law in New York must register by completing a form registration and paying the \$375 biennial fee. The initial attorney registration and fee payment must be completed online at: <https://iapps.courts.state.ny.us/aronline/BoleSearch>. Instructions regarding registration will be provided to applicants at the time they are certified by the State Board of Law Examiners to the Appellate Division pursuant to § 520.7 of the Rules of the Court of Appeals.

B. Continuing legal education: 22 NYCRR Part 1500

1. Newly admitted lawyers

Every newly admitted lawyer must complete a minimum of 32 hours of accredited transitional education within the first two years of admission to the bar. Each year must include 16 hours, consisting of three hours of ethics and professionalism six hours of skills, and seven hours of practice management and areas of professional practice. These hours must consist of formal courses and programs approved by the Continuing Legal Education Board; nontraditional formats are not permitted.

2. Other than newly admitted lawyers

Every lawyer other than a newly admitted lawyer must complete a minimum of 24 credit hours of continuing legal education, accredited by the CLE Board, every two years, with at least four credit hours consisting of Ethics and Professionalism, and effective July 1, 2018, one of the four credit hours must be in Diversity, Inclusion and Elimination of Bias. Credit hours may be earned in non-traditional formats (CD's, self-study, on-line, etc.) as well as formal courses, and credit also can be earned for speaking and teaching activities, attending law school courses, judging law school competitions, legal writing, and performing pro bono legal services.

C. Misconduct and discipline generally: Judiciary Law 90; RPC rule 8.4 (g) (h)

A lawyer may not violate or attempt to violate any of the Rules of Professional Conduct, nor engage in any conduct involving dishonesty, fraud, deceit or misrepresentation, or conduct that is prejudicial to the administration of justice. Nor may a lawyer unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Violations of any of these Rules may be reported to the attorney disciplinary committee of the appropriate Appellate Division Department and may result in censure, suspension or disbarment.

D. Unauthorized practice of law: RPC rule 5.5

A lawyer may not practice law in a jurisdiction in violation of the regulations of the legal profession in that jurisdiction. Nor may a lawyer aid a non-lawyer in the unauthorized practice of law.

E. Non-legal services and cooperative business arrangements: RPC rules 5.7, 5.8; 22 NYCRR Part 1205

A lawyer who provides non-legal services to a person that are not distinct from legal services being provided to that person is subject to the Rules for both the legal and non-legal services. Even if the non-legal services are distinct from the legal services, the non-legal services still would be subject to the Rules if the person receiving the services could reasonably believe that the non-legal services are the subject of a lawyer-client relationship. Lawyers and law firms may not, however, offer non-legal services through non-lawyers as part of the services of the lawyer or law firm, but they may enter into contractual relationships (cooperative business arrangements) with non-legal professionals or firms to provide non-legal services for clients if the profession is included in a list established in the Joint Appellate Division Rules. The list currently includes architecture, accountancy, professional engineering, land surveying, and certified social work.

F. Competence: RPC rule 1.1 (b), (c)

A lawyer may not handle a legal matter that he or she is not competent to handle, without associating with a lawyer who is competent to handle it. A lawyer also may not intentionally:

- Fail to seek the objectives of the client through reasonably available means permitted, or
- Prejudice or damage the client during the course of the representation.

G. Pro bono services: RPC rules 6.1, 6.5

Every lawyer should aspire to provide at least 50 hours of qualifying pro bono legal services each year to poor persons, and to annually contribute financially to organizations that provide legal services to poor persons in an amount at least equivalent to the amount typically billed by the lawyer for one hour of time. Pro bono legal services include professional legal services to persons who are financially unable to compensate counsel and professional services to charitable, religious, civic and educational organizations in matters designed predominantly to address the needs of poor persons. Appropriate organizations for financial contributions are organizations primarily or substantially engaged in the provision of legal services to the poor.

A lawyer who, under the auspices of programs sponsored by a court, bar association, government agency or not-for-profit legal services organization, provides short-term legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter, is subject to the requirements of the provisions of the Rules governing conflicts of interest only if the lawyer has actual knowledge at the time of

commencement of representation that the representation of the client involves a conflict of interest.

H. Pro bono requirement for bar admission: 22 NYCRR § 520.16

Applicants seeking admission to the bar, including foreign-educated candidates, must complete 50 hours of qualifying pro bono legal services prior to seeking admission. The services must be law-related and assist in the provision of legal services without charge for low-income or disadvantaged individuals, not-for-profit organizations, and other individuals, groups and organizations seeking to secure or promote access to justice, or in public service for various governmental entities. All pre-admission pro bono work must be supervised by persons designated in the rule and proof of completion must be filed with the application for admission to practice in the Appellate Division where admission is sought. Applicants for admission on motion without examination are exempt from the requirement.

I. Pro Bono Scholars Program: 22 NYCRR § 520.17

The Pro Bono Scholars Program permits students in their final year of law school to devote their last semester of study to performing pro bono service for the poor through an approved externship program, law school clinic, legal services provider, law form or corporation. By participating in the program, students are permitted to take the New York bar examination in February during the final year of study and, upon successful completion of the program and any other graduation and admission requirements, will be eligible for accelerated admission to the bar.

J. Skills competency requirement for bar admission: 22 NYCRR § 520.18

In addition to the requirements for pro bono services, applicants seeking admission to the bar, including foreign-educated candidates, must satisfy the skills and professional values requirements of Rule 520.18. The requirements can be met through one of five pathways listed in the rule, three of which relate to and can be satisfied by an applicant's law school study. Proof of compliance with one of the pathways must be filed with the application for admission to practice in the Appellate Division where admission is sought. The requirement is applicable to applicants for admission who commenced their law study after August 1, 2016. Applicants who qualify for the bar examination after completion of an LL.M. program under Rule 520.6 are subject to the requirement if they commenced their LL.M. program after August 1, 2018. Applicants for admission on motion without examination are exempt from the requirement, as are applicants qualifying to take the bar examination under Rule 520.4 or Rule 520.5.

K. Lawyers Assistance Program

Lawyer competence is directly related to lawyer well-being. To be a good lawyer, you must be a healthy lawyer. The practice of law is a stressful business. Many law students and lawyers suffer from chronic stress, depression, and substance use/abuse. If you are struggling with any such problem, you are encouraged to seek help. The New York State Bar Association Lawyer Assistance Program (LAP) provides education and assistance to lawyers, judges, law

school students, and immediate family members who are affected by the problem of substance abuse, stress, depression or other mental health issues. Its goal is to assist in the prevention, early identification and intervention of problems that can affect professional conduct and quality of life. LAP services are free and confidential. Services provided by LAP include:

- early identification of impairment;
- intervention and motivation of impaired attorneys to seek help;
- assessment, evaluation and development of an appropriate treatment plan;
- referral of impaired attorneys to community resources, self-help groups, outpatient counseling, detoxification and rehabilitation services;
- information and referral for depression;
- and training programs on alcoholism, drug abuse and stress management.

To get help, call 1-800-255-0569 or send an email to lap@nysba.org. For additional information, see: <http://www.nysba.org/CustomTemplates/SectionLanding.aspx?id=49916>.

REAL PROPERTY

I. Landlord and Tenant

Article 7 of the Real Property Law (RPL) contains many specific provisions regarding leases of real property.

A. Formation of lease: GOL §§ 5-702, 5-703; RPL §§ 235-f, 237

A lease for a longer period than one year is void unless in writing subscribed by the party to be charged or his or her lawful agent (GOL § 5-703). A lease for a period of one year or less may be oral.

Every written residential lease must be written in a clear and coherent manner, using words with common and everyday meanings and must be appropriately divided and captioned in its various sections (GOL § 5-702).

A lease cannot prohibit occupancy by dependent children of tenant or tenant's spouse or contain a clause requiring tenants to remain childless (RPL §§ 235-f, 237).

B. Types of tenancies

New York recognizes the same types of tenancies as at common law:

- Tenancy for years;
- Periodic, month-to-month, year-to-year;
- Tenancy at will; or
- Tenancy at sufferance.

C. Assignment and sublease: RPL § 226-b

If a residential lease is in a dwelling having fewer than four residential units, a tenant may not assign the lease without consent of the landlord, which consent may be unconditionally withheld without cause. A landlord who unreasonably withholds consent must release the tenant from the lease if the tenant has so requested upon 30 days' notice.

If the residential lease is in a dwelling having four or more residential units, a tenant has a right to sublease, upon complying with notice provisions contained in the statute subject to written consent of the landlord, which consent may not be unreasonably withheld.

Different rules may apply to public housing, rent-stabilized properties and cooperatives.

D. Warranty of Habitability: RPL § 235-b

Every written or oral lease for residential property is deemed to contain a warranty of habitability. The landlord is deemed to warrant that the leased premises are fit for human

habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life health or safety. Any agreement by a tenant waiving or modifying his or her rights under the statute is void as contrary to public policy.

E. Holdovers: RPL § 232-c

If a term of lease is longer than one month, the tenant's holding over does not give the landlord the option to hold the tenant to a new term equal to the term of the lease. The landlord may proceed to remove the tenant as permitted by law, but if the landlord accepts rent for any period subsequent to the lease expiring, a month-to-month tenancy is created.

F. Termination of monthly or month-to-month tenancy: RPL §§ 232-a, 232-b

1. New York City: RPL § 232-a

A tenant cannot be removed on grounds of holding over unless, at least 30 days before expiration of the term, the landlord serves notice in writing, in the same manner as a notice of petition in summary proceedings, which the landlord elects to terminate the tenancy.

2. Outside New York City

Either landlord or tenant may terminate by notifying the other at least one month before expiration of the term (RPL § 232-b).

G. Breach and remedies, summary proceedings: Real Property Actions and Proceedings Law (RPAPL) 711; RPL § 234

Any breach of a lease by the tenant gives the landlord the right to commence a special proceeding to recover possession of the property (RPAPL § 711).

If the tenant abandons leased property, the landlord has no duty to mitigate damages by re-letting (*Holy Props. v Cole Prods.*, 87 NY2d 130 [1995]; *Rios v Carrillo*, 53 AD3d 111 [2d Dept 2008]).

