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Drafting NY Civil-Litigation Documents: Part 29—Disclosure Motions Cont'd

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Drafting New York Civil-Litigation Documents: Part XXIX — Disclosure Motions Continued

In the last issue, the *Legal Writer* discussed motions to compel disclosure and motions for sanctions and penalties for nondisclosure. We discussed that a court need not rely on the CPLR 3126 sanction remedies in fashioning a disclosure order. A court may create an order that's "just."

The "general rule is that a court should only impose a sanction commensurate with the particular disobedience it is designed to punish, and go no further . . . . [and] to avoid a sanction which will adversely affect the interest of an innocent party."[1] Because many judges are averse to the sanctions available under CPLR 3126, judges favor creating their own orders with built-in conditions that parties must obey — also known as conditional disclosure orders.

In a conditional order, the court will sanction the disobedient party unless the party discloses the required information within a specific period of time. A conditional order might be your last chance to obey the court; if you don't comply, you'll face the court's sanction. Don't assume that the court will give you a last-chance warning by fashioning a conditional order. The court might penalize you immediately and dismiss the case.[2] Courts generally favor conditional orders, though. Some courts will issue a conditional order regardless whether the disobedient party disobeyed a court's earlier disclosure order or disobeyed a notice for disclosure.[3] But the court's sanction might be harsher if the disobedient party disobeyed the court's earlier disclosure order.[4]

Courts favor conditional orders because "the court relieves itself of the unrewarding inquiry into whether a party's resistance [to disclosure] was willful."[5] A court will find the disobedient party's behavior willful if the court "is convinced not only that the party refused disclosure in the past, but apparently will not, without judicial prodding, make it in the future either."[6]

Courts haven't been consistent about when a penalty in a conditional order takes effect. One court might apply the penalty immediately.[7] Another court might give disobedient parties a chance to explain their reason for disobeying the court's conditional order.[8]

The court might also sanction you monetarily under CPLR 3126: "The authority for a money sanction under CPLR 3126 exists independent of the general sanctions provision applicable to frivolous conduct."[9] Thus, your misconduct need not be frivolous for the court to sanction you monetarily.[10] In its order, the court might require disobedient parties to pay their adversary's costs and attorney fees "to cover the extra time and expense engendered by the unwarranted resistance."[11] Under CPLR 3126, the court may sanction the disobedient party, the attorney, or both.[12]

A court also has "the power to award monetary sanctions and costs for 'frivolous conduct' during disclosure" under Rule 130-1.1 of the Rules of the Chief Administrator of the Courts.[13] Parties, attorneys, or both, who engage in frivolous conduct are subject to sanctions under Rule 130-1.1.[14] Sanctions shall not "exceed $10,000 for any single occurrence of frivolous conduct."[15] An attorney must pay the sanction to the Lawyers' Fund for Client Protection.[16] A non-attorney party must pay the sanction to the "clerk of the court for transmittal to the Commissioner of Taxation and Finance."[17] Sanctions under 130-1.1 aren't paid to the aggrieved party or the aggrieved party's attorney.[18]

Your misconduct need not be frivolous for the court to sanction you monetarily.

A court's power to impose a money sanction is discretionary. If the court determines that resisting disclosure was an attorney's fault — and not the client's fault — the court might order the attorney to pay the sanction "out of pocket, without reimbursement at any time from the client."[19]

A court that determines whether to award a penalty, sanction, or both might "consider the nature of the disclosure transgression, who is responsible [for the transgression], whether the conduct was willful, and the extent of the prejudice, if any, to the aggrieved party."[20] Courts will balance the equities and the prejudice: the extent to which the disobedient party acted in a willful, wanton, and contumacious manner with the extent to which the party seeking disclosure was prejudiced, if at all, by the delay in obtaining disclosure.[21]

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No uniformity exists in how courts apply CPLR 3126 penalties. The penalties are determined differently between appellate and trial courts, between judges in the same judicial district, and with the same judge from one case to the next.[22]

An appellate court won't disturb the trial court's penalty absent a clear abuse of discretion.[23]

The Essentials: Your Moving Papers

If you're moving to compel disclosure or to obtain a penalty or sanction for nondisclosure, here's what you'll need to include in your motion:

