

## CHAPTER 8

### OBTAINING INFORMATION TO PREPARE YOUR CASE: THE PROCESS OF DISCOVERY\*

#### A. Introduction

This Chapter is an overview of the general rules of discovery. Discovery is the process that allows you to ask your opponent for information he possesses that you need to present your case. Your opponent can also use the discovery process to get information from you. Discovery also allows you to get information from other sources, like co-defendants or potential witnesses. Discovery usually takes place before the trial begins. In a civil action, the process starts after the *complaint* (document that begins a suit) has been filed. In a criminal action, it generally starts after the defendant has been *arraigned* (brought before the court to plead to the charge brought against him).

Discovery is governed by a fairly complicated set of rules.<sup>1</sup> It is important for you to know the rules for two reasons. First, you need discovery to fully prepare your case for trial. Second, you must know how to respond to your opponent's requests for information in order to avoid being penalized by the court. Discovery is a privilege and a responsibility: when you file a suit, you have the right to information from your opponent but you also must respond to your opponent's requests for discovery. If you refuse to comply with proper discovery requests from the other side, your lawsuit may be dismissed.

Discovery rules differ depending on the type of case (civil or criminal) and the type of court in which you are appearing (state or federal). Civil discovery is very broad and has relatively few restrictions. Criminal discovery, on the other hand, is quite different and relatively limited. Regardless of the depth of treatment given to a particular rule in this Chapter, you must always check the appropriate rule yourself, in addition to any cases interpreting the rule. You should also "Shepardize" (or update) the rules and the cases, since the rules change quite frequently. Chapter 2 of the *JLM*, "Introduction to Legal Research," explains Shepardizing and other methods of legal research.

Discovery is intended to:

- (1) narrow and clarify the issues that will be presented to the court;
- (2) find out the claims of each party;
- (3) find out the important facts and details of your case and your opponent's case;
- (4) get testimony from witnesses while their memories are fresh, because they might forget details or become otherwise unable to testify later; and
- (5) get rid of the surprise and delay that would occur if each party knew nothing about the other side's case until the trial itself.

You will know much more about what you will have to prove and disprove to win your case once you have completed the discovery process. You will also know what information you still need in order to be successful.

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\* This Chapter was revised by Paula M. McManus and Roslyn R. Morrison based in part on previous versions by Colleen Romaka, David Lamoreaux, and members of the 1977–78 *Columbia Human Rights Law Review*.

1. In federal court, the Federal Rules of Civil Procedure (Fed. R. Civ. P.) are used in civil cases, and the Federal Rules of Criminal Procedure (Fed. R. Crim. P.) are used in criminal cases. New York state court uses the Civil Practice Law and Rules (N.Y. Civ. Prac. Law & R. or N.Y. C.P.L.R.) in civil cases and the Criminal Procedure Law (N.Y. Crim. Proc. Law) in criminal cases. N.Y. Crim. Proc. L. is also commonly referred to as C.P.L. Each set of rules contains discovery procedures for the appropriate type of case. For other states, you can find rules of civil and criminal procedure in the state's Annotated Code or Annotated General Statutes. Also, for most states, West and LexisNexis publish a yearly volume for the state that contains current rules of civil and criminal procedure. West's publication is *Rules of Court—State*. (For example, if you are looking for information on Connecticut, look to West's 2011 *Rules of Court—Connecticut*.) LexisNexis' publication is called *Court Rules Annotated*. (For example, if you are looking for information on New Hampshire, look to LexisNexis' 2011 *New Hampshire Court Rules Annotated*.) You can often request the volume you need through inter-library loan if your library does not carry it.

This Chapter gives you an overview of the discovery rules. Part B addresses the discovery rules for civil lawsuits, while Part C focuses on the discovery rules for criminal cases. Each of these Parts is further divided into two sections: discovery in federal cases and discovery in New York state cases.

## B. Civil Discovery

### 1. Introduction

Specific rules of civil procedure govern the various ways to get discovery in civil cases.<sup>2</sup> They vary depending on whether you bring your case in federal or state court.<sup>3</sup> The federal rules governing civil discovery are discussed in Part B(2) of this Chapter; the New York State rules are discussed in Part B(3). Although the basic ideas are the same, it is important to know the specific rules of the court where you bring your claim. Otherwise, your case may be dismissed early. Also, individual courts and judges can set their own special procedural rules, so you should try to find out if your judge has a special system to follow. You can do this by writing to the clerk of the court. The addresses of the federal and state courts in New York are listed in Appendices I and II at the end of the *JLM*.

There is no required form for filing a discovery request, but you should state clearly the information you are seeking and the rule under which you are making your request. Many legal formbooks contain examples of the many different types of discovery requests.<sup>4</sup> Selected federal forms are provided in the Appendix at the end of this Chapter. *Do not tear them out of the book*; you must copy them on your own paper and insert the particular information you need.

### 2. Federal Discovery Procedures

#### (a) Introduction

In a civil action in federal court, discovery is governed by the Federal Rules of Civil Procedure, Rules 26–37.<sup>5</sup> The rules are fairly straightforward and should be relatively easy to follow. There is one basic rule to keep in mind: *you should always explain how the material you seek is relevant to your case*. Courts will not look kindly on you if you deliberately harass your opponent with unimportant requests that require a great deal of time or money. The judge may impose penalties on anyone who abuses the discovery process in this way.<sup>6</sup> At the same time, the discovery rules are usually applied generously so that each side may get the necessary information to pursue his case.

#### (b) Scope of Discovery

In a civil action, information must be *relevant* to your case for it to be discoverable.<sup>7</sup> Furthermore, certain types of information are *privileged*, which means they are not subject to discovery and may be kept secret.

One category of privileged information is communication between people in specific relationships, which the law protects and keeps private as a matter of public policy.<sup>8</sup> Examples of privileged relationships include those between lawyer and client, doctor and patient, priest and confessor, and husband and wife.<sup>9</sup>

2. See Fed. R. Civ. P. 26–37 (Depositions and Discovery) (federal courts); N.Y. C.P.L.R., art. 31 (Disclosure) (New York state courts). These rules of civil procedure also apply to attacks on a conviction after appeal, such as federal or state habeas corpus petitions, and Article 440 motions in New York. See *JLM* Chapters 13, 20, and 21 for information on habeas corpus and Article 440. Note that discovery in a habeas proceeding is only available for “good cause” and is not automatic. See *Henard v. Newkirk*, 987 F. Supp. 691, 694 (N.D. Ind. 1997) (directing prisoner to show good cause to authorize discovery).

3. Useful summaries of the law governing discovery in federal courts include Charles Alan Wright & Mary Kay Kane, *Law of Federal Courts* 580–647 (6th ed. 2002) and 6, 7 James William Moore, *Moore’s Federal Practice* 26–37A (3d ed. 2007).

4. See, e.g., 6, 7 James William Moore, *Moore’s Federal Practice* 26–37A (3d ed. 2007).

5. Note that habeas corpus rules differ slightly from discovery rules. See Chapter 13 of the *JLM*, “Federal Habeas Corpus,” and 28 U.S.C. §§ 2246, 2247 (2006).

6. Fed. R. Civ. P. 37(a)(5)(B). Sanctions are discussed in Part B(2)(f) of this Chapter.

7. Fed. R. Civ. P. 26(b)(1).

8. 81 Am. Jur. 2d Witnesses § 273 (2013).

9. 81 Am. Jur. 2d Witnesses §§ 357 (2013) (describing attorney-client privilege); 81 Am. Jur. 2d Witnesses §§ 416, 419 (2013) (describing doctor-patient privilege); 81 Am. Jur. 2d Witnesses § 498 (2013)

Information shared within these relationships and meant to be private is generally privileged, but the court will balance your interest against the strong interest of pursuit of the truth (because the court will be deprived of the information provided by the privileged evidence).<sup>10</sup> Generally, though, if your opponent requested copies of your personal correspondence, you would not have to give him letters that you wrote to your spouse, lawyer, etc. Of course, it also means that your opponent can withhold such privileged material from you.

Another category of privileged material is trial preparation material, also called “attorney work product.”<sup>11</sup> The work product rule is complicated and not discussed at length in this Chapter. Briefly, the rule covers information, analysis, arguments, and opinions prepared by attorneys for trial. You may be able to get access to some factual information if you can show “substantial need”<sup>12</sup>—that is, if you cannot get the information anywhere else and it would be unfair if you did not have it—but this does not include the opposing lawyer’s opinions and analyses related to the case.<sup>13</sup>

If you feel your opponent has requested privileged material from you, you are responsible for showing the court that the requested material is privileged. If you refuse to respond to a discovery request because you think the information is privileged, you must explain the reason (without giving away the information), and you must still respond to other discovery requests that do not ask for privileged material. The court may order you to turn over the material if it decides it is not privileged.

