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 may have that you think you should present in 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[1], 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.[2] It is important for you to know the rules for two reasons. First, you need discovery to get the information you need to fully prepare your case for trial. Second, you must know how to respond to your opponent's requests for information. Discovery is a privilege and a responsibility; when you file a suit, you have the right to obtain 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 limited. Regardless of the information given in this Chapter, you must always check the appropriate rule yourself, in addition to any cases interpreting the rule. You should also "Shepardize" (or check that they are still valid) 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

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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. A civil action is a private dispute between two or more individuals or parties. For example, a lawsuit about a car accident could be a civil action. In a criminal action, a person is charged with a crime by the government.

2. 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 courts use 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. LAW 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 2014 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' 2014 New Hampshire Court Rules Annotated.) You can often request the volume you need through inter-library loan if your library does not carry it.

(5) prevent the surprise and delay that would occur if each party knew nothing about the other side's case until the trial happened.

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.

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

In a civil case, the defendant (sometimes called "respondent") is the party being sued. The plaintiff (sometimes called "petitioner") is the party who filed the suit. Specific rules of civil procedure govern the various ways discovery is conducted in civil cases.[3] They vary depending on whether you bring your case in federal or state court.[4] 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 that you are expected 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 clearly state the information you are seeking and the rule under which you are making your request. Many legal form books contain examples of the many different types of discovery requests.[5] 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 onto your own paper and then fill them out yourself.

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.[6] The rules are fairly straightforward and should be relatively easy to follow. There is one basic rule you should keep in mind: *you should always explain how the material you seek is relevant*

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3. *See* FED. R. CIV. P. 26–37 (Depositions and Discovery) (Federal Courts); N.Y. C.P.L.R. 31 (McKinney 2009) (Disclosure) (New York State Courts). Different rules apply depending on whether you are bringing your case federally or at the state level. Although the federal and state rules have different titles, they deal with the same issues. These rules of civil procedure also apply to attacks on a conviction after it is appealed, 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 a reason the court feels is adequate ("good cause") and is not automatic. *See* R. Governing Sec. 2254 Cases in the U.S. Dist. Courts 6(a), *available at* http://www.uscourts.gov/file/rules-governing-section-2254-and-section-2255-proceedings (last visited Nov. 28, 2020) (allowing the judge to authorize discovery "for good cause" where the incarcerated person is in state custody); R. Governing Sec. 2255 Proceedings for the U.S. Dist. Courts 6(a), *available at* http://www.uscourts.gov/file/rules-governing-section-2254-and-section-2255-proceedings (last visited Nov. 28, 2020) (allowing the judge to authorize discovery "for good cause" where the incarcerated person is in federal custody).

4. Useful summaries of the law governing discovery in federal courts include CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 577–637 (7th ed. 2011) and 6, 7 JAMES WILLIAM MOORE ET. AL., MOORE'S FEDERAL PRACTICE Ch. 26–37A (3d ed. 2015).

5. *See*, *e.g.*, 6, 7 JAMES WILLIAM MOORE, MOORE'S FEDERAL PRACTICE Ch. 26–37A (3d ed. 2015).

6. 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 (discussing rules about obtaining discovery through depositions and affidavits and admissibility of other documentary evidence).

to your case. Courts will not look kindly on you if you deliberately harass your opponent with irrelevant requests that require a great deal of time or money to respond to. The judge may impose penalties on anyone who abuses the discovery process in this way.[7] At the same time, the discovery rules are usually applied generously so that each side can get relevant information necessary to pursue his case.

(b) Scope of Discovery

In a civil action, information must be relevant to your case for it to be discoverable.[8] Furthermore, certain types of information are "privileged," which means that the information is not subject to discovery and may be kept secret even if it is relevant.

One category of privileged information is communication between people in specific relationships that the law protects and keeps private.[9] Examples of privileged relationships include those between lawyer and client, doctor and patient, priest and confessor, and spouses (such as husband and wife).[10] Information shared within these relationships is generally privileged. However, the court will balance your privacy interest against the strong public interest in pursuing the truth (because the court will be deprived of the information that could have been provided by the privileged evidence).[11] Generally, though, if your opponent requests copies of your personal correspondence, you will not have to give him letters that you wrote to your spouse, lawyer, etc. Of course, this 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."[12] The work product rule is complicated and not discussed at length in this Chapter. Generally, 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 you have a "substantial need"[13] for it —that is, if you cannot get the information anywhere else and it would be unfair if you did not have it—but the opposing lawyer's opinions and analyses related to the case will still be protected.[14]

If you feel that 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 why you think that information is privileged. During this process, however, you should also try to avoid "giving away" the information by describing it in too much detail. This could allow your adversary to gain an advantage over you. Even if you think one discovery request involves privileged material, 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.

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7. FED. R. CIV. P. 37(a)(5)(B). Sanctions (penalties) are discussed in FED. R. CIV. P. 37(b)(2).

8. FED. R. CIV. P. 26(B)(1).

9. 81 AM. JUR. 2D *Witnesses* § 272 (2015).

