Common Questions (and Pointers) About the 2020 Reforms:

Provided by The Legal Aid Society of New York City

This Is Not A Comprehensive Summary of the New Laws – It's A List of Some Points to Consider.

Some Points About Motions:

1. **Be Sure to Withdraw All Discovery "Demands" (and Bill Requests) From Pre-2020 Omnibus Motions After the Court Rules on the Motion:** Since discovery is now automatic under 245.10, be sure *not* to file omnibus motions that include discovery "demands." As for omnibus motions filed before 2020, be sure to withdraw the discovery "demands" on the record at the time that the court rules on the motion (or, if the court has already ruled, do it as soon as possible after January 1st). Otherwise, the DA could try to argue that the "demand" continued to be pending even after the court decided the motion, and that created excludable time under 30.30(4)(a). An unanswered Bill of Particulars request could pose the same problem. (Do *not* withdraw *Vilardi*/*Brady* "specific requests" since we do not think the same argument could be made for them.)

2. **There Are New Omnibus Motion Templates on LASnet:** Some of the statutory changes alter the contents of omnibus motions. So we should not use old motions, and should switch to the updated motion templates on LASnet's Criminal Page under "Motions and Forms."

3. **DAs May Now Require Motions In All Cases (Not Agree to Hearings on Consent) – So We Should Brush Up on "*Mendoza* Allegations":** Because the new reforms put teeth into the 30.30 dismissal sanction, DAs are taking advantage of the 30.30(4)(a) "motion" exclusion by refusing to consent to suppression hearings. Two key consequences will be that (1.) we will probably see more *denials* of hearings on the papers; and (2.) since we will receive far more discovery early in the case, our factual allegations must be more precise and address disclosed information that pertains to the search/seizure under People v. Mendoza, 82 N.Y.2d 415 (1993). To brush up on the rules for moving for *Mapp* and *Dunaway* hearings, read the discussion in Schoeffel/ Mitchell's *Suppression Hearings* treatise on LASnet (2019 version, pp. 87-102).

4. **The 45-Day Period for Motions Is Extended If the "Written List" of Potentially Suppressible Property Is Disclosed After the Motion Period Begins:** There's an automatic extension of the 45-day period for filing motions if the written list of potentially suppressible objects required by 245.20(1)(m) is disclosed after arraignment on the indictment/information. The defense gets 45 days from *receipt* of the list. See 255.20(1). If the DA discloses it on or before arraignment on an indictment/information, there's no extension; and if there are no suppressible objects, there's no extension. It's important to keep in mind that this written list of suppressible property under (1)(m) is *different from* the DA's duty to disclose and let the defense inspect *the actual items* of "tangible property" in the case under (1)(o). The same extension applies where the DA

discloses search warrant information under (1)(n). Where DAs make such a disclosure, the 45 days begins to run when the warrant materials are disclosed.

5. **The 45-Day Period for Motions Otherwise Begins at Arraignment on an Information or Arraignment on an Indictment:** Apart from the new extension for (1)(m) and (1)(n) materials (and an existing extension for late 710.30 notice and eavesdropping warrants), the 45 days for motions begins to run at arraignment on either an information or indictment (Supreme Court Arraignment). There is no general extension for discovery compliance. There is also no requirement that DAs state "ready for trial" prior to the running of the 45 days. The DA's filing of a Certificate of Compliance neither triggers nor extends the 45-day period. Courts continue to have discretion to extend or toll the motions period under CPL 255.20, but to do so they could require a consent adjournment under 30.30(4)(b).

6. **Courts Cannot Shorten the 45-Day Period or Require that the Defendant Accept a Motion Schedule:** CPL 255.20 only requires that the defense serve motions within 45-days of arraignment. Judges do not have discretion to *shorten* that period, under Matter of Veloz v. Rothwax, 65 N.Y.2d 902 (1985). The statute does not require the defense to notify the court in advance of serving motions, and it does not allow for preclusion of motions if we fail to do so. Nor does any statute create a 30.30 exclusion that automatically runs from arraignment on an information/indictment until service of motions. Thus, the defense may opt to "wait for discovery" following arraignment on the information or indictment, with the caveat that it must still follow the timetables set forth in 255.20 for serving motions.

7. **If Police Violate the Statute Requiring Appearance Tickets In Lieu of Arrests, Fruits Can Be Suppressible on Statutory (and Constitutional) Grounds:** Under CPL 150.20(1), police officers *must* issue an Appearance Ticket instead of making a custodial arrest in many circumstances. If police violate that statute, the defense can seek suppression on *both* statutory *and* constitutional grounds. See generally People v. Gavazzi, 20 N.Y.3d 907, 909 (2012)(ruling that suppression was warranted for violation of a statute where the statute "operates directly to protect and preserve a constitutionally guaranteed right of the citizen"); People v. Greene, 9 N.Y.3d 277, 280 (2007)("Our decisions make clear that a violation of a statute does not, without more, justify suppressing the evidence to which that violation leads. *We have made an exception to this rule only when the principal purpose of a statute is to protect a constitutional right*").