If a residential lease provides that in any action or summary proceeding the landlord may recover legal fees from the tenant if successful, there is implied in the lease a covenant to pay legal fees incurred by the tenant in a successful defense (RPL § 234).

H. Deposits: GOL §§ 7-103, 7-105

Any security deposits by the tenant are held by the landlord in trust, may not be commingled with the landlord's personal moneys, and are not an asset of the landlord.

If the landlord deposits the security in a bank, he or she must notify the tenant, providing appropriate information. If the deposit is in an interest-bearing account, the landlord may retain 1% for expenses, and any balance is held for or paid to the tenant.

If a rental is in a building containing six or more family dwelling units, the landlord must deposit the security in an interest-bearing account.

If title to a leased property is transferred to a new owner, a landlord must transfer any deposits to the new owner.

II. Real Property Contracts

A. Statute of Frauds: GOL § 5-703

Any contract for the sale of real property is void unless in writing and signed by the party to be charged or his or her lawful agent (*see Contracts, V*). A land purchase option constitutes the creation or grant of an interest in real property, and thus falls within New York's statute of frauds, requiring a writing signed by the party to be charged (*Scutti Enterprises, Inc. v Wackerman Guchone Custom Builders, Inc.*, 153 AD2d 83, 87 [4th Dept 1989]).

B. Condition of property: RPL §§ 461, 462, 465; General Business Law §§ 777, 777-a

Under the doctrine of caveat emptor a vendor has not duty to disclose any information concerning the property, with some legal and equitable exceptions (*Meyers v Rosen*, 69 AD3d 1095 [2d Dept 2010]) including:

- Property Condition Disclosure Statement (RPL § 462).

Every seller of real property improved by a one to four family dwelling used, or to be used, as the home or residence of one or more persons (*see RPL § 461*) pursuant to a contract must deliver the required disclosure statement to the buyer or buyer's agent prior to the buyer signing a binding contract (RPL § 462). If the seller fails to do so, the buyer at the closing receives a credit of \$500 against the purchase price (RPL § 465).

- Housing Merchant Implied Warranty (General Business Law §§ 777, 777-a).

This warranty is implied in any sale by a builder of a new home. Among other provisions, this warranty provides that six years from and after the closing date the home will be free from material defects.

- If some conduct, more than mere silence, on the part of the seller rises to the level of active concealment, a seller may have a duty to disclose information concerning the property (*see Slavin v Hamm*, 210 AD2d 831 [3d Dept 1994]).

C. Risk of loss

New York has adopted the Uniform Vendor and Purchaser Risk Act (GOL § 5-1311), so unless otherwise expressly provided:

- If neither legal title nor possession has been transferred to the buyer and if all or a material part of the property is destroyed without fault of the buyer or taken by eminent domain, the seller cannot enforce the contract and the buyer is entitled to recover any portion of the price paid.
- If neither legal title nor possession has been transferred to the buyer and if only an immaterial part of the property is destroyed or taken, neither party is deprived of right to enforce the contract but there will be an abatement of the purchase price.
- If the legal title or possession of the property has been transferred, the buyer bears the loss.

III. Real Property Mortgages

A. Lien theory

In New York a mortgage creates a lien on the property. It is not a transfer of title.

B. Transfers

In New York, the mortgage always follows the note. An assignment of the mortgage without the note is void (*see U.S. Bank N.A. v Dellarmo*, 94 AD3d 746 [2d Dept 2012]). An assignment of the note will transfer the mortgage even if the assignment is silent as to the mortgage.

C. Enforcement: CPLR 5230 (a); RPAPL art. 13

1. Election of remedies by mortgagee upon default by mortgagor

A mortgagee may bring a legal action on the note. Execution of a judgment obtained in an action must specify that no part of the mortgaged property may be levied upon or sold thereunder (CPLR 5230 [a]). The mortgagee may not then bring a foreclosure action until execution has been returned wholly or partly unsatisfied (RPAPL § 1301 [1]).

A mortgagee may bring an equitable action for foreclosure and sale (RPAPL, article 13). The mortgagee may not then bring a separate action on the debt without leave of court (RPAPL § 1301 [3]).

2. Ownership of Note

The plaintiff, whether the original mortgagee or an assignee of the mortgage, must allege and prove ownership of the note at the time the action is commenced (*see Wells Fargo Bank N.A. v Marchione*, 69 AD3d 204 [2d Dept 2009]).

3. Residential foreclosure notices

When the summons and complaint are served, there are additional statutory notices which must be delivered to the mortgagor and to any tenant of a dwelling unit in the property explaining in detail the significance of the action to them (RPAPL § 1303). And if the mortgage is a high-cost, subprime or non-traditional home loan, there is an additional notice which must be given at least 90 days before commencement of the action (RPAPL § 1324).

4. Redemption

The mortgagor has a right to redeem by paying into court the full amount due and the costs of the action until the foreclosure sale takes place (RPAPL § 1341). After the sale there is no right to redeem (*see Wells Fargo Bank, N.A. v Carney*, 50 AD3d 287 (1st Dept 2008)).

5. Deficiency judgment

Simultaneously with a motion to confirm the sale, if made within 90 days of the delivery of the deed to the purchaser at the sale, the plaintiff may move for leave to enter a deficiency judgment. The amount is the sum of (1) the judgment with interest and (2) all prior liens and encumbrances with interest, minus the greater of (1) the market value as determined by the court or (2) the foreclosure sale price (RPAPL § 1371).

IV. Title

A. Concurrent Estates: EPTL 6-2.2 (d)

1. Tenants in common

Under EPTL 6-2.2, there is a presumption that a disposition to two or more persons creates in them a tenancy in common unless it is specifically declared to be a joint tenancy. Tenants in common are presumed to have equal interests in the property, but the presumption can be rebutted if one party contributed more than the other (*see Johnson v Depew*, 33 AD2d 645 [4th Dept 1969]).

2. Joint tenancy

A joint tenancy may be created by a deed in which one (or more) of the grantees is also a grantor even though unities of time and title are technically not satisfied.

Disposition to persons not legally married to one another but described as husband and wife creates in them a joint tenancy unless expressly declared to be a tenancy in common (EPTL 6-2.2 [d]).

3. Tenancy by the entirety

A disposition of real property to married persons creates in them a tenancy by the entirety. One party may convey or mortgage his or her interest, but the grantee or mortgagee (or purchaser at a foreclosure sale) takes subject to the survivorship right of the other party (*see Lawriw v City of Rochester*, 14 AD2d 13 [4th Dept 1961], *affd* 11 NY2d 759 (1962); *see also Hiles v Fisher*, 144 NY 306 [1895]). If the tenancy by the entirety is subsequently terminated by divorce, the interest of the grantee or purchaser at a foreclosure sale will be that of a tenant in common (*see V.R.W., Inc. v Klein*, 68 NY2d 560 [1986]).

B. Adverse possession: RPAPL 501, 541, 543

In New York, the statutory period for adverse possession is ten years (also for easement by prescription).

Presumption of occupancy by a cotenant terminates after ten years of exclusive occupancy by the other cotenant, who thus may acquire title by adversely possessing for 20 years (RPAPL § 541).

By statute enacted in 2008:

- Claim of right means a reasonable basis for the belief that the property belongs to the claimant, but a claim of right is not required if the ownership cannot be ascertained from the records (RPAPL § 501 [3]).
- De-minimis, non-structural encroachments, including fences, hedges, shrubbery, plantings, sheds and non-structural walls, and acts of lawn mowing or similar maintenance across the boundary line of an adjoining owner are all deemed to be permissive and non-adverse (RPAPL § 543).

Note: Any adverse claim that vested before the 2008 statute (i.e., began before July 7, 2008) is not affected by it (*see Pritsiolas v Apple Bankcorp, Inc.*, 120 AD3d 647 [2d Dept 2014]).

C. Recording act: RPL §§ 290, 291

New York is a race-notice jurisdiction whereby an unrecorded conveyance is invalid against a subsequent purchaser for value who first records without knowledge of any prior unrecorded instruments.

Although a mortgage is a lien and not a transfer of title, for purposes of the recording act, a mortgage is a conveyance (RPL § 290 [3]).

Judgments are not protected by a recording act, so a mortgage prior in time to judgment retains priority even if it is unrecorded.

D. Restrictive covenants

For a restrictive covenant to be enforced the owner of the burdened property must have actual or constructive notice of the covenant. Constructive notice will be provided by a recorded deed only if the deed is in the direct chain of title of the burdened property (*Witter v Taggart*, 78 NY2d 234 [1991]). A deed from a prior owner of the burdened property to a different person for another lot is not in the direct chain of title of the burdened property, even if the deed was recorded prior to the deed for the burdened property and the other lot is an adjoining lot in the same tract as the burdened property.

TORTS AND TORT DAMAGES

I. Negligence and Related Tort Concepts

A. Comparative negligence/assumption of risk: CPLR 1411, 1412

New York is a pure comparative negligence jurisdiction. In an action to recover damages for personal injury, injury to property or wrongful death, the culpable conduct attributable to the claimant or decedent, including contributory negligence or assumption of risk, does not bar recovery. However, such conduct diminishes the amount of damages otherwise recoverable in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages (CPLR 1411). For example, if a jury returns a verdict in favor of the plaintiff in the amount of \$100,000 and apportions the liability 60% to the plaintiff and 40% to the defendant, the plaintiff may recover \$40,000.

Culpable conduct, including contributory negligence and assumption of risk, claimed in diminution of damages is an affirmative defense to be pleaded and proved by the party asserting the defense (CPLR 1412). Damages are diminished in cases of implied assumption of the risk, but where the plaintiff voluntarily assumes the known risk of injury, such express assumption of risk will absolve the defendant of a duty owed to the plaintiff (*Abergast v Board of Educ. of S. New Berlin Cent. School*, 65 NY2d 161 [1985]). A participant in a sports or recreational activity voluntarily assumes and consents to the risks which are inherent in and arise out of the nature of the sport generally and which flow from participation (*Morgan v State of New York*, 90 NY2d 471 [1997]).

