CHAPTER 8

OBTAINING INFORMATION TO PREPARE YOUR CASE: THE PROCESS OF DISCOVERY[1*]

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 they may have that you think might be helpful 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[2], the process starts after the "complaint" (the document that begins a suit) has been filed. In a criminal action, it generally starts after the defendant has been "arraigned" (brought to court to make an initial pleading to the charge brought against him).

This Chapter gives you an overview of the discovery rules and is divided into two main parts. **Part B** addresses the discovery rules for civil lawsuits, which is further divided into three sections: discovery in federal cases, discovery in New York State cases, and electronic discovery. **Part C** focuses on the discovery rules for criminal cases. Part C is also divided into three sections: federal constitutional requirements, discovery in New York State cases, and discovery in federal cases. **Appendix A** at the end of this Chapter includes sample legal documents for conducting discovery.

Discovery is governed by a fairly complicated set of rules.[3] 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 is very limited in many states and the federal system. 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" (check that they are still valid) the rules and cases, since the rules change quite frequently. *JLM*, Chapter 2, "Introduction to Legal Research," explains Shepardizing and other methods of legal research.

[1*] 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*.

[2] 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 case between two individuals, which would be a civil action. In a criminal action, a person is charged with a crime by the government.

[3] 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.

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) 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.

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.[4] They vary depending on whether you bring your case in federal or state court.[5] The federal rules governing civil discovery are discussed in Section B(2) of this Chapter; the New York State rules are discussed in Section 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. Both federal and New York State courts also allow electronic discovery (called eDiscovery). eDiscovery is discussed in Section B(4) of this chapter. 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.[6] 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.

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[4] *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. The methods of discovery from the Federal Rules of Civil Procedure can also be used in federal habeas proceedings. But discovery is only available in federal habeas proceeding when the court determines that there is adequate reason ("good cause"); it 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 Mar. 14, 2024) (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 Mar. 14, 2024) (allowing the judge to authorize discovery "for good cause" where the incarcerated person is in federal custody).

[5] 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).

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

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 and 45.[7] 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 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.[8] 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.[9] 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.[10] Examples of privileged relationships include those between lawyer and client, doctor and patient, clergy and penitent, and spouses (such as husband and wife).[11] 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).[12] 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."[13] 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"[14] for it —that is, if you cannot get the information anywhere else and it would be unfair if you

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[7] Note that habeas corpus discovery rules differ slightly from discovery rules in federal civil cases. *See JLM*, Chapter 13, "Federal Habeas Corpus Petitions," and 28 U.S.C. §§ 2246, 2247 (discussing rules about obtaining discovery through depositions and affidavits and admissibility of other documentary evidence).

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

[9] FED. R. CIV. P. 26(b)(1).

[10] 81 AM. JUR. 2D *Witnesses* § 272 (2015).

[11] *See* 81 AM. JUR. 2D *Witnesses* §§ 318–397 (2015) (describing attorney-client privilege); 81 AM. JUR. 2D *Witnesses* §§ 398–465 (2015) (describing doctor-patient privilege, which is recognized in many states; note that federal courts recognize a psychotherapist-patient privilege but not a general doctor-patient privilege); 81 AM. JUR. 2D *Witnesses* §§ 466–476 (2015) (describing clergy-penitent privilege); 81 AM. JUR. 2D *Witnesses* §§ 281–317 (2015) (describing marital privilege).

[12] *See* 81 AM. JUR. 2D *Witnesses* § 276 (2015) (describing the scope of the confidentiality 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).

[13] 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).

[14] *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).

did not have it—but the opposing lawyer's opinions and analyses related to the case will still be protected.[15]

One can "waive" a privilege, which makes otherwise privileged material no longer privileged. Most notably, if a privileged party voluntarily discloses or consents to disclosure of a significant part of a privileged communication, that might waive the privilege.[16] For example, if your opponent sends an email to their attorney that would normally fall under the attorney-client privilege but they also send that email to someone with whom they do not have a privileged relationship, that email is likely no longer privileged. As another example, if a patient gives written consent to their psychiatrist to release records, the patient can no longer claim that those records are protected by the psychotherapist-patient privilege.[17] But "waiver does not occur if" the "disclosure [to a third party] is itself a privileged communication."[18]

Privilege and waiver of privilege look different in different states, and the federal courts also have their own rules on privilege. If you think a communication might be privileged, you should look into the law in your jurisdiction. The easiest place to start is likely with your jurisdiction's Rules of Evidence, which should describe at least some applicable privileges.[19] See *JLM*, Chapter 2, "Introduction to Legal Research" for more information on conducting legal research.

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 opponent 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.

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.[20] 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 because it is unlikely to support or undermine either side's argument. 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.[21] Still using the police misconduct example above, assume that you have found

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[15] You cannot, for example, ask your opponent to tell you in advance the argument that they 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.

[16] 4 HANDBOOK OF FED. EVID. § 511:1, (9th ed. 2023); 81 AM. JUR. 2D WITNESSES § 280.

