HOLTZSCHUE ON REAL ESTATE CONTRACTS AND CLOSINGS

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HOLTZSCHUE ON REAL ESTATE CONTRACTS AND CLOSINGS

A Step-by-Step Guide to Buying and Selling Real Estate

Third Edition

Karl B. Holtzschue

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This work is designed to provide practical and useful information on the subject matter covered. However, it is sold with the understanding that neither the publisher nor the author is engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

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For my wife Linda,
and
Alison, Adam, Sara, Jo, Edna,
and last but not least
Sid

About the Author

KARL B. HOLTZSCHUE, an alumnus of Dartmouth College (1959) and Columbia Law School (1966), is an author on legal topics and has also taught as an Adjunct Professor at Columbia Law School, Columbia Business School, Fordham Law School, and Vermont Law School. From 1988 to 1990, he was the partner heading the real estate department in the New York City office of the law firm of O'Melveny & Myers. Before that, he had been a member of the New York City firm of Webster & Sheffield. Mr. Holtzschue's experience has been in all aspects of real estate law and all types of real estate transactions, including acquisitions and sales; private, public, and nonprofit developments; leasing; representation of institutional lenders in construction; permanent and convertible loans; joint ventures; and workouts. From 1987 to 1990, Mr. Holtzschue chaired the Committee on Real Property Law of the Association of the Bar of the City of New York (the City Bar). In 1998, he became a member of the Executive Committee of the Real Property Law Section of the New York State Bar Association (NYSBA) and co-chair of the Section's Title and Transfer Committee. In 2004, he was elected an officer of the Executive Committee and served as Chair for a year beginning June 1, 2007. In 2012, he received the over 4600 member Real Property Law Section's *Professionalism Award*, its highest award. He is a member of the American College of Real Estate Lawyers and has been active on several committees of the City Bar and the New York State and American Bar associations. He is a former member of the TriBar Committee on Lawyers' Opinions.

In addition to *Holtzschue on Real Estate Contracts* and its supplements, Mr. Holtzschue has written three books on the purchase and sale of real estate and chapters on caveat emptor, mortgage commitment contingencies, real estate financing, mortgage-backed securities, and mortgage loan opinions for standard texts on real property. He was the original editor of the NYSBA's Residential Real Estate Forms on HotDocs. He has written articles in various publications, has participated in drafting model contracts of sale, and has lectured extensively on real estate matters, including purchase and sale of real estate, transfer taxes, and attorneys' opinions in mortgage loan transactions.

For any questions or other inquiries, contact Mr. Holtzschue at kbholt@gmail.com.

Table of Chapters

Table of Contents

Chapter 2 Drafting and Negotiating the Contract

Chapter 3 Preparing for the Closing

Chapter 4 The Closing

Acknowledgments for the First Edition

My first acknowledgments go to certain people who were instrumental in the development of my career in real estate law: Professor Curtis J. Berger, who introduced me to the subject at Columbia Law School; my partners, Bethuel M. Webster and Frederick Sheffield, who gave me the opportunity to pursue my interest in the field; Robert M. Feely, who as Chairman of the Committee on Real Property Law of the Association of the Bar of the City of New York originally conceived of what became the "Contract of Sale for Office, Commercial and Multi-Family Residential Premises"; the members of the 1978–79 subcommittee on contracts of sale who participated in drafting the "Rider to House Contract of Sale," Alvin Jay Feldman, Joseph G. Holzka, Arthur J. Mirante, Stephen Munzer, and Martin D. Polevoy (ex officio); and the members of the 1979–80 subcommittee on contracts of sale who participated in drafting the "Contract of Sale for Office, Commercial and Multi-Family Residential Premises," Messrs. Feldman, Holzka, and Mirante and Murray Adams, Judah B. Klein, Jon C. Minikes, and, especially, Edward B. Schoen, who contributed so much to the deliberations and to the final draft.

Next I would like to thank the following people for their help to me in writing this book: my associates at Webster & Sheffield, Anne A. Rabbino, Paul Luca, Robert S. Insolia, and Frank M. Glaser, for their research assistance; Trevor O'Neill for his analysis of the contract forms from various states; my secretary, Doreen Cuccurullo, for typing the initial drafts and proofreading; the word processing department at Webster & Sheffield for typing all the subsequent drafts; Christine Wierzba, for her research assistance; Helen Buckley, for her proofreading; and, especially, my associate, Jacqueline A. Weiss, for her skillful editing, research, and boundless enthusiasm for the project. If any errors or omissions have not been corrected, the responsibility is, of course, mine.

KARL B. HOLTZSCHUE
New York, New York
August 1985

Preface to the Third Edition

The Third Edition is the result of a complete review of the entire book. New developments, such as the new ALTA title insurance policies and endorsements and changes in rates, have been described. Cases and statutes have been updated, including the New York agency disclosure and mortgage loan originator statutes. Footnotes have been separated and shortened to make them easier to read, particularly with respect to the Property Condition Disclosure Act. Differences between upstate and downstate practice are further highlighted, particularly with respect to "secondary contracts" and searching and insuring title. A discussion of the Lawyers Fund for Client Protection has been added. Cross-references have been expanded. The index has been updated. The 2002 New Jersey contract for sale has been included, with various paragraphs cited in the text.

Over the past twenty-plus years, the greatest expansion of the subjects discussed has been in environmental matters, caveat emptor, the Property Condition Disclosure Act, mortgage commitment contingency clauses, and ethics. Cases, statutes, and contract forms have kept changing. We will continue our efforts at the NYSBA's Real Property Law Section, which I will chair for a year, starting June 1, 2007, to try to improve the practice, keep up with developments, and keep practitioners informed.

KARL B. HOLTZSCHUE
New York, New York
June 2007

Introduction

Representing the purchaser or seller of a house or other real estate is one of the most basic and personal services an attorney may be called upon to provide. The first purchase of a house is also usually the most significant financial transaction the client has ever undertaken and often the first time the client will have been represented personally by an attorney.

Consequently, it is especially important that the attorney be well informed and efficient in performing these services. The principal responsibility of the seller's attorney is to prepare and negotiate a contract that will bind the purchaser and protect the seller from liability to the maximum extent feasible and customary. The purchaser's attorney must see to it that the seller is also bound and that the purchaser receives good title (or at least the agreed state of title). A well-drafted contract should prevent the parties from changing their minds and escaping from liability on technical grounds.