B. Violation of statute or regulation

As a general rule, violation of a state statute that imposes a specific duty constitutes negligence per se and violation of a municipal ordinance or administrative rule or regulation constitutes some evidence of negligence (*Elliot v City of New York*, 95 NY2d 730 [2001]). In certain cases, violation of a state statute may impose absolute liability (see Torts and Tort Damages, I.F.).

C. Landowner liability: GOL § 9-103

In determining the duty owed by the owner or occupier of land to a person entering the premises, New York has abandoned the common law distinctions among invitees, licensees and trespassers. Instead, New York has adopted the single standard of reasonable care under the circumstances. A landowner must act as a reasonable person in maintaining the premises in a reasonably safe condition in view of all of the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk (*Basso v Miller*, 40 NY2d 233 [1976]).

Under New York's recreational use statute (GOL § 9-103), there is no duty to keep premises safe for entry or use by others for hunting, fishing, boating, hiking, cross-country skiing, sledding, snowmobile operation or other recreational activities or to give warning of any

hazardous condition on the property. A landowner can be found liable, however, for willful or malicious failure to guard or to warn against a dangerous condition or generally for injury suffered where permission to use the property was granted for consideration.

D. Negligent supervision/entrustment

New York has abrogated the defense of intra-family immunity for non-willful torts. Thus, actions between parents and children are actionable to the same extent that such actions are actionable when brought by non-family members (*Gelbman v Gelbman*, 23 NY2d 434 [1969]). However, a parent's negligent failure to supervise his or her child is not actionable by the child, and third-party tortfeasors are not entitled to contribution from parents for liability resulting, in part, from negligent supervision of the child (*Holodook v Spencer*, 36 NY2d 35 [1974]). There is an exception when the parent has breached a duty owed to third parties by negligently permitting an infant child to use a dangerous instrument. In that case, the parent may be found liable to the third party injured as a consequence of the parent's failure to protect the third party from the foreseeable harm that results from a child's improvident use of a dangerous instrument, which harm includes the third party's tort liability. Accordingly, a third party cast in liability for injury to a child may seek contribution from a parent who has negligently entrusted the child with a dangerous instrument and whose negligence contributed to the child's injury (*Nolechek v Gesuale*, 46 NY2d 332 [1978]).

E. Negligent infliction of emotional distress

New York has adopted a zone-of-danger rule with respect to emotional distress suffered upon witnessing the injury of a member of plaintiff's immediate family. A plaintiff is in the zone-of-danger if the plaintiff is exposed to an unreasonable risk of injury due to the defendant's conduct. Such a plaintiff may recover damages for injuries suffered in consequence of shock or fright resulting from the contemporaneous observation of serious physical injury or death of a member of the plaintiff's immediate family, where the defendant's same conduct was a substantial factor in causing injury to the plaintiff's family member (*Bovsun v Sanperi*, 61 NY2d 219 [1984]). The rule is based on the traditional negligence concept that, where a defendant has unreasonably endangered the plaintiff's physical safety, the defendant has breached a duty owed directly to plaintiff, entitling plaintiff to recover all damages sustained, including those damages suffered as a consequence of witnessing the suffering of an immediate family member also injured by defendant's conduct (*id.*).

Medical malpractice resulting in miscarriage or stillbirth is a violation of a duty of care to the expectant mother, entitling her to damages for emotional distress, even in the absence of an independent injury to the mother (*Broadnax v Gonzalez*, 2 NY3d 148 [2004]).

F. Statutory standard of care owed to construction workers: Labor Law §§ 240, 241

New York's "Scaffolding Law" (Labor Law § 240) imposes a duty on contractors, owners and their agents to furnish or erect scaffolding, hoists, stays, ladders and other devices so as to give proper protection to workers involved in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure. The statute imposes absolute liability

for its violation, and a plaintiff's comparative fault will not reduce the recovery (*Blake v Neighborhood Housing Services of NYC, Inc.*, 1 NY3d 280 [2003]). There is an exception for the owners of one or two-family dwellings who contract for but do not direct or control the work. The statute imposes strict liability on owners, contractors and their agents for its violation where a worker sustains an elevation-related injury, whether due to a falling object or a falling worker, where the injury is the consequence of the absence or improper use of such required safety devices.

Labor Law § 241 requires contractors and owners and their agents, except for owners of one and two-family dwellings who contract for but do not direct or control the work, to comply with various requirements. Subdivision 6 requires that all areas in which construction, excavation or demolition work is being performed be so constructed, shored, guarded and operated so as to provide reasonable and adequate protection to persons employed or lawfully frequenting such places. The commissioner of labor is authorized to make rules to carry the provisions of the subdivision into effect. Violation of such rules is evidence of negligence (see *Torts and Tort Damages*, I.B.).

G. Vicarious liability: GOL § 11-101 (Dram Shop Act); Alcohol Beverage Control Act § 65; Vehicle and Traffic Law § 388

New York's Dram Shop Act (GOL § 11-101) creates a cause of action in favor of a person injured in person, property, means of support or otherwise by an intoxicated person as against any person who, by unlawfully selling liquor or assisting in procuring liquor for such intoxicated person, caused or contributed to such intoxication. The Dram Shop Act requires a commercial sale of alcohol (*D'Amico v Christie*, 71 NY2d 76 [1987]). Actual and exemplary damages may be recovered. An unlawful sale may be a sale to a minor, a visibly intoxicated person or a habitual drunkard (Alcohol Beverage Control Act § 65).

Dram Shop liability extends to a person, including a social host, who knowingly causes intoxication in a person under the age of 21 by furnishing, or assisting in procuring, alcohol to the minor (GOL § 11-100). "Furnishing" within the meaning of GOL § 11-100 requires participation in a "deliberate plan" to furnish alcohol to underage individuals (*Rust v Reyer*, 91 NY2d 355, 360 [1998]).

The owner of a vehicle is vicariously liable for death or injury to a person or property resulting from the negligent use or operation of the vehicle by a person using or operating the vehicle with the express or implied permission of the owner (Vehicle and Traffic Law § 388). The statute creates a strong presumption of permissive use that can only be rebutted with substantial evidence sufficient to show the driver of the vehicle was not operating it with the express or implied permission of the owner (*Amex Assur. Co. v Kulka*, 67 AD3d 614 [2d Dept [2009]]).

As a general rule, parents are not vicariously liable for the torts of their minor children. However, the parent of an infant over ten years of age is liable for damages caused by the infant who willfully, maliciously or unlawfully damages, destroys or defaces public or private property. The parent's liability is limited to the sum of \$5,000 (GOL § 3-112).

H. Wrongful death actions: EPTL 5-4.1, 5-4.3, 5-4.4

The personal representative of a decedent's estate may bring an action to recover damages due to injury resulting in the decedent's death as against a person who would have been liable to the decedent if death had not ensued (EPTL 5-4.1). The damages recoverable are the pecuniary losses suffered by those for whose benefit the action is brought (EPTL 5-4.3). The damages are exclusively for the benefit of the decedent's distributees and are to be distributed in accordance with the pecuniary injuries suffered by the distributees (EPTL 5-4.4). The proceeds of a wrongful death action, thus, are not assets of the estate to be distributed in accordance with the decedent's will or the laws of intestacy.

The plaintiff in a wrongful death case is not held to the high degree of proof required where an injured party can him/herself testify and describe the occurrence upon which the action is based (*Noseworthy v City of New York*, 298 NY 76 [1948]). The *Noseworthy* doctrine (which has also been applied in cases of amnesia), where applicable, requires a jury charge explaining the lesser burden of proof.

I. Negligent misrepresentation, including duty to non-contractual party

In a commercial context, a duty to speak with care exists when the relationship between the parties is such that one may justifiably rely upon the other for information. Liability for negligent misrepresentation in a commercial transaction may be imposed where there is a special relationship between parties giving rise to an exceptional duty regarding commercial speech and justifiable reliance on such speech. Whether the relationship between the parties is such that the reliance is justified is generally a question of fact, with consideration given to whether the person making the representation held unique or special expertise; whether a special relationship of trust or confidence existed between the parties; and whether the speaker was aware of the use to which the information would be put and supplied it for that purpose (*Kimmell v Schaeffer*, 89 NY2d 257 [1996]).

An accountant may be liable to a party with whom he or she does not have privity of contract where the party relies to his detriment on inaccurate financial reports prepared by the accountant if: (1) the accountant was aware that the financial reports would be used for a particular purpose; (2) in furtherance of that purpose, a known party was intended to rely; and (3) there was some conduct on the part of the accountant linking him or her to that party, which evinces the accountant's understanding of that party's reliance (*Credit Alliance Corp. v Arthur Andersen & Co.*, 65 NY2d 536 [1985]).

II. Contribution, Indemnification and Limitations on Joint and Several Liability

A. Entitlement to amount of contribution: CPLR 1401, 1402

Persons subject to liability for the same personal injury, property damage or wrongful death may claim contribution among them, regardless of whether an action has been brought or judgment rendered against the person from whom contribution is sought (CPLR 1401). The amount of contribution that may be recovered is the excess paid by the person seeking

contribution over and above his or her equitable share of the judgment recovered by the injured party. Equitable shares are determined in accordance with the relative culpability of each person liable for contribution (CPLR 1402). For example, where the judgment in favor of the plaintiff is \$100,000 and defendants A and B, who are jointly and severally liable, are determined to be, respectfully, 70% and 30% responsible for the damages, the plaintiff may recover the full amount of the damages from either defendant, but if defendant A pays the entire judgment, he may recover \$30,000 from defendant B, by way of contribution.

B. How contribution is claimed: CPLR 1403

A cause of action for contribution may be asserted in a separate action or by cross-claim, counterclaim or third party claim in a pending action. The statute of limitations on a claim for contribution is six years, running from payment.

C. Limitation on claims for contribution in workers' compensation context: Workers' Compensation Law §§ 10, 11

An employer must provide compensation for the disability or death of its employees from injuries arising out of and in the course of employment regardless of whether the employer or employee was negligent, and an employee's sole remedy against the employer lies in recovery under the Workers' Compensation Law.

