PLI’S COMPLETE LIBRARY OF TREATISE TITLES

ART LAW

BANKING & COMMERCIAL LAW
Asset-Based Lending: A Practical Guide to Secured Financing
Equipment Leasing–Leveraged Leasing
Hillman on Commercial Loan Documentation
Hillman on Documenting Secured Transactions: Effective Drafting and Litigation
Maritime Law Answer Book

BANKRUPTCY LAW
Bankruptcy Deskbook
Personal Bankruptcy Answer Book

BUSINESS, CORPORATE & SECURITIES LAW
Accountants’ Liability
Anti-Money Laundering: A Practical Guide to Law and Compliance
Antitrust Law Answer Book
Broker-Dealer Regulation
Conducting Due Diligence in a Securities Offering
Consumer Financial Services Answer Book
Corporate Compliance Answer Book
Corporate Legal Departments: Practicing Law in a Corporation
Corporate Political Activities Deskbook
Corporate Whistleblowing in the Sarbanes-Oxley/Dodd-Frank Era
Covered Bonds Handbook
Cybersecurity: A Practical Guide to the Law of Cyber Risk
Derivatives Deskbook: Close-Out Netting, Risk Mitigation, Litigation
Deskbook on Internal Investigations, Corporate Compliance, and White Collar Issues
Directors’ and Officers’ Liability: Current Law, Recent Developments, Emerging Issues
Doing Business Under the Foreign Corrupt Practices Act
EPA Compliance and Enforcement Answer Book
Exempt and Hybrid Securities Offerings
Fashion Law and Business: Brands & Retailers
Financial Institutions Answer Book: Law, Governance, Compliance
Financial Product Fundamentals: Law, Business, Compliance
Financial Services Mediation Answer Book
Financial Services Regulation Deskbook
Financially Distressed Companies Answer Book
Global Business Fraud and the Law: Preventing and Remediing Fraud and Corruption
Hedge Fund Regulation
Initial Public Offerings: A Practical Guide to Going Public
Insider Trading Law and Compliance Answer Book
Insurance and Investment Management M&A Deskbook
International Corporate Practice: A Practitioner’s Guide to Global Success
Investment Adviser Regulation: A Step-by-Step Guide to Compliance and the Law
Life at the Center: Reflections on Fifty Years of Securities Regulation
Mergers, Acquisitions and Tender Offers: Law and Strategies
Mutual Funds and Exchange Traded Funds Regulation
Outsourcing: A Practical Guide to Law and Business
Privacy Law Answer Book
Private Equity Funds: Formation and Operation
Prokauer on Privacy: A Guide to Privacy and Data Security Law in the Information Age
Public Company Deskbook: Complying with Federal Governance & Disclosure Requirements
SEC Compliance and Enforcement Answer Book
Securities Investigations: Internal, Civil and Criminal
Securities Law and Practice Deskbook
The Securities Law of Public Finance
Securities Litigation: A Practitioner's Guide
Social Media and the Law
Soderquist on Corporate Law and Practice
Sovereign Wealth Funds: A Legal, Tax and Economic Perspective
A Starter Guide to Doing Business in the United States
Technology Transactions: A Practical Guide to Drafting and Negotiating Commercial Agreements
Variable Annuities and Variable Life Insurance Regulation

COMMUNICATIONS LAW

Advertising and Commercial Speech: A First Amendment Guide
Sack on Defamation: Libel, Slander, and Related Problems
Telecommunications Law Answer Book

EMPLOYMENT LAW

Employment Law Yearbook
ERISA Benefits Litigation Answer Book
Labor Management Law Answer Book

ESTATE PLANNING AND ELDER LAW

Blattmachr on Income Taxation of Estates and Trusts
Estate Planning & Chapter 14: Understanding the Special Valuation Rules
International Tax & Estate Planning: A Practical Guide for Multinational Investors
Manning on Estate Planning
New York Elder Law
Stocker on Drawing Wills and Trusts