Attorneys, like generals, are sometimes guilty of fighting the last war (instead of the present one) by arguing over provisions to protect against problems they encountered in a prior transaction. A reasonable balance should be struck between covering every conceivable contingency and covering the minimum. This is most likely to happen if the attorneys are experienced and knowledgeable about contracts, custom, and practice. Conduct is also important; aggressiveness can be overdone. As my father-in-law once said to the attorney who represented the purchaser of his house: "Young man, this is not an adversary proceeding. Your client wants to buy and I want to sell. Don't make problems." On the other hand, the attorneys may have to make their clients face up to some matters for their own good. If the attorneys explain their reasons properly, they should not be seen as obstructing or overcomplicating the negotiations. Far too many people already think that attorneys are guilty of those sins.

Since its publication in 1946, *Contracts for the Sale of Realty* by Alexander Bicks (as later revised by Herman M. Glassman and William M. Kufeld) has been a basic reference guide for New York lawyers who were new to real estate contracts and practice. Its primary focus was on sales of houses. The most recent edition, published in 1973, was based on the then-current printed form contract of sale

distributed by the title companies in New York. One of the greatest virtues of the book was its lively description and analysis of the negotiating positions of the seller and the purchaser and its suggestions of appropriate ways to reconcile them.

In 1978, the title companies' printed form was substantially revised, primarily to comply with "plain language" requirements (see section 2:1.3 of the text). I participated in commenting on the revision as chairman of a contract of sale subcommittee of the Committee on Real Property Law of the Association of the Bar of the City of New York (now known as the "New York City Bar Association"). Subsequently, our committee prepared a printed form "Rider to NY House Contract of Sale" (Appendix D). In 1980, our committee prepared a printed form "Contract of Sale for New York Office, Commercial and Multi-Family Residential Premises" (Appendix K). In 1990, I represented the committee in the drafting of a new residential contract.

This book was originally offered as an updated and expanded replacement for the Bicks book. The material is reorganized, based on checklists for purchasing and selling real estate that I developed over twenty-eight years of practice. The attorneys for the purchaser and the seller are given a step-by-step description of the transaction from beginning to end. The discussion of the contract preparation and negotiation follows the format of the 2000 printed form of the title companies (NY Multibar form), the 1978 NYBTU Form 8041 and the "Rider to NY House Contract of Sale" (Form 316), which are included as Appendices C1, C and D. A detailed discussion of sales of buildings having tenants is also included, based upon the printed form, "Contract of Sale for New York Office, Commercial and Multi-Family Residential Premises" (Form 154 for New York and Form 3125 for all states), which are included as Appendices K and L. Contracts, from Albany and Buffalo and other states (including Connecticut and New Jersey), are also discussed and compared (see section 1:2.2).

The negotiating positions of the parties and suggested outcomes are described in the manner of the Bicks book. Where "may" is used as a suggestion to the attorney instead of "should," this indicates a position that is unusual or not widely accepted in sales of houses. The second edition expanded coverage in several areas, such as discussions of environmental matters, caveat emptor, acceptable title, title insurance, surveys, mortgage and other contingency clauses, the Hart-Scott-Rodino Antitrust Improvements Act, federal income tax changes, and time-of-the-essence cases. Other new cases, statutes, and articles have been noted.

References have been added to my other two books on the subject: Volume 1 (*Purchase and Sale*) in *New York Practice Guide: Real Estate* (limited to New York law and practice, but including numerous forms and reference materials), and *Real Estate Transactions: Purchase and Sale of Real Property* (a two-volume collection and analysis of form contracts of sale from every state and a one-volume nationwide treatise on related issues). Research was based primarily on the Bicks book; M. Friedman, *Contracts and Conveyances of Real Property* (7th ed. 2006); R. Werner, *Real Estate Closings* (2d ed. 1988); deWinter, *Real Estate Contracts and Conveyances: A Practitioner's Handbook* (1992); materials prepared for my classes at Fordham Law School and Columbia Business School; and my other books. Citations are primarily to New York cases and statutes, in part because the New York State legislature has been so active in this area. For citations in other states, the Friedman and Werner books and my nationwide book should be consulted.

With apologies to our sisters at the bar, I have used "he" and "his" solely in the interest of brevity and informality.

A new section on ethics and professionalism, following this Introduction, was added in 1998.

☞ **TIP:** Practice tips appear throughout the treatise in boxes like this set off from the main text.

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June 2007
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Ethics and Professional Responsibility

[1] New York Lawyer's Code of Professional Responsibility

A concerted effort has been made by the New York State Bar Association, the Practising Law Institute and others in their continuing education programs to make sure that lawyers are familiar with The Lawyer's Code of Professional Responsibility of the NYSBA and ethics generally. The Code includes Canons, Ethical Considerations, and Disciplinary Rules. The Canons embody the general concepts from which the Ethical Considerations and Disciplinary Rules are derived. The Ethical Considerations are aspirational and constitute a body of principles upon which the lawyer can rely for guidance. The Disciplinary Rules are mandatory and state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Rulings on specific questions are given in opinions issued by the NYSBA Committee on Professional Ethics and comparable committees of local bar associations.

NOTE: The New York Rules of Professional Conduct replace the New York Code of Professional Responsibility as of April 1, 2009.[1]

The current Code was adopted effective January 1, 1970, with the most recent amendments effective June 30, 1999, June 1, 2001, November 1, 2001, and March 4, 2002.[2] The 1999 changes to the Disciplinary Rules and Ethical Considerations affected jurisdiction and choice of law, lawyer advertising and solicitation, conflicts of interest, business transactions with clients, media rights, sexual relations with clients and other matters. For representation commenced after June 1, 2001, clients may require arbitration of fee disputes involving $1,000 to $50,000.[3] The November 1, 2001 changes added new provisions relating to nonlegal services, such as engineering, financial planning, accounting, brokerage, social work and real estate ("multidisciplinary practice"), and require that a lawyer must provide the client with a prescribed statement of the client's rights prior to commencement of

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1. *See infra* subsection [7].
2. Krane, *Proposed Amendments to the Code of Professional Responsibility: A Continuing Process of Change*, 69 N.Y. ST. B.J. 42 (May/June 1997).
3. N.Y. COMP. CODES R. & REGS. tit. 22, pt. 37.

legal representation of a client referred by a nonlegal service provider or prior to the referral of an existing client to a nonlegal service provider.[4] Prof. Roy Simon annually publishes an excellent guide.[5] Other sources are also helpful.[6]

[2] Letters of Engagement

Effective March 4, 2002, an attorney must provide a written letter of engagement to each client before commencing the representation (unless the fee is expected to be less than $3,000), detailing the scope of legal services and fees, expenses, billing practices and, where applicable, notice of the client's right to arbitration of fee disputes.[7] The engagement letter is required to notify the client of a possible right

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4. New DRs 1-106 and 1-107, amended DRs 2-101, 2-102, and 2-103, and 22 N.Y. COMP. CODES R. & REGS. tit. 22, pt. 1205. N.Y.S.B.A. Opinions 752, 753 and 755 note that the MDP rules do not abrogate prior rules as to conflicts and solicitation.