8. **After *Thompson* and *Melamed*, We Should Promptly Supplement/Reargue Motions to Controvert Phone/Social Media/Computer Search Warrants:** This isn't directly related to the reforms – but everyone should consider supplementing/rearguing all motions to controvert cellphone or social media search warrants, based on the highly favorable decisions in People v. Thompson, __ A.D.3d __, 2019 WL 6573187 (1st Dept. 12/5/19)(cellphone search warrant overbroad), and People v. Melamed, __ A.D.3d __, 2019 WL 7160467 (2d Dept. 12/24/19)(computer search warrant overbroad).

Some Points About Records At Court Appearances:

9. **Ask the Judge to Have the DA Specify on the Record That They Have Actually Asked Police to Provide a "Complete Copy of Their Complete Records and Files":** The Legislature now requires all New York state and local law enforcement agencies – "upon request by the prosecution" – to make available to the DA a complete copy of their complete records and files for purposes of discovery compliance. See 245.55(3). We need to ensure that DAs actually *make* this request. So try to get the DA to specify on the record *when* they made the request, or to explain why they haven't done it yet. If the judge is reluctant, stress that it's part of the statute and there's no valid reason *not* to do it.

10. **Consider Asking the Judge to Require A Second *Brady* "Certificate of Compliance" Under 245.35(3):** The Legislature specifically flagged the option that judges can require the DA to file a second "Certificate of Compliance" specifically directed at favorable/ *Brady* information discoverable under 245.20(1)(k), including such information that was *not written down* by police. See 245.35(3). There is no downside in asking judges on the record to require it – the Legislature put it in the statute because it's good policy.

Some Points About Requests Made to the DA:

11. **DAs Now Must Answer Our Questions About Information In the Case:** The first paragraph of 245.20(1) requires disclosure of all "*information*" about the subject matter of the case. This means that the DA's duty is not limited to tangible property or documents but is broader. It also means that DAs and police cannot avoid disclosure obligations *merely by not writing things down*. So if defense counsel asks the DA a factual question about case-related matters known to law enforcement, the DA must answer. For example, in a "constructive possession" case involving a gun found in premises occupied by multiple people, defense counsel could ask the DA to specify what evidence they have that shows that the client had "dominion and control." Etc.

12. **Before Possible *Gissendanner* Motions, Consider Requesting the DA's Examination of the Officer's Personnel File Under 50(a)(4) to Report If It Contains Anything – Since DAs Must Provide All "Information" Under 245.20(1)&(1)(k):** Police personnel records confidential under Civil Rights Law 50(a) are not treated as *automatically* within the DA's "control" for discovery, and still need to be sought by defense subpoena or motion for a court order. But DAs have always been allowed to look into an officer's personnel file without making a motion, under 50(a)(4). Since under 245.20(1) DAs now have the duty to provide "*all . . . information* that relates to the subject matter of the case" – including favorable impeachment information under 245.20(1)(k)(iv) – we could ask the DA (or ask the judge to order the DA) to look in the file and report back on whether there is any basis to make a *Gissendanner* motion. See also 245.20(2)(requiring the DA's "diligent, good faith effort to ascertain" discoverable information not within the DA's possession or control); 245.20(7)("presumption in favor of disclosure"); Civil Rights Law §50(a)(4)("The provisions of this section shall not

apply to any district attorney or his assistants . . . a grand jury, or any agency of government which requires the records . . . in the furtherance of their official functions").

13. **Note the DA's Duty to Designate Exhibits It Will Offer In Its "Case-In-Chief" – and the DA's Separate Duty to Designate ALL Recordings It Will Offer (Including for Rebuttal or Impeachment) – A Distinction That Matters for Rikers Recordings:** The DA has an obligation to designate which "tangible property" (exhibits) it intends to introduce "in its case-in-chief" – but this designation can be delayed until the time of trial without making a motion, if the DA has acted with due diligence but not formed an intention to offer the exhibit. See 245.20(1)(o). Under a separate provision, the DA also has an obligation to designate which electronic recordings it intends to introduce *for any purpose* – not limited to recordings offered in the "case-in-chief," and including recordings that would be used on *rebuttal* or *to impeach*. There is also no statutory timing extension in this provision. See 245.20(1)(g). Especially in cases with highly voluminous amounts of the client's recorded Rikers calls, defense counsel can bring this distinction to the DA's attention to try to learn before trial which of the client's recorded calls the DA would offer *only to impeach*. Otherwise, we may not learn that in advance.

Some Points About Pre-Grand Jury Discovery:

14. **File Cross-Grand Jury Notice and "*Schedule*" the Defendant's Testimony If You Want All of the Defendant's Statements Earlier Than "15 Days":** If a felony complaint is pending, the DA now must provide all of the defendant's statements to law enforcement 48 hours before the "scheduled" time for the defendant's grand jury testimony. See 245.10(1)(c), 190.50(5)(a). Apparently this provision applies only if a time has been "*scheduled*" for the defendant to testify – so we must serve cross-grand jury notice and arrange for the testimony. DAs may ultimately decide to just disclose the statements rather than actually insisting on "scheduling" times. In any event, there is no penalty for withdrawing cross-grand jury notice if the client ultimately opts not to testify.

