

Chapter 16

Notice for Discovery and Inspection and Subpoenas Duces Tecum

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PART A: PROCEDURAL CONTEXT**§ 16.01 Procedural Context—Notice for Discovery and Inspection and Subpoena Duces Tecum**

CPLR 3120 is the disclosure mechanism that allows a party involved in litigation to require another party or any other person to produce for, and permit the party seeking discovery to inspect, copy, test or photograph any designated documents or things in the possession, custody or control of the party or person served with the disclosure request. CPLR 3120(1)(i). The section also permits entry upon land or other property in order to inspect, measure, survey, sample, test, photograph or record, by motion picture or otherwise, the property or specifically designated objects found on the property. CPLR 3120(1)(ii).

Discovery and inspection under CPLR 3120 may be distinguished from disclosure pursuant to CPLR 3111, which authorizes the production of books and papers to aid in the examination before trial of a particular party or witness, and CPLR 3131, which allows the production of papers and documents relevant to interrogatories. By contrast, CPLR 3120 envisages general discovery of books and papers that relate to the merits of the action, or its defense, as broadly defined in CPLR 3101, subject to general restrictions on disclosure.

Production from a party is obtained by notice, while production from a non-party is obtained by service of a subpoena duces tecum, on notice to other parties in the litigation.

Properly used, CPLR 3120 can be a potent discovery device, and good litigators will carefully craft their CPLR 3120 disclosure demands and tailor them to each individual case. Unfortunately, all too often, litigators rely upon canned, boiler-plate demands, which by their nature often will result in missed opportunities for meaningful disclosure. There is no limit placed on the number of CPLR 3120 demands that may be served, and, consequently, there is no need to hedge their use.

As with all other disclosure devices in Article 31, with the exception of notices to admit, the filing of the note of issue and certificate of

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readiness terminates the use of CPLR 3120 demands, unless unusual and unanticipated circumstances arise, warranting leave of court, or the parties stipulate to their use.

CPLR 3120 was revamped in 2003 to reduce the burden on a party seeking disclosure from a non-party, eliminating the requirement that a court order be obtained prior to requesting documents from a non-party.

PART B: SERVING NOTICE FOR DISCOVERY AND INSPECTION TO OBTAIN DOCUMENTS AND THINGS FROM PARTY

§ 16.02 Checklist for Serving Notice for Discovery and Inspection to Obtain Documents and Things from Party

- Serve notices for discovery and inspection to obtain documents or things from, or for entry onto land of, party to litigation. *See* § 16.03 *below*.
- Specify, with as much detail as possible, documents and things requested, or purpose of entry onto land demanded. *See* § 16.03[2] *below*.
- Avoid use of catch-all words and phrases such as “any,” “all,” or “any and all” in drafting demands for disclosure. *See* § 16.09 *below*.
- Specify time for production, which must not be less than 20 days after service. *See* § 16.03[2] *below*.
- Specify place of inspection. *See* § 16.03[2] *below*.
- Specify manner of making inspection, copying, testing, photographing, or entry onto land or property. *See* § 16.03[2] *below*.
- Describe each item for which inspection, copying, testing, or photographing is requested, with reasonable particularity. *See* § 16.03[2] *below*.
- Tailor initial notice of discovery and inspection to fit the facts of case at hand. *See* § 16.03[3] *below*.
- Serve notice at any time after commencement of action. *See* § 16.03[3] *below*.
- Add five days to time required for response when serving notice of discovery and inspection by regular mail—the traditional

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method unless time is of the essence—pursuant to CPLR 2103(b)(2). *See* § 16.03[3] *below*.

- Stipulate to change date, time, or place of any inspection, if necessary. The stipulation should be in writing, and, if there is any question about completing disclosure within deadlines set by court, stipulation should be “so ordered” by judge. *See* § 16.03[4] *below*.
- Search Advisor** Civil Procedure>Discovery Methods>Requests for Production & Inspection
- Investigate Parties on Lexis.com.** *See* § Intro.09 *above*.