HEALTH LAW

FDA Deskbook: A Compliance and Enforcement Guide
Health Care Litigation and Risk Management Answer Book
Health Care Mergers and Acquisitions Answer Book
Medical Devices Law and Regulation Answer Book
Pharmaceutical Compliance and Enforcement Answer Book

IMMIGRATION LAW

Fragomen on Immigration Fundamentals: A Guide to Law and Practice

INSURANCE LAW

Business Liability Insurance Answer Book
Insurance Regulation Answer Book
Reinsurance Law

INTELLECTUAL PROPERTY LAW

Copyright Law: A Practitioner’s Guide
Faber on Mechanics of Patent Claim Drafting
How to Write a Patent Application
Intellectual Property Law Answer Book
Kane on Trademark Law: A Practitioner’s Guide
Likelihood of Confusion in Trademark Law
Patent Claim Construction and Markman Hearings
Patent Licensing and Selling: Strategy, Negotiation, Forms
Patent Litigation
Pharmaceutical and Biotech Patent Law
Post-Grant Proceedings Before the Patent Trial and Appeal Board
Substantial Similarity in Copyright Law
Trade Secrets: A Practitioner’s Guide
LITIGATION
American Arbitration: Principles and Practice
Class Actions and Mass Torts Answer Book
Electronic Discovery Deskbook
Essential Trial Evidence: Brought to Life by Famous Trials, Films, and Fiction
Expert Witness Answer Book
Evidence in Negligence Cases
Federal Bail and Detention Handbook
How to Handle an Appeal
Medical Malpractice: Discovery and Trial
Product Liability Litigation: Current Law, Strategies and Best Practices
Sinclair on Federal Civil Practice
Trial Handbook

REAL ESTATE LAW
Commercial Ground Leases
Friedman on Contracts and Conveyances of Real Property
Friedman on Leases
Holtzschue on Real Estate Contracts and Closings: A Step-by-Step Guide to Buying and Selling Real Estate
Net Leases and Sale-Leasebacks

TAX LAW
The Circular 230 Deskbook: Related Penalties, Reportable Transactions, Working Forms
The Corporate Tax Practice Series: Strategies for Acquisitions, Dispositions, Spin-Offs, Joint Ventures, Financings, Reorganizations & Restructurings
Foreign Account Tax Compliance Act Answer Book
Internal Revenue Service Practice and Procedure Deskbook
International Tax & Estate Planning: A Practical Guide for Multinational Investors
International Tax Controversies: A Practical Guide
International Trade Law Answer Book: U.S. Customs Laws and Regulations
Langer on Practical International Tax Planning
The Partnership Tax Practice Series: Planning for Domestic and Foreign Partnerships, LLCs, Joint Ventures & Other Strategic Alliances
Private Clients Legal & Tax Planning Answer Book
Transfer Pricing Answer Book

GENERAL PRACTICE PAPERBACKS
Anatomy of a Mediation: A Dealmaker’s Distinctive Approach to Resolving Dollar Disputes and Other Commercial Conflicts
Attorney-Client Privilege Answer Book
Drafting for Corporate Finance: Concepts, Deals, and Documents
Pro Bono Service by In-House Counsel: Strategies and Perspectives
Smart Negotiating: How to Make Good Deals in the Real World
Thinking Like a Writer: A Lawyer’s Guide to Effective Writing & Editing
Working with Contracts: What Law School Doesn’t Teach You

Order now at www.pli.edu
Or call (800) 260-4754 Mon.–Fri., 9 a.m.–6 p.m.