An employer is not liable for contribution or common law indemnification to any third party for injuries sustained by an employee acting within the scope of his/her employment unless the employee has sustained a "grave injury." A "grave injury" is defined as one of the following:

- Death;
- Permanent and total loss of use or amputation of an arm, leg, hand or foot;
- Loss of multiple fingers or multiple toes, or loss of an index finger;
- Paraplegia or quadriplegia;
- Total and permanent blindness or deafness;
- Loss of nose or an ear;
- Permanent and severe facial disfigurement; or
- An acquired injury to the brain caused by an external physical force resulting in permanent total disability.

D. Effect of release: GOL § 15-108

A release given to one of two or more persons liable or claimed to be liable in tort for the same injury or wrongful death reduces the claim of the injured party against the other tortfeasors by the greatest of the amount stipulated in the release, the amount of consideration paid for the release, or the amount of the released tortfeasor's equitable share of the damages.

A tortfeasor who obtains his or her release from an injured party is relieved of liability for contribution to any other tortfeasor and waives his or her right to claim contribution from any other tortfeasor.

For example, assume a plaintiff brings an action for personal injuries against defendants A and B, and thereafter releases defendant A from liability for \$20,000. If the plaintiff later obtains a judgment against defendant B for \$100,000, and the jury determines that defendant A was 40% liable for the damages caused to the plaintiff and defendant B 60% liable, the plaintiff's recovery will be reduced by \$40,000 (defendant A's equitable share of the damages as it is greater than the \$20,000 defendant A paid for the release) and the plaintiff will be limited to recovering \$60,000 from defendant B. Thus, plaintiff's total recovery will be \$80,000.

E. Limitation on liability of joint and several tortfeasors for non-economic loss:
CPLR Art 16

New York modifies traditional rules of joint and several liability in certain personal injury cases with respect to non-economic loss. Non-economic loss is defined to include pain and suffering, mental anguish and loss of consortium. Specifically, a defendant whose proportionate share of the fault is 50% or less is liable for plaintiff's non-economic loss only to the extent of such proportionate share. The defendant whose liability is less than 50% is only severally liable for the claimant's non-economic loss (CPLR 1601, 1602). For example, assume a plaintiff sues defendants A, B and C to recover damages for personal injuries. Assume the jury awards the plaintiff \$100,000 in pain and suffering and \$50,000 for economic loss (medical expenses, lost wages and the like). Assume also that the jury finds defendant A 10% liable for plaintiff's damages, defendant B 30% liable and defendant C 60% liable. All defendants are jointly and severally liable for plaintiff's \$50,000 economic loss. However, while defendant C is liable for the full amount of plaintiff's \$100,000 pain and suffering award, defendant A is only liable for \$10,000 and defendant B is only liable for \$30,000 of that award. Accordingly, if defendant C is insolvent, plaintiff will not be able to recover the entire award for pain and suffering.

In determining the apportionment of fault for purposes of Article 16, the culpable conduct of any person not a party to the action shall not be considered if the plaintiff is unable with due diligence to obtain jurisdiction over such person. If a plaintiff-worker has not sustained a "grave injury" (*see Torts and Tort Damages, II.C.*), CPLR 1601 similarly precludes consideration of the employer's culpable conduct in determining any equitable shares.

The limitations of CPLR Article 16 on joint and several liability do not apply:

- To a tortfeasor held liable for having violated a non-delegable duty, such as is imposed on owners and contractors by Labor Law § 240 (*see Torts and Tort Damages, I.F.*) or to liability arising under the doctrine of respondeat superior;
- To actions requiring proof of intent, such as torts like fraud or assault;
- To persons held liable by reason of the ownership, use or operation of a motor vehicle;
- In a product liability action to the apportioned share of a manufacturer where the manufacturer is not a party to the action and the plaintiff establishes the inability to obtain jurisdiction over the manufacturer who would have been liable under the doctrine of strict liability;

- If a plaintiff-worker has sustained a “grave injury” (*see* Torts and Tort Damages, II.C.) and sues a defendant claimed liable for the injury, to the extent of the equitable share of the plaintiff’s employer; or
- To persons held liable for causing injury by having unlawfully released a hazardous substance into the environment

(CPLR 1602).

III. Other Torts

A. *Per se* defamation

Slander is generally not actionable unless the plaintiff suffers special damage. The four established exceptions (collectively “slander per se”) consist of statements (1) charging plaintiff with a serious crime; (2) that tend to injure plaintiff in his/her trade, business or profession; (3) that plaintiff has a loathsome disease; or (4) imputing unchastity to a woman. The law presumes that damages will result from statements in these categories and damages need not be alleged or proven (*Lberman v Gelstein*, 80 NY2d 429 [1992]). In a libel action, similarly damages are presumed where a statement charges a person with committing a serious crime or tends to cause injury to a person’s profession or business (*Geraci v Probst*, 15 NY3d 336 [2010]).

B. Invasion of privacy: Civil Rights Law §§ 50, 51

New York does not recognize a common law right of privacy. However, the use for advertising or trade purposes of the name or picture of any living person without such person’s written consent is a misdemeanor (Civil Rights Law § 50). A person whose name, picture or voice is used for purposes of advertising or trade without the person’s written consent may seek an injunction and may also sue for damages (Civil Rights Law § 51). If the person’s picture is not used for trade or advertising purposes, but rather in connection with the reporting of a newsworthy event or a matter of public interest, the statutory right of privacy is not transgressed (*Howell v New York Post Co., Inc.*, 81 NY2d 115 [1993]; *see Messenger v Gruner & Jahr Printing and Pub.*, 94 NY2d 436 [2000]).

C. Prima facie tort

A plaintiff may recover damages for injuries resulting from a “prima facie tort”, defined as the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or series of acts which would otherwise be lawful. An essential element of the cause of action is special damages (*ATI, Inc. v Ruder & Finn, Inc.*, 42 NY2d 454, 458 [1977]).

IV. Statutory No-Fault: Insurance Law §§ 5101-5109

A. Purpose

The Comprehensive Motor Vehicle Insurance Reparations Act (New York’s “No-Fault” Law) provides a means of compensating victims of automobile accidents for their economic

losses promptly and without regard to fault or negligence (*Montgomery v Daniels*, 38 NY2d 41, 46 [1975]). The statutory scheme requires that every owner's policy of liability insurance issued on a motor vehicle provide for the payment of "first-party benefits" to a person injured in the use or operation of the vehicle, other than occupants of another motor vehicle or a motorcycle. Thus, in a two-car accident, an injured party looks to the insurance on the vehicle he or she was driving or in which he or she was riding as a passenger to recover such items of damage as medical expenses and lost wages, regardless of whether or not the accident was caused by the negligence of the driver or the negligence of the driver of another vehicle. In order to find that the injury was caused in the use or operation of a vehicle (see Insurance Law § 5104 [a]), the vehicle must be the proximate cause of the injury (*Cividanes v City of New York*, 20 NY3d 925 [2012]).

B. Basic economic loss: Insurance Law § 5102 (a)

"Basic economic loss" is defined as up to \$50,000 per person of the following items:

- All necessary medical and related expenses without limitation as to time, provided the need for such services is ascertainable within one year of the date of the accident;
- Loss of earnings, up to \$2,000 per month for up to three years from the date of the accident;
- All other reasonable and necessary expenses, up to \$25 per day for not more than one year from the date of the accident.

"First-party benefits" are payments to reimburse an injured person for "basic economic loss," less 20% of lost earnings and amounts paid under state or federal law in disability or workers' compensation benefits (Insurance Law § 5102 [b]).

C. Serious injury determination: Insurance Law § 5102 (d)

A "serious injury" means a personal injury resulting in:

- Death;
- Dismemberment;
- Significant disfigurement;
- A fracture;
- Loss of a fetus;
- Permanent loss of use of a body organ, member, function or system;
- Permanent consequential limitation of use of a body organ or member;
- Significant limitation of use of a body function or system; or
- A medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident.

D. Entitlement to and exclusions from coverage for first-party benefits: Insurance Law § 5103

As noted above, every owner's policy of liability insurance issued on a motor vehicle must provide for the payment of "first-party benefits" to a person injured in the use or operation of the vehicle, other than occupants of another motor vehicle or a motorcycle. However, the insurer may exclude from coverage a person who:

- Intentionally causes his or her own injury;
- Is injured as a result of operating a vehicle while intoxicated or while his or her ability to operate the vehicle is impaired by the use of an illegal drug;
- Is injured while in the course of a felony, while seeking to avoid lawful arrest, while operating a vehicle in a speed contest, or while operating or occupying a vehicle known to be stolen.

Any dispute involving the recovery of first-party benefits can be resolved either through arbitration or by lawsuit.

A policy of insurance issued on a motorcycle must provide for the payment of first-party benefits to a pedestrian injured by the use or operation of the motorcycle. However, no-fault coverage is optional for the owner and operator of the motorcycle.

E. Availability of action for non-economic loss: Insurance Law § 5104 (a)

In any action by a "covered person" against another "covered person" for personal injuries arising out of negligence in the use or operation of a motor vehicle, there is no right of recovery for non-economic loss (i.e., pain and suffering), except in the case of a "serious injury", or for "basic economic loss" (Insurance Law § 5104 [a]). A "covered person" is a pedestrian, owner, operator or occupant injured through the use or operation of a motor vehicle. In an action by a "covered person" against a "non-covered person" (for example, the manufacturer of a defective seatbelt), "basic economic loss" is recoverable, but the insurer who paid "first-party" benefits to reimburse the "covered person" for "basic economic loss" has a lien against any judgment to the extent of the benefits paid (Insurance Law § 5104 [b]).

F. Availability of action for economic loss in excess of basic economic loss

Although "basic economic loss" is not recoverable in an action by a "covered person" against another "covered person", to the extent economic losses exceed "basic economic loss", they are recoverable.

V. Municipal Tort Liability

A. Proprietary vs. governmental functions

Public entities are immune from negligence claims arising out of the performance of their governmental functions, including police protection, unless the injured person establishes a special relationship with the entity creating a specific duty to protect that individual (*Miller v State of New York*, 62 NY2d 506 [1984]). However, when the State or other public entity acts in

a proprietary capacity as a landowner, it is subject to the same principles of tort law as is a private landowner.