15. **The Right to the Defendant's Statements 48 Hours Before Grand Jury Testimony Does Not Extend to *Surveillance Recordings* of the Incident (Without Statements):** Obviously it would be extremely useful to review important surveillance footage before deciding whether the defendant will testify at the grand jury – but the statutory provision extends only to the defendant's *statements*. See 245.10(1)(c).

Some Points About Speedy Trial / 30.30:

16. **The DA's Pre-2020 "Ready" Statements Will Become Invalid on January 1st:** At 12:01 a.m. on January 1st, the DA's prior statements/certificates of "readiness" will become invalid going forward unless the DA has provided all discovery and a "Certificate of Compliance." See 245.50(3); 30.30(5). Whether or not a pre-2020 "ready" statement was valid for time calculations prior to January 1st will have to be

litigated in a 30.30 motion. We may have arguments to challenge them as illusory under *Brown*/*Sibblies* based on what we learn in discovery, but it will be a fact-specific determination and in theory it's possible that a pre-2020 "ready" statement was valid and stopped the clock.

17. **Challenge Off-Calendar "Ready" Statements At the Next Court Appearance:** Judges now must evaluate the DA's "ready" statements on the record. See 30.30(5). But that may not happen with Off-Calendar certificates of readiness unless we raise a challenge at the next court appearance. Part of our challenges to "ready" statements should be to try to identify possible missing discovery materials not covered by a protective order, since compliance with 245.20(1) and a proper "Certificate of Compliance" are now required for readiness. See 245.50(3); 30.30(5).

18. **The DA's "Certificate of Compliance" Is Invalid Until ALL 245.20(1) Materials Are Turned Over – the DA Cannot Rely On the "Continuing Duty":** The statute specifies that the Certificate of Compliance "shall state" that the DA "has disclosed and made available *all known* material and information subject to discovery." See 245.50(1). Although "supplemental" certificates are allowed by 245.50(1), these are proper only when additional discovery is provided "pursuant to section 245.60" – which in turn applies where the DA "*learns of* additional material or information which it would have been under a duty to disclose . . . had it known of it at the time of a previous discovery obligation or discovery order." Article 245, therefore, does not contemplate filing a "Certificate of Compliance" when the DA already *knows of* additional materials but has not yet turned them over at the time a certificate is filed – such as expert witness reports, non-transcribed grand jury minutes, etc.

19. **Remember the Fundamental 30.30 Rule That An Applicable 30.30(4) Exclusion Stops the Clock *Even If the DA Has Not Yet Stated "Ready"*:** Often this key point did not matter as much in practice in the past, since DAs routinely stated "ready" at the start of the case and all calculations were post-readiness. Now that discovery compliance is needed for a "ready" statement, more cases will be in the "pre-readiness" posture – and therefore 30.30(4) exclusions (*e.g.*, for consent, motions, bench warrants, etc.) will become much more important and will be litigated more often.

20. **Ask That the Next Adjournment After the Conversion Ruling or Supreme Court Arraignment Be For "Discovery Compliance" (Not "For Motions"):** Upon arraignment on an indictment or information, judges usually ask defense lawyers if they want a motion schedule – which will be excludable time under 30.30(4)(a). The only other option offered by the court is typically to waive motions and adjourn for trial. Now, because discovery under Article 245 is automatic and does not require filing "demands," a new option would be to *adjourn for discovery compliance* if discovery is still incomplete. This is reasonable since the defense might not even *want* to file motions depending on what it learns in discovery. Some new discovery provisions also involve materials that affect *which motions* the defense could file [*see* 245.20(1)(m)&(n)] – a change from prior law. But note that the CPL 255.20 motion clock still controls, albeit

there are new statutory extensions. Please review the further discussion of this important issue in Schoeffel/Mitchell's "*CPL 245 'Discovery'*" Guide, pp. 85-86.

21. **To Avoid Stopping the 30.30 Clock, Try to Make *Oral* (Not Written) Applications About Things Like Protective Orders, Etc.:** When litigating discovery-related issues such as protective orders under 245.70, generally it will be better *not* to do it in writing (in cases where 30.30 applies). Filing written discovery motions stops the 30.30 clock under 30.30(4)(a), but orally arguing the issues does not. On the other hand, certain discovery issues must be raised by written motions (*e.g.*, motions under 245.30 for access to premises; discretionary discovery; etc.) – and please be aware that there are now template motions for these on LASnet's Criminal Page under "Motions and Forms" / "Discovery."

22. **It Is Critical to File "Reply" 30.30 Motions:** When filing a 30.30 motion that challenges the validity of the DA's "ready" statement or the applicability of a 30.30 exclusion, it's extremely important to submit a *reply affirmation* that addresses the DA's responsive papers. It's the only sure way to preserve the issues for appeal. See People v. Allard, 28 N.Y.3d 41 (2016).

