

**NYSACDL**

New York State Association of Criminal Defense Lawyers  
An Affiliate of the National Association of Criminal Defense Lawyers

"Not for the few, but for the rights of All"

## **NYSACDL SUPPORTS DISCOVERY REFORM IN NEW YORK**

The **NYSACDL** is comprised of the most experienced members of the private defense bar and the most dedicated Public Defenders and Legal Aid criminal defense lawyers from across the entire State of New York. Together we call for the immediate reform of criminal discovery in New York.

### **NYSACDL strongly supports fairness in Criminal Discovery in New York State and specifically supports the Legal Aid Society's proposal: *Criminal Discovery Reform in New York.***

- The prevailing New York culture of **trial by ambush** and legal gamesmanship regarding the evidence in criminal cases must come to an end.
- The vast gulf in fairness between the complete discovery mandated in **civil cases** and the archaic, limited disclosure required in **criminal cases** which affect the liberty interests of hundreds of thousands of New York citizens, must be rectified.
- One of the main contributing causes of wrongful convictions in New York, lack of fair and complete discovery, which hampers defense investigation, must be remedied.
- Ethical standards, legal scholars and expert reports support this needed reform.

## **Why is DISCOVERY REFORM necessary in New York?**

- **Current CPL §240.20 is unfair and wastes scarce judicial resources.**

**". . . the trial of a criminal charge should not be a sporting event where each side remains ignorant of the facts in the hands of the adversary until events unfold at trial."**

*(People v. Copicotto, 50 NY2d 222, 226 [1980].)*

Imagine you or someone you love is charged with a crime somewhere in New York State. Your liberty, livelihood and reputation are at stake, even in the most minor of criminal court cases. If you are able to, you hire the very best and most experienced attorney you can afford. If not, you will be assigned a defense attorney by the Court. No matter who you are or who your lawyer is, you get a few sheets of paper charging you with some kind of offense. If you are innocent, you may know nothing about the charged event. If you are even less fortunate, you may have been under the influence of an addiction, mental illness or a psychological disorder which renders you utterly unable to assist your counsel with information or investigation. At this point, the State through its numerous investigators and agents has volumes of information about the case you and your lawyer do not.

In a felony case, your lawyer may demand a preliminary hearing to evaluate the evidence, hear some witness testimony and to get access to some witness statements and other information about the case which will otherwise be lawfully withheld. You may very well be indicted by a Grand Jury before you can have that preliminary hearing. Unless you are going to testify at Grand Jury, all its proceedings are secret. You have little basis for knowing whether you should exercise your right to testify at Grand Jury. The State has no obligation to tell you anything about the case yet.

After indictment your lawyer may file reams of demands and motions designed to get witness statements and evidence so she can investigate your case. Your lawyer may conduct hearings that have little chance of legal success because it is the sole way to hear what the witnesses in your case have to say and have said before about your case. Absent such advocacy, the State is only required to provide minimal information not already contained in the charging documents. (Indeed, the current criminal discovery statute does not even require the prosecutor to turn over police reports about the crime!)

Meanwhile, you must decide whether to take a plea of guilty that will mark you as a criminal for the rest of your life but may preserve your freedom. Or, you can choose to risk the wrath of the justice system and opt to take your chances with a trial. If you lose this gamble you will likely lose your liberty for an unknown time.

You ask your lawyer if you should plead guilty or take the case to trial. No matter who your lawyer is, retained or appointed, your lawyer, despite all efforts to the contrary, will likely

not have been provided all the information you need to make that decision. You are blind. But you must decide. The current Criminal Procedure Law, §240.20, allows the State to leave you and your lawyer in the dark for that decision. Worse, if you decide to exercise your Constitutional rights to a trial, all the information about the case can be dumped on you and your lawyer at the very last second, sometimes even after the jury has been selected and sworn, when it is absolutely useless to help in investigating and preparing your case.

This is no exaggeration. New York defense lawyers have testified to the *Kaye Commission on the Future of Indigent Defense Services* that the current system causes them to **“beg scrape and plead”** for information only to get nothing. One lawyer testified that it takes **“many, many adjourned dates to find out what you need to know about the case before you can make an intelligent judgment on how to handle it.”** Another made it clear that there would be less litigation if open discovery were provided and that the **“whole system would be a lot more just if the information was handed over.”** [See *The Spangenberg Group’s Status of Indigent Defense in New York*, June 16, 2006, pp77-83.]