Practising Law Institute
1177 Avenue of the Americas
New York, NY 10036

When ordering, please use Priority Code NWS9-X.
For my wife Linda,
and
Alison, Adam, Sara, Jo, Edna,
and last but not least
Sid
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 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 is the 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>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Preparing for the Sale or Purchase</td>
</tr>
<tr>
<td>2</td>
<td>Drafting and Negotiating the Contract</td>
</tr>
<tr>
<td>3</td>
<td>Preparing for the Closing</td>
</tr>
<tr>
<td>4</td>
<td>The Closing</td>
</tr>
</tbody>
</table>
Table of Contents

About the Author ................................................................. ix

Table of Chapters ................................................................. xi

Acknowledgments for the First Edition ................................. xxv

Preface to the Third Edition ................................................... xxvii

Introduction ............................................................................. xxix

Ethics and Professional Responsibility ................................. xxxiii

[2] Letters of Engagement ....................................................... xxxiv
[6] Lawyers Fund for Client Protection ................................. xxxviii
[8] Attorney Escrow Accounts ............................................... xl
[9] Conflicts of Interest ......................................................... xlii
[10] References to Ethics in Text ............................................. xliii

Chapter 1 Preparing for the Sale or Purchase

§ 1:1 Representing the Seller ................................................. 1-2
§ 1:1.1 Interviewing the Client ............................................. 1-2
§ 1:1.2 Brokers ....................................................................... 1-6
[A] Brokerage Agreement ................................................. 1-7
[B] Agency Disclosure .................................................... 1-11
§ 1:1.3 Structuring the Transaction ....................................... 1-13
[A][1] Sale of a Residence ............................................... 1-13
[A][2] Other Sales .......................................................... 1-15
[B] State and Local Transfer Taxes .................................... 1-19
[C] Other Considerations ............................................... 1-20
§ 1:1.4 Gathering Documents and Other Facts ................... 1-20
§ 1:1.5 Binders and Letters of Intent ................................. 1-23
§ 1:1.6 Options and Rights of First Refusal ......................... 1-26
Chapter 2 Drafting and Negotiating the Contract

§ 2:1 Form of Contract .............................................................. 2-6
§ 2:1.1 Statute of Frauds ........................................................ 2-6
§ 2:1.2 Printed Forms and Typed Contracts ................. 2-13
   [A] House Sales ......................................................... 2-14
   [B] Comparison of Forms ........................................... 2-18
   [C] Sales of Tenanted Buildings ......................... 2-19
§ 2:1.3 Plain Language ......................................................... 2-21
§ 2:2 Usual Contract Provisions ............................................. 2-22
§ 2:2.1 Date ................................................................. 2-22
§ 2:2.2 Parties ............................................................... 2-23
§ 2:2.3 Description of the Premises ............................ 2-24
   [A] Land ................................................................. 2-24
   [B] Easements .......................................................... 2-27
   [C] Buildings and Improvements ......................... 2-29
   [D] Street Beds and Condemnation Awards ....... 2-29
   [E] Appurtenances .................................................... 2-29
   [F] Personal Property ............................................... 2-30
§ 2:2.4 Purchase Price .......................................................... 2-32
   [B] Acceptable Funds .............................................. 2-34
# Table of Contents

§ 2:2.5 Purchase Money Note and Mortgage ................................................................. 2-35
  [B] Purchaser’s Mortgage Provisions .............................................................. 2-43

§ 2:2.6 Existing Mortgage ......................................................................................... 2-47

§ 2:2.7 Acceptable Title and Title Insurance ............................................................. 2-53
  [A] Marketable Title ......................................................................................... 2-54
  [B] Fee Simple Title ......................................................................................... 2-56
  [C] Insurable Title ............................................................................................. 2-57
  [D] Permitted Exceptions to Title ...................................................................... 2-62
    [D][1] Zoning and Similar Laws and Governmental Regulations...................... 2-63
    [D][2] Consents for the Erection of Structures on, Under, or Above Any Streets on Which the Premises Abut .................................................. 2-64
    [D][3] Encroachments of Stoops, Etc., upon Any Street or Highway ............ 2-65
    [D][4] Survey; Adverse Possession .................................................................. 2-65
    [D][5] Exceptions from Seller’s Title Insurance Policy .................................... 2-74
    [D][6] Matters Done or Suffered by Seller ..................................................... 2-74
    [D][7] Covenants, Restrictions, Easements, and Other Agreements ............... 2-75
    [D][8] Rights of Tenants .................................................................................. 2-88
    [D][9] Personal Inspection ............................................................................... 2-88
  [E] Title Insurance ................................................................................................ 2-89
    [E][1] Rates ........................................................................................................ 2-93
    [E][2] Policy Forms .......................................................................................... 2-97
    [E][3] Endorsements .......................................................................................... 2-103
    [E][4] Creditors’ Rights Exclusion ................................................................... 2-105
    [E][5] Forfeiture Statutes .................................................................................. 2-106