§ 16.03 Serving Notice for Discovery and Inspection to Obtain Documents and Things from Party**[1]—Serving Notice for Discovery and Inspection Upon Party**

In order to obtain the production of documents and things from another party to the litigation, the party seeking disclosure serves a notice for discovery and inspection upon that party, identifying the matter to be disclosed. Where the party is represented by an attorney, the notice is served upon the attorney.

Exception: CPLR 2307 requires a motion on notice before a court may issue a subpoena duces tecum to be served on a library, a department or bureau of a municipal corporation, or upon the state, or an officer of the state. *See* § 16.05[2] *below*.

[2]—Drafting Notice for Discovery and Inspection

In drafting the notice for discovery and inspection, the party seeking disclosure must specify:

1. The time for production, which shall not be less than 20 days after service;
2. The place of the inspection;
3. The manner of making the inspection, copy, test, photograph or entry onto land or property; and
4. A listing of the items sought by individual item or by category, describing each item and category with reasonable particularity.

See CPLR 3120(2).

[3]—Timing Service of Notice of Discovery and Inspection

The statute provides that a CPLR 3120 notice may be served after commencement of an action. CPLR 3120. Thus, “there appears to be no limitation on a plaintiff’s ability to serve a notice for discovery under CPLR 3120 with a summons.” *Weinstein, Korn & Miller, New York Civil Practice: CPLR* ¶ 3120.07. As a practical matter, however, CPLR 3120 disclosure is typically requested by plaintiff after the receipt of the defendant’s answer or after the defendant’s time to answer has expired and a defendant typically serves an initial CPLR 3120 demand with its answer.

[4]—Stipulating to Modify Notice for Discovery and Inspection

Unless a court order is involved, parties are free to stipulate among themselves to change the date and time and/or place, of any inspection conducted pursuant to CPLR 3120.

Strategic Point: Any stipulation modifying the terms of a CPLR 3120 notice should be in writing, and, if there is any question about completing the disclosure within the deadlines set by the court, the better practice is to have the stipulation “so ordered” by the judge.

Practice Resources:

- *Weinstein, Korn & Miller, New York Civil Practice: CPLR* Ch. 3120.
- *CPLR Manual* § 20.12.
- *LexisNexis AnswerGuide New York Civil Litigation* §§ 6.33, 6.34.
- *Bender’s Forms for the Civil Practice* Form No. CPLR 3120:1 *et seq.*
- CPLR 2307.
- CPLR 3120 (*see Appendix A below*).

PART C: SERVING SUBPOENA DUCES TECUM TO OBTAIN DOCUMENTS AND THINGS FROM NON-PARTY

§ 16.04 Checklist for Serving Subpoena Duces Tecum to Obtain Documents and Things from Non-Party

- Request that party exercising control over non-party voluntarily arrange for non-party to respond to demand without need for subpoena. *See* § 16.05[1] *below*.
- Serve subpoena duces tecum to obtain documents, things, or entry onto land from non-party. *See* § 16.05[1] *below*.
- Specify, with as much detail as possible, documents or things demanded, or purpose of entry onto land demanded. *See* § 16.05[3] *below*.
- Avoid use of catch-all words and phrases such as “any,” “all,” or “any and all” in drafting demands for production. *See* § 16.09 *below*.
- Specify time for production, which must not be less than 20 days after service. *See* § 16.05[3] *below*.
- Specify place of inspection. *See* § 16.05[3] *below*.
- Specify manner of making inspection, copying, testing, photographing, or entry onto land or property. *See* § 16.05[3] *below*.
- List items sought in subpoena duces tecum by individual item or by category, describing each item and category with reasonable particularity. *See* § 16.05[3] *below*.
- Provide required notice to other parties. *See* § 16.05[4] *below*.
- Obtain written stipulation if there is need to change date, time, or place of any inspection called for in subpoena duces tecum, and if there is any question about completing disclosure within deadlines set by the court, stipulation should be “so ordered” by judge. *See* § 16.05[5] *below*.
- Move by order to show cause where there is concern that evidence will be destroyed. *See* § 16.05[6] *below*.
- Search Advisor** Civil Procedure>Discovery Methods>Requests for Production & Inspection
- Investigate Witnesses on Lexis.com.** *See* § Intro.08 *above*.