One law professor has noted **“Where money is involved, all parties receive all relevant information from their adversaries upon request; but where individual liberty is at stake, such information can either be withheld by the prosecutor or parceled out at a time when it produces the least benefit to the accused.”** [See Jenny Roberts, “Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate and Pretrial Discovery in Criminal Cases,” 31 *Fordham Urb. L.J.* 1097 (2004).]

The current restrictions on discovery in New York are contrary to the American Bar Association Model Rules. ABA Discovery Standard 11-4.1(a) mandates discovery initiated **“as early as possible in the process”** so that each party has **“sufficient time to use the disclosed information adequately to prepare for trial.”** By contrast, New York allows even the minimal discovery required to be withheld until the very last moment in criminal cases.

A very recent ABA ethical decision emphasizes the importance of early disclosure of information in criminal cases. The decision states that a prosecutor’s ethical obligation to disclose favorable information to the defense is more broad than that set by the *Brady v. Maryland* decision alone. The Committee on Ethics and Professional Responsibility went out of its way to state that: **“In general, for the disclosure of information to be timely, it must be made early enough that the information can be used effectively.”** The Committee also pointed out that **“[a]mong the most significant purposes for which disclosure must be made under Rule 3.8(d) is to enable defense counsel to advise the defendant regarding whether to plead guilty,”** and that the **“defendant’s decision may be strongly influenced by defense counsel’s evaluation of the strength of the prosecution’s case...”** The Committee then inserted a footnote referring favorably to jurisdictions in which open file discovery is provided. [ABA Standing Committee on Ethics and Professional Responsibility, **Formal Opinion 09-454**, July 8, 2009, *Prosecutor’s Duty to Disclose Evidence and Information Favorable to the Defense.*]

The patent unfairness of current CPL §240.20 becomes crystal clear when one compares that restrictive statute, which functions to keep nearly all information about the case out of the hands of the criminal defense lawyer, to the expansive requirements of New York's alibi statute, CPL §250.20. If a defendant chooses to argue to a jury that he was not present at the scene of his charged offense, and present witnesses in support of that defense, the defendant himself must provide to the State the exact location or locations where he claims to have been, the names, residential addresses, the places of employment and the addresses of those places of employment for every witness he intends to call in support of his alibi. (All information that the State is not required to provide in the first instance!) The State is then required to give notice of any witnesses they may call to rebut any alibi testimony. By this statute, the State is allowed to protect itself from any alleged 11<sup>th</sup> hour fabrications from a defendant who is presumed innocent, but also presumed inherently deceitful. In stark contrast, because of CPL §240.20, the defendant is not entitled to the basic information he needs to carry out the investigation necessary to defend himself from the allegations and hold the State to its burden of proof.

New York should join those states which have put the prosecution's discovery obligations for criminal defendants and their lawyers on equal footing with their counterparts in the civil realm.

- **Lack of Discovery Invariably Leads to Ineffective Assistance of Counsel and is a Significant Contributing Cause of Wrongful Convictions**

The current CPL §240.20 shows a fundamental and systematic disrespect for defense counsel's ethical obligations to provide a zealous defense. Such a defense requires frank, informed discussions of plea bargain offers. It requires an exhaustive investigation. A zealous defense requires filing meaningful motions and eventually finding the best jurors for the case if it goes to trial. It requires artful and persuasive opening and closing arguments. A zealous defense requires full and thorough cross examinations. It requires solid strategic and tactical decisions about what witnesses to call and how to attack the State's case. Enforcement of a defendant's fundamental Constitutional rights is contingent upon defense counsel receiving meaningful discovery as early as possible. **"The right to effective assistance of counsel rings hollow when restrictive discovery rules render an attorney unable to investigate the facts of the case."** [See Roberts, "Too Little, Too Late", 31 Fordham Urb. L.J. 1097 at 1100 (2004)]

Lack of discovery leads to ineffective assistance of counsel, and ineffective assistance of counsel inevitably leads to wrongful convictions. The Innocence Project, with its hundreds of exonerations, has exposed the reality that wrongful convictions are a national plague within our criminal justice system. A recent study carried out by the New York State Bar Association's *Task Force on Wrongful Convictions* documented and diagnosed the causes of fifty-three wrongful convictions. Nineteen of the wrongful convictions stemmed from what was termed "Defense Practices", described as "one or more errors by an attorney representing the falsely accused, **usually a failure to fully investigate or to offer alternative theories and/or suspects.**" [See **Final Report of the NYSBA's Task Force on Wrongful Convictions**, April 4, 2009, pp6-7.]

