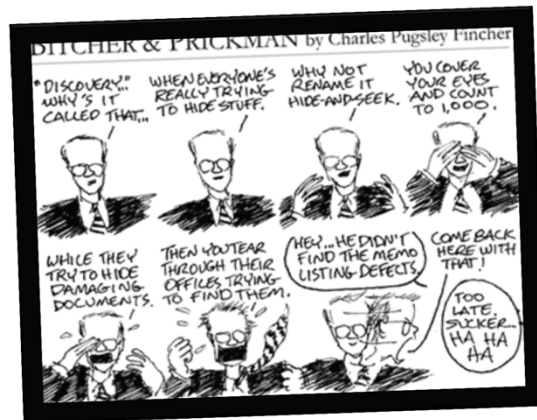


Practical Skills – Basic Matrimonial Practice



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Dom. Rel. Law §236(B)(4)

There shall be compulsory disclosure by both parties of their respective financial states in a matrimonial action – NO showing of special circumstances required.

Statement of Net Worth



- ⌘ A demand for a SNW can be served any time after the commencement of the action
- ⌘ A SNW must be provided within 20 days of service
- ⌘ Must provide court with a copy of the SNW 10 days prior to the Preliminary Conference. (NYCRR 202.16(f)(i))
- ⌘ Must attach a copy of the SNW to any motion requesting *pendente lite* spousal support, child support or counsel fee awards. (NYCRR 202.16 (k)(2))



What should be in the SNW?

- ⌘ All income and assets of whatsoever kind and nature
- ⌘ A list of assets transferred during the preceding 3 years or length of marriage
- ⌘ All debts

What should be annexed to the SNW?

- ⌘ A current and representative paystub
- ⌘ Most recently filed Federal and State tax returns with W2 statements
- ⌘ Attorney's retainer agreement

Scope of Disclosure CPLR 3101



- ⌘ **CPLR 3101(a)(1) : Disclosure from a Party**
 - ⌘ Compulsory financial disclosure
 - ⌘ Absent unreasonable requests, disclosure may span entire length of marriage
- ⌘ **Exceptions to 3101(a)(1)**
 - ⌘ Privileged matter
 - ⌘ Attorney work product
 - ⌘ Matters prepared in anticipation of litigation obtained only upon showing of substantial need and undue hardship

Non-Party Disclosure



- ⌘ CLPR 3101(a)(4) “any other person, upon notice stating the circumstances or reasons such disclosure is sought or required.”
- ⌘ Compelling disclosure from a non-party requires service of a subpoena.
- ⌘ Special Circumstances rule no longer threshold for non-party disclosure. Kooper v Kooper, 74 AD3d 6 [2010]

Discovery of Grounds and Custody Issues?



œ Departments are divided on the question

œ 1st and 2nd Departments:
NO

œ 3rd and 4th Departments:
YES



Discovery Devices

- Notice for Discovery & Inspection
- Notice of Entry upon Land
- Demand for Address
- Subpoenas
- Interrogatories
- Demand for Parties' Statements & Expert Witnesses (CPLR 3101(d), (e) and (i))
- Notice to Admit
- Physical and Mental Examinations
- Depositions



Notice for Discovery and Inspection



CPLR § 3120

CPRL §3120(1)



Notice for D&I

☞ Served upon a party to the action

Subpoena Duces Tecum

☞ Served upon third parties

- Devices may be served at ANY time after the commencement
- Devices must specify the time, which must be at least 20 days after the service of the notice
- Devices must specify the place and manner of making the inspection, copy, test or photograph

Notice for D&I



Each item should be described with “reasonable particularity”

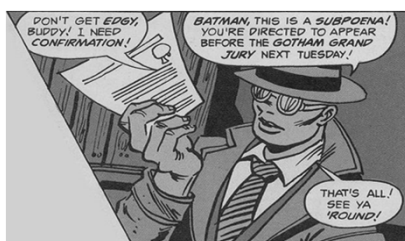
Tailor the notice to the facts of your particular case

If necessary, include provisions for electronic discovery in the notice



Subpoena

Requires an appearance of a person to give testimony



Subpoena Duces Tecum

Requires the production of documents

Any documents received must be copied and sent or made available to opposing counsel

