II. THE LAY OF THE LAND: DISCOVERY TOOLS AND TACTICS

NOVEMBER 15 & 16, 2004
Brooklyn & White Plains, NY

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A. Determining the Need for Discovery

1. Generally.

The general purpose of discovery, obviously, is to (a) support the client's litigation position; and (b) to disprove the adversary's. These goals can be furthered by (i) documents, (ii) admissions by the opponent, or (iii) by the testimony of disinterested witnesses.

To begin the process an attorney must determine the facts that are legally significant. The significance of certain facts, however, are controlled by the "theory of the case." Different "theories" will make different facts "significant." Thus an attorney must, early on, develop the theory of the case. The theory, in turn, must depend on the case law that would compel a particular result under each of the different theories.

Because, at least initially, the client knows more about the facts of the case than the attorney, it is vital that the client understand the theory of the case. The attorney should explain the theory and the legal underpinnings to the client so that the client can assist in accumulating and developing the facts supporting the litigation. Moreover, the attorney must explain the adversary's theory of the case so that the client is in a position to help develop evidence to disprove the adversary's case.

Paradoxically, the theory of the case will usually change as discovery discloses additional facts. Thus the attorney must initially develop a "working" theory of the case and decide in which direction to focus the discovery efforts. The attorney, however, must remain flexible and, depending on what is unearthed during the discovery phase of the litigation, possibly abandon one theory and develop another or, at the least, fine tune the theory to accommodate any newly discovered facts of the case.

The five major issues in divorce actions are (i) the [fault] grounds for divorce; (ii) the equitable distribution of marital property; (iii) maintenance; (iv) custody; and (v) child support.

A party's assets, income and earning potential are relevant to the issues of

equitable distribution, maintenance and child support. Discovery may thus be used to determine a party's true earnings, to support or impeach a claim of separate vs. marital property, to determine any increase in value of separate property during the marriage and the non-titled spouse's contributions to it, to determine any increase in the value of property after the commencement of the divorce action and to determine whether that asset is an active or passive asset, and any data needed to support or impeach an expert's appraisal regarding the value of any property.

Maintenance, pursuant to statute, is determined based on the following thirteen factors, several of which might require discovery:

(1) the income and property of the respective parties including marital property distributed pursuant to subdivision five of this part;

(2) the duration of the marriage and the age and health of both parties;

(3) the present and future earning capacity of both parties;

(4) the ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefor;

(5) reduced or lost lifetime earning capacity of the party seeking maintenance as a result of having foregone or delayed education, training, employment, or career opportunities during the marriage;

(6) the presence of children of the marriage in the respective homes of the parties;

(7) the tax consequences to each party;

(8) contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;

(9) the wasteful dissipation of marital property by either spouse;

(10) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration; and

(11) any other factor which the court shall expressly find to be just and proper. DRL § 236(B)(6)(a) (emphasis added).

2. Grounds.

Discovery of material relevant to the grounds for divorce, the Appellate Divisions are split. The First and Second Departments do not permit discovery of these materials, *Briger v. Briger*, 110 AD2d 526, 487 NYS2d 756 (1st Dept., 1985)("absent `exceptional circumstances,' disclosure with regard to particular acts of marital misconduct is unwarranted); *Corsel v. Corsel*, 133 AD2d 604, 519 NYS2d 710 (2d Dept., 1987) ("pretrial discovery concerning the merits of a matrimonial action should not be permitted"), while the upstate Third and Fourth Departments do, *see, e.g., Schaefer v. Connors*, 159 AD2d 780, 552 NYS2d 61 (3d Dept., 1990) ("in this department `there is no general prohibition against disclosure concerning the merits of matrimonial actions'"). The theory of the downstate courts is that, absent egregious circumstances that "shock the conscience of the court," the fault grounds will not effect the equitable distribution. Discovery on those issues will only exacerbate an already acrimonious relationship, prevent any chance for reconciliation and will be used merely to harass the future-ex-spouse. The upstate departments reply that protective orders are available if a party is in need of one to prevent abusive discovery.

3. Custody.

a. Generally.

Only certain discovery devices are generally permitted for use in custody litigation while others are not. Depositions and bills of particulars are generally not permitted in the First and Second Departments, *Ferguson v. Ferguson*, 2 Misc3d 277, 772 NYS2d 480 (Sup. Ct., Nassau County, 2003); *Ochs v. Ochs*, 193 Misc2d 502, 749 NYS2d 650 (Sup. Ct., Westchester County, 2002); *Coderre v. Coderre*, NYLJ 2/26/90 at 21 (Suffolk County); *Ginsberg v. Ginsberg*, 104 AD2d 482, 479 NYS2d 233 (2d Dept., 1984) (quashing a request for a bill of particulars), though other discovery devices are.

In *Kesseler v. Kesseler*, 10 NY2d 445, 225 NYS2d 1 (1962), the Court of

Appeals noted that courts may "depart from strict adversary concepts in certain respects" when dealing with custody disputes. Several years later the Court used *Kessler* to justify the *ex parte, in camera* interview of children which results, in essence, in decision making based on "secret" evidence available only to the court. *Lincoln v. Lincoln*, 24 NY2d 270, 299 NYS2d 842 (1969). The appellant in *Lincoln* argued that the procedure violated her fundamental constitutional rights. The Court, however, rejected that argument.

> We cannot accept the argument, persuasive as it might seem at first, because it ignores the fact that, in a custody proceeding arising out of a dispute between divorced parents, the first concern of the court is and must be the welfare and the interests of the children (Domestic Relations Law, § 70). Their interests are paramount. The rights of their parents must, in the case of conflict, yield to that superior demand.
>
> It requires no great knowledge of child psychology to recognize that a child, already suffering from the trauma of a broken home, should not be placed in the position of having its relationship with either parent further jeopardized by having to publicly relate its difficulties with them or be required to openly choose between them. The trial court however, if it is to obtain a full understanding of the effect of parental differences on the child, as well as an honest expression of the child's desires and attitudes, will in many cases need to interview the child. There can be no question that an interview in private will limit the psychological danger to the child and will also be far more informative and worthwhile than the traditional procedures of the adversary system -- an examination of the child under oath in open court.
>
> . . . . The procedures of the custody proceeding must, therefore, be

> molded to serve its primary purpose, and limited modifications of the traditional requirements of the adversary system must be made, if necessary. (*Kesseler v. Kesseler*, 10 N Y 2d 445; *People ex rel. Fields v. Kaufmann*, 9 A D 2d 375.) The test is whether the deviation will on the whole benefit the child by obtaining for the Judge significant pieces of information he needs to make the soundest possible decision.
>
> The trial court here concluded that the only method by which it might avoid placing an unjustifiable emotional burden on the three children and, at the same time, enable them to speak freely and candidly concerning their preferences was to assure them that their confidences would be respected. This could only be done in the absence of counsel, and we see no error or abuse of discretion in the procedure followed by the trial court.

Id. *Kessler* and *Lincoln* have been cited as authority for the different discovery rules in custody litigation.

The Third and Fourth Departments of the Appellate Divisions have taken a broader view of permissible discovery in custody matters than the First and Second Departments have. Thus the court, in *Westrom v. Westrom*, 130 Misc2d 265, 495 NYS2d 628 (Supreme Court, Chautauqua County, 1985), stated that full disclosure benefits the adversarial process and will more likely ensure the correct outcome by the court:

> The argument has been advanced that pretrial disclosure would cause additional upset to the child and exacerbate and compound the unpleasantries inherent in a custody battle. It is also argued that such disclosure will delay an expeditious determination of the custody issue, to the detriment of the child.

> While the above arguments have some merit, they represent short-term dangers. A failure to fully "flesh out" the custody issues may represent a potential long-term danger to the child. . . . Pretrial disclosure as to custody issues will help to insure [*sic*] that all relevant issues and facts are brought before the court in its consideration of this most important issue. Any potentially dangerous side effects of pretrial disclosure can largely be offset by sensitive handling of this disclosure by the attorneys for the parties.
>
> This court has long been on the record favoring full disclosure on the merits of matrimonial actions. (*Vaccaro v. Vaccaro*, 98 Misc2d 406). The Fourth Department of the Appellate Division is in accord with our position. (*Lemke v. Lemke*, 100 AD2d 735). In the case of *Williams v. Williams* (July 13, 1984) the Fourth Department appears to have given implicit approval of this issue by denying a stay of a court order directing an examination before trial with regard to the issue of custody.
>
> We think it is both good law and good sense to permit this disclosure.

Id.

In *Edgerly v. Moore*, NYLJ 2/9/96 at 25 (Supreme Court, New York County) (David Saxe, J.), the court listed several of the factors courts generally use in determining custody:

- the child's current residence;
- which parent has been the child's primary caretaker;
- any prior custody agreements between the parents;
- the home environment of each parent;
- the parental guidance each parent can provide;

- each parents' lifestyle and stability;
- the ability of each parent to provide for the child's emotional and intellectual development;
- each parent's financial standing;
- each parents' prior conduct with the child;
- where appropriate, the child's preference;
- the residence of the child's siblings; and
- which parent would likely support the relationship of the child with the other parent.

b. Physician Patient Privilege & disclosure of medical information.

Parties to a custody proceeding place their physical and mental well being in issue. *Rosenblitt v. Rosenblitt*, 107 AD2d 292, 294, 486 NYS2d 741 (2d Dept., 1985); *Anonymous v. Anonymous*, 5 AD3d 516, 772 NYS3d 866 (2d Dept., 2004). Thus, even though a person's communication with treating physicians are generally privileged, CPLR § 4504, those communications are discoverable in a custody dispute. *DeBlasio v. DeBlasio*, 187 AD2d 551, 590 NYS2d 227 (2d Dept., 1992). In *DeBlasio* the Appellate Division held that a hospital was properly ordered to produce to the court a party's drug and alcohol treatment. The party's "interest in preserving confidentiality," the court held, "must yield to the paramount interest of protecting the well-being of the parties' young child." *Id.* "Because the potential for abuse in matrimonial and custody cases is 'so great' the court's discretionary power to limit disclosure and grant protective orders is equally broad." *Garvin v. Garvin*, 162 AD2d 497, 556 NYS2d 699 (2d Dept., 1990) (citations omitted).

In *Coderre v. Coderre*, NYLJ 2/26/90 at 21 (Supreme Court, Suffolk County), the court held that although a parent could subpoena the medical records of the

other parent, the subpoena must be made returnable only to the courthouse and can be released only on such conditions as the court deems appropriate; *accord, New York ex rel. Hickox v. Hickox*, 64 AD2d 412, 410 NYS2d 81 (1st Dept., 1978) (same).

c. Compelling a [Second Partisan] Medical Examination:

When custody is in issue, a court must appoint a neutral forensic mental health professional to report to, and advise, the court. *Giraldo v. Giraldo*, 85 AD2d 164, 447 NYS2d 466 (1st Dept., 1982). Failure to appoint such a neutral evaluator is reversible error. *Id.*

A party disfavored by the court-appointed forensic psychologist's report frequently desires the opinion of the party's own expert. The report of a mental health professional who has not examined both parties, however, is entitled to little weight. *Renee B. v. Michael B.*, 204 AD2d 57, 611 NYS2d 831 (1st Dept., 1994). Thus, the party must seek to compel the other spouse to submit to additional psychological examinations. Though CPLR § 3121 authorizes such an examination, courts have restricted that right in the custody context.

Thus in *Rosenblitt v. Rosenblitt*, 107 AD2d 292, 294, 486 NYS2d 741 (2d Dept., 1985), where the parties were evaluated by a neutral expert, the court suppressed a demand by one party to have the other evaluated by her own expert. Citing *Wegman v. Wegman*, 37 NY 940, 380 NYS2d 649 (1975), the Second Department held that although CPLR § 3121 was applicable to matrimonial actions and would presumptively permit the examination of one party by the other's physician, it was improper to order such an examination in the absence of a showing that the neutral evaluation was inadequate or deficient:

> Where forensic examinations have been conducted and there is no showing that such examinations were in any way inadequate or deficient, it

> is an abuse of discretion to compel one particular party to submit to further evaluations at the insistence of the adverse party where not a single reason is presented in support of the application.

380 NYS2d 743-44. The court went on to say that, "even were we to conclude that a further psychiatric evaluation is warranted, defendant's partisan expert would not be the proper person to conduct it." *Id.* The dissent in *Rosenblitt*, 486 NYS2d at 745, argued forcefully that the adversarial process is especially important on an issue as crucial as child custody and that discovery should, therefore, not have been restricted in such a vital area. That view, however, was rejected by the Second Department majority panel in *Rosenblitt*.

Similarly, in *Hirschfeld v. Hirschfeld*,114 AD2d 1006, 495 NYS2d 445 (2d Dept., 1985), *aff'd,* 69 NY2d 842, 514 NYS2d 704 (1987), the Second Department affirmed the decision of the trial court that refused to permit psychological testing of the father. "[I]n the absence of any showing on the part of defendant that the prior examinations were inadequate or deficient or that plaintiff's behavior was in conflict with the children's social, emotional, or moral welfare, Special Term properly denied this branch of defendant's cross motion." The Appellate Division was affirmed by the Court of Appeals. *Hirschfeld v. Hirschfeld*, 69 NY2d 842, 514 NYS2d 704 (1987).

Justice Gische, in an unpublished opinion, refused to permit a psychological examination reasoning that "continued exposure to different mental health professionals can only be confusing, particularly when the child has such a heightened awareness of the parents['] ongoing conflicts." *Anonymous v. Anonymous*, (Supreme Court, New York County, September 11, 2003) (Justice Gische)(unpublished opinion). Similarly, in *Chenkin v. Chenkin*, NYLJ 11/24/98 at 25 (Supreme Court, Suffolk County), the court held that a party cannot compel an additional partisan examination unless the party first shows (i) a deficiency in the original report; and, (ii) in the First Department,

that a further examination won't be harmful to the child; *accord*, *Quinn v. Genovese*, 158 AD2d 602, 551 NYS2d 844 (2d Dept., 1990)(2d Dept., 1990) (without a showing that the court-ordered evaluations were deficient, it was proper for the court to deny additional psychiatric and psychological evaluations).

Other courts, however, have permitted such partisan examinations. In *In re B. v. B.*, 134 Misc.2d 487, 510 NYS2d 979 (Family Court, New York County, 1987) (George L. Jurow, J.) the mother moved for an order directing the examination of the father by her own expert, in addition to the neutral expert the parties were going to select. The father sought a protective order. The court, in permitting the examination by the other party's expert, held that *Rosenblitt* was distinguishable in that in this case: (i) the impartial mental health examinations had not yet been conducted; (ii) the proposed parties' expert had not yet formed a biased opinion and so was still impartial; (iii) the potential for delay was minimal; (iv) the additional examination could hardly be considered harassing or prejudicial since both parties had acknowledged routinely obtaining the assistance of mental health professionals; and (v) "[f]inally and most significant[ly]" this was a case involving the breakdown of a complex joint custody agreement with "mental health professionals as arbiters." Rather than being duplicative, the court reasoned, another assessment would merely add more information. The court read *Rosenblitt* to permit "under appropriate circumstances, partisan retained experts . . . to supplement impartial court-ordered evaluations."

Four years later the parties again returned to court in a new custody battle. This time the father sought to compel the mother and their child to submit to a psychiatric examination by his designated expert, Dr. Richard Gardner. *In re B. (B. II*), NYLJ 6/20/1991 (Jurow, J.) [Please note that I was unable to find this opinion online]. Dr. Gardner was the psychiatrist originally stipulated by the parties to be the impartial expert in 1987. After the conclusion of that action, Dr. Gardner continued to consult with the father. This time the court directed the mother to submit to the examination.

In *Cohen v. Cohen*, NYLJ 6/9/03 at 34 col. 3 (Justice LaMarca), the court ordered the wife to undergo further testing. There the forensic expert agreed with the husband's claim that the wife was suffering from a "serious mental health disorder." He disagreed, however, with the husband's assessment of how that impacted the wife's ability to parent their child. The court noted that it "should have before it as much legally admissible evidence either in support of or in opposition to the expert opinion," and ordered the wife to submit to an examination by the husband's designated expert.

Similarly, where there is a legitimate reason for conducting a medical examination, even the Second Department has permitted it. *Burgel v. Burgel*, 141 AD2d 215, 533 NYS2d 735 (2d Dept., 1988). In *Burgel* the wife admitted that she had used cocaine in the past but claimed that she had ceased using it several months earlier. The husband requested that she permit a hair sample to be taken for a radioimmunoassay (RIA) test which might be able to detect drug use over the course of several months. The trial court granted the husband's motion and the Second Department affirmed. (The court left for another day the scientific validity of the procedure and the *Frye* and *Daubert* issues.)

In contrast, the court in *Garvin v. Garvin*, 162 AD2d 497, 556 NYS2d 699 (2d Dept., 1990), reversed the Family Court and denied the father's petition to require the mother to submit to psychological and RIA exams. The father there based his request on the mother's boyfriend's prior arrest for misdemeanor possession of marijuana and his claim that he twice smelled marijuana on her breath. This, the court held, amounted to a mere "suspicion" that the mother had smoked marijuana, the test which the father requested could not readily detect marijuana use, and, therefore, "there [wa]s no discernible legitimate purpose for such testing."

In a similar area the husband in *Anne D. v. Raymond D.*, 139 Misc.2d 718, 528 NYS2d 775 (Supreme Court, Nassau County, 1988), alleged that the wife had numerous affairs during the marriage. He, therefore, asked that she submit to an HIV test

citing *Maharam v. Maharam*, 123 AD2d 165, 510 NYS2d 104 (1st Dept., 1986). The court denied his request and distinguished the cases. Here, the court held, the husband's "mere allegations do not provide a sufficient predicate for such an intrusive action." *Maharam*, in contrast, was a case in which a party was accused of infecting the spouse with a sexually transmitted disease and was sued for divorce and negligence. A medical examination, therefore, was appropriate there.

Because the forensic examination is so critical a part of a custody case, a party is entitled to have counsel present for the examination, even if the forensic psychologist objects. *Koons v. Koons*, 161 Misc2d 842, 615 NYS2d 563 (Supreme Court, New York County, 1994); *Sardella v. Sardella*, 125 AD2d 384, 509 NYS2d 109 (2d Dept., 1986). Counsel, of course, cannot interfere with the examination. *Nalbandian v. Nalbandian*, 117 AD2d 657, 498 NYS2d 394 (2d Dept., 1986); *Sardella, supra*. Counsel may not, however, attend the examination of an opposing party. *Id.*

d. Discovery of the Forensic Expert's Notes & Raw Data:

There is great controversy among members of the Bar on whether the notes and raw data of a neutral forensic evaluator should be made available to counsel before trial. The three trial court decisions that deal with this issue have refused such access. *Feuerman v. Feuerman*, 112 Misc.2d 961, 447 NYS2d 838 (Supreme Court, Nassau County, 1982) (wife's psychiatrist could not get forensic's raw test data in advance of trial but can subpoena them for the trial); *Ochs v. Ochs*, 193 Misc2d 502, 749 NYS2d 650 (Sup. Ct., Westchester County, 2002) (Robert A. Spolzino, J.) (denying access to forensic notes in the absence of a special showing); and *MC v. WW*, NYLJ 7/8/03 at 19 col. 5 (Supreme Court, Kings County) (Jeffrey Sunshine, J.). These courts have held that expanding discovery by permitting access to such notes would lengthen the time necessary to prepare for a custody trial, increase its costs and damage the children who are the subjects of the custody dispute. Courts have also been concerned that

discovery of data and testing material might somehow inhibit the note taking of the evaluators.