§ 16.05 Serving Subpoena Duces Tecum to Obtain Documents or Things from Non-Party

[1]—Serving Subpoena Duces Tecum on Non-Party

Where disclosure is sought from a non-party, the party seeking disclosure must serve a subpoena duces tecum upon the party from whom disclosure is sought, identifying the matter to be disclosed. Previously, a court order was required to obtain documents under CPLR 3120 from a non-party where the documents were not sought as part of a non-party deposition. However, through an amendment in 2003, CPLR 3120 now provides for the production of documents or things from a non-party through service of a subpoena duces tecum. Service of the subpoena may be made by any of the methods permitted in CPLR 308.

Strategic Point: Very often, a non-party will be under the de facto control of one of the parties to the action. In such a case, an attempt to have the party voluntarily arrange for the non-party to respond to a CPLR 3120 demand may be successful, and should be attempted, in order to avoid the effort and expense of arranging for service of the subpoena.

[2]—Serving Subpoena Duces Tecum on Library, Department or Bureau of Municipal Corporation, or State or Officer of State

CPLR 3120(4) was also added in 2003 to make clear that nothing in CPLR 3120 alters the requirement set forth in CPLR 2307 that a court must issue a subpoena duces tecum, upon a motion on notice, where disclosure is sought from:

1. A library;
2. A department or bureau of a municipal corporation;
3. The state; or
4. An officer of the state.

CPLR 2307 further requires that, unless the court orders otherwise, a motion for such disclosure must be made on at least one day's notice to the library, department, bureau, or officer having custody of the matter for which disclosure is sought. In addition, a subpoena issued must be served upon the library, department, bureau, or officer, as well as on

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adverse parties, at least 24 hours before the time fixed for production, unless the court, in an emergency, dispenses with the notice requirement.

[3]—Drafting Subpoenas Duces Tecum

In drafting the subpoena duces tecum, the party seeking disclosure must specify the following:

1. The time for production, which shall not be less than 20 days after service;
2. The place of the inspection;
3. The manner of making the inspection, copy, test, photograph, or entry onto land or property;
4. A list of the items requested by individual item or by category, describing each item and category with reasonable particularity.

See CPLR 3120(2).

[4]—Complying with Additional Procedures Required for Non-Party Disclosure Pursuant to Service of Subpoena Duces Tecum

As amended, CPLR 3120 also requires that a party serving a subpoena duces tecum upon a non-party for disclosure under the section take the following additional steps:

1. Serve a copy of the subpoena duces tecum upon all other parties;
2. Within five days of receiving all or some of the requested matter, give notice to the other parties that the matter so obtained is available for inspection and copying at a specified time and place.

See CPLR 3120(3).

[5]—Timing Service of Subpoena Duces Tecum

Like CPLR 3120 notices, subpoenas duces tecum may also be served immediately after the commencement of an action although such disclosure is typically not requested by plaintiff until after the receipt of the defendant's answer or after the defendant's time to answer has expired. Also as with notices, unless a court order is involved, parties are free to stipulate among themselves and with the person subpoenaed to change the date, time, and/or place of any inspection conducted pursuant to a CPLR 3120 subpoena duces tecum. As with notices for discovery and inspection, such a stipulation should be in writing and, in appropriate circumstances, so-ordered by the court. *See* § 16.03[4] *above*.