[17] 4 HANDBOOK OF FED. EVID. § 511:1, (9th ed. 2023).

[18] 4 HANDBOOK OF FED. EVID. § 511:1, (9th ed. 2023).

[19] For example, New York's general civil evidence rules are at N.Y. C.P.L.R. §§ 4501–4550; information on privileges in California is at CAL. EVID. CODE §§ 900–1070; privileges in civil proceedings in Oklahoma are at OKLA. STAT. ANN. TIT. 12, §§ 2501–2513; privileges in Texas are described at TEX. R. EVID. 501–513. Federal rules on privilege are at FED. R. EVID. 501–502. Some rules provide more detail than others—for instance, the federal rules give relatively little information on privileges in federal court. Where the rules provide little information, you should look at case law in your jurisdiction.

[20] 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.

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

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 Subsection 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 opponent 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 opponent 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 opponent 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 opponent 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.[22] In addition, Rule 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 opponent. 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,[23] the opposing lawyer, and a stenographer.[24] 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

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[22] 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).

[23] The person questioned in a deposition is called the "deponent."

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

permission to do so before the meeting.[25] 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,[26] 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.[27] 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"[28] 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 makes things a little easier 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, you can, for example stipulate to holding the deposition in a place convenient for you (such as the jail or prison), and to tape-recording the deposition instead of hiring a stenographer.

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.[29] 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 because the deponent's attorney will likely review his answers before sending them to you.

(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.[30] Nonetheless, if you feel you need to ask more than twenty-five questions, you may ask the court for special permission.[31] 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

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[25] FED. R. CIV. P. 26(d)(1).

[26] 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).

[27] FED. R. CIV. P. 26(b)(2)(C)(iii).

[28] As noted above, the "deponent" is the person who is questioned in the deposition. The deponent may not be as well prepared by their attorney as they will be at the trial, and their attorney will not have an opportunity to review the deponent's responses before you receive them.

[29] FED. R. CIV. P. 31.

[30] FED. R. CIV. P. 33(a).

[31] FED. R. CIV. P. 26(b)(2)(A).

information, and (3) whether the burden or expense of the additional interrogatories would outweigh their likely benefit.[32] You may send interrogatories as soon as you and your opponent have attended the mandatory meeting under Rule 26(f).[33] 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.[34] 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.

(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).[35]

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[32] FED. R. CIV. P. 26(b)(2)(C).

[33] FED. R. CIV. P. 26(f). See Subsection B(2)(c) of this Chapter for more detail.

[34] FED. R. CIV. P. 33(b)(2).

[35] *See* Subsection B(2)(f) of this Chapter for more detail.

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.[36] 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.[37]

(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.[38]

(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 that 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.[39]

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

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

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[36] FED. R. CIV. P. 34(a).

[37] *See* N.Y. C.P.L.R. 1101 (McKinney 2012) (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 incarcerated, 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 incarcerated person, poor person's relief only entitles you to a reduced filing fee rather than a complete exemption. § f(2)).

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

[39] FED. R. CIV. P. 36(a)(3).

(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 Subsection 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 (penalties, such as 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 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.[40]

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.").

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[40] 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.

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 in civil cases.[41] 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.[42] Unlike in federal courts, if you want to depose someone who is not a party to the proceeding, New York courts require that you get a subpoena.[43] 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.

Rule 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.[44] 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

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[41] This is different from the federal system. *See* FED. R. CIV. P. 26(a).

[42] N.Y. C.P.L.R. Rule 3107 (McKinney 2018).

[43] N.Y. C.P.L.R. Rule 3106(b) (McKinney 2018). Note that the subpoena must be served at least 20 days before the examination.

[44] N.Y. C.P.L.R. Rule 3116(a) (McKinney 2018).

may immediately serve an interrogatory.[45] In New York, the answering party has only twenty days to answer the interrogatory or to object to the questions.[46]

(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.[47]

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.[48] 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 will likely be 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.[49] 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.[50] 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.[51]

(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*.[52]

(v) *Admissions*

New York admissions rules are very similar to the federal rules.[53] 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 admission either 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.[54]

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[45] N.Y. C.P.L.R. Rule 3132 (McKinney 2018).

[46] N.Y. C.P.L.R. Rule 3133(a) (McKinney 2018).

[47] N.Y. C.P.L.R. Rule 3111, 3120(1) (McKinney 2018).

[48] 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).

[49] 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. Rule 3120(2) (McKinney 2018).

[50] Anello v. Turner Constr. Co., 96 Misc. 2d 208, 210, 408 N.Y.S.2d 845, 846 (Sup. Ct. N.Y. County 1978).

[51] Agric. & Indus. Corp. v. Chem. Bank, 94 A.D.2d 671, 672, 462 N.Y.S.2d 667, 668 (1st Dept. 1983).

[52] N.Y. C.P.L.R. §§ 2301–2308 (McKinney 2010).

[53] *See* N.Y. C.P.L.R. § 3123 (McKinney 2018); FED. R. CIV. P. 36.

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

(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,[55] 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.

