# Discovery Reform in New York

## Major Legislative Provisions

*Updated after April 2020 Amendments*

Center for Court Innovation

Discovery Reform in New York: Major Legislative Provisions

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## Major Legislative Provisions

*On April 1, 2019, New York State passed sweeping criminal justice reform legislation, including discovery reform, requiring prosecutors to disclose their evidence to the defense earlier in case proceedings. The discovery reforms went into effect January 1, 2020, but, in April 2020, they were amended, with an effective date 30 days later. This document summarizes the New York's reformed discovery statute, updated to incorporate the April 2020 amendments.*

*The 2019 discovery reform repealed and replaced New York State's discovery law, dubbed the "blindfold" law, with a new statute, Article 245 of the Criminal Procedure Law. The reformed law requires significantly greater openness and establishes specific timeframes for the sharing of evidence between the prosecution and defense during the pretrial period. With discovery reform, New York joins 46 other states that have adopted comparable "open discovery" laws.*[1]

*The 2020 amendments relaxed some of the timeframes created in the initial version, making distinctions between defendants who are incarcerated and those who are not. Further, the amendments create specific exceptions for the disclosure of identifying information of certain victims and witnesses.*

*Compared to the pre-reform era, accelerated discovery timelines remain in force—and could possibly shrink case processing times, resulting in shorter jail stays for defendants held in pretrial detention. By facilitating the defendant's ability to prepare a defense, the reform may also result in fewer prison or jail sentences and ultimately fairer, more just outcomes.*

## Automatic Discovery and the Presumption of Openness

Discovery reform requires "automatic" discovery, eliminating the need for defense attorneys to make written "demands" to obtain and review evidence. Specifically, the prosecution must allow the defendant to "discover, inspect, copy, photograph and test" all materials relating to the subject matter of the case, whenever the prosecutor or someone under the prosecutor's direction is in possession, custody, or control of such items. The statute also creates a "presumption of openness," directing judges to favor disclosing information when applying the statute to specific rulings in pending cases.

By contrast, the pre-reform discovery statute (C.P.L. Article 240) required prosecutors to fulfill discovery obligations *only after* the defense attorney had made a demand in writing. In addition, it did not establish early timeframes for when demanded materials should be turned over. For instance, regarding witnesses' written statements, recordings, criminal records, and pending criminal actions, the pre-reform statute did not require prosecutors to turn over information until the commencement of trial, which limits a defendant's opportunity to properly investigate and respond to such information.

# Discovery Requirements for the Prosecution

## Discoverable Materials

The reform statute enumerates 21 different kinds of materials that prosecutors must turn over to the defense.[2] Several of the items were not previously listed in the old discovery law. Most notably, the prosecution is now required to turn over the following:

- **Names and adequate contact information** for *any* person who has relevant information regarding the case, with the exception of confidential informants. The 2020 amendments additionally specify that *identifying information* of 911 callers, victims, and witnesses of sex offenses and sex trafficking offenses, victims and witnesses of defendants involved in criminal enterprises (pursuant to Penal Law 460.10), as well as confidential informants, may be withheld initially, with notice to the defendant (unless the court rules otherwise). However, if the prosecution seeks the testimony of the witness, they must disclose their name and identifying information 15 days before the trial or hearing, or as soon as practicable. The defendant can also make a motion for more timely disclosure.

- **Name and work affiliation of all police and other law enforcement personnel** who have evidence or relevant information regarding the case.

- **Statements by any person with relevant information**, regardless of whether the person will be called as a witness at trial and including witnesses to be called in any pretrial hearing.

- **Electronic recordings, including 911 calls,** regardless of whether the prosecutor intends to use them at trial, with a limitation if the electronic recording exceeds 10 hours.[3] However, the statute does allow for 911 calls to be disclosed as transcripts (as opposed to recordings), pursuant to a protective order.

- **"Brady" disclosures,**[4] which include information that exculpates the defendant, mitigates the defendant's culpability, supports a defense, impeaches a prosecution witness, or raises questions as to the identification of the defendant as a perpetrator.

("Brady" information must be shared expeditiously upon receipt, if obtained sooner than the timeline requirement referenced below.)

- **Rewards, promises, or inducements** offered to any prosecution witnesses.

- **Search warrants and all related materials,** including the warrant application, supporting affidavit, a police inventory of all property seized, and a transcript of all testimony or other oral communications.