10. *See* 81 AM. JUR. 2D *Witnesses* § 318 (2015) (describing attorney-client privilege); 81 AM. JUR. 2D *Witnesses* § 398 (2015) (describing doctor-patient privilege); 81 AM. JUR. 2D *Witnesses* § 466 (2015) (describing priest-confessor privilege); 81 AM. JUR. 2D *Witnesses* § 281 (2015) (describing marital privilege).

11. *See* 81 AM. JUR. 2D *Witnesses* § 276 (2015) (describing the scope of the confidentially privilege and the court's ability to balance privacy interest against public interest in disclosure of truth); 81 AM. JUR. 2D *Witnesses* § 274 (2015) (explaining the limitations of the court in expanding or narrowing the confidentiality privileges accepted by the legislature).

12. 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, 500–514, 67, S. Ct. 385, 388–397, 91 L. Ed. 451, 456–466 (1947).

13. *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).

14. 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.

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.[15] In order to prove misconduct, you must identify the officer who you believe was abusive during your arrest. The arrest record will directly support your case on this point because it will state the officer's name. Therefore, it is fair to say that the arrest record is relevant to your case, and you can ask for it in discovery. However, the officer's high school report card is probably irrelevant to your case. If you ask for it and the other side objects, the judge will probably rule that the report card cannot be obtained in discovery.

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.[16] 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 these other officers *might* know whether the officer has a violent personality or a history of abusive work practices. You should be able to find out these other officers' names and possibly ask them questions in a formal setting, which is called "deposing" 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 obtaining information 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 with your opponent early on and exchange certain information. Below is a brief overview of the rule's requirements. Since the rule is fairly detailed, you should read the complete text of Rule 26 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 exact 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. (Remember, except for privileged information, any information that is relevant to your case is discoverable.) 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 to determine if your adversary has given you all the information to which you are entitled. For example, Rule 26(a)(2) requires any party who plans to call an expert witness to turn over basic information about the expert's opinions, experience, and qualifications.[17] In addition, Rule

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15. Files from a police officer's personnel file may be helpful to proving police misconduct. But many states have laws that make it hard to obtain records from a police officer's personnel file. Even if you bring your lawsuit in *federal* court, the judge might consider the state police-privacy law in deciding whether to release records from an officer personnel file in discovery. For example, in Cody v. N.Y. State Div. of State Police, 2008 WL 3252081, at *2 (E.D.N.Y 2008), the court held that while 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 apply in federal court, it does not mean files will always be turned over if requested. The court said that federal judges must balance the interests for and against keeping the records confidential during the discovery phase of a trial.

16. FED. R. CIV. P. 26(b) advisory committee's note to 1970 amendment.

17. 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

26(a)(3) requires you and your opponent to exchange your list of trial witnesses 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 provide additional information or correct any information already exchanged if the party later realizes that the initial information is 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,[18] the opposing lawyer, and a stenographer.[19] 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 gives permission to do so before the meeting.[20] Rule 30(a)(2)(A) limits the number of depositions, so each side may only take up to ten depositions. Nevertheless, if you feel that you need to take more than ten depositions, you may ask for the court's permission to do so. In deciding 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,[21] 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.[22] Overall, the court wants to make sure that requests for extra 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"[23] and to have face-to-face contact, unlike with other discovery methods.

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. 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" (a "stipulation" is a document signed by both parties stating that they agree to a certain fact, rule, or way of proceeding). If you and your opponent agree to a stipulation, 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.

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(4) how many other cases he has testified in over the past four years. FED. R. CIV. P. 26(a)(2).

18. The person questioned in a deposition is called the "deponent."

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

20. FED. R. CIV. P. 26(d)(1).

21. A "cumulative" request is a request that is overly broad and includes so much material that it is difficult or impossible to meet within a reasonable time period. An example of such a request may be requesting the records of all policyholders from an insurance company for the last 40 years. A "duplicative" request is one that asks for the same records asked for in an earlier discovery request, without any good reason to request those records again. An example may be requesting many paper copies of files which you already received electronic copies of. FED. R. CIV. P. 26(b)(2)(C)(i).

22. FED. R. CIV. P. 26(b)(2)(C)(iii).

23. As noted above, the "deponent" is the person who is questioned in the deposition. 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.

If your opponent is unwilling to sign a stipulation allowing alternative methods of taking a deposition, you can make a motion to the court to order him to cooperate. You should 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.[24] However, you should keep in mind 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. Unlike depositions, interrogatories are not performed in person. Only parties to the lawsuit must respond to interrogatories. Outside witnesses do not need to respond to interrogatories. Putting aside this important limitation, interrogatories are very useful because they are inexpensive. Rule 33(a) limits the number of questions you may ask each party to twenty-five questions.[25] Nonetheless, if you feel you need to ask more than twenty-five questions, you may ask the court for special permission.[26] To determine whether to grant your request, the court will consider (1) whether the information you are seeking is unreasonably repetitive, (2) whether you have already had the opportunity to obtain the information, and (3) whether the burden or expense of the additional interrogatories would outweigh their likely benefit.[27] You may send interrogatories as soon as you and your opponent have attended the mandatory meeting under Rule 26(f).[28] You should 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 any special rules apply to you.