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.[56] 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.[57] eDiscovery is subject to the same limitations as paper discovery. Privileged communications are still private, even if they take place over email or another electronic method of communication.[58]

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[55] 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.

[56] For cases declaring electronically stored information discoverable, see Aguilar v. Immigr. & Customs Enf't, 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 Ent., Inc. v. The William Morris Agency, No. 98 Civ. 8272(RPP)(JCF), 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).

[57] FED. R. CIV. P. 26(a); In re Bristol Myers-Squibb Sec. Litig., 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).

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

(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 whatever electronic 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[59]

The Federal Rules of Civil Procedure apply to digital documents in the same way they apply to paper-based records.[60] 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 the costs.[61] 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.[62]

(d) New York eDiscovery Rules[63]

In New York, courts have consistently found that you can use N.Y. C.P.L.R. 3120 to obtain electronic documents.[64] The principles regarding electronic discovery are similar to those under the Federal Rules. The main rule specifically addressing eDiscovery in New York is Uniform Trial Court Rule 202.12. This rule requires parties to address eDiscovery during preliminary conferences when potentially relevant.[65] 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.[66]

In New York, the requesting party often bears the costs of producing electronically stored information, although this varies.[67] 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

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[59] Fed. R. Civ. P. 33, 34.

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

[61] 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).

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

[63] N.Y. COMP. CODES R. & REGS. tit. 22, § 202.12 (2024); N.Y. C.P.L.R. 3120, 3111 (McKinney 2019).

[64] *See, e.g.*, Delta Fin. Corp. v. Morrison, 13 Misc. 3d 604, 609, 819 N.Y.S.2d 908, 912 (Sup. Ct. Nassau County 2006).

[65] N.Y. COMP. CODES R. & REGS. tit. 22, § 202.12(b), (c)(3) (2024).

[66] N.Y. COMP. CODES R. & REGS. tit. 22, § 202.12(c)(3) (2024).

[67] *See* 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. County 2010).

it imposes upon the producing party.[68] As with other discovery requests, the court will reject overly broad requests.[69]

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.

Section C(1) below discusses criminal discovery in federal cases. It explains that in all criminal cases, the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution require the prosecutor to turn over certain materials to the defendant. Section C(2) reviews the discovery rules that apply in New York criminal cases. Finally, Section C(3) briefly describes 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 (government lawyer) must provide you with evidence that is "favorable"[70] and "material"[71] to either guilt or punishment.[72] The prosecution is also required to learn of such evidence from anyone else "acting on the government's behalf in the case," such as the police.[73] You may be entitled to a new trial if the prosecutor withholds such evidence, even by mistake.[74]

You can use the Supreme Court's ruling in the *Brady* case to get access to evidence that supports your innocence and evidence that weakens the government's case against you.[75] One example is any evidence that shows that a government witness may not be trustworthy. This evidence is called "impeachment evidence." The government may also be required to give you the statements made by a witness before trial if the statements do not match the testimony that the witness plans to give at trial.[76]

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[68] *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 202.70 App. A (2024) (eDiscovery guidelines for the commercial division); Moore v. Publicis Groupe, 287 F.R.D. 182, 192–193 (S.D.N.Y. 2012).

[69] 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. County 2010).

[70] This includes "exculpatory" evidence, meaning evidence that tends to prove the defendant is not guilty.

[71] Evidence is "material" when 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, 489 (1985).

[72] 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).

[73] Kyles v. Whitley, 514 U.S. 419, 437, 115 S. Ct. 1555, 1567, 131 L. Ed. 2d 490, 508 (1995).

[74] 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.'" (quoting Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–1197, 10 L. Ed. 2d 215, 218 (1963)). 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).

[75] 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 the government has to give you all relevant evidence, including evidence that could support your innocence and evidence that could weaken the government's case against you); Giglio v. United States, 405 U.S. 150, 154, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104, 108 (1972) (holding that the government must give you any evidence they have that affects the trustworthiness of a witness during discovery).

[76] Kyles v. Whitley, 514 U.S. 419, 433, 115 S. Ct. 1555, 1565, 131 L. Ed. 2d 490, 505 (1995) (noting that the

In general, *Brady* requires the government to disclose *all* evidence that might be good for you and your defense. But federal courts have created several limitations to the *Brady* rule. The prosecutor is required to give you evidence only if it is "material" (meaning that the evidence is relevant to the case and may change how the judge rules).[77] This means that evidence that would very likely not affect the judge or jury's final decision does not have to be given to you. The court will only order a new trial if the prosecutors did not give you evidence that was material to your case. If the government withholds multiple pieces of evidence, courts have to look at all of those pieces of evidence together (cumulatively) when deciding if they would have made a difference.[78]

Second, *Brady* does not require the prosecution (government) to turn over (give you) evidence if you knew it existed or if you should have been able to get it without the prosecution's help.[79] For example, in one case, the prosecution told the defense attorney to interview a witness instead of handing over the witness's pretrial statement (a statement summarizing what the witness will say at trial). The federal court decided that even though the prosecution withheld the statement, it had not "suppressed" the evidence under *Brady* because the defense attorney could have interviewed the witness to get the same information.[80]

Third, even though *Brady* requires prosecutors to give you evidence that might help show that you are innocent, it does not give you the right to search through all of the state's files.[81] The state gets to decide which information you are given. It is up to your defense attorney to figure out if any evidence was withheld from (not given to) you.[82]

If you find out that the prosecution violated its requirements under *Brady*, you can raise this in a state post-conviction motion (in New York, this is an Article 440 motion) or a federal habeas corpus petition. For more on these motions, see *JLM*, Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence," and Chapter 13, "Federal Habeas Corpus Petitions."