- **Electronically created or stored information** if obtained from the defendant or a source other than the defendant, but which is related to the subject matter of the case.

- **A list of an expert witness's proficiency tests and results** must be turned over along with their name, business address, curriculum vitae, and list of publications.

- **Scientific tests, physical and mental examinations and reports** that are requested by law enforcement, or prepared by a witness, or to be introduced at trial or a hearing must be disclosed. However, these items are not required to be turned over until such tests, examinations or reports are completed.

## Discovery Timeframe

The amended timeframe for disclosure generally requires the prosecution to turn over all "discoverable" materials as soon as practicable, but *no later than 20 days after arraignment* if the defendant is held in pretrial detention or *no later than 35 days* if the defendant is out of custody. An additional 30 days is permitted if the materials are voluminous or, if after making earnest efforts, the materials are not in the prosecution's actual possession, and the prosecutor is not reasonably able to obtain the materials (namely, body-worn, surveillance and dashboard camera footage). *In effect, the maximum timeframe is, thus, 50 or 65 days, even after a 30-day extension*, with a few exceptions for specific kinds of discovery.[5]

The statute creates a different timeline for vehicle and traffic offenses charged on a simplified traffic information[6] and municipal code offenses that do not authorize a jail sentence. For those matters, discovery should be turned *over 15 days before trial* or *as soon as practicable*.

Regarding the prescribed deadlines, the prosecutor is obligated to make a good faith effort (1) to find out whether the requested materials exist and (2) to obtain all discoverable materials listed in the statute, where they do exist, including items that may not yet be in the prosecution's custody, possession or control. If materials are exceptionally voluminous and despite diligent efforts are not in the prosecution's possession, a motion can be made before the court to obtain additional time to turn over such materials (e.g. body worn camera, surveillance camera and dashboard camera footage).

## Additional Timeline Requirements

The two critical pretrial activities of grand jury proceedings and plea offers are subject to special timeline requirements.

**Grand Jury Proceedings.** The period after criminal court arraignment (the first court date) but preceding indictment by a grand jury is often the most pivotal point in felony cases, where the defendant and the defense attorney are required to make decisions regarding whether to plead guilty or testify in the grand jury with little to no information. The reformed discovery statute seeks to mitigate the number of unknowns. When the defendant wishes to exercise the right to testify, the prosecution must provide to the defense any statements made to law enforcement by the defendant or a co-defendant. These statements must be shared 48 hours prior to the defendant's scheduled grand jury testimony, regardless of the above-noted 20 or 35-day general deadline (i.e., earlier than 20 or 35 days if the grand jury hears the case earlier).

**Plea Offers.** Defendants are no longer required to consider a plea offer without knowledge of the evidence against them. If the prosecution makes an offer during the pre-indictment phase of a felony case, prosecutors are required to turn over discoverable materials at least three calendar days *prior* to the expiration of the offer. During other stages, discoverable materials must be shared seven calendar days *prior* to the expiration of any plea offer. The right to discovery before pleading guilty can be waived by the defendant, but the prosecution cannot make such a waiver a condition of the plea (with the exception of repleaders pursuant to Penal Law 440.10[7]). Further, the 2020 amendments to Article 245 state that the court must inquire and the defense counsel must advise the defendant of their right to obtain and waive discovery. These provisions put an end to the pressure defendants sometimes face of either accepting a plea offer without full knowledge of the evidence or risking the prosecutor's retraction of the offer before discovery is complete.

For the prosecution's failure to provide discoverable materials during plea bargaining, the court must, at a minimum, preclude the use of the non-disclosed materials at trial if:

1) The defendant alleges a violation of the discovery law, and

2) The court finds that the prosecution's failure to disclose impacted the defendant's decision to refuse the plea, and

3) The prosecution refuses to reinstate the plea.

## Coordination with Law Enforcement

For purposes of the statute, any materials that are in the possession of law enforcement are deemed to be in the possession of the prosecutor. Thus, any delays in transmitting evidence

from law enforcement to local prosecutors' offices are not valid excuses for failing to turn over information to the defense. (Again, there are time allowances for exceptionally voluminous materials.)