A second requirement for discovery is that the material requested be “relevant” to the case. Information is relevant when it supports or undermines a fact that either side is trying to prove. Imagine, for example, that you have filed a civil lawsuit for police misconduct at the time of your arrest.<sup>14</sup> In proving misconduct you would have to identify the officer who you believe was abusive. The arrest record directly supports your proof on this point because it will state the officer’s name. The arrest record will then be relevant, and you could ask for it in discovery. On the other hand, if you asked for the officer’s high school report card, that information would probably be irrelevant. If you asked for it and the other side objected, the judge would probably rule that the report card is not discoverable.

Information is also relevant when it *may lead* to other relevant information. You may request information if there is any reasonable possibility that it will lead you to admissible evidence that you can present at trial.<sup>15</sup> Still using the police misconduct example above, assume that you have found out the officer’s name and are suing the officer personally. You might request the names and addresses of other members of the police department, because it would be helpful to know his background and these other officers *might* know whether the officer has a violent personality or abusive work practices. You should be able to find out these other officers’ names and possibly depose them (depositions are discussed in Part B(2)(d)(i) of this Chapter). Even though you might not find any useful or admissible information, the discovery rules allow you to try to build your case by following leads that may uncover relevant information.

### (c) Mandatory Discovery: Rule 26

Rule 26 of the Federal Rules of Civil Procedure is designed to make it easy for you and your opponent to exchange basic information. The rule requires you to meet early on with your opponent and exchange certain

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(describing priest-confessor privilege); 81 Am. Jur. 2d Witnesses §§ 284–85 (2013) (describing marital privilege).

10. 81 Am. Jur. 2d Witnesses § 277 (2013).

11. The rule protecting attorney work product is also called the “Hickman-Taylor rule” because it is based upon the Supreme Court case *Hickman v. Taylor*, 329 U.S. 495, 500–14, 67 S. Ct. 385, 388–97, 91 L. Ed. 451, 456–66 (1947).

12. See, e.g., *In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d 180, 188 (2d Cir. 2007) (finding “substantial need” for the documents requested because they were unique evidence that could not be obtained through other means).

13. You cannot, for example, ask your opponent to tell you in advance the argument that he will make at trial. Work product privilege is covered in Fed. R. Civ. P. 26(b)(3), which you should read if work product protection becomes an issue in your case.

14. In *Mercado v. Division of New York State Police*, 989 F. Supp. 521, 522 (S.D.N.Y. 1998), the court held that N.Y. Civ. Rights L. § 50-a, which says a police officer’s personnel files may only be turned over if the officer consents or if a judge issues an order requiring the release of these records, does not necessarily apply to discovery in federal litigation.

15. Fed. R. Civ. P. 26(b)(1).

information. Below is a brief overview of the rule's requirements. Since the rule is fairly detailed, you should read the complete text if you are involved in a federal civil suit. Local courts may suspend some Rule 26 requirements, so you should always check with the court clerk to determine what your responsibilities are.

Under Rule 26(f), you and your adversary must meet "as soon as practicable" to discuss your case. The goal of this meeting is to see if you can settle the case without a trial. In addition, the Rule requires the parties to create a "discovery plan." This means you and your opponent need to set deadlines for discovery.

Within fourteen days after the Rule 26(f) meeting, Rule 26(a)(1)(A) requires you and your adversary to exchange certain basic information such as the names, addresses, and phone numbers of any people who might have discoverable information. Your adversary is automatically entitled to Rule 26(a)(1) information, which means you are required to send this information and he does not have to request it. Therefore, you should read this Rule carefully to know what information you are required to send and if your adversary has given you all the information to which you are entitled. For example, Rule 26(a)(2) requires any party who will call an expert witness to turn over basic information about the expert's opinions, experience, and qualifications.<sup>16</sup> In addition, Rule 26(a)(3) requires you and your opponent to exchange your list of witnesses at trial and summaries of any evidence that you plan to introduce. The exchange of information under Rule 26(a)(3) must take place at least thirty days before trial.

Lastly, Rule 26(e) requires each party to voluntarily supplement or correct any information already exchanged if he later realizes that the initial information is either incomplete or inaccurate. Under Rule 26(g), you must sign and write your address on all information that you supply to your adversary. By doing so, you indicate that to the best of your knowledge the information is complete and true.

#### (d) Additional Methods of Obtaining Information

##### (i) Depositions: Rules 27, 28, 30, 31, and 32

In a *deposition*, someone who may have useful information is asked a series of questions, usually by the attorney for the party seeking the information. An oral deposition is similar to a witness examination at trial. Basically, a meeting is set up with the person you want to depose,<sup>17</sup> the opposing lawyer, and a *stenographer*.<sup>18</sup> Under Rule 26(d), depositions (as well as any other forms of discovery) may be sought only after the initial mandatory meeting with your opponent, unless the court otherwise gives permission.<sup>19</sup> Rule 30(a)(2)(A) limits the number of depositions each side may take to a maximum of ten. Nevertheless, if you feel that you need to take more than ten depositions, you may seek the court's permission to do so. To decide whether to grant your request for more depositions, the court will consider several factors, including (1) whether the information you are seeking is unreasonably cumulative or duplicative<sup>20</sup> or if it can be obtained more conveniently from another source; (2) whether you have already had the opportunity to get the information you are seeking; and (3) whether the burden or expense of the proposed discovery outweighs the likely benefit.<sup>21</sup> Overall, the court wants to make sure that requests for depositions are reasonable and worth the inconvenience they cause the other party.

At the deposition, you may ask a broad range of questions. Depositions are particularly useful because they give you the opportunity to obtain an unplanned, honest response from the *deponent* (the person being questioned)<sup>22</sup> and to have face-to-face contact, unlike other discovery methods.

16. This includes: (1) the expert's name and qualifications, (2) the opinions the expert will express along with any facts, data, or exhibits that support those opinions, (3) how much the expert is being paid to testify, and (4) how many other cases he has testified in over the past four years. Fed. R. Civ. P. 26(a)(2).

17. The *defendant* (sometimes called *respondent*) is the party being sued. The *plaintiff* (sometimes called *petitioner*) is the party who filed the papers to bring the suit. The *deponent* is the person questioned in a deposition.

18. The *stenographer* (sometimes called the court reporter) is a professional secretary who types in shorthand everything said during the deposition.

19. Fed. R. Civ. P. 26(d)(1).

20. A *cumulative* request is overly broad and includes so much material that it is difficult or impossible to meet within a reasonable time period. A *duplicative* request is one that repeats earlier discovery requests needlessly.

21. Fed. R. Civ. P. 26(b)(2)(C).

22. The deponent may not be as well prepared by his attorney as he will be at the trial, and his attorney will not have an opportunity to review the deponent's responses before you receive them.

The problem with depositions, however, is that they tend to be time-consuming and expensive. If you depose someone, you usually have to hire a stenographer and pay to have the stenographer's notes typed out in readable form. Both parties, their attorneys, and the witness must arrange a suitable time and place for the deposition. Rule 29 of the Federal Rules of Civil Procedure offers some relief by providing for the use of stipulations.<sup>23</sup> If you and your opponent agree, you can hold the deposition in a place convenient for you (such as the jail or prison), and you can tape-record the deposition instead of hiring a stenographer.

If your opponent is unwilling to stipulate to alternative methods of taking a deposition, you can make a motion to the court to order him to cooperate. Be prepared to show specific reasons for your request (for example, that you cannot afford a stenographer). Another option is to obtain written depositions. If you choose to use written depositions, you should refer to Rule 31 for the exact procedure.<sup>24</sup> However, you should note that the use of written depositions does not allow you to get the un-coached answers that you can get with oral depositions.

### (ii) Interrogatories: Rule 33

*Interrogatories* are written questions that must be answered in writing under oath. Only parties to the lawsuit must respond to interrogatories, not outside witnesses. Apart from this important limitation, interrogatories are very useful because they are inexpensive. Rule 33(a) limits the number of questions each party may ask to twenty-five.<sup>25</sup> Nonetheless, if you feel you need to ask more than twenty-five questions, you may ask the court for special permission. To determine whether to grant your request, the court will consider whether the information you are seeking is unreasonably repetitive, whether you have already had the opportunity to obtain the information, and whether the burden or expense of the additional interrogatories would outweigh their likely benefit.<sup>26</sup> Interrogatories may be sent as soon as you and your opponent have attended the mandatory meeting under Rule 26(f).<sup>27</sup> Note that many local courts and individual judges have their own special rules for handling interrogatories, so you should check with the clerk of the court to find out if special rules apply to you.