Brady represents the rules for discovery protected by the U.S. Constitution in *all* criminal cases in the United States. All states are required to provide a criminal defendant with the material discussed in this section. However, *Brady* is only the *minimum* constitutional requirement guaranteed to criminal defendants. Your state's discovery rules may give you a right to more discovery than this basic constitutional standard.

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government must share evidence that a witness lied in their statements to the court); Giglio v. United States, 405 U.S. 150, 153–154, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104, 108 (1972).

[77] Pennsylvania v. Ritchie, 480 U.S. 39, 57, 107 S. Ct. 989, 1001, 94 L. Ed. 2d 40, 57 (1987) (defining "material" as a "'reasonable probability that . . . the result of the proceeding would have been different'" if the evidence had been shared) (quoting United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481, 494 (1985)).

[78] Kyles v. Whitley, 514 U.S. 419, 436, 115 S. Ct. 1555, 1567, L. Ed. 2d 490, 507 (1995).

[79] *See*, *e.g.*, United States v. Grossman, 843 F.2d 78, 85 (2d Cir. 1988) (holding that the government was not required to provide 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").

[80] *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 N.Y. Crim. Proc. Law § 245.20(1)(e) (McKinney 2023, compact ed.); *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").

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

[82] 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 is one of the states that gives criminal defendants a right to more information than *Brady*. New York requires prosecutors to automatically share most evidence with you under Article 245 of the New York Criminal Procedure Law ("N.Y. Crim. Proc. Law").[83] This system of discovery is supposed to make the criminal justice system more fair by giving both sides access to the same information.[84] This Section provides a general overview of discovery rules found in Article 245 of the N.Y. Crim. Proc. Law. If you run into specific problems, you should refer to the law itself. [85]

(b) Timing of Discovery

In New York most discovery happens "automatically." This means that the government is forced to share most evidence with you without you having to ask for it. If you are in jail while your case is waiting for trial, the prosecutor must share most evidence with you within twenty calendar days of your arraignment. ("Arraignment" is the first court appearance you make after being arrested, when the judge will decide your bail and you will plead "guilty" or "not guilty." Arraignment is not your criminal trial, which will happen later.)[86] If you are not in jail, the government must send most evidence to you within thirty-five days of your arraignment.[87] If there is a large amount of discovery materials, or if the prosecutor does not have some of the materials, he can ask for an extension from the judge of up to thirty calendar days.[88] Additionally, the government must tell you about your prior crimes and misconduct that it intends to use at trial at least fifteen days before the first scheduled trial date.

A special rule applies if you have been charged with a felony and are required to testify before a grand jury about that charge. When this is the case, the prosecutor must give you access to statements that you made to law enforcement at least forty-eight hours (two days) before you testify.[89]

The government is allowed to ask the court for permission not to send you certain items of discovery and keep that evidence private.[90] If the prosecutor does this, he must tell you in writing that he is keeping some discovery private and he must also tell you what law gives him permission to keep

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[83] N.Y. CRIM. PROC. LAW §§ 245.10–245.85 (McKinney 2023, compact ed.). Note that Article 245 of New York Criminal Procedure Law (sections cited beginning with "N.Y. CRIM. PROC. LAW § 245") became effective in 2020 and, as of this Chapter's publication, McKinney's Consolidated Laws of New York Annotated edition is only current through 2014. A McKinney volume published after 2020 should reflect the law as stated in this Chapter, unless there are further changes. In the meantime, the McKinney Compact edition is up to date, so we reference it here.

[84] People v. Copicotto, 50 N.Y.2d 222, 226, 406 N.E.2d 465, 428 N.Y.S.2d 649 (1980).

[85] Additionally, you may want to consult treatises explaining the law, such as: 2 BARRY KAMINS, GORDON MEHLER, ROBERT HILL SCHWARTZ, & JAY SHAPIRO, NEW YORK CRIMINAL PRACTICE, §§ 17.01–17.02 (2023); GARY MULDOON, HANDLING A CRIMINAL CASE IN NEW YORK, ch. 8 (2023).

[86] N.Y. CRIM. PROC. LAW § 245.10(1)(a)(i) (McKinney 2023, compact ed.). Note that under New York law, a "calendar day includes the time from midnight to midnight. Sunday or any day of the week specifically mentioned means a calendar day." N.Y. Gen. Const. Law § 19.

[87] N.Y. CRIM. PROC. LAW § 245.10(1)(a)(ii) (McKinney 2023, compact ed.).