23. **In 30.30 Motions, Preserve the Issue that "*Green* Time" – Post-Decision, Post-Hearing, or Post-Discovery Adjournment – Is Chargeable:** In recent decades, lower courts have used 30.30(4)(a) to exclude not only the period from the filing of motions until the day the motion is decided (which is squarely within the statute), but also a full adjournment of whatever "reasonable" length *after the decision* on motions or *after* the completion of discovery. Appellate Division cases have allowed these so-called "*Green* exclusions" following virtually *any* kind of motion practice, including when no hearings were ordered, or after the hearing issue itself was decided. The Court of Appeals has never approved this practice and People v. Green, 90 A.D.2d 705 (1st Dept. 1982), does not comport with the statute. *Green* itself merely declared that a 10-day adjournment was "reasonable" and did not specify the outer limits of such exclusions. See e.g., People v. Jaswinder, 165 Misc.2d 371 (Crim Ct., N.Y. Co. 1995); People v. Simons, 14 Misc.3d 1239(A)(Crim Ct., N.Y. Co. 2007)(finding only 14 days of a post-decision adjournment to be excludable under *Green*). So, always preserve the issue in 30.30 motions. Rely on Court of Appeals decisions whose analysis undercuts the "*Green*" exclusion theory. See People v. Wells, 24 N.Y.3d 971 (2014); People v. Collins, 82 N.Y.2d 177 (1993); People v. Cortes, 80 N.Y.2d 201 (1992); People v. Correa, 77 N.Y.2d 930 (1991).

24. **Denial of A 30.30 Motion Can Now Be Appealed After A Guilty Plea (and Despite A Waiver of Appeal) – So Be Sure to File Notice of Appeal:** The Legislature has changed the law to allow appeals from the denial of a 30.30 dismissal motion despite a guilty plea. See 30.30(6). There is also a strong argument that 30.30 dismissal issues *cannot be subject to a valid waiver* of the right to appeal. Defense counsel should, therefore, file Notice of Appeal in all plea cases where a 30.30 dismissal motion was decided and lost.

25. **30.30 Applies to Traffic Infractions Now – But There Are Ambiguities:** The legislative drafting of the provision that applies 30.30 to traffic infractions is unclear, as discussed in Schoeffel/Mitchell's "*CPL 245 'Discovery'*" Guide, pp. 153-54. One possibility is described in the McKinney's Practice Commentary, which differentiates between *stand-alone* traffic infractions and those *charged alongside other offenses*, and opines that 30.30 applies only in the latter situation. But we should argue in our dismissal motions (as applicable) that 30.30 applies in both situations, and that the court should apply a 30-day time limit for stand-alone traffic infractions to effectuate the legislative intent. We should also raise a 30.20/constitutional argument, and be sure to cite the many lower-court decisions that have dismissed traffic infractions on constitutional grounds.

Some Points About Office Policies and Record-Keeping:

26. **If the DA Gives You Hard Copies of Discovery Materials or of a Certificate of Compliance, Be Sure They Get Into the File – and Best Practice Is to Digitize Them:** We need to keep complete copies of *all* of the DA's discovery materials on our server in the event of future litigation or post-conviction proceedings, and we also have to systematically keep track of the DA's Certificates of Compliance (which trigger our reciprocal discovery obligations). Whenever you receive paper discovery, be careful not to put it somewhere where you or others may not be able to find it later. *Everything must go into the file* – and a best practice is to digitize all documents. Also, if you receive discovery by email, or an emailed link to the DA's online discovery site and our Discovery Paralegal is not cc'd, ask the DA to include the Paralegal so she can access it.

27. **Do Not Register With the DA's Proposed "Portal" for Contacting Witnesses (WitCom or a Verizon Service):** The Legal Aid Society will not consent to or participate in the testing and use of a witness portal app, or any other technology that fails to provide defense counsel with adequate contact information for witness as mandated by 245.20 (1)(c). Attorneys and staff should *not* register with WitCom or a Verizon service. There is a template motion to compel the disclosure of witness contact information available on LASnet's Criminal Page under "Motions and Forms" / "Discovery."

28. **It Is Legal Aid Policy Not to Waive The Time Periods of Discovery Except When It Is In the Best Interest of the Client In A Particular Case – and This Includes Refusing to Waive Discovery Before Consideration Of or Acceptance Into Treatment or Diversion Courts:** It is unlawful for the DA to condition making a plea offer to a crime on waiver of discovery rights. See 245.25(2); see also 245.75. Legal Aid Society attorneys should not agree to waive all rights to discovery. But, in a particular case where it is in the client's best interest, counsel may consider *delaying or tolling* discovery for a set period (but not waiving all discovery). This policy applies to discovery waivers, not to 30.30 or 180.80 waivers.