After you send the interrogatories, your opponent must answer within thirty days. One exception is if the court has ordered a shorter or longer period of time or you and the other party have agreed to a shorter or longer time.[29] 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, 2019?
(2) Why were you on Block 8 at 8:00 P.M. on January 30, 2019?
(3) At 8:00 P.M. on January 30, 2019, 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, 2019?

In order to obtain specific answers, you must ask specific questions. If you want to get as much information as possible from these interrogatories, 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," and may therefore elicit more information.

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 very careful about issuing 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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24. FED. R. CIV. P. 31.
25. FED. R. CIV. P. 33(a).
26. FED. R. CIV. P. 26(b)(2)(A).
27. FED. R. CIV. P. 26(b)(2)(C).
28. FED. R. CIV. P. 26(f). See Part B(2)(c) of this Chapter for more detail.
29. 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 requests 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 (force) 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). A "sanction" is a penalty or coercive measure that results from failing to comply with a law, rule, or order (usually, sanctions are monetary fines, but they can also lead to imprisonment or dismissal of the lawsuit).[30]

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 remove, information they think is secret or sensitive. If you think your opponent is hiding information that you need and are entitled to see, you can move for an order compelling discovery under Rule 37(a)(3)(B).

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.[31] If you request material that your opponent must send you copies of, you should be prepared to pay copying costs or ask the court to pay them under a "poor person's order." 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.[32]

(iv) Subpoenas: Rule 45

Subpoenas under Rule 45 allow you to compel (force) witnesses who are not parties to attend a deposition or trial. With a subpoena, 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 to comply, the court may hold that party in contempt for failure to comply. In order to file a subpoena, you may write to the clerk with your request.[33]

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30. See Part B(2)(f) of this Chapter for more detail.

31. FED. R. CIV. P. 34(a).

32. *See* N.Y. C.P.L.R. 1101 (McKinney 2009) (stating that the motion for poor person's relief may be filed through a form affidavit available in the clerk's office. This affidavit should be filed with the summons and complaint. If you are an inmate, the affidavit should include "the name and mailing address of the facility at which [you are] confined along with the name and mailing address of any other federal, state or local facility at which [you were] confined during the preceding six month period." Your case will be given an index or case number. After a judge receives your case, the court will receive your trust fund account statement from the institution holding you. § f(1). When filing as an inmate, poor person's relief only entitles you to a reduced filing fee rather than a complete exemption. § f(2)).

33. FED. R. CIV. P. 45(a). An attorney may also issue and sign a subpoena in some instances. FED. R. CIV. P. 45(a)(3).

(v) Admissions: Rule 36

Rule 36 allows you to serve a written "request for admission" to 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. Requests for admission are primarily intended to resolve issues that are not central to the lawsuit. Some examples are issues related to the facts of your case, how the law applies, and whether any documents that have been provided are genuine. If you ask your opponent to admit a fact that presents a "genuine issue for trial," he must respond by admitting or denying the fact, or saying the fact is either true or false. Your opponent may deny that the admission is true until evidence is presented. A "genuine issue for trial" is a fact which your claim relies on to succeed. If you and your opponent disagree about a fact that can determine the success of your case, it will need to be decided by the court. For example, if you ask your opponent to admit that you were not carrying anything when you were arrested, there would be a genuine issue for trial if your opponent has evidence or witnesses stating that you were carrying something.

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. Your opponent must submit a written denial within thirty days or the court will consider the statements admitted.[34]

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

(1) Admit that you were in Block 8 at 8:00 P.M. on January 30, 2019.
(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.

Note that in requests for admission, you cannot make open-ended information requests like those in question (2) of the interrogatory examples in Part B(2)(d)(ii) above. If you make a request for admission of a fact and your opponent refused to admit it, but you later prove it was true, 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. However, if you believe that your opponent has made an unreasonable request—for example, he or she asks for privileged information or seeks information 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 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 demanding 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. On the other

34. FED. R. CIV. P. 36(a)(3).

hand, if you refuse to comply with discovery requests, 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 differences between 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.[35]

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.[36] As a result, you must request any information that you want from your opponent, and your opponent must request any information he 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 defendant has responded (or after the time period for the defendant's response has expired, whichever comes sooner).

The New York and federal discovery processes 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 and make recommendations to the judge. This may be helpful if you have difficulty getting your opponent to cooperate. However, 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 situations like yours. Keep in mind, 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. Therefore, 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.[37] Unlike in federal courts, if you want to depose someone who is not a party to the proceeding, New York courts require that you to get a subpoena.[38] As with the federal rules, any material that you request 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.

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35. Jack B. Weinstein et al., NEW YORK CIVIL PRACTICE LAW AND RULES MANUAL (3d ed. 2010) ("Weinstein/Korn/Miller Manual"), 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.