§ 2:2.8 Form of Deed ................................................................................................. 2-107

§ 2:2.9 Closing Date and Place .................................................................................. 2-110
  [A] Adjournments and Time of the Essence ...................................................... 2-111

§ 2:2.10 Broker ......................................................................................................... 2-116
  [A] Entitlement to Commission ......................................................................... 2-117
  [B] Written Agreement ....................................................................................... 2-124
  [C] Duties of Broker and Agency Disclosure .................................................... 2-125

§ 2:2.11 Condition of Premises and Caveat Emptor ............................................... 2-127
  [A] Caveat Emptor ............................................................................................. 2-129
    [A][1] Generally No Duty of Seller to Disclose Defects .................................. 2-129
    [A][2] Exceptions Requiring Disclosure ............................................................ 2-131
    [A][3] Liability for Representations of Seller ................................................... 2-140
    [A][4] Purchaser’s Duty to Inspect .................................................................... 2-144
    [A][5] Contractual Defenses of Seller ............................................................... 2-147
    [A][6] Liability of Brokers ................................................................................ 2-152

(Holtzschue, Rel. #19, 4/18) xv
§ 2:2.12 Violations and Municipal Liens ........................................ 2-157
[A] Violations ............................................................... 2-157
[B] Municipal Liens...................................................... 2-160

§ 2:2.13 Apportionments, Installment Assessments, and Utility Readings ......................................... 2-160
[A] Apportionments...................................................... 2-160
[B] Installment Assessments........................................ 2-163
[C] Utility Readings...................................................... 2-163

§ 2:2.14 Objections to Title .................................................. 2-164
[A] Allowance for Unpaid Taxes, Etc.................................... 2-164
[B] Use of Purchase Price to Pay Encumbrances ............... 2-165
[C] Affidavits to Clear Objections ................................ 2-166

§ 2:2.15 Transfer and Recording Taxes ........................................ 2-166
[A] Transfer Taxes........................................................... 2-166
[B] New York State Real Property Transfer Gains Tax ......................... 2-169
[C] Mortgage Recording Tax ........................................... 2-169
[D] Foreign Investment in Real Property Tax ............... 2-171

§ 2:2.16 Purchaser’s Lien .................................................... 2-172

§ 2:2.17 Remedies for Breach or Failure to Close ................. 2-173
[A] Breach of Seller’s Representations and Obligations .......................................................... 2-173
[A][1] Rescission .......................................................... 2-179
[A][2] Damages ............................................................. 2-180
[A][3] Specific Performance, Notice of Pendency .............. 2-182
[A][4] Survival of Seller’s Representations and Obligations .......... 2-188
[B] Breach of Purchaser’s Obligations ................................ 2-189
[B][1] Retention of Down Payment .................................... 2-192
[B][2] Damages ............................................................. 2-194
[B][3] Specific Performance ............................................. 2-195
[C] Termination or Cancellation of Contract of Sale ............... 2-196

§ 2:2.18 Risk of Loss by Damage or Condemnation ............... 2-197
[A] Uniform Vendor and Purchaser Risk Act ....................... 2-198

§ 2:2.19 Miscellaneous Provisions ........................................ 2-199
[A] Entire Agreement ...................................................... 2-199
[B] Changes Must Be in Writing ........................................ 2-200
[C] Binding on Heirs, Successors, and Assigns ..................... 2-200
[D] Changes in Dates by Attorneys .................................... 2-201
[E] Adjournment ......................................................... 2-201
[F] Further Assurances ................................................... 2-201
[G] Exclusive Benefit ..................................................... 2-201
[H] Assignment ............................................................ 2-201

§ 2:2.20 Execution and Delivery ............................................ 2-202