   See also SIMON'S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED (West Group 2000); Holtzschue, *Ethics and Professionalism*, 27 N.Y. REAL PROP. L.J. 61 (Spring 1999); Holtzschue, *Adventures in Home Sales: A Case Study in Legal Ethics*, 28 N.Y. REAL PROP. L.J. 16 (Winter 2000); Green & Stein, *Adventures in the Mortgage Trade: A Case Study in Legal Ethics*, 27 N.Y. REAL PROP. L.J. 49 (Spring 1999); Copps, Tartaglia & Petro, *Recent Cases on Professional Practice*, 33 N.Y. REAL PROP. L.J. 188 (Fall 2005) (conflicts of interest, prior representation, temporary certificate of occupancy, subpoenas and nonmilitary affidavits, improper repeated referrals, and escrow accounts).
5. SIMON'S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED (West Group 2000).
6. Holtzschue, *Ethics and Professionalism*, 27 N.Y. REAL PROP. L.J. 61 (Spring 1999); Holtzschue, *Adventures in Home Sales: A Case Study in Legal Ethics*, 28 N.Y. REAL PROP. L.J. 16 (Winter 2000); Green & Stein, *Adventures in the Mortgage Trade: A Case Study in Legal Ethics*, 27 N.Y. REAL PROP. L.J. 49 (Spring 1999); Copps, Tartaglia & Petro, *Recent Cases on Professional Practice*, 33 N.Y. REAL PROP. L.J. 188 (Fall 2005) (conflicts of interest, prior representation, temporary certificate of occupancy, subpoenas and nonmilitary affidavits, improper repeated referrals, and escrow accounts).
7. N.Y. COMP. CODES R. & REGS. tit. 22, pt. 1215; Seth Rubenstein, P.C. v. Ganea, 41 A.D.3d 54, 833 N.Y.S.2d 566 (2d Dep't 2007) (attorney's failure to provide letter of engagement was unintentional and did not preclude recovery in quantum meruit) (see discussion deploring the quandary resulting from disparate lower court rulings in other Departments in Emanuel, *2nd Department Interprets Engagement Rule, in* N.Y. PROF. RESPONSIBILITY REP. 1 (May 2007)); Kutner v. Antonacci, 16 Misc. 3d 585, 837 N.Y.S.2d 859 (Dist. Ct. Nassau Cty. 2007) (retainer agreement provision for 16% interest on unpaid legal fees, though not usurious, was not fair and reasonable; reduced to 9% statutory pre-judgment rate); Rimberg & Assocs., PC v. Jamaica Chamber of Commerce, Inc., 40 A.D.3d 1066, 837 N.Y.S.2d 259 (2d Dep't 2007) (non-refundable minimum retainer fee agreement was void, but did not prevent attorney from seeking to recover reasonable value of legal

to arbitration in case of a fee dispute.[8] Several NYSBA opinion letters

services); Barry Malin & Assocs. P.C. v. Nash Metalware Co., 18 Misc. 3d 890, 849 N.Y.S.2d 752 (Civ. Ct. N.Y. Cty. 2008) (law firm did not have enforceable contract to represent client where letter of engagement for $100,000 fee never signed and was not entitled to recover in quantum meruit, distinguishing *Seth Rubenstein*); Miller v. Nadler, 60 A.D.3d 499, 875 N.Y.S.2d 461 (1st Dep't 2009) (law firm's failure to comply with rules on retainer agreements did not preclude it from suing for services provided); Util. Audit Grp. v. Apple Mac & R Corp., 59 A.D.3d 707, 874 N.Y.S.2d 525 (2d Dep't 2009) (attorney's failure to comply with letter of engagement rule did not prevent recovery of fees based on quantum meruit); Nabi v. Sells, 70 A.D.3d 252, 892 N.Y.S.2d 41 (1st Dep't 2009) (noncomplying aspects of retainer agreement did not bar recovery by attorneys in quantum meruit); Pratt, *New York's Engagement Letter Rule and Fee Dispute Resolution Program: The Process of Fee Collection*, NYSBA J. 26 (June 2012); Notrica v. N. Hills Holding Co., 105 A.D.3d 826, 964 N.Y.S.2d 167 (2d Dep't 2013) (counsel's failure to provide letter of engagement did not bar claims for fees for services rendered); *In re* Burns, 123 A.D.3d 1284, 997 N.Y.S.2d 844 (3d Dep't 2014) (attorney's admissions that he failed to promptly refund unearned portion of client's retainer fee following his discharge warranted requirement that attorney provide three reports by accountant confirming that he is maintaining required bookkeeping records, and that he completed four hours of CLE in ethics and four hours in law practice management); Salamone, P.C. v. Cohen, 129 A.D.3d 877, 12 N.Y.S.3d 180 (2d Dep't 2015) (retainer agreement assessing interest rate of 18% per annum on fee balance due not subject to statutory interest rate limitation of 6%; obligation not a loan; rate not usurious as client could avoid interest by paying on time; issues of fact whether attorney overbilled and acted unethically); *In re* Brown, 133 A.D.3d 7, 17 N.Y.S.3d 124 (1st Dep't 2015) (failure to furnish letters of engagement for services where fees exceeded $3,000, depositing fees into escrow account to avoid tax lien, paying personal expenses from escrow account, and making accountant a signatory warranted *two-year suspension*); Nicholas A. Gabriele, P.C. v. Fay, 50 Misc. 3d 73, 24 N.Y.S.3d 490 (2d Dep't 2015) (attorney entitled to recover finance charges for late payment and administrative charges for attorney's disbursements where client did not object to provisions in plain language in retainer agreement); Stewart v. Berger, 137 A.D.3d 1103, 29 N.Y.S.3d 42 (2d Dep't 2016) (six-year limitations period for contract actions and for fraud actions, rather than three-year limitations period for legal malpractice actions and breach of fiduciary duty, applied to client's claim alleging that attorneys charged excessive fees in violation of retainer agreement; claim for punitive damages for fraud vacated); Ferst v. Abraham, 140 A.D.3d 581, 34 N.Y.S.3d 38 (1st Dep't 2016) (retainer provision holding client liable for attorney fees incurred in collection of fees, without reciprocal allowance for attorney fees should client prevail, was void and unenforceable).