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

37. N.Y. C.P.L.R. 3107 (McKinney 2019).

38. N.Y. C.P.L.R. 3106(b) (McKinney 2019). Note that the subpoena must be served 20 days before the examination.

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 incarcerated person 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.[39] 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. 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.[40] In New York, the answering party has only twenty days to answer the interrogatory or to object to the questions.[41]

(iii) Requests for Production

In New York, requests for production of documents and other materials are similar to requests in federal court under the Federal Rules of Civil Procedure. New York also allows you to obtain discovery of materials in the custody and control of non-parties with the court's permission.[42]

New York courts require requests for production to be reasonable and not overly burdensome. This means that you must know what you are seeking and it must be relevant to the case. Requests for discovery should not be overbroad.[43] An example of an overbroad discovery request would be what courts often refer to as a "fishing expedition." A "fishing expedition" is 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 where you were arrested. This kind of discovery request is consistently rejected. Your requests must be relevant and described with "reasonable particularity." In the context of a request for production, "reasonable particularity" means that your request must be sufficiently specific to enable the other party to identify what documents you are requesting without having to turn over all of their files.[44] Your request must not impose an undue burden on the opposing party. Your request must also be specific enough that the court can determine if the documents you are requesting are appropriate to the case.[45] As a result, when writing a request for production, you should avoid terms like "all," "all other," or "any and all" unless you are requesting all documents within a small, specific, and identifiable set.[46]

39. N.Y. C.P.L.R. 3116(a) (McKinney 2019).
40. N.Y. C.P.L.R. 3132 (McKinney 2001).
41. N.Y. C.P.L.R. 3133(a) (McKinney 2019).
42. N.Y. C.P.L.R. 3111, 3120(1) (McKinney 2001).
43. 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).
44. State v. De Groot, 35 A.D.2d 240, 241, 315 N.Y.S.2d 310, 311 (3d Dept. 1970); N.Y. C.P.L.R. 3120(2) (McKinney 2019).
45. Anello v. Turner Constr. Co., 96 Misc. 2d 208, 210, 408 N.Y.S.2d 845, 846 (Sup. Ct. N.Y. County 1978).
46. Agric. & Indus. Corp. v. Chem. Bank, 94 A.D.2d 671, 672, 462 N.Y.S.2d 667, 668 (1st Dept. 1983).

(iv) Subpoenas

New York rules regarding subpoenas are very similar to the federal rules. New York also allows the "subpoena *duces tecum*". A "subpoena *duces tecum*" is an order for a witness to appear and bring specified documents. In certain proceedings, a judge must issue a subpoena *duces tecum*.[47]

(v) Admissions

New York rules regarding admission are very similar to the federal rules.[48] A request for admission is similar to an interrogatory. But, an admission must include a list of statements for your opponent to either admit or deny. The plaintiff may serve a request for an admission after the defendant has answered the complaint or twenty days after service of the summons. The plaintiff may not serve a request for an admission within twenty days before trial. The person receiving a request for an admission has twenty days to deny the allegation or give a detailed explanation of why he cannot admit or deny the allegation.[49]

(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 original 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 into the trial any evidence concerning the topic that should have been supplemented.

N.Y. C.P.L.R. 3103 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,[50] you may make a motion to the court under N.Y. C.P.L.R. 3103(c). In response, 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 bringing a lawsuit in New York state court.

4. Electronic Discovery ("eDiscovery")

(a) Introduction

The government now electronically stores many of the documents and much of the information that will be useful to your case. 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 records, intake forms, and disciplinary hearing records. 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.

47. N.Y. C.P.L.R. 2301–2308 (McKinney 2019).

48. *See* N.Y. C.P.L.R. 3123 (McKinney 2019); Fed. R. Civ. P. 36.

49. N.Y. C.P.L.R. 3123 (McKinney 2019). For a more detailed explanation of an admission, see Part B(2)(d)(v) of this Chapter.

50. For an example of information obtained in an "improper manner," see Levy v. Grandone, 8 A.D.3d 630, 631, 779 N.Y.S.2d 558, 558 (2d. Dept. 2004), where the plaintiff obtained documents without notifying the defendant's attorney. The court held that the documents were improperly obtained, but because the defendant was not prejudiced by the plaintiff's action, decided that suppression of the evidence was not warranted.

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.[51] Mandatory disclosure rules apply to eDiscovery. Your opponent must hand over copies or descriptions of relevant electronic information before you even submit a discovery request.[52] 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.[53]

(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 so that even if the content is removed, you will have copies in your possession.

The next step is to send a "preservation letter." A "preservation letter" is a way of telling your opponent to save evidence 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. The letter should state that your opponent must not take steps to destroy the digital evidence. The letter should tell your opponent to stop any routine processes that result in the destruction of the specified digital files. 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[54]

The Federal Rules of Civil Procedure apply to digital documents in the same way they apply to paper-based records.[55] If the parties disagree about the scope of eDiscovery, the court will determine whether an eDiscovery request should be granted. The court must consider whether the potential benefits of the proposed eDiscovery will outweigh its costs.[56] If the court determines that the expense of eDiscovery outweighs its likely benefit, it may make the party requesting the eDiscovery material pay for its production.[57]

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51. For cases declaring electronically stored information discoverable, see Aguilar v. Immigration & Customs Enforcement, 255 F.R.D. 350, 354–355 (S.D.N.Y. 2008) (discussing metadata); Sec. Exch. Comm'n v. Beacon Hill Asset Mgmt LLC, 231 F.R.D. 134, 145 (S.D.N.Y. 2004) (discussing email attachments); Rowe Entm't, Inc. v. The William Morris Agency, No. 98 Civ. 8272(RPP), 205 F.R.D. 421, 428 (S.D.N.Y. 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 2006) (discussing backup tape data).