Moreover, prosecutors must ensure a regular "flow of information" between law enforcement and the prosecuting agency, particularly regarding information that is exculpatory or otherwise favorable to the defense ("Brady" material). Whenever an electronic recording (e.g., 911 call, police radio transmittals, body camera recordings) is created relating to an investigation or prosecution, the arresting officer or lead detective must make copies of such recordings and notify the prosecution of its existence in writing, upon the filing of an accusatory instrument (i.e., a charging document presented at the initial criminal court or lower court arraignment.) Upon learning of recordings, the prosecution must ensure that they are preserved. Further, when the defense makes a timely request for a specific 911 call, the prosecution must take reasonable steps to ensure that it is preserved. If law enforcement does not make a recording available, the defendant can move for and the court must order a remedy or sanction. Finally, state and local law enforcement must make all relevant records and files available to the prosecution.

### Supplemental Discovery: "Uncharged Misconduct and Criminal Acts"

If the prosecution intends to introduce evidence of "uncharged misconduct and criminal acts" at trial not charged in the indictment or information (i.e. a "Molineux" application), the prosecution must provide notice as soon as practicable and no later than 15 days prior to the *first scheduled trial date*. The prosecutor must also provide a list to the defendant of what acts they intend to present and whether the prosecution will be using evidence of these acts to challenge the credibility (impeachment) of the defendant or as substantive proof at trial.

## Reciprocal Discovery: The Defendant's Obligations

The defense must provide "reciprocal" discovery within 30 days after the prosecution has served a Certificate of Compliance (discussed below). The reciprocal discovery obligation relates to evidence the defense intends to offer at trial, specifically the following:

- **Expert opinion evidence;**
- **Tapes and electronic recordings;**
- **Any drawings and photographs** prepared by law enforcement or another person;
- **Scientific reports and data** prepared as a result of a physical or mental examination or any other scientific test;

- **Rewards, promises and inducements** offered to a witness for testimony;

- **Tangible property;**

- **Names, addresses and birth date** of individuals (other than the defendant) the defense intends to call for testimony at trial. Note, however, that if the defendant chooses to present a witness to challenge the credibility of a prosecution witness (for purposes of impeachment), this information need not be turned over until *after* the prosecution witness testifies.

The defendant's obligation to provide reciprocal discovery is subject to constitutional limitations. After reasonable diligence, if the defense is unable to provide expert opinion evidence and tangible property is unavailable for disclosure, the timeframe of 30 days after the prosecution's filing of a certificate of compliance can be stayed without the need for a motion. The disclosure must then be made as soon as possible.

## Discretionary Discovery: Additional Discovery by Order of the Court

When the defendant is seeking information or materials not already listed in the recently created Article 245, and the information constitutes material evidence (i.e., relates to the subject matter of the case), the court can order the prosecution or any other individual or entity who possesses it to turn over such information in response to the defendant's motion. The defendant's request must be reasonable, and the defendant must not be able to obtain equivalent information without "undue hardship." The prosecution or other relevant individual in opposition to the disclosure can request to testify or submit papers "in camera" (in judge's chambers, outside of public view) or ex parte (without the presence of opposing counsel) prior to any judicial order for discretionary discovery but must show "good cause" for the non-disclosure.

## Procedures for Limiting Disclosure: Protective Orders

Parties may at times have valid reasons for withholding information, generally related to the safety of witnesses if their names, contact information, or involvement in a case were revealed. While the pre-reform statute allowed for protective orders, the new statute makes more detailed allowances. When the prosecution or defense does not wish to disclose specific material or evidence, they must establish good cause for the non-disclosure; notify the opposing party in writing that information is being withheld; and apply for a protective order.

The court may then order that the discovery or inspection of specific material or information be "denied, restricted, conditioned, or deferred." Alternatively, a court may order that the material be limited to defense counsel's viewing and cannot be shared with the defendant; or

the court may limit access to the material, ordering that it can only be viewed at a specific location, (e.g. the prosecutor's office or police station).

- **Hearing Requirement:** When a party seeks a protective order and the other opposes it, the court must conduct a hearing within three business days of the initial request. A decision to disclose or limit disclosure must be made by the court expeditiously.

- **Presence of the Defendant at the Hearing:** The court may conduct the hearing outside the presence of the defendant when the defendant is charged with a violent felony offense (pursuant to Penal Law 70.02) or a Class A felony (except for drug offenses) *if* the prosecutor requests it and shows good cause for excluding the defendant from the hearing.

- **Good Cause:** When establishing the need for a protective order, the party moving for it must show that there is a "good cause" exception. Good cause can arise under specific circumstances, mostly relating to the safety of and risk to a witness and the preservation of a defendant's constitutional rights. Where good cause is established, the time periods for turning over discovery can be modified.