Subpoenas



- ⌘ May be issued without a court order by an attorney of record for a party to an action.
- ⌘ Shall be served in the same manner as a Summons (CPLR 308)
- ⌘ Any person served with a subpoena shall be paid or tendered in advance authorized traveling expenses and one day's witness fee.
- ⌘ Must be served on opposing counsel and within five days of compliance of the subpoena, in whole or in part, give to each party notice that the items produced in response are available for inspection and copying, specifying the time and place thereof. (CPLR 3120 (3))

Subpoena Duces Tecum



- ⌘ Medical providers need not respond or object to a Subpoena Duces Tecum **UNLESS** accompanied by a written authorization (HIPAA release form) by the patient.
- ⌘ A subpoena served on a medical provider **SHALL** state in conspicuous bold-faced type that records shall not be provided unless the subpoena is accompanied by a written authorization
- ⌘ Failure to state an objection within 20 days "significantly limits grounds... to make objections" but it does not result in a waiver of objections.

Notice of Entry onto Property



Stu's Views

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For Christmas,
I want a complete,
non-evasive answer
to my discovery
request.

I do toys,
not miracles.



⌘ CPLR 3120(1)(ii)

⌘ Any time after the commencement, any party, or on any other person a subpoena duces tecum, may serve upon the other a notice, permitting entry upon designated land or other property in control of the party served

Demand for Address



⌘ Wright-Roberts v Roberts, 81 AD3d 524 (Respondent required to provide address where Wife served a demand for address pursuant to CPLR 3118)

Objections to Discovery Demands



Must be made within 20 days
of receipt and must state
with "reasonable
particularity" the nature of
the objection

Interrogatories



- œ CPLR 3130 and 3132
- œ May not serve the Defendant with Interrogatories until their time to serve a responsive pleading has expired.
- œ In matrimonial actions, written interrogatories **AND** a bill of particulars may be made upon a party

Scope of Interrogatories



- œ CPLR 3131
- œ Any matters embraced in the disclosure requirement of CPLR 3101
- œ Answer may be used to the same extent as the deposition of a party
- œ Interrogatories may require copies of such documents as are relevant to the answer required

Interrogatories Upon a Non-Party



- œ Interrogatories **MAY** be served upon a non-party any time after the commencement of the action if:
 - œ A motion is brought by either party
 - œ Notice is served upon the other party and non-party
 - œ Interrogatories are restricted to financial matters
 - œ Requested information is reasonable **AND** necessary

Answer or Objections to Interrogatories



- ⌘ Answer MUST be served within **20 days** after service
- ⌘ Must serve a copy of the answers to each interrogatory, EXCEPT to ones which party objects.
- ⌘ Objections must be stated with **reasonable particularity**
- ⌘ Form of Answers
- ⌘ In **writing** and **under oath** by party served
- ⌘ Each question must be answered **adequately** and **fully**
- ⌘ Answer may be amended or supplemented by Order of the court, UNLESS done so pursuant to CPLR 3101(h)

Trial Demands



- ⌘ Demand for Witnesses: CPLR 3101(a)
- ⌘ Demand for Experts: CPLR 3101(d)(1)
- ⌘ Upon request, each party shall disclose:
 - ⌘ Each person whom the party expects to call as an expert
 - ⌘ In reasonable detail, the subject matter
 - ⌘ The substance of the facts and opinions
 - ⌘ Qualifications of the expert

Demand for Experts



- ⌘ No time limit for a party to make a demand for experts
- ⌘ If party, for good cause, retains an expert in an insufficient amount of time before trial to give appropriate notice, party shall not be precluded from offering expert's testimony solely on noncompliance.
- ⌘ 22 NYCRR 202.16, responses to demands for expert information shall be served within 20 days of service of such demands.
- ⌘ 202.16(g)(2): requires experts to file a written report with the court, which shall be exchanged and filed no later than 60 days before the trial. Reply reports shall be exchanged and filed no later than 30 days before the trial.

Demand for Statements; Photographs and Videotapes



- ⌘ CPLR 3101(e): A party has a right to a copy of his or her own statement in possession of the other party.