29. **Judges Should Not Require *Written Waivers* of Discovery at Pleas or Other Dispositions – and It Is Legal Aid Policy That Counsel Not Sign Them and Advise Clients Not to Sign Them:** In connection with guilty pleas or other dispositions, some judges may demand that defense counsel and the client both sign a *written* "waiver of discovery." Such waivers are not authorized by law; are not part of a bargained-for plea or pre-plea disposition; and may hinder the attorney-client relationship. These judges appear to be acting based on misinterpretation of 245.75, which requires written waivers in a very different and narrow situation. Counsel can explain (as necessary) that 245.75 pertains only to the rare scenario where the defendant is *going to trial* but does not want to *provide reciprocal discovery* to the DA (aside from having to still give alibi or psychiatric notices), and thus gives up discovery from the DA at the start of the case. It is based on a New Jersey statute, and the legislative history confirms that. See N.J. CT. R. 3:13-3(b). Thus, the requirement of a written waiver has no applicability at all to guilty pleas entered at the defendant's behest when the DA has not completed discovery. Under the provision that actually applies in this situation – 245.25 – the Legislature specifically stated that the defendant "may waive his or her [discovery] rights" and did *not* require that it be done in writing. Moreover, the written waiver may create conflict between the lawyer and client, and may result in delays that cause clients to lose a desired plea. Thus, Legal Aid Society attorneys should not agree to sign such waivers and should advise clients not to do so. On the other hand, note that courts do have the ability to inquire orally at a plea proceeding into the plea's voluntary nature, which can include asking about waiver of discovery and other pre-trial or trial rights.

30. **Be Aware That DAs Are Prohibited From Requiring A Waiver of *Discovery* In Exchange for A Plea Offer to A Crime – But They Are Not Explicitly Barred From Requiring Waiver of *30.30 and 180.80 Rights* In Exchange For A Plea Offer:** Because DAs and judges may raise this point, counsel should be aware that there is no explicit prohibition in 245.25 against DAs requiring the defense to waive 30.30 or 180.80 rights in exchange for making a plea offer. The statute specifically prohibits requiring a waiver of 245.20(1) *scope-of-discovery* rights in exchange for making a plea offer, but it does not specifically prohibit requiring a waiver of 245.10(1) *timing-of-discovery* rights. If DAs try to implement a policy of *requiring* 30.30 and timing-of-discovery waivers in all cases as a condition for a plea offer, the defense bar should collectively oppose such a measure; and there is also an argument that it would violate the new 30.30(4)(b), which states that judges may grant continuances consented to by the defense only if the "postponement is in the interest of justice, taking into account the public interest in the prompt dispositions of criminal charges." Such policies delay dispositions.

31. **It Is Also Legal Aid Policy That Counsel Not Sign Court Forms Compelling *Client Contact Information*, and Advise Clients Not to Sign Them:** Some judges may demand that defense counsel and the client both complete and sign a form, UCS 517, that records client contact information to be used for notification of court appearances. The new laws do not create an obligation for the accused to provide such information or to acknowledge and sign a form to be kept in a public court file. See CPL 510.43. The form also is not part of a bargained-for plea or pre-plea disposition in which the client gains a benefit. Thus, Legal Aid attorneys should not agree to sign such forms and

should advise clients not to do so. On the other hand, where it will have no detrimental impact on the client in the case or in collateral matters, counsel may confer with the client about it and enter a preferred contact method and contact information (ensuring this is consistent with such information previously given by or on behalf of the client).

32. <u>It Is Legal Aid Policy That Counsel Not Sign Forms *Reciting "Parker Warnings"* (*i.e.*, "Failure to Appear" Consequences), and Advise Clients Not to Sign Them</u>: Some judges may demand that defense counsel and the client both sign or initial a form that lists the "*Parker* Warnings." The form may also include a warning that a warrant can issue for failure to appear. This is part of an effort to lay a basis for the court to find a voluntary waiver of the right to presence, if the client later fails to appear at trial or another proceeding. (Note that the court would also have to take *other* steps as well before proceeding without the defendant, as discussed in Schoeffel/Mitchell's memo on LASnet "Trial Misc. – Absent Defendant.") There is no legal authority that requires the lawyer or the defendant to sign such a form; doing so may be detrimental to the client and may create a conflict of interest; and the form may undermine the 2020 reforms that limit the issuance of warrants in various respects. <u>See</u> CPL 510.50(2). Thus, Legal Aid attorneys should not agree to sign such forms and should advise clients not to do so. On the other hand, note that courts can still *orally* give *Parker* warnings to clients.

<u>Some Points About Discovery From the Defense:</u>

33. <u>Always Remember That Defense Discovery Is Limited to Witnesses and Items That We *Intend to Introduce*</u>: The defense's discovery is limited to 8 categories of items and information that it "*intends to introduce*" (and this key restriction has a constitutional basis). That means that the defense is free to review recordings or consult experts (etc.) without risk that any *incriminating* evidence or *adverse* opinions would be turned over to the DA. Also note that *statements of the defendant* are never discoverable. <u>See</u> 245.65.

