



# LEGAL NOTES

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### ***LANDLORD AND TENANT: “NON-PAYMENT” AND “HOLD-OVER” PROCEEDINGS***

**By Jay R. Myrow, J.D.**

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The right of a landlord to evict a tenant in New York is governed by laws set forth in the Real Property Actions and Proceedings Law (the “RPAPL”) Although a written lease may provide for the landlord’s “right” to evict a tenant under certain circumstances, the proceedings must follow the requirements set forth in the RPAPL.

The “guidelines” set forth in the law include (i) who may bring an action, (ii) against whom an eviction action may be brought, (iii) the Court in which the proceeding may be brought, (iii) the necessary papers to be filed and the information that must be included therein, (iv) the manner and times to file and serve the papers on the opposing party, and (v) the relief that can be obtained by the landlord. The RPAPL also provides that a tenant can file one or more counterclaims against the landlord and raise any affirmative defenses against the action.

The most important decision to be made by a landlord seeking to evict a tenant is whether the tenant can be evicted for “non-payment,” or

whether the landlord must resort to a “hold-over” proceeding. A “non-payment” proceeding may be brought when a tenant fails to pay rent as required by the written lease or oral agreement, and fails to bring past due rent current within three days of receiving written notice to pay. The notice must be served personally by a process server or someone other than the landlord. The lawsuit to evict can be filed immediately after the third day if the tenant has not paid. If the tenant pays the past due rent at any time prior to the Court entering a judgment in favor of the Landlord, the action is terminated and the tenant remains in possession of the premises.

A “hold-over” proceeding may be brought after the lease or tenancy has been terminated. A written lease with a fixed term ends at the end of the last month or year of the lease. A month-to-month tenancy may be terminated by the landlord giving one month’s advance notice of termination. Such notice may be given orally or in writing delivered by the landlord. The lawsuit to evict may be filed immediately after the end of the lease term.

The overwhelming majority of cases we handle are for non-payment. At that stage, our clients usually want to part ways with the tenant as quickly as possible. Since a non-payment proceeding can be brought in less than a week

(if proper notice is given), the landlord will usually take the risk that the tenant can defeat the proceeding by paying the past due rent. Although the landlord must continue with the tenant, at least the rent is paid. For landlords that absolutely want to end the tenancy, we will simultaneously serve a three day notice for non-payment and a one month notice of termination. Although it is unlikely the tenant will pay the past due rent if they are going to be evicted anyway, at least the landlord is able to proceed in Court after the three days for non-payment of the rent has expired.

A word of caution to landlords: a savvy, “professional” tenant can raise affirmative defenses in both “non-payment” and “hold-over” proceedings. One such defense that I raised in Court on behalf of a commercial tenant is the “stale rent” defense. In that case, the landlord had waited over five years to bring suit for non-payment of rent (the tenant withheld the rent because of substantial flood damage from a defective, leaking roof). When the suit was brought, the landlord claimed back rent of \$70,000.00 and accrued late charges of nearly the same amount. In such circumstances where a landlord delays in bringing a proceeding for non-payment of rent for such a long period of time that it can reasonably be expected that the tenant will not be able to bring the rent current, the Courts have denied the landlord the right to proceed with a non-payment proceeding that seeks to recover the full amount of rent owed. The Courts have instead substituted a shorter period (two to three months) of back rent and afforded the tenant an opportunity to pay that amount to defeat the proceeding. The landlord is then allowed to bring an action to recover the other amounts owed, while the tenant can remain in the premises if they stay current on the rent going forward.

The requirements set forth in the RPAPL are numerous and complicated. The failure to strictly comply with the requirements can be fatal to an eviction proceeding. If you have any

doubts as to how to proceeding in an eviction proceeding, call one of our attorneys.

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## ***MEDICAID RECOVERY***

**By Mindy Menke, J.D.**

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In order to qualify for long-term nursing home Medicaid, an individual cannot have more than \$13,800 worth of assets in his or her name. The applicant’s spouse, known as the “Community Spouse,” may retain assets ranging from \$74,820.00 to \$109,560. If the individual owns a house in his or her name, the house is exempt from the aforementioned calculation, as long as the individual intends to return home. If a husband and wife own a home jointly, it is also exempt from available asset calculations as long as the spouse is residing in the home. However, that does not mean that the home is protected. The Department of Social Services (DSS) has the right to place a lien on the house for amount it has paid for the applicant’s care. With nursing home costs averaging over \$10,000 per month in the Hudson Valley, the equity value of the home can be significantly reduced. The best way to protect the house is to create an Irrevocable “Medicaid Asset Protection Trust” at least five years before the individual needs to apply for Medicaid in order to receive maximum protection.

The person receiving nursing home Medicaid is allowed to keep \$50 of his or her monthly income. All excess income must go towards the cost of his or her care. The Community Spouse is allowed to keep \$2,739.00 of his or her monthly income. If the Community Spouse’s monthly income is less than \$2,739.00, he or she is entitled to a portion of the institutionalized spouse’s income to bring him or her up to \$2,739.00.