[6]—Moving by Order to Show Cause for Production of Items Where There Is Concern That Evidence Will Be Destroyed

Where a party believes there is a likelihood that evidence in the control of a non-party will be destroyed, the party should proceed by an order to show cause pursuant to CPLR 2214(d) for the production of these items as opposed to simply serving a subpoena under CPLR 3120. *In re Lees*, 187 Misc. 2d 901, 904, 727 N.Y.S.2d 254, 256 (Sup. Ct. Monroe County 2001) (“One of the best reasons for seeking to bring a motion on by order to show cause is a demonstrated need for a retention of a status quo until a contested hearing . . . [i]f such a showing is made . . . the order to show cause can contain an additional clause . . . restraining the other side from specified doings until further order of the court”).

Practice Resources:

- *Weinstein, Korn & Miller, New York Civil Practice: CPLR* ¶¶ 3120.00, 3120.01, 3120.02, 3120.03.
- *CPLR Manual* § 20.12.
- *LexisNexis AnswerGuide New York Civil Litigation* § 6.34.
- *Bender’s Forms for the Civil Practice* Form No. CPLR 3120:1, Form No. CPLR 3120:2A, Form No. CPLR 3120(3), Form No. CPLR 3120(4), Form No. CPLR 3120(5), Form No. CPLR 3120(6), Form No. CPLR 3120(7), and Form No. CPLR 3120(17).
- CPLR 3111, 3120 (*see* Appendix A *below*).

PART D: OBJECTING TO NOTICE FOR DISCOVERY AND INSPECTION AND SUBPOENA DUCES TECUM

§ 16.06 Checklist for Objecting to Notice for Discovery and Inspection and Subpoena Duces Tecum

- Serve response, stating with reasonable particularity, reasons for each objection to any CPLR 3120 demand containing objectionable requests. *See* § 16.08 *below*.
- Move to compel disclosure of matter to which objection is raised pursuant to CPLR 3124 or CPLR 2308. *See* § 16.08 *below*.

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- Cross-move for protective order, pursuant to CPLR 3103(a), when motion is made to compel production of matter to which objection has been raised.
- Allege that disclosure sought is palpably improper if timely and specific objection was not interposed when demand was served. *See* § 16.08 *below*.
- Search Advisor** Civil Procedure>Disclosure & Discovery>Protective Orders
- Search Advisor** Civil Procedure>Discovery Methods>Requests for Production & Inspection

§ 16.07 Understanding Proper Scope for Disclosure of Documents and Things**[1]—Distinguishing Disclosure of Documents and Things from Production of Things at Deposition****[a]—Scope of Disclosure of Documents and Things Broader Than Production Required at Deposition**

CPLR 3120 does not apply where production of documents is sought in connection with a non-party deposition. *Matthews v. McDonald*, 241 A.D.2d 808, 661 N.Y.S.2d 80 (3d Dep't 1997) (CPLR 3120(b) was not the applicable rule to apply where documents were sought to be produced, along with a non-party witness, at a non-party deposition; instead CPLR 3111 applied). CPLR 3111 governs the production of books, papers, and other things in the possession, custody, or control of the witness to be examined. *See* Ch. 12 *above*. The scope of disclosure under CPLR 3111 is narrower than CPLR 3120, since production under CPLR 3111 is designed to aid in the examination of a party or witness, whereas CPLR 3120 is limited only by the general discovery guidelines set forth in CPLR 3101(a). *Matthews v. McDonald*, 241 A.D.2d 808, 661 N.Y.S.2d 80 (3d Dep't 1997) (CPLR 3111 is a more limited device than CPLR 3120 and is used to require the production of material at, and for use in, the deposition).

Strategic Point: Since the scope of disclosure under CPLR 3120 is broader than that under CPLR 3111, a party should serve a CPLR 3120 demand in advance of serving a CPLR 3111 notice, or simultaneously, but requiring production in advance of depositions. The CPLR 3120 demand may turn up more

documents than the CPLR 3111 demand, which may provide a basis for additional questioning of the witness.