It was clear from the testimony at the Task Force hearings that the investigation required by defense counsel to avoid wrongful convictions was not possible without open and complete discovery of all information related to the criminal case. In the testimony given to the Task Force on Wrongful Convictions on February 24, 2009 in Albany, one attorney panel member expressed trepidation to a witness about **“institutional structural concerns”** regarding the **“gamesmanship that is played with regard to discovery.”** He went on to state:

*“With the large caseloads...wouldn’t you agree that it would be just as important to mandate that a D.A. turn over all discovery on Day 1 of the criminal process so that the overworked public defender, the overworked defense attorney—even if he is a private attorney—will not have to guess what’s in the D.A.’s file and undertake investigation...Isn’t it just as important coming out of this Task Force that the legislature mandate open discovery on Day 1 of the criminal process...”*[See **Final Report**, Albany Transcript pp56, 57.]

The attorney witness testified in response:

*“I think the moment is ripe for that. I think all of the streams of exonerations and wrongful convictions and your inquiry...about defense services, are all leading us inexorably to the position where the legislature has to revise the discovery system.”* [See **Final Report**, Albany Transcript p58.]

NYSACDL member Bruce Barket testified in front of the Task Force in New York City where he recounted what was required to achieve the exoneration of his wrongfully convicted client Martin Tankleff. Barket stated in part:

*“Discovery in criminal cases is abysmal. New York provides for only narrow disclosures by prosecutors. Prosecutors are permitted to withhold the identity of most witnesses, most witness statements, almost all police reports and almost all investigative leads. As an attorney in private practice I’ve had the opportunity to try some civil cases...Before I pick a jury, I will have seen every single witness statement that exists. I’ll have had an opportunity to depose the witnesses. I’ll certainly know the names of every single witness. Literally there will be no surprises...when I stand up to pick a jury in a murder case it is very likely that I will not have seen a single police report; that I will not have seen a single witness statement. I will have deposed no one, unless there would happen to be some kind of pretrial hearing. Worse, once I receive the statements, literally at the beginning of the trial, I won’t have the time to investigate what the witnesses have to say. I won’t have the time to determine whether or not what they claim to have seen or heard is accurate. The sad reality is that trial by ambush in criminal cases is a harsh reality, and every single person who has represented a criminal defendant in New York State knows it. This ought to end. We ought to bring discovery in criminal cases into the 21<sup>st</sup> century.”* [See **Final Report**, NYC Transcript pp167-169.]

To sum up, in the words of Professor Jenny Roberts, **“If adequate investigation can help protect against wrongful conviction, then courts must give the constitutional duty to**

investigate real meaning by giving defense counsel the discovery they need in order to investigate.” [See Roberts, “Too Little, Too Late”, 31 Fordham Urb. L.J. at 1103 (2004).]

NYSACDL also believes the time is ripe for legislative reform to New York’s antiquated criminal discovery statutes.

## **What reforms are needed to create fairness in Criminal Discovery in New York State?**

(1) **Discovery in New York must be expanded to include all information relevant to the pending case.** LAS’s proposed CPL 245.20 rightfully expands the information required to be produced by the State. Right now the amount of discovery required is so minimal as to prevent investigation of the case or making reasonable judgments about whether to plead guilty or go to trial. NYSACDL supports the LAS proposal to greatly expand discovery.

(2) **Discovery must be automatic.** Countless hours of needless demands and litigation could be avoided if the DA were required to turn over all discovery in some specified time without any defense demand. This requirement should be in some way reciprocal upon the defense to turn over specified discovery. The LAS proposal mandates discovery to be produced by the State within 15 days and allows 30 days for the defense to provide reciprocal discovery.

A) **There must be sanctions for failing to comply with automatic discovery.** Those sanctions could range from preclusions to adverse inference instructions, depending on the severity of the violation.

B) **There must be a requirement that all statements of the defendant and co-defendants be provided prior to any Grand Jury presentation.** To do otherwise is to chill a defendant’s statutory right to testify at Grand Jury. The LAS proposal requires such information produced, upon timely request, within 48 hours prior to Grand Jury. (See CPL 245.10(1)(iii).) NYSACDL agrees that such information should be produced, but without any request from the defendant required. The specified statements should be produced automatically prior to Grand Jury.