8. Lorin v. 501 Second St. LLC, 2 Misc. 3d 646, 769 N.Y.S.2d 361 (Civ. Ct. Kings Cty. 2003) (client's defense of legal malpractice did not excuse attorney's failure to arbitrate fee dispute); Larrison v. Scarola, 11 Misc. 3d 572, 812 N.Y.S.2d 243 (Sup. Ct. N.Y. Cty. 2005) (law firm prohibition of arbitration without its consent violated public policy); Calendar v. Edwards, 13 Misc. 3d 1086, 822 N.Y.S.2d 422 (Civ. Ct. Queens Cty. 2006) (reference to court website was not adequate notice to client of right to resolve fee dispute by arbitration); Ween v. Dow, 35 A.D.3d 58, 822 N.Y.S.2d 257

address provisions that may be included in retainer agreements and issues relating to collecting legal fees.[9]

[3] Multijurisdictional Practice

The ABA has amended Model Rule 5.5 to allow provision of legal services on a temporary basis in jurisdictions where the lawyer is not admitted ("multijurisdictional practice") if done in association with a lawyer that is admitted there or where the services are reasonably related to the lawyer's practice in a jurisdiction where the lawyer is admitted.[10] Although New York has not taken this step, several other states have.

[4] Summary of Ethics Decisions

A review of published decisions [as to violations of the Disciplinary Rules] shows that public discipline is largely confined to *failure to segregate client funds, stealing from clients*, *neglect* so gross as to delay or deny justice, *conflicts of interest* so gross as to cause identifiable client harm, inappropriate courtroom conduct so gross as to warrant criminal contempt, or *conspicuous dishonesty*.[11]

[5] General Concepts of the Code and Rules

A lawyer should become familiar with the general concepts of the Code and Rules:

(1st Dep't 2006) (lack of reciprocal provision for attorneys' fees should client prevail made retainer agreement provision unenforceable); Tray v. Thaler & Gertler, LLP, 17 Misc. 3d 617, 842 N.Y.S.2d 713 (Dist. Ct. Nassau Cty. 2007) (court lacked jurisdiction to provide de novo review of arbitration under fee dispute resolution program; judge cites need for review to articulate specific procedures for judicial review); Jay Arthur Goldberg, P.C. v. 30 Carmine LLC, 27 Misc. 3d 680, 896 N.Y.S.2d 660 (N.Y. Sup. Ct. 2010) (retainer did not contain written waiver of client's right to de novo review of arbitration of fee dispute); Pratt, *New York's Engagement Letter Rule and Fee Dispute Resolution Program: The Process of Fee Collection*, NYSBA J. 26 (June 2012).

9. NYSBA Ethics Op. 1104 (Oct. 5, 2016) (lawyer may secure legal fees by having client sign note secured by a mortgage); NYSBA Ethics Op. 1112 (Jan. 7, 2017) (retainer agreement may provide that client secures payment of legal fees by credit card and lawyer may bill credit card for legal fees, costs, or disbursements that client failed to pay within twenty days of billing); NYSBA Ethics Op. 1118 (Apr. 4, 2017) (lawyer may disclose confidential information reasonably necessary to collect a fee).

10. Werner, *Licensed in One State, but Practicing in Another: Multijurisdictional Practice*, 17 PROB. & PROP. 6 (Mar./Apr. 2003).

11. Fales, *The Bar Association's Role in Maintaining Professionalism*, 69 N.Y. ST. B.J. 49 (May/June 1997) (emphasis supplied).

A lawyer should only handle a legal matter the lawyer is competent to handle. DR 6-101. Rule 1.1(b).

A lawyer should represent the client zealously, but should accede to reasonable requests of opposing counsel, be punctual, avoid offensive tactics, and treat with courtesy and consideration all persons involved in the legal process. DR 7-101(A)(1). Rules 1.1(c) ("zealously" deleted), 1.2(e), (g).

A lawyer may exercise professional judgment to waive or fail to assert a right or position of a client. DR 7-101(B)(1). Rule 1.2(e).

A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal. DR 7-101(B)(2). Rule 1.2(f).

A lawyer shall not assert a position when the lawyer knows or when it is obvious that such action would serve merely to harass another. DR 7-102(A)(1). Rule 3.1.

A lawyer must not knowingly make a false statement of law or fact. DR 7-102(A)(5). Rule 4.1.

A lawyer must not counsel or assist a client in conduct that the lawyer knows to be illegal or fraudulent. DR 7-102(A)(7). Rule 1.2(d).

A lawyer who learns that a client has perpetrated a fraud in a tribunal shall promptly call upon the client to rectify the same and, if the client refuses, the lawyer shall reveal the fraud to the affected person, except when the information is protected as a confidence or secret. DR 7-102(B)(1). Rule 3.3(a)(3) (even if protected as confidential under Rule 1.6).

A lawyer shall not communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer unless the lawyer has the prior consent of the lawyer representing the other party. DR 7-104. Rule 4.2(a).

Except when permitted by the Disciplinary Rules, a lawyer shall not knowingly reveal a confidence or secret of a client to the disadvantage of the client. DR 4-101(B)(1). Rule 1.6(a).

A lawyer may reveal the intention of a client to commit a crime and the information necessary to prevent the crime. DR 4-101(C)(3). Rule 1.6(b).

A lawyer may not represent a client if a reasonable lawyer would conclude that there is a significant risk that the lawyer's professional judgment on behalf of the client will be adversely affected by the lawyer's own financial, business, property, or other personal interests, *unless* the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to the client and if the

client gives informed consent to the representation, *confirmed in writing*, after full disclosure of the implications of the simultaneous representation and the advantages and risks involved. DR 5-101.[12] Rule 1.7 (informed consent must be confirmed in writing).[13]

A lawyer may not represent a client if a reasonable lawyer would conclude that the representation will involve the lawyer in representing differing interests, *unless* the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client and if each gives informed consent to the representation, *confirmed in writing*, after full disclosure of the implications of the simultaneous representation and the advantages and risks involved. DR 5-105(C). Rule 1.7 (informed consent in writing).[14]

With the consent of the client after full disclosure, a lawyer may accept compensation from one other than the client (for example, parent of client), but the lawyer may not permit the person who pays the lawyer to direct or regulate his or her professional judgment or cause the lawyer to compromise the lawyer's duty to maintain the confidences and secrets of the client. DR 5-107. Rule 1.8(f).