[88] N.Y. CRIM. PROC. LAW § 245.10(1)(a) (McKinney 2023, compact ed.).

[89] N.Y. CRIM. PROC. LAW § 245.10(1)(c) (McKinney 2023, compact ed.).

[90] For more information on protective orders, see section C(2)(f) below.

the discovery private.[91] Keep in mind that even if the court allows the prosecutor to withhold certain materials, you still have a right to access portions of those materials that are not protected by law.

(c) Scope of Automatic Discovery

(i) *Automatic Discovery from the Prosecutor to the Accused*

Section 245.20 sets out a non-exhaustive list of which discovery materials the prosecutor has to send to you. Even if the prosecutor does not have certain materials, including evidence that helps your case, he must try to obtain those materials and send them to you.[92] Under New York law, the prosecutor legally possesses any documents held by law enforcement.[93] This means that the prosecutor must share police documents with you when they are relevant to your case.

You have a right to inspect, photograph, and test discovery materials.[94] The list of materials set out in section 245.20 is long, so you may find it helpful to read through it carefully. Keep in mind that the prosecutor may ask the court to keep some materials private (a protective order), which would prevent you from seeing them. Protective orders are discussed below in Subsection C(2)(f).

The prosecutor must give you written, recorded, and oral statements that you made to the police, or to someone who was working for the police. This rule also gives you a right to access statements made by your co-defendants (people charged with the same crime you are charged with) to law enforcement officers, even if those co-defendants will be tried separately.[95] The prosecutor must also make grand jury testimony available to you if it is available in your case. This includes statements that you or a co-defendant made to a grand jury, but it can also include statements made by other people.[96] 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.[97] It can also help you uncover evidence that is potentially damaging to you. For instance, if you made a statement before a homicide indicating that you hated 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.

The prosecutor must also give you the names and contact information of people who have information related to your case, regardless of whether it helps or harms your defense.[98] The prosecutor must also let you know which police officers have information. For police officers, however, the prosecutor must give you their names and their work affiliations, but not their contact information.[99] For all of these people, the prosecutor must tell you who he intends to call as witnesses.[100] Knowing who will testify at the trial will help you prepare defenses to their testimony. Additionally, the prosecution must make available to you all statements of people who have information relevant to your case.[101] The prosecutor must do this regardless of whether the prosecutor will call them as a witness or not.[102] This includes police reports and statements that were made at pretrial hearings.

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[91] N.Y. CRIM. PROC. LAW § 245.10(1)(a)(iv)(A) (McKinney 2023, compact ed.).
[92] N.Y. CRIM. PROC. LAW § 245.20(2) (McKinney 2023, compact ed.).
[93] N.Y. CRIM. PROC. LAW § 245.20(2) (McKinney 2023, compact ed.).
[94] N.Y. CRIM. PROC. LAW § 245.20(1)(a) (McKinney 2023, compact ed.).
[95] N.Y. CRIM. PROC. LAW § 245.20(1)(a) (McKinney 2023, compact ed.).
[96] N.Y. CRIM. PROC. LAW § 245.20(1)(b) (McKinney 2023, compact ed.).
[97] N.Y. PENAL LAW § 40.05 (McKinney 2009).
[98] N.Y. CRIM. PROC. LAW § 245.20(1)(c) (McKinney 2023, compact ed.).
[99] N.Y. CRIM. PROC. LAW § 245.20(1)(d) (McKinney 2023, compact ed.).
[100] N.Y. CRIM. PROC. LAW § 245.20(1)(c)–(d) (McKinney 2023, compact ed.).
[101] N.Y. CRIM. PROC. LAW § 245.20(1)(e) (McKinney 2023, compact ed.).
[102] N.Y. CRIM. PROC. LAW § 245.20(1)(e) (McKinney 2023, compact ed.).

If the prosecutor seeks expert evidence, he must give his experts' names, professional backgrounds, and the results of any proficiency test that the expert took within the last ten years.[103] A proficiency test is a test that an expert takes to prove that he is an expert of a subject. Additionally, the prosecutor must give you any report that the expert prepares. If the expert doesn't prepare a report, the prosecutor must give you a written summary of how the expert will testify at trial.[104] You can use this information to prepare to defend against an expert's testimony. For instance, you can use conflicting lab reports to attack the credibility of an expert.

The prosecutor must also give you recordings of any 911 calls that are related to your case.[105] The prosecutor must tell you which calls he intends to raise in a proceeding at court or during trial. If there are over ten hours of 911 calls, the prosecutor only has to give you the portions he intends to use in a proceeding or during trial.[106] But he must also give you a list that describes the other calls. You have a right to request recordings or transcripts of listed calls.

The prosecutor must give you any photos or drawings that law enforcement or a witness made for your case.[107] If the prosecutor has photos of any evidence, those photos must be shown to you, too.[108]

In preparing their case, the prosecutor might have scientific tests or analyses done. If the prosecutor does this, he has a range of information that includes all test results and notes that were made during the testing process.[109] The information also includes information about how well the lab manages its records and any evidence of the lab recently making mistakes.[110] This is important because it might give you evidence that the results of the scientific testing are unreliable.