After you send the interrogatories, your opponent must answer within thirty days, unless the court has given permission or you have agreed to a longer period of time.<sup>28</sup> As with depositions, your questions must be relevant to the case, cannot ask for privileged material, and cannot be unreasonably burdensome to the other side. If you are suing a prison official for assault, for example, you might ask the following questions in your interrogatory:

- (1) Were you on Block 8 at or around 8:00 P.M. on January 30, 1999?
- (2) Why were you on Block 8 at 8:00 P.M. on January 30, 1999?
- (3) At 8:00 P.M. on January 30, 1999, did you hear any noise coming from the east dayroom?
- (4) Did you go inside the east dayroom shortly after 8:00 P.M. on January 30, 1999?

In order to obtain specific answers, you must ask specific questions. If you want more information, do not phrase your questions in a manner that allows only a "yes" or "no" answer. Questions (1), (3) and (4) above are types of questions that would be answered with only a "yes" or "no." Question (2), because it asks 'why,' *cannot* be answered with a "yes" or "no."

If you have trouble getting answers to your interrogatories and there is no legitimate reason for your opponent's failure to respond, then you can submit a motion for an order compelling (forcing) discovery under Rule 37(a)(3)(B). However, a court will grant your motion only if you can show that you made every possible effort to get the answers from your opponent yourself before asking the court for help. If the judge does grant your motion, the court will penalize your opponent if he does not respond to your interrogatories. Some judges are reluctant to issue orders compelling discovery, so you should read the Federal Rules of Civil Procedure closely and prepare an argument to show why you need the requested information and why you have a right to receive it.

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23. A *stipulation* is a document signed by both parties stating that they agree to a certain fact, rule, or way of proceeding.

24. Fed. R. Civ. P. 31.

25. Fed. R. Civ. P. 33(a).

26. Fed. R. Civ. P. 26(b)(2).

27. Fed. R. Civ. P. 26(f).

28. Fed. R. Civ. P. 33(b)(2).

(iii) Production of Documents: Rule 34

Rule 34 of the Federal Rules of Civil Procedure enables you to obtain documents and other physical objects in your opponent's possession. Once again, you may only get materials that are relevant to your case and that are not privileged. Like other forms of discovery, the court's permission is not generally required, and it is assumed that the parties will cooperate in exchanging the necessary material. Remember that requests to produce documents are also subject to the limits of Rule 26(b). This means that they cannot be cumulative or duplicative, they cannot have been available to you by other means, and the burden on the other party cannot outweigh the benefit of the information.

You can request materials after you have met with your opponent under Rule 26(f), or you can ask the court for permission to request materials sooner. As with interrogatories, there is a thirty-day period in which to respond. If your opponent refuses to cooperate with a reasonable request, you can file an order to compel discovery under Rule 37(a)(3)(B). If your opponent does not comply with the order, you can make a motion asking the court to sanction your opponent under Rule 37(b).<sup>29</sup>

A request for production must describe the name and date of each document or object as specifically as possible. You should try to find out as much as you can about the documents or objects your opponent has that might be useful to you. Note that when prison officials provide documents in discovery, they often "redact," or blacken out, information they think is secret or sensitive. If you think your opponent is hiding information you need and are entitled to see, you can move for an order compelling discovery under Rule 37(a)(3)(B).

Remember that Rule 34 does not limit you to requesting documents that might be found in an official file; you can ask for books, accounts, memoranda, letters, photographs, charts, physical evidence, or any other object you can describe specifically. If you request a large volume of material such that your opponent has no choice other than sending you copies, you should be prepared to pay copying costs or ask the court to pay them under a poor person's order.<sup>30</sup>

(iv) Subpoenas: Rule 45

Subpoenas under Rule 45 allow you to *compel* (force) witnesses who are not parties to attend a deposition or trial. You can also ask the witness to bring documents or other discoverable materials that fall under Rule 34. A subpoena to a third party requesting such documents is often called a subpoena *duces tecum*. If you serve a subpoena on a third party—either to testify or to produce documents—and the party refuses, the court may hold that party in contempt for failure to comply. In order to file a subpoena, you must obtain a form by writing to the clerk of the court.<sup>31</sup>

(v) Admissions: Rule 36

Rule 36 allows you to serve a written "request for admission" to your opponent. You do not need the court's permission to serve this request but you must wait until after you attend the Rule 26(f) meeting with your opponent. A request for admission is similar to an interrogatory, except that you must prepare a list of statements for your opponent to either admit or deny. Your opponent must submit a written denial within thirty days or the court will consider the statements admitted.

Here are some statements that you might include in a request for admission, using the prison assault example presented above in Section B(2) of this Chapter:

- (1) Admit that you were in Block 8 at 8:00 P.M. on January 30, 1999.
- (2) Admit that you heard noises coming from the east dayroom at 8:00 P.M. on that evening.
- (3) Admit that you went inside the east dayroom shortly after 8:00 P.M. on that evening.
- (4) Admit that the attached copy of the incident report is a true and accurate copy of the original on file.

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29. A *sanction* is a penalty or punishment that results from failing to comply with a law, rule, or order. See Black's Law Dictionary (8th ed. 2004). Usually, sanctions are monetary fines, but they can also be imprisonment or dismissal of the lawsuit. See Part B(2)(f) of this Chapter for more detail.

30. A poor person's order is a statement signed under oath and submitted to the court that requests a waiver of court costs and states that the applicant is financially unable to pay.

31. Fed. R. Civ. P. 45(a)(3). An attorney may also issue and sign a subpoena in some instances. Fed. R. Civ. P. 45(a)(3)(A)-(B).

Note that in requests for admission, you cannot make open-ended information requests, like in question (2) of the interrogatory examples in Part B(2)(d)(ii) above.<sup>32</sup> Also, requests for admission under the Federal Rules are intended primarily to resolve issues that are not central to the lawsuit, such as background information. If you ask your opponent to admit a fact that presents a “genuine issue for trial,” he must respond but may deny the matter until evidence is presented. If you later prove a fact your opponent previously refused to admit, your opponent may be required to pay some of your attorney’s fees under Rule 37(c)(2).

#### (e) Protective Orders

Both parties have the right to discover important information from the other side, and both parties must help make discoverable material available. If you believe, however, that your opponent has made an unreasonable request—for example, one that asks for privileged information or is meant to intimidate you or waste your time and money—you can move for a protective order under Rule 26(c)(1) instead of preparing a response to the request.

In a motion for a protective order, you must give the judge a good reason why your opponent’s request for information was improper or unreasonable. You must also show that you have made every effort to resolve the issue with your opponent before you sought help from the court (for example, you told your opponent that you thought his request was unreasonable and he refused to make any changes). If the judge grants a protective order, your opponent’s request will either be thrown out (in which case you will not have to respond) or be limited (in which case you will only have to respond to part of the request).

#### (f) Sanctions: Rule 37

Rule 37 allows the court to issue sanctions (monetary fines) against any person who fails to comply with the rules of discovery. This provides a way for the court to enforce discovery rules.

If your opponent has not responded to your request for discovery and you have made every effort to get him to respond, you can move for an order compelling your opponent to comply with your request. If your motion is granted but your opponent still does not comply, the court may hold your opponent in contempt of court, and your opponent may face fines or even imprisonment. If you refuse to comply with discovery requests, on the other hand, the court may dismiss the lawsuit. All of these punishments are available under Rule 37. Often, parties will be encouraged to comply with discovery requests if they find out that their opponent has moved for sanctions.

### 3. New York Discovery Procedure

#### (a) Introduction

For the most part, the rules governing discovery procedures in civil suits brought in New York state courts are similar to the federal rules discussed above. The following is a brief description of the New York statutes, noting some of the differences between the federal and New York state rules. If you have a case in a New York state court, you will need to carefully examine these rules and the cases that apply them. This Section should help you get started.<sup>33</sup>

New York statutes use the term “disclosure” instead of “discovery,” but the procedures are basically the same. The statutes governing disclosure are contained in Article 31 of the New York Civil Practice Law and Rules (“N.Y. C.P.L.R.”).

A major difference between New York disclosure and federal discovery is that under the New York rules, parties are not required to meet or give out information voluntarily.<sup>34</sup> As a result, you must request any information that you want from your opponent, and your opponent must request any information your opponent wants from you. Also, you and your opponent do not need to wait until after you meet to begin making requests for information. Generally, information can be requested after a complaint is filed and the

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32. “Why were you on Block 8 at 8:00 P.M. on January 30, 1999?”

33. J. Weinstein et. al., *New York Civil Practice Law and Rules Manual* (2d ed. 1997), provides a great deal of information on New York civil procedure and disclosure. Its organization follows the structure of the N.Y. C.P.L.R., so you can simply consult the section of the Weinstein/Korn/Miller Manual that corresponds to the N.Y. C.P.L.R. section you want to research.

34. This is different from the federal system. *See* Fed. R. Civ. P. 26(a).

defendant has responded (or the time period for the defendant's response has expired, whichever comes sooner).