Justice Spolzino, in *Ochs*, acknowledges the importance and fallibility of the court appointed evaluator and of cross examination for determining the truth:

> [T]he neutrality of the expert and the high regard that the court must have in order to appoint a particular forensic psychologist, makes his or her report a highly significant factor for the court to consider . . .
>
> Despite the importance of this role, however, the court-appointed neutral is not Caesar's wife. Our jurisprudence has long concluded that the adversarial process is the best means for reaching the truth insofar as it is humanly possible to do so. . . . Since the normal grist for cross-examination is provided by the facts on which an expert's conclusions are based, as reflected in the notes and raw data he or she has collected (*see*, Juvelier, Child Custody: Reconciling the Disclosure Rules in Custody and Visitation Cases, 3 NY Fam.L.Monthly, No. 4 at 4 (Feb. 2002)), it is difficult not to conclude that the adversarial process would achieve its best result where such information is provided to counsel in advance of trial. In fact, the framers of the Uniform Marriage and Divorce Act have apparently reached this conclusion in permitting such disclosure (Uniform Marriage and Divorce Act § 405 [9 ULA 603 (1970)]).

193 Misc2d at 505-06 (several citations omitted). Nevertheless, he refused to permit access to the notes. "[T]he adversarial process that is most conducive to reaching the truth is often detrimental to the relationships it is intended to protect." *Id*. at 506. Because litigation places a great burden on the parties and the children, "[t]he process should not be permitted to defeat, through an excess of zeal in discovering every last

ounce of relevant information, the beneficial effects that are intended to be achieved in the result." *Id*. at 507. He feared that evaluators may be "less willing to commit to paper the impressions they form in the course of their interviews" if their notes were discoverable. Thus, Justice Spolzino, concluded, pretrial disclosure is "likely to make custody litigation lengthier and more expensive without providing any concomitant benefit sufficient to justify its costs." *Id.* 749 NYS2d at 655.

Justice Sunshine in *MC*, similarly, based his decision to refuse access to the notes and raw data, by citing the increased expense broader discovery would entail:

> This Court is reluctant to expand the scope of matrimonial litigation to include discovery on the issues of custody other than subpoenaing of witnesses and documents to be available for trial. Otherwise the "pre-custody dispute"in the form of "pre-trial litigation" will likely double the amount of attorneys' time and professional efforts resulting in protracted litigation while time continues to march on. . . .
>
> . . . This Court is reluctant to now allow and expand the process of discovery to include the submission of raw data and notes to be evaluated by a hired expert of the plaintiff for the purposes of challenging the neutral forensic expert's report. . . . Similarly . . .the psychologist who conducted psychological testing, while subject to cross-examination, should not yield raw data results for further exploration by plaintiff's witness."

Id.;.

The countervailing arguments were well articulated by Justice Diane A. Lebedeff in a different context. *Drago v. Tishman Constr. Corp. of N.Y.*, 4 Misc3d 354, 777 NYS2d 889 (Supreme Court, New York County, 2004). *Drago* involved a construction accident in which a party sought to obtain the notes and raw data from an

opposing expert. Justice Lebedeff held that it would be unreasonable to expect an opposing counsel to conduct an effective cross-examination on an expert without prior access to that expert's notes and raw data. Though counsel who did not have pre-trial access to the raw data could have her own expert present in the courtroom to hear the data of the opposing expert, that method would be deficient in a complicated matter:

> Commonly, absent a pre-trial review of raw data, the data simply would be presented during testimony by an expert (*Gayle v. Port Authority of New York, New Jersey,* - A.D.2d -, 6 A.D.3d 183, 775 N.Y.S.2d 2, 2004 WL 636249, * 1 [1st Dept. 2004], medical expert opinion is to be supported by "relevant examples and data" and it is "the jury's prerogative to resolve [any] conflicting testimony"). If interpretative assistance were needed by opposing counsel, such party may have its own expert present in the courtroom while the testing expert testifies (*People v. Santana*, 80 N.Y.2d 92, 100, 600 N.E.2d 201, 587 N.Y.S.2d 570 [1992], *rearg dismissed*, 81 N.Y.2d 1008, 616 N.E.2d 161, 599 N.Y.S.2d 806 [1993], "reasons for exclusion do not apply to expert witnesses. It has been pointed out that the presence in the courtroom of an expert witness who does not testify to the facts of the case but rather gives his opinion based upon the testimony of others hardly seems suspect and will in most cases be beneficial, for he will be more likely to base his expert opinion on a more accurate understanding of the testimony as it evolves before the jury" [citations and internal quotation marks omitted]).
>
> The typical trial approach is ill-suited to the situation present here. Because a battery of tests was administered, it cannot be envisioned that a defense expert swiftly and almost instantaneously for each test could confirm the scoring, reassess the percentile rankings and statistical levels

> of confidence, and review the propriety of the conclusion drawn by plaintiff's expert, and then coolly assist defense counsel to prepare a comprehensive, thoughtful examination of plaintiff's expert. To delay access to the raw data until the trial, in this case, could be projected to lead to extensive trial delays for defense preparation of both a voir dire and cross examination bearing upon the tests and their results.

4 Misc3d at 357, 777 NYS2d 891-92. Though Justice Lebedeff notes that discovery in custody matters are limited, 4 Misc3d at 358 & n.2, 777 NYS2d at 892 & n.2, her reasoning applies equally well to a complicated custody dispute in which the award of custody depends on the validity of the forensic expert's conclusions and the strength of its reasoning.

Denying counsel access to the forensic expert's notes and raw data prevents proper cross examination and improperly drapes a "mantle of infallibility . . . around the court's experts." Freed, Brandeis & Weidman, Custody, Experts, Evaluations and Reports, NYLJ 3/12/92 at 3. Court evaluators, like all other human beings, are subject to biases, prejudices and frailties which should properly be exposed to the court before it adopts the evaluator's opinion and the only way to do so is by examining, not merely the evaluator's report, but the process in which the evaluator collected and analyzed the data to reach the conclusion. Timothy M. Tippins, Custody Evaluations, Part 4: Full Disclosure Critical, NYLJ 1/15/04 at 3 (*citing* Martindale, D.A., Cross Examining Mental Health Experts in Child Custody Litigation, The Journal of Psychiatry & Law, 29/Winter 2001 at 483).

> [T]hough it is reasonable to presume that evaluator bias is uncommon, unquestioning trust in evaluator neutrality is naive. The personal values that guide the lives of others and the human weaknesses that affect the

> lives of others are seen in evaluators as well. Whether in private conversation or courts of law, people who express opinions like to see those opinions accepted and are naturally inclined to offer supporting information and disinclined to offer non-supporting information.

Id. n.14. Indeed at least one other state has recognized the need for accountability by the forensic evaluators, *id.* n.15 (*citing R.M. v. S.G.*, 13 P.3d 747 (Alaska, 2000)) and even the American Psychological Association has recognized that psychologists should be permitted to turn over their notes, *id*. n.16 (*citing* APA Ethical Principles § 9.04 Release of Test Data). Hopefully, in a truly contested custody dispute in which there is a significant possibility of evaluator error, the courts will permit an attorney to properly prepare for cross examination by obtaining, well before trial, the notes and raw data underlying the evaluator's opinion. In that way the attorney will be permitted to obtain the assistance of another mental health professional to analyze the data and advise the attorney and court on whether the methodology used was deficient in some respect.

e. Neutrality of Forensic Examiner:

The court-appointed forensic evaluator must be neutral without any connection to either party. *Bricker v. Powers*, 196 AD2d 696, 601 NYS2d 616 (1st Dept., 1993) (reversing the trial court (David Saxe, J.) and holding that it was inappropriate to appoint a psychiatrist who attended school with one of the parties). (Note, the decision recounts how Dr. Stephen Herman was the first appointed expert but, when his "report . . . was inconclusive in that it made no recommendation and stated that the expert could not determine which statements of the respective parties were credible," the trial court appointed another forensic expert. This raises the question of whether it is appropriate for an expert to render an opinion on custody in apparent violation of "the usual rule that an expert is not permitted to give an opinion on the ultimate issue." *People v. Fuller*, 24

N.Y.2d 292, 309 n.4, 300 N.Y.S.2d 102 (1969); *People v. Ingram*, 2 AD3d 211, 770 NYS2d 294 (1st Dept., 2003).)

If, however, a party fails to object to the appointment, any objection is deemed waived. *Chait v. Chait*, 215 AD2d 238, 638 NYS2d 426 (1st Dept., 1995).

In *Edgerly v. Moore*, NYLJ 2/9/96 at 25 (Supreme Court, New York County) (David Saxe, J.), the court criticized one lawyer's "contact with and `preparation of' the court-appointed expert witness, particularly without advance notice to the other side."

f. Introduction, Availability & Confidentiality of the Forensic Reports:

Rule 202.18 of the Uniform Rules of the New York State Trial Courts, 22 NYCRR § 202.18, permits a court to appoint an expert even over the objection of a party. Rule 202.16[g] permits the court to accept into evidence a report made under oath by an expert, but requires "the expert [to] be present [in court] and available for cross-examination." 22 NYCRR § 202.16[g]. A court may not accept a report from an expert into evidence without disclosing its contents to the parties and their attorneys. *Chisaidos v. Chisaidos*, 170 AD2d 428, 565 NYS2d 536 (2d Dept., 1991). The court does not, however, have to permit the parties to obtain a physical copy of the report. *Scuderi-Forzano v. Forzano*, 213 AD2d 652, 624 NYS2d 942 (2d Dept., 1995). Permitting them to see the report in chambers is sufficient. *Id.*

Many courts that have released the forensic reports to the attorneys have required them to maintain the confidentiality of those reports and not provide copies of them to their clients. In *Chenkin v. Chenkin*, NYLJ 11/24/98 at 25 (Supreme Court, Suffolk County), for example, the court held that the forensic report may be shown to the parties but, citing the damage that can be done to parties if forensic reports are disseminated in the community, prohibited the attorneys from releasing the report to the clients. *Id.; accord, MC v. WW*, NYLJ 7/8/03 at 19 col. 5 (Supreme Court, Kings County) (Jeffrey Sunshine, J.).

B. General Formal Discovery Tools Including Interrogatories, Depositions and Requests to Produce

1. Scope of Discovery.

"Parties to a matrimonial action are entitled to a searching exploration of each other's assets and dealings at the time of and during the marriage in order to distinguish marital from separate property, to uncover hidden assets, and possible waste of marital property." *Briger v. Briger*, 110 AD2d 526, 487 NYS2d 756 (1st Dept., 1985)(*citing Kaye v. Kaye*, 102 AD2d 682, 686) (emphasis added).

CPLR § 3101(a) permits discovery of "all matter material and necessary in the prosecution and or defense of [the] action." CPLR § 3101(a). Although the phrase "material and necessary" might appear to be less broad than the Federal Rules' "any matter . . . which is relevant to the subject matter," Fed.R.Civ.P. 26(b)(1), the Court of Appeals has declared that it not "be accorded so narrow a construction." *Allen v. Crowell-Collier Pub. Co.*, 21 NY2d 403, 407-08, 288 NYS2d 449, 453 (1968). Rather, the Court stated, "we believe that a broad interpretation of the words `material and necessary' is proper." *Id.* The purpose of discovery, the Court explained, "is to advance the function of a trial to ascertain the truth and to accelerate the disposition of suits." 21 NY2d at 407. "[I]f there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered "evidence material . . . in the prosecution or defense." *Id.* (quoting 3 Weinstein-Korn-Miller, NY Civ.Prac. ¶ 3101.07). Ultimately, "[t]he test is one of usefulness and reason." *Andon ex rel. Andon v. 302-304 Mott St. Assoc.*, 94 NY2d 740, 746, 709 NYS2d 873, 877 (2000). Courts have also noted that, "[t]he rules governing disclosure differ from those concerning admissibility" and that material is discoverable even if not admissible "if it could lead to the discovery of admissible evidence." *Burgel v. Burgel*, 141 AD2d 215, 533 NYS2d 735, 737 (2d Dept., 1988).

2. Compulsory Financial Disclosure in Matrimonial Actions (DRL § 236[B][4])

DOMESTIC RELATIONS LAW
ARTICLE 13. PROVISIONS APPLICABLE TO MORE THAN ONE TYPE OF MATRIMONIAL ACTION

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

NY CLS Dom Rel § 236 (2004)

§ 236. Special controlling provisions; prior actions or proceedings; new actions or proceedings

Except as otherwise expressly provided in this section, the provisions of part A shall be controlling with respect to any action or proceeding commenced prior to the date on which the provisions of this section as amended become effective and the provisions of part B shall be controlling with respect to any action or proceeding commenced on or after such effective date. Any reference to this section or the provisions hereof in any action, proceeding, judgment, order, rule or agreement shall be deemed and construed to refer to either the provisions of part A or part B respectively and exclusively, determined as provided in this paragraph any inconsistent provision of law notwithstanding.

PART A
PRIOR ACTIONS OR PROCEEDINGS

Alimony, temporary and permanent.

1. Alimony. . . .

2. Compulsory financial disclosure. In all matrimonial actions and proceedings commenced on or after September first, nineteen hundred seventy-five in supreme court in which alimony, maintenance or support is in issue and all support proceedings in family court, there shall be compulsory disclosure by both parties of their respective financial states. No showing of special circumstances shall be required before such disclosure is ordered. A sworn statement of net worth shall be provided upon receipt of a notice in writing demanding the same, within twenty days after the receipt thereof. In the event said statement is not demanded, it shall be filed by each party, within ten days after joinder of issue, in the court in which the procedure is pending. As used in this section, the term net worth shall mean the amount by which total assets including income exceed total liabilities including fixed financial obligations. It shall include all income and assets of whatsoever kind and nature and wherever situated and shall include a list of all assets transferred in any manner during the preceding three years, or the length of the marriage, whichever is shorter; provided, however that transfers in the routine course of business which resulted in an exchange of assets of substantially equivalent value need not be specifically disclosed where such assets are otherwise identified in the statement of net worth. Noncompliance shall be punishable by any or all of the penalties prescribed in section thirty-one hundred twenty-six of the civil practice law and rules, in examination before or during trial.

PART B
NEW ACTIONS OR PROCEEDINGS

Maintenance and distributive award. 1. Definitions. . . . .

2. Matrimonial actions. . . . .

3. Agreement of the parties. . . . .

4. Compulsory financial disclosure.

a. In all matrimonial actions and proceedings in which alimony, maintenance or support is in issue, there shall be compulsory disclosure by both parties of their respective financial states. No showing of special circumstances shall be required before such disclosure is ordered. A sworn statement of net worth shall be provided upon receipt of a notice in writing demanding the same, within twenty days after the receipt thereof. In the event said statement is not demanded, it shall be filed with the clerk of the court by each party, within ten days after joinder of issue, in the court in which the proceeding is pending. As used in this part, the term "net worth" shall mean the amount by which total assets including income exceed total liabilities including fixed financial obligations. It shall include all income and assets of whatsoever kind and nature and wherever situated and shall include a list of all assets transferred in any manner during the preceding three years, or the length of the marriage, whichever is shorter; provided, however that transfers in the routine course of business which resulted in an exchange of assets of substantially equivalent value need not be specifically disclosed where such assets are otherwise identified in the statement of net worth. All such sworn statements of net worth shall be accompanied by a current and representative paycheck stub and the most recently filed state and federal income tax returns including a copy of the W-2(s) wage and tax statement(s) submitted with the returns. In addition, both parties shall provide information relating to any and all group health plans available to them for the provision of care or other medical benefits by insurance or otherwise for the benefit of the child or children for whom support is sought, including all such information as may be required to be included in a qualified medical child support order as defined in section six hundred nine of the employee retirement income security act of 1974 *(29 USC 1169)* including, but not limited to: (i) the name and last known mailing address of each party and of each dependent to be covered by the order; (ii) the identification and a description of each group health plan available for the benefit or coverage of the disclosing party and the child or children for whom support is sought; (iii) a detailed description of the type of coverage available from each group health plan for the potential benefit of each such dependent; (iv) the identification of the plan administrator for each such group health plan and the address of such administrator; (v) the identification numbers for each such group health plan; and (vi) such other information as may be required by the court. Noncompliance shall be punishable by any or all of the penalties prescribed in section thirty-one hundred twenty-six of the civil practice law and rules, in examination before or during trial.

b. As soon as practicable after a matrimonial action has been commenced, the court shall set the date or dates the parties shall use for the valuation of each asset. The valuation date or dates may be anytime from the date of commencement of the action to the date of trial.

5. Disposition of property in certain matrimonial actions. . . . .

6. Maintenance. . . . .

7. [*Interim Child Support*] . . . .

8. Special relief in matrimonial actions. . . . .

9. Enforcement and modification of orders and judgments in matrimonial actions. . . .

The specific matrimonial-discovery devices, however, are not exclusive. All of the discovery devices of Article 31 of the Civil Practice Law and Rules are also available to the matrimonial practitioner. *Colella v. Colella*, 99 AD2d 794 (2d Dept., 1984) (“The compulsory financial disclosure provision of the Equitable Distribution Law . . . evinces a legislative intent that both parties to a matrimonial action give full and fair

disclosure of finances which is not limited to the sworn statement of net worth . . . but includes any appropriate disclosure device authorized in CPLR article 31. `Indeed, the use of an examination before trial to supplement the official form affidavit provides a mechanism with which to guarantee the trustworthiness of the affidavit and to enforce its integrity')(quoting *Garrel v Garrel*, 59 AD2d 885, 886).

3. General Discovery Devices, CPLR Article 31 - Disclosure.

Disclosure generally **§ 3101. Scope of disclosure**

(a) Generally.
(b) Privileged matter.
(c) Attorney's work product.
(d) Trial preparation.
(e) Party's statement.
(f) Contents of insurance agreement.
(g) Accident reports.
(h) Amendment or supplementation of responses.
(i) [*films & photographs*]

§ 3102. Method of obtaining disclosure

(a) Disclosure devices.
(b) Stipulation or notice normal method.
(c) Before action commenced.
(d) After trial commenced.
(e) Action pending in another jurisdiction.
(f) Action to which state is party.

Protection from Abuse **§ 3103. Protective orders**

(a) Prevention of abuse.
(b) Suspension of disclosure pending application for protective order.
(c) Suppression of information improperly obtained.

§ 3104. Supervision of disclosure

(a) Motion for, and extent of, supervision of disclosure.
(b) Selection of referee.
(c) Powers of referee; motions referred to person supervising disclosure;
(d) Review of order of referee.
(e) Payment of expenses of referee.

R 3105. Notice to party in default

Depositions

R 3106. Priority of depositions; witnesses; prisoners; designation of deponent

(a) Normal priority.
(b) Witnesses.
(c) Prisoners.
(d) Designation of deponent.