§ 2:3 Additional Contract Provisions ........................................ 2-205
§ 2:3.1 Mortgage Commitment Contingency ........................................ 2-205
  [A] Contingency Clause ......................................................... 2-205
  [B] Institutional Lender and Mortgage Broker .................. 2-208
  [C] Commitment Date ........................................................... 2-209
  [D] Loan Amount, Term, and Interest Rate .................. 2-210
  [E] Purchaser’s Obligations .................................................. 2-211
  [F] Rights to Cancel ............................................................... 2-217
  [G] Other Considerations ...................................................... 2-226

§ 2:3.2 Title Report; Title Opinion .............................................. 2-228

§ 2:3.3 Certificate of Occupancy .................................................. 2-229

§ 2:3.4 Condition of Systems and Appliances .................................. 2-231

§ 2:3.5 Seller’s Ownership and Power to Sell ................................ 2-232

§ 2:3.6 Delivery of Possession at Closing ..................................... 2-236

§ 2:3.7 Limitation on Assignment of Contract .......................... 2-237

§ 2:3.8 Nonsurvival of Seller’s Liability .................................... 2-238

§ 2:3.9 Escrow of Down Payment ............................................... 2-240

§ 2:3.10 Limitation of Purchaser’s Liability .............................. 2-245

§ 2:3.11 Insurance Against Violation of Covenants .................. 2-245

§ 2:3.12 Inspection Contingency ............................................... 2-246

§ 2:3.13 Maintenance of Grounds ............................................... 2-248

§ 2:3.14 New York State Real Property Transfer Gains Tax .......... 2-248

§ 2:3.15 Adjournments ............................................................ 2-249

§ 2:3.16 Notices by Mail; Notices by Attorneys .......................... 2-249

§ 2:3.17 Nonpayment of Check ............................................... 2-250

§ 2:3.18 Risk of Loss .............................................................. 2-250

§ 2:3.19 Preclosing Possession by Purchaser ...................... 2-251

§ 2:3.20 Postclosing Possession by Seller ............................... 2-253

§ 2:3.21 Recording Memorandum of Contract ......................... 2-254

§ 2:3.22 New Construction ....................................................... 2-254
  [A] Plans and Specifications ................................................. 2-255
  [B] “Punch List” ............................................................... 2-255
  [C] Guarantee of Work ......................................................... 2-256
  [D] Guarantees and Warranties .............................................. 2-256
  [E] Certificates and Permits ................................................ 2-256
  [F] Down Payment ................................................................. 2-256
  [G] Streets, Sewers, and Utilities ....................................... 2-257

§ 2:3.23 Condominium Units ..................................................... 2-257
  [A] Description ............................................................... 2-257
  [B] Title Exceptions .......................................................... 2-258
  [C] Deed ........................................................................... 2-258
  [D] Apportionments ............................................................ 2-258
  [E] Right of First Refusal .................................................... 2-258
  [F] Statement of Common Charges ...................................... 2-258
  [G] Payment of Transfer Fees .............................................. 2-258
§ 2:3.24 Representations of Seller and Conditions to Closing

