APRIL 2020 CHANGES TO CPL Article 245 DISCOVERY LAWS

Prepared by Jill Paperno, First Assistant Public Defender, Monroe County Public Defender's Office

In April, 2020 the following changes, effective May 3, 2020, were made to the discovery laws set forth in CPL Article 245 enacted in 2019, and implemented on January 1, 2020.

CPL 245.10 – Timing of discovery

In the original statute, the law required that initial discovery be provided as soon as practicable, but no later than fifteen days of arraignment, with certain exceptions. This applied to all accusatory instruments regardless of a defendant's custodial status. There was an exception if materials were voluminous or could not be obtained with due diligence by the prosecutor, an additional thirty days was available without any requirement that a motion be filed by the prosecutor.

The timing statute has been modified to set forth different deadlines depending on the circumstances of the defendant, as described below.

245.10(1)(a) – There have been four subdivisions added, (i) through (iv).
Subdivision (i) modifies the timing for defendants who are in custody. It requires that initial discovery be provided as soon as practicable but no later than twenty calendar days following arraignment. If a client is in custody on another matter, you may wish to argue that this timeline applies.

Subdivision (ii) addresses the timing of initial discovery for a defendant who is out of custody. In those cases, the initial discovery must be provided as soon as practicable but not later than thirty-five calendar days after arraignment.

Subdivision (iii) addresses timing of discovery in cases involving traffic infractions charged by simplified information, or petty offenses in village, town, city or county codes, which do not carry a sentence of imprisonment, and where the defendant is not charged with a crime. In such cases, the defendant is entitled to discovery no later than fifteen days before trial, though the defendant may move for earlier disclosure. NOTE: It's written in a way that may be confusing, as the clause that states that it may not be a jailable offense comes after the section relating to local ordinances, but based on the use of commas, as well as common sense, it is applicable to only non-jailable traffic violations.

Subdivision (iv)(A) addresses withholding of discovery by a party seeking a protective order, and appears to repeat a portion of 245.10(1)(a). It adds a provision that information concerning the identity of a 911 caller, alleged victim of a sex offense, alleged victim of a sex trafficking offense, or any witness or victim of a crime where the defendant has substantiated affiliation with a "criminal enterprise" (gang) may be withheld, although the defendant may move for disclosure. This seems to shift the burden from the prosecutor seeking a protective order to the defense moving for disclosure.

Subdivision (iv)(B) provides for the further extension of the deadline for providing discovery when the discovery is voluminous or despite diligent, good faith efforts, is not in the possession of the prosecution. It allows extension beyond the thirty days already provided in the statute, if the prosecution makes a motion for a protective order. It also now specifically states that voluminous materials may include video footage from body-worn cameras, dashboard cameras and surveillance cameras.

245.20 – Initial Discovery

245.20(1)(c) This subdivision addresses names and contact information for witnesses. The amendment to this section of the statute includes the protection for 911 callers, victims or witnesses of sex offenses and sex trafficking charges, and victims or witnesses in cases in which the defendant has a substantiated affiliation with a criminal enterprise. This tracks the timing statute's amendments allowing for withholding of such information. Subdivision (c), which requires provision of contact information, now specifically permits withholding of contact information relating to these categories of individuals without need for a motion for a protective order, but the prosecutor must still inform the defense that such material has not been disclosed, unless the court has ruled otherwise for good cause shown.

245.20(1)(f), which addresses discovery about experts, has been modified to limit what is required of expert proficiency testing to a list of the tests taken, rather than all of the tests. You can still move for supplemental discovery or subpoena these tests.

245.20(1)(g) addresses tapes and recordings. This section has been amended to permit the prosecutor to withhold the names and identifying information about 911 callers without the need for a protective order. It permits the defense to move for disclosure, and requires that if a prosecutor is calling the witness at trial or in a hearing, the prosecution must disclose the name and contact information no later than fifteen days before such trial or hearing or as soon as practicable.

245.20(1)(j) relates to tests, examinations, and other scientific and medical information. The amendment clarifies that the prosecution is not required to provide information relating to such tests, experiments or examinations until the tests and examinations have been completed. Whether this will be used to sit on results remains to be seen. But remember, CPL 245.20(1)(f) provides for an adjournment if certain expert evidence is not provided in time.

Section 245.25

Section 245.25 addresses disclosure of discovery prior to guilty pleas. Subdivision 2 of this section was amended to extend the timing of disclosure by the prosecutor in cases involving simplified informations charging traffic infractions or city, town or village petty offenses. In such cases, as noted in 245.10(1)(a)(iii), the prosecutor may disclose fifteen days before trial, but a defendant may move for earlier disclosure.

245.25(3) permits the prosecution to condition a plea on a waiver of discovery in cases in which a defendant's conviction was vacated pursuant to CPL 440.10 and the defendant is taking a plea.

CPL 245.50 – Certificates of Compliance

245.50(1) has been amended to specifically require that a certificate of compliance be served even if there is discovery that has been lost or destroyed. Language has also been added that there be no adverse consequences to the prosecutor if the certificate was filed in good faith (already in the statute) and **reasonable under the circumstances** (additional language in new amendment). Thus, it appears that if the certificate was unreasonable under the circumstances and merely used to stop the clock, the sanction provisions still apply.

245.50(3) – Trial readiness

This statute has been amended to allow the prosecutor to declare readiness under additional circumstances. First, the statute has changed the standard under which a prosecutor may be deemed ready. Previously, the language was "absent an individualized finding of exceptional circumstances by the court before which the charge is pending, the prosecution shall not be deemed ready for trial for purposes of section 30.30 of this chapter until it has filed a proper certificate pursuant to subdivision one of this section. The language now reads, "absent an individualized finding of special circumstances in the instant case by the court before which the charge is pending, the prosecution shall not be deemed ready for trial for purposes of section 30.30 of this chapter…" It seems that the standard the prosecutor must meet, now "special circumstances" as opposed to "exceptional circumstances", has been lessened, at least to this writer.

Second, the statute was amended under this section to permit a court to deem a prosecutor ready for trial if information that was discoverable was lost or destroyed despite diligent and good faith efforts reasonable under the circumstances. However, sanctions may still be available under CPL 245.80.

245.50(4) – Challenges to Certificates of Compliance

This new provision requires that challenges to, or questions relating to, a certificate of compliance be addressed by a motion. It does not state that the motion must be in writing.

Section 245.70 – Protective Orders

245.70(1) has been modified to specify that one of the types of protective orders that may be sought is a substitution of a 911 transcript for the actual recording.

245.70(3), relating to the hearing on protective orders, permits the court, upon request of the prosecutor, to conduct the hearing on protective orders in camera and outside the presence of the defendant when the defendant is charged with a non-drug A felony or a violent felony.

Section 245.75 – Waiver of discovery

This section adds a requirement that the court inquire of the defendant on the record about whether the defendant understands their right to discovery and the right to waive it.

A subdivision 2 has been added relating to waiver of discovery in CPL article 440 cases.

Judiciary Law 216(5)

This provision requires the chief administrative judge of the courts to collect data and report annually on Article 245 of the CPL, including information about resources needed for implementation, cases where discovery obligations are not met, and more. This shall be released publicly.