- **Appellate Review:** If a court grants or denies a protective order specifically pertaining to the disclosure of the name, address, contact information and statements of a witness, the party who received the adverse decision may appeal to the intermediate appellate court. The party seeking appellate review must file an order to show cause within two days of the adverse ruling.

- **Sanctions:** Any party that violates a protective order by sharing protected information can be charged with criminal contempt.

# Ensuring Compliance with Discovery Reforms

## Certificates of Compliance

The prosecution is required to submit a "certificate of compliance" after complying with the aforementioned "automatic" discovery requirements. The certificate must state that the prosecutor exercised due diligence and made reasonable inquiry into the existence of relevant materials, and that the prosecutor has turned over all known discoverable materials, with the exception of evidence that has been lost or destroyed (subject to a sanction pursuant to Criminal Procedure Law 245.80(1)(b)) and materials withheld pursuant to a protective order. The certificate must also list all the materials that have been turned over. Further, certificates submitted in good faith and that are reasonable under the circumstances will not result in an adverse consequence for the prosecution, however, the court may grant a remedy or sanction for a discovery violation.

A *supplemental* certificate of compliance must be filed if prosecutors later share additional discovery, pursuant to a continued duty to disclose newly learned information. This *supplemental* certificate of compliance must be filed before trial and should identify the additional information and list the materials provided.

## Compliance and Trial Readiness

The prosecution cannot be deemed ready for trial, orally or in writing, without having fulfilled the discovery obligation and filed a certificate of compliance. The clear intent of the legislature is to prevent the prosecution from submitting statements of readiness, orally or in writing, while discovery remains incomplete. However, the prosecution can be deemed ready for trial even if discoverable materials have not been disclosed due to being lost or destroyed. Again, sanctions may be imposed.

## Limiting Litigation

To ensure compliance and limit litigation over discovery disputes, the court may:

- Order that the parties discuss a disclosure issue to reach an agreement regarding the requested discovery;
- Require a discovery compliance conference;
- Require the prosecution to file an additional certificate of compliance with specific reference to any exculpatory or otherwise favorable information that has been provided to the defense; or
- Order any other measure required to ensure that the goals of discovery reform are met.

Ultimately, challenges to a certificate of completion, however, must be addressed in a motion.

## Data Reporting Requirements

The 2020 bail and discovery reform amendments included reporting requirements for the Office of Court Administration (OCA) and the Division of Criminal Justice Services (DCJS). Both agencies must collect and publish specific data on their respective websites. OCA is required to collect and report information regarding the implementation of the discovery reforms, including:

- The procedures used to implement the reforms

- The resources needed for implementation
- Information on cases where discovery obligations were not met, and
- Case outcomes

The report should be posted on OCA's website and made publicly available annually, with the first report being posted 18 months after the amendment's effective date (May 1, 2020), covering the initial 12 months of implementation.

# Remedies and Sanctions

The discovery reform statute provides sanctions that already existed in the pre-reform statute but also offers additional guidance for when and how they should be used. The court must impose a remedy or sanction: (1) when information or materials are turned over late, *if* the party receiving the materials can show that it was prejudiced (i.e. the party was materially affected by the late disclosure); and (2) when the materials have been lost or destroyed *if* the party entitled to the materials can show that the materials contained information regarding a contested issue.

When materials have been turned over late, even without any showing of prejudice, the court must grant reasonable time to the party receiving the materials to prepare and respond to the new information. If the materials are lost or destroyed the sanction should be proportionate to the potential ways that the material could have helped the party entitled to disclosure.

## Delineated Remedies and Sanctions

In response to a failure to comply with discovery obligations, the court can use one of the following remedies and sanctions:

- Issue an additional order for discovery (e.g., where the additional order specifies exactly what must be disclosed and gives a timeframe for complying).
- Grant a continuance (e.g., to provide more time to the party receiving late discovery to review the information).
- Order that a hearing is reopened or a witness re-called.
- Instruct the jury to make an adverse inference against the noncompliant party in the case.
- Preclude or strike a witness's testimony.

- Admit or exclude other evidence (i.e., with the effect of compensating the party that did not receive discovery in compliance with the statute).

- Order a mistrial.

- Order a dismissal of all or some of the charges.

The court has the discretion to fashion a remedy or sanction that is just, under the circumstances. The statute makes clear, however, that any sanction imposed on the defendant cannot impede the defendant's constitutional right to present a defense.