§ 2:3.25 Environmental Matters

[A] Generally

[B] Environmental Assessment


[D] Disclosure

[E] Environmental Impact Statements

[F] Approval and Permit Requirements


[H] Underground Storage Tanks

[I] Other Hazardous Substances and Conditions

[J] Insurance

§ 2:3.26 Miscellaneous Additional Provisions

[A] Smoke Alarm and Other Required Provisions

[B] Subject to Approval of Attorney

[C] Subdivision or Rezoning Contingency

[D] Interstate Land Sales Full Disclosure Act

[E] Antitrust

[F] Disabilities and Handicaps

[G] Copyright Law

[H] Alternative Dispute Resolution

[I] Attorneys’ Fees

[J] Sale Contingency

§ 2:4 Contracts for Tenanted Buildings

§ 2:4.1 General Considerations

§ 2:4.2 Seller’s Representations

[A] Rent Schedule

[B] Rent Control

[C] Residential Appliances

[D] Real Estate Taxes and Assessments

[E] Insurance and Service Contracts

[F] Employees

§ 2:4.3 Seller’s Obligations Between Contract and Closing

[A] Existing Leases

[B] New Leases

[C] Application of Security Deposits

[D] Service Contracts

[E] Insurance Policies

[F] Removal of Personal Property

[G] Real Estate Tax Protests

[H] Access to the Premises, the Leases, and Other Documents
§ 2:4.4 Seller’s Closing Obligations ................................... 2-298
[A] Leases ............................................................... 2-298
[B] Security Deposits .............................................. 2-299
[C] Updated Rent Schedule .................................... 2-299
[D] Tenant Records ................................................ 2-299
[E] Notices to Tenants .......................................... 2-299
[F] Tenant Estoppel Letters .................................... 2-299
[G] Service Contracts ............................................. 2-300
[H] Assignment of Contracts ................................... 2-300
[I] Original Insurance Policies ................................ 2-300
[J] Updated Representations ................................... 2-300
[K] Plans and Specifications .................................... 2-300
[L] Approvals of Leases ......................................... 2-300
[M] Expense Statements ........................................ 2-301
[N] Other Closing Documents ................................. 2-301

§ 2:4.5 Additional Apportionments ................................ 2-301
[A] Prepaid Rents .................................................... 2-301
[B] Rent Arrears ....................................................... 2-301
[C] Percentage Rents and Escalation Charges .......... 2-302
[D] Security Deposit Administrative Charges .......... 2-302
[E] Prepaid Fee or Charges Under Rent Regulation Statutes ......................................................... 2-302
[F] Reletting Expenses ............................................. 2-302

§ 2:4.6 Limitations on Survival of Seller’s Representations and Obligations ................................ 2-303

Chapter 3 Preparing for the Closing

§ 3:1 Representing the Seller ........................................... 3-2
§ 3:1.1 Review Purchaser’s Title Report and Arrange for Cure of Title Objections ..................................... 3-2
§ 3:1.2 Apply for New York State Gains Tax Clearance ..... 3-4
§ 3:1.3 Obtain Satisfactions or Closing Letters from Existing Mortgagees ............................................. 3-4
§ 3:1.4 Prepare Closing Checklist .................................... 3-6
§ 3:1.5 Prepare Deed and Other Closing Documents ...... 3-6
§ 3:1.6 Calculate Apportionments .................................. 3-9
§ 3:1.7 Arrange for Utility Readings ............................ 3-12
§ 3:1.8 Remind Purchaser to Deliver Proper Closing Checks ................................................................. 3-12
§ 3:1.9 Arrange for Payment of Transfer Taxes .......... 3-13
§ 3:1.10 Obtain Waiver of Right of First Refusal for Condominium Unit .................................................... 3-13
§ 3:1.11 Schedule the Closing ........................................ 3-14
§ 3:2 Representing the Purchaser ...................................... 3-14
§ 3:2.1 Review Mortgage Commitment ........................................ 3-15
§ 3:2.2 Order and Review Title Report ...................................... 3-18
§ 3:2.3 Prepare New York State Gains Tax Questionnaire ........... 3-21
§ 3:2.4 Prepare Closing Checklist ........................................... 3-21
§ 3:2.5 Verify Representations and Review Deed, Mortgage Loan Documents, and Other Closing Documents .......................................................... 3-22
§ 3:2.6 Calculate Apportionments ............................................ 3-26
§ 3:2.7 Arrange for Opening Utility Accounts .......................... 3-27
§ 3:2.8 Arrange for Issuance of Fire and Liability Insurance Policies ..................................................... 3-27
§ 3:2.9 Arrange for Proper Closing Checks .............................. 3-28
§ 3:2.10 Have Purchaser Inspect Before Closing ....................... 3-28
§ 3:2.11 Schedule the Closing .................................................. 3-29