• *Exhibits*. Attach as exhibits any earlier disclosure demands, preliminary-conference orders, compliance-conference orders, and any other disclosure orders.[24] Include any letter you've sent to your adversary relating to complying or failing to comply with disclosure. Arrange your exhibits in chronological order.[25] Your paper trail should be logically "clear to the reader that the demand or demands were proper, a proper response was not forthcoming, efforts were made to persuade the offending party to provide the disclosure prior to making the motion, and that the efforts were unsuccessful."[26]

• *Lay a foundation*. To win your motion, establish a few things in your affidavit or affirmation to obtain the relief you're seeking:[27] (1) that you've made a proper and timely request for disclosure from your adversary, or that a court issued an order directing disclosure; (2) that the disclosure you're seeking is material and necessary to your action; (3) that your adversary has refused to provide all or part of the requested disclosure; (4) that your adversary hasn't asserted a valid basis for objecting to the disclosure; (5) that your adversary is "deliberately frustrating the disclosure scheme"[28] by acting willfully, wantonly, or contumaciously, or that your adversary's refusal to provide disclosure may be inferred as willful, wanton, or contumacious;[29] and (6) that you'll be prejudiced if you don't obtain the disclosure you seek.[30]

• *A good-faith affirmation*. If you're the party moving for disclosure, you'll need an affirmation explaining that you've "conferred with counsel for the opposing party in a good-faith effort to resolve the issues raised by the motion."[31] If you fail to include the good-faith affirmation with your motion, a court will deny your motion.[32] In addition to their attorney affirmations, many attorneys will include a separate good-faith affirmation with their disclosure motions.[33] Including a separate good-faith affirmation, and labeling it "Good-Faith Affirmation," will make it easy for the court and court personnel to verify that your motion has the necessary components.

If your motion is based on a conditional order and your adversary hasn't complied with the condition(s), you don't need to include a good-faith affirmation.[34] In your motion, state that your adversary hasn't complied with the conditional order. Explain that you don't need to confer with your adversary about complying with the conditional order.[35]

The Essentials: Your Opposition Papers

If your adversary is moving for disclosure or for disclosure sanctions or both, you have a few options in how you respond in your opposition papers:

• Assert a privilege or a reasonable basis that your adversary's disclosure demand is improper.[36]

• Argue that you've already given your adversary all outstanding disclosure. As an exhibit in your opposition papers, attach the disclosure you've given to your adversary.[37]

• Respond in your opposition to your adversary's disclosure motion by providing the disclosure your adversary seeks.[38] Attach the disclosure as an exhibit.

• Respond with a combination of the above.

Regardless whether you've provided the disclosure or have refused to provide the disclosure, you'll still need to establish that your failure to disclose wasn't deliberate — that your behavior wasn't willful, wanton, or contumacious.[39] Also, explain that your adversary won't be prejudiced or wasn't prejudiced by your late disclosure.

If you've defaulted by failing to abide by the terms of a conditional order, you might overcome a default by demonstrating to the court that you have (1) a reasonable excuse for the default and (2) a meritorious claim or defense.[40]

When evidence is lost, destroyed, or altered, a party seeking the evidence may move for sanctions against the spoliator — the party who lost, destroyed, or altered the evidence.

Improperly Obtained Information

The court has all the remedies outlined in CPLR 3126 when you've improperly obtained disclosure: awarding monetary sanctions and costs, striking pleadings, deeming issues resolved, and precluding evidence.[41] The court might suppress information that's obtained through "improper or irregular disclosure procedures."[42] The court will determine whether the information so obtained prejudices a party's substantial rights.[43] A court may also dismiss a case when one party obtains too much disclosure, such as obtaining confidential files "on the sly."[44]

Spoliation of Evidence

Intentionally or negligently losing, destroying, or altering evidence that should be disclosed is called spolia-

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tion.[45] When evidence is lost, destroyed, or altered, a party seeking the evidence may move for sanctions against the spoliator — the party who lost, destroyed, or altered the evidence.[46] A court may impose a spoliation sanction under CPLR 3126. The court may also impose a spoliation sanction — a per se penalty — under the common-law doctrine of spoliation.[47]

In evaluating a spoliation motion, the court may consider a number of factors:[48] (1) who lost, destroyed, or altered the evidence; (2) whether the spoliation was intentional or negligent; (3) when the spoliation occurred; (4) whether the evidence was relevant, i.e., "key evidence"; (5) what impact or prejudice to prosecute or defend its case inured to the party seeking the evidence; (6) whether the nature of the evidence or the conduct of the spoliator warrants a sanction; and (7) what penalty or sanction is appropriate. Discuss each of these factors in your spoliation motion, in your papers opposing the spoliation motion, and in your reply papers.