Notice to Admit CPLR 3123(a)



- ⌘ Service - On the sooner of: 1) the service of Defendant's Answer or 2) 20 days from service of summons
- ⌘ Cannot be served later than twenty days before trial
- ⌘ Device used to establish certain facts or authenticity of documentation to be used at trial without protracted testimony. Must serve copies of the document with the request (unless already furnished)
- ⌘ Each matter to which admission is requested is deemed admitted UNLESS within 20 days from service, the served party either 1) denies the matter or ii) sets forth reasons why cannot truthfully deny or admit

Medical Authorizations and HIPAA



- ⌘ Physician/Patient Privilege
- ⌘ Applies to not only information communicated orally but also from information obtained from observation of the patient's appearance and symptoms
- ⌘ Does not apply to billing information or patient's payments
- ⌘ HIPAA

Physical or Mental Examination CPLR 3121



- ⌘ **Parties to a contested custody proceeding place their physical and mental conditions in issue.**
- ⌘ Examinations **MUST** be accompanied by proper HIPAA authorization or court order
- ⌘ Party to be examined may have their counsel present but opposing counsel may not be present
- ⌘ A copy of the report must be served pursuant to CPLR 3121(b)

Depositions



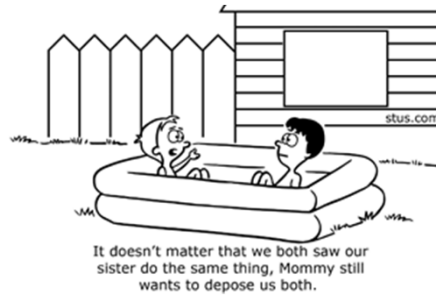
*The witness had been doing so well
at his deposition when suddenly...*

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Priority of Depositions



- ☞ Plaintiff may not serve a deposition notice on Defendant (without court order) until Defendant's time to serve a responsive pleading has expired.



Oral Depositions



- ☞ Require 20 days notice, unless otherwise ordered by the court.
- ☞ Notice shall be in writing, stating the time and place of the deposition as well as the name and address of each person to be examined.
- ☞ A party to be examined pursuant to an already served notice by the other party may serve notice of at least 10 days for the examination of the other party

Non-Party Deposition



- œ Notices are to be served on all other parties
- œ A subpoena and requisite fees must be served on the witness.
- œ Subpoena should include a statement of the reasons or circumstances that the disclosure is sought.

Written Depositions



- œ A deposition may be taken on written questions when the examining party and deponent stipulate or when testimony is to be taken without the State.
- œ A commission or letters rogatory may be issued when necessary or convenient for the taking of a deposition outside the State.
- œ **Letters Rogatory**
 - œ Formal request from a court to a foreign court for assistance
 - œ Most common remedies sought: service of process and taking of evidence

Objections at Oral Deposition



- ⌘ 221 NYCRR 221.1
- ⌘ No objections shall be made except those which pursuant to subdivision (b), (c) or (d) of CPLR 3115 would be waived if not interposed.
- ⌘ All objections shall be noted by the transcriber. The answer shall be given and the deposition shall proceed subject to the objection and to the right of the person to apply for appropriate relief pursuant to CPLR Article 31.

Refusal to Answer



- ⌘ A deponent shall answer all questions EXCEPT:
 - ⌘ To preserve a privilege or right of confidentiality
 - ⌘ To enforce a limitation set forth in an order of the court; or
 - ⌘ When the question is “plainly improper” and would, if answered, cause significant prejudice to any person.
- ⌘ Refusal to answer, or direction not to answer, shall be accompanied by a succinct and clear statement of the basis therefor.

Communication with Deponent



- ⌘ 22 NYCRR 221.3
- ⌘ An attorney shall not communicate with the deponent **UNLESS**:
 - ⌘ All parties consent; or
 - ⌘ The communication is made for the purpose of determining whether the question is appropriate on the grounds set forth in 22 NYCRR 221.2
- ⌘ The reason for the communication shall be stated for the record clearly and succinctly.

Electronic Discovery





- Information is increasingly stored electronically in addition to and often instead of on paper.
- Ball v State of New York, 421 NYS2d 328 (relying on federal authority for the proposition that computer based information is subject to disclosure).
- Although analysis remains the same ("material" and "necessary"), there are new and unforeseen issues surrounding electronically stored information

Electronically Stored Information



⌘ Preservation

- ⌘ Address at Preliminary Conference
- ⌘ Issue preservation letters and/or notices to opposing counsel and/or non-parties as early as possible.