The New York and federal discovery process also differ in how they deal with difficulties that arise during the discovery process. Under N.Y. C.P.L.R. 3104, you may request that the court appoint a referee to oversee the process. This may be helpful if you have difficulty getting your opponent to cooperate. But if you make this request, the court can make you pay the referee's expenses. If you are thinking about this option, you may wish to write to the clerk of the court to see how your particular judge generally handles such situations. Keep in mind that, under N.Y. C.P.L.R. 3114, you may need to provide language translations for all questions and answers if a witness does not understand English. The party seeking the information must pay for this translation and the associated costs. If you need information from a person who needs a translator and you cannot afford one, you should check with the court to see if you have other options.

#### (b) Methods of Obtaining Information

##### (i) Depositions

Depositions in New York state court require twenty days notice unless the court orders otherwise.<sup>35</sup> In New York courts, unlike federal courts, a subpoena is required to depose someone who is not a party to the proceeding.<sup>36</sup> As with the federal rules, any material that is requested through disclosure in New York courts must be relevant and not privileged. If you think information that you want to request, or information requested from you, may be privileged, refer to N.Y. C.P.L.R. 3101, which details what types of information are privileged and what information may be requested through discovery.

Section 3106(c) of the N.Y. C.P.L.R. requires the court's permission before a deposition can be taken from a person in prison. This rule affects both parties: it applies if you need to depose a fellow prisoner and it also applies to your opponent if he wishes to depose you. If your opponent does depose you, Section 3116(a) requires you to read and sign your statement after the deposition to confirm that everything in the deposition is true and correct to the best of your knowledge. If you feel that a change needs to be made, you may write in the change at the end of the deposition. You must also state the reasons for making the change. Once your deposition is finished, you are allowed to keep a copy under Section 3101(e). It is always a good idea to request a copy so that you have a record of your testimony.

##### (ii) Interrogatories

The practice and form for interrogatories are similar to those used in the federal courts. However, there are some differences. Under New York law, without a court order, a *plaintiff* may not serve a defendant with an interrogatory until after the time limit for the defendant to answer the plaintiff's complaint has expired. On the other hand, a defendant can serve interrogatories on any other party whether or not he has answered the plaintiff's complaint. In other words, after receiving the complaint, the defendant may immediately serve an interrogatory.<sup>37</sup> Also, in New York the answering party has only twenty days to answer the interrogatory or to object to the questions.<sup>38</sup> Finally, unlike the Federal Rules, New York does not limit the number of interrogatories that may be requested.<sup>39</sup>

##### (iii) Requests for Production

In New York, requests for production of documents and other materials are similar to requests in federal court under Federal Rules of Civil Procedure. New York also allows the discovery of materials in the custody and control of non-parties with the court's permission.<sup>40</sup>

New York courts require requests for production to be reasonable and not overly burdensome. This means you must know what you are seeking and it must be relevant to the case. For example, in *Konrad v. 136 East 64th Street Corporation*, a New York court ruled that even though N.Y. C.P.L.R. 3120(2) does not

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35. N.Y. C.P.L.R. 3107 (McKinney 2012).

36. N.Y. C.P.L.R. 3106(b) (McKinney 2012). Note that the subpoena must be served 20 days before the examination.

37. N.Y. C.P.L.R. 3132 (McKinney 2012).

38. N.Y. C.P.L.R. 3133(a) (McKinney 2012).

39. N.Y. C.P.L.R. 3130(1) (McKinney 2012).

40. N.Y. C.P.L.R. 3111, 3120(1) (McKinney 2012).

require requested documents to be “specifically” identified, an overbroad discovery request without a clear target or focus would be thrown out.<sup>41</sup> The court noted that requests must be relevant and described with “reasonable particularity,” and must not impose an undue burden on the opposing party.<sup>42</sup>

#### (iv) Subpoenas

New York rules regarding subpoenas are very similar to the federal rules. New York also allows the subpoena *duces tecum* (ordering the witness to appear and bring specified documents), which must be issued by a judge in certain proceedings.<sup>43</sup>

#### (v) Admissions

New York rules regarding admission are very similar to the federal rules.<sup>44</sup> A request for admission is similar to an interrogatory, but must include a list of statements for your opponent to either admit or deny. A request for an admission by the plaintiff may be served after the defendant has answered the complaint, but no later than twenty days before trial. The person receiving a request for admission has twenty days to admit or deny the allegation or give a detailed explanation of why he cannot admit or deny the allegation.<sup>45</sup>

#### (vi) Motions to Compel Disclosure and Sanctions

If you are having difficulty obtaining information to which you are entitled, you may move the court to compel disclosure under N.Y. C.P.L.R. 3124. If the court grants your motion and your opponent still does not provide you with the information, the court may impose penalties under N.Y. C.P.L.R. 3126. You should also keep in mind that N.Y. C.P.L.R. 3101(h) requires all persons to amend or supplement information they have submitted if at any time they obtain or remember new information that makes their initial statements incomplete or wrong. If this requirement is not followed, the court is authorized under N.Y. C.P.L.R. 3101(h) to make “whatever order may be just.” This may mean that the court will not allow any evidence concerning the subject matter that should have been supplemented into the trial.

Section 3103 of the N.Y. C.P.L.R. allows the court to issue orders “designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.” If you feel your opponent obtained information improperly,<sup>46</sup> you may make a motion to the court under N.Y. C.P.L.R. 3103(c), and the court may prevent that information from being used as evidence at trial.

This is only a brief overview of the New York Rules. Although they are generally similar to the Federal Rules, be sure to study the relevant sections of the N.Y. C.P.L.R. noted above before proceeding in New York state court.

### 4. Electronic Discovery (eDiscovery)

#### (a) Introduction

Many of the documents and much of the information that will be useful to your case is now stored in electronic form by the government. For example, many Departments of Corrections maintain useful statistics on their websites. Your own records might be kept in electronic form as well, including medical

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41. Konrad v. 136 East 64th Street Corp., 209 A.D.2d 228, 228, 618 N.Y.S.2d 632, 633 (1st Dept. 1994) (finding that an overbroad discovery request constituted an undue burden).

42. Konrad v. 136 East 64th Street Corp., 209 A.D.2d 228, 228, 618 N.Y.S.2d 632, 633 (1st Dept. 1994) (requiring discovery requests to be relevant). Courts often use the phrase “fishing expedition” when a party requests a huge range of information in the hopes that something will turn out to be useful, without any specific reason to believe that it will be. An example of a “fishing expedition” would be a discovery request for the entire file of every police officer who worked in the precinct in which you were arrested. This kind of discovery request is consistently rejected.

43. N.Y. C.P.L.R. 2301–08 (McKinney 2012).

44. See N.Y. C.P.L.R. 3123 (McKinney 2012); Fed. R. Civ. P. 36.

45. N.Y. C.P.L.R. 3123 (McKinney 2012). For a more detailed explanation of an admission, see Part B(2)(d)(v) of this Chapter.

46. For an example of information obtained in an “improper manner,” see Juskowitz v. Hahn, 56 Misc. 2d 647, 648, 289 N.Y.S.2d 870, 871–72 (Sup. Ct. Nassau County 1968), where the defendant obtained evidence from the plaintiff without notifying the plaintiff’s attorney. The court, while declining to make a judgment on whether the defendant’s actions were unethical, decided that the circumstances were sufficient to warrant suppression of the evidence.

records, intake forms, and disciplinary hearing records, among others. Finally, if prison officials communicate with one another via email, some of those communications could be relevant to your case. They could show, for example, that prison officials were aware of unsafe conditions in the prison that harmed you.

The process of requesting electronic documents is called *eDiscovery*. You can use the same set of discovery tools to request all sorts of electronic documents, including emails, internet browsing history, and even electronic documents that have been deleted but still exist on backup disks.<sup>47</sup> Mandatory disclosure rules apply to eDiscovery, and your opponent must hand over copies or descriptions of relevant electronic information before you even submit a discovery request.<sup>48</sup> eDiscovery is subject to the same limitations as paper discovery. Privileged communications are still private, even if they took place over email or another electronic medium of communication.<sup>49</sup>

#### (b) Tools and Strategies

If you think you will want to seek digital evidence, you should come up with a clear plan even before meeting with your opponent. Take steps to preserve what evidence you can, such as useful statistics and information on websites. Download, save, and print the content whenever possible—even if the content is removed, you will have copies in your possession.

The next step is to send a *preservation letter*, which is a way to “freeze frame” and prevent your opponent from deleting or tampering with electronic evidence. The letter should describe the data you seek and demand that all digital evidence be separated and preserved. You should send a preservation letter before your suit begins, if possible, and well before any voluntary disclosures by you or your opponent.