If the prosecution fails to disclose a statement made by a prosecution's witness, that alone will not permit the court to order a new pretrial hearing, or set aside a conviction, or reverse, modify or vacate a conviction. The defendant must show that there was a reasonable possibility that the non-disclosure "materially contributed" to the result of the trial or proceeding. The defendant's right to re-open a pretrial hearing when the statement is discovered prior to the end of trial remains intact.

# Other Notable Discovery Law Provisions

## Continued Duty to Disclose

While the discovery reform seeks to limit the amount of time it takes to complete discovery, it also maintains the continued duty to disclose. This duty requires that both parties turn over information that they later learn exists and that would have been discoverable initially.

## Order to Preserve Evidence

Any party can file a motion with the court requesting an order mandating that an individual, entity or agency in possession of relevant items preserve them for a specific amount of time. The court must respond expeditiously and may later modify or vacate the order if the preservation of the evidence causes significant hardship to the entity, agency or individual.

## Order for Access to Premises

The defendant may request a court order permitting access to a crime scene or other premises related to the case. The court can also order that the premises remain unchanged. In considering whether to grant such a motion, the court must consider several factors:

1) Need for access, including the risk that the defendant will be deprived of useful evidence.

2) The position of the individual or entity who owns or possesses the premises.

3) The privacy interest and perceived hardship to the individual or entity allowing access.

4) The position of the prosecution regarding the request for access.

The court may deny access if the probative value can be obtained through other means. Further, if access is granted, the individual or entity who possesses or owns the property may request that law enforcement be present while granting the access.

# Conclusion

The criminal justice landscape continues to change rapidly in 2020, given the 2019 reforms and subsequent amendments that have taken effect. Considering New York State's recent history of withholding vital information from defendants before accepting guilty pleas or disclosing information on the eve of trial, the presumption of openness and timeframes established through these reforms will likely have drastic effects on both case procedure and processing, as well as outcomes. Hopefully, such changes are another step toward a more fair, transparent, and just criminal legal system.

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### Notes

[1] See Lieberman, D & Kushner, I. (2019, March 1). *Take Off the Blindfold: Reform New York Discovery Law*. Retrieved from https://www.nyclu.org/en/publications/take-blindfold-reform-ny-discovery-law-commentary; See also Schwartapfel, B (2017, August 7). *Defendants Kept in The Dark About Evidence, Until It's Too Late*. Retrieved from https://www.nytimes.com/2017/08/07/nyregion/defendants-kept-in-the-dark-about-evidence-until-its-too-late.html?bblinkid=56384536&bbemailid=4645020&bbejrid=34726352.

[2] The enumerated materials that fall under "initial" or "automatic" discovery can be found be found in the new C.P.L. § 245.20(1)(a)-(u).

[3] When the electronic recording exceeds 10 hours, the prosecution may disclose only the recording that the prosecution intends to use at trial or at a pretrial hearing. However, the prosecution must still provide a list of the source and quantity of the excluded portion of recordings and their general subject matter, if known.

[4] Brady v. Maryland, 373 U.S. 83 at 87 (1963), where the court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution.

[5] There are several specific exceptions to the 50- or 65-day limit (combining the initial 20- and 35-day limit and 30-day extension allowance). For instance, expert evidence must be disclosed not later than 60 calendar days before the first scheduled trial date; as a practical matter, 60 days prior to most trials likely falls *after* the 50- or 60-day mark. In addition, any specific electronic material that the defense requests

and that was not previously disclosed (e.g., by the 50- or 65-day mark) must be disclosed not less than 15 calendar days after the defendant's request. Further, in any Vehicle and Traffic Law (VTL) offense (e.g., driving while intoxicated) where records of calibration, certification, repair, inspection maintenance were prepared six months after the administration of a test, disclosure must occur the earlier of 15 days following the prosecution's receipt of such records or 15 days before the first scheduled trial date.

[6] A simplified traffic information is a written accusation by a police officer, or other public servant authorized by law to issue such accusation, completed on a brief or simplified form prescribed by the commissioner of motor vehicles. It charges a person with one or more traffic infractions or misdemeanors relating to traffic. Criminal Procedure Law § 1.20

[7] Criminal Procedure Law 440.10 allows for the withdrawal of a previous judgment for specific reasons, delineated in the statute. Repleaders allow a defendant to enter a new and different plea, as result of the withdrawal.