A lawyer shall not charge an excessive fee. DR 2-106. Rule 1.5(a).

A lawyer shall not divide a fee for legal services with another lawyer who is not a partner or associate unless the client consents after full disclosure, the division is in proportion to the services performed and the total fee does not exceed reasonable compensation. DR 2-107. Rule 1.5(g).

[6] Lawyers Fund for Client Protection

The Lawyers Fund for Client Protection, funded by part of the license fees paid by lawyers, pays claims against lawyers. It publishes

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12. Kimm v. Chang, 38 A.D.3d 481, 833 N.Y.S.2d 429 (1st Dep't 2007) (conflict of interest, even if a violation of the Code of Professional Responsibility, does not by itself support a cause of action for malpractice); Cavaliere v. Plaza Apartments, Inc., 922 N.Y.S.2d 531 (2d Dep't 2011) (attorneys owed fiduciary duty to clients with respect to sale of clients' shares in apartment complex to attorneys where attorneys had ongoing attorney-client relationship; questions of fact whether duty was breached and clients suffered damages).
13. A lawyer having a valid consent obtained prior to the effective date of the rules (Apr. 1, 2009) need not obtain a new consent in writing. The client need not sign the consent. Any type of writing, even an email, from the lawyer to the client confirming an oral consent would be sufficient. NYSBA Ethics Op. 829 (Apr. 29, 2009).
14. *Id.*

an Annual Report on its website, listing the names of lawyers against whom claims were made.[15]

[7] New York Rules of Professional Conduct

The New York Rules of Professional Conduct replace the New York Code of Professional Responsibility as of April 1, 2009. The new Rules maintain much of the language and substance of the prior Code, drawing on both the old Disciplinary Rules and the old Ethical Considerations. Changing to the ABA model rules format was first proposed by NYSBA's Committee on Standards of Attorney Conduct (COSAC), with a section-by-section commentary explaining the proposals and comparing them to both the old NY Code and the ABA Model Rules of Professional Conduct. COSAC also supplemented that commentary with detailed Reporters' Notes that explained the changes and sometimes cited case law or discussed comparable rules in other jurisdictions.[16] The Administrative Board of the New York Courts adopted most, but not all, of COSAC's proposals. Official Commentaries on the Rules have been adopted by the NYSBA House of Delegates.

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15. Lawyers' Fund for Client Protection of the State of New York, Annual Report of The Board of Trustees (2010), http://www.nylawfund.org/AR2010.pdf. *See* Chen Li v. Akhtar, 6 Misc. 3d 1021A, 800 N.Y.S.2d 344 (Sup. Ct. Queens Cty. 2005) (risk of misappropriation of down payment by seller's attorney falls on seller; parties ordered to close the sale, purchaser directed to convey to sellers any interest in the down payment, sellers directed to apply to the Lawyers Fund for Client Protection for reimbursement); Saferstein v. Lawyers' Fund for Client Prot., 30 A.D.3d 653, 815 N.Y.S.2d 787 (3d Dep't 2006) (damages resulting from malpractice are not eligible for reimbursement by Lawyers' Fund); Lawyers' Fund for Client Protection of The State of New York v. JP Morgan Chase Bank, 80 A.D.3d 1129, 915 N.Y.S.2d 741 (3d Dep't 2011) (complaint alleged that bank that retained attorney to close mortgage loans and act as escrow agent disregarded warning signs, such as regular negative account balances that put it on notice and triggered duty to make inquiries; amendment of complaint was timely).
16. Simon, *Comparing the New NY Rules of Professional Conduct to the Existing NY Code of Professional Responsibility (Part I and Part II), in* N.Y. PROF. RESPONSIBILITY REPORT 1 (Feb. and Mar. 2009) (with tables comparing the Rules with the Code); Simon, *Interesting Provisions in the New Rules—Part I, Rule 1.0 through Rule 1.6, in* N.Y. PROF. RESPONSIBILITY REPORT 1 (Apr. 2009).

[8] Attorney Escrow Accounts

Attorneys must handle escrow accounts carefully, in accordance with the Model Rules, court rules, and the Judiciary Law.[17] The principal ethics rule as to handling escrow accounts is Rule 1.15 (formerly DR 9-102), which covers the prohibition against commingling and misappropriation, keeping separate accounts, notification, bookkeeping records, authorized signatories, and other matters. Many disciplinary cases against attorneys involve misuse of escrow accounts, with discipline ranging from censure to disbarment (most often, a two-year suspension).[18] In New York, attorneys have been

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17. For guidance, see COFFEY & COPPS, NYSBA, ATTORNEY ESCROW ACCOUNTS—RULES, REGULATIONS AND RELATED TOPICS (4th ed. 2015) [hereinafter COFFEY & COPPS] (handling of escrow funds, conflicts of interest of attorney as escrow agent, sample escrow agreements, Interest on Lawyer Account Fund (IOLA), and Lawyers Fund for Client Protection); Brassell v. Harbourview Abstract, Inc., 2016 N.Y. Misc. LEXIS 3512, 2016 N.Y. Slip. Op. 31817(U) (Sup. Ct. Suffolk Cty. 2016) (where Len and Robert as tenants in common sold property and $62,000 was escrowed with abstract company until satisfaction of mortgage, and attorneys for Robert obtained release of entire escrow amount to them and paid it all to Robert, Robert's attorneys assumed role of escrow agent for both, and Len was entitled to his half; Robert's attorneys had a duty to inquire into escrow agreement); Sasidharan v. Piverger, 145 A.D.3d 814, 44 N.Y.S.3d 85 (2d Dep't 2016) (lenders stated claim to recover damages for breach of escrow agreement and breach of fiduciary duty against escrow agents, by alleging that escrow agents failed to deliver to lenders upon their demand quitclaim deed to property being held in escrow under escrow agreement, and assisted in selling property to third party without acknowledging lenders' lien); La Candelaria E. Harlem Cmty. Ctr., Inc. v. First Am. Title Ins. Co. of N.Y., 146 A.D.3d 473, 46 N.Y.S.3d 14 (1st Dep't 2017) (abstract company did not have actual authority as agent of title insurance company to enter into escrow agreement with vendor, since escrow to comply with court order regarding vendor's disposition of proceeds it received from sale of property was not title-related); Alarmex Holdings, LLC v. JP Morgan Chase Bank, N.A., 147 A.D.3d 151, 48 N.Y.S.3d 19 (1st Dep't 2017) (depository bank's allowing of transfer of funds from escrow account was routine business service, and did not amount to substantial assistance of escrow agent (Marc Dreier)'s fraud or aiding and abetting conversion, where bank did not have actual knowledge of fraud or conversion).