52. FED. R. CIV. P. 26(a); In re Bristol Myers-Squibb Securities Litigation, 205 F.R.D. 437, 441 (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); 1 JAY E. GRENIG & WILLIAM C. GLEISNER, eDISCOVERY & DIGITAL EVIDENCE § 2:1 (2013) (stating that courts generally treat electronic evidence the same as non-electronic evidence).

53. Baptiste v. Cushman & Wakefield, Inc., No. 03Civ.2102(RCC)(THK), 2004 U.S. Dist. LEXIS 2579, at *5–9 (S.D.N.Y. Feb. 20, 2004).

54. Fed. R. Civ. P. 33, 34.

55. FED. R. CIV. P. 33, 34 (*see* Advisory Committee's Note to 2006 amendment for additional details regarding electronic documents).

56. Jones v. Goord, No. 95 CIV. 8026(GEL), 2002 U.S. Dist. LEXIS 8707, at *16–19 (S.D.N.Y. May 16, 2002) (finding that the court should decide costs and benefits of forcing a party to produce eDiscovery on a case by case basis).

57. Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 318, 323–324 (S.D.N.Y. 2003) (In order to decide which party should pay for the cost of producing the full eDiscovery, the court found that a sample of the eDiscovery materials should be produced so the court can more effectively weigh the costs against the benefits).

(d) New York eDiscovery Rules[58]

New York has adopted the Uniform State Laws addressing eDiscovery.[59] 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 section 202.12. Section 202.12 requires parties to address eDiscovery during all preliminary conferences.[60] At preliminary conferences, the parties may discuss where key electronic data is preserved and in what form it will be turned over to the requesting party.[61]

In New York, the requesting party often bears the costs of producing electronically stored information, although this varies.[62] As with the Federal Rules, New York courts will balance the parties' competing interests. The courts weigh the need for requested eDiscovery against the burden it imposes upon the producing party.[63] As with other discovery requests, the court will reject overly broad requests.[64]

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.

Part C(1) below discusses criminal discovery in federal cases. It explains that in all criminal cases, the Due Process Clause of the Fifth and Fourteenth Amendments of the U.S. Constitution requires the prosecutor to turn over certain materials to the defendant. Part C(2) reviews the discovery rules that apply in New York criminal cases. Finally, there is a brief note about federal discovery procedures, which are similar to New York's procedures because the New York rules were modeled on them. Remember that this Part does not cover the 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

Under *Brady v. Maryland*, a prosecutor may not refuse your request for evidence that is "exculpatory" [65] and "material"[66] to either guilt or punishment.[67] You may be entitled to a new trial if the prosecutor withholds such evidence, even by mistake.[68]

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58. N.Y. COMP. CODES R. & REGS. tit. 22, § 202.12 (2018); N.Y. C.P.L.R. 3120, 3111 (McKinney 2019).

59. N.Y. COMP. CODES R. & REGS. tit. 22, § 202.7 App. A (2018).

60. N.Y. COMP. CODES R. & REGS. tit. 22, § 202.12 (2018).

61. N.Y. COMP. CODES R. & REGS. tit. 22, § 202.12(c)(3) (2018).

62. MBIA Ins. Corp. v. Countrywide Home Loans, Inc., 27 Misc. 3d 1061, 1074–1076, 895 N.Y.S.2d 643, 653–654 (Sup. Ct. N.Y. Cty. 2010).

63. N.Y. COMP. CODES R. & REGS. tit. 22, § 202.7 App. A; Moore v. Publicis Groupe, 287 F.R.D. 182, 192–193 (S.D.N.Y. 2012).

64. MBIA Ins. Corp. v. Countrywide Home Loans, Inc., 27 Misc. 3d 1061, 1069, 1077, 895 N.Y.S.2d 643, 649, 655 (Sup. Ct. N.Y. Cty. 2010).

64. "Exculpatory" evidence tends to prove the defendant is not guilty.

66. 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, 433, 115 S. Ct. 1555, 1565, 131 L. Ed. 2d 490, 505 (1995); *see also* United States v. Bagley, 473 U.S. 667, 674–675, 105 S. Ct. 3375, 3379, 87 L. Ed. 2d 481, 488–489 (1985); United States v. Agurs, 427 U.S. 97, 104, 96 S. Ct. 2392, 2398, 49 L. Ed. 2d 342, 350 (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.").

67. Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–1197, 10 L. Ed. 2d 215, 218 (1963). For specific examples of various applications of the *Brady* rule, see 2 BARRY KAMINS, GORDON MEHLER, ROBERT HILL SCHWARTZ, & JAY SHAPIRO, NEW YORK CRIMINAL PRACTICE § 17.03[8] (Matthew Bender ed., 2d ed. 2020).

68. Kyles v. Whitley, 514 U.S. 419, 421–422, 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, 153, 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

Brady applies to evidence that supports your claim of innocence and also evidence that weakens the prosecution's case.[69] One example is any evidence that undermines the credibility of a government witness. This evidence is called "impeachment evidence." The prosecution may also be required to turn over the statements made by a witness before trial if the statements are inconsistent with the testimony that witness plans to give at trial.[70]

In general, *Brady* requires a prosecutor to disclose *all* evidence that might be favorable to you. Federal courts have created several limitations to the *Brady* rule. The prosecutor 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 you will be found guilty or not guilty at trial.[71] This means that evidence that would probably not affect the final verdict does not have to be disclosed. The court will likely not order a new trial if the prosecutors withheld evidence that was not material.