34. <u>The Statute Explicitly Carves Out *Statements of A Defense Witness* Called Solely to Impeach; But There Is No Explicit Carve-Out For *Surveillance Footage* Used to Impeach</u>: If the defense intends to call witnesses only for impeachment, we need not disclose their names, addresses, birth dates or written or recorded statements until the time of trial under an explicit exception in the statute. But this carve-out does not include *surveillance recordings* that the defense "intends to introduce" at trial. They must be turned over on the regular time-frame of 30 days after the DA's "Certificate of Compliance." <u>See</u> 245.20(4). Of course, if we genuinely have not formed an intention to introduce the recording, then it is not discoverable unless and until we decide to introduce it. Even under the former statute, we've always had to negotiate the risk of preclusion in these situations if the judge *disbelieves* our argument that we did not intend to introduce it until we heard the trial testimony (*e.g.*, because the video cuts both ways; we expected the officer to tell the truth; we genuinely formed the intent to introduce at trial; etc.). That problem doesn't change under the new laws, and these are often hard decisions. If a judge tries to preclude, always argue that at most a *lesser* sanction is required due to the constitutional rights to present a defense and to confrontation (as specified in 245.80[2]).

35. **Normally *Different Investigators* Should Interview the DA's Witnesses – and Do "Substantive" Investigations (Like Taking Photos, Downloading Video, Etc.):** The names and case-related statements of defense witnesses who will be called *solely to impeach* are not discoverable before trial. But the names and case-related statements of other intended defense witnesses (other than the defendant) are discoverable 30 days after the DA's "Certificate of Compliance." See 245.20(4). This key distinction has major implications for defense investigations – as discussed in detail in Schoeffel/Mitchell's "*CPL 245 'Discovery'*" Guide, pp. 73-75.

36. **Investigators Who May Testify Probably Should Not Make Notes That They Watched or Obtained Surveillance Footage – That Presents Risks:** If a defense investigator is called to testify, all of his or her written and recorded statements about the subject matter of the case must be disclosed. The *timing* of disclosure depends on whether the witness is called solely to impeach – but the witness's notes must be turned over at some point (unless there's a protective order). See 245.20(4). If an investigator *makes notes* about surveillance footage that he or she has watched or obtained, the notes will be disclosed and that creates the risks that – even if the defense did *not* "intend to introduce" the recording, and thus did not disclose it – the DA could try to either (1.) cross-examine the investigator *about what she saw* (we would argue it's an improper end-run around the statute); or (2.) subpoena the recording (we also have arguments against that). It's better to avoid these risks by not making any notes about recordings.

37. **Remember to "*Dawsonize*" Exculpatory Defense Witnesses:** Police and DAs will try to *interview* defense witnesses far more than in the past since the defense must disclose its intended witnesses. See 245.20(4). We can't give legal advice to a witness (other than the advice that they may secure counsel). But it is proper to inform defense witnesses that they should understand that, by speaking with defense counsel, they have now brought the information forward to the proper person who can use it in the appropriate manner, and that they should not feel any obligation to speak about it further with anyone else, such as the police or the DA. For an exculpatory defense witness, so-called "*Dawsonizing*" the witness in this manner (and documenting it for the file) is highly important if done in a timely fashion – because it serves to avoid impeachment problems at trial. It effectively preempts the DA from meeting the requirements for an impeachment that attempts to show that the defense witness who gives exculpatory testimony at trial *failed to come forward earlier* to disclose that information to the authorities. See People v. Dawson, 50 N.Y.2d 311, fn.4 (1980). Letters are on LASnet.

38. **In Appropriate Cases, Consider Litigating the "*Wardius*" Issue Involving Disclosure of Defense Witnesses' Addresses and Birth Dates:** The new discovery law requires the defense to disclose its intended witnesses' "birth dates" and "addresses" to the DA. See 245.20(4)(a). But the DA does not have to disclose the "birth dates" of witnesses and only needs to disclose "adequate contact information" (not "physical addresses"). See 245.20(1)(c). In appropriate cases – where it matters and we want to litigate it – we can attempt to withhold our witnesses' birth dates and addresses and argue that this imbalanced rule violates due process under Wardius v. Oregon, 412 U.S. 470 (1973). Alternatively, if it would assist the defense's investigations, we could argue that there is a

constitutional mandate for the DA to disclose an intended witness's "birth date" or potentially a "physical address."

39. ***Defense Counsel*** **Can Write the "Statement of Facts/Opinions/Grounds" of An Intended Expert's Testimony – Which Is Usually Preferable to** ***the Expert*** **Doing It:** A key part of the expanded discovery obligations for expert witnesses is that the parties must now disclose either the expert's report, or, if no report exists, a "written statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." See 245.20(1)(f)&(4). It's very important to recognize that the *defense lawyer* can write the "statement of facts/opinions/grounds" – it does not have to be done by the expert – and that will usually be preferable since counsel can determine the proper scope of information required. More generally, remember to specifically discuss with experts – at the outset of the consultation – the consequences of note-taking, emails and writings about substantive matters (as opposed to mere scheduling issues).