[b]—Description of Matter to Be Produced Must Be Set Forth with Greater Particularity Under CPLR 3120

In contrast to the level of specificity required by CPLR 3120(2) (*see* § 16.01(b) *above*), CPLR 3111 has been held to require that the request for production of documents simply be “reasonable” in light of the requesting party’s knowledge at the time the request is prepared. *Batchie v. Travelers Ins. Co.*, 110 A.D.2d 864, 488 N.Y.S.2d 420 (2d Dep’t 1985) (a CPLR 3111 request may be broader than a CPLR 3120 request). *See also* § 16.07[1][a] *above*.

[2]—Understanding That Material and Necessary Standard Governs Disclosure Under CPLR 3120

The scope of disclosure that may be sought pursuant to CPLR 3120 is governed by CPLR 3101(a). Accordingly, the “material and necessary” standard will govern the scope of disclosure of records. *See* Ch. 2 *above*. *Alfaro v. Schwartz*, 233 A.D.2d 281, 282, 649 N.Y.S.2d 176, 177 (2d Dep’t 1996) (because the value of plaintiff’s properties were relevant to his claim for damages, discovery of the contract of sale and deed should be allowed since it was “sufficiently related to the issues in litigation to make the effort to obtain it in preparation for trial reasonable”) (quoting *Allen v. Crowell-Collier Publishing Co.*, 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968)).

[3]—Understanding Various Types of Material That May Be Properly Demanded Under CPLR 3120

[a]—Demanding Documents

By the plain language of CPLR 3120, documents may be demanded, and documents are the most frequent subject of notices for discovery and inspection. If access to the original documents is desired, the notice should so specify. *See* § 16.07 *below*.

Where documents sought pursuant to CPLR 3120 are in a foreign language, the party from whom production is sought is not required to create a translation of the document into English. *Rosado v. Mercedes-Benz of North America, Inc.*, 103 A.D.2d 395, 480 N.Y.S.2d 124 (2d

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Dep't 1984) (German automobile manufacturer not required to translate documents from German into English).

[b]—Demanding Things

There is no restriction on the type of “things” that may be inspected pursuant to a CPLR 3120 notice or subpoena. Among the “things” for which inspection has been ordered are the following:

1. Photographs of an accident scene. *Sullivan v. New York City Transit Authority*, 109 A.D.2d 879, 487 N.Y.S.2d 72 (2d Dep't 1985);
2. Blood test results. *Rivers v. The Travelers*, 80 A.D.2d 687, 436 N.Y.S.2d 434 (3d Dep't 1981);
3. An automobile tire. *Binke v. Goodyear Tire & Rubber Co.*, 55 A.D.2d 632, 390 N.Y.S.2d 163 (2d Dep't 1976);
4. X-rays. *Jackson v. Nelson*, 81 A.D.2d 677, 437 N.Y.S.2d 797 (3d Dep't 1981).

There are occasions when testing that involves an alteration or destruction of evidence is necessary to determine why a material failed or an event occurred. However, courts are usually reluctant to permit destructive testing. Thus, very often, in the first instance, a court will order non-destructive inspection and testing, allowing the parties an opportunity to determine if such non-destructive testing is sufficient before considering an application for destructive testing. *Scully v. Farragut Refrigeration Co.*, 207 Misc. 798, 140 N.Y.S.2d 614 (Sup. Ct. Queens County 1955) (court permitted visual and microscopic observation and photography of cable involved in accident, and barred any test that would alter the condition of the cable, subject to the right of any party to make an application for further testing in the event the initial inspection was not adequate).

● **Warning:** A party in possession of real evidence must make certain that any alteration or destruction of the real evidence be done only pursuant to court order or by stipulation with all parties, or risk a claim of intentional or negligent spoliation.

Strategic Point: Wherever possible, any alteration or destructive testing of real evidence should be done on notice to all interested parties and persons, with all parties and persons being

given an opportunity to attend and, in appropriate circumstances, suggest modified or different testing protocols. Any differences should be resolved by court order.