18. *In re* Wilkins, 70 A.D.3d 1119, 895 N.Y.S.2d 552 (3d Dep't 2010) (failure to supervise employee as to client escrow accounts and maintain records warranted *censure*); *In re* Emengo, 902 N.Y.S.2d 579 (2d Dep't 2010) (failure to maintain sufficient balance in attorney trust account for down payment warranted *two-year suspension*); *In re* Gelzinis, 907 N.Y.S.2d 273 (2d Dep't 2010) (failure to preserve escrow funds, misappropriation of client funds, and treating escrow money as his personal bank account warranted *disbarment*); *In re* Jakabovics, 908 N.Y.S.2d 22 (1st Dep't 2010) (failure to maintain sufficient funds in IOLA account and deficient record keeping warranted *resignation*); *In re* Abrams, 908 N.Y.S.2d 202 (1st Dep't 2010)

(misappropriating client funds and failure to maintain attorney trust account records warranted *two-year suspension*); *In re* Koston Hui Feng, 908 N.Y.S.2d 435 (2d Dep't 2010) (conversion of client funds and failure to maintain required records warranted *six-month suspension*); *In re* Rahmanan, 90 A.D.3d 7, 934 N.Y.S.2d 105 (1st Dep't 2011) (failure to return $150,000 deposited in IOLA account as an investment by client allowed to *resign*); *In re* Galasso, 94 A.D.3d 30, 940 N.Y.S.2d 88 (2d Dep't 2012) (failure to maintain vigilance over client trust funds, resulting in hundreds of thousands of dollars misappropriated by firm's bookkeeper and attorney's brother warranted *two-year suspension*), *aff'd in part and modified in part*, 19 N.Y.3d 688, 978 N.E.2d 1254, 954 N.Y.S.2d 784 (2012) (high degree of vigilance required); *In re* Hager, 94 A.D.3d 161, 941 N.Y.S.2d 53 (1st Dep't 2012) (failing to advise client that funds for $9 million deposit in escrow account did not clear, to his client's detriment in real estate loan transactions, warranted acceptance of attorney's *resignation*); *In re* Cusack, 945 N.Y.S.2d 104 (2d Dep't 2012) (family company in-house counsel abdicating control over attorney escrow account as lender's attorney in mortgage loan transactions to non-attorney related to borrower/buyer, failing to disburse funds to satisfy mortgages and pay mortgage, transferring and recording taxes, engaging in numerous conflicts of interest, converting client funds by over-drawing on escrow account, improperly sharing fees with a non-attorney, thus helping to perpetuate vast criminal conspiracy warranted *four-year suspension*); *In re* Galasso, 105 A.D.3d 103, 961 N.Y.S.2d 475 (2d Dep't 2013) (on review of sanction imposed due to misuse of client funds by attorney's brother, where there were "red flags" and no reimbursement of the client losses, *two-year suspension* was upheld); *In re* Adams, 114 A.D.3d 1, 977 N.Y.S.2d 248 (1st Dep't 2013) (admitting to releasing funds held as escrow agent for investment fraud scheme that escrow agreement did not allow and participating in scheme to defraud constituted admission of a felony and triggered automatic *disbarment*); *In re* Jackson, 123 A.D.3d 258, 996 N.Y.S.2d 8 (1st Dep't 2014) (felony convictions for misappropriation of client escrow funds, submitting forged records, false testimony, and misrepresentations warranted *disbarment*); Matthew K. Flanagan, *Follow the Money—Escrow Accounts: The Dangers of Excessive Delegation and Deference*, 87 N.Y. St. B.J. 28 (June 2015) (lessons of the Court of Appeals opinion in *Galasso*, 19 N.Y.3d 688, including periodic reviews of bank statements, direct contact with the bank, and personal review of any discrepancies); *In re* Langione, 131 A.D.3d 199, 11 N.Y.S.3d 256 (2d Dep't 2015) (failure to exercise appropriate oversight over escrow accounts by attorney who was partner of Peter Galasso, but was merely signatory on escrow account, warranted *six-month suspension*); Lin Shi v. Alexandratos, 137 A.D.3d 451, 26 N.Y.S.3d 523 (1st Dep't 2016) (seller's attorney, acting as escrow agent, handled down payment in accordance with contract, precluding claims by *purchaser* for breach of fiduciary duty and attorney misconduct); *In re* Schneider, 143 A.D.3d 58, 36 N.Y.S.3d 690 (2d Dep't 2016) (misappropriation of escrow, failing to maintain any records, and borrowing against escrow funds, albeit with developer's permission warranted *one-year suspension*); *In re* Leo, 68 N.E.3d 22 (N.Y. 2016) (petitioner was disbarred for failure to preserve escrow funds; Appellate Division did not abuse its discretion in *denying petitioner disbarred attorney's motion for reinstatement* to the practice of law based on its determination that petitioner did not demonstrate the requisite fitness and character); *In re* Campbell, 148 A.D.3d 107, 46 N.Y.S.3d 173 (2d Dep't 2017) (suspended

disciplined for the mishandling of attorney escrow accounts handled *by their partners*.[19]

As to escrow of the down payment, see also cases cited in *infra* section 2:3.9.

As to the ethical disclosure requirements of attorney escrow, see COFFEY & COPPS, supra note 16, §§ 2.15, 2.17 (citing N.Y.S.B.A. Ethics Op. 575 (1986) (full disclosure of facts and consent of both parties) and N.Y.C. Bar Op. 1986-5 (full disclosure and informed consent required)). Downstate practitioners believe that use of the downstate contract of sale is sufficient.