Second, *Brady* does not require the prosecution to turn over evidence if you knew it existed or if you should have been able to take advantage of it without the prosecution's help.[72] 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*.[73]

Third, even though *Brady* requires prosecutors to turn over evidence that might help to show the your innocence, it does not give you "unsupervised authority to search through the [state's] files" in search of exculpatory material.[74] "[T]he 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.[75]

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.

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trial. Arizona v. Youngblood, 488 U.S. 51, 57–58, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281, 289 (1988).

69. Kyles v. Whitley, 514 U.S. 419, 433, 115 S. Ct. 1555, 1565, 131 L. Ed. 2d 490, 505 (1995) (citing United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)) (noting 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).

70. Kyles v. Whitley, 514 U.S. 419, 433, 115 S. Ct. 1555, 1565, 131 L. Ed. 2d 490, 505 (1995); Giglio v. United States, 405 U.S. 150, 154, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104, 108 (1972).

71. 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 the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment" and defining "material" as 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, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481, 494 (1985)).

72. *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").

73. *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 be disclosed even if they are not *Brady* material. N.Y. Crim. Proc. Law §240.45(1)(a) (McKinney 2012); *see also* 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").

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

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

2. New York Procedures

(a) Introduction

New York leads a movement to give criminal defendants more 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").[76] Article 240 is based 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.[77]

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.[78]

(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[79] that are material[80] to your case.

Any written, recorded, or oral statement you made to the police (or to a person acting under police direction) that was not made during "the criminal transaction" is discoverable material.[81] You can request this material, as well as similar statements made by a co-defendant who will be tried jointly with you.[82] This generally applies if you or a co-defendant made a statement following arrest, such as a statement made at the police station. Notice that this does not cover statements made *during* "the criminal transaction."[83] For example, the prosecution usually does not have to give you a copy of conversations between you and an undercover officer if the conversation occurred during a drug transaction. An exception exists where the statement is recorded electronically. If a statement made during the criminal transaction is recorded on tape, you are entitled to it through discovery.[84] 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.[85]

Any statement made to the police or to a person acting under police direction *before* the criminal transaction took place is also discoverable. Such evidence might be used to establish a motive or intent to commit the crime. For instance, if you made a statement before a homicide indicating that you hated

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76. N.Y. CRIM. PROC. LAW §§ 240.10–240.90 (McKinney 2019).

77. 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).

78. Chapter 17 of Waxner's New York Criminal Practice also provides helpful information about New York criminal discovery. *See also* 2 BARRY KAMINS, GORDON MEHLER, ROBERT HILL SCHWARTZ, & JAY SHAPIRO, NEW YORK CRIMINAL PRACTICE § 17 (Matthew Bender ed., 2d ed. 2020).

79. N.Y. CRIM. PROC. LAW § 240.20(1) (McKinney 2009). 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 2009).

80. N.Y. CRIM. PROC. LAW § 240.40(1)(c) (McKinney 2009).

81. N.Y. CRIM. PROC. LAW § 240.20(1)(a) (McKinney 2009).

82. N.Y. CRIM. PROC. LAW § 240.20(1)(a) (McKinney 2009); People v. Arthur, 175 Misc. 2d 742, 768, 673 N.Y.S.2d 486, 506 (Sup. Ct. N.Y. County 1997) (holding that statements of a codefendant are subject to discovery and must be turned over).

83. N.Y. CRIM. PROC. LAW § 240.20(1)(a) (McKinney 2009).

84. N.Y. CRIM. PROC. LAW § 240.20(1)(g) (McKinney 2009).

85. N.Y. PENAL LAW § 40.05 (McKinney 2009).

the victim, it could be used to prove motive to kill them. Therefore, it is important 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.[86] 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.[87] This evidence might include a written report based on a physical or mental examination or a scientific test or experiment related to the crime for which you are charged.[88]

Tapes or electronic recordings are yet another type of discoverable property.[89] The prosecutor must disclose any tape or electronic recording that he intends to introduce at trial if you request such material, even if that "recording was made during the course of the criminal transaction." You are also entitled to reports that reveal "[t]he approximate date, time, and place of the" crime and of the arrest.[90] This information may be useful to help you establish an alibi. You also may discover "any other property obtained" from you or from a co-defendant.[91] This might include weapons, clothing, drugs, tools, cars, or other items. Discovery of this type of property can help you prepare your case by giving you insight into what the prosecutor will present at trial to link you to the crime.