R 3107. Notice of taking oral questions

R 3108. Written questions; when permitted

R 3109. Notice of taking deposition on written questions

(a) Notice of taking; service of questions and cross-questions.
(b) Officer asking written questions.

R 3110. Where the deposition is to be taken within the state

R 3111. Production of things at the examination

R 3112. Errors in notice for taking depositions

R 3113. Conduct of the examination

(a) Persons before whom the depositions may be taken.
(b) Oath of witness; recording of testimony; objections; continuous examination; written questions read by examining officer.
(c) Examination and cross-examination.

*** THIS SECTION IS CURRENT THROUGH CH. 262, 08/02/2004 ***
*** WITH THE EXCEPTION OF CHS. 1-3, 50, 51, 53-60, 94, 109, 138, 143, 146, 151, 156, 162, 170, 171, 186, 190, 198 and 207 ***

CIVIL PRACTICE LAW AND RULES
ARTICLE 31. DISCLOSURE

§ 3101. Scope of disclosure

(a) **Generally.** There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by:

(1) a party, or the officer, director, member, agent or employee of a party;

(2) a person who possessed a cause of action or defense asserted in the action;

(3) a person about to depart from the state, or without the state, or residing at a greater distance from the place of trial than one hundred miles, or so sick or infirm as to afford reasonable grounds of belief that he or she will not be able to attend the trial, or a person authorized to practice medicine, dentistry or podiatry who has provided medical, dental or podiatric care or diagnosis to the party demanding disclosure, or who has been retained by such party as an expert witness; and

(4) any other person, upon notice stating the circumstances or reasons such disclosure is sought or required.

(b) **Privileged matter.** Upon objection by a person entitled to assert the privilege, privileged matter shall not be obtainable.

(c) **Attorney's work product.** The work product of an attorney shall not be obtainable.

(d) **Trial preparation.**

1. Experts.

(i) Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just. In an action for medical, dental or podiatric malpractice, a party, in responding to a request, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph.

(ii) In an action for medical, dental or podiatric malpractice, any party may, by written offer made to and served upon all other parties and filed with the court, offer to disclose the name of, and to make available for examination upon oral deposition, any person the party making the offer expects to call as an expert witness at trial. Within twenty days of service of the offer, a party shall accept or reject the offer by serving a written reply upon all parties and filing a copy thereof with the court. Failure to serve a reply within twenty days of service of the offer shall be deemed a rejection of the offer. If all parties accept the offer, each party shall be required to produce his or her expert witness for examination upon oral deposition upon receipt of a notice to take

oral deposition in accordance with rule thirty-one hundred seven of this chapter. If any party, having made or accepted the offer, fails to make that party's expert available for oral deposition, that party shall be precluded from offering expert testimony at the trial of the action.

(iii) Further disclosure concerning the expected testimony of any expert may be obtained only by court order upon a showing of special circumstances and subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate. However, a party, without court order, may take the testimony of a person authorized to practice medicine, dentistry or podiatry who is the party's treating or retained expert, as described in paragraph three of subdivision (a) of this section, in which event any other party shall be entitled to the full disclosure authorized by this article with respect to that expert without court order.

2. Materials. Subject to the provisions of paragraph one of this subdivision, materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

(e) **Party's statement.** A party may obtain a copy of his own statement.

(f) **Contents of insurance agreement.** A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purpose of this subdivision, an application for insurance shall not be treated as part of an insurance agreement.

(g) **Accident reports.** Except as is otherwise provided by law, in addition to any other matter which may be subject to disclosure, there shall be full disclosure of any written report of an accident prepared in the regular course of business operations or practices of any person, firm, corporation, association or other public or private entity, unless prepared by a police or peace officer for a criminal investigation or prosecution and disclosure would interfere with a criminal investigation or prosecution.

(h) **Amendment or supplementation of responses.** A party shall amend or supplement a response previously given to a request for disclosure promptly upon the party's thereafter obtaining information that the response was incorrect or incomplete when made, or that the response, though correct and complete when made, no longer is correct and complete, and the circumstances are such that a failure to amend or supplement the response would be materially misleading. Where a party obtains such information an insufficient period of time before the commencement of trial appropriately to amend or supplement the response, the party shall not thereupon be precluded from introducing evidence at the trial solely on grounds of noncompliance with this subdivision. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just. Further amendment or supplementation may be obtained by court order.

(i) In addition to any other matter which may be subject to disclosure, there shall be full disclosure of any films, photographs, video tapes or audio tapes, including transcripts or memoranda thereof, involving a person referred to in paragraph one of subdivision (a) of this section. There shall be disclosure of all portions of such material, including out-takes, rather than only those portions a party intends to use. The provisions of this subdivision shall not apply to materials compiled for law enforcement purposes which are exempt from disclosure under section eighty-seven of the public

officers law.

§ 3102. Method of obtaining disclosure

(a) **Disclosure devices.** Information is obtainable by one or more of the following disclosure devices: depositions upon oral questions or without the state upon written questions, interrogatories, demands for addresses, discovery and inspection of documents or property, physical and mental examinations of persons, and requests for admission.

(b) **Stipulation or notice normal method.** Unless otherwise provided by the civil practice law and rules or by the court, disclosure shall be obtained by stipulation or on notice without leave of the court.

(c) **Before action commenced.** Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order. The court may appoint a referee to take testimony.

(d) **After trial commenced.** Except as provided in section 5223, during and after trial, disclosure may be obtained only by order of the trial court on notice.

(e) **Action pending in another jurisdiction.** When under any mandate, writ or commission issued out of any court of record in any other state, territory, district or foreign jurisdiction, or whenever upon notice or agreement, it is required to take the testimony of a witness in the state, he may be compelled to appear and testify in the same manner and by the same process as may be employed for the purpose of taking testimony in actions pending in the state. The supreme court or a county court shall make any appropriate order in aid of taking such a deposition.

(f) **Action to which state is party.** In an action in which the state is properly a party, whether as plaintiff, defendant or otherwise, disclosure by the state shall be available as if the state were a private person.

§ 3103. Protective orders

(a) **Prevention of abuse.** The court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

(b) **Suspension of disclosure pending application for protective order.** Service of a notice of motion for a protective order shall suspend disclosure of the particular matter in dispute.

(c) **Suppression of information improperly obtained.** If any disclosure under this article has been improperly or irregularly obtained so that a substantial right of a party is prejudiced, the court, on motion, may make an appropriate order, including an order that the information be suppressed.

§ 3104. Supervision of disclosure

(a) Motion for, and extent of, supervision of disclosure. Upon the motion of any party or witness on notice to all parties or on its own initiative without notice, the court in which an action is pending may by one of its judges or a referee supervise all or part of any disclosure procedure.

(b) Selection of referee. A judicial hearing officer may be designated as a referee under this section, or the court may permit all of the parties in an action to stipulate that a named attorney may act as referee. In such latter event, the stipulation shall provide for payment of his fees which shall, unless otherwise agreed, be taxed as disbursements.

(c) Powers of referee; motions referred to person supervising disclosure. A referee under this section shall have all the powers of the court under this article except the power to relieve himself of his duties, to appoint a successor, or to adjudge any person guilty of contempt. All motions or applications made under this article shall be returnable before the judge or referee, designated under this section and after disposition, if requested

by any party, his order shall be filed in the office of the clerk.

(d) Review of order of referee. Any party or witness may apply for review of an order made under this section by a referee. The application shall be by motion made in the court in which the action is pending within five days after the order is made. Service of a notice of motion for review shall suspend disclosure of the particular matter in dispute. If the question raised by the motion may affect the rights of a witness, notice shall be served on him personally or by mail at his last known address. It shall set forth succinctly the order complained of, the reason it is objectionable and the relief demanded.

(e) Payment of expenses of referee. Except where a judicial hearing officer has been designated a referee hereunder, the court may make an appropriate order for the payment of the reasonable expenses of the referee.

R 3105. Notice to party in default

When a party is in default for failure to appear, he shall not be entitled to notice or service of any copy required under this article.

R 3106. Priority of depositions; witnesses; prisoners; designation of deponent

(a) Normal priority. After an action is commenced, any party may take the testimony of any person by deposition upon oral or written questions. Leave of the court, granted on motion, shall be obtained if notice of the taking of the deposition of a party is served by the plaintiff before that party's time for serving a responsive pleading has expired.

(b) Witnesses. Where the person to be examined is not a party or a person who at the time of taking the deposition is an officer, director, member or employee of a party, he shall be served with a subpoena. Unless the court orders otherwise, on motion with or without notice, such subpoena shall be served at least twenty days before the examination. Where a motion for a protective order against such an examination is made, the witness shall be notified by the moving party that the examination is stayed.

(c) Prisoners. The deposition of a person confined under legal process may be taken only by leave of the court.

(d) Designation of deponent A party desiring to take the deposition of a particular officer, director, member or employee of a person shall include in the notice or subpoena served upon such person the identity, description or title of such individual. Such person shall produce the individual so designated unless they shall have, no later than ten days prior to the scheduled deposition, notified the requesting party that another individual would instead be produced and the identity, description or title of such individual is specified. If timely notification has been so given, such other individual shall instead be produced.

R 3107. Notice of taking oral questions

A party desiring to take the deposition of any person upon oral examination shall give to each party twenty days' notice, unless the court orders otherwise. The notice shall be in writing, stating the time and place for taking the deposition, the name and address of each person to be examined, if known, and, if any name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. The notice need not enumerate the matters upon which the person is to be examined. A party to be examined pursuant to notice served by another party may serve notice of at least ten days for the examination of any other party, his agent or employee, such examination to be noticed for and to follow at the same time and place.

R 3108. Written questions; when permitted

A deposition may be taken on written questions when the examining party and the deponent so stipulate or when the testimony is to be taken without the state. A commission or letters rogatory may be issued where necessary or convenient for the taking of a deposition outside of the state.

R 3109. Notice of taking deposition on written questions

(a) Notice of taking; service of questions and cross-questions. A party desiring to take the deposition of any person upon written questions shall serve such questions upon each party together with a notice stating the name and address of the person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and the name or descriptive title and address of the officer before whom the deposition is to be taken. Within fifteen days thereafter a party so served may serve written cross-questions upon each party. Within seven days thereafter the original party may serve written redirect questions upon each party. Within five days after being served with written redirect questions, a party may serve written recross-questions upon each party.

(b) Officer asking written questions. A copy of the notice and copies of all written questions served shall be delivered by the party taking the deposition to the officer designated in the notice. The officer shall proceed promptly to take the testimony of the witness in response to the written questions and to prepare the deposition.

R 3110. Where the deposition is to be taken within the state

A deposition within the state on notice shall be taken:

1. when the person to be examined is a party or an officer, director, member or employee of a party, within the county in which he resides or has an office for the regular transaction of business in person or where the action is pending; or

2. when any other person to be examined is a resident, within the county in which he resides, is regularly employed or has an office for the regular transaction of business in person, or if he is not a resident, within the county in which he is served, is regularly employed or has an office for the regular transaction of business in person; or

3. when the party to be examined is a public corporation or any officer, agent or employee thereof, within the county in which the action is pending; the place of such examination shall be the office of any of the attorneys for such a public corporation or any officer, agent or authorized employee thereof unless the parties stipulate otherwise.

For the purpose of this rule New York city shall be considered one county.

R 3111. Production of things at the examination

The notice or subpoena may require the production of books, papers and other things in the possession, custody or control of the person to be examined to be marked as exhibits, and used on the examination. The reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery.

R 3112. Errors in notice for taking depositions

All errors and irregularities in the notice for taking a deposition are waived unless at least three days before the time for taking the deposition written objection is served upon the party giving the notice.

R 3113. Conduct of the examination

(a) Persons before whom depositions may be taken. Depositions may be taken before any of the following persons except an attorney, or employee of an attorney, for a party or prospective party and except a person who would be disqualified to act as a juror because of interest in the event or consanguinity or affinity to a party:

1. within the state, a person authorized by the laws of the state to administer oaths;

2. without the state but within the United States or within a territory or possession subject to the jurisdiction of the United States, a person authorized to take acknowledgments of deeds outside of the state by the real property law of the state or to administer oaths by the laws of the United States or of the place where the deposition is taken; and

3. in a foreign country, any diplomatic or consular agent or representative of the United States,

appointed or accredited to, and residing within, the country, or a person appointed by commission or under letters rogatory, or an officer of the armed forces authorized to take the acknowledgment of deeds.

Officers may be designated in notices or commissions either by name or descriptive title and letters rogatory may be addressed "To the Appropriate Authority in (here name the state or country)."

(b) Oath of witness; recording of testimony; objections; continuous examination; written questions read by examining officer. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction, record the testimony. The testimony shall be recorded by stenographic or other means, subject to such rules as may be adopted by the appellate division in the department where the action is pending. All objections made at the time of the examination to the qualifications of the officer taking the deposition or the person recording it, or to the manner of taking it, or to the testimony presented, or to the conduct of any person, and any other objection to the proceedings, shall be noted by the officer upon the deposition and the deposition shall proceed subject to the right of a person to apply for a protective order. The deposition shall be taken continuously and without unreasonable adjournment, unless the court otherwise orders or the witness and parties present otherwise agree. In lieu of participating in an oral examination, any party served with notice of taking a deposition may transmit written questions to the officer, who shall propound them to the witness and record the answers.

(c) Examination and cross-examination. Examination and cross-examination of deponents shall proceed as permitted in the trial of actions in open court. When the deposition of a party is taken at the instance of an adverse party, the deponent may be cross-examined by his own attorney. Cross-examination need not be limited to the subject matter of the examination in chief.

(d) [Eff Jan 1, 2005] The parties may stipulate that a deposition be taken by telephone or other remote electronic means and that a party may participate electronically. The stipulation shall designate reasonable provisions to ensure that an accurate record of the deposition is generated, shall specify, if appropriate, reasonable provisions for the use of exhibits at the deposition; shall specify who must and who may physically be present at the deposition; and shall provide for any other provisions appropriate under the circumstances. Unless otherwise stipulated to by the parties, the officer administering the oath shall be physically present at the place of the deposition and the additional costs of conducting the deposition by telephonic or other remote electronic means, such as telephone charges, shall be borne by the party requesting that the deposition be conducted by such means.

R 3114. Examination of witness who does not understand the English language

If the witness to be examined does not understand the English language, the examining party must, at his own expense, provide a translation of all questions and answers. Where the court settles questions, it may settle them in the foreign language and in English. It may use the services of one or more experts whose compensation shall be paid by the party seeking the examination and may be taxed as a disbursement.

R 3115. Objections to qualification of person taking deposition; competency; questions and answers

(a) Objection when deposition offered in evidence. Subject to the other provisions of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(b) Errors which might be obviated if made known promptly. Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct

of persons, and errors of any kind which might be obviated or removed if objection were promptly presented, are waived unless reasonable objection thereto is made at the taking of the deposition.

(c) Disqualification of person taking deposition. Objection to the taking of a deposition because of disqualification of the person by whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(d) Competency of witnesses or admissibility of testimony. Objections to the competency of a witness or to the admissibility of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if objection had been made at that time.

(e) Form of written questions. Objections to the form of written questions are waived unless served in writing upon the party propounding the questions within the time allowed for serving succeeding questions or within three days after service.

R 3116. Signing deposition; physical preparation; copies

(a) Signing. The deposition shall be submitted to the witness for examination and shall be read to or by him or her, and any changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness before any officer authorized to administer an oath. If the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed. No changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination.

(b) Certification and filing by officer. The officer before whom the deposition was taken shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall list all appearances by the parties and attorneys. If the deposition was taken on written questions, he shall attach to it the copy of the notice and written questions received by him. He shall then securely seal the deposition in an envelope endorsed with the title of the action and the index number of the action, if one has been assigned, and marked "Deposition of (here insert name of witness)" and shall promptly file it with, or send it by registered or certified mail to the clerk of the court where the case is to be tried. The deposition shall always be open to the inspection of the parties, each of whom is entitled to make copies thereof. If a copy of the deposition is furnished to each party or if the parties stipulate to waive filing, the officer need not file the original but may deliver it to the party taking the deposition.

(c) Exhibits. Documentary evidence exhibited before the officer or exhibits marked for identification during the examination of the witness shall be annexed to and returned with the deposition. However, if requested by the party producing documentary evidence or on exhibit, the officer shall mark it for identification as an exhibit in the case, give each party an opportunity to copy or inspect it, and return it to the party offering it, and it may then be used in the same manner as if annexed to and returned with the deposition.

(d) Expenses of taking. Unless the court orders otherwise, the party taking the deposition shall bear the expense thereof.

(e) Errors of officer or person transcribing. Errors and irregularities of the officer or the person transcribing the deposition are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

R 3117. Use of depositions

(a) Impeachment of witnesses; parties; unavailable witness. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the

rules of evidence, may be used in accordance with any of the following provisions:

1. any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness;

2. the deposition testimony of a party or of any person who was a party when the testimony was given or of any person who at the time the testimony was given was an officer, director, member, employee or managing or authorized agent of a party, may be used for any purpose by any party who was adversely interested when the deposition testimony was given or who is adversely interested when the deposition testimony is offered in evidence;

3. the deposition of any person may be used by any party for any purpose against any other party who was present or represented at the taking of the deposition or who had the notice required under these rules, provided the court finds:

(i) that the witness is dead; or

(ii) that the witness is at a greater distance than one hundred miles from the place of trial or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(iii) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or

(iv) that the party offering the deposition has been unable to procure the attendance of the witness by diligent efforts; or

(v) upon motion or notice, that such exceptional circumstances exist as to make its use desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court;

4. the deposition of a person authorized to practice medicine may be used by any party without the necessity of showing unavailability or special circumstances, subject to the right of any party to move pursuant to section 3103 to prevent abuse.

(b) Use of part of deposition. If only part of a deposition is read at the trial by a party, any other party may read any other part of the deposition which ought in fairness to be considered in connection with the part read.

(c) Substitution of parties; prior actions. Substitution of parties does not affect the right to use depositions previously taken. When an action has been brought in any court of any state or of the United States and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest all depositions taken in the former action may be used in the latter as if taken therein.

(d) Effect of using deposition. A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use of a deposition as described in paragraph two of subdivision (a). At the trial, any party may rebut any relevant evidence contained in a deposition, whether introduced by him or by any other party.

R 3118. Demand for address of party or of person who possessed an assigned cause of action or defense

A party may serve on any party a written notice demanding a verified statement setting forth the post office address and residence of the party, of any specified officer or member of the party and of any person who possessed a cause of action or defense asserted in the action which has been assigned. The demand shall be complied with within ten days of its service.

R 3120. Discovery and production of documents and things for inspection, testing, copying or photographing

1. After commencement of an action, any party may serve on any other party a notice or on any other person a subpoena duces tecum:

(i) to produce and permit the party seeking discovery, or someone acting on his or her behalf, to inspect, copy, test or photograph any designated documents or any things which are in the possession,

custody or control of the party or person served; or

(ii) to permit entry upon designated land or other property in the possession, custody or control of the party or person served for the purpose of inspecting, measuring, surveying, sampling, testing, photographing or recording by motion pictures or otherwise the property or any specifically designated object or operation thereon.