The prosecutor must give you all evidence and information that shows you might not be guilty or reduces your culpability.[111] Reducing your culpability means if you are found guilty, you will be considered less at fault and your punishment may be less severe. You also have a right to receive information that supports a defense you might raise or provides a basis to suppress evidence. If evidence is suppressed, it means that the prosecutor cannot show it to a jury at trial. Also, the prosecutor must give you any evidence that makes it look like someone else committed the alleged crime, as well as evidence that weighs in favor of a shorter sentence.[112]

If the prosecutor plans to call witnesses, he must give you any information that could be used to impeach those witnesses.[113] Impeaching a witness is when you show evidence that a witness's testimony cannot be trusted. Impeachment evidence might include information that a witness has given testimony that conflicts with what they are saying in court or evidence that the witness has a criminal record. Additionally, the prosecutor must tell you if he has made any promises to witnesses that might influence what they say in court.[114] This information may help you attack the credibility of prosecution witnesses. For example, if you find out that a potential witness for the prosecution was 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

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[103] N.Y. CRIM. PROC. LAW § 245.20(1)(f) (McKinney 2023, compact ed.).

[104] N.Y. CRIM. PROC. LAW § 245.20(1)(f) (McKinney 2023, compact ed.).

[105] N.Y. CRIM. PROC. LAW § 245.20(1)(g) (McKinney 2023, compact ed.).

[106] N.Y. CRIM. PROC. LAW § 245.20(1)(g) (McKinney 2023, compact ed.).

[107] N.Y. CRIM. PROC. LAW § 245.20(1)(h) (McKinney 2023, compact ed.).

[108] N.Y. CRIM. PROC. LAW § 245.20(1)(i) (McKinney 2023, compact ed.).

[109] N.Y. CRIM. PROC. LAW § 245.20(1)(j) (McKinney 2023, compact ed.).

[110] N.Y. CRIM. PROC. LAW § 245.20(1)(j) (McKinney 2023, compact ed.).

[111] N.Y. CRIM. PROC. LAW § 245.20(1)(k) (McKinney 2023, compact ed.). This is similar to the constitutional requirement to disclose exculpatory evidence to defendants under Brady v. Maryland, 373 U.S. 83 (1963). However, it does not contain a materiality requirement like *Brady*.

[112] N.Y. CRIM. PROC. LAW § 245.20(1)(k) (McKinney 2023, compact ed.).

[113] N.Y. CRIM. PROC. LAW § 245.20(1)(k) (McKinney 2023, compact ed.).

[114] N.Y. CRIM. PROC. LAW § 245.20(1)(l) (McKinney 2023, compact ed.).

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.

The prosecutor must give you a list of any physical objects that you or a co-defendant allegedly possessed when you allegedly committed the crime.[115] You also have a right to see any physical items that have to do with your case. The prosecutor must also disclose whether he will argue that you possessed (or constructively possessed) these objects.[116] This might include weapons, clothing, drugs, tools, cars, or other items. Knowing what the prosecution is going to say about this property can help you prepare your case by providing insight into what the prosecutor will present at trial to link you to the crime.

You also have a right to inspect any electronic information that is related to your case.[117] If the prosecutor has taken your phone, laptop, or other electronic device or account, the prosecutor must give you a copy of all the information that was on that device or account.

The prosecutor must also give you supplemental discovery about your prior crimes and misconduct at least fifteen days before the first scheduled trial date.[118] This covers evidence that you have committed uncharged crimes or misconduct that the prosecutor intends to raise at trial to impeach you. "Impeaching you" means presenting evidence or argument suggesting that your testimony cannot be trusted. This is often called "*Sandoval* evidence" in New York. Supplemental discovery also covers evidence that the prosecutor could also use to prove an issue in the case—like motive, intent, the lack of a mistake or accident, or the existence of a scheme or plan for committing two related crimes.[119] This is often called "*Molineux* evidence" in New York. If the prosecutor wants to use this type of evidence against you, he must tell you about it.[120] He must disclose all misconduct and criminal acts which he intends to use, and why he intends to use them (for impeachment or as proof of an issue).[121]

(ii) *Automatic Discovery from the Accused to the Prosecutor*

Under Article 245, automatic discovery goes both ways. This means that you must automatically share covered discovery materials with the prosecutor.[122] Once the prosecutor gives you his certificate of compliance, you have thirty calendar days to give discovery materials to the prosecutor.[123] A certificate of compliance is a written statement by the prosecutor that says he has given you all the evidence he is required to give you.[124] This rule does not require you to share discovery with the prosecutor if it is protected by the Constitution.[125]

Your duty to disclose information is set out in 245.20(4). You must disclose the following information that you might have in your possession to the prosecutor:

(1) If you consult with experts, you must tell the prosecutor their names and their addresses. You must also give the prosecutor their resumes as well as the results of any proficiency tests that they have taken in the past ten years. You must also share any reports that your experts make for trial, or, if they don't have any reports, then a summary of how they will testify.