C) **It is essential that expert witness information, including any reports, a statement of the facts and opinions to which the expert is expected to testify and the expert’s CV, is required to be produced.** (See proposed CPL 245.20(f).) No defense counsel can properly prepare an ethically zealous and effective cross examination without such information. Obviously, the defense should be required to produce the same information for defense experts.

i) NYSACDL also supports automatic discovery depositions in felony cases for any expert witness who may be called by either party to testify at trial.

Cf. New Hampshire Revised Statutes 517:13. [Also allowing depositions of witnesses in criminal cases upon a finding of “necessity”.]

(3) **The definition of Brady information must be made clear and there must be meaningful sanctions for violating Brady.** Brady information is not just exculpatory information or material exculpatory information. The State is required to turn over all **favorable** information relevant to the issues of guilt or punishment. Such information includes information relevant to the credibility of witnesses. The State has an ongoing obligation to learn of such favorable evidence known to others acting on the State’s behalf. These bedrock principles of Due Process are meaningless without enforcement and tangible sanctions.

The LAS proposal has an extensive description of this kind of required discovery at **245.20(j)**. NYSACDL supports this formulation of Brady as does the NYSBA’s Task Force on Wrongful Convictions.

(4) **Discovery must be expanded to include all the varieties of electronic and digital information involved in every case.** Even the most mundane criminal case involves the internet, computers, cell phones, text messages and digital images. Our discovery statutes must be brought up to speed with the information revolution by recognizing all the types of information embedded in every human interaction and thus, every kind of criminal case. The LAS proposed CPL 245.20(s) encompasses that need nicely, and NYSACDL fully supports that necessary expansion.

## **OBJECTIONS TO DISCOVERY REFORM BY PROSECUTORS AND LAW ENFORCEMENT ARE UNFOUNDED**

As the Court of Appeals observed in *People v. Copicotto* (50 NY2d 220, 226 [1980]):  
*"[b]roader pretrial discovery enables the defendant to make a more informed plea decision, minimizes the tactical and often unfair advantage to one side, and increases to some degree the opportunity for an accurate determination of guilt or innocence \* \* \*."*

Unfortunately, District Attorneys and other law enforcement entities oppose broader discovery, and frequently make two arguments in opposition to proposals for expanded and early criminal discovery:

- (1) **The alleged expense of such a system and;**
- (2) **The danger to witnesses if their information is made available to defense counsel as part of discovery.**

NYSACDL asserts that those concerns are unfounded and, in any event, are not significant enough to block the clear need for thorough discovery reform in New York.

## **I. Discovery Reform is not Cost Prohibitive; It May Even Save Money.**

Prosecutors and police departments have complained that early discovery would increase their costs, and thus early discovery should be avoided. But the fairness of the New York criminal justice system should not be dependent upon budget constraints. For too long, defendants have been saddled with a discovery statute which places enormous burdens upon their ability to conduct a defense. As a result, in New York defense attorneys and prosecutors spend an enormous amount of time litigating over access to information that the other side possesses. This is costly and counterproductive to the search for the truth.

Many jurisdictions around the country, including large states with big cities (Florida, Massachusetts), and smaller states with small cities (New Hampshire) have open, early discovery, and recognize the benefits of doing so. For example, in New Hampshire, a state with a requirement of early, full discovery, defense attorneys are afforded full discovery early in the case, including all statements and police reports. In felony cases in New Hampshire, defense counsel sometimes makes an agreement to receive full discovery prior to indictment. In other cases, counsel is entitled to receive full discovery within 30 days of arraignment in the Superior Court, including notice of any bad acts to be used against the defendant at trial.

In cases in which early discovery is provided, clients make earlier, better informed decisions regarding how best to proceed. In the overwhelming number of these cases, clients recognize that it is in their best interest to accept a plea bargain early in the process, instead of after numerous motions have been filed, and hearings conducted. The criminal justice system is saved the expense of motions and hearings, and perhaps a trial – that in New York are regularly conducted because the defendant has no information regarding the People's case.

On balance, it seems reasonable to conclude that the minimal costs of providing early, complete discovery as proposed in LAS's CPL §245.20 would be offset by an increase in early plea bargaining and a decrease in unnecessary litigation, and a reduction in the number of wrongfully convicted.