⌘ Access

- ⌘ Memory of a computer is akin to a file cabinet
Byrne v Byrne, 650 NYS2d 499
- ⌘ Parties entitled to discovery from computers where husband resides and conducts business. Cloning hard drives acceptable if showing made that it is necessary.
Etzion v Etzion, 796 NYS2d 844

Electronically Stored Information



☞ Form of Production

- ☞ Federal courts hold that production of electronic files must be made in a reasonably useable form, such as pdf format
- ☞ CPLR 3122 - whenever a person is required to produce documents for inspection, that person shall produce them as they are kept in the ordinary course of business or shall organize and label them to correspond to the categories in the request

☞ Costs of Production

- ☞ Party seeking discovery should bear the costs incurred in the production of discovery material.

Electronically Stored Information



☞ Suppression of Material

- ☞ Motion to suppress denied, wife entitled to access family computer - Boudakian v Boudakian

☞ Spoliation - destruction or significant alteration of evidence, or failure to preserve property for another's use as evidence

- ☞ **Conversion** - unauthorized assumption and exercise of ownership over personal property belonging to another
- ☞ Extends doctrine of conversion to include electronic records stored on a computer. Thyroff v Nationwide Mutual Ins. Co.

Electronically Stored Information



⌘ Penal Law

- ⌘ §250 Eavesdropping
- ⌘ §156 Computer offenses

⌘ Privilege

- ⌘ Recognize widespread commercial use of email and when parties to a privileged relationship communicate by email, they have a reasonable expectation of privacy.
- ⌘ NYSBA Committee on Professional Ethics Op 782: A lawyer who uses technology to communicate with client must use reasonable care with respect to such communication, assess the risks attendant to the use and determine if the mode of transmission is appropriate under the circumstances

Electronically Stored Information



⌘ Metadata

- ⌘ Refers to electronically stored information that generally is not visible
- ⌘ It is embedded in software and reveals information about the creation and modification of a document

⌘ NYSBA Committee on Professional Ethics Op 749

- ⌘ Modern computer technology enables users who receive documents to “get behind” what is visible.
- ⌘ A lawyer may not make use of software applications that surreptitiously examine or trace electronically transmitted documents.

Amendment/Supplementation of Responses



- ⌘ Party must amend or supplement a response previously given to a request for disclosure promptly upon the party thereafter obtaining information
- ⌘ Information obtained within an insufficient period of time before the commencement of trial, is not precluded from introducing evidence based solely on grounds of non-compliance
- ⌘ Whether evidence will be submitted is within court's discretion

Motions to Compel



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O P Q R S T U V W X Y Z



No, I don't need a
"Motion to Compel Answer".

- ⌘ Available for all devices except the Notice to Admit
- ⌘ Remedies available include:
 - ⌘ Resolve issues in favor of requesting party
 - ⌘ Taking a negative inference on certain issues
 - ⌘ Prohibit non-complying party from certain claims/defenses or from producing certain documents in evidence
 - ⌘ Striking out parts/whole non-complying party's pleadings
 - ⌘ Staying further proceedings until order is obeyed
 - ⌘ Judgment by default

Protective Orders



- ⌘ Court may make a protective order denying, limiting, conditioning or regulating the use of a discovery device
- ⌘ Designed to prevent unreasonable annoyance and expense
- ⌘ Service of a motion for a protective order suspends disclosure of the particular matter in dispute
- ⌘ Information may be suppressed if improperly obtained
- ⌘ Court can monitor the extent of discovery in a given case.

Good Faith Affirmation



- ⌘ Motions on discovery require submission of a "good faith" affirmation
- ⌘ Affirmation must state that attorneys conferred in a good faith effort to resolve issues in motion
- ⌘ Affirmation shall indicate time, place and nature of consultation

Confidentiality Agreements



- ⌘ Seeks to preserve certain information as confidential by restricting its release and providing for a remedy in the event of its release.
- ⌘ How it arises in a matrimonial action:
 - ⌘ Between spouses
 - ⌘ Between spouses and their attorneys
 - ⌘ Between spouse's business and a spouse's attorney
 - ⌘ Between spouse's business and a spouse's expert
 - ⌘ Between spouse's attorney and spouse's expert