Chapter 4 The Closing

§ 4:1 Representing the Seller .................................................. 4-2
§ 4:1.1 Deliver Deed and Other Closing Documents .................. 4-2
§ 4:1.2 Deliver Closing Letters from Existing Mortgagees ...... 4-4
§ 4:1.3 Deliver Affidavit to Title Company ............................... 4-5
§ 4:1.4 Deliver Transfer Tax Documents and Payments .......... 4-5
§ 4:1.5 Deliver Keys ................................................................ 4-6
§ 4:1.6 Pick Up Closing Checks .............................................. 4-7
§ 4:1.7 Pick Up Executed Purchase Money Note and Mortgage .................................................................................... 4-8
§ 4:1.8 Pick Up Fire and Liability Insurance Policy ................. 4-9
§ 4:1.9 Deliver Condominium Documents .............................. 4-9
§ 4:1.10 Complete Other Closing Checklist Requirements ......... 4-9
§ 4:1.11 Designate Person to File IRS Closing Report ............... 4-10

§ 4:2 Representing the Purchaser ............................................. 4-13
§ 4:2.1 Review Deed and Other Closing Documents ............... 4-13
§ 4:2.2 Deliver Note, Mortgage, and Other Loan Documents ............................................................................. 4-13
§ 4:2.3 Deliver Fire and Liability Insurance Policies ............... 4-20
§ 4:2.4 Have Title Report Marked and Redated ...................... 4-20
§ 4:2.5 Have Transfer Tax Documents Signed and Delivered .............................................................................. 4-22
§ 4:2.6 File Miscellaneous Reports .......................................... 4-22
§ 4:2.7 Deliver Closing Checks .............................................. 4-23
§ 4:2.8 Pick Up Keys .............................................................. 4-24
§ 4:2.9 Pick Up Condominium Documents ............................ 4-24
§ 4:2.10 Complete Other Closing Checklist Requirements ...... 4-24
§ 4:2.11 Designate Person to File IRS Closing Report ............... 4-25
§ 4:3 After the Closing ............................................................ 4-25
§ 4:3.1 Representing the Seller ............................................. 4-25
§ 4:3.2 Representing the Purchaser ...................................... 4-26

Appendices ........................................................................... App.-1