40. **When Writing Investigation Requests on LawManager, Remember the "Work Product" Rules That Distinguish Between "Opinions" and "Summarized Statements" of Intended Defense Witnesses (Other Than the Defendant):** Under the "work product" discovery exception in 245.65, the defense does *not* have to disclose any records that are "only" the "legal research, opinions, theories or conclusions" of the attorney or the attorney's agents. But the defense *does* have to disclose "summarized" statements of intended defense witnesses (other than the defendant). Counsel should be cognizant of this point when writing Investigation Requests on LawManager, since often we explain the case and direct the investigator's efforts and the source for our instructions sometimes is a potential *defense witness* (other than the client). We need to be careful when drafting these requests when they summarize information from our witnesses.

41. **It Would Be Wise to Maintain A Running List of Potential Discovery Materials From the Defense:** Obviously the defense has far broader and earlier discovery obligations under 245.20(4), and we must file a "Certificate of Compliance" 30 days after receiving the DA's Certificate. It would be a good idea for attorneys to keep a running list of possible discoverable items, so we won't have to scramble at the last moment to find/remember everything that is discoverable. A template of the defense "Certificate of Compliance" is on LASnet's Criminal Page under "Motions and Forms" / "Discovery."

Some Points About Protective Orders:

42. **If the Court Grants A "Counsel-Only" Protective Order, Ask the Judge to Explain It to the Client On the Record:** There will be increased use of "counsel-only" protective orders under the new statute – and in an effort to avoid resulting problems in attorney-client relationships, the Legislature has required that judges "shall" explain to the defendant on the record in these situations that counsel is not allowed to disclose the restricted materials *based on the court's ruling*. See 245.70(1). We should affirmatively ask for these instructions to help avert clients' misunderstandings.

43. **Our Right to *Notice* of the DA's Application for A Protective Order, and/or That A Protective Order Was Granted:** Judges can and will hear applications for protective orders *ex parte* (for "good cause"). See 245.70(1). But there are questions as to the DA's obligation to give us *advanced notice* of an application for a protective order, and/or *notice* that a protective order was granted. Both 245.10(1)(a) and 245.20(5) address notice to the opposing party of non-disclosure of discoverable information – but the timing of that notice is not explicit (*e.g.*, is it prior to the application to the court; when the court rules; or at the time of the discovery obligation?). Nevertheless, we should argue that the court at minimum has the obligation to give the defense notice if a protective order is granted that involves a witness's name, contact information, or statements. Otherwise, if the court does not tell us (or direct the DA to give us notice), it would negate our right to seek "expedited review" of the ruling by a single appellate justice as provided under 245.70(6). That provision requires the defense to seek review within 2 business days. Another option could be that, if we receive *late* notice of the protective order, we could seek to restart the clock for expedited review by making an application to *reargue* the order.

44. **Consider Moving to Reconsider Protective Orders Issued *Before* 2020 – Especially In Alleged Gang Cases Where We Do Not Believe There Is Actually Gang Affiliation:** The Legislature has revised and altered several of the statutory factors that qualify as "good cause" for a protective order under 245.70(4). In particular, if the case involves alleged "gang affiliation," it now specifically requires a "*substantiated* showing of affiliation with a criminal enterprise" – a change made based on concerns that courts were sometimes too lightly accepting claims of gang involvement. Whether or not to make this application is case-specific. But if you want to obtain "expedited review" by a single appellate justice of a pre-2020 protective order under 245.70(6), you will need to seek to reargue the protective order and then make the application for expedited review within 2 business days of the denial or the new ruling.

45. **Consider Seeking Protective Orders For *Defense Discovery* – Especially Based On Danger to Our Witnesses:** Carefully consider the need for a protective order for *reciprocal discovery* materials. For instance, in an alleged gang case, there may be a danger that the DA will share intended defense witnesses' information with intended prosecution witnesses who have gang affiliations. If the judge has already rejected a proposed "counsel-only" compromise with respect to certain disclosures from the DA [*see* 245.70(1)], it is hard for the judge to reject the same argument raised by the defense. A protective order allowing the defense to withhold discovery may also be appropriate if materials could reveal an uncharged crime, and in many other situations.

46. **With Respect to the New Right to "Expedited Review" of Certain Protective Order Rulings, We Should Always Use That Terminology – *Not* Call It An "Appeal":** Either party can seek expedited review by a single appellate justice of the granting or denial of a protective order application "relating to the name, address, contact information or statements of a person." See 245.70(6). An article in the *New York Law Journal* on 8/16/19 suggested this provision could violate the state constitution, which

places limits on appeals and the duties of appellate judges. We disagree with that idea – and the provision looks nothing like an appeal (*e.g.*, it can be *ex parte*; there can be no briefs or written decision; it is not limited to information in the record; etc.). We suspect that neither the DAs nor the defense would raise the challenge because both of us can benefit from the provision – but a court could raise it on its own, so we should always use the statutory term "Expedited Review" (not "Appeal") because it underscores our position that this is *not* an appeal. (A memo of law is being prepared to defend the constitutionality of the provision, if the issue arises.)