#### (c) Federal eDiscovery Rules<sup>50</sup>

The Federal Rules of Civil Procedure apply to digital documents in the same way they apply to paper-based records.<sup>51</sup> If the parties disagree about the scope of eDiscovery, the court will determine whether an eDiscovery request should be granted by considering whether the potential benefits of the proposed eDiscovery will outweigh its costs.<sup>52</sup> If the court determines that the expense of eDiscovery outweighs its likely benefit, it may make the party requesting the material pay for its production.<sup>53</sup>

#### (d) New York eDiscovery Rules<sup>54</sup>

New York has adopted the Uniform State Laws addressing eDiscovery.<sup>55</sup> These rules are similar to the Federal Rules and deal mainly with electronic information during the early stages of discovery. The main rule relating to eDiscovery is Uniform Rule § 202.12, which requires parties to address eDiscovery during all preliminary conferences.<sup>56</sup> Some questions frequently discussed at preliminary conferences include where

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47. For cases declaring electronically stored information discoverable, see *Aguilar v. Immig. & Customs Enforcement*, No. 07 Civ. 8224(JGK)(FM), 2008 WL 5062700, at \*4 (S.D.N.Y. Nov. 21, 2008) (discussing metadata); *Comm'n v. Beacon Hill Asset Mgmt LLC*, No. 02CIV8855(LAK)(HBP), 231 F.R.D. 134, 144 (S.D.N.Y. Aug. 3, 2004) (discussing email attachments and unprinted documents); *Rowe Entm't, Inc. v. The William Morris Agency*, No. 98 Civ. 8272(RPP), 2002 WL 975713, at \*2 (S.D.N.Y. May 9, 2002) (discussing electronically stored information); *Delta Fin. Corp. v. Morrison*, 13 Misc. 3d 604, 609, 819 N.Y.S.2d 908, 912 (Sup. Ct. Nassau County Aug. 17, 2006) (discussing backup tape data).

48. Fed. R. Civ. P. 26(a); 1 eDiscovery & Digital Evidence § 2:1 (2013) (stating that courts generally treat electronic evidence the same as non-electronic evidence); *In re Bristol Myers-Squibb Securities Litigation*, 205 F.R.D. 437, 441–42 (D.N.J. 2002) (noting that the Advisory Committee for the Federal Rules of Civil Procedure requires mandatory disclosure of relevant electronic evidence but holding that it only applies to evidence in electronic form at the time mandatory disclosure is to be made).

49. Fed. R. Civ. P. 34(a); *Baptiste v. Cushman & Wakefield, Inc.*, No. 03Civ.2102(RCC)(THK), 2004 WL 330235, at \*2 (S.D.N.Y. Feb. 20, 2004).

50. 5 U.S.C. § 552a (2012); Fed. R. Civ. P. 16, 26, 28, 33, 34.

51. Fed. R. Civ. P. 33(a), 33(d), 34(a).

52. *Jones v. Goord*, No. 95 CIV. 8026(GEL), 2002 WL 1007614, at \*6 (S.D.N.Y. May 16, 2002).

53. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 318, 323–24 (S.D.N.Y. 2003).

54. N.Y. Comp. Codes R. & Regs. tit. 22, § 202.12 (2009); N.Y. C.P.L.R. 3120, 3111 (McKinney 2012).

55. N.Y. Comp. Codes R. & Regs. tit. 22, § 202.12 (2009); N.Y. C.P.L.R. 3120 supplementary practice commentaries (McKinney 2012).

56. N.Y. Comp. Codes R. & Regs. tit. 22, § 202.12 (2009).

key electronic data is stored, how it will be preserved, and in what form it will be turned over to the requesting party.<sup>57</sup>

In New York, the requesting party often bears the costs of producing electronically stored information, although this varies.<sup>58</sup> As with the Federal Rules, New York courts will balance the parties' competing interests, weighing the need for requested eDiscovery against the burden it imposes upon the producing party.<sup>59</sup> As with other discovery requests, overly broad requests will be rejected.<sup>60</sup>

### C. Criminal Discovery

The rules governing discovery in a criminal prosecution differ from those that govern a civil proceeding. In general, discovery in criminal cases is more limited.

The following section, Part C(1), discusses criminal discovery in federal cases. It explains that the Sixth Amendment of the United States Constitution requires the prosecution to turn over certain materials to the defendant in all criminal cases. Part C(2) outlines the discovery rules that apply in New York criminal cases. Finally, there is a brief note about federal discovery procedures, which are not very different because the New York rules were modeled on them. Remember that this Part does not treat criminal discovery rules in detail. If you are involved in a criminal case, you should refer to the applicable rules and research any cases that apply those rules.

#### 1. Federal Constitutional Requirements

According to the rule laid down by the U.S. Supreme Court in *Brady v. Maryland*, a prosecutor may not refuse a request by the defendant for evidence that is *exculpatory* (tends to prove the defendant is not guilty) and *material*<sup>61</sup> to either guilt or punishment.<sup>62</sup> Withholding such evidence, even by mistake, gives the defendant the right to a new trial.<sup>63</sup>

*Brady* applies to evidence that supports the defendant's claim of innocence, but also to evidence that weakens the prosecution's case.<sup>64</sup> One example is any material that undermines the credibility of a government witness. This material is called *impeachment evidence*. The prosecution can be required to turn over a witness' pretrial statements if they are inconsistent with the witness' in-court testimony, because the defense can use the pretrial statement to weaken the witness' testimony.<sup>65</sup> However, *Brady* does not mean

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57. N.Y. Comp. Codes R. & Regs. tit. 22, § 202.12(c)(3) (2009).

58. *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 27 Misc. 3d 1061, 1074–76, 895 N.Y.S.2d 643, 653–54 (Sup. Ct. N.Y. County 2010).

59. N.Y. C.P.L.R. 3101(a) (McKinney 2012); *Allen v. Crowell-Collier Publishing Co.*, 21 N.Y.2d 403, 406 (N.Y. 1968); *Manley v. New York City Hous. Auth.*, 190 A.D.2d 600, 600 (N.Y. App. Div. 1st Dept. 1993).

60. N.Y. C.P.L.R. 3101(a) (McKinney 2012); *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 27 Misc. 3d 1061, 1077, 895 N.Y.S.2d 643, 655 (Sup. Ct. N.Y. County 2010).

61. Evidence is *material* where there is a reasonable probability that its disclosure would have produced a different result at trial. *Kyles v. Whitley*, 514 U.S. 419, 422 (1995). See also *United States v. Agurs*, 427 U.S. 97, 104 (1976) (holding that “a fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial.”) See also *United States v. Bagley*, 473 U.S. 667, 674–675 (1985).

62. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97, 10 L. Ed. 2d 215, 218 (1963). For specific examples of various applications of the *Brady* rule, see Marvin Waxner, *New York Criminal Practice* § 17.03[8] (2d ed. 2005).

63. *Kyles v. Whitley*, 514 U.S. 419, 422, 115 S. Ct. 1555, 1560, 131 L. Ed. 2d 490, 498 (1995) (awarding a new trial after finding *Brady* violation); *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104, 108 (1972) (noting that “suppression of material evidence justifies a new trial ‘irrespective of the good faith or bad faith of the prosecution.’”). Note that when the police *lose* evidence that is potentially exculpatory and therefore cannot comply with *Brady*, the defendant must show that they acted in bad faith in order to win a new trial. *Arizona v. Youngblood*, 488 U.S. 51, 57–58, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281, 289 (1988).

64. *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S. Ct. 1555, 1565, 131 L. Ed. 2d 490, 506 (1995) (noting, in discussing *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), that there is no difference between exculpatory and impeachment evidence for *Brady* purposes); *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104, 108 (1972) (holding that “evidence affecting credibility” falls within the *Brady* disclosure rule).

65. *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S. Ct. 1555, 1565, 131 L. Ed. 2d 490, 506 (1995); *Giglio v.*

that a prosecutor must disclose *all* evidence favorable to a defendant. Federal courts have indicated several limitations to the *Brady* rule. The prosecution is required to turn over evidence only if it is "material." The Supreme Court considers evidence to be "material" if there is a "reasonable probability" that this evidence will affect whether the defendant is found guilty or not guilty at trial.<sup>66</sup> This means that evidence that would probably not affect the final verdict does not have to be disclosed and a new trial does not have to be ordered if such evidence was withheld by prosecutors.