Appendix B Checklist for Purchase of New York Real Property ............................................. App. B-1
Appendix C NY Contract of Sale {NYBTU Form 8041} ......................................................... App. C-1
Appendix C1 NY Contract of Sale {Multibar} [11–2000] ... App. C1-1
Appendix C2 NY Capital Region {Albany} Contract of Sale and Addenda .................................. App. C2-1
Appendix C3 NY Erie County {Buffalo} Contract of Sale and Riders ........................................ App. C3-1
Appendix C5 NY Monroe County {Rochester} Purchase and Sale Contract and Addenda .......... App. C5-1
Appendix C6 NY Rockland County Contract of Sale and Personal Property Rider .................... App. C6-1
Appendix D Rider to NY House Contract of Sale {Form 316} .................................................. App. D-1
Appendix D1 NY Condominium Contract of Sale {Form 146} ................................................ App. D1-1
Appendix E Florida Contract of Sale ........................................................................ App. E-1
Appendix F Texas Contract of Sale ................................................................................ App. F-1
Appendix G Chicago, Illinois; Contract of Sale ................................................................. App. G-1
Appendix H Boston, Massachusetts; Contract of Sale ............................................. App. H-1
Appendix I California Contract of Sale ........................................................................ App. I-1
Appendix J Forms Comparison Chart ........................................................................ App. J-1
Appendix K NY Contract of Sale: Office, Commercial, and Multi-Family Residential Premises {ABCNY} ................................................................. App. K-1
<table>
<thead>
<tr>
<th>Appendix</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>L</td>
<td>Contract of Sale: Office, Commercial, and Multi-Family Residential Premises (All States) [ABCNY]</td>
</tr>
<tr>
<td>M</td>
<td>Mortgage Note [NYBTU Form 8011]</td>
</tr>
<tr>
<td>N</td>
<td>First Mortgage [NYBTU Form 8014]</td>
</tr>
<tr>
<td>Q</td>
<td>Bargain and Sale Deed with Covenant [NYBTU Form 8002]</td>
</tr>
<tr>
<td>R</td>
<td>Brokerage Agreement Letter</td>
</tr>
<tr>
<td>R1</td>
<td>NY Real Property Law § 443: Disclosure Regarding Real Estate Agency Relationship</td>
</tr>
<tr>
<td>S</td>
<td>Customs in Respect to Title Closings</td>
</tr>
<tr>
<td>T</td>
<td>Closing Checklist for Sale or Purchase of House</td>
</tr>
<tr>
<td>U</td>
<td>Closing Financial Statement</td>
</tr>
<tr>
<td>V</td>
<td>Closing Financial Statement (Alternate)</td>
</tr>
<tr>
<td>W</td>
<td>Closing Memorandum</td>
</tr>
<tr>
<td>X</td>
<td>Designation Agreement</td>
</tr>
<tr>
<td>X1</td>
<td>I.R.S. Form W-9</td>
</tr>
<tr>
<td>Y</td>
<td>New Jersey Contract of Sale</td>
</tr>
<tr>
<td>Z</td>
<td>Greater Hartford Association of Realtors Contract of Sale</td>
</tr>
<tr>
<td>Z1</td>
<td>NY Property Condition Disclosure Act</td>
</tr>
<tr>
<td>Z3</td>
<td>Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards</td>
</tr>
<tr>
<td>Z4</td>
<td>Residential Loan Application</td>
</tr>
<tr>
<td>Z5</td>
<td>Good Faith Estimate (GFE)</td>
</tr>
<tr>
<td>Z6</td>
<td>Settlement Statement (HUD-1)</td>
</tr>
<tr>
<td>Z7</td>
<td>Certification of Non-Foreign Status</td>
</tr>
<tr>
<td>Z8</td>
<td>NY State Combined Real Estate Transfer Tax Return (TP-584)</td>
</tr>
</tbody>
</table>
Table of Contents

Appendix Z9 Sample Calculation of Closing Adjustments .............................................. App. Z9-1

Table of Authorities ................................................................. T-1
Cases ........................................................................................... T-1
Federal Law .................................................................................. T-49
Statutes by Name ......................................................................... T-49
Code of Federal Regulations .................................................... T-51
Public Laws .................................................................................. T-51
State Statutes .............................................................................. T-52
United States Code ..................................................................... T-62
Internal Revenue Code ............................................................... T-63
Ethics Opinions .......................................................................... T-64

Index ........................................................................................... I-1
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.

KARL B. HOLTZSCHUE
New York, New York
June 2007
kbholt@gmail.com
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.


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 legal representation of a

1. See infra subsection [7].
client referred by a nonlegal service provider or prior to the referral of an existing client to a nonlegal service provider.\textsuperscript{4} Prof. Roy Simon annually publishes an excellent guide.\textsuperscript{5} Other sources are also helpful.\textsuperscript{6}

\section{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.\textsuperscript{7}

The engagement letter is required to notify the client of a possible right

\begin{footnotesize}
\begin{enumerate}
\item 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 deploiring 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 services].
\end{enumerate}
\end{footnotesize}
to arbitration in case of a fee dispute. Several NYSBA opinion letters (Holtzschue, Rel. #19, 4/18)
address provisions that may be included in retainer agreements and issues relating to collecting legal fees.9


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.


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


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

---

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].


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 reveals 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
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).

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

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.\textsuperscript{15}


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.\textsuperscript{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.

\textsuperscript{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); Saterstein 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).

Attorney Escrow Accounts

Attorneys must handle escrow accounts carefully, in accordance with the Model Rules, court rules, and the Judiciary Law. 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].

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 Rahman, 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 Galasso, 94 A.D.3d 104 (2d 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 attorney’s application to resign granted, due to allegations of neglect of legal matters, failure to return unearned portion
New York, attorneys have been 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

[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.  

[10] 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.

KARL B. HOLTZSCHUE

New York, New York

April 2018

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).

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).