2. The notice or subpoena duces tecum shall specify the time, which shall be not less than twenty days after service of the notice or subpoena, and the place and manner of making the inspection, copy, test or photograph, or of the entry upon the land or other property and, in the case of an inspection, copying, testing or photographing, shall set forth the items to be inspected, copied, tested or photographed by individual item or by category, and shall describe each item and category with reasonable particularity.

3. The party issuing a subpoena duces tecum as provided hereinabove shall at the same time serve a copy of the subpoena upon all other parties and, within five days of compliance therewith, in whole or in part, give to each party notice that the items produced in response thereto are available for inspection and copying, specifying the time and place thereof.

4. Nothing contained in this section shall be construed to change the requirement of section 2307 that a subpoena duces tecum to be served upon a library or a department or bureau of a municipal corporation, or of the state, or an officer thereof, requires a motion made on notice to the library, department, bureau or officer, and the adverse party, to a justice of the supreme court or a judge of the court in which the action is triable.

§ 3121. Physical or mental examination

(a) Notice of examination. After commencement of an action in which the mental or physical condition or the blood relationship of a party, or of an agent, employee or person in the custody or under the legal control of a party, is in controversy, any party may serve notice on another party to submit to a physical, mental or blood examination by a designated physician, or to produce for such examination his agent, employee or the person in his custody or under his legal control. The notice may require duly executed and acknowledged written authorizations permitting all parties to obtain, and make copies of, the records of specified hospitals relating to such mental or physical condition or blood relationship; where a party obtains a copy of a hospital record as a result of the authorization of another party, he shall deliver a duplicate of the copy to such party. A copy of the notice shall be served on the person to be examined. It shall specify the time, which shall be not less than twenty days after service of the notice, and the conditions and scope of the examination.

(b) Copy of report. A copy of a detailed written report of the examining physician setting out his findings and conclusions shall be delivered by the party seeking the examination to any party requesting to exchange therefor a copy of each report in his control of an examination made with respect to the mental or physical condition in controversy.

R 3122. Objection to disclosure, inspection or examination; compliance

(a) Within twenty days of service of a notice or subpoena duces tecum under rule 3120 or section 3121, the party or person to whom the notice or subpoena duces tecum is directed, if that party or person objects to the disclosure, inspection or examination, shall serve a response which shall state with reasonable particularity the reasons for each objection. If objection is made to part of an item or category, the part shall be specified. A medical provider served with a subpoena duces tecum requesting the production of a patient's medical records pursuant to this rule need not respond or object to the subpoena if the subpoena is not accompanied by a written authorization by the patient. Any subpoena served upon a medical provider requesting the medical records of a patient shall state in conspicuous bold-faced type that the records shall not be provided unless the subpoena is accompanied by a written authorization by the patient. The party seeking disclosure under rule 3120 or section 3121 may move for an order under rule 3124 or section 2308 with respect to any objection

to, or other failure to respond to or permit inspection as requested by, the notice or subpoena duces tecum, respectively, or any part thereof.

(b) Whenever a person is required pursuant to such a notice, subpoena duces tecum or order to produce documents for inspection, and where such person withholds one or more documents that appear to be within the category of the documents required by the notice, subpoena duces tecum or order to be produced, such person shall give notice to the party seeking the production and inspection of the documents that one or more such documents are being withheld. This notice shall indicate the legal ground for withholding each such document, and shall provide the following information as to each such document, unless the party withholding the document states that divulgence of such information would cause disclosure of the allegedly privileged information: (1) the type of document; (2) the general subject matter of the document; (3) the date of the document; and (4) such other information as is sufficient to identify the document for a subpoena duces tecum.

(c) Whenever a person is required pursuant to such notice or order to produce documents for inspection, that person shall produce them as they are kept in the regular course of business or shall organize and label them to correspond to the categories in the request.

(d) Unless the subpoena duces tecum directs the production of original documents for inspection and copying at the place where such items are usually maintained, it shall be sufficient for the custodian or other qualified person to deliver complete and accurate copies of the items to be produced. The reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery.

R 3122-a. Certification of business records

(a) Business records produced pursuant to a subpoena duces tecum under rule 3120 shall be accompanied by a certification, sworn in the form of an affidavit and subscribed by the custodian or other qualified witness charged with responsibility of maintaining the records, stating in substance each of the following:

1. The affiant is the duly authorized custodian or other qualified witness and has authority to make the certification;

2. To the best of the affiant's knowledge, after reasonable inquiry, the records or copies thereof are accurate versions of the documents described in the subpoena duces tecum that are in the possession, custody, or control of the person receiving the subpoena;

3. To the best of the affiant's knowledge, after reasonable inquiry, the records or copies produced represent all the documents described in the subpoena duces tecum, or if they do not represent a complete set of the documents subpoenaed, an explanation of which documents are missing and a reason for their absence is provided; and

4. The records or copies produced were made by the personnel or staff of the business, or persons acting under their control, in the regular course of business, at the time of the act, transaction, occurrence or event recorded therein, or within a reasonable time thereafter, and that it was the regular course of business to make such records.

(b) A certification made in compliance with subdivision (a) is admissible as to the matters set forth therein and as to such matters shall be presumed true. When more than one person has knowledge of the facts, more than one certification may be made.

(c) A party intending to offer at a trial or hearing business records authenticated by certification subscribed pursuant to this rule shall, at least thirty days before the trial or hearing, give notice of such intent and specify the place where such records may be inspected at reasonable times. No later than ten days before the trial or hearing, a party upon whom such notice is served may object to the offer of business records by certification stating the grounds for the objection. Such objection may be asserted in any instance and shall not be subject to imposition of any penalty or sanction. Unless objection is made pursuant to this subdivision, or is made at trial based upon evidence which could not

have been discovered by the exercise of due diligence prior to the time for objection otherwise required by this subdivision, business records certified in accordance with this rule shall be deemed to have satisfied the requirements of subdivision (a) of rule 4518. Notwithstanding the issuance of such notice or objection to same, a party may subpoena the custodian to appear and testify and require the production of original business records at the trial or hearing.

§ 3123. Admissions as to matters of fact, papers, documents and photographs

(a) Notice to admit; admission unless denied or denial excused. At any time after service of the answer or after the expiration of twenty days from service of the summons, whichever is sooner, and not later than twenty days before the trial, a party may serve upon any other party a written request for admission by the latter of the genuineness of any papers or documents, or the correctness or fairness of representation of any photographs, described in and served with the request, or of the truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry. Copies of the papers, documents or photographs shall be served with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless within twenty days after service thereof or within such further time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters. If the matters of which an admission is requested cannot be fairly admitted without some material qualification or explanation, or if the matters constitute a trade secret or such party would be privileged or disqualified from testifying as a witness concerning them, such party may, in lieu of a denial or statement, serve a sworn statement setting forth in detail his claim and, if the claim is that the matters cannot be fairly admitted without some material qualification or explanation, admitting the matters with such qualification or explanation.

(b) Effect of admission. Any admission made, or deemed to be made, by a party pursuant to a request made under this rule is for the purpose of the pending action only and does not constitute an admission by him for any other purpose nor may it be used against him in any other proceeding; and the court, at any time, may allow a party to amend or withdraw any admission on such terms as may be just. Any admission shall be subject to all pertinent objections to admissibility which may be interposed at the trial.

(c) Penalty for unreasonable denial. If a party, after being served with a request under subdivision (a) does not admit and if the party requesting the admission thereafter proves the genuineness of any such paper or document, or the correctness or fairness of representation of any such photograph, or the truth of any such matter of fact, he may move at or immediately following the trial for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. Unless the court finds that there were good reasons for the denial or the refusal otherwise to admit or that the admissions sought were of no substantial importance, the order shall be made irrespective of the result of the action. Upon a trial by jury, the motion for such an order shall be determined by the court outside the presence of the jury.

R 3124. Failure to disclose; motion to compel disclosure

If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response.

R 3125. Place where motion to compel disclosure made

Unless otherwise provided by rule of the chief

administrator of the courts, the county in which a deposition is being taken or an examination or inspection is being sought may be treated by the moving party as the county in which the action is pending for purposes of section 3124.

§ 3126. Penalties for refusal to comply with order or to disclose

If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or

2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or

3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

§ 3130. Use of interrogatories

1. Except as otherwise provided herein, after commencement of an action, any party may serve upon any other party written interrogatories. Except in a matrimonial action, a party may not serve written interrogatories on another party and also demand a bill of particulars of the same party pursuant to section 3041. In the case of an action to recover damages for personal injury, injury to property or wrongful death predicated solely on a cause or causes of action for negligence, a party shall not be permitted to serve interrogatories on and conduct a deposition of the same party pursuant to rule 3107 without leave of court.

2. After the commencement of a matrimonial action or proceeding, upon motion brought by either party, upon such notice to the other party and to the non-party from whom financial disclosure is sought, and given in such manner as the court shall direct, the court may order a non-party to respond under oath to written interrogatories limited to furnishing financial information concerning a party, and further provided such information is both reasonable and necessary in the prosecution or the defense of such matrimonial action or proceeding.

§ 3131. Scope of interrogatories

Interrogatories may relate to any matters embraced in the disclosure requirement of section 3101 and the answers may be used to the same extent as the depositions of a party. Interrogatories may require copies of such papers, documents or photographs as are relevant to the answers required, unless opportunity for this examination and copying be afforded.

R 3132. Service of interrogatories

After commencement of an action, any party may serve written interrogatories upon any other party. Interrogatories may not be served upon a defendant before that defendant's time for serving a responsive pleading has expired, except by leave of court granted with or without notice. A copy of the interrogatories and of any order made under this rule shall be served on each party.

R 3133. Service of answers or objections to interrogatories

(a) Service of an answer or objection. Within twenty days after service of interrogatories, the party upon whom they are served shall serve upon each of the parties a copy of the answer to each interrogatory, except one to which the party objects, in which event the reasons for the objection shall be stated with reasonable particularity.

(b) Form of answers and objections to

interrogatories. Interrogatories shall be answered in writing under oath by the party served, if an individual, or, if the party served is a corporation, a partnership or a sole proprietorship, by an officer, director, member, agent or employee having the information. Each question shall be answered separately and fully, and each answer shall be preceded by the question to which it responds.

(c) Amended answers. Except with respect to amendment or supplementation of responses pursuant to subdivision (h) of section 3101, answers to interrogatories may be amended or supplemented only by order of the court upon motion.

§ 3140. Disclosure of appraisals in proceedings for condemnation, appropriation or review of tax assessments

Notwithstanding the provisions of subdivisions (c) and (d) of section 3101, the chief administrator of the courts shall adopt rules governing the exchange of appraisal reports intended for use at the trial in proceedings for condemnation, appropriation or review of tax assessments.

Abusive Discovery Demands:

An interrogatory requesting a spouse to identify "accountants, stockbrokers, corporate attorneys and advisors during the past five years" is unreasonable and was struck down in *Briger v. Briger*, 110 AD2d 526, 487 NYS2d 756 (1st Dept., 1985). Similarly, interrogatories that require the production of "all" or "any and all" documents "constitute[] an overly burdensome demand for discovery." *MacKinnon v. MacKinnon*, 245 AD2d 690, 665 NYS2d 123 (3d Dept., 1997). The court, in *MacKinnon*, further held that the trial court properly limited the disclosure period to five years preceding the commencement of the action, and held, under the facts of that case, that conducting "an impermissible fishing expedition" by way of interrogatories before conducting depositions was abusive and improper. *Id.*

4. Local Court Rules relating to Discovery and Discovery in Matrimonial Actions (22 NYCRR §§ 202.1, *et. seq.*)

New York Codes, Rules, and Regulations
TITLE 22. JUDICIARY
SUBTITLE A. JUDICIAL ADMINISTRATION
CHAPTER I. STANDARDS AND ADMINISTRATIVE POLICIES
CHAPTER II. UNIFORM RULES FOR THE NEW YORK STATE TRIAL COURTS
PART 200. UNIFORM RULES FOR COURTS EXERCISING CRIMINAL JURISDICTION
PART 202. UNIFORM CIVIL RULES FOR THE SUPREME COURT AND THE COUNTY COURT

202.1 Application of Part; waiver; additional rules; application of CPLR; definitions
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202.14 Special masters
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§ 202.27 Defaults
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202.31 Identification of trial counsel
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202.33 Conduct of the voir dire
202.35 Submission of papers for trial
202.36 Absence of attorney during trial
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202.42 Bifurcated trials

NEW YORK CODES, RULES AND REGULATIONS

*** THIS DOCUMENT REFLECTS CHANGES RECEIVED THROUGH AUGUST 20, 2004 ***

TITLE 22. JUDICIARY
SUBTITLE A. JUDICIAL ADMINISTRATION
CHAPTER II. UNIFORM RULES FOR THE NEW YORK STATE TRIAL COURTS
PART 202. UNIFORM CIVIL RULES FOR THE SUPREME COURT AND THE COUNTY COURT

@ 202.15 Videotape recording of civil depositions

(a) When permitted. Depositions authorized under the provisions of the Civil Practice Law and Rules or other law may be taken, as permitted by section 3113(b) of the Civil Practice Law and Rules, by means of simultaneous audio and visual electronic recording, provided such recording is made in conformity with this section.

(b) Other rules applicable. Except as otherwise provided in this section, or where the nature of videotaped recording makes compliance impossible or unnecessary, all rules generally applicable to examinations before trial shall apply to videotaped recording of depositions.

(c) Notice of taking deposition. Every notice or subpoena for the taking of a videotaped deposition shall state that it is to be videotaped and the name and address of the videotape operator and of the operator's employer, if any. The operator may be an employee of the attorney taking the deposition. Where an application for an order to take a videotaped deposition is made, the application and order shall contain the same information.

(d) Conduct of the examination.

(1) The deposition shall begin by one of the attorneys or the operator stating on camera:

(i) the operator's name and address;

(ii) the name and address of the operator's employer;

(iii) the date, the time and place of the deposition; and

(iv) the party on whose behalf the deposition is being taken.

The officer before whom the deposition is taken shall be a person authorized by statute and shall identify himself or herself and swear the witness on camera. If the deposition requires the use of more than one tape, the end of each tape and the beginning of each succeeding tape shall be announced by the operator.

(2) Every videotaped deposition shall be timed by means of a time-date generator which shall permanently record hours, minutes and seconds. Each time the videotape is stopped and resumed, such times shall be orally announced on the tape.

(3) More than one camera may be used, either in

sequence or simultaneously.

(4) At the conclusion of the deposition, a statement shall be made on camera that the recording is completed. As soon as practicable thereafter, the videotape shall be shown to the witness for examination, unless such showing and examination are waived by the witness and the parties.

(5) Technical data, such as recording speeds and other information needed to replay or copy the tape, shall be included on copies of the videotaped deposition.

(e) Copies and transcription. The parties may make audio copies of the deposition and thereafter may purchase additional audio and audio-visual copies. A party may arrange to have a stenographic transcription made of the deposition at his or her own expense.

(f) Certification. The officer before whom the videotape deposition is taken shall cause to be attached to the original videotape recording a certification that the witness was fully sworn or affirmed by the officer and that the videotape recording is a true record of the testimony given by the witness. If the witness has not waived the right to a showing and examination of the videotape deposition, the witness shall also sign the certification in accordance with the provisions of section 3116 of the Civil Practice Law and Rules.

(g) Filing and objections. (1) If no objections have been made by any of the parties during the course of the deposition, the videotape deposition may be filed by the proponent with the clerk of the trial court and shall be filed upon the request of any party.

(2) If objections have been made by any of the parties during the course of the deposition, the videotape deposition, with the certification, shall be submitted to the court upon the request of any of the parties within 10 days after its recording, or within such other period as the parties may stipulate, or as soon thereafter as the objections may be heard by the court, for the purpose of obtaining rulings on the objections. An audio copy of the sound track may be submitted in lieu of the videotape for this purpose, as the court may prefer. The court may view such portions of the videotape recording as it deems pertinent to the objections made, or may listen to an audiotape recording. The court, in its discretion, may also require submission of a stenographic transcript of the portion of the deposition to which objection is made, and may read such transcript in lieu of reviewing the videotape or audio copy.

(3) (i) The court shall rule on the objections prior to the date set for trial and shall return the recording to the proponent of the videotape with notice to the parties of its rulings and of its instructions as to editing. The editing shall reflect the rulings of the court and shall remove all references to the objections. The proponent, after causing the videotape to be edited in accordance with the court's instructions, may cause both the original videotape recording and the deleted version of the recording, clearly identified, to be filed with the clerk of the trial court, and shall do so at the request of any party. Before such filing, the proponent shall permit the other party to view the edited videotape.

(ii) The court may, in respect to objectionable material, instead of ordering its deletion, permit such material to be clearly marked so that the audio recording may be suppressed by the operator during the objectionable portion when the videotape is presented at the trial. In such case the proponent may cause both the original videotape recording and a marked version of that recording, each clearly identified, to be filed with the clerk of the trial court, and shall do so at the request of any party.

(h) Custody of tape. When the tape is filed with the clerk of the court, the clerk shall give an appropriate receipt for the tape and shall provide secure and adequate facilities for the storage of videotape recordings.

(i) Use at trial. The use of videotape recordings of depositions at the trial shall be governed by the provisions of the Civil Practice Law and Rules and all other relevant statutes, court rules and decisional law relating to depositions and relating to the admissibility of evidence. The proponent of the videotaped deposition shall have the responsibility of providing whatever equipment and personnel may be necessary for presenting such videotape deposition.

(j) Applicability to audio taping of depositions. Except where clearly inapplicable because of the lack of a video portion, these rules are equally applicable to the taking of depositions by audio recording alone. However, in the case of the taking of a deposition upon notice by audio recording alone, any party, at least five days before the date noticed for taking the deposition, may apply to the court for an order establishing additional or alternate procedures for the taking of such audio deposition, and upon the making of the application, the deposition may be taken only in accordance with the court order.

(k) Cost. The cost of videotaping or audio recording shall be borne by the party who served the notice for the videotaped or audio recording of the deposition, and such cost shall be a taxable disbursement in the action unless the court in its discretion orders otherwise in the interest of justice.

(l) Transcription for appeal. On appeal, visual and audio depositions shall be transcribed in the same manner as other testimony and transcripts filed in the appellate court. The visual and audio depositions shall remain part of the original record in the case and shall be transmitted therewith. In lieu of the transcribed deposition and, on leave of the appellate court, a party may request a viewing of portions of the visual deposition by the appellate court but, in such case, a transcript of pertinent portions of the deposition shall be filed as required by the court.

§ 202.16 Matrimonial actions; calendar control of financial disclosure in actions and proceedings involving alimony, maintenance, child support and equitable distribution; motions for alimony, counsel fees pendente lite, and child support; special rules

(a) Applicability. This section shall be applicable to all contested actions and proceedings in the Supreme Court in which statements of net worth are required by section 236 of the Domestic Relations Law to be filed and in which a judicial determination may be made with respect to alimony, counsel fees pendente lite, maintenance, custody and visitation, child support, or the equitable distribution of property, including those referred to Family Court by the Supreme Court pursuant to section 464 of the Family Court Act.