Second, *Brady* does not require the prosecution to turn over evidence if the defense knew it existed or should have been able to take advantage of it without the prosecution's help.<sup>67</sup> In one case, the prosecution told the defense attorney to interview a witness instead of handing over the witness's pretrial statement. The federal court held that, even though the prosecution withheld the statement, it had not "suppressed" the evidence under *Brady*.<sup>68</sup>

Third, even though *Brady* requires prosecutors to turn over evidence that might help to show the defendant's innocence, it does not give the defense "unsupervised authority to search through the [state's] files" in search of exculpatory material.<sup>69</sup> The state decides which information must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision not to disclose cannot be challenged.<sup>70</sup>

*Brady* represents the standard of discovery guaranteed by the U.S. Constitution in *all* criminal cases in the United States. Thus, the states are required to provide a criminal defendant with this material as well. However, *Brady* is only the *minimum* constitutional requirement guaranteed to criminal defendants. State discovery rules may give you a right to more discovery than this basic constitutional standard.

## 2. New York Procedures

### (a) Introduction

New York has been at the forefront of a movement to permit criminal defendants freer access to information. Though there are still limits on the information that criminal defendants can obtain before trial, New York has broadened discovery under Article 240 of the New York Criminal Procedure Law (N.Y. Crim. Proc. Law).<sup>71</sup> Article 240 is patterned on Rule 16 of the Federal Rules of Criminal Procedure. So, if you run into a discovery problem and find a federal case interpreting Rule 16 in your favor, the New York state courts usually will consider the case as persuasive (that is, supportive of your case) for interpreting Article 240.<sup>72</sup>

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United States, 405 U.S. 150, 154, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104, 108 (1972).

66. *Pennsylvania v. Ritchie*, 480 U.S. 39, 57, 107 S. Ct. 989, 1001, 94 L. Ed. 2d 40, 57 (1987) (noting that "the government has an obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment," and defining material to mean that there is a "reasonable probability" that the result of the proceeding would have been different if the evidence had been disclosed) (citing *United States v. Bagley*, 473 U.S. 667, 678, 105 S. Ct. 3375, 3381, 87 L. Ed. 2d 481, 491 (1985)).

67. *See, e.g., United States v. Grossman*, 843 F.2d 78, 85 (2d Cir. 1988) (holding that the government was not required to provide allegedly exculpatory grand jury testimony when the defendant knew or should have known the essential facts); *United States v. Gaggi*, 811 F.2d 47, 59 (2d Cir. 1987) (holding that "no *Brady* violation occurs if the defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence").

68. *See United States v. Salerno*, 868 F.2d 524, 542 (2d Cir. 1989) (rejecting defendant's argument that the government should have turned over the grand jury testimony of a potential witness when the defendant could have interviewed the witness himself). Note that in New York, witnesses' pretrial statements must generally be disclosed even if they are not *Brady* material. *People v. Rosario*, 9 N.Y.2d 286, 289, 173 N.E.2d 881, 883, 213 N.Y.S.2d 448, 450 (1961) (finding that justice entitles the defendant to see a witness' prior statement "as long as the statement relates to the subject matter of the witness' testimony and contains nothing that must be kept confidential").

69. *Pennsylvania v. Ritchie*, 480 U.S. 39, 59, 107 S. Ct. 989, 1002, 94 L. Ed. 2d 40, 58 (1987).

70. *Pennsylvania v. Ritchie*, 480 U.S. 39, 59, 107 S. Ct. 989, 1002, 94 L. Ed. 2d 40, 59 (1987).

71. N.Y. Crim. Proc. Law §§ 240.10–240.90 (McKinney 2012).

72. *People v. Copicotto*, 50 N.Y.2d 222, 226, 406 N.E.2d 465, 468, 428 N.Y.S.2d 649, 652 (1980) (stating that the criminal discovery procedure in Article 240 was adopted from Fed. R. Crim. P. 16).

Below is a general overview of discovery rules found in Article 240 of the N.Y. Crim. Proc. Law. If you run into specific problems, you should refer to the statutory provisions themselves and any accompanying notes.<sup>73</sup>

(b) Scope of Discovery

(i) Discovery Between the Accused and the Prosecutor

Article 240 allows you to inspect, photograph, copy, or test certain types of “property”<sup>74</sup> that are “material” to your case.

Any written, recorded, or oral statement you made to the police or to persons acting under police direction “other than in the course of the criminal transaction”<sup>75</sup> is discoverable material. You can request this material, as well as similar statements made by a co-defendant who will be tried jointly with you. This generally applies if you or a co-defendant made a statement following arrest—for example, in a statement made at the police station. Notice that this does not cover statements made *during* “the criminal transaction.” For example, the prosecution usually does not have to give you copies of conversations between you and an undercover officer during a drug transaction. An exception exists where the statement is recorded electronically; if a conversation is recorded on tape, you are entitled to it through discovery.<sup>76</sup> This can be very helpful in setting up certain defenses, such as entrapment. In an entrapment defense, you need to show that the police got you to commit a crime you would not have committed if they had left you alone.

Any statement made *before* the criminal transaction can also be discoverable. Such evidence might establish a motive or intent to commit the crime. For instance, if you made a statement before a homicide indicating that you hated the victim, it could be used to prove motive. It is important, then, that you discover if any material of this sort exists.

Another type of discoverable material is a transcript of testimony that you or a co-defendant made before a grand jury.<sup>77</sup> A transcript of your testimony could reveal weaknesses in your case because it could show whether you gave any damaging testimony. It might also help you maintain a consistent version of your story. If, for instance, you make a statement at trial inconsistent with the testimony you gave before the grand jury, the prosecution could point this out and weaken your credibility with the judge or jury. You will want to anticipate and, if possible, prevent this.

Article 240 also allows you to discover scientific evidence.<sup>78</sup> Such evidence might include a written report based on a physical or mental examination, a scientific test or experiment related to the crime for which you are charged, psychological reports, ballistics reports (scientific gun examination that can determine whether a bullet was fired from a particular gun), drug tests, semen tests, and blood-typing.

Tapes or electronic recordings are yet another type of discoverable property.<sup>79</sup> The prosecutor must disclose any tape or electronic recording that he intends to introduce at trial if you request such material. You are also entitled to reports that reveal the approximate date, time, and place of the crime and of the arrest.<sup>80</sup> This information may be useful if you have an alibi. Also, you may discover “any other property” obtained from you or a co-defendant.<sup>81</sup> This might include weapons, clothing, drugs, tools, cars, or other items. Discovery of this type of property can help you in preparing your case since it gives you insight into what the prosecutor is going to present at trial to link you to the crime.

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73. Chapter 17 of Waxner’s New York Criminal Practice also provides helpful information about New York criminal discovery. Marvin Waxner, *New York Criminal Practice* (2d. ed. 2005).

74. Property is defined as “any existing tangible personal or real property, including, but not limited to, books, records, reports, memoranda, papers, photographs, tapes or other electronic recordings, articles of clothing, fingerprints, blood samples, fingernail scrapings or handwriting specimens, but excluding attorneys’ work product.” N.Y. Crim. Proc. Law § 240.10(3) (McKinney 2012).

75. N.Y. Crim. Proc. Law § 240.20(1)(a) (McKinney 2012).

76. N.Y. Crim. Proc. Law § 240.20(1)(g) (McKinney 2012).

77. N.Y. Crim. Proc. Law § 240.20(1)(b) (McKinney 2012).

78. N.Y. Crim. Proc. Law § 240.20(1)(c) (McKinney 2012).

79. N.Y. Crim. Proc. Law § 240.20(1)(g) (McKinney 2012).

80. N.Y. Crim. Proc. Law § 240.20(1)(i) (McKinney 2012).

81. N.Y. Crim. Proc. Law § 240.20(1)(f) (McKinney 2012).

(ii) Discovery Between the Accused and Third Parties: Subpoena *Duces Tecum*

The subpoena *duces tecum* is a process whereby the court orders a witness to bring documents relevant to the court proceedings when he comes to testify. It is frequently used when information is in the hands of third parties.<sup>82</sup> The subpoena *duces tecum* is the only method for prosecutors and defendants to discover third party materials. Under Article 240, they cannot use a “demand to produce” or “motion for discovery” to obtain information from third parties.

In order to obtain a subpoena *duces tecum* for pretrial discovery purposes under N.Y. Crim. Proc. Law §610.20(3), you must show the following in your motion:<sup>83</sup>

- (1) The materials are relevant and evidentiary;
- (2) The request is specific;
- (3) The materials are not otherwise reasonably obtainable before trial by the exercise of due diligence;
- (4) You cannot properly prepare for trial without inspecting the material before trial, and not having the information might unreasonably delay the trial; and
- (5) The application is made in good faith and is not intended to be a general “fishing expedition.”

In addition, your motion for a subpoena *duces tecum* should indicate a specific time and place for inspection of the desired materials.