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

The "subpoena *duces tecum*" is a process where the court orders a witness to bring documents relevant to the court proceedings with him when he comes to testify.[92] It is frequently used when information is in the hands of third parties (meaning, someone who is not the prosecution and is not the defendant).[93] The subpoena *duces tecum* is the only method prosecutors and defendants can use to discover third party materials. Under Article 240, they cannot use a "demand to produce" or "motion for discovery" (as demands to produce are also called) to obtain information from third parties.[94]

In order to obtain a subpoena *duces tecum* for pretrial discovery purposes under N.Y. Crim. Proc. Law §610.20(3) (McKinney 2009 & Supp. 2014), you must show the following in your motion:[95]

(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;

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86. N.Y. CRIM. PROC. LAW § 240.20(1)(b) (McKinney 2009).
87. N.Y. CRIM. PROC. LAW § 240.20(1)(c) (McKinney 2009).
88. N.Y. CRIM. PROC. LAW § 240.20(1)(c) (McKinney 2009).
89. N.Y. CRIM. PROC. LAW § 240.20(1)(g) (McKinney 2009).
90. N.Y. CRIM. PROC. LAW § 240.20(1)(i) (McKinney 2009).
91. N.Y. CRIM. PROC. LAW § 240.20(1)(f) (McKinney 2009).
92. N.Y. CRIM. PROC. LAW § 610.10(2), (3) (McKinney 2009).
93. *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 [t]ecum* is applicable to witnesses other than the adverse party to the case").
94. N.Y. CRIM. PROC. LAW § 240.10(1) (McKinney 2009) (only allowing a "demand to produce" to be used on a party to a criminal case).
95. The requirements for a *duces tecum* in New York are explained in People v. Price, 100 Misc. 2d 372, 379, 419 N.Y.S.2d 415, 420–421 (Sup. Ct. Bronx County 1979) and People v. Morrison, 148 Misc. 2d 61, 67–68, 559 N.Y.S.2d 1013, 1018 (Crim Ct. N.Y. County 1990). Federal Courts use the same standard. *See* United States v. Nixon, 418 U.S. 683, 698–700 (1974) (adopting Judge Weinfeld's formulation in United States v. Iozia, 13 F.R.D. 335, 338 (S.D.N.Y. 1952) as the appropriate standard for federal judges to use in evaluating a subpoena *duces tecum*).

(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.[96] "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."[97] The prosecutor is not required to turn over memoranda or other documents containing his legal theories or opinions. Similarly, you are not required to produce such documents of your own if a prosecutor demands them. For example, you do not need to give the prosecutor a copy of notes that you took about a defense you plan to raise at trial. 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 § 240.20(1), you may obtain access to any discoverable material before the trial begins by serving a "demand to produce" on the prosecutor.[98] A demand to produce is a written notice that you may serve on your adversary without having to first get permission from the court. It should include information on what property you want to inspect, and provide reasonable notice of the time at which you hope to conduct the inspection. Be specific in your demands. You are not permitted to go on a "fishing expedition" by requesting to inspect property in very general terms. 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.

You must file a demand to produce within thirty days of your arraignment.[99] However, if you are unrepresented (that is, you have no lawyer), the thirty-day period does not start until a lawyer first appears in court on your behalf. You must have requested an adjournment to obtain a lawyer's 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.[100] 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.[101] As a defendant, you must respond to the

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96. N.Y. CRIM. PROC. LAW § 240.10(2), (3) (McKinney 2009) (excluding "Attorneys' work product"); N.Y. CRIM. PROC. LAW § 240.20(1)(a) (McKinney 2009) (excluding statements made during the "criminal transaction").

97. N.Y. CRIM. PROC. LAW § 240.10(2) (McKinney 2009). Police reports, notes and memoranda created for internal use are generally not made available for discovery, unless they contain exculpatory material or material that the D.A. intends to use at trial. *See* People v. Finkle, 103 Misc. 2d 985, 986, 427 N.Y.S.2d 374, 375 (Sup. Ct. Sullivan County 1980). However, routine police records containing information that must be filed in the normal course of business may be discovered. Such determinations are to be made by the court on an *ad hoc* basis. People v. Simone, 92 Misc. 2d 306, 312–313, 401 N.Y.S.2d 130, 134 (Sup. Ct. Bronx County 1977).

98. *See* N.Y. CRIM. PROC. LAW §§ 240.80, 240.90, 255.20 (McKinney 2009) for information on filing a motion for an order of discovery.

99. For an example of a demand form, see 2 BARRY KAMINS, GORDON MEHLER, ROBERT HILL SCHWARTZ & JAY SHAPIRO, NEW YORK CRIMINAL PRACTICE, Form No. 17:1 (Matthew Bender ed., 2d ed. 2020).

100. However, unless the court orders otherwise, the prosecutor may only ask for material that is similar in kind and character to the material you are asking for from him. *See* N.Y. CRIM. PROC. LAW § 240.40(2)(b) (McKinney 2009); People v. Copicotto, 50 N.Y.2d 222, 227–228, 428 N.Y.S.2d 649, 653–654, 406 N.E.2d 465, 469–470 (1980).

101. N.Y. CRIM. PROC. LAW § 240.40(2)(b) (McKinney 2009); *see also* People v. Sirmons, 242 A.D.2d 883, 884–885, 662 N.Y.S.2d 645, 646–647 (4th Dept. 1997).

prosecutor's demands by either providing the desired information or filing a written refusal of demand under N.Y. Crim. Proc. Law § 240.35.