B. Special relationship/special duty

A municipality's duty to provide police protection is a duty owed to the public at large, and not to any particular individual or class of individuals. A municipality's provision of police protection is generally regarded as a resource-allocating function, best left to the discretion of policy makers. Accordingly, as a general rule, a municipality may not be held liable for injuries resulting from a failure to provide police protection. However, there is an exception to the general rule when a "special relationship" exists between the municipality and the claimant. The elements of this "special relationship" are:

- An assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured;
- Knowledge on the part of the municipality's agents that inaction could lead to harm;
- Some form of direct contact between the municipality's agents and the injured party; and
- That party's justifiable reliance on the municipality's affirmative undertaking.

(*Cuffey v City of NY*, 69 NY2d 255 [1987]).

C. Notice of claim requirement: General Municipal Law § 50-e

An action may not be maintained against a municipality, fire district or school district to recover damages alleged to have been sustained by reason of the negligence or wrongful act of the defendant unless a notice of claim is served within 90 days after the claim arises or, in the case of wrongful death, 90 days from the appointment of a representative of a decedent's estate (General Municipal Law §§ 50-e, 50-i; see Civil Practice and Procedure, V.B.)

TRUSTS, WILLS AND ESTATES

I. Intestate Succession: EPTL 4-1.1; Abandoned Property Law § 1215

Property not disposed of by will is distributed pursuant to EPTL 4-1.1. If the decedent is survived by:

- Spouse and issue, \$50,000 and one-half of the residue to the spouse and remainder to the issue by representation ([a] [1] (*see* Trusts, Wills and Estates, II.E.7));
- A spouse and no issue, the whole to the spouse ([a] [2]);
- Issue and no spouse, the whole to issue, by representation ([a] [3]);
- Parent(s) but no spouse or issue, the whole to the parent(s) ([a] [4]);
- No spouse, issue or parent, the whole to the issue of parents(s) (by representation) ([a] [5]).

If grandparents or their issue are the only survivors, one-half the estate goes to the paternal grandparents or their issue, by representation, and the other half to the maternal grandparents or their issue, by representation (EPTL 4-1.1 [a] [6]). For purposes of this distribution by representation, the issue of grandparents includes only children and grandchildren. Thus, by representation distribution ends at first cousins. If no children or grandchildren of the decedent's grandparents survive the decedent, the estate passes one-half to the great-grandchildren of the maternal grandparents, per capita, and one-half to the great-grandchildren of the paternal grandparents, per capita (EPTL 4-1.1 [a] [7]). Per capita means in equal shares (EPTL 2-2.11).

If the decedent is not survived by any of the above mentioned relatives, the estate escheats to the state (Abandoned Property Law § 1215).

A. Disqualification of parent, spouse: EPTL 4-1.4, 5-1.2

EPTL 4-1.4 disqualifies a parent from inheritance if he or she fails to support the child or abandons the child while the child is under the age of 21, whether or not the child dies before the age of 21. The Court of Appeals has defined abandonment as a “settled purpose to be rid of all parental obligations or to forego all parental rights” (*Matter of Susan W.*, 34 NY2d 76, 80 [1974]). A parent may regain the right to inherit if he or she resumes the parental duties, including financial support, and continues fulfilling them until the death of the child (EPTL 4-1.4 [a] [1]).

A spouse is disqualified from sharing in intestacy if, among other things, the marriage was void under the Domestic Relations Law, the parties were legally separated or divorced under a final decree, or the surviving spouse has abandoned or refused to support the deceased spouse and such abandonment or refusal to support continues through the time of death (EPTL 5-1.2).

B. Non-marital children: EPTL 4-1.2

Generally, a non-marital child has full inheritance rights from the mother and mother's family. A non-marital child inherits from his or her birth father only if paternity is established by one of the following four criteria:

- An order of filiation declaring the person to be the child's father;
- The mother and father acknowledged paternity under the Public Health Law;
- The father files a witnessed and acknowledged affidavit of paternity with the Putative Father Registry; or
- Paternity is established by clear and convincing evidence, which may include a DNA test, or if the father openly and notoriously acknowledged the child as his own.

The rights of non-marital children extend to their issue as well.

C. Child conceived after parent's death: EPTL 4-1.3

Section 4-1.3, enacted in 2014, provides rights to children conceived from the genetic material of a deceased individual. Under certain conditions, a child conceived using the genetic material of a deceased person is a distributee of the child's genetic parent and may be included in any disposition to a class described as "issue", "children", "descendants", "heirs", or any other term included in a will, trust, or other instrument created by the genetic parent. Those conditions include that the genetic parent must have created a written instrument within seven years of his or her death and said instrument must provide consent for the use of his or her genetic material. The child must be conceived no later than 24 months after the genetic parent's death or born no later than 33 months after the genetic parent's death.

II. Wills

A. Execution requirements: EPTL 3-2.1, 3-2.2

Section 3-2.1 sets forth the formalities a testator must follow to execute a valid will. To be valid:

- A will must be signed at the end by the testator or by a person on the testator's behalf in the presence of the testator and by his or her direction;
- The testator must sign his or her name and declare to each of the attesting witnesses that the instrument he or she is signing or has signed is his or her will;
- At least two attesting witnesses must sign the end of the will in the testator's presence. The testator may sign in the presence of the attesting witnesses, who see him sign, or the testator may acknowledge his signature to them;
- Attesting witnesses must both attest the testator's signature, as affixed or acknowledged in their presence, and at the request of the testator, sign their names within a 30-day period of each other.

Under section 3-2.2, except in limited military circumstances, oral (nuncupative) wills and holographic (handwritten) wills are not valid in New York.

B. Codicils: EPTL 3-2.1

A codicil requires the same formalities as a will. If the codicil is not executed with the formalities of section 3-2.1, it is ineffective and the will remains as originally executed.

C. Incorporation by reference

In New York, the doctrine of incorporation by reference is generally not recognized (*Booth v Baptist Church of Christ of Poughkeepsie*, 126 NY 215, 247-248 [1891]). In other words, a will may not incorporate by reference any document that was not signed and attested with the formalities of EPTL 3-2.1. Exceptions have been carved out via statutes, such as EPTL 3-3.7. Under section 3-3.7, a testator may direct in his or her will that the assets be poured over into a lifetime trust. This pour-over trust need not be executed with the same formalities as a will, but must be in existence before or be executed contemporaneously with the will. The trust must be in writing, signed by the creator and at least one trustee, and either acknowledged like a deed or signed by two witnesses.

D. Revocation

1. By physical act or subsequent writing: EPTL 3-4.1

A will can be revoked by another will; a writing of the testator clearly indicating an intention to effect such revocation, executed with the formalities prescribed by statute for the execution and attestation of a will; or by a physical act such as:

- Burning,
- Tearing,
- Cutting,
- Canceling (writing across words),
- Obliterating, or
- Mutilating.

The testator may destroy the will himself or herself or direct another person to do so in his or her presence and in the presence of two witnesses other than the person destroying the will. Whether a marking is sufficient to constitute revocation is a question of fact for the courts to decide.

In addition, a will may be revoked or altered by a nuncupative or holographic declaration of revocation as set forth in EPTL 3-2.2. Revocation is effective only if intended by the testator. Revocation of a will also revokes the codicils to the revoked will.

2. Partial revocation: EPTL 3-4.1

A will may be partially revoked by another will or a writing executed and attested with the formalities of a will. The statute does not allow for partial revocation of a will by a physical act.

3. Proof of lost will, presumption of revocation: SCPA 1407

SCPA 1407 provides that a copy of a lost or destroyed will may be submitted for probate only if it is established that:

- The will has not been revoked,
- The will was properly executed, and
- “All of the provisions of the will [can be] clearly and distinctly proved by each of at least two credible witnesses or by a copy or draft of the will proved to be true and complete”

(*Matter of DiSiena*, 103 AD3d 1077 [3d Dept 2013]).

When a will previously executed cannot be found after the death of the testator, there is a strong presumption that it was revoked by destruction by the testator. A proponent of a lost/destroyed will has the burden of proof to show that the testator did not destroy the will with the intent to revoke it.

4. Revival of revoked wills: EPTL 3-4.6

If a testator executes a will that is revoked by a later will containing a revocation clause, the first will cannot be revived by the testator merely revoking the later will. A prior will or disposition may be revived by:

- Executing a codicil that incorporates the provisions of the will by reference,
- A writing executed with will formalities declaring the revival of the old will, or
- Re-execution and re-attestation of the prior will in accordance with will formalities.

5. Dependent relative revocation

“The doctrine of dependent relative revocation may be simply stated by saying that where the intention to revoke a will is conditional and where the condition is not fulfilled, the revocation is not effective” (*Matter of Sharp*, 68 AD3d 1182 [3d Dept 2009]). The doctrine is usually applied where the testator cancels a will with the intent to make a new testamentary disposition, and the new disposition is not made or fails for some reason.

6. Revocation due to divorce: EPTL 5-1.4

All dispositions to a former spouse, including dispositions by will, by powers of appointment, by beneficiary designations for securities, life insurance, pension or retirement benefits, or by revocable trust, including a Totten Trust, are revoked if the spouses are judicially separated, divorced or if their marriage is annulled or declared void or dissolved on the ground of absence. Nominations of the former spouse to serve in any fiduciary or representative capacity are also revoked. The former spouse is treated as having predeceased the testator; thus, the disposition passes to the alternative beneficiaries.

E. Construction problems

1. Lapsed legacies: EPTL 3-3.3, 3-3.4 (residue of a residue)

Under New York's Anti-Lapse Statute, if a testator makes a disposition to his or her brother, sister or issue in a will, and that beneficiary predeceases the testator, the disposition passes to the issue of the predeceased brother, sister or issue (EPTL 3-3.3). If the will is executed after August 31, 1992, the disposition passes by representation (EPTL 1-2.16), otherwise it will pass per stirpes (EPTL 1-2.14).