Before a court sanctions a party for spoliation, that party must have had an obligation to preserve the evidence.[49] If a non-party to the litigation has lost, destroyed, or altered evidence, the court must determine whether the non-party has an "agency or other legal relationship . . . so that the loss, destruction, or alteration of the evidence by one [non-party] may be imputed to the other" party to the litigation.[50] If the party's attorney takes custody of the evidence, responsibility for the evidence "may subsequently shift to the party's attorney."[51]

To obtain a sanction, you must establish that the evidence the spoliator allegedly lost, destroyed, or altered actually existed.[52]

New York doesn't recognize the tort of third-party negligent spoliation of evidence.[53]

Spoliation sanctions under CPLR 3126 include a resolving order, a preclusion order, or dismissal.[54] The court may also strike the spoliator's pleadings even if the spoliation was negligent rather than willful.[55] A court may impose sanctions less severe than striking the spoliator's pleadings "where the missing evidence does not deprive the moving party of the ability to establish his or her defense or case."[56] The court may also give an adverse inference charge to the jury if evidence is lost, destroyed, or altered.[57]

Spoliation and spoliation sanctions come into play in the area of electronic disclosure and electronically stored information (ESI), including emails. Once litigation is reasonably anticipated, a party must preserve — a "litigation hold" — all ESI.[58] Failing to preserve ESI might result in the court's choosing any sanction in CPLR 3126, including giving the jury an adverse-inference charge.[59]

Don't wait until trial — by moving for a directed verdict — to seek a spoliation sanction.[60] A trial court has no authority sua sponte to strike the spoliator's pleadings when you haven't moved timely for spoliation sanctions.[61]

When moving for spoliation sanctions, consider including with your motion an affidavit or affirmation from an expert. An expert's affidavit or affirmation "is particularly important in cases involving electronic evidence."[62]

In your opposition, consider "[o]ffer[ing] to accept a less severe sanction . . . [that] impacts in the least serious manner upon your party's ability to prove a claim or defense."[63]

Disclosure in Special Proceedings

Parties aren't entitled to disclosure as a matter of right in special proceedings. They must instead move the court for leave for disclosure. CPLR Article 4 governs special proceedings. Article 78 proceedings and summary proceedings to recover property under Article 7 of the Real Property Actions and Proceedings Law (RPAPL) are examples of special proceedings.[64]

Special proceedings are meant to be fast and economical. Parties may not dawdle or conduct lengthy and expensive disclosure. The only disclosure device you may use, without having to seek leave of the court, is a notice to admit.[65] Obtaining leave of court for disclosure isn't required in Surrogate's Court "even though its regular business is carried on in a series of special proceedings."[66]

Special proceedings are meant to be fast and economical.

You'll need a court order if you're seeking disclosure in a summary Housing Court proceeding.[67] Parties usually seek disclosure in two types of cases: nonprimary residence and owner's-use proceedings.[68] The court almost always automatically grants disclosure in these cases. A landlord, the petitioner, brings a primary-residence holdover when it believes that a tenant, the respondent, isn't using a rent-regulated apartment as the tenant's primary residence. In an owner's-use case, "the landlord seeks to recover a rent-regulated apartment based on the claim that the landlord or the landlord's family will reside in the apartment as their primary residence after possession of the apartment is obtained."[69] In illegal-sublet cases, unlike nonprimary residence and owner's-use cases, no presumption favors disclosure. A court might grant disclosure when a respondent asserts certain defenses: rent overcharge, horizontal multiple dwellings, illusory tenancy, succession rights, and economic infeasibility.[70] In these proceedings, you'll need to demonstrate ample need for the disclosure.[71]

In special proceedings, move under CPLR 3124 to compel disclosure, move under CPLR 3126 to sanction your adversary for nondisclosure, and move under CPLR 3103 for a protective order.