## **II. Witness Safety Objections to Discovery Reform Are a Red Herring.**

In the jurisdictions with early and complete discovery, there is no evidence to support, according to the LAS proposal, that there is an increase in witness safety-related issues due to discovery practice. Like stories of the wrongfully convicted (who may spend years in prison for crimes they did not commit), every so often there are tragic and violent high profile cases of witness intimidation that catch the eye of the general public and law enforcement. Such cases appear to be few and far between. States such as Massachusetts, New Jersey, Florida, Colorado, Arizona, California, Illinois, Michigan, New Hampshire, North Carolina and Pennsylvania have employed broad discovery without any evidence that witness safety has been jeopardized. In fact, according to the LAS proposal, studies have shown that broad discovery practices have

been approved by both sides of the criminal bar and that such discovery practices are considered efficient and fair.

In New York State in 2008, according to records from the Division of Criminal Justice Services, there were a total of 341 arrests across the entire state for either tampering with or intimidating a witness. Compared to 575,221 total arrests during the same time period, witness tampering cases constituted .00059% of overall arrests in New York in 2008. There is no reason to believe there would be a significant change in that percentage even with true open discovery.

Indeed, in 1991 the New York State Assembly Codes Committee commissioned a study of national criminal discovery practices, in comparison to those of New York State. In calling for expanded criminal discovery in New York, the Report debunked the myth that greater pre-trial discovery lead to an increased in witness intimidation or tampering. The Report concluded that "the link between criminal discovery and witness intimidation is extremely weak" (*See Report to the New York State Assembly Codes Committee, "Criminal Discovery in New York State: Current Practice and Proposals for Change" (1991), p.112; see also pp. 91-92.*)

In New York there are ample ways to deal with any potential witness intimidation issues and they have been in place and effective for many years. Discovery can be redacted if good cause is shown, and the LAS proposal wisely continues this possibility. (*See LAS CPL § 245.70.*). Courts can hold hearings to determine if witnesses have been intimidated, and upon a showing of witness intimidation, order that the witness's grand jury testimony be admissible at trial in lieu of live testimony. (*See People v. Geraci, 85 NY2d 359 [1995].*) Defendants and their families, friends and associates can be charged with Witness Tampering if such allegations are substantiated. (*See Penal Law §§ 215.10 et seq.*) The current provisions under New York law right now are sufficient to deal with what few witness intimidation issues exist.

Many witness safety arguments against open and complete discovery reforms also presume something that is generally false: that stranger crime is common. Rare is the criminal case in which the complaining witness and the accused did not already know each other in some capacity. This goes for theft cases, assaults and even drug sale cases. The enormous bulk of people involved in criminal cases either as defendants, witnesses or complainants already know each other in some way. And if they do not, they find out who the players are in the event very soon afterward, regardless of discovery issues. Limited discovery does not serve to protect witnesses or alleged victims. It serves only to hamstring defense counsel, who is then forced to drag the case out by adjournment after adjournment simply to gather as much information as possible about the case so as to give the client a reasonable idea of what course to take.

## **CONCLUSION**

New York State should heed the words of one of the more conservative jurists of recent years on the New York Court of Appeals, Judge Bellacosa, who stated in a 1992 dissenting opinion lamenting the problems caused by violation of present discovery rules and remedies:

*"the Legislature might more comprehensively consider halting the wide swing of the Rosario pendulum and restoring it to a proper place of perspective and proportion. One way to accomplish this and effect a sensibly balanced remedy would be open-file pretrial discovery on the criminal side. New York prosecutors, long opposed to this reform, may at long last recognize the lesser price paid by society and victims from prosecutors opening their files to defense counsel in the pretrial discovery phase compared to risking the turmoil and uncertainty of the massive Rosario mine field in countless individual cases. In the end, such a modulated procedural reform would more surely bring about fairness for and less games-playing by both sides, and would definitively restore "a right sense of justice" as an antidote to the spreading threat of the per se virus".*

(*People v. Banch*, 80 NY2d 610, 626-627, [1992] [emphasis added].)

Our current discovery system is counterproductive and indefensible. Real discovery reform will have a positive trickle-down effect and will help improve every other aspect of the criminal justice system in the long run. **NYSACDL** believes reform as described in the **Legal Aid Society's** reform proposal is essential to the improvement of the fairness and due process in the criminal justice system in New York.

Early, complete and automatic discovery is a win-win policy. Cases will resolve earlier and there will be less litigation carried out simply to ascertain basic facts of the case. When cases do go to trial, there will be a truly adversarial contest on a level playing field without surprise or ambush. In such a scenario, everyone wins, including prosecutors, law enforcement and the citizens of New York State.

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