NYSBA Ethics Opinion 764 (07/22/03) opined that an attorney may only accept an earnings credit against bank charges based on balances held in his IOLA account with the consent of client after full disclosure, but that position has been criticized as not practical if the attorney holds funds for more than one client in her IOLA account.[20]

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attorney's *application to resign* granted, due to allegations of neglect of legal matters, *failure to return unearned portion of legal fees*, and misappropriation of third-party funds); *In re* DiConza, 150 A.D.3d 176, 53 N.Y.S.3d 694 (2d Dep't 2017) (intentionally and repeatedly invading client funds to pay for personal and business expenses and *attempt to conceal misconduct by persuading client to make a loan* warranted *three-year suspension*); *In re* Kayatt, 159 A.D.3d 101, 70 N.Y.S.3d 478 (1st Dep't 2018) (attorney's misuse of escrow accounts as business/personal accounts and to allegedly shield personal funds from tax authorities warranted *two-year suspension*); *In re* Aaron, 160 A.D.3d 150, 72 N.Y.S.3d 589 (2d Dep't 2018) (criminal conduct in being accessory after the fact to client's conspiracy to defraud investors in client's company, by allowing client to put company's funds into his attorney escrow account, warranted *four-year suspension*); *In re* Herzberg, 163 A.D.3d 220, 82 N.Y.S.3d 9 (1st Dep't 2018) (failure to return client funds once he was suspended and allowing use of his letterhead after suspension warranted *disbarment*); *In re* Roberts, 164 A.D.3d 200, 82 N.Y.S.3d 200 (2d Dep't 2018) (failing to provide accounting of real estate closing, engaging in conflict of interest by entering into rental transaction with client, failing to promptly refund legal fee, and failing to reconcile attorney escrow accounts warranted *two-year suspension*).

19. *In re* Laudonio, 75 A.D.3d 144, 904 N.Y.S.2d 696 (2d Dep't 2010) (failure to monitor attorney special accounts, failure to discover partner's misappropriation of $17 million, and failure to prevent $3 million in dishonored checks where partner hid his misconduct (where partner was firm's founder and pillar of community) warranted *six-month suspension*); *In re* Fonte, 75 A.D.3d 199, 905 N.Y.S.2d 173 (2d Dep't 2010) (failure to make adequate effort to review or supervise, or to detect partner's fraudulent manipulation of attorney special accounts and failure to cooperate in investigation warranted *three-year suspension*, rejecting Special Referee's conclusion that respondent was a victim of fraudulent scheme by firm's founder and pillar of community).

20. COFFEY & COPPS, *supra* note 17, at 104 n.14.

[9] Conflicts of Interest

Attorneys should avoid conflicts of interest, particularly with their clients.[21] Some cases have found that attorneys did not have a conflict of interest.[22]

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21. *See also infra* sections 1:1.1 (seller and buyer), 1:1.2, 1:1.2[B] (seller and broker); *In re* Coluzzi, 130 A.D.3d 80, 12 N.Y.S.3d 206 (2d Dep't 2015), engaging in conflict of interest by representing seller and inducing her to sell to attorney's business partner, and inflating price and having purchaser sign illusory promissory note to deceive lender into to making higher loan warranted *three-year suspension*); McCutchen v. 3 Princesses & A P Tr. Dated Feb. 3, 2004, 138 A.D.3d 1233, 29 N.Y.S.3d 611 (3d Dep't 2016) (disqualification of property owner's attorney in owner's action against neighbors seeking prescriptive easement warranted, though not mandatory, to avoid appearance of impropriety where attorney previously represented prior owner of one of the neighboring parties in earlier action); Curanovic v. Cordone, 33 N.Y.S.3d 409 (2d Dep't 2016) (attorney's conversation with plaintiff occurring outside the presence of his attorney involved no confidential information as would warrant disqualification in action for trespass); Bajohr v. Berg, 143 A.D.3d 849, 39 N.Y.S.3d 241 (2d Dep't 2016) (trial court providently disqualified attorney who was defendant in action alleging breach of fiduciary duty as to money held in escrow from representing plaintiff in action seeking declaratory relief, under advocate-witness rule; attorney likely to be called as witness); Skanska USA Bldg. Inc. v. Atl. Yards B2 Owner, LLC, 40 N.Y.S.3d 46 (1st Dep't 2016) (trial court providently exercised discretion in denying contractor's motion to disqualify law firm from representing developer in breach of contract action, even though firm had previously represented contractor's corporate affiliates, absent showing that affiliates' legal matters had any relation to breach of contract action); Taylor v. Casolo, 144 A.D.3d 1209, 40 N.Y.S.3d 650 (3d Dep't 2016) (in action by former officer alleging fraud in his investing in a land holding company, attorney was disqualified under advocate-witness rule where attorney represented the company and its owner in formation of the company); *In re* Goodman, 154 A.D.3d 139 (2d Dep't 2017) (attorney who engaged in two real estate transactions as mortgage broker despite conflicts of interest warranted one-year suspension); NYSBA Ethics Op. 764 (July 22, 2003) (an attorney may only accept an earnings credit against bank charges based upon balances held in the attorney's IOLA account with the consent of the client after full disclosure). *But see* ATTORNEY ESCROW ACCOUNTS, at 104 n.14 (NYSBA 4th Ed. 2015), which criticizes this practice as impractical if the attorney holds funds for more than one client.

22. Kain Dev., LLC v. Krause Props., LLC, 130 A.D.3d 1229, 14 N.Y.S.3d 520 (3d Dep't 2015) (attorney for seller who provided services to purchaser as a result of her representation of seller regarding projects where their interests were aligned not disqualified for conflict of interest in action brought by purchaser for breach of contract).

[10] Malpractice

Attorneys have been sued for malpractice, which requires proof of negligence, proximate cause, and actual damages.[23] Many have