## (c) Non-discoverable Material

The two types of material that are generally not discoverable under Article 240 are (1) attorney’s work product, and (2) records of any statement made during the criminal transaction, with the exception of any electronic recordings that the prosecutor intends to introduce at trial.<sup>84</sup> “Attorney’s work product” is defined in the statute as “property to the extent that it contains the opinions, theories, or conclusions of the prosecutor, defense counsel or members of their legal staffs.”<sup>85</sup> The prosecutor is not required to turn over memoranda or other documents containing his legal theories or opinions. In the same manner, you are not required to produce such documents of your own if a prosecutor’s demand is made. If you have, for instance, notes laying out the defense of consent in a rape charge, you do not need to reveal how you are going to attempt to show consent. This rule is very similar to the work product rule found in civil discovery.

## (d) Procedures to Obtain Information

Under N.Y. Crim. Proc. Law § 240.10(1), you may obtain access to any discoverable material before the trial begins by serving a “demand to produce” on the prosecutor.<sup>86</sup> A demand to produce is a written notice that you may serve on your adversary without first getting permission from the court. It should include information on what property you want to inspect, and provide reasonable notice of the time you hope to conduct the inspection. Be specific in your demands. You are not permitted to go on a “fishing expedition” by requesting in very general terms to inspect property. For example, it would be improper for you to demand inspection of any and all information in the prosecutor’s files that might be material to the case.

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82. See *State ex rel. Everglades Cypress Co. v. Smith*, 139 So. 794, 795, 104 Fla. 91, 93 (Fla. 1932) (stating that the process of subpoena *duces tecum* is applicable to witnesses other than the adverse party to the case).

83. *People v. Price*, 100 Misc. 2d 372, 378–79, 419 N.Y.S.2d 415, 420 (Sup. Ct. Bronx County 1979). The list cited above is not a direct quote from the case, but rather reflects clarifications of the case’s meaning as subsequent case law has interpreted it.

84. See *United States v. Grossman*, 843 F.2d 78, 85 (2d Cir. 1988) (stating that a prosecuting party only has the duty to disclose exculpatory evidence which is known to the prosecution but unknown to the defense).

85. N.Y. Crim. Proc. Law § 240.10 (McKinney 2012). However, if any exculpatory *Brady* material exists, then a duty to disclose that particular evidence is imposed, even though the material might include some work product. *People v. Finkle*, 103 Misc. 2d 985, 986, 427 N.Y.S.2d 374, 375 (Sup. Ct. Sullivan County 1980). Routine police records containing information that is required to be filed in the normal course of business may be discovered. *People v. Simone*, 92 Misc. 2d 306, 312–13, 401 N.Y.S.2d 130, 134 (Sup. Ct. Bronx County 1977).

86. See N.Y. Crim. Proc. Law §§ 240.80, 240.90, and 255.20 (McKinney 2012) for information on filing a motion for an order of discovery.

You must file a demand to produce within thirty days of your arraignment.<sup>87</sup> However, if you are unrepresented (that is, you have no lawyer), the thirty-day period does not start until counsel initially appears on your behalf—provided you have requested an adjournment to obtain such assistance.

Discovery is not limited to the defendant. The prosecutor, too, may take advantage of reciprocal discovery under N.Y. Crim. Proc. Law § 240.30.<sup>88</sup> In addition to discovery, you may also be ordered to provide non-testimonial evidence, such as appearing in a lineup, providing a handwriting sample, fingerprinting, posing for photographs so long as they are not a re-enactment of the crime, or submitting to a reasonable physical or medical inspection.<sup>89</sup> As a defendant, you must respond to the prosecutor's demands by either providing the desired information or filing a refusal of demand under N.Y. Crim. Proc. Law § 240.35.

The discovery process does not end once the trial begins. Under N.Y. Crim. Proc. Law § 240.45, certain materials can be discovered at the initial stages of the trial. These materials could prove to be very important to your case. After the jury has been sworn and before the prosecutor's opening address,<sup>90</sup> the prosecutor must turn over to you the following documents or information:

- (1) Any statement (including testimony before a grand jury or a videotaped examination) made by a person the prosecutor plans to call as a witness that relates to the subject matter of the witness's testimony;<sup>91</sup>
- (2) Any conviction record of a witness to be called at trial if the prosecutor is aware of the record; and
- (3) Information concerning any pending criminal action against any witness the prosecution intends to call, if the prosecutor is aware of such action.

Note that you have the same duty to reveal such information to the prosecutor before presenting your case.<sup>92</sup>

This information may help you attack the credibility of prosecution witnesses. For instance, if you find out that a potential witness for the prosecution has been previously convicted of perjury, or lying under oath, you may use this information at trial to *impeach* the witness (attack his credibility). Revealing this fact to a jury may cast doubt on the truth of the witness' testimony. This could give you an advantage.

#### (e) Duty to Disclose

Throughout the entire discovery process, there is a duty to disclose properly requested information. This means that both the prosecutor and the defendant must hand over to the other side any important documents or information that the other side has requested. Do not ignore the prosecutor's demands for discoverable material because you could face sanctions by the court.<sup>93</sup>

Despite the general duty to disclose, a prosecutor or defendant may refuse to reveal requested information in some situations. The main requirement for refusing to disclose is that you must have a reasonable belief that the requested material is not discoverable. For example, material may not be discoverable where it is irrelevant, privileged, or subject to a protective order.<sup>94</sup> When refusing to comply with a demand, you must do so in writing and explain the reasons for your refusal.<sup>95</sup> This must be done within fifteen days from the time you are served with the demand unless you can show good cause for why you need more time.<sup>96</sup> Your refusal must be served upon the demanding party and a copy of it must be filed with the court.<sup>97</sup>

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87. For an example of a demand form, see Marvin Waxner, *New York Criminal Practice*, Form No. 17:1 (2d. ed. 2005).

88. However, the prosecutor may only ask for material that is similar in kind and character to the material you are asking for from him.

89. N.Y. Crim. Proc. Law § 240.40(2)(b) (McKinney 2012).

90. In the case of a non-jury trial, the information must be turned over prior to the offering of evidence.

91. This is commonly called *Rosario* material. See *People v. Rosario*, 9 N.Y.2d 286, 289, 173 N.E.2d 881, 882–83, 213 N.Y.S.2d 448, 450 (1961) (codified in N.Y. Crim. Proc. Law § 240.45(1)(a)). In federal practice, these documents are governed by the Jencks Act, 18 U.S.C. § 3500 (2012).

92. N.Y. Crim. Proc. Law § 240.45(2) (McKinney 2012).

93. N.Y. Crim. Proc. Law § 240.70 (McKinney 2012).

94. N.Y. Crim. Proc. Law § 240.35 (McKinney 2012).

95. N.Y. Crim. Proc. Law § 240.35 (McKinney 2012).

96. N.Y. Crim. Proc. Law § 240.80(2) (McKinney 2012).

97. N.Y. Crim. Proc. Law § 240.35 (McKinney 2012).

If the prosecutor demands information from you and you refuse, the court may order you to disclose the material anyway.<sup>98</sup> Similarly, if the prosecutor refuses to provide information that you demand, but the court finds the prosecutor's refusal unjustified, it will order the prosecutor to give you the material you requested.<sup>99</sup> The court may also order discovery of any other materials the prosecutor intends to use at trial if you show that such property is material to your case and that the request is reasonable.<sup>100</sup>

If you feel there is good reason for refusing to turn over some of your material, you can apply for a protective order, which will deny or limit discovery. The prosecutor can apply for a protective order as well, and the court can even issue one on its own initiative.<sup>101</sup> Even other parties affected in your case can apply for a protective order if they think there is a good reason not to turn over information.

The court will grant you a protective order if you show good cause for requesting the order. Good cause may be (1) constitutional limitation; (2) the danger that physical evidence may be destroyed or damaged; (3) substantial risk of physical harm to someone; (4) the possibility of intimidation or bribery; (5) a risk of unjustified annoyance or embarrassment to any person; (6) any potential negative effects on the legitimate needs of law enforcement, such as protection of informants; or (7) any other factor that outweighs the usefulness of discovery.<sup>102</sup> When filed, a motion for a protective order suspends discovery of the particular matter.<sup>103</sup> This means that you or (the prosecutor) won't be forced to hand over the disputed material until the judge makes a decision on your request for the protective order.

If you refuse to disclose information requested by the prosecutor, you must be sure that you have a good cause. If you do not, the court may order sanctions.<sup>104</sup> Sanctions might include prohibiting the use of specific evidence or witnesses at your trial. The court can also take any other appropriate action that it thinks is reasonable to sanction you. Therefore, it is important that you pay special attention to the procedures involved, particularly to the time limits (deadlines for filing certain motions and requests) found throughout N.Y. Crim. Proc. Law § 240.

It is also important to remember that there is a continuing duty to disclose any additional information subject to discovery.<sup>105</sup> This means that if you have made a demand for material and the prosecutor later receives information that is covered by your original request, the prosecutor must turn over that information to you. Similarly, you must turn over material that you later become aware of if it is covered by a prosecutor's earlier demand to produce.