(2) If you have scientific tests or analyses, you must share their results.

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115 N.Y. CRIM. PROC. LAW § 245.20(1)(m) (McKinney 2023, compact ed.).

116 N.Y. CRIM. PROC. LAW § 245.20(1)(m) (McKinney 2023, compact ed.).

117 N.Y. CRIM. PROC. LAW § 245.20(1)(g) (McKinney 2023, compact ed.).

118 N.Y. CRIM. PROC. LAW § 245.10(1)(b) (McKinney 2023, compact ed.).

119 N.Y. CRIM. PROC. LAW § 245.20(3) (McKinney 2023, compact ed.).

120 N.Y. CRIM. PROC. LAW § 245.20(3) (McKinney 2023, compact ed.).

121 N.Y. CRIM. PROC. LAW § 245.20(3) (McKinney 2023, compact ed.).

122 N.Y. CRIM. PROC. LAW § 245.20(4) (McKinney 2023, compact ed.).

123 N.Y. CRIM. PROC. LAW § 245.50(2) (McKinney 2023, compact ed.).

124 N.Y. CRIM. PROC. LAW § 245.50(1) (McKinney 2023, compact ed.).

125 N.Y. CRIM. PROC. LAW § 245.20(4) (McKinney 2023, compact ed.). Constitutional protections include your right against self-incrimination.

(3) You must share any 911 calls that you have access to.
(4) You must share any photos or drawings that you or a witness have prepared for your case.
(5) You must share any promises or rewards made to persons called as witnesses.
(6) You must also share any physical items you have relating to the subject matter of the case, with a list of which evidence you intend to use during your trial.

(iii) *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.[126] 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).[127] The subpoena *duces tecum* is the only method prosecutors and defendants can use to discover third-party materials. The automatic discovery provisions of Article 245 do not apply to third parties.[128]

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:[129]

(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.

(d) Work Product Privilege

Generally, neither side's "work product" is discoverable under Article 245.[130] "Attorney's work product" is defined in the law as "those portions of records, reports, correspondence, memoranda, or internal documents of the adverse party which are only the legal research, opinions, theories or conclusions of the adverse party or its attorney or the attorney's agents."[131] 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.

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126 N.Y. CRIM. PROC. LAW § 610.10(2)–(3) (McKinney 2009).

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

128 N.Y. CRIM. PROC. LAW § 245.20(1)–(4) (McKinney 2023, compact ed.) (requiring automatic discovery between only the prosecutor and the defendant).

129 The requirements for a subpoena *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*).

130 N.Y. CRIM. PROC. LAW § 245.65 (McKinney 2023, compact ed.) (excluding "Attorneys' work product" from discovery).

131 N.Y. CRIM. PROC. LAW § 245.65 (McKinney 2023, compact ed.).

(e) Non-Automatic Discovery

Under New York law, you have a large right of access to discovery materials. There are some situations, however, where you might need to make a motion to the court to order additional discovery.

For example, if you are concerned that evidence might become lost or destroyed, you can petition the court to order any person or organization to preserve any evidence they might have that is related to your case.

Similarly, if you need access to a crime scene to prepare your case, you can petition for a court order granting you access. It is the court's choice whether to make this kind of order. If giving you access to a crime scene will create a large disruption for the person who owns the crime scene, or if the information you want to gather is available from a different source, the court might not grant the order.

Additionally, there might be evidence that you do not receive through automatic discovery. This might be because the prosecutor does not possess the material or for some other reason. If you can show that your request for the materials is reasonable and that you cannot access the materials without the court's help, the court will order anyone in its jurisdiction to make the material available for you.

The prosecution can also seek the court's help to gather information. One important example is for "non-testimonial evidence from the defendant." Non-testimonial evidence refers to things like taking your fingerprints or pictures, or taking a DNA sample. If the prosecutor wants to gather non-testimonial evidence from you, he must get permission from the court to do so.

(f) Duty to Disclose and Protective Orders

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 discoverable materials. It is important to make full and timely disclosures. If you do not, you could face sanctions (penalties) by the court.[132]

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.[133] Other "affected person[s]" impacted by your case can testify at a hearing in support of a protective order if they think there is a good reason not to turn over information.[134]

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.[135]

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 other remedial action.[136] Sanctions might include prohibiting you from using specific evidence or witnesses at your trial.[137] The court can also take any other action that it thinks is reasonable to sanction you. Therefore, it is important that you pay special attention to the procedures involved, and particularly to the time limits (deadlines for filing certain motions and requests) found in N.Y. Crim. Proc. Law § 245.10.

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[132] N.Y. CRIM. PROC. LAW § 245.80 (McKinney 2023, compact ed.).

[133] N.Y. CRIM. PROC. LAW § 245.70(1) (McKinney 2023, compact ed.).

[134] N.Y. CRIM. PROC. LAW § 245.70(1) (McKinney 2023, compact ed.).

[135] N.Y. CRIM. PROC. LAW § 245.70(4) (McKinney 2023, compact ed.).