[c]—Demanding Entry Upon Land or Property

A party may demand “entry upon designated land or other property,” for the purpose of “inspecting, measuring, surveying, sampling, testing, photographing or recording by motion pictures or otherwise the property or any specifically designated object or operation thereon.” CPLR 3120(1)(ii). This is often done in a personal injury action to examine an accident scene.

A party seeking entry onto land must serve a proper notice under CPLR 3120(1)(ii), and the failure to do so may lead to denial of the request. *Silcox v. City of New York*, 233 A.D.2d 494, 650 N.Y.S.2d 305 (2d Dep’t 1996) (plaintiff denied access to examine and photograph accident site after failing to provide the proper notice under CPLR 3120(1)(ii), where over two years had elapsed since the date of the accident, and the defendant raised security issues in connection with any inspection of the accident site).

Where entry onto land to examine an accident site is granted, CPLR 3120 does not require that a reenactment of an accident be conducted. *Madison v. Spancrete Mach. Corp.*, 288 A.D.2d 888, 889, 732 N.Y.S.2d 301, 302 (4th Dep’t 2001) (CPLR 3120(1)(ii) “does not authorize discovery and inspection in the form of an accident reenactment”). Similarly, CPLR 3120 does not appear to require disclosure of items merely to aid in the recreation of an accident scene or scenario. *Sullivan v. New York City Transit Authority*, 109 A.D.2d 879, 880, 487 N.Y.S.2d 72, 74 (2d Dep’t 1985) (Special Term properly granted a protective order against plaintiffs’ request that defendants supply them with a certain bus to be positioned on a city street to recreate the alleged accident scene as CPLR 3120 contemplates discovery and inspection and does not sanction the reenactment of an alleged accident scenario). However, one court has characterized the trial court’s denial of a reenactment as not being an abuse of discretion, suggesting that, under appropriate circumstances, a court might providently grant a reenactment. *Hyde v. Chrysler Corp.*, 150 A.D.2d 343, 540 N.Y.S.2d 868, 869 (2d Dep’t 1989) (“Since the appellant has availed itself of the opportunity to inspect the vehicle which is the subject of this litigation and to inspect and measure the plaintiff’s driveway where the accident occurred, the Supreme Court did not improvidently exercise its discretion . . . when it declined to

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authorize ‘further’ discovery and inspection in the form of an accident reenactment at the plaintiff’s premises”).

Strategic Point: While a reenactment may not be permitted, where machinery or other equipment is the subject of the inspection, if the inspectors want to observe the machinery or equipment in operation, the CPLR 3120 demand should so state.

Practice Resources:

- *Weinstein, Korn & Miller, New York Civil Practice: CPLR* ¶¶ 3120.14—3120.25.
- *CPLR Manual* § 20.12.
- *LexisNexis AnswerGuide New York Civil Litigation* §§ 6.18—6.23.
- *Bender’s Forms for the Civil Practice* Form No. CPLR 3120:1, Form No. CPLR 3120:2A, Form No. CPLR 3120:3, Form No. CPLR 3120:4, Form No. CPLR 3120:5, Form No. CPLR 3120:6, Form No. CPLR 3120:7, Form No. CPLR 3120:17.
- CPLR 3120 (*see* Appendix A *below*).

§ 16.08 Opposing Disclosure of Documents and Things by Seeking Protective Order or Interposing Objections to Demands

A party or non-party opposing disclosure sought pursuant to CPLR 3120 may move for a protective order pursuant to CPLR 3103. *See* Ch. 6 *above*.

A party or person served with a CPLR 3120 notice or subpoena may also interpose objections pursuant to CPLR 3122. However, where documents or things are withheld pursuant to an objection interposed in the response, the response must also identify the matter withheld pursuant to CPLR 3122(b). *See* Ch. 5 *above*.