Class gifts to issue, however, are not subject to the anti-lapse statute and are governed instead by EPTL 2-1.2, whereby a disposition to "issue" will pass by representation (effective August 31, 1992).

EPTL 3-3.4 provides that when a residuary disposition to two or more residuary beneficiaries is ineffective in part, the ineffective disposition will pass to the other residuary beneficiaries, ratably, unless the testator has provided otherwise or unless the anti-lapse statute applies to the lapsed portion.

2. Ademption: EPTL 3-4.3, 3-4.5

Under the "identity" theory of ademption, when a testator makes a specific disposition of property and the property is not part of the estate at the testator's death, the disposition fails. Where specifically devised property changes form, however, the specific gift does not adeem. Specifically, EPTL 3-4.3 provides that

"[a] conveyance, settlement or other act of a testator by which an estate in his property, previously disposed of by will, is altered but not wholly divested does not revoke such disposition, but the estate in the property that remains in the testator passes to the beneficiaries pursuant to the disposition. However, any such conveyance, settlement or other act of the testator which is wholly inconsistent with such previous testamentary disposition revokes it."

Under section 3-4.5, if a specific disposition of property is damaged or destroyed before the decedent's death and the insurance company reimburses the executor after the decedent's death, the beneficiary is entitled to that money.

3. Advancement: EPTL 2-1.5

Under the doctrine of advancement, a testator may satisfy part or all of a disposition or intestate share by making a lifetime gift to the beneficiary. The doctrine is limited to situations in which such gifts are accompanied by a writing, which must be executed contemporaneously with the gift and signed by the decedent, or acknowledged by the donee, stating that the donor intended the gift to be an advancement. The decedent must intend to substitute the gift for the donee's share of the estate.

4. Competency of attesting witness-beneficiary: EPTL 3-3.2

A disposition to an attesting witness is void unless there are two other disinterested attesting witnesses who are available to testify. However, an interested witness remains a competent witness and may be called to testify as to the validity of the will. If the interested witness is also an intestate distributee, the witness is entitled to receive the lesser of his or her intestate share or the disposition made to him or her in the will.

5. Renunciation: EPTL 2-1.11

A person who disclaims a gift (renounces interest in decedent's estate) is considered to have predeceased the decedent. In order for the disclaimer to be valid, it must be:

- In writing,
- Signed and acknowledged before a notary public, and
- Accompanied by a separate affidavit stating that no consideration was received for the disclaimer by a person whose interest will be accelerated.

A beneficiary must renounce a disposition within nine months of a transfer, and the disclaimer is irrevocable.

6. Abatement: EPTL 13-1.3

Funeral expenses, debts, taxes and administration expenses retain priority over dispositions under a will and distributions in intestacy. Unless otherwise provided by a testator, if the assets of the testator's estate are insufficient to pay all obligations of the estate and distributions under the will, the interests in the estate will abate in the following order:

- Distributive shares in property not disposed of by will,
- Residuary dispositions,
- General dispositions (EPTL 1-2.8),
- Demonstrative dispositions (EPTL 1-2.3),
- Specific dispositions (ratably) (EPTL 1-2.17),
- Dispositions to the decedent's spouse that are eligible for the estate tax marital deduction.

The testator may, however, provide for a different order of abatement.

7. Gifts to classes, children and issue: EPTL 2-1.2, 2-1.3, 4-1.3

Section 2-1.2 provides that dispositions to issue will pass by representation if the instrument was created after August 31, 1992. Under by-representation disposition, issue of deceased issue take an equal share with the other survivors at their level. Prior to this date, dispositions to issue will pass per stirpes. Under a per stirpes disposition, the issue of deceased issue take their parent's share. For example, if property passes by representation to decedent's issue and he is survived by children A and B, and by grandchildren G-1 and G-2 from predeceased child C, and by grandchild G-3 from predeceased child D, then children A and B each get one-fourth of the estate, and the other half is divided evenly (one-sixth of the estate

each) among grandchildren G-1, G-2 and G-3. Under a per stirpes distribution, grandchildren G-1 and G-2 would share one-fourth of the estate and grandchild G-3 alone would receive one-fourth of the estate.

Section 2-1.3 provides that when a testator disposes of property in favor of a class described as his or her “issue,” adopted, posthumous and non-marital children are entitled to share in the disposition.

A genetic child may be included in any disposition to a class (EPTL 4-1.3; *see* Trusts and Estates, I.C.).

8. Adopted children: EPTL 1-2.10; DRL 117

EPTL 1-2.10 defines “issue” as descendants and includes adopted children and their issue. Under DRL 117, adopted children are the issue of their adoptive parents. They are not the issue of their biological parents. Thus, as a general matter, an adopted-out child will not take in a class gift from a birth relative unless that child is “specifically named in a biological ancestor’s will, or the gift is expressly made to issue including those adopted out of the family” (*Matter of Best*, 66 NY2d 151, 156 [1985], *cert denied sub nom McCollum v Read*, 475 US 1083 [1986]).

An adopted-out child may, however, share in a class gift to “issue” of his or her biological family if the testator or grantor is his or her grandparent or a descendant of the grandparent (aunt, uncle, cousin, etc.) and the adoptive parent is a stepparent, a grandparent or a descendant of the grandparent (DRL 117).

F. Will contests: EPTL 3-3.5

1. Due execution: EPTL 3-2.1, 3-2.2

See Trusts and Estates II.A. for the execution requirements. The proponent of the will has the burden of proving due execution (*see In re Goldin’s Will*, 90 NYS2d 601, 602-603 [Surrogate’s Court, Erie County 1949]).

2. Testamentary capacity: EPTL 3-1.1

Under EPTL 3-1.1, “[e]very person eighteen years of age or over, of sound mind and memory, may by will dispose of real and personal property and exercise a power to appoint such property.” Generally, courts will look to whether the testator:

- Understood the nature and consequences of executing a will,
- Knew the nature and extent of the property that he or she was disposing of, and
- Knew those who would be considered the natural objects of his or her bounty and his or her relationship to them

(*Matter of Kumstar*, 66 NY2d 691, 692 [1985]). The proponent of the will has the burden of proving that the testator possessed testamentary capacity (*id.*).

3. Undue influence

Unlike due execution and testamentary capacity, the objectant has the burden of proving undue influence (*see In re Goldin's Will*, 90 NYS2d at 603). The objectant must “show that the influencing party’s actions are so pervasive that the will is actually that of the influencer, not that of the decedent” (*Matter of Prevratil*, 121 AD3d 137, 141-142 [3d Dept 2014]). “[T]he influence exercised [must] amount to a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the testator to do that which was against his [or her] free will and desire, but which he [or she] was unable to refuse or too weak to resist” (*Matter of Walther*, 6 NY2d 49, 53 [1959]).

4. Fraud

To prove fraud, it must be shown that “the proponent knowingly made a false statement that caused decedent to execute a will that disposed of his property in a manner different from the disposition he would have made in the absence of that statement” (*Matter of Clapper*, 279 AD2d 730, 732 [3d Dept 2001]). The objectant has the burden of establishing the existence of fraud (*In re Goldin's Will*, 90 NYS2d at 603).

5. Mistake

A will is entitled to probate even if the decedent was mistaken concerning extraneous facts which might otherwise have caused the decedent to make a different disposition, unless the mistake of fact was the product of undue influence (*Matter of Young*, 289 AD2d 725 [3d Dept 2001]). Where the mistake affects the decedent’s testamentary intentions, however, the will may be denied probate (*In re Forbes' Will*, 14 NYS 460 [2d Dept 1891], *affd* 128 NY 640 [1891]). The objectant has the burden of proving mistake (*see Young*, 289 AD2d at 727).

6. No-contest clauses: EPTL 3-3.5 (b)

A testator may include in his or her will an “in terrorem” or no-contest clause, which prevents a disposition from taking effect if the will is contested by the beneficiary, even if the beneficiary has probable cause for the contest. Such a provision will be enforced, subject to certain exceptions, including that:

- The beneficiary objects, based on probable cause, on the grounds of forgery or revocation by a later will;
- A guardian contests on behalf of an infant beneficiary;
- The beneficiary objects to the court’s jurisdiction, refuses to join in the probate petition, or waives service of a citation;
- The beneficiary provides information pertinent to the probate of the will;
- The beneficiary conducts preliminary examinations under SCPA 1404 to evaluate the merits of his or her objections; or
- Institutes, joins or acquiesces in a proceeding for the construction of any provision in the will.

7. Standing to contest: SCPA 1410

A person has standing to contest probate of a will if probate would adversely affect his or her interests.

G. Non-probate transfers

1. Inter vivos gifts

A valid inter vivos gift requires:

- Intent on the part of the donor to make a present transfer;
- Delivery of the gift, either actual or constructive, to the donee; and
- Acceptance by the donee

(*Gruen v Gruen*, 68 NY2d 48 [1986]). The proponent of a gift has the burden of proving each of these elements by clear and convincing evidence.

2. Joint tenancies: EPTL 6-2.1, 6-2.2

Under EPTL 6-2.1, property can be owned by an individual or by more than one person as:

- Joint tenants,
- Tenants in common, or
- Tenants by the entirety.

A disposition to two or more people creates a tenancy in common unless otherwise specified (EPTL 6-2.2).

3. Totten Trusts: EPTL 7-5.2

A Totten Trust (*Estate of Totten*, 179 NY 112 [1904]) is a bank account in the name of the decedent payable on his or her death to a named beneficiary. The creator of a Totten Trust may revoke or modify it during the creator's lifetime or by will. The trust must be described in the will as being in trust for a named beneficiary in a named financial institution. The will need not mention an intent to revoke or modify the trust, but must dispose of part or the whole of the trust account in order to effect a revocation or modification of the trust. The beneficiary has no vested right in the trust, only an expectancy that he or she might receive the trust in the future.

4. Transfer on death brokerage accounts: EPTL 13-4.1, 13-4.12

Under the Transfer-on-Death Security Registration Act, an owner of securities can register them in his or her own name and, upon death, they pass to the designated beneficiary.