In the next issue of the *Journal*, the *Legal Writer* will discuss subpoenas, moving to quash subpoenas, and contempt motions. ■

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1. 1 Byer's Civil Motions § 24:50, at 318 (Howard G. Leventhal 2d rev. ed. 2006; 2012 Supp.).

2. David D. Siegel, New York Practice § 367, at 629 (5th ed. 2011) (citing *Fish v. Schindler*, 75 A.D.3d 219, 222, 901 N.Y.S.2d 598, 600 (1st Dep't 2010) (holding that "last chance" warning is not required before court strikes defendant's answer and sets case down for inquest)).

3. *Id.* § 367, at 632.

4. *Id.*

5. *Id.* § 367, at 629.

6. *Id.*

7. *Id.* § 367, at 632 (citing *Wilson v. Galicia Contracting & Restoration Corp.*, 10 N.Y.3d 827, 828–29, 860 N.Y.S.2d 417, 418, 890 N.E.2d 179, 180 (2008) ("[T]he court issued a self-executing conditional order directing defendants to comply by July 1, 2002 or their answers would be stricken. Having failed to comply, [defendant's] answer was stricken as of July 1, 2002.")).

8. *Id.* (citing *Lauer v. City of Buffalo*, 53 A.D.3d 213, 216, 862 N.Y.S.2d 675, 678 (4th Dep't 2008) ("But where, as here, a noncompliant party has defaulted on a motion seeking a conditional order to strike its pleading or had consented to the conditional order before failing to comply with it, that party has had no opportunity to offer a reasonable excuse for the default. Nor has that party had the opportunity to establish a meritorious claim or defense, the additional prerequisite to relief under CPLR 5015(a)(1).")).

9. *Id.* § 367, at 632.

10. *Id.* (citing *Mazarakis v. Bronxville Glen I Ass'n*, 229 A.D.2d 661, 661, 644 N.Y.S.2d 793, 794 (3d Dep't 1996) ("We conclude that Supreme Court's award of sanctions should not be disturbed as it was not an improvident exercise of the court's discretionary authority under CPLR 3126, which is separate and distinct from the authority granted by 22 NYCRR 130-1.1.").

11. *Id.* § 367, at 632.

12. David Paul Horowitz, New York Civil Disclosure § 24.05, at 24-7 (2012).

13. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial § 31:92, at 31-14 (2006; Dec. 2009 Supp.) (citing 22 N.Y.C.R.R. § 130-1.1); Horowitz, *supra* note 12, § 23.06, at 23-9.

14. Horowitz, *supra* note 12, § 23.06, at 23-9.

15. 22 N.Y.C.R.R. 130-1.2.

16. Horowitz, *supra* note 12, § 24.04, at 24-6 (citing 22 N.Y.C.R.R. 130-1.3).

17. *Id.* § 24.04, at 24-6.

18. *Id.*

19. Siegel, *supra* note 2, at § 367, at 632.

20. Horowitz, *supra* note 12, § 24.01, at 24-2.

21. *Id.* § 24.06, at 24-8.

22. *Id.* § 23.07, at 23-9.

23. *Id.* § 24.07, at 24-11 (citing *Myers v. Cmty. Gen. Hosp. of Sullivan County*, 51 A.D.3d 1359, 1360, 859 N.Y.S.2d 753, 755 (3d Dep't 2008) ("The penalty imposed will not be disturbed absent a clear abuse of the court's discretion . . . even if the sanction is dismissal of the underlying complaint.") (citations omitted)).

24. *Id.* § 23.07, at 23-10.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*§ 23.07, at 23-11.

29. The *Legal Writer* discussed willful, wanton, and contumacious behavior in Part XXVIII of this series. *See Drafting New York Civil-Litigation Documents: Part XXVIII — Disclosure Motions Continued*, 85 N.Y. St. B.J. 64 (Nov./Dec. 2013).

30. Horowitz, *supra* note 12, § 23.07, at 23-10, 23-11.

31. 22 N.Y.C.R.R. 202.7(a)(2); David L. Ferstendig, New York Civil Litigation § 7.15, at 7-112 (2013).