● **Warning:** If a CPLR 3120 demand is objectionable, make certain to promptly move for a protective order or timely interpose an objection to the demand within 20 days of service, or as otherwise agreed between the parties, in order to avoid waiving any objection.

§ 16.09 Opposing Disclosure Where Disclosure Demand Does Not Specify Matter to Be Produced

A demand that lacks specificity is subject to vacatur by the court upon motion for a protective order. While fishing expeditions and “blunderbuss” demands are subject to vacatur, if the demand is relevant and can be answered without undue burden, the demand should be answered. *Sullivan v. New York City Transit Authority*, 109 A.D.2d 879, 487 N.Y.S.2d 72, 74 (2d Dep’t 1985) (holding that demands were properly subject to vacatur by Special Term where the demands lacked the specificity required by CPLR 3120; “Although many of the items of plaintiffs’ demand are couched in blunderbuss phrases of the type this court has condemned in the past . . . items 8 and 9 are . . . relevant and specific enough to permit responses without undue burden, and [thus] it was error . . . to vacate them”).

Similarly, the use of the language “any and all” is frowned upon as being overbroad, and, as a result, may lead to the issuance of a protective order by the court. *Lauer’s Furniture Stores, Inc. v. Pittsford Place Assocs.*, 190 A.D.2d 1054, 593 N.Y.S.2d 674, 675 (4th Dep’t 1993) (appellate court held trial court improperly ordered production of “any and all” contracts, finding the use of the words “any and all” rendered the demand unspecific and therefore not in compliance with the statute).

Strategic Point: Even if a party is seeking “all,” “any,” or “any and all” documents or things, an effort should be made to craft the CPLR 3120 demand in such a way as to avoid using these words and phrases since they are red flags for the objecting party to wave before the court.

Practice Resources:

- *Weinstein, Korn & Miller, New York Civil Practice: CPLR* ¶ 3120.06.
- *CPLR Manual* § 20.12.
- *LexisNexis AnswerGuide New York Civil Litigation* §§ 6.45, 6.46.
- *Bender’s Forms for the Civil Practice* Form No. CPLR 3120:1, Form No. CPLR 3120:2A, Form No. CPLR 3120:3, Form No. CPLR 3120:4, Form No. CPLR 3120:5, Form No. CPLR 3120:6, Form No. CPLR 3120:7, and Form No. CPLR 3120:17.

16–17 NOTICE FOR DISCOVERY AND INSPECTION AND SUBPOENAS § 16.11

- CPLR 3101(a), 3111, 3120 (*see* Appendix A *below*).

§ 16.10 Serving More Than One Demand for Disclosure of Documents and Things

A party or person may serve, or be served, with more than one CPLR 3120 demand, as the statute does not restrict the number of times the device may be utilized, subject only to the limitation that the use not be abusive. *State v. General Elec. Co.*, 215 A.D.2d 928, 626 N.Y.S.2d 861 (3d Dep't 1995) (plaintiff was required to respond to two subsequent discovery and inspection demands, despite the fact that it had already fully responded to one).

Practice Resources:

- *Weinstein, Korn & Miller, New York Civil Practice: CPLR* ¶¶ 3122.00, 3122.01, 3122.02, 3122.03, 3122.04.
- *CPLR Manual* § 20.12.
- CPLR 3120, 3121, 3122(c) (*see* Appendix A *below*).

PART E: RESPONDING TO NOTICES FOR DISCOVERY AND INSPECTION AND SUBPOENAS DUCES TECUM**§ 16.11 Checklist for Responding to Notices for Discovery and Inspection and Subpoenas Duces Tecum**

- Produce materials responsive to demand in conformity with requirements of CPLR 3122(c), that is, as they are kept in regular course of business or organized and labeled to correspond with categories of demand. *See* § 16.12[1] *below*.
Where documents or other matter responsive to demand are withheld, withheld material must be identified in accordance with requirements of CPLR 3122(b).
- Produce copies unless originals are demanded, in which case arrangements must be made to allow demanding party opportunity to inspect and copy originals. *See* § 16.12[2], [3] *below*.
- Provide certification of business records as required by CPLR 3122-a. *See* § 16.13 *below*.
- Search Advisor** Civil Procedure>Discovery Methods>Requests for Production & Inspection