Some Points About Discovery Violations:

47. **Arguing for Sanctions When Surveillance Footage Is Lost – and Either (1.) It Was A *Police* Camera Yet Law Enforcement Did Not Watch or Obtain It; or (2.) It Was A *Non-Police* Camera and Police Watched But Did Not Download It:** The arresting officer or lead detective has a new statutory duty to notify the DA "in writing" about all known police recordings in the case, and if they are not disclosed due to any failure to comply the court "shall" impose an appropriate remedy/sanction. See 245.55(3). We can try to argue that this provision also requires sanctions for erased recordings from police-operated cameras that law enforcement personnel *knew existed* but did *not watch or download*. Moreover, for non-police cameras, because the introductory paragraph of 245.20(1) requires disclosure of all known "*information*" possessed by law enforcement, there is also an argument that police officers who *watched* surveillance recordings on non-police cameras but needlessly did not download or copy them cannot disclose all of the *images* they saw – and thus a sanction/remedy is required if the defendant can show "prejudice" from the "loss." See 245.80(1)(b). See also People v. Handy, 20 N.Y.3d 663 (2013)(requiring an "adverse inference" charge for lost footage from *state-run* cameras when the defense has made a diligent request for them). To facilitate making these arguments, it would be a good idea to ask our investigators to *find* such cameras and then to lay a basis *on cross* for the sanction request.

48. **When 245.20(1) Discovery Is Late, Investigate the Possible Impact Immediately:** Under 245.80, our ability to get sanctions against the DA for discovery violations hinges on our showing of prejudice. Where discovery is provided late, it's important for the defense to consider what steps *might have been taken* had the discovery been provided earlier, and then to investigate promptly. Was there video that was destroyed? Were witnesses unable to remember things clearly? But if such investigation is delayed until right before trial, it will be very hard to show that the delay specifically caused the loss. That's why quick action is necessary.

49. **There Is A Right to "Reasonable Time to Prepare and Respond" to Late Discovery, Even If the Defense Cannot Show "Prejudice":** Don't forget that the statute now specifies that the court "*shall*" provide "reasonable time to prepare and respond" to untimely discovery – even if the party *cannot* make a showing of "prejudice" to obtain a remedy/sanction. See 245.80(1)(a). We should remind judges of this rule, as needed.

50. **Don't Forget the Statutory Right to Reopen the Hearing If A "*Testifying*" Witness's Statement Is Disclosed During Trial:** There is a statutory right to a reopened suppression hearing upon request when the statement of a "*testifying*" DA's witness that should have been disclosed before a pre-trial hearing is disclosed for the first time before the close of evidence during trial. See 245.80(3). It's important to remember to make that application, or the issue will be waived on appeal. Also note that the court can grant a new or reopened suppression hearing based on *other* kinds of discovery violations as well – including failure to provide *Brady*/*Geaslen* "favorable" information prior to the hearing (or the time for seeking a hearing) – and that issue also must be timely raised or it will be deemed waived on appeal.

Some Points About Subpoenas:

51. **Do *Not* Serve the DA With Subpoenas on Governmental Agencies Anymore:** The Legislature has dropped the former requirements that defense subpoenas on government agencies had to be served on the DA, and that they required 24-hour advanced notice. Now the defense only needs a court-indorsed subpoena for governmental agencies, with at least 3 days for the agency to comply (unless the court shortens the compliance period in an "emergency"). The DA is not notified unless the agency voluntarily informs the DA. See 610.20(3). Remember *not* to use former/outdated subpoena forms! Also, until the new practice has become routine, it's wise to discuss the issue with paralegals or others involved in drafting or serving subpoenas.

52. **Consider Whether Subpoenas on the NYPD or on the DA Would Be Useful – the Claims That This Is An Improper "End Run" Around Discovery Are Now Gone:** By establishing a new statutory standard for enforcement of subpoenas, the Legislature has eliminated the common argument made by NYPD lawyers and DAs that the discovery statute limits the defense's subpoena power (*i.e.*, that such subpoenas are an improper "end run around discovery"). See 610.20(3). For discussion, see Schoeffel/Mitchell's "*CPL 245 'Discovery'*" Guide, pp. 148-50. So, if we are concerned that key evidence may be lost due to automatic-erasure time periods – or that police or DAs may not download and preserve certain recordings, as required by 245.55(3) – we have the right to subpoena them.

53. **In Appearance Ticket or DAT Cases, There Is A Strong Argument That We Have Authority to Issue Subpoenas Where We Enter the Case *Prior to Arraignment*:** Far more of our clients will receive Appearance Tickets and will not be arraigned on an accusatory instrument until 20 days or more after the alleged incident. If we are able to enter the case before arraignment (*i.e.*, if the courts will give us the information beforehand), there's a good argument that we can act immediately to issue subpoenas to preserve and obtain material evidence such as surveillance footage. For discussion, see Schoeffel/Mitchell's "*CPL 245 'Discovery'*" Guide, pp. 151-52.

- John Schoeffel, Peter Mitchell, and Chris Pisciotta (1/2/20).