[136] N.Y. CRIM. PROC. LAW § 245.80(1)(a) (McKinney 2023, compact ed.).

[137] N.Y. CRIM. PROC. LAW § 245.80(2) (McKinney 2023, compact ed.).

(g) Discovery Before a Guilty Plea

If the prosecutor offers you a plea deal, you are still entitled to receive discovery materials.[138] The specifics vary based on whether you receive a plea offer before or after indictment.

If you receive a plea deal before indictment, the prosecutor must disclose to you all the discovery materials required by section 245.20 (described in Subsection C(2)(c)(i), "Automatic Discovery from the Prosecutor to the Accused," of this Chapter). The prosecution must make these materials available to you at least three calendar days before the plea deal expires. A plea deal is expired when you can no longer choose to accept it. The prosecutor may not ask you to waive your right to discovery in exchange for a plea offer.[139]

If you have already been charged by an indictment or an information, the prosecutor must give you all 245.20 materials within seven calendar days before the plea deal expires.[140]

(h) The End of Discovery

Once the prosecutor has finished giving you all the automatic discovery required by section 245.20, they must give you a certificate of compliance that says that they have made an honest effort to give you all the evidence and materials subject to discovery. This certificate must list all the materials that the prosecutor gave you.[141] The prosecutor is not considered "ready" for trial until he gives you a certificate of compliance.[142] If the prosecutor is not ready quickly enough, as described in N.Y. Crim. Proc. Law § 30.30 (the statutory right to a speedy trial), you may be able to get your case dismissed permanently. For more details on this, refer to the relevant statutes.[143]

When you finish giving the prosecutor all the materials that you are required to provide automatically, you must give the prosecutor a certificate of compliance. You must also provide a list of all the materials that you gave the prosecutor.[144]

Both you and the prosecutor have a "continuing duty to disclose."[145] It might be the case that after you or the prosecutor send a certificate of compliance, you or the prosecutor find new material that should have been automatically shared. If this happens the party that finds the new materials must disclose it to the other side. Even once discovery is finished, the prosecutor has a "continuing duty to disclose." This means that if, after discovery is over, the prosecutor finds new evidence or materials which they would have been required to give you, they must give you access to that new material.

This rule applies to you too.[146] You might find new evidence or materials after the end of discovery which should have been given to the prosecutor. If you do, you must share it with the prosecutor as soon as possible.

(i) *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 245 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

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[138] N.Y. CRIM. PROC. LAW § 245.25(1)-(2) (McKinney 2023, compact ed.).

[139] N.Y. CRIM. PROC. LAW § 245.25(1) (McKinney 2023, compact ed.).

[140] N.Y. CRIM. PROC. LAW § 245.25(2) (McKinney 2023, compact ed.).

[141] N.Y. CRIM. PROC. LAW § 245.50(1) (McKinney 2023, compact ed.).

[142] N.Y. CRIM. PROC. LAW § 245.50(3) (McKinney 2023, compact ed.).

[143] N.Y. CRIM. PROC. LAW § 30.30 (McKinney 2018); N.Y. CRIM. PROC. LAW § 245.50(3) (McKinney 2023, compact ed.).

[144] N.Y. CRIM. PROC. LAW § 245.50(2) (McKinney 2023, compact ed.).

[145] N.Y. CRIM. PROC. LAW § 245.60 (McKinney 2023, compact ed.).

[146] N.Y. CRIM. PROC. LAW § 245.60 (McKinney 2023, compact ed.).

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[147]

Discovery is much more limited in federal criminal cases, especially before a guilty plea. 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. 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. Additionally, witness statements are covered separately in the Jencks Act (18 U.S.C. § 3500) and Rule 26.2.

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.

[147] For a more detailed discussion of discovery in federal criminal cases, see: 24, 25 MOORE'S FEDERAL PRACTICE - CRIMINAL, §§ 606.06[3] (grand jury materials), 616.00–616.08 (discovery and inspection), 617.00–617.12 (subpoenas) (2024); 2 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, Federal Rules of Criminal Procedure, ch. 5, §§ 241–280 (4th ed.).

Appendix A

SAMPLE DISCOVERY DOCUMENTS

This Appendix includes sample legal forms for conducting discovery in federal civil cases. ***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 Civil 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[148]

[proper case caption][149]

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]

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

[148] Adapted from Roger S. Haydock & David F. Herr, Discovery Practice app. B-26 (8th ed. 2022) (Form D-1).

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

A-2. Sample Request for Admission[150]

[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[151]

[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*.

[150] Adapted from Roger S. Haydock & David F. Herr, Discovery Practice app. B-30 (8th ed. 2022) (Form F-1).

[151] Adapted from Roger S. Haydock & David F. Herr, Discovery Practice app. B-23 (8th ed. 2022) (Form B-9).

A-4. SAMPLE NOTICE OF MOTION FOR ORDER COMPELLING DISCOVERY[152]

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*.

[152] Adapted from Roger S. Haydock & David F. Herr, Discovery Practice app. B-34 (8th ed. 2022) (Form G-1).