If the Community Spouse has income or assets in excess of the Medicaid resource allowance, he or she can retain the excess resources by signing a spousal refusal. A spousal refusal is a statement that the Community Spouse will not contribute any of his or her resources towards the care of the applicant. Although the spousal refusal is a very effective planning tool, it is not without risk. DSS can bring a support action against the Community Spouse in order to compel them to contribute their resources towards the applicant's care.

One of the major areas of confusion regarding Medicaid is the look back period. Prior to February 2009, the look back period for outright transfers was 36 months. But, the Deficit Reduction Act of 2006 expanded the look back period. Beginning in February 2009, one month was added to the look back period for each month that passed, until February 2011, when the look back period will be 60 months. For example, if an application applies in September 2010, the look back period will be 55 months.

This means that the applicant must submit 55 months worth of bank statements, including statements from accounts that were closed during the look back period, all canceled checks over \$1,000.00, all property transfers paperwork, all information relating to the sale and purchase of stocks and bonds, statements from brokerage accounts, and information relating to social security, pensions, IRAs and other retirement accounts. This can be a difficult task, even for those individuals who are well organized. DSS is specifically looking for any gifts made during the look back period. Any gifts made during the look back will create a penalty period in which the applicant or his or her family will have to privately pay for nursing home care.

The best thing you can do is to begin planning for long-term care before you need it. By having the right information, an Irrevocable Medicaid Asset Protection Trust, and a good power of

attorney, you can help protect assets for your loved ones.

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## ***WHAT IS THE DMV "POINTS" SYSTEM AND HOW DOES IT AFFECT YOUR LICENSE TO DRIVE IN NEW YORK STATE?***

**By Carol C. Pierce, J.D.**

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***"The best car safety device is a rear-view mirror with a cop in it."***

***Dudley Moore***

The Department of Motor Vehicle's ("DMV") driver violation point system is designed to help identify New York State drivers who commit several traffic violations within a given time period. Certain traffic violations issued by the police are assigned a point value. The majority of the traffic violations that are assigned a point value are typically speeding or "moving" violations. Obviously, the greater the offense, the greater the point value of given to the violation.

### ***How are points calculated by DMV?***

In order to receive points on your license, you must be convicted of a traffic violation; that is, either you plead guilty or were found guilty after a trial. The calculation for the point totals is based upon the date of the violation, *not* the conviction date. The total points for all violations are then calculated within the past 18 months. Note: The information containing your convictions always remains on your driving abstract record; only the calculation of your total points changes after 18 months.

### ***If I get a ticket in another state, do I receive points on my NYS driver's license?***

New York State DMV does not record out-of-state violations committed by NYS drivers in

other jurisdictions *except* for alcohol/drug related violations, and moving violations committed in Quebec or Ontario. Nevertheless, although NYS DMV will not record your out-of-state violation, if you do not respond to a ticket or fail to pay a fine for a moving violation in another jurisdiction, DMV will suspend your license until you respond to that ticket or pay the fine.

***So what is the effect of the point system?***

Any driver whose point value reaches or exceeds 11 points within an 18-month period will have their license suspended by the Department of Motor Vehicles. Once your license is suspended, so are your privileges to drive. If your point values are 11 points or greater and you are notified by DMV that your license is suspended, you can request a DMV hearing *only* to prove that a different person committed the violations.

***How do I reduce the points on my license?***

There are two ways to reduce the points on your license, the first of which is to not obtain any new convictions within an 18-month period from your last violation. Remember the points are calculated within an 18-month period. The second option is to take a DMV-approved accident prevention course (“Defensive Driving Course”). These courses can be taken at a specific location or even online. Upon completion of this course not only will you receive a 4-point reduction on your license, but you will also save 10% on your automobile insurance premiums for three years. One caveat: Make sure that any defensive driving program has been approved by the DMV, or it will not count in the reduction of points on your license.

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***JOIN US FOR A BOOK SIGNING PARTY!***

BSR&B partner Rich Shapiro is a contributing author for *The Complete Guide to Estate & Financial Planning in Turbulent Times*, recently published by the Collaborative Press. This 300-page hard cover book provides a wealth of information about estate and financial planning topics in an easy-to-use Q & A format.

On September 14, 2010 from 4 to 6 p.m., Rich will be hosting a book signing party in our Education Center. Each attendee will receive a *free* autographed copy of the book (retail price is \$29.95)!

To register, call Donna Wood at 291-0011 ext. 242, or send an e-mail to [dwood@mid-hudsonlaw.com](mailto:dwood@mid-hudsonlaw.com).

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## EDUCATIONAL WORKSHOPS

**Blustein, Shapiro, Rich & Barone, LLP offers complimentary educational workshops to our clients and friends. Here's our upcoming workshop schedule:**

### **Estate Plans That Work™**

September 16, 2010 – 3:00 p.m. to 6:00 p.m.

### **Protecting Your Assets from Nursing Home Costs**

September 29, 2010 – 3:30 p.m. to 5:30 p.m.

**To register for a workshop, call Donna at 291-0011 x.242, or register online at [www.mid-hudsonlaw.com](http://www.mid-hudsonlaw.com) by going to the "Event Calendar" link.**

**All workshops will be held in the BSRB Education Center at our 10 Matthews Street location.**

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