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23. Barnett v. Schwartz, 47 A.D.3d 197, 848 N.Y.S.2d 663 (2d Dep't 2007) (upheld jury verdict that attorney negligently counseled client to enter into "as is" lease of property without any due diligence as to environmental condition); Malik v. Beal, 54 A.D.3d 910, 864 N.Y.S.2d 153 (2d Dep't 2008) (purchaser's complaint against his attorney held to state claim for malpractice; contract for multi-use commercial property required seller to deliver copies of all "existing" COs; seller later said COs did not exist and retained down payment); Winters v. Dowdall, 63 A.D.3d 650, 882 N.Y.S.2d 100 (1st Dep't 2009) (client stated malpractice claim respecting advice on section 1031 exchange and selection of qualified intermediary); Uzzle v. Nunzie Ct. Homeowners Ass'n, Inc., 70 A.D.3d 928, 895 N.Y.S.2d 203 (2d Dep't 2010) (purchaser stated valid cause of action against attorney for malpractice and against title insurance company for damages arising from lack of legal access); Kram Knarf, LLC v. Djonovic, 74 A.D.3d 628, 903 N.Y.S.2d 386 (1st Dep't 2010) (allegations that attorneys negligently gave incorrect explanation of acquisition documents sufficient to state malpractice claim; while contract disclosed certain liabilities respecting contamination, without proper due diligence and adequate legal counsel, clients were unaware of full extent of liabilities) (dissent); Frederick v. Meighan, 75 A.D.3d 528, 905 N.Y.S.2d 635 (2d Dep't 2010) (law firm's malpractice in failing to inspect real estate documents before forwarding them to potential buyer was proximate cause of client's injury); Destaso v. Condon Renick, LLP, 90 A.D.3d 809, 936 N.Y.S.2d 51 (2d Dep't 2011) (malpractice claims for creating usurious loans, fictitious mortgages, and below-market contract of sale for property not owned by borrower were improperly dismissed); Gelobter v. Fox, 90 A.D.3d 829, 935 N.Y.S.2d 59 (2d Dep't 2011) (summary judgment for defendant attorneys denied in malpractice case where purchase price in contract of sale they drafted was $615,000, with plaintiff seller to credit purchaser with $155,000 at closing, and another attorney represented seller at closing); M & R Ginsburg, LLC v. Segal, Goldman, Mazzotta & Siegel, P.C., 90 A.D.3d 1208, 934 N.Y.S.2d 269 (3d Dep't 2011) (issues of fact as to negligence and proximate cause for attorney's failure to include pharmacy restriction in contract of sale to developer); Hotaling v. Sprock, 107 A.D.3d 1446, 967 N.Y.S.2d 794 (4th Dep't 2013) (client raised issue of fact as to whether he sustained damages for loss of rent, precluding summary judgment in favor of attorneys sued for negligence in failing to determine that zoning ordinance prohibited him from operating adult use business in building he purchased for that purpose); Fidelity Nat'l Title Ins. Co. of N.Y. v. Lite & Russell, P.C., 132 A.D.3d 802, 18 N.Y.S.3d 660 (2d Dep't 2015) (triable issues of fact in suit by title insurer as mortgage lender's subrogee whether conduct of private mortgage lender's attorneys in wiring funds allegedly on instructions of purported borrowers, later discovered to be imposters, constitute legal malpractice and was proximate cause of damages to lender); Jorge v. Hector Atilio Marichal, P.C., 140 A.D.3d 1020, 34 N.Y.S.3d 485 (2d Dep't 2016) (issues of fact whether attorney committed malpractice by failing to give timely notice of purchaser's intention to cancel contract to purchase coop); Benitez v. United Homes of New York, LLC, 142 A.D.3d

successfully defended themselves, sometimes because any negligence by the attorney was not the proximate cause of any damages to the client.[24] Damages resulting from malpractice are not eligible for reimbursement by Lawyer's Fund for Client Protection.[25]

867, 38 N.Y.S.3d 26 (1st Dep't 2016) (law firm that represented mortgagee in closing of residential mortgage loan liable for malpractice by failing to advise that property lacked certificate of occupancy, failing to advise of consequent risk of funding, and failing to confirm that purchaser contributed 3% of her own funds toward closing); Millian v. Hafif & Assoc., PLLC, 61 Misc. 3d 1208(A) (Sup. Ct. N.Y. Cty. 2018) (attorneys denied summary judgment where buyers of condominium alleged negligence in due diligence for not informing them of HVAC problems and ongoing assessments).

24. Bazinet v. Kluge, 14 A.D.3d 324, 788 N.Y.S.2d 77 (1st Dep't 2005) (not malpractice to deposit million dollar IOLA escrow deposits in CT bank that failed; no requirement that escrow funds be deposited in insured account); Bazinet v. Kluge, Kimm v. Chang, 38 A.D.3d 481, 833 N.Y.S.2d 429 (1st Dep't 2007) (conflict of interest, even if a violation of the Code of Professional Responsibility, does not by itself support a cause of action for malpractice); Bells v. Foster, 83 A.D.3d 876, 922 N.Y.S.2d 124 (2d Dep't 2011) (summary judgment denied where purchaser failed to demonstrate that negligence on part of her attorney in failing to timely cancel contract for inability to obtain mortgage was sole proximate cause of her damages, and attorney alleged that her own actions were sole proximate cause of her damages); Humbert v. Allen, 932 N.Y.S.2d 155 (2d Dep't 2011) (purchasers' attorney's alleged failure to give written notice of cancellation was not proximate cause of damages; purchasers independently breached contract when they sought loan in far greater amount than specified in contingency clause); Cervini v. Zanoni, 95 A.D.3d 919, 944 N.Y.S.2d 574 (2d Dep't 2012) (clients failed to state legal malpractice claim based on attorney's failure to rescind loan due to lender's alleged violation of TILA where they failed to allege they were able to tender principal of mortgage loan); Wo Ye Hing Realty, Corp. v. Stern, 99 A.D.3d 58, 949 N.Y.S.2d 50 (1st Dep't 2012) (attorney without required knowledge of like-kind exchange not proximate cause of losses because clients had not taken actions requisite to timely purchase replacement, precluding malpractice claim); Bua v. Prucell & Ingrao, P.C., 99 A.D.3d 843, 592 N.Y.S.2d 592 (2d Dep't 2012) (former seller failed to adequately allege breach of standard of care; seller's attorney's method of termination of contract of sale and return of deposit was reasonable despite purchaser's later suit for specific performance); Leon Petroleum, LLC v. Carl S. Levine & Assocs., P.C., 122 A.D.3d 686, 996 N.Y.S.2d 139 (2d Dep't 2014) (failure to draft purchase agreement to include unpaid condemnation awards was not malpractice, but, rather, was reasonable strategic decision to avoid increase in purchase price); Gall v. Colon-Sylvain, 151 A.D.3d 698, 55 N.Y.S.3d 424 (2d Dep't 2017) (attorney for purchaser-borrower and lender for sale of residential real estate by seller, a corporation, did not have duty to give advice for benefit of shareholder of corporation).

25. Saferstein v. Lawyers' Fund for Client Prot., 30 A.D.3d 653, 815 N.Y.S.2d787 (3d Dep't 2006).

[11] References to Ethics in Text

In the 1997 Supplement and subsequent releases, I have tried to add references to the Code sections and ethics opinions of the NYSBA that relate to sales of real estate.

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New York, New York
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