(b) Form of Statements of Net Worth. Sworn statements of net worth, except as provided in subdivision (k) of this section, exchanged and filed with the court pursuant to section 236 of the Domestic Relations Law, shall be in substantial compliance with the Statement of Net Worth form contained in Chapter III, Subchapter A of Subtitle D (Forms) of this Title.

(c) Retainer agreements and closing statements. (1) A signed copy of the attorney's retainer agreement with the client shall accompany the statement of net worth filed with the court, and the court shall examine the agreement to assure that it conforms to Appellate Division attorney conduct and disciplinary rules. Where substitution of counsel occurs after the filing with the court of the net worth statement, a signed copy of the attorney's retainer agreement shall be filed with the court within 10 days of its execution.

(2) An attorney seeking to obtain an interest in any property of his or her client to secure payment of the attorney's fee shall make application to the court for approval of said interest on notice to the client and to his or her adversary. The application may be granted only after the court reviews the finances of the parties and an application for attorney's fees.

(d) Request for Judicial Intervention. A request for judicial intervention shall be filed with the court by the plaintiff no later than 45 days from the date of service of the summons and complaint or summons with notice upon the defendant, unless both parties file a notice of no necessity with the court, in which event the request for judicial intervention may be filed no later than 120 days from the date of service of the summons and complaint or summons with notice upon the defendant. Notwithstanding section 202.6(a) of this Part, the court shall accept a request for judicial intervention that is not accompanied by other papers to be filed in court.

(e) Certification. Every paper served on another party or filed or submitted to the court in a

matrimonial action shall be signed as provided in section 130-1.1a of this Title.

(f) Preliminary conference. (1) In all actions or proceedings to which this section of the rules is applicable, a preliminary conference shall be ordered by the court to be held within 45 days after the action has been assigned. Such order shall set the time and date for the conference and shall specify the papers that shall be exchanged between the parties. These papers must be exchanged no later than 10 days prior to the preliminary conference, unless the court directs otherwise. These papers shall include:

(i) statements of net worth, which also shall be filed with the court no later than 10 days prior to the preliminary conference;

(ii) all paycheck stubs for the current calendar year and the last paycheck stub for the immediately preceding calendar year;

(iii) all filed state and federal income tax returns for the previous three years, including both personal returns and returns filed on behalf of any partnership or closely held corporation of which the party is a partner or shareholder;

(iv) all W-2 wage and tax statements, 1099 forms, and K-1 forms for any year in the past three years in which the party did not file state and federal income tax returns;

(v) all statements of accounts received during the past three years from each financial institution in which the party has maintained any account in which cash or securities are held;

(vi) the statements immediately preceding and following the date of commencement of the matrimonial action pertaining to:

(a) any policy of life insurance having a cash or dividend surrender value; and

(b) any deferred compensation plan of any type or nature in which the party has an interest including, but not limited to, Individual Retirement Accounts, pensions, profit-sharing plans, Keogh plans, 401(k) plans and other retirement plans.

Both parties personally must be present in court at the time of the conference, and the judge personally shall address the parties at some time during the conference.

(2) The matters to be considered at the conference may include, among other things:

(i) applications for pendente lite relief, including interim counsel fees;

(ii) compliance with the requirement of compulsory financial disclosure, including the exchange and filing of a supplemental statement of net worth indicating material changes in any previously exchanged and filed statement of net worth;

(iii) simplification and limitation of the issues;

(iv) the establishment of a timetable for the completion of all disclosure proceedings, provided that all such procedures must be completed and the note of issue filed within six months from the commencement of the conference, unless otherwise shortened or extended by the court depending upon the circumstances of the case; and

(v) any other matters which the court shall deem appropriate.

(3) At the close of the conference, the court shall direct the parties to stipulate, in writing or on the record, as to all resolved issues, which the court then shall "so order," and as to all issues with respect to fault, custody and finance that remain unresolved. Any issues with respect to fault, custody and finance that are not specifically described in writing or on the record at that time may not be raised in the action unless good cause is shown. The court shall fix a schedule for discovery as to all unresolved issues and, in a noncomplex case, shall schedule a date for trial not later than six months from the date of the conference. The court may appoint a law guardian for the infant children, or may direct the parties to file with the court, within 30 days of the conference, a list of suitable law guardians for selection by the court. The court also may direct that a list of expert witnesses be filed with the court within 30 days of the conference from which the court may select a neutral expert to assist the court. The court shall

schedule a compliance conference unless the court dispenses with the conference based upon a stipulation of compliance filed by the parties. Unless the court excuses their presence, the parties personally must be present in court at the time of the compliance conference. If the parties are present in court, the judge personally shall address them at some time during the conference.

(g) Expert witnesses. (1) Responses to demands for expert information pursuant to CPLR § 3101(d) shall be served within 20 days following service of such demands.

(2) Each expert witness whom a party expects to call at the trial shall file with the court a written report, which shall be exchanged and filed with the court no later than 60 days before the date set for trial, and reply reports, if any, shall be exchanged and filed no later than 30 days before such date. Failure to file with the court a report in conformance with these requirements may, in the court's discretion, preclude the use of the expert. Except for good cause shown, the reports exchanged between the parties shall be the only reports admissible at trial. Late retention of experts and consequent late submission of reports shall be permitted only upon a showing of good cause as authorized by CPLR § 3101(d)(1)(i). In the discretion of the court, written reports may be used to substitute for direct testimony at the trial, but the reports shall be submitted by the expert under oath, and the expert shall be present and available for cross-examination. In the discretion of the court, in a proper case, parties may be bound by the expert's report in their direct case.

(h) Statement of proposed disposition. (1) Each party shall exchange a statement setting forth the following:

(i) the assets claimed to be marital property;

(ii) the assets claimed to be separate property;

(iii) an allocation of debts or liabilities to specific marital or separate assets, where appropriate;

(iv) the amount requested for maintenance, indicating and elaborating upon the statutory factors forming the basis for the maintenance requests;

(v) the proposal for equitable distribution, where appropriate, indicating and elaborating upon the statutory factors forming the basis for the proposed distribution;

(vi) the proposal for a distributive award, if requested, including a showing of the need for a distributive award;

(vii) the proposed plan for child support, indicating and elaborating upon the statutory factors upon which the proposal is based; and

(viii) the proposed plan for custody and visitation of any children involved in the proceeding, setting forth the reasons therefor.

(2) A copy of any written agreement entered into by the parties relating to financial arrangements or custody or visitation shall be annexed to the statement referred to in paragraph (1) of this subdivision.

(3) The statement referred to in paragraph (1) of this subdivision, with proof of service upon the other party, shall, with the note of issue, be filed with the court. The other party, if he or she has not already done so, shall file with the court a statement complying with paragraph (1) of this subdivision within 20 days of such service.

(i) Filing of note of issue. No action or proceeding to which this section is applicable shall be deemed ready for trial unless there is compliance with this section by the party filing the note of issue and certificate of readiness.

(j) Referral to family court. In all actions or proceedings to which this section is applicable referred to the Family Court by the Supreme Court pursuant to section 464 of the Family Court Act, all statements, including supplemental statements, exchanged and filed by the parties pursuant to this section shall be transmitted to the Family Court with the order of referral.

(k) Motions for alimony, maintenance, counsel fees pendente lite and child support (other than under section 237(c) or section 238 of the Domestic Relations Law). Unless, on application made to the court, the requirements of this subdivision be waived for good cause shown, or

unless otherwise expressly provided by any provision of the CPLR or other statute, the following requirements shall govern motions for alimony, maintenance, counsel fees (other than a motion made pursuant to section 237(c) or section 238 of the Domestic Relations Law for counsel fees for services rendered by an attorney to secure the enforcement of a previously granted order or decree) or child support or any modification of an award thereof:

(1) Such motion shall be made before or at the preliminary conference, if practicable.

(2) No motion shall be heard unless the moving papers include a statement of net worth in the official form prescribed by subdivision (b) of this section.

(3) No motion for counsel fees shall be heard unless the moving papers also include the affidavit of the movant's attorney stating the moneys, if any, received on account of such attorney's fee from the movant or any other person on behalf of the movant, and the moneys such attorney has been promised by, or the agreement made with, the movant or other persons on behalf of the movant, concerning or in payment of the fee.

(4) The party opposing any motion shall be deemed to have admitted, for the purpose of the motion but not otherwise, such facts set forth in the moving party's statement of net worth as are not controverted in:

(i) a statement of net worth, in the official form prescribed by this section, completed and sworn to by the opposing party, and made a part of the answering papers; or

(ii) other sworn statements or affidavits with respect to any fact which is not feasible to controvert in the opposing party's statement of net worth.

(5) The failure to comply with the provisions of this subdivision shall be good cause, in the discretion of the judge presiding, either:

(i) to draw an inference favorable to the adverse party with respect to any disputed fact or issue affected by such failures; or

(ii) to deny the motion without prejudice to renewal upon compliance with the provisions of this section.

(6) The notice of motion submitted with any motion for or related to interim maintenance or child support shall contain a notation indicating the nature of the motion. Any such motion shall be determined within 30 days after the motion is submitted for decision.

(7) Upon any application for an award of counsel fees or appraisal/accounting fees made prior to the conclusion of the trial of the action, the court shall set forth in specific detail, in writing or on the record, the factors it considered and the reasons for its decision.

(1) Hearings or trials pertaining to temporary or permanent custody or visitation shall proceed from day to day to conclusion. With respect to other issues before the court, to the extent feasible, trial should proceed from day to day to conclusion.

. . . .

§ 202.18 Testimony of court-appointed expert witness in matrimonial action or proceeding

In any action or proceeding tried without a jury to which section 237 of the Domestic Relations Law applies, the court may appoint a psychiatrist, psychologist, social worker or other appropriate expert to give testimony with respect to custody or visitation, and may appoint an accountant, appraiser, actuary or other appropriate expert to give testimony with respect to equitable distribution or a distributive award. The cost of such expert witness shall be paid by a party or parties as the court shall direct.

5. The Close of Discovery - Filing the Note of Issue (22 NYCRR §§ 202.21)

§ 202.21 Note of issue and certificate of readiness

(a) General. No action or special proceeding shall be deemed ready for trial or inquest unless there is first filed a note of issue accompanied by a certificate of readiness, with proof of service on all parties entitled to notice, in the form prescribed by this section. Filing of a note of issue and certificate of readiness is not required for an application for court approval of the settlement of the claim of an infant, incompetent or conservatee. The note of issue shall include the county clerk's index number; the name of the judge to whom the action is assigned; the name, office address and telephone number of each attorney who has appeared; the name, address and telephone number of any party who has appeared pro se; and the name of any insurance carrier acting on behalf of any party. Within 10 days after service, the original note of issue, and the certificate of readiness where required, with proof of service where service is required, shall be filed in duplicate with the county clerk together with payment of the calendar fee prescribed by CPLR 8020 or a copy of an order permitting the party filing the note of issue to proceed as a poor person, and a duplicate original with proof of service shall be filed with the clerk of the trial court. The county clerk shall forward one of the duplicate originals of the note of issue to the clerk of the trial court stamped "Fee Paid" or "Poor Person Order."

(b) Forms. The note of issue and certificate of readiness shall read substantially as follows:

NOTE OF ISSUE

Calendar No. (if any)..... For use of clerk
Index No. .....
.....Court, ... County
Name of assigned judge.....

Notice for trial

Trial by jury demanded _____
_____ of all issues
_____ of issues specified below
_____ or attached hereto
Trial without jury _____
Filed by attorney for _____
Date summons served _____
Date service completed _____
Date issue joined _____
Nature of action or special proceeding
Tort:
Motor vehicle negligence _____
Medical malpractice _____
Other tort _____
Contract _____
Contested matrimonial _____

Special preference
claimed under_____
on the ground that _____
_____

Uncontested matrimonial _____
Tax certiorari _____
Condemnation _____
Other (not itemized above) _____
(specify)_____

Attorney(s) for Plaintiff(s)
Office and P.O. Address:
Phone No.

Indicate if this action is
brought as a class action _____

Attorney(s) for Defendant(s)
Office and P.O. Address:
Phone No.

Amount demanded $ _____
Other relief _____
Insurance carrier(s), if known:

NOTE: The clerk will not accept this note of issue unless accompanied by a certificate of readiness.

CERTIFICATE OF READINESS FOR TRIAL(Items 1-7 must be checked)

	Complete	Waived	Not required
1. All pleadings served.	.....	.....	.....
2. Bill of particulars served.	.....	.....	.....
3. Physical examinations completed.	.....	.....	.....
4. Medical reports exchanged.	.....	.....	.....
5. Appraisal reports exchanged.	.....	.....	.....
6. Compliance with section 202.16 of the Rules of the Chief Administrator (22 NYCRR 202.16) in matrimonial actions.	.....	.....	.....
7. Discovery proceedings now known to be necessary completed.	.....	.....	.....

8. There are no outstanding requests for discovery.

9. There has been a reasonable opportunity to complete the foregoing proceedings.

10. There has been compliance with any order issued pursuant to section 202.12 of the Rules of the Chief Administrator (22 NYCRR 202.12).

11. If a medical malpractice action, there has been compliance with any order issued pursuant to section 202.56 of the Rules of the Chief Administrator (22 NYCRR 202.56).

12. The case is ready for trial.

Dated: _____
(Signature) _____
Attorney(s) for: _____
Office and P.O. address: _____
_____

(c) Jury trials. A trial by jury may be demanded as provided by CPLR 4102. Where a jury trial has been demanded, the action or special proceeding shall be scheduled for jury trial upon payment of the fee prescribed by CPLR 8020 by the party first filing the demand. If no demand for a jury trial is made, it shall constitute a waiver by all parties and the action or special proceeding shall be scheduled for nonjury trial.

(d) Pretrial proceedings. Where a party is prevented from filing a note of issue and certificate of readiness because a pretrial proceeding has not been completed for any reason beyond the control of the party, the court, upon motion supported by affidavit, may permit the party to file a note of issue upon such conditions as the court deems appropriate. Where unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings.

(e) Vacating note of issue. Within 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect. However, the 20-day time limitation to make such motion shall not apply to tax assessment review proceedings. After such period, except in a tax assessment review proceeding, no such motion shall be allowed except for good cause shown. At any time, the court on its own motion may vacate a note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect. If the motion to vacate a note of issue is granted, a copy of the order vacating the note of issue shall be served upon the clerk of the trial court.

(f) Reinstatement of note of issue. Motions to reinstate notes of issue vacated pursuant to this section shall be supported by a proper and sufficient certificate of readiness and by an affidavit by a person having first-hand knowledge showing that there is merit to the action, satisfactorily showing the reasons for the acts or omissions which led to the note of issue being vacated, stating meritorious reasons for its reinstatement and showing that the case is presently ready for trial.

(g) Limited specification of damages demanded in certain actions. This subdivision shall apply only in counties where the Chief Administrator of the Courts has established arbitration programs pursuant to Part 28 of the Rules of the Chief Judge of the State of New York pertaining to the arbitration of certain actions (22 NYCRR Part 28). In a medical malpractice action or an action against a municipality seeking a sum of money only, where the party filing the note of issue is prohibited by the provisions of CPLR 3017(c) from stating in the pleadings the amount of damages sought in the action, the party shall indicate on the note of issue whether the amount of damages exceeds $ 6,000, exclusive of costs and interest. If it does not, the party shall also indicate if it exceeds $ 2,000, exclusive of costs and interest.

(h) Change in title of action. In the event of a change in title of an action by reason of a substitution of any party, no new note of issue will be required. Notice of such substitution and change in title shall be given to the assigned judge and to the clerk within 10 days of the date of an order or stipulation effecting the party substitution or title change.

(i) Additional Requirements with Respect to Uncontested Matrimonial Actions.

(1) Uncontested matrimonial actions, proceedings for dissolution of marriages and applications of declaratory judgments shall be assigned to judges or special parts of

court as the Chief Administrator shall authorize.

(2) There shall be a Unified Court System Uncontested Divorce Packet which shall contain the official forms for use in uncontested matrimonial actions. The Packet shall be available in the Office of the Clerk of the Supreme Court in each county, and the forms shall be filed with the appropriate clerk in accordance with the instructions in the Packet. These forms shall be accepted by the Court for obtaining an uncontested divorce, and no other forms shall be necessary. The Court, in its discretion, may accept other forms that comply with the requirements of law.

(3) The proposed judgments shall be numbered in the order in which they are received and submitted in sequence to the judge or referee.

(4) Unless the court otherwise directs, the proof required by statute must be in writing, by affidavits, which shall include a sufficient factual statement to establish jurisdiction, as well as all elements of the cause of action warranting the relief sought.

(5) If the judge or referee believes that the papers are insufficient, the complaint shall either be dismissed for failure of proof or a hearing shall be directed to determine whether sufficient evidence exists to support the cause of action.

(6) Whether upon written proof or at the conclusion of a hearing, the judge or referee shall render a decision and sign the findings of fact, conclusions of law and the judgment, unless for reasons stated on the record decision is reserved.

(7) Where a hearing has been held, no transcript of testimony shall be required as a condition precedent to the signing of the judgment, unless the judge or referee presiding shall so direct.

The filing of a note of issue waives further discovery, *Giglio v. Carucci*, 116 AD2d 1040, 498 NYS2d 593 (4th Dept., 1986); *Gray v. Crouse-Irving Memorial Hospital*, Inc., 107 AD2d 1038, 486 NYS2d 540 (4th Dept., 1985); *Williams v. New York City Transit Authority*, 23 AD2d 590, 256 NYS2d 708 (2d Dept., 1965); *Price v. Brody*, 7 AD2d 204, 181 NYS2d 661 (1st Dept., 1959). Further discovery is thereafter permitted only upon a showing of "special, unusual or extraordinary circumstances" and, in the absence of such a showing, it is an abuse of discretion to deny the suppression of discovery. *Price v. Brody*, 7 AD2d 204, 181 NYS2d 661 (1st Dept., 1959); 22 NYCRR § 202.21(d).

Conversely, the filing of a premature Note of Issue, is deemed to be an attempt to usurp a trial preference and is not permitted. *Bycomp Inc. v. New York Racing Assoc., Inc.*, 116 AD2d 895, 498 NYS2d 274 (3d Dept., 1986)(Main, J. dissenting). "The general rule is that if a case is not ready for trial, the note of issue must be stricken." *Bycomp, Inc. v. New York Racing Assoc.*, 116 AD2d 895, 498 NYS2d 274 (3d Dept., 1986). A court should, therefore, vacate a note of issue that was filed before discovery is complete. *Erena v. Colavita Pasta & Oil Corp.*, 199 AD2d 729, 605 NYS2d 475 (3d Dept., 1993), *leave to appeal dismissed*, 83 NY2d 847, 612

NYS2d 109 (1994). A note of issue and certificate of readiness that were filed while discovery requests were still outstanding should also be vacated. *Friedman & Kaplan v. Hoffman*, 166 AD2d 188, 560 NYS2d 430 (1st Dept., 1990); *Rogers v. U-Haul Co.*, 161 AD2d 214, 554 NYS2d 600 (1st Dept., 1990)(note of issue stricken until discovery complete in third-party action). This is because a note of issue which contains false statements should be stricken. *H & Y Realty Co. v. Baron*, 121 AD2d 238, 503 NYS2d 35 (1st Dept., 1986).