Discovery does not end once the trial begins. Under N.Y. Crim. Proc. Law § 240.45, certain materials can still be discovered at the beginning of a trial. These materials can be very important to your case. After the jury has been sworn and before the prosecutor's opening address,[102] 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' testimony;[103]
(2) Any conviction record of a witness to be called at trial if the prosecutor is aware of the record; and
(3) Information about 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 give this information to the prosecutor before presenting your case.[104]

This information may help you attack the credibility of prosecution witnesses. For example, if you find out that a potential witness for the prosecution has been previously convicted of perjury (lying under oath), you may be able to use this information during cross-examination of the witness to try to "impeach" him (attack his credibility). Revealing this fact during cross-examination may make jurors doubt the truth of what the witness says in his testimony. By attacking the credibility of the witness, you may help your case.

(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 give 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 (penalties) by the court.[105]

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 (explained further below).[106] When refusing to comply with a demand, you must do so in writing and explain the reasons for your refusal.[107] 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.[108] Your refusal must be served upon the demanding party and a copy of it must be filed with the court.[109]

If the prosecutor demands information from you and you refuse, the court may order you to disclose the material anyway.[110] 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

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102. In the case of a non-jury trial (or "bench trial"), the information must be turned over before the offering of evidence. N.Y. CRIM. PROC. LAW §240.45(1) (McKinney 2009).

103. This is commonly called *Rosario* material. *See* People v. Rosario, 9 N.Y.2d 286, 289–290, 173 N.E.2d 881, 882–883, 213 N.Y.S.2d 448, 450–451 (1961) (codified at 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.

104. N.Y. CRIM. PROC. LAW § 240.45(2) (McKinney 2009).

105. N.Y. CRIM. PROC. LAW § 240.70 (McKinney 2009).

106. N.Y. CRIM. PROC. LAW § 240.35 (McKinney 2009). For examples of privileged material, see Part B(2)(b) of this Chapter.

107. N.Y. CRIM. PROC. LAW § 240.35 (McKinney 2009).

108. N.Y. CRIM. PROC. LAW § 240.80(2) (McKinney 2009).

109. N.Y. CRIM. PROC. LAW § 240.35 (McKinney 2009).

110. N.Y. CRIM. PROC. LAW § 240.40(2)(a) (McKinney 2009).

material you requested.[111] 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.[112]

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 (without anyone asking for one).[113] Even other "affected person[s]" impacted by your case can apply for a protective order if they think there is a good reason not to turn over information.[114]

The court will grant you a protective order if you show good cause for requesting the order. Good cause may be (1) constitutional limitations; (2) the danger that physical evidence may be destroyed or damaged; (3) substantial risk of physical harm to someone; (4) the possibility of intimidation, economic harm, or bribery to someone; (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.[115] When filed, a motion for a protective order suspends discovery of the particular matter.[116] Suspension 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 good cause. If you do not, the court may order sanctions or "take any other appropriate action."[117] Sanctions might include prohibiting you from using 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.[118] This means that if you requested certain 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 give the prosecutor material you later become aware of if it is covered by the prosecutor's earlier discovery request.

(f) Summary

This description of discoverable materials and information is meant to give you only a very general picture of the tools available to you in a criminal proceeding. To use these tools in your case, you should read Article 240 of the N.Y. Crim. Proc. Law carefully. Pay close attention to the sections of the statute that relate to types of discoverable material. You should also look at the case law interpreting the statute, particularly if you are looking for the answer to a very specific question. You can find a lot of the case law by looking 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 instead 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, the rules are very similar. Federal Rule 16 provides for

111. N.Y. CRIM. PROC. LAW § 240.40(1)(a) (McKinney 2009).
112. N.Y. CRIM. PROC. LAW § 240.40(1)(c) (McKinney 2009).
113. N.Y. CRIM. PROC. LAW § 240.50(1) (McKinney 2009).
114. N.Y. CRIM. PROC. LAW § 240.50(1) (McKinney 2009); *see* People v. Mileto, 290 A.D.2d 877, 878–879, 737 N.Y.S.2d 170, 173 (3d Dept. 2002).
115. N.Y. CRIM. PROC. LAW § 240.50(1) (McKinney 2009).
116. N.Y. CRIM. PROC. LAW § 240.50(3) (McKinney 2009).
117. N.Y. CRIM. PROC. LAW § 240.70(1) (McKinney 2009).
118. N.Y. CRIM. PROC. LAW § 240.60 (McKinney 2009).

basically the same types of discoverable material[119] and has similar rules for limiting the discovery process by protective orders.[120] There are also provisions for sanctions if a party does not follow the Rule[121] or violates the continuing duty to disclose.[122]

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 to support your specific request or motion. 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.

119. *See* FED. R. CRIM. P. 16(a)–(b).
120. *See* FED. R. CRIM. P. 16(d)(1).
121. *See* FED. R. CRIM. P. 16(d)(2).
122. *See* FED. R. CRIM. P. 16(c).

APPENDIX A

SAMPLE DISCOVERY DOCUMENTS

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[123]

[proper case caption][124]

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.]

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

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

Dated:
[date] [city, state]

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

A-2. SAMPLE REQUEST FOR ADMISSION[125]

[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[126]

[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*.

125. Adapted from Roger S. Haydock & David F. Herr, Discovery Practice app. B-30 (5th ed. 2009) (Form F-1).

126. 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[127]

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 an incarcerated person*].

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*.

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