#### (f) Summary

This description of various discoverable materials and information is meant to give you only a very general picture of the tools available to you in a criminal proceeding. Effective use of these tools requires a careful reading of Article 240 of the N.Y. Crim. Proc. Law and the particular sections relating to types of discoverable material. You must also look at the case law interpreting the various provisions, particularly if you are looking for the answer to a very specific question. Much of the case law can be found in the annotations to the New York statutes, which are listed directly after the statute provisions. Supplemental treatises may also be helpful.

### 3. Federal Discovery

If your criminal case is in federal court, you should refer to Rule 16 of the Federal Rules of Criminal Procedure for the discovery rules. Since Article 240 of N.Y. Crim. Proc. Law is based on Rule 16 of the Federal Rules of Criminal Procedure, there are no major differences in form. Federal Rule 16 provides for basically the same types of discoverable material<sup>106</sup> and has similar rules for limiting the discovery process

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98. N.Y. Crim. Proc. Law § 240.40(2)(a) (McKinney 2012).

99. N.Y. Crim. Proc. Law § 240.40(1)(a) (McKinney 2012).

100. N.Y. Crim. Proc. Law § 240.40(1)(c) (McKinney 2012).

101. N.Y. Crim. Proc. Law § 240.50(1) (McKinney 2012).

102. N.Y. Crim. Proc. Law § 240.50(1) (McKinney 2012).

103. N.Y. Crim. Proc. Law § 240.50(3) (McKinney 2012).

104. N.Y. Crim. Proc. Law § 240.70(1) (McKinney 2012).

105. N.Y. Crim. Proc. Law § 240.60 (McKinney 2012).

106. See Fed. R. Crim. P. 16(a) and (b).

by protective orders.<sup>107</sup> There are also provisions for sanctions if a party does not follow the Rule<sup>108</sup> or violates the continuing duty to disclose.<sup>109</sup>

Note, however, that Federal Rule 16 and Article 240 of the N.Y. Crim. Proc. Law are applied differently in practice, even though they are very similar in form. Discovery is harder to get in federal courts than in New York state courts, which makes it more difficult for you to get information from the prosecutor. This is because federal courts allow the prosecutor to make more decisions about what to disclose to you and will generally support those decisions.

When you make a specific request or motion in federal court, be sure to cite the relevant subsections of Rule 16 as authority for your specific requests and motions. If you need to subpoena a third party to produce documents or evidence (subpoena *duces tecum*), refer to Rule 17(c) of the Federal Rules of Criminal Procedure.

#### D. Conclusion

Discovery allows you and your opponent to find out important information from each other about the case. The rules of discovery govern *what* information to request or disclose, as well as *when* to request or disclose it. These rules differ depending on whether your case is civil or criminal and whether you are in state or federal court. It is important to know the rules of discovery that apply to your case because failure to comply may result in penalties, including having your case thrown out of court.

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107. See Fed. R. Crim. P. 16(d)(1).

108. See Fed. R. Crim. P. 16(d)(2).

109. See Fed. R. Crim. P. 16(c).

## APPENDIX A

### SAMPLE DISCOVERY DOCUMENTS

A-1	Sample Request For Production of Documents
A-2	Sample Request For Admission
A-3	Sample Notice of Interrogatory
A-4	Sample Notice of Motion for Order Compelling Discovery

Selected legal forms for conducting discovery in federal court follow. ***Do not tear these forms out of the book.*** You must copy them onto your own paper, filling in appropriate information that applies to you. You may be able to adapt these forms to state procedure if your state's discovery law is similar to that contained in the Federal Rules of Criminal Procedure. In that case, you should replace the federal rule cited with the applicable state law or rule. But you should always consult a legal form book for your state if you are not sure that these forms match your state's procedure.

#### A-1. SAMPLE REQUEST FOR PRODUCTION OF DOCUMENTS<sup>110</sup>

[proper case caption]<sup>111</sup>

Plaintiff [*your name*] requests defendant [*defendant's name*] to respond within [*number*] days to the following requests, namely that:

Defendant produce and permit plaintiff to inspect and to copy each of the following documents: [You should list the documents either individually (for example, minutes of a prison disciplinary hearing) or by category (for example, personnel files of one of the defendants) and describe each of them.].

[You should also state the time, place, and manner of making the inspection and of making the photocopies. You may wish to request that the defendants send copies of the documents to you at your prison facility. You should also request that the defendants send a list of all of the documents they are sending so that you can make sure that none of the documents were lost in transit.]

Defendant produce and permit plaintiff to inspect and to photograph, test, or sample each of the following objects: [list the objects either individually (baton used by guard) or by category (blood and hair samples of the guard or the samples obtained from you during a medical examination)].

[Again, you should ask the defendants to send the evidence to you, unless you are concerned that the objects will be interfered with before they reach you at the prison. You may wish to request specifically that the objects are sent in sealed containers so that you can see if they are tampered with before they reach you. However, if they are tampered with before they reach you, you may have no remedy.]

Defendant permit plaintiff [or name someone who will get the information for you] to enter [describe property to be entered] and to inspect, photograph, test or sample [describe the portion of property and the objects to be inspected. Since you will not be able to leave your facility to visit a property, you should ask someone else to visit the cell block or other area where the incident that you are complaining about occurred.].

[You should also state the time, place, and manner of making the inspection and performance of any related acts.]

Dated:

[date] [city, state]

110. Adapted from Roger S. Haydock & David F. Herr, *Discovery Practice* app. B-26 (5th ed. 2009) (Form D-1).

111. Chapter 6 of the *JLM*, "An Introduction to Legal Documents," includes examples of what case captions look like.

Signed,  
[your name & address]  
Plaintiff, *pro se*.

## A-2. SAMPLE REQUEST FOR ADMISSION<sup>112</sup>

[proper case caption]

Plaintiff [*your name*] requests defendant [*defendant's name*], within [*number*] days after service of this request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

That each of the following documents, exhibited with this request, is genuine:

[Here list the documents and describe each document that you have so that the defendant will be able to verify that it is the actual document and not something that has been changed.].

That each of the following statements is true:

[Here list the statements that you would like the defendant to admit. If you believe that the defendant may not want to admit certain things, you may not want to include those things in a request for admission, but in an interrogatory.].

Dated:

[date] [city, state]

Signed,

[your name & address]

Plaintiff, *pro se*.

## A-3. SAMPLE NOTICE OF INTERROGATORY<sup>113</sup>

[proper case caption]

To: [Each party and the attorney for each party]

PLEASE TAKE NOTICE that pursuant to Rule 31, Fed. R. Civ. P., the following interrogatories are to be propounded on behalf of [*party seeking answers*] to [*name and address of deponent*] by [*name and title of deposition officer*] pursuant to notice served herewith.

[Set out interrogatories in numerical order.]

Dated:

[date] [city, state]

Signed,

[your name & address]

Plaintiff, *pro se*.

<sup>112</sup>. Adapted from Roger S. Haydock & David F. Herr, *Discovery Practice* app. B-30 (5th ed. 2009) (Form F-1).

<sup>113</sup>. Adapted from Roger S. Haydock & David F. Herr, *Discovery Practice* app. B-23 (5th ed. 2009) (Form B-9).

## A-4. SAMPLE NOTICE OF MOTION FOR ORDER COMPELLING DISCOVERY<sup>114</sup>

*Note: This motion seeks to compel production of documents. This form may also be used if your opponent has refused to comply with a different discovery request (for example, failing to respond to interrogatories). Simply change the language referring to a request for production of documents to indicate the type of discovery you are seeking.*

[proper caption]

[*Plaintiff/defendant*] moves this court for an order pursuant to Rule 37 of Fed. R. Civ. P. [*describe relief sought*]. A copy of a proposed order is attached to this motion. The reasons supporting this motion include [*explain reasons such as the defendant's failure to answer your interrogatories, to produce records, or to allow you to perform discovery in a way that was practical for you*].

[*Plaintiff/defendant*] further moves the court for an order seeking reasonable attorney's fees and costs and expenses incurred in this proceeding. There exists substantial justification for seeking fees, costs and expenses, because [*explain reasons, such as defendant's ignoring your requests or defendant's telling you that your case was worthless because you are a prisoner*].

This motion is based upon the notice, pleadings, records, and files in this action, and the attached supporting affidavits [*or declarations*] of [*party, witness, attorney—persons who can state that they know that the defendant did not produce the documents or that you did not receive them*] and the attached memorandum of law [*if necessary or appropriate*], and oral and documentary evidence to be presented at the hearing on the motion [*if you think a hearing will be necessary*].

Dated:

[date] [city, state]

Signed,

[your name & address]

Plaintiff, *pro se*.

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114. Adapted from Roger S. Haydock & David F. Herr, *Discovery Practice* app. B-34 (5th ed. 2009) (Form G-1).