Similarly, a statement of readiness that is filed before the opposing party has had a reasonable opportunity for discovery is inherently defective. An opponent must also be given a reasonable period of time to analyze prior productions to determine whether further discovery is necessary before a party may file a statement of readiness. *Kantor v. Kantor*, 100 AD2d 928, 474 NYS2d 842 (2d Dept., 1984); *North v. Murtaugh*, 229 AD2d 1012, 645 NYS2d 189 (4th Dept., 1996). The amount of time that is "reasonable" should be determined by considering the parties, their trial schedule and their staff limitations. *Torres v. New York City Transit Authority*, 192 AD2d 400, 596 NYS2d 66 (1st Dept., 1993), *appeal withdrawn*, 210 AD2d 1012, 622 NYS2d 410 (1st Dept., 1994).

6. Discharge of Counsel - CPLR § 321

CPLR § 321(b) provides that an attorney who has appeared in an action on behalf of a party (an attorney "of record") may not be discharged except in one of two specified manners: By order of the Court made by motion "on such notice . . . as the court may direct" (i.e., by order to show cause), or by a formal consent to change attorneys. Section 321 provides:

> **§ 321. Attorneys**
>
> **(a) Appearance in person or by attorney.** A party, other than one specified in section 1201 of this chapter, may prosecute or defend a civil action in person or by attorney, except that a corporation or voluntary association shall appear by attorney, except as otherwise provided in sections 1809 and 1809-A of the New York city civil court act, sections 1809 and 1809-A of the uniform district court act and sections 1809 and 1809-A

of the uniform city court act, and except as otherwise provided in section 501 and section 1809 of the uniform justice court act. If a party appears by attorney such party may not act in person in the action except by consent of the court.

(b) Change or withdrawal of attorney.

1. Unless the party is a person specified in section 1201, an attorney of record may be changed by filing with the clerk a consent to the change signed by the retiring attorney and signed and acknowledged by the party. Notice of such change of attorney shall be given to the attorneys for all parties in the action or, if a party appears without an attorney, to the party.

2. An attorney of record may withdraw or be changed by order of the court in which the action is pending, upon motion on such notice to the client of the withdrawing attorney, to the attorneys of all other parties in the action or, if a party appears without an attorney, to the party, and to any other person, as the court may direct.

(c) Death, removal or disability of attorney. If an attorney dies, becomes physically or mentally incapacitated, or is removed, suspended or otherwise becomes disabled at any time before judgment, no further proceeding shall be taken in the action against the party for whom he appeared, without leave of the court, until thirty days after notice to appoint another attorney has been served upon that party either personally or in such manner as the court directs.

In *Moustakas v. Bouloukos*, 112 AD2d 981, 492 NYS2d 793 (2d Dept., 1985), plaintiff Moustakas hired an attorney named Heller to represent him in his dispute with defendant Bouloukos. Moustakas later discharged Heller and even gave him a handwritten note terminating his services. The following month Moustakas met with Bouloukos and Bouloukos' attorney and ultimately signed a settlement agreement without Heller's knowledge. Moustakas later moved to set aside the settlement agreement and his motion was granted. The Second Department affirmed. Because Heller was the attorney of record for Moustakas, Moustakas' handwritten note did not satisfy CPLR § 321 and was insufficient to discharge him. As a result, the Second Department held, Bouloukos' attorney had violated DR 7-104(a)(1) by meeting with Moustakas without Heller being present. Section 321, the appellate court held, not only protected attorneys by providing formal notice of a change of attorneys but also served to protect the represented party from overreaching adversaries:

> Until an attorney of record withdraws or is changed or discharged in the manner prescribed by CPLR 321, his authority as attorney of record for his client continues, as to adverse parties, unabated. This principle has generally been

> applied to afford protection to adverse parties, by eliminating disputes and uncertainty as to whether and when the authority of an attorney representing an opponent terminated. . . .
>
> . . . In our view, CPLR 321 not only protects adverse parties; it has the further salutary purpose of protecting parties from attorneys who represent other parties in the action.

Id. (citations omitted and emphasis added). Thus, the court held, until the attorney received notice that complied with CPLR § 321, the attorney was not permitted to meet with the opposing party without the attorney present. *Id.*

Although there is some case law that might be used to shield an attorney from a malpractice claim, *see, e.g., MacArthur v. Hall, McNicol, Hamilton & Clark*, 217 AD2d 429, 628 NYS2d 705 (1st Dept., 1995), a careful practitioner should insist that one of the methods of CPLR § 321(b) be used when being discharged.

7. Spoliation of Evidence - CPLR 3126 and the Obligation to preserve.

In *MetLife Auto & Home & Co. v. Joe Basil Chevrolet, Inc.*, 1 NY3d 478, 775 NYS2d 754 (2004), the Court of Appeals reviewed the current law regarding spoliation of evidence. *MetLife* involved a Chevrolet Tahoe which seemed to catch on fire while parked in a home garage. The fire spread to the house completely destroying it. MetLife insured the house and paid for the damages. It then sought to inspect the Chevy Tahoe, which was being held by Chevrolet's insurance company, Royal. Although Royal agreed to make the automobile available, shortly before the inspection date it notified MetLife that it had inadvertently dismantled and destroyed the Tahoe. MetLife sued asserting, among other things, an independent cause of action for spoliation of evidence. Though the Court rejected spoliation as an independent tort against third parties, its recap of the doctrine serves as a caution against

failing to preserve evidence:

> A cause of action for spoliation of evidence is a relatively recent phenomenon in the law (see *Benjamin T. Clark, The License to Solvate Must Be Revoked: Why Missouri Should Recognize a Tort for Third-Party Spoliation, 59 J Mo B 308[2003]*; *Stefan Rubin, Tort Reform: A Call for Florida to Scale Back Its Independent Tort for the Spoliation of Evidence51 Fla L Rev 345 [1999]*; , *Bart S. Wilhoit, Spoliation of Evidence: The Viability of Four Emerging Torts46 UCLA L Rev 631 [1998]*).
>
> One traditional method of dealing with spoliation of evidence in New York has been *CPLR 3126* where sanctions, including dismissal, have been imposed for a party's failure to disclose relevant evidence (see e.g. *New York Cent. Mut. Fire Ins, Co. v. Turnerson's Elec. Co., Inc.,* 280 A.D.2d 652, 721 N.Y.S.2d 92 [2d Dept 2001]).
>
> Similarly, the Appellate Divisions have held that spoliation of evidence by an employer may support a common law cause of action when such spoliation impairs an employee's right to sue a third party tortfeasor. For example, in *DiDomenico v C & S Aeromatik Supplies, Inc.* (252 A.D.2d 41, 682 N.Y.S.2d 452 [2d Dept 1998]), the Appellate Division invoked the rule against plaintiff's employer, United Parcel Service, after the employee's eye was damaged by a caustic liquid sprayed from a package he was handling. DiDomenico had requested the cooperation of UPS in identifying the manufacturer, packer and shipper of the caustic liquid that injured him. UPS not only failed to preserve the package containing the liquid but also delayed in providing appropriate records. As a result, DiDomenico could not sustain an action against the manufacturer and the manufacturer could not defend itself against a claim.

The Appellate Division struck the answer of UPS pursuant to *CPLR 3126*, noting that

> "Separate and apart from CPLR 3126 sanctions is the evolving rule that a spoliator of key physical evidence is properly punished by the striking of its pleading. This sanction has been applied even if the destruction occurred through negligence rather than wilfulness, and even if the evidence was destroyed before the spoliator became a party, provided it was on notice that the evidence might be needed for future litigation"

(*252 A.D.2d at 53*); see also *Kirkland v New York City Housing Authority,* 236 A.D.2d 170, 666 N.Y.S.2d 609 [1st Dept 1997]).

MetLife Auto & Home & Co. v. Joe Basil Chevrolet, Inc., 1 NY3d 478, 775 NYS2d 754 (2004).

Although not as much of an issue in matrimonial litigation as in commercial litigation, attorneys should still consider the preservation of electronic files and e-mails to avoid possible sanctions and penalties for the spoliation of evidence. *See, e.g., Zubulake v. UBS Warburg*, 2004 U.S.Dist. LEXIS 13574, 94 Fair Empl. Prac. Cas. (BNA) 1 (S.D.N.Y., 2004) (Shira A. Scheindlin, D.J.) (defendant sanctioned with costs and the imposition of a negative inference instruction for failing to segregate and preserve relevant electronic files). For additional information regarding electronic discovery under the new proposed Federal electronic discovery rules *see*, Shira A. Scheindlin, Electronic Discovery Takes Center Stage, NYLJ 9/13/04 at 4; *see also*, *Rowe Enter. Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y., 2002) (shifting the cost of electronic document production onto the plaintiff).

C. Informal Methods of Discovery

1. Ethical and legal Considerations

a. General Ethical Proscriptions of Deceitful Conduct:

The New York Code of Professional Responsibility, Disciplinary Rule ("DR") 7-102, provides that "a lawyer shall not: . . . 5. Knowingly make a false statement of law or fact." DR 7-102[A][5]. Similarly, DR 1-102, prohibits a lawyer from "[e]ngag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation." DR 1-102[A][4]. Judiciary Law section 487 makes it a crime for an attorney to commit deception and also imposes treble damages upon the attorney. It provides, in relevant part, that an attorney who

> [i]s guilty of deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . [i]s guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, . . . forfeits to the party injured treble damages, to be recovered in a civil action.

Jud. Law § 487.

Bar associations and courts have stressed the attorney's obligation to always tell the truth. In 1993 the American Bar Association dealt with the issue of judges who, in the context of settlement negotiations, asked attorneys to disclose to the judge their clients' settlement limits. ABA Formal Op. 93-370 (1993). The opinion concludes that although it is improper for a judge to pressure an attorney to reveal a client's confidence such as the settlement limits, an attorney may still not misrepresent the truth in an effort to deflect the judge's [improper] question:

> Model Rule 4.1 [of the Model Rules of Professional Conduct, enacted in many states but not in New York] states: "In the course of representing a client a lawyer

shall not knowingly make a false statement of material fact or law to a third person." The Comment to Rule 4.1 states in relevant part:

> Whether a particular statement should be regarded as one of fact can depend on circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category . . .

While as explained in the Comment, *supra*, a certain amount of posturing or puffery in settlement negotiations may be an acceptable convention between opposing counsel, a party's actual bottom line or the settlement authority given to a lawyer is a material fact. A deliberate misrepresentation or lie to a judge in pretrial negotiations would be improper under Rule 4.1. Model Rule 8.4(c) also prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, and Rule 3.3 provides that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal. The proper response by a lawyer to improper questions from a judge is to decline to answer, not to lie or misrepresent.

ABA Formal Op. 93-370 at 5 (1993).

As can be understood from the foregoing, it may be problematic for an attorney to misrepresent him or herself in order to obtain information for litigation purposes. In *In re Pautler*, 47 P.3d 1175 (Colo. 2002), Pautler, an attorney, was suspended for three months for his misrepresentations in getting an admitted murderer to turn himself in. *Pautler* involved the

apprehension of William Lee "Cody" Neal. Neal had brought a woman to his home where the bodies of two of his female victims lay. He then tied her, spread-eagled, to bolts in the floor and cut her clothes off with a knife. He forced her to watch as he duct-taped a third victim to a chair and killed her by hitting her in the skull with an axe. He then took her at gun point back to her home and held her, her roommate, and a friend, hostage for thirty hours. He ultimately left them with instructions that they should call the police and page him on his pager.

On the cell phone with detectives, Neal asked to speak with a specific lawyer. Pautler tried to contact the lawyer but the lawyer's phone number was out of service. Neal then asked to speak with a public defender. After consulting his superiors and determining that "extraordinary measures were necessary," Pautler identified himself as a public defender and encouraged Neal to surrender. Neal had already confessed to his crimes and Pautler made no attempt to elicit additional information from him. Neal surrendered and was ultimately convicted and sentenced to death. Pautler, however, was charged by a disciplinary panel with engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation" in violation of rule 8.4(c) of the Colorado Rules of Professional Conduct. The panel hearing the matter rejected Pautler's defense of "justification," held the defense inapplicable to professional misconduct, and suspended Pautler for three months. The Colorado Supreme Court affirmed. "[E]ven a noble motive," the court held, "does not warrant departure from the Rules of Professional Conduct." (For a more detailed treatment of the *Pautler* case and the ethical issues raised by it *see*, Rebecca B. Cross, Ethical Deception by Prosecutors, *31 Fordham Urb. L.J. 215* (2003).)

Other courts have similarly held it improper for attorneys to assume a false identity to obtain evidence of wrongdoing by an adversary. These include the courts in *Sequa Corp. v. Lititech Inc.*, 807 F.Supp. 653, 663 (D. Colo. 1992); *Midwest Motor Sports, Inc. v. Arctic Cat, Inc.*, 144 F.Supp.2d 1147 (D.S.Da., 2001) (posing as a customer is deceitful and manifestly unfair trial practice); *In re Gatti*, 330 Or. 517, 8 P.3d 966 (Or. 2000) (private attorney who misrepresented himself as a chiropractor during the course of an alleged fraud investigation

publicly reprimanded and the claim for a "prosecutor's exception" to the fraud rule rejected). (It should be noted, however, that the decision in *Gatti* may have been abrogated by a change in Oregon's disciplinary rules, *infra*.)

At least two states now permit prosecutors to engage in covert activities to obtain incriminating information about targets of their investigations. Oregon, after the *Gatti* decision, amended its Rules of Professional Responsibility to permit attorneys investigating unlawful activity to "advise clients . . . or to supervise lawful covert activity" in order "to obtain information on unlawful activity through the use of misrepresentation or other subterfuge." Oregon Code of Professional Responsibility DR 1-102(D) (2001).

Similarly, the Utah State Bar in an Ethics Advisory Opinion, No. 02-05, concluded that, "we do not believe that rule was intended to prohibit prosecutors or other governmental lawyers from participating in lawful undercover investigations. . . . We hold that as long as a prosecutor's or other governmental lawyer's conduct employing dishonesty, fraud, deceit or misrepresentation is part of an otherwise lawful government operation, the prosecutor or other governmental lawyer does not violate Rule 8.4(c)." Utah St. Bar Ethics Adv. Op. No. 02-05 (2002) (available at http://www.utahbar.org/-rules_ops_pols/ethics_opinions/op_02_05.html). The Ethics Advisory Committee was careful, however, not to sanction undercover operations by private attorneys:

> We cannot, however, throw a cloak of approval over all lawyer conduct associated with an undercover investigation or "covert" operation. Further, a lawyer's illegal conduct or conduct that infringes the constitutional rights of suspects or targets of an investigation might also bring into question the lawyer's fitness to practice law in violation of Rule 8.4(c). The circumstances of such conduct would have to be considered on a case-by-case basis. Nor do we provide a license to ignore the Rules' other prohibitions on misleading conduct. We do hold, however, that a

> state or federal prosecutor's or other governmental lawyer's otherwise lawful participation in a lawful government operation does not violate Rule 8.4(c) based upon any dishonest, fraud, deceit or misrepresentation required in the successful furtherance of that government operation.

Id. ¶ 10.

The Utah State Bar Ethics Advisory Opinion relies in part on *Apple Corps. Ltd. v. International Collectors Society*, 15 F.Supp.2d 456 (D.N.J., 1998). To prove that the defendants there were violating a consent order by selling stamps bearing the image of the Beatles, plaintiff's counsel called them on the phone posing as a customer. Defendants later sought sanctions against the plaintiff's counsel for their deceitful conduct but the Court rejected their application:

> Undercover agents in criminal cases and discrimination testers in civil cases, acting under the direction of lawyers, customarily dissemble as to their identities or purposes to gather evidence of wrongdoing. . . . This limited use of deception, to learn about ongoing acts of wrongdoing, is also accepted outside the area of criminal or civil rights law enforcement. The prevailing understanding in the legal profession is that a public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means.

Id. See also, *Richardson v. Howard*, 712 F.2d 319 (7th Cir., 1983) (authorizing the use of "testers" to detect housing discrimination), and *Hamilton v. Miller*, 477 F.2d 908, 909 n.1 (10th Cir., 1973) (same).

Locally, the Southern District of New York in *Gidatex, S.r.L. v. Campaniello*

Imports, Ltd., 82 F.Supp.2d 119 (S.D.N.Y. 1999) (Shira A. Scheindlin, J.), denied a motion *in limine* seeking to prevent the admission of undercover tape recordings and evidence. The plaintiff in *Gidatex* was the owner of the furniture trademark "Saporiti Italia." The defendant's agency to sell Saporiti furniture expired but it continued using plaintiff's trademark in signs and advertisements claiming that it was only trying to sell its remaining inventory. The plaintiff, however, suspected that the defendant was luring customers in with plaintiff's trademark but then selling them other brands of furniture. It hired two investigators who posed as interior decorators. The investigators visited defendant's showrooms and warehouses and secretly tape recorded their conversations with defendant's salespeople showing how they redirected customers to other brands. In court the defendant moved to suppress the evidence. It claimed that because it was represented by counsel, the investigators were prohibited by DR 7-104(a)(1) from speaking to their salespeople. DR 7-104(a)(1) provides, in relevant part, that:

> a lawyer shall not . . . communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

22 NYCRR § 1200.35(a)(1); DR 7-104(a)(1). Moreover, DR 1-102(a)(2) prohibits a lawyer from "circumventing a disciplinary rule through [the] actions of another." 22 NYCRR § 1200.35(a)(2); DR 1-102(a)(2). The court stated that:

> Although it is not a crime in New York State for a person to record his or her conversation with another person without the knowledge or consent of the person being recorded, *see* McKinney's Penal Law § 250.00, "there is authority for the proposition that it is unethical for an attorney to do so, since such conduct is

> considered to involve deceit or misrepresentation." *Miano v. AC&R Advert. Inc.*, 148 F.R.D. 68, 76 (S.D.N.Y. 1993) (denying defendant's motion . . . to preclude plaintiffs from offering tapes in evidence), *adopted and approved*, 834 F.Supp. 632 (S.D.N.Y. 1993).

Nevertheless, the *Gidatex* court concluded that the investigators' conversations with the defendant's "low level employees" was not

> the type of conduct prohibited by the rules. The use of private investigators, posing as consumers and speaking to nominal parties who are not involved in any aspect of the litigation, does not constitute an end-run around the attorney/client privilege. Gidatex's investigators did not interview the sales clerks or trick them into making statements they otherwise would not have made. Rather, the investigators merely recorded the normal business routine in the Campaniello showroom and warehouse.