5. Joint bank accounts: Banking Law § 675

The deposit of funds in a bank account in the name of the depositor and another person and in form to be paid or delivered to either, or the survivor of them, creates *prima facie* evidence of intent to create a joint tenancy with the right of survivorship. This presumption can be rebutted by providing direct proof that no joint tenancy was intended or substantial circumstantial proof that the joint account had been opened for convenience only.

6. Life insurance: EPTL 13-3.2

Life insurance assets ordinarily do not pass under a will or in intestacy, but rather by beneficiary designation. Thus, an insurance beneficiary's rights are not affected by laws governing the transfer of property by will or intestacy unless the insured fails to properly designate a beneficiary, no named beneficiary survives the insured, or the insured expressly designates his or her estate or personal representative(s) as beneficiary. Designation of a beneficiary must be done by a signed writing. The insurance carrier may also set forth the rules in its contract on how to designate a beneficiary and the carrier must agree to the designation of the beneficiary.

7. Retirement benefits: EPTL 13-3.2

No statute or laws governing the transfer of property by will, gift or intestacy may impair or defeat the rights of beneficiaries of pension, retirement, profit-sharing or other specified benefit plans. Thus, the right of a person entitled to receive money or other property pursuant to such a plan may not be defeated by a testamentary disposition. Rights under a retirement plan are however contractual rights and therefore limited by the provisions of the contract.

8. Lifetime Trusts (*see* Trusts and Estates, V.A.)

III. Family Protection

A. Spouse's elective share and testamentary substitutes: EPTL 5-1.1-A, 5-1.2

In New York, a surviving spouse has the right to take \$50,000 or one-third of the net estate, whichever is greater (EPTL 5-1.1-A). The net estate consists of:

- Property in the decedent's name that could pass under a will (net probate assets),
- Property that passes in intestacy,
- Testamentary substitutes, and
- Debts owed to decedent.

Testamentary substitutes include:

- Gifts causa mortis made before and after marriage;
- Totten Trusts (EPTL 7-5.1 [d]), including bank accounts in testator's name in trust for another and payable-on-death securities;
- Survivorship estates: including joint tenancies, tenancies by the entirety, joint bank accounts, and survivor bank accounts to the extent of decedent's contribution;

- Employee pension, profit sharing, and deferred compensation plans (if the plan is a “qualified” plan under IRS 401 and payable to the surviving spouse, only one-half is considered a testamentary substitute);
- Lifetime transfers in which decedent retained the power to revoke such disposition or a power to consume, invade or dispose of the principal, or name new beneficiaries, including annuities (*see Estate of Zuppa*, 48 AD3d 1036 [4th Dept. 2008]).
- Property over which decedent retained a presently exercisable general power of appointment; and
- Gifts made within one year of death but excluding any portion not subject to the federal gift tax pursuant to the annual exclusion.

Life insurance contracts are not considered testamentary substitutes (*id.*).

The one-third share is reduced by property received by intestacy, testamentary substitutes, and bequests under the will. The elective share is paid ratably, unless otherwise directed by the will, by the decedent’s beneficiaries, such as intestate beneficiaries, beneficiaries under the will, and beneficiaries of testamentary substitutes.

The surviving spouse must exercise the right of election within two years of the decedent’s death, but a court may in its discretion extend this time period upon a showing of good cause. The right of election may be waived by an agreement that is written, signed, and acknowledged before a notary public.

A surviving spouse is disqualified from sharing in a wrongful death recovery, intestacy or electing against the will under certain circumstances, including where there is a final judgment of divorce or separation, the surviving spouse abandoned the decedent and the abandonment continued until the decedent’s death, or the surviving spouse failed or refused to support the decedent (EPTL 5-1.2).

B. Share of after-born or pretermitted child: EPTL 5-3.2

EPTL 5-3.2 provides that a child born after the execution of the testator’s will shall succeed to a portion of the testator’s estate if the after-born child was left unprovided for by any settlement or without any mention in the will.

If the testator had no child living when he or she executed his or her last will, the after-born child succeeds to the portion of such testator’s estate as would have passed to such child had the testator died intestate.

If the testator had one or more children living when he or she executed his last will and no provision is made therein for any such child, an after-born child is not entitled to share in the testator’s estate.

If the testator had one or more children living when he or she executed his or her last will, and provision is made therein for one or more of such children, an after-born child is entitled to share in the testator’s estate, as follows:

- The portion of the testator's estate in which the after-born child may share is limited to the disposition made to children under the will;
- The after-born child shall receive such share of the testator's estate as he or she would have received had the testator included all after-born children with the children upon whom benefits were conferred under the will, and given an equal share of the estate to each such child;
- If the intention of the testator was to make a limited provision to be applied only to the testator's children living at the time the will was executed (for example, "I give each of my children \$1,000 because they have provided me with little comfort"), the after-born child succeeds to the portion of such testator's estate as would have passed to such child had the testator died intestate.

IV. Health Care Proxies and Powers of Attorney

A. Health Care Proxies: Public Health Law §§ 2980, 2981, 2982, 2985

Public Health Law § 2981 authorizes any competent adult to appoint a health care agent by a health care proxy that is signed and dated by the adult in the presence of two adult witnesses, who must also sign and who cannot be the appointed agent. The agent's authority commences upon a determination that the adult lacks capacity to make health care decisions.

The agent's decisions must be consistent with the known wishes of the principal (i.e., by the adult having executed a living will or having expressed such beliefs) including religious and moral beliefs (Public Health Law § 2982). If the principal's wishes are not reasonably known or cannot reasonably be determined, the agent may act in accordance with the adult's best interests. However, if the adult's wishes regarding the administration of artificial nutrition and hydration are not reasonably known and cannot with reasonable diligence be ascertained, the agent shall not have any authority to make decisions regarding these measures. If the agent does not know the adult's wishes concerning life-sustaining treatments, they are not authorized to make any decisions regarding those measures.

The proxy may be revoked by notifying the agent or a health care provider orally or in writing, any other act evidencing a specific intent, execution of a subsequent health care proxy, and divorce from the agent unless the principal specifies otherwise (Public Health Law § 2985).

B. Power of Attorney: GOL §§ 5-1501, 5-1501A, 5-1501B, 5-1505, 5-1511, 5-1513, 5-1514

1. Statutory and non-statutory forms

A Power of Attorney (POA) permits another person (an agent) to complete financial transactions on a principal's behalf. Section 5-1501 of the General Obligations Law sets out the forms creating a durable and nondurable statutory short-form POA. A durable POA survives the principal's incapacity and a nondurable POA does not survive the principal's incapacity. The

statutory short-form POA is durable unless the principal expressly states otherwise in the document (GOL § 5-1501A).

To be recognized as a valid POA under the law, the POA must meet certain execution requirements and contain certain specific language, whether it is a statutory short-form or a non-statutory form (GOL § 5-1501B [1] [a]-[d]). The POA must be signed and dated by the principal (who must have capacity) and by the agent and their signatures must be acknowledged in same manner as required for the recording of a deed. The agent does not have to sign the POA at the same time as the principal.

The specific language prescribed for a statutory short-form POA is set forth in GOL § 1513. In order for the principal to grant the agent various authorities (listed as “(A)” through “(O)” in the form), the principal must place his or her initials in a bracket preceding each specific authority. If the principal wishes to grant his or her agent authority over all of the matters enumerated in the form, the principal need only place the initials inside the bracket enumerated “(P)” and does not need to initial the other lines. Placing an “X” or other mark rather than the principal’s initials is invalid and does not serve to grant to the agent any authority unless a principal lacks capacity for a standard signature and routinely signs his or her name with such a mark (*Matter of Marriott*, 86 AD3d 943 [4th Dept 2011]).

The POA may contain modifications or additions (GOL § 5-1503). Pursuant to EPTL Article 13-A, a principal can modify the POA to give the agent access to the principal’s digital assets, including electronic files and e-mail communications.

2. Agent’s authority to make gifts

Under the statutory short-form POA, an agent may not make gifts in excess of \$500 in the aggregate in any calendar year. If the principal wishes to grant his or her agent authority to make gifts in excess of an annual total of \$500 for all gifts, the principal must: (1) initial a statement in the statutory short-form POA; and (2) simultaneously execute a separate Statutory Gifts Rider in the exact wording as set forth in GOL § 5-1514. The principal must sign the Statutory Gifts Rider in the presence of two witnesses or acknowledge his or her signature before two witnesses. The Statutory Gifts Rider may also contain modifications or additions as expressly permitted in GOL § 5-1503.

3. Standard of care

The standard of care to be exercised by the agent is defined as “observing the standard of care that would be observed by a prudent person dealing with property of another” and exercising a fiduciary duty to act in the best interest of the principal (GOL § 5-1505). An agent’s fiduciary duties include:

- Acting according to any instructions from the principal or, where there are no instructions, in the best interest of the principal, and to avoid conflicts of interest;
- Keeping the principal’s property separate and distinct from any other property owned or controlled by the agent;

- Keeping a record of all receipts, disbursements, and transactions entered into by the agent on behalf of the principal and to make such record and power of attorney available to the principal or to third parties at the request of the principal; and
- Not making gifts to one's self without such authority under the Statutory Gifts Rider.

4. Termination

The power of attorney terminates when:

- The principal dies;
- The principal becomes incapacitated, if the power of attorney is not durable;
- The principal revokes the power of attorney;
- The principal revokes the agent's authority and there is no co-agent or successor agent;
- The agent dies, becomes incapacitated or resigns and there is no co-agent or successor agent;
- The purpose of the power of attorney is accomplished; or
- A court order revokes the power of attorney

(GOL § 5-1511 [1]).

The power of attorney also terminates when the authority of the agent terminates, which can occur when:

- The principal revokes the agent's authority;
- The agent dies, becomes incapacitated or resigns;
- The power of attorney terminates; or
- The agent's marriage to the principal is terminated by divorce or annulment

(GOL § 5-1511 [2]).