32. Horowitz, *supra* note 12, § 23.07, at 23-11 (citing *Molyneaux v. City of N.Y.*, 64 A.D.3d 406, 407, 882 N.Y.S.2d 109, 110 (1st Dep't 2009) ("The court improperly granted plaintiffs' CPLR 3126 motion in the absence of the required affirmation by their attorney that the latter had conferred with defendants' attorney in a good faith effort to resolve the issues raised by the motion."); *Dunlop Dev. Corp. v. Spitzer*, 26 A.D.3d 180, 182, 810 N.Y.S.2d 28, 30 (1st Dep't 2006) ("The court properly denied petitioner's motion for discovery, since petitioner failed to include an affirmation of good faith, as mandated by 22 NYCRR 202.7(a).")).

33. *Id.* § 23.07, at 23-12.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. Siegel, *supra* note 2, July 2013 Pocket Part, at § 367, at 85 (citing *Gibbs v. St. Barnabas Hosp.*, 16 N.Y.3d 74, 80, 917 N.Y.S.2d 68, 71, 942 N.E.2d 277, 280 (2010) ("To obtain relief from the dictates of a conditional order that will preclude a party from submitting evidence in support of a claim or defense, the defaulting party must demonstrate (1) a reasonable excuse for the failure to produce the requested items and (2) the existence of a meritorious claim or defense.")).

41. Barr et al., *supra* note 13, § 31:122, at 31-16.

42. *Id.* § 31:120, at 31-16.

43. CPLR 3103(c); Barr et al., *supra* note 13, § 31:121, at 31-16 (citing *In re Beiny*, 129 A.D.2d 126, 136, 517 N.Y.S.2d 474, 480 (1st Dep't 1987) (suppressing records attorney obtained from custodian of records without serving notice on opposing counsel.); *Wilk v. Muth*, 136 Misc. 2d 476, 477, 518 N.Y.S.2d 762, 763 (Sup. Ct. Suffolk County 1987) (suppressing medical report when attorney obtained it from client's doctor in preparation for malpractice action and misrepresented to doctor that attorney needed records because client was injured in accident); *contra In re Kochovos*, 140 A.D.2d 180, 181, 528 N.Y.S.2d 37, 38 (1st Dep't 1988) ("Notwithstanding our extreme disapproval of the tactics employed by counsel . . . . [n]one of the material obtained was privileged, and there is no showing that counsel would not have been entitled to obtain the documents at issue in the normal course of discovery, properly conducted. Thus, the contestants did not obtain an unfair advantage despite the use of impermissible tactics. The Surrogate, therefore, properly denied the broad scope of suppression requested by the proponents.")).

44. Siegel, *supra* note 2, at § 367, at 631 (citing *Lipin v. Bender*, 193 A.D.2d 424, 428, 597 N.Y.S.2d 340, 343 (1st Dep't 1993) (dismissing case when plaintiff stole privileged documents from his adversary and made copies of them in violation of court directive), *aff'd*, 84 N.Y.2d 562, 565, 620 N.Y.S.2d 744, 744, 644 N.E.2d 1300, 1300 (1994)).

45. Horowitz, *supra* note 12, § 26.01, at 26-3.

46. *Id.*

47. *Id.* § 26.03, at 26-5 (citing *DiDomenico v. C&S Aeromatik Supplies, Inc.*, 252 A.D.2d 41, 53, 682 N.Y.S.2d 452, 459 (2d Dep't 1998)).

48. *Id.* § 26.01, at 26-3.

49. *Id.* § 26.05, at 26-10.

50. *Id.* § 26.06, at 26-12.

51. *Id.* § 26.05, at 26-10.

52. *Id.* § 26.05, at 26-11 (citing *Lisa E.G. v. Genesee Hosp.*, 48 A.D.3d 1064, 1065, 850 N.Y.S.2d 734, 735 (4th Dep't 2008) ("[P]laintiffs failed to establish that the evidence allegedly lost or destroyed by defendants ever existed.").

53. *Id.* § 26.12, at 26-23 (citing *Ortega v. City of New York*, 9 N.Y.3d 69, 82, 845 N.Y.S.2d 773, 781, 876 N.E.2d 1189, 1197 (2007) ("The complexities inherent in any multiple party negligence action would be compounded in a spoliation claim since litigation emphasizing the impact of destruction of evidence would afford the jury no reasonable means of determining how liability might have been apportioned among tortfeasors in the original litigation or of assessing [the] plaintiff's own comparative fault, if any.")); Byer's Civil Motions, *supra* note 1, at § 24:51, at 324 (citing *MetLife Auto & Home v. Basil Chevrolet, Inc.*, 99 N.Y.2d 510, 760 N.Y.S.2d 101, 790 N.E.2d 275 (2003)).