82 F.Supp.2d at 126. As to the "misrepresentations" the court held that:

> hiring investigators to pose as consumers is an accepted investigative technique, not a misrepresentation. The policy interests behind forbidding misrepresentations by attorneys are to protect parties from being tricked into making statements in the absence of their counsel and to protect clients from misrepresentations by their own attorneys. The presence of investigators posing as interior decorators did not cause the sales clerks to make any statements they otherwise would not have made. There is no evidence to indicate that the sales clerks were tricked or duped by the investigators' simple questions such as "is the

qualify the same?" or "so there is no place to get their furniture?"

82 F.Supp.2d at 122.

Similarly, the court in *United States v. Parker*, 165 F. Supp. 2d 431, 476 (D.N.Y., 2001), refused to suppress evidence obtained by "deceptive investigative `techniques' supervised by the Government's attorneys who oversaw the investigation." The court noted that:

> Indeed, opinions of state and local bar associations hold DR 1-102(A)(4) do not apply to prosecuting attorneys who provide supervision and advice to undercover investigations. N.Y. State Bar Assoc. Ethics Comm. Opinion No. 515 (1979); Assoc. of the Bar of the City of N.Y. Comm. on Professional Ethics Opinion No. 696, 1993 WL 837936. See also *Gidatex* [*supra*].

165 F.Supp.2d 476. Even if the ethical rules were violated, the court concluded, it would not require exclusion of the evidence. *Id*. at 477. *See also*, Isbell and Salvi*, Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct*, 8 Geo.L.J. 805-07; Arizona State Bar Committee on the Rules of Professional Conduct Op. 99-11 (9/99) (opining that ethics rules do not prohibit lawyers from employing private investigators who, under pretext, test for discrimination).

b. Taping of Conversations by Attorneys:

The recording of telephone conversations by attorneys has long been held to be an unethical practice. Recently, however, several Bar Associations have done an about face and

have held it permissible under certain circumstances. The history and reasoning is well summarized in the formal opinion of the Association of the Bar of the City of New York, number 2003-02:

> For more than twenty-five years, it was the position of the ABA [American Bar Association] that undisclosed taping by any lawyers other than law enforcement officials was unethical. *See* ABA Formal Op. 337 (1974). In Formal Opinion 01-422, however, the ABA reversed its position, opining that undisclosed taping was not in and of itself unethical unless prohibited by the law of the relevant jurisdictions.
>
> The Professional Responsibility Committee of this Association has recommended to this Committee that we follow the lead of the ABA . . . .
>
> This Committee remains of the view, first expressed in NY City 1980-95, that undisclosed taping smacks of trickery and is improper as a routine practice. At the same time we recognize that there are circumstances in which undisclosed taping should be permissible on the ground that it advances a generally accepted societal good.
>
> . . . [M]ost of the opinions . . . [are] reflective of a cautious case-by-case evolution toward the general principle that if undisclosed taping is done under circumstances that can be said to further a generally accepted societal good, it will not be regarded as unethical.
>
> While that principle carries with it, as many ethical rules do, some risk of uncertainty in its application, attorneys can easily minimize that risk by confining the practice of undisclosed taping to circumstances in which the societal justification is compelling. In addition, even if a disciplinary body does not necessarily share an attorney's assessment of the need for undisclosed taping in a

particular set of circumstances, there is little likelihood of, and no need for, the imposition of sanctions as long as the attorney had a reasonable basis for believing that the surrounding circumstances warranted undisclosed taping.

Accordingly, while this Committee concludes that there are circumstances other than those addressed in our prior opinions in which an attorney may tape a conversation without disclosure to all participants, we adhere to the view that undisclosed taping as a routine practice is ethically impermissible. We further believe that attorneys should be extremely reluctant to engage in undisclosed taping and that, in assessing the need for it, attorneys should carefully consider whether their conduct, if it became known, would be considered by the general public to be fair and honorable.

. . .

Finally, as we have made clear, merely wishing to obtain an accurate record of what was said does not justify undisclosed taping. Nor, at least with respect to individuals who are not potential witnesses, is undisclosed taping justified by a desire to guard against the possibility of a subsequent denial of what was said. Such practices constitute engaging in undisclosed taping as a routine matter and, for the reasons discussed above, are ethically impermissible.

Association of the Bar of the City of New York Formal Opinion 2003-02; *accord*, New York County Lawyers' Association, Comm. on Prof. Ethics no. 696 (June, 1993). The opinions, however, are quick to point out that it would be an ethical violation if the attorney assured the other party to the conversation that the conversation was not being recorded.

c. Specific Statutory Prohibitions:

(i). Federal Statutes -

(a) Wiretapping, 18 U.S.C §§ 2510 et. seq.

Section 2511 of Title 18 of the United States Code prohibits the interception of electronic communications. 18 USC § 2511. It provides for fines, penalties and imprisonment for its violation, 18 USC § 2511(4) & (5), as well as damages and attorneys' fees, 18 USC § 2520(a). Moreover, the penalties apply equally to one who "intentionally discloses" or attempts to use "the contents of any [intercepted] communication." 18 USC §§ 2511(1)(c) & (d). Evidence obtained in violation of the statute is inadmissible at trial. 18 USC § 2515. The statute does except the interception by "a party to the communication or where one of the parties to the communication has given prior consent to such interception." 18 USC 2511(2)(d).

§ 2511. Interception and disclosure of wire, oral, or electronic communications prohibited

(1) Except as otherwise specifically provided in this chapter [*18 USCS § § 2510* et seq.] any person who--

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when--

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(e) (i) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or

electronic communication, intercepted by means authorized by sections 2511(2)(a)(ii), 2511(2)(b)-(c), 2511(2)(e), 2516, and 2518 of this chapter, (ii) knowing or having reason to know that the information was obtained through the interception of such a communication in connection with a criminal investigation, (iii) having obtained or received the information in connection with a criminal investigation, and (iv) with intent to improperly obstruct, impede, or interfere with a duly authorized criminal investigation,

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

(2) (a) (i) It shall not be unlawful under this chapter [*18 USCS § § 2510* et seq.] for an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire or electronic communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service, except that a provider of wire communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) Notwithstanding any other law, providers of wire or electronic communication service, their officers, employees, and agents, landlords, custodians, or other persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications or to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 [*50 USCS § 1801]* if such provider, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with--

(A) a court order directing such assistance signed by the authorizing judge, or

(B) a certification in writing by a person specified in section 2518(7) of this title or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required,

setting forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specifying the information, facilities, or technical assistance required. No provider of wire or electronic communication service, officer, employee, or agent thereof, or landlord, custodian, or other specified person shall disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the person has been furnished an order or certification under this subparagraph, except as may otherwise be required by legal process and then only after prior notification to the Attorney General or to the principal prosecuting attorney of a State or any political subdivision of a State, as may be appropriate. Any such disclosure, shall render such person liable for the civil damages provided for in section 2520. No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, or agents, landlord, custodian, or other specified person for providing information, facilities, or assistance in accordance with the terms of a court order, statutory authorization, or certification under this chapter [*18 USCS § § 2510* et seq.].

(b) It shall not be unlawful under this chapter [*18 USCS § § 2510* et seq.] for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 [*47 USCS § § 151* et seq.] of the United States Code, to intercept a wire or electronic communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter [*18 USCS § § 2510* et seq.] for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter [*18 USCS § § 2510* et seq.] for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the

Constitution or laws of the United States or of any State.

(e) Notwithstanding any other provision of this title or section 705 or 706 of the Communications Act of 1934 [*47 USCS § 605* or 606], it shall not be unlawful for an officer, employee, or agent of the United States in the normal course of his official duty to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 [*50 USCS § 1801],* as authorized by that Act [*50 USCS § § 1801* et seq.].

(f) Nothing contained in this chapter or chapter 121 or 206 of this title [*18 USCS § § 2510* et seq., or 2701 et seq., or 3121 et seq.], or section 705 of the Communications Act of 1934 [*47 USCS § 605],* shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 [*50 USCS § 1801],* and procedures in this chapter or chapter 121 or 206 of this title [*18 USCS § § 2510* et seq., or 2701 et seq., or 3121 et seq.] and the Foreign Intelligence Surveillance Act of 1978 [*50 USCS § § 1801* et seq.] shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act [*50 USCS § 1801],* and the interception of domestic wire, oral, and electronic communications may be conducted.

(g) It shall not be unlawful under this chapter [*18 USCS § § 2510* et seq.] or chapter 121 of this title [*18 USCS § § 2701* et seq.] for any person--

(i) to intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public;

(ii) to intercept any radio communication which is transmitted--

(I) by any station for the use of the general public, or that relates to ships, aircraft, vehicles, or persons in distress;

(II) by any governmental, law enforcement, civil defense, private land mobile, or public safety communications system, including police and fire, readily accessible to the general public;

(III) by a station operating on an authorized frequency within the bands allocated to the amateur, citizens band, or general mobile radio services; or

(IV) by any marine or aeronautical communications system;

(iii) to engage in any conduct which--

(I) is prohibited by section 633 of the Communications Act of 1934 [*47 USCS § 553];* or

(II) is excepted from the application of section 705(a) of the Communications Act of 1934 [*47 USCS § 605*(a)] by section 705(b) of that Act [*47 USCS § 605*(b)];

(iv) to intercept any wire or electronic communication the transmission of which is causing harmful interference to any lawfully operating station or consumer electronic equipment, to the extent necessary to identify the source of such interference; or

(v) for other users of the same frequency to intercept any radio communication made through a system that utilizes frequencies monitored by individuals engaged in the provision or the use of such system, if such communication is not scrambled or encrypted.

(h) It shall not be unlawful under this chapter [*18 USCS § § 2510* et seq.]--

(i) to use a pen register or a trap and trace device (as those terms are defined for the purposes of chapter 206 (relating to pen registers and trap and trace devices) of this title) [*18 USCS § § 3121* et seq.]; or

(ii) for a provider of electronic communication service to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful or abusive use of such service.

(i) It shall not be unlawful under this chapter [*18 USCS § § 2510* et seq.] for a person acting under color of law to intercept the wire or electronic communications of a computer trespasser transmitted to, through, or from the protected computer, if--

(I) the owner or operator of the protected computer authorizes the interception of the computer trespasser's communications on the protected computer;

(II) the person acting under color of law is lawfully engaged in an investigation;

(III) the person acting under color of law has reasonable grounds to believe that the contents of the

computer trespasser's communications will be relevant to the investigation; and

(IV) such interception does not acquire communications other than those transmitted to or from the computer trespasser.

(3)

(a) Except as provided in paragraph (b) of this subsection, a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such person or entity, or an agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

(b) A person or entity providing electronic communication service to the public may divulge the contents of any such communication--

(i) as otherwise authorized in section 2511(2)(a) or 2517 of this title;

(ii) with the lawful consent of the originator or any addressee or intended recipient of such communication;

(iii) to a person employed or authorized, or whose facilities are used, to forward such communication to its destination; or

(iv) which were inadvertently obtained by the service provider and which appear to pertain to the commission of a crime, if such divulgence is made to a law enforcement agency.

(4)

(a) Except as provided in paragraph (b) of this subsection or in subsection (5), whoever violates subsection (1) of this section shall be fined under this title or imprisoned not more than five years, or both.

(b) Conduct otherwise an offense under this subsection that consists of or relates to the interception of a satellite transmission that is not encrypted or scrambled and that is transmitted--

(i) to a broadcasting station for purposes of retransmission to the general public; or

(ii) as an audio subcarrier intended for redistribution to facilities open to the public, but not including data transmissions or telephone calls,

is not an offense under this subsection unless the conduct is for the purposes of direct or indirect commercial advantage or private financial gain.

(c) [Redesignated]

(5)

(a) (i) If the communication is--

(A) a private satellite video communication that is not scrambled or encrypted and the conduct in violation of this chapter [*18 USCS § § 2510* et seq.] is the private viewing of that communication and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain; or

(B) a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct in violation of this chapter [*18 USCS § § 2510* et seq.] is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain,

then the person who engages in such conduct shall be subject to suit by the Federal Government in a court of competent jurisdiction.

(ii) In an action under this subsection--

(A) if the violation of this chapter [*18 USCS § § 2510* et seq.] is a first offense for the person under paragraph (a) of subsection (4) and such person has not been found liable in a civil action under section 2520 of this title, the Federal Government shall be entitled to appropriate injunctive relief; and

(B) if the violation of this chapter [*18 USCS § § 2510* et seq.] is a second or subsequent offense under paragraph (a) of subsection (4) or such person has been found liable in any prior civil action under section 2520, the person shall be subject to a mandatory $ 500 civil fine.

(b) The court may use any means within its authority to enforce an injunction issued under paragraph (ii)(A), and shall impose a civil fine of not less than $ 500 for each violation of such an injunction.

(b) Computer Records 18 USC §§ 2701 et. seq.

Federal law also prohibits the unauthorized access of computer systems, and imposes fines and penalties for such access. 18 USC § 2701. A violator is also liable for damages and subject to punitive damages and attorney's fees. 18 USC §§ 2707(b) & (c).

§ 2701. Unlawful access to stored communications

(a) Offense. Except as provided in subsection (c) of this section whoever--

(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or

(2) intentionally exceeds an authorization to access that facility; and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished as provided in subsection (b) of this section.

(b) Punishment. The punishment for an offense under subsection (a) of this section is--

(1) if the offense is committed for purposes of commercial advantage, malicious destruction or damage, or private commercial gain, or in furtherance of any criminal or tortious act in violation of the Constitution or laws of the United States or any State--

(A) a fine under this title or imprisonment for not more than 5 years, or both, in the case of a first offense under this subparagraph; and

(B) a fine under this title or imprisonment for not more than 10 years, or both, for any subsequent offense under this subparagraph; and

(2) in any other case--

(A) a fine under this title or imprisonment for not more than 1 year or both, in the case of a first offense under this paragraph; and

(B) a fine under this title or imprisonment for not more than 5 years, or both, in the case of an offense under this subparagraph that occurs after a conviction of another offense under this section.

(c) Exceptions. Subsection (a) of this section does not apply with respect to conduct authorized--

(1) by the person or entity providing a wire or electronic communications service;

(2) by a user of that service with respect to a communication of or intended for that user; or

(3) in section 2703, 2704 or 2518 of this title.

(c) Motor Vehicle Records, 18 USC §§ 2721 et. seq.

Federal law prohibits the disclosure or obtaining of confidential motor vehicle records. 18 USC §§ 2721-22. It prohibits both the release and use of that information or for obtaining the information under false pretenses. *Id.* Violation of that statute subjects the violator to criminal penalties, 18 USC § 2723(a), and liability for damages of at least $2,500, punitive damages and attorneys' fees. 18 USC § 2724(b).

The statute contains an exception for information obtained "[f]or use in connection with any civil . . . proceeding in any Federal, State or local court or agency . . .

including . . . investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court." 18 USC § 2721(b)(4). An attorney who properly obtains such information, however, can still violate the statute by disclosing that information for an unauthorized purpose. 18 USC § 2721(c). Moreover, an attorney who discloses the information for an authorized purpose must keep records of that disclosure for five years. *Id.*

18 USC § 2721 - Prohibition on release and use of certain personal information from State motor vehicle records

§ 2721. Prohibition on release and use of certain personal information from State motor vehicle records

(a) In general. A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity:

(1) personal information, as defined in *18 U.S.C. 2725*(3), about any individual obtained by the department in connection with a motor vehicle record, except as provided in subsection (b) of this section; or

(2) highly restricted personal information, as defined in *18 U.S.C. 2725*(4), about any individual obtained by the department in connection with a motor vehicle record, without the express consent of the person to whom such information applies, except uses permitted in subsections (b)(1), (b)(4), (b)(6), and (b)(9): Provided, That subsection (a)(2) shall not in any way affect the use of organ donation information on an individual's driver's license or affect the administration of organ donation initiatives in the States.

(b) Permissible uses. Personal information referred to in subsection (a) shall be disclosed for use in connection with matters of motor vehicle or driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls, or advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufacturers, and removal of non-owner records from the original owner records of motor vehicle manufacturers to carry out the purposes of titles I and IV of the Anti Car Theft Act of 1992, the Automobile Information Disclosure Act *(15 U.S.C. 1231* et seq.), the Clean Air Act *(42 U.S.C. 7401* et seq.), and chapters 301, 305, and 321-331 of title 49 [*49 USCS § § 30101* et seq., 30501 et seq., 32101 et seq.-33101 et seq.], and, subject to subsection (a)(2), may be disclosed as follows:

(1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.

(2) For use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions; motor vehicle product alterations, recalls, or advisories; performance monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non-owner records from the original owner records of motor vehicle manufacturers.

(3) For use in the normal course of business by a legitimate business or its agents, employees, or contractors, but only–

(A) to verify the accuracy of personal information submitted by the individual to the business or its agents, employees, or contractors; and

(B) if such information as so submitted is not correct or is no longer correct, to obtain the correct information, but only for the purposes of preventing fraud by, pursuing legal remedies against, or recovering on a debt or security interest against, the individual.

(4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

(5) For use in research activities, and for use in producing statistical reports, so long as the personal information is not published, redisclosed, or used to contact individuals.

(6) For use by any insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims investigation activities, antifraud activities, rating or underwriting.

(7) For use in providing notice to the owners of towed or impounded vehicles.

(8) For use by any licensed private investigative agency or licensed security service for any purpose permitted under this subsection.

(9) For use by an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver's license that is required under chapter 313 of title 49 [*49 USCS § § 31301* et seq.].

(10) For use in connection with the operation of private toll transportation facilities.

(11) For any other use in response to requests for individual motor vehicle records if the State has obtained the express consent of the person to whom such personal information pertains.

(12) For bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the person to whom such personal information pertains.

(13) For use by any requester, if the requester demonstrates it has obtained the written consent of the individual to whom the information pertains.

(14) For any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety.

(c) Resale or redisclosure. An authorized recipient of personal information (except a recipient under subsection (b)(11) or (12)) may resell or redisclose the information only for a use permitted under subsection (b) (but not for uses under subsection (b) (11) or (12)). An authorized recipient under subsection (b)(11) may resell or redisclose personal information for any purpose. An authorized recipient under subsection (b)(12) may resell or redisclose personal information pursuant to subsection (b)(12). Any authorized recipient (except a recipient under subsection (b)(11)) that resells or rediscloses personal information covered by this chapter [*18 USCS § § 2701* et seq.] must keep for a period of 5 years records identifying each person or entity that receives information and the permitted purpose for which the information will be used and must make such records available to the motor vehicle department upon request.

(d) Waiver procedures. A State motor vehicle department may establish and carry out procedures under which the department or its agents, upon receiving a request for personal information that does not fall within one of the exceptions in subsection (b), may mail a copy of the request to the individual about whom the information was requested, informing such individual of the request, together with a statement to the effect that the information will not be released unless the individual waives such individual's right to privacy under this section.

(e) Prohibition on conditions. No State may condition or burden in any way the issuance of an individual's motor vehicle record as defined in *18 U.S.C. 2725*(1) to obtain express consent. Nothing in this paragraph shall be construed to prohibit a State from charging an administrative fee for issuance of a motor vehicle record.

(ii). New York State Statutes -

(a) Wiretapping, NY Pen. L. §§ 250.00 et. seq.