§ 16.12 Responding to Notices for Discovery and Inspection and Subpoenas Duces Tecum

[1]—Producing Documents as They Are Kept in Regular Course of Business or Organized to Correspond to Disclosure Demand

CPLR 3122(c) requires that documents produced pursuant to a CPLR 3120 demand be either:

1. Produced as they are kept in the regular course of business; or
2. Organized and labeled in order to correspond to the various categories of the request.

CPLR 3122(c).

The document production must be organized by one of these two methods. *State v. Sand & Stone Assocs.*, 282 A.D.2d 954, 723 N.Y.S.2d 725 (3d Dep’t 2001) (Appellate Division agreed with producing party’s concession that documents required to be produced needed to be organized in accordance with CPLR 3122(c)). The same requirement applies to documents produced pursuant to CPLR 3121. *See* CPLR 3122(c).

[2]—Producing Actual Documents

A party is entitled to the production of records, and not merely a summary of those records. *Trotman v. Hewlett Packard Co.*, 685 N.Y.S.2d 807, 258 A.D.2d 645 (2d Dep’t 1999) (where information sought was statement by defendant in a related Supreme Court action, and the State, in the Court of Claims action, had proposed furnishing a summary of the statement in lieu of exchanging the complete record, the appellate court reversed the trial court’s denial of the motion to discover the actual statement).

[3]—Producing Copies of Documents in Response to Subpoena If Originals Not Demanded

The statute provides that “[u]nless a subpoena duces tecum directs the production of original documents for inspection and copying at the place where such items are usually maintained, it shall be sufficient for the custodian or other qualified person to deliver complete and accurate copies of the items to be produced.” CPLR 3122(d).

16–19 NOTICE FOR DISCOVERY AND INSPECTION AND SUBPOENAS § 16.13**[4]—Defraying Non-Party’s Reasonable Production Expenses**

CPLR 3122 provides that the “reasonable production expenses of a nonparty witness shall be defrayed by the party seeking discovery.” CPLR 3122(d).

Practice Resources:

- *Weinstein, Korn & Miller, New York Civil Practice: CPLR* ¶ 3120.14.
- *CPLR Manual* § 20.12.
- *LexisNexis AnswerGuide New York Civil Litigation* § 6.34.
- CPLR 3120, 3122(d) (*see Appendix A below*).

§ 16.13 Certifying Business Records Produced in Response to Subpoenas Duces Tecum

CPLR 3122-a was added in 2003 and applies to all business records produced pursuant to a subpoena duces tecum under CPLR 3120. The business records must be accompanied by a sworn affidavit from the custodian of records or other qualified person certifying “in substance” the following:

1. That the person certifying the records is an appropriate person to do so;
2. That a reasonable inquiry was made and the records produced are accurate versions of the documents described in the subpoena;
3. That the documents produced represent all of the documents demanded, and if not, a description of the missing documents and an explanation of their absence; and
4. That the documents produced were made in the regular course of business.

CPLR 3122-a(a).

In addition, CPLR 3122-a(b) makes a certification made pursuant to CPLR 3122-a(a) admissible as to the matters set forth therein, and CPLR 3122-a(c) contains a mechanism for offering business records, authenticated pursuant to CPLR 3122-a(a), at trial. CPLR 3122-a(c) also provides a mechanism for objecting to the introduction of business records as evidence.

Practice Resources:

- *Weinstein, Korn & Miller, New York Civil Practice: CPLR*
¶¶ 3122-a.00, 3122-a.01, 3122-a.02, 3122-a.03.
- *CPLR Manual* § 20.12
- CPLR 3122-a (*see Appendix A below*).