54. Siegel, *supra* note 2, § 367, at 630 (citing *Ortega*, 9 N.Y.3d at 76, 845 N.Y.S.2d at 776, 876 N.E.2d at 1192 ("New York courts therefore possess broad discretion to provide proportionate relief to the party deprived of the lost evidence, such as precluding proof favorable to the spoliator to restore balance to the litigation, requiring the spoliator to pay costs to the injured party associated with the development of replacement evidence, or employing an adverse inference instruction at the trial of the action . . . . Where appropriate, a court can impose the ultimate sanction of dismissing the action or striking responsive pleadings, thereby rendering a judgment by default against the offending party.") (citations omitted); *Kirkland v. N.Y.C. Hous. Auth.*, 236 A.D.2d 170, 177–76, 666 N.Y.S.2d 609, 613 (1st Dep't 1997) (holding that even though destruction of stove was unintentional, impleader claim against stove maker had to be dismissed)).

55. Horowitz, *supra* note 12, § 26.01, at 26-3; § 26.06(2)(d), at 26-14.

56. *Wetzler v. Sisters of Charity Hosp.*, 17 A.D.3d 1088, 1089, 794 N.Y.S.2d 540, 542 (4th Dep't 2005) (citations omitted).

57. *Gogos v. Modell's Sporting Goods, Inc.*, 87 A.D.3d 248, 254, 926 N.Y.S.2d 53, 58 (1st Dep't 2011) (upholding adverse inference charge for destroying videotape); *Ahroner v. Israel Discount Bank of N.Y.*, 79 A.D.3d 481, 482, 913 N.Y.S.2d 181, 182 (1st Dep't

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2010) (upholding adverse inference charge after finding that destruction of evidence was either intentional or grossly negligent).

58. *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33, 41, 939 N.Y.S.2d 321, 328 (1st Dep't 2012) (relying on federal decision, *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003), to hold that a party must preserve emails as part of litigation hold even if the party must suspend computer system's automatic-deletion function).

59. *VOOM HD Holdings*, 93 A.D.3d at 41, 939 N.Y.S.2d at 328 (finding that defendant's failure to preserve ESI constituted gross negligence and warranted an adverse inference charge).

60. Horowitz, *supra* note 12, § 26.03, at 26-6.

61. *Id.* § 26.03, at 26-7 (citing *Sisters of Charity Hosp.*, 17 A.D.3d at 1090, 794 N.Y.S.2d at 542).

62. *Id.* § 26.09(2), at 26-19 (citing *Ingoglia v. Barnes & Noble Coll. Booksellers, Inc.*, 48 A.D.3d 636, 637, 852 N.Y.S.2d 337, 338 (2d Dep't 2008) ("The defendant's expert found that after the defendant demanded inspection of the plaintiff's computer, a software program was installed on the computer which was designed to permanently remove data from the computer's hard drive.")).

63. *Id.* § 26.10, at 26-21.

64. Siegel, *supra* note 2, § 550, at 977.

65. *Id.* § 555, at 984 (citing CPLR 3123; *but see In re Western Printing & Lithographing Co. v. McCandlish*, 55 Misc. 2d 607, 607–08, 286 N.Y.S.2d 59, 60–61 (Sup. Ct. Dutchess County 1967) (permitting bill of particulars without leave of court in special proceeding under Article 7 of the Real Property Tax Law)).

66. *Id.* § 555, at 984.

67. *Id.* § 577, at 1027.

68. Gerald Lebovits, Rosalie Valentino & Rohit Mallick, *Disclosure and Disclosure-Like Devices in the New York City Housing Court*, 37 N.Y. Real Prop. L.J. 34 (Summer 2009).

69. *Id.* at 35.

70. *Id.* at 37–39.

71. *Id.* at 35 (citing *New York Univ. v. Farkas*, 121 Misc. 2d 643, 648, 468 N.Y.S.2d 808, 811–12 (Civ. Ct. N.Y. County 1983)).