V. Trusts

A. Creation of lifetime trusts, including trust res, beneficiary, trustee, valid purposes and execution requirements: EPTL 3-3.7, 6-2.2, 7-1.1, 7-1.4, 7-1.14, 7-1.15, 7-1.17, 7-1.18, 7-2.3

A grantor may create a trust of real or personal property for any lawful purpose (EPTL 7-1.4). A trust has three parties, its creator, the trustee and the beneficiary. A trust is not merged or invalid because a person, including but not limited to the creator of the trust, is or may become the sole trustee and the sole holder of a present beneficial interest therein, provided that one or more other persons hold a beneficial interest therein (EPTL 7-1.1).

EPTL 7-1.14 provides that any person or entity may make a lifetime trust. The person or entity must intend to create a trust, and the trust must have at least one definite and ascertainable beneficiary who is not the trustee and a grantor who delivers the corpus to the trustee.

Any kind of estate in property may be disposed of by lifetime trust (EPTL 7-1.15). Under section 7-1.17 (a), the provision setting forth the formal requirements for executing a trust, the trust must be:

- In writing;
- Executed by the creator of the trust and at least one trustee; and
- Acknowledged like a real estate deed for recording or executed in the presence of two witnesses, who must then sign it.

A trust is not valid until funded (EPTL 7-1.18), with the exception of life insurance, pension trusts, and pour-over trusts (EPTL 3-3.7; *Matter of Sackler*, 145 Misc.2d 950 (Surrogate's Court, Nassau County 1989)). In order to be sufficiently funded, the assets must be transferred through recording a deed or completing the registration of the stock certificate (EPTL 7-1.18). If the asset is not recordable or registrable, the grantor must assign the asset to the trust in writing (*id.*).

The trustee holds legal title to trust property and co-trustees share legal title jointly with right of survivorship (EPTL 6-2.2 [e]). When a sole trustee dies, the trust property vests in a court, which can then appoint a successor trustee, unless the trust otherwise provides (EPTL 7-2.3).

B. Types of trusts

1. Revocable: EPTL 7-1.16, 7-1.17

If a trust provides that it is revocable, a grantor may amend or revoke the trust in a writing that is executed and acknowledged with the same formalities as the initial trust instrument (EPTL 7-1.17 [a]). The governing instrument can eliminate the need for formalities, but all revocations or modifications must be in writing. Additionally, the grantor may revoke or amend a lifetime trust in his or her will, provided that he or she specifically refers to the trust (EPTL 7-1.16).

2. Irrevocable: EPTL 7-1.9, 7-1.16

A lifetime trust is irrevocable unless the trust instrument expressly provides that it is revocable (EPTL 7-1.16). Notwithstanding, an irrevocable trust may be revoked or amended pursuant to EPTL 7-1.9 (*see* Trusts and Estates, V.D.).

3. Testamentary: EPTL 3-2.1

A testamentary trust is a trust created in a will. Consequently, a testamentary trust only becomes effective upon the death of the testator.

4. Pour-over: EPTL 3-3.7

A testator may direct in his or her will that his assets be poured over into a lifetime trust. This pour-over trust need not be executed with the same formalities as a will and may be amendable or revocable, but it must be in existence before or be executed contemporaneously with the will. The trust must be in writing, signed by the creator and at least one trustee, and either acknowledged like a deed or signed by two witnesses.

5. Charitable, including cy pres: EPTL 8-1.1

In New York, a disposition for charitable purposes is valid despite the lack of a definite or ascertainable beneficiary. The state Attorney General represents beneficiaries of charitable trusts. A charitable trust will not fail for lack of a trustee. Rather, title will pass to the court with jurisdiction to appoint a trustee.

A charitable trust may be reformed under the cy pres doctrine. In order to reform the charitable trust, a court must find the following three conditions:

- The gift or trust is charitable in nature;
- The language of the will or trust instrument indicates that the donor demonstrated a general, rather than specific, charitable intent; and
- The particular purpose for which the gift or trust was created has failed, or has become impossible or impracticable to achieve.

C. Alienability of trust interests and spendthrift trust provisions, rights of creditors:
EPTL 7-3.1, 7-1.5, 7-1.6, 7-3.4; CPLR 5201, 5205

In New York, income interests in a trust are not alienable and therefore beyond the reach of creditors (i.e., spendthrift protection), unless the grantor of the trust expressly makes them alienable in the trust instrument (EPTL 7-1.5). For example, if a trust directs income to A for life, remainder to B, A may not sell or assign his income interest, and A's creditors cannot reach the income, unless the grantor provides otherwise. Notwithstanding spendthrift protection, an income beneficiary may assign all or part of his income to a spouse or children he is legally obligated to support, or income over \$10,000 per year to his heirs pursuant to an acknowledged document (EPTL 7-1.5 [b]). In addition, EPTL 7-1.6 provides that a court may in its discretion make an allowance from principal to any income beneficiary for the beneficiary's support and education.

Remainder interests are freely alienable unless by specific provision in the trust, the grantor makes the trust remainder inalienable. In the example above, B can sell his remainder interest during his lifetime or bequeath it in his will, even if the remainder interest is contingent.

Creditors of the creator and income beneficiaries have certain statutory rights. For example, a disposition in trust by a creator for his own benefit (a self-settled trust) is void against existing or subsequent creditors (EPTL 7-3.1). CPLR 5205 (d) allows creditors to reach 10% of the income from a trust, and pursuant to EPTL 7-3.4, unless a trust requires the accumulation of income, a creditor may levy against the income in excess of what is necessary for the income beneficiary's support and education.

D. Amendment, revocation and termination: EPTL 7-1.9, 7-1.16, 7-1.17, 7-1.19, 7-2.2

If a trust is revocable (*see* EPTL 7.1.16, 7-1.17 [a]), the creator can revoke the trust without the consent of the beneficiaries by written notice of revocation delivered to at least one other trustee within a reasonable time if the person executing the revocation is not the sole trustee (EPTL 7-1.17 [b]).

If a trust is irrevocable, the grantor must execute an instrument in writing acknowledged or proved in the manner required for the recording of a conveyance of real property, with the consent of all living beneficiaries, executed in like manner (EPTL 7-1.9). A trustee is not an interested person, and the consent of an unborn child is not needed to revoke or amend a trust (*Matter of Peabody [Chase Manhattan BankpHoltzman]*, 5 NY2d 541 [1959]).

A court may terminate a trust, upon application by a trustee or beneficiary, if it finds that:

- Continuation of the trust is economically impracticable,
- The express terms of the disposing instrument do not prohibit its early termination, and
- Such termination would not defeat the specified purpose of the trust and would be in the best interests of the beneficiaries

(EPTL 7-1.19).

When the purpose of a trust ceases, the trust terminates and the estate of the trustee also ceases (EPTL 7-2.2).

VI. Rule Against Perpetuities: EPTL 9-1.1, 9-1.2, 9-1.3

The rule against perpetuities limits the ability of owners to control future disposition of their property. In New York, the rule against perpetuities, which applies to both real and personal property, but not charities, applies two rules in determining the validity of a disposition of property: (1) the suspension of the absolute power of alienation and (2) the remoteness of the vesting of the estate. Under the suspension of alienation rule, any estate in which the conveying instrument suspends the absolute power of alienation for longer than lives in being at the creation of the estate plus 21 years is deemed void (EPTL 9-1.1 [a] [2]). Under the second rule, “[n]o estate in property shall be valid unless it must vest, if at all, not later than [21] years after one or more lives in being at the creation of the estate and any period of gestation involved” (EPTL 9-1.1 [b]). Beneficiaries of a trust must be definite and ascertainable within the perpetuities period.

Pursuant to the EPTL 9-1.2 (Reduction of Age Contingency), where an estate would be invalid under the rule against perpetuities because of a person reaching an age in excess of 21 years, the age contingency is reduced to 21 years for the person subject to that contingency. For example, if the grantor provides “to A for life, remainder to A’s children who shall reach the age of 30,” the remainder interest is invalid (because A could have a child after creation of the

interest who could reach the age of 30 more than 21 years after A's death). EPTL 9-1.2 permits the age contingency to be reduced to 21 as to those beneficiaries whose interests would otherwise be invalidated.

GLOSSARY OF STATE STATUTES AND RULES

Abandoned Property Law	Labor Law
Alcohol Beverage Control Act	Limited Liability Company Law
Arts and Culture Law	New York Codes Rules and Regulations (NYCRR)
Banking Law	New York Constitution (NY Const)
Business Corporation Law (BCL)	Partnership Law
Civil Practice Law and Rules (CPLR)	Penal Law
Civil Rights Law	Public Health Law
Criminal Procedure Law (CPL)	Public Officers Law
Domestic Relations Law (DRL)	Real Property Actions and Proceedings Law (RPAPL)
Estates, Powers and Trusts Law (EPTL)	Real Property Law (RPL)
Education Law	Rules of Professional Conduct (RPC)
Executive Law	Social Services Law
Family Court Act (FCA)	State Administrative Procedure Act (SAPA)
General Business Law	State Technology Law
General Municipal Law	Surrogate's Court Procedure Act (SCPA)
General Obligations Law (GOL)	United States Constitution (US Const)
Insurance Law	Vehicle and Traffic Law
Judiciary Law	Workers' Compensation Law

APPENDIX A

APPELLATE DIVISIONS

There are four Appellate Divisions of the Supreme Court, one in each of the State's four Judicial Departments. These Courts resolve appeals from judgments or orders of the superior courts of original jurisdiction in civil and criminal cases, and review civil appeals taken from the Appellate Terms and the County Courts acting as appellate courts.

Judicial Departments			
<u>First</u>	<u>Second</u>	<u>Third</u>	<u>Fourth</u>
Bronx NY County	Dutchess Kings Nassau Orange Putnam Queens Richmond Rockland Suffolk Westchester	Albany Broome Chemung Chenango Clinton Columbia Cortland Delaware Essex Franklin Fulton Greene Hamilton Madison Montgomery Otsego Rensselaer St. Lawrence Saratoga Schenectady Schoharie Schuyler Sullivan Tioga Tompkins Ulster Warren Washington	Allegany Cattaraugus Cayuga Chautauqua Erie Genesee Herkimer Jefferson Lewis Livingston Monroe Niagara Oneida Onondaga Ontario Orleans Oswego Seneca Steuben Wayne Wyoming Yates

APPENDIX B