The court, *Boatswain v. Boatswain*, 3 Misc. 3d 803, 804-805, 778 N.Y.S.2d 850 (N.Y. Misc., 2004) (Jeffrey Sunshine, J.), set out the parameters for admissibility of telephone wiretaps:

> It is well established that a tape recording of a telephone conversation without a warrant is wiretapping. In order for a wiretapping to be admitted into evidence there must have been the consent of at least one of the parties to the tape recording. Wiretapping is defined as the unlawful inception of a telephonic communication (see Penal Law 250.00). Wiretapping is generally committed when a person intentionally overhears a telephonic communication without the consent of a party to the communication (see Penal Law 250.00(1). Without the consent of either party to the conversation, the wiretapping violates section 250.05 of the Penal Law and must be suppressed (see CPLR § 4506; see also Pica v. Pica, 70 A.D.2d 931, 417 N.Y.S.2d 528 [2nd Dept.1979]). Furthermore, without consent, these recordings are inadmissible because the legislature intended to prohibit admission of all illegally intercepted evidence in all court proceedings when it enacted the statutes exclusionary provision. If, in fact, "Paul" did not consent to the recordings and clearly defendant did not consent to the recordings, then the recordings are inadmissible. The purpose of the deposition is to ascertain whether or not "Paul" consented to the tape recording.
>
> It should be noted that the amateur-self made transcript annexed to the motion is insufficient to form a basis of admissible evidence at this juncture. The trial judge must determine the recording[']s audibility and authenticity. After an audibility hearing is held, a recording must be excluded if it is determined that the

> recording is so inaudible and indistinct that [] one would have to guess at what was being said (see *People v. Beasley*, 98 A.D.2d 946, 471 N.Y.S.2d 383, *aff'd,* 62 N.Y.2d 767, 465 N.E.2d 1261, 477 N.Y.S.2d 325; *People v. Graham*, 57 A.D.2d 478, 394 N.Y.S.2d 982, *aff'd*, 44 N.Y.2d 768, 377 N.E.2d 480, 406 N.Y.S.2d 36). At this juncture, there has been no request made for a hearing as to the audibility of the tape, but a copy of the tape and certified transcripts must be made available to the defendant's counsel within fourteen (14) days of this date. If defendant's counsel seeks to have an expert examine the original tape, plaintiff must comply within ten (10) of said request

Boatswain v. Boatswain, 3 Misc. 3d 803, 804-805, 778 N.Y.S.2d 850 (N.Y. Misc., 2004) (Jeffrey Sunshine, J.)

§ 250.05. Eavesdropping

A person is guilty of eavesdropping when he unlawfully engages in wiretapping, mechanical overhearing of a conversation, or intercepting or accessing of an electronic communication.

Eavesdropping is a class E felony.

§ 250.25. Tampering with private communications

A person is guilty of tampering with private communications when:

1. Knowing that he does not have the consent of the sender or receiver, he opens or reads a sealed letter or other sealed private communication; or

2. Knowing that a sealed letter or other sealed private communication has been opened or read in violation of subdivision one of this section, he divulges without the consent of the sender or receiver, the contents of such letter or communication, in whole or in part, or a resume of any portion of the contents thereof; or

3. Knowing that he does not have the consent of the sender or receiver, he obtains or attempts to obtain from an employee, officer or representative of a telephone or telegraph corporation, by connivance, deception, intimidation or in any other manner, information with respect to the contents or nature thereof of a telephonic or telegraphic communication; except that the provisions of this subdivision do not apply to a law enforcement officer who obtains information from a telephone or telegraph corporation pursuant to section 250.35; or

4. Knowing that he does not have the consent of the sender or receiver, and being an employee, officer or representative of a telephone or telegraph corporation, he knowingly divulges to another person the contents or nature thereof of a telephonic or telegraphic communication; except that the provisions of this subdivision do not apply to such person when he acts pursuant to section 250.35.

Tampering with private communications is a class B misdemeanor.

§ 250.30. Unlawfully obtaining communications information

A person is guilty of unlawfully obtaining communications information when, knowing that he does not have the authorization of a telephone or telegraph corporation, he obtains or attempts to obtain, by deception, stealth or in any other manner, from such corporation or from any employee, officer or representative thereof:

1. Information concerning identification or location of any wires, cables, lines, terminals or other apparatus used in furnishing telephone or telegraph service; or

2. Information concerning a record of any communication passing over telephone or telegraph lines of any such corporation.

Unlawfully obtaining communications information is a class B misdemeanor.

§ 4506. Eavesdropping evidence; admissibility; motion to suppress in certain cases

1. The contents of any overheard or recorded communication, conversation or discussion, or evidence derived therefrom, which has been obtained by conduct constituting the crime of eavesdropping, as defined by section 250.05 of the penal law, may not be received in evidence in any trial, hearing or proceeding before any court or grand jury, or before any legislative committee, department, officer, agency, regulatory body, or other authority of the state, or a political subdivision thereof; provided, however, that such communication, conversation, discussion or evidence, shall be admissible in any civil or criminal trial, hearing or proceeding against a person who has, or is alleged to have, committed such crime of eavesdropping.

2. As used in this section, the term "aggrieved person" means:

(a) A person who was a sender or receiver of a telephonic or telegraphic communication which was intentionally overheard or recorded by a person other than the sender or receiver thereof, without the consent of the sender or receiver, by means of any instrument, device or equipment; or

(b) A party to a conversation or discussion which was intentionally overheard or recorded, without the consent of a least one party thereto, by a person not present thereat, by means of any instrument, device or equipment; or

(c) A person against whom the overhearing or recording described in paragraphs (a) and (b) was directed.

3. An aggrieved person who is a party in any civil trial, hearing or proceeding before any court, or before any department, officer, agency, regulatory body, or other authority of the state, or a political subdivision thereof, may move to suppress the contents of any overheard or recorded communication, conversation or discussion or evidence derived therefrom, on the ground that:

(a) The communication, conversation or discussion was unlawfully overheard or recorded; or

(b) The eavesdropping warrant under which it was overheard or recorded is insufficient on its face; or

(c) The eavesdropping was not done in conformity with the eavesdropping warrant.

4. The motion prescribed in subdivision three of this section must be made before the judge or justice who issued the eavesdropping warrant. If no eavesdropping warrant was issued, such motion must be made before a justice of the supreme court of the judicial district in which the trial, hearing or proceeding is pending. The aggrieved person must allege in his motion papers that an overheard or recorded communication, conversation or discussion, or evidence derived therefrom, is subject to suppression under subdivision three of this section, and that such communication, conversation or discussion, or evidence, may be used against him in the civil trial, hearing or proceeding in which he is a party. The motion must be made prior to the commencement of such trial, hearing or proceeding, unless there was no opportunity to make such motion or the aggrieved person was not aware of the grounds of the motion. If the motion is granted, the contents of the overheard or recorded communication, conversation or discussion or evidence derived therefrom, may not be received in evidence in any trial, hearing or proceeding.

A party is entitled to be given a copy of any audio tape recording made of the party since it is “a copy of his own statement.” CPLR § 3101(e); *Bayer v. Bayer*, 113 Misc2d 391, 448 NYS2d 1008 (Supreme Court, Nassau County, 1982); *McKenzie v. McKenzie*, 78 AD2d

585, 432 NYS2d 424 (4th Dept., 1980).

Johnson v. Johnson, 235 AD2d 217, 652 NYS2d 504 (1st Dept., 1997), involved a custody battle. There the father demanded that the mother turn over audio and video tapes she made of her and the children. The court held that there was no eavesdropping issue. The court, however, noted that because the use of the tapes has "the potential to undermine the trust and confidence that should exist between [a] parent and [a] child . . . . it should be left to the sound discretion of the Trial Judge to determine whether and how to use any of this material, if at all, keeping in mind the paramount consideration of the best interests of the two children." 235 AD2d at 217-18.

Kosovsky v. Zahl, 165 Misc.2d 164, 627 NYS2d 523 (Supreme Court, New York County, 1995) (David Saxe, J.), also involved a custody battle in which the husband demanded production of all films, videotapes and audiotapes of himself with the children. The court ruled that although he is entitled to a copy, it was to be turned over only after his testimony.

This ruling, however, is likely superseded. In *DiMichel v. South Buffalo Ry. Co*., 80 NY2d 184 (1992), the Court of Appeals held that a defendant in a personal injury action did not have to provide video surveillance tapes of the plaintiff until after the plaintiff testified. In response, the New York State Legislature enacted CPLR § 3101(i) requiring the unqualified production of surveillance material. The Court of Appeals held that the overruling of *DiMichel* by 3101(i), also overruled the "timing" provisions of the *DiMichel* holding and, as a result, video surveillance must be turned over to a party even before the party testifies at a deposition. *Tai Tran v. New Rochelle Hospital Med. Ctr.*, 99 NY2d 383, 756 NYS2d 509 (2003). Thus, it would seem, that *New Rochelle* similarly overrules the timing provision of *Kosovsky*.

I.K. v. M.K., 194 Misc2d 608, 753 NYS2d 828 (Supreme Court, New York County, 2003)(Judith Gische, J.), dealt with a father who, when the children were with him in Pennsylvania, tape recorded their conversations with their mother in New York. He then sought to use the tape recordings in court, and provide them to the court evaluator and the children's

therapist. The court held that the tapes were illegally made and, therefore, excluded under CPLR § 4506. The court rejected the father's claim that, as a parent, he could consent to the recordings on behalf of the children. It held that the father's consent in this context was invalid:

> "At the time the father tape recorded these conversations, he knew that the parties were going to be involved in a custody trial. . . . His decision to tape record the conversations as inextricably intertwined with his self-interest in obtaining evidence fo that custody trial. Since his personal interests cannot be separated from his decision to "consent" on the children's behalf, it has no legal significance in this context.

194 Misc2d at 609. The court, therefore, excluded the tapes and their transcripts from evidence or from being provided to the court-ordered evaluator. The court did, however, permit the tapes to be heard by the children's treating therapists for treatment purposes only. 194 Misc2d at 612.

In *In re Harry R. v. Esther R.*, 134 Misc2d 404, 510 NYS2d 792 (Family Court, Bronx County, 1986), the father recorded conversations he had with the mother and children. Though this did not violate the eavesdropping statute and was, technically, admissible, the court sustained the objection to its admissibility. The court noted that children are entitled to feel that they may communicate freely with their parents without fear that those communications would be recorded and revealed later. Admitting those recordings, the court held, would "violate the confidence and trust children have in their parents." The court, therefore, precluded the tapes.

The eavesdropping statute applies equally to spouses living in the same home and a spouse who surreptitiously records the other violates the law and any resultant evidence should be suppressed. *Pica v. Pica*, 70 AD2d 931, 417 NYS2d 528 (2d Dept., 1979); *Connin v. Connin*, 89 Misc2d 548, 392 NYS2d 530 (Supreme Court, Monroe County, 1976); *see also*, 55 ALR Fed 936 (Applicability of provisions of Omnibus Crime Control and Safe Streets Act of 1968

prohibiting interception of wire or oral communications *(18 USCS § 2511*(1)) to interception by spouse, or spouse's agent, of conversations of other spouse in marital home.).

(b) Computer Records - NY Pen.L. §§ 156.00 et. seq.

§ 156.05. Unauthorized use of a computer

A person is guilty of unauthorized use of a computer when he knowingly uses or causes to be used a computer or computer service without authorization and the computer utilized is equipped or programmed with any device or coding system, a function of which is to prevent the unauthorized use of said computer or computer system.

Unauthorized use of a computer is a class A misdemeanor.

§ 156.10. Computer trespass

A person is guilty of computer trespass when he knowingly uses or causes to be used a computer or computer service without authorization and:

1. he does so with an intent to commit or attempt to commit or further the commission of any felony; or

2. he thereby knowingly gains access to computer material. Computer trespass is a class E felony.

§ 156.20. Computer tampering in the fourth degree

A person is guilty of computer tampering in the fourth degree when he uses or causes to be used a computer or computer service and having no right to do so he intentionally alters in any manner or destroys computer data or a computer program of another person.

Computer tampering in the fourth degree is a class A misdemeanor.

§ 156.25. Computer tampering in the third degree

A person is guilty of computer tampering in the third degree when he commits the crime of computer tampering in the fourth degree and:

1. he does so with an intent to commit or attempt to commit or further the commission of any felony; or

2. he has been previously convicted of any crime under this article or subdivision eleven of section 165.15 of this chapter; or

3. he intentionally alters in any manner or destroys computer material; or

4. he intentionally alters in any manner or destroys computer data or a computer program so as to cause damages in an aggregate amount exceeding one thousand dollars.

Computer tampering in the third degree is a class E felony.

§ 156.26. Computer tampering in the second degree

A person is guilty of computer tampering in the second degree when he commits the crime of computer tampering in the fourth degree and he intentionally alters in any manner or destroys computer data or a computer program so as to cause damages in an aggregate amount exceeding three thousand dollars.

Computer tampering in the second degree is a class D felony.

§ 156.27. Computer tampering in the first degree

A person is guilty of computer tampering in the first degree when he commits the crime of computer tampering in the fourth degree and he intentionally alters in any manner or destroys computer data or a computer program so as to cause damages in an aggregate amount exceeding fifty thousand dollars.

Computer tampering in the first degree is a class C felony.

§ 156.30. Unlawful duplication of computer related material

A person is guilty of unlawful duplication of computer related material when having no right to do so, he copies, reproduces or duplicates in any manner:

1. any computer data or computer program and thereby intentionally and wrongfully deprives or appropriates from an owner thereof an economic value or benefit in excess of two thousand five hundred dollars; or

2. any computer data or computer program with an intent to commit or attempt to commit or further the commission of any felony.

§ 156.35. Criminal possession of computer related material

A person is guilty of criminal possession of computer related material when having no right to do so, he knowingly possesses, in any form, any copy, reproduction or duplicate of any computer data or computer program which was copied, reproduced or duplicated in violation of section 156.30 of this article, with intent to benefit himself or a person other than an owner thereof.

Criminal possession of computer related material is a class E felony.

2. Informal Modes of Obtaining Discovery:

- ♦ Internet searches;
- ♦ Market research;
- ♦ Industrial research;
- ♦ Private investigators;
- ♦ Conversations with customers, employees, co-workers;
- ♦ Admissions to friends, family or others.

D. Proven Methods for Discovering Assets in Divorce

1. How to Uncover Hidden Assets

- ● Compare the claimed earnings against the lifestyle of the parties; Be sure to include credit card expenditures and other less obvious outflows;
- ● Check for personal expenses absorbed in a business -
- ● Check cell phone and EZ-Pass records to find business contacts;
- ● Check the accuracy of the business' reported income by checking:

goods purchased

sales reported;

- Check loan & credit card applications for statements of true income;

Uncover Non-Obvious Assets:

- Frequent flyer miles or credit card purchase points;
- Timeshare properties;
- U.S. Savings Bonds or other securities;
- Unexercised stock or real estate options;
- Check for patents, copyrights or other royalty rights, franchise or government rights;
- Country or health club memberships;
- Unused vacation or sick leave;
- Retirement benefits (golden parachutes);
- Is the party entitled to any income tax refunds?
- Is the party entitled to any income tax capital gains carry-forwards or capital losses?
- Is the party entitled to any charitable contribution deductions?
- Hobby or other collectibles;
- Prepaid rents, leases, insurance (car or other) or taxes;
- Security deposits (utilities, car lease);
- Unpaid commissions or salary;
- Referral fees;
- Tort or worker compensation claims;
- Claims (insurance claims) or other rights that matured during the marriage;
- Retained earnings permitted to remain in the business;
- Debts due from others;

- Entertainment tickets, season ticket options;
- Burial plots;

2. On-Line Records Searches

a. Official (Government and Judicial) WebSites:

- Federal court & case information - http://pacer.psc.uscourts.gov;
- New York State courts - http://www.courts.state.ny.us/home.htm;
- NYS case & court information - http://www.CourtAlert.com;
- NYC real estate deeds and property records - http://www.nyc.gov/html/dof/html/acris.html;
- professional databases or licensing cites;
- United States Treasury - http://www.ussavingsbonds.gov (will calculate the present value of any Treasury Bonds).
- United States' government official web portal - www.firstgov.gov

b. Unofficial WebSites and other resources:

When using the internet for research the most important consideration is the source of the information. Information on the internet is only as reliable as the source posting it. Some internet resources are:

- www.matlaw.com - case law sorted by issues relevant to the practice of matrimonial law.;
- www.LegalRA.com - this site claims to sort data by its relevance and reliability;
- http://www.bvlibrary.com - Published by Business Valuation Resources, LLC, (888) BUS-VALU, (503) 291-7963, a company headed by Shannon Pratt, noted valuation guru. Pratt is the founder and publisher of Shannon

Pratt's Business Valuation Update and Judges & Lawyers Business Valuation Update™ newsletters and Pratt's Stats™, The Lawyer's Business Valuation Handbook, co-author of Valuing a Business: The Analysis and Appraisal of Closely Held Companies, 4th ed., Valuing Small Businesses and Professional Practices, 3rd ed., and Guide to Business Valuations;

- http://www.atla.org - information about "hired guns," experts who repeatedly testify, particularly if it is for the defense bar;
- http://www.accurint.com - a people and asset finder resource for attorneys and judgment collectors;
- http://www.nysl.nysed.gov - New York State library (claims to include legal decisions);
- Cornell University website - http://www.law.cornell.edu/topics/;
- http://find.intelius.com/search-summary-out.php? - people research /finder website such as www.whitepages.com;
- finding people - www.switchboard.com;
- www.411.com;

Appraisal Organizations:

- American Society of Appraisers (ASA), www.appraisers.org;
- American Institute of Certified Public Accountants, www.aicpa.org;
- Institute of Business Appraisers (IBA), www.go-iba.org;
- National Association of Certified Valuation Analysts, http://www.nacva.com/;
- National Association of Real Estate Appraisers (NAREA), www.iami.org/narea;
- Member Appraisal Institute (MAI), www.appraisalinstitute.org;

- The Professional appraisers used on the PBS' Antique Roadshow can be found at: www.pbs.org/wgbh/pages/roadshow/series/appraisers;
- www.NorthernLight.com
- http://www.ebay.com can be used to find the approximate value of various items;

Art information and Value:

- Art Dealers Association of America, www.artdealers.org;

Car Information:

- Kelly's Blue Book - www.kbb.com;
- Edmunds, www.edmunds.com;
- Carmax - www.carmax.com;

Sports memorabilia:

- www.beckett.com;

Mental health issues - http://www.grohol.com

E. Special Proceedings - CPLR Art. 4

A post-judgment custody dispute is not an action but only a "special proceeding" and discovery, therefore, is available only with leave of court. *Slawiak v. Hollywood*, 123 Misc2d 435, 473 NYS2d 745 (Supreme Court, Erie County, 1984); CPLR 408.

F. Controlling Authority from Another Department

In the absence of controlling authority in the Department in which a court sits,

under the doctrine of *stare decisis*, the court is bound to follow the decisions of even another Department. *Mountain View Coach Lines, Inc. v. Storms*, 102 AD2d 663, 476 NYS2d 918 (2d Dept., 1984).