PROPOSED LEGISLATION FOR REFORMING CRIMINAL DISCOVERY IN NEW YORK STATE

Submitted by New York State Bar Association (A-7292/S-6848)

I. Repeal of Criminal Procedure Law Article 240 and Enactment of New Article 245.

II. Amendments to Other Criminal Procedure Law Provisions Relating to Discovery and Access to Information, and to Penal Law Crimes Against a Victim or Witness.

Article 245

(Replacing Current Article 240, Which Is Repealed)

Discovery

245.10. Availability of protective orders

1. Any discovery subject to protective order. Upon a showing of good cause by either party, the court may at any time order that discovery or inspection of any kind of material or information under this article be denied, restricted, conditioned or deferred, or make such other order as is appropriate. The court may impose as a condition on discovery to a defendant that the material or information to be discovered be available only to counsel for the defendant; or, alternatively, that counsel for the defendant, and persons employed by the attorney or appointed by the court to assist in the preparation of a defendant's case, may not disclose physical copies of the discoverable documents to a defendant or to anyone else, provided that the prosecution affords the defendant access to inspect redacted copies of the discoverable documents at a supervised location that provides regular and reasonable hours for such access, such as a prosecutor's office, police station, facility of detention, or court.

The court may permit a party seeking or opposing a protective order under this section, or another affected person, to submit papers or testify on the record ex parte or in camera. Any such papers and a transcript of such testimony may be sealed and shall constitute a part of the record on appeal. This section does not alter the allocation of the burden of proof with regard to matters at issue, including privilege.

> **COMMENT:** This provision follows the uniform practice nationwide that either party can seek an order from the court restricting or delaying any kind of discovery (as needed) under a broad and flexible "good cause" standard. When appropriate, discovery can be restricted to only the defense *lawyer* – not to the defendant or others – as under current C.P.L. §240.50(2).
>
> The provision also highlights the availability of an alternative procedure, used in other States when a protective order is issued, under which physical copies of discovery documents can be turned over to only the defense lawyer, not to the defendant or others, when the defendant is given supervised access to inspect (not obtain copies of) redacted versions of those documents. This partial restriction on a defendant's access addresses concerns that in certain kinds of cases some defendants might improperly post or publicly circulate physical copies of discovery in an effort to undermine law enforcement or deter potential witnesses. But it pragmatically balances that concern against the defendant's need to have basic information about the case to make informed decisions and assist counsel.

2. Modification of time periods for discovery. Upon motion of a party in an individual case, the court may alter the time periods for discovery imposed by this article upon a showing of good cause.

> **COMMENT:** Courts may grant categorical extensions of the ordinary periods for turning over all discovery (in addition to issuing piecemeal orders to delay disclosure of individual items) in a given case. This builds useful flexibility into the discovery system. It would be appropriate in certain complex or multi-defendant cases when providing early discovery is impracticable, and in other unusual situations.

3. Showing of good cause. Good cause under this section may include constitutional rights or limitations; danger to the integrity of physical evidence; a substantial risk of physical harm, intimidation, economic reprisal, bribery or unjustified annoyance or embarrassment to any person; a substantial risk of an adverse effect upon the legitimate needs of law enforcement, including the protection of the confidentiality of informants; danger to any person stemming from factors such as a defendant's gang affiliation, prior history of interfering with witnesses, or threats or intimidating actions directed at potential witnesses; or other similar factors that also outweigh the usefulness of the discovery.

> **COMMENT:** Going beyond the factors listed in the current definition of "good cause" for judges to issue protective orders in C.P.L. §240.50(1), this provision also specifically highlights that a defendant's *gang affiliations* or any known *misconduct directed at witnesses* justify granting a protective order. This makes it even more clear that judges have robust leeway to issue orders to let the prosecution withhold information as needed. In fact, it specifies that protective orders are available when *any factor* outweighs the discovery's usefulness.

This same approach to regulating discovery to ensure safety of witnesses and effective law enforcement has been used successfully for decades in other States. Quite simply, judges can be relied on to grant protective orders when needed (and expedited review of these rulings is provided for in subdivision 5). The bill also gives prosecutors two alternative options for withholding witnesses' contact information from the defendant without making *any* showing, as set forth in §§245.20(3) and (4).

4. Successor counsel or pro se defendant. In cases in which the attorney-client relationship is terminated prior to trial for any reason, any material or information disclosed subject to a condition that it be available only to counsel for the defendant, or limited in dissemination by protective order or otherwise, shall be provided only to successor counsel for the defendant under the same condition(s) or be returned to the prosecution, unless the court rules otherwise for good cause shown or the prosecutor gives written consent. Any work product derived from such material or information shall not be provided to the defendant, unless the court rules otherwise or the prosecutor gives written consent. If the defendant is acting as his or her own attorney, the court may regulate the time, place and manner of access to any discoverable material or information; and it may as appropriate appoint persons to assist the defendant in the investigation or preparation of the case. Upon motion or application of a defendant acting as his or her own attorney, the court may at any time modify or vacate any condition or restriction relating to access to discoverable material or information, for good cause shown.

COMMENT: Special challenges can arise when defendants exercise their constitutional right to self-representation. For instance, when a protective order has allowed only the defense lawyer to obtain certain discovery and the defendant later decides to proceed pro se (perhaps only as a temporary step in the pre-trial period), some have argued that the protective order could be compromised.

This provision specifies that discovery material limited by the court, and any "work product" that indirectly could divulge the restricted information, may not be turned over to the newly pro se defendant without authorization. At the same time, it helps to ensure that all pro se defendants have a fair chance to argue for greater access to discovery materials or for modification of a protective order, and it gives judges flexible authority to manage the challenges posed in these cases.

5. Expedited review of adverse ruling. (a) A party that has unsuccessfully sought, or unsuccessfully opposed the granting of, a protective order under this section relating to the name, address, contact information or statements of a person may obtain expedited review of that ruling by an individual justice of the intermediate appellate court to which an appeal from a judgment of conviction in the case would be taken.

(b) Such review shall be sought within two business days of the adverse or partially adverse ruling, by order to show cause filed with the intermediate appellate court. The order to show cause shall in addition be timely served on the lower court and on the opposing party, and shall be accompanied by a sworn affirmation stating in good faith (i) that the ruling affects substantial interests, and (ii) that diligent efforts to reach an accommodation of the underlying discovery dispute with opposing counsel failed or that no accommodation was feasible; except that service on the opposing party, and a statement regarding efforts to reach an accommodation, are unnecessary where the opposing party was not made aware of the

application for a protective order and good cause exists for omitting service of the order to show cause on the opposing party. The lower court's order subject to review shall be stayed until the appellate justice renders decision.

(c) The assignment of the individual appellate justice, and the mode of and procedure for the review, are determined by rules of the individual appellate courts. The appellate justice may consider any relevant and reliable information bearing on the issue, and may dispense with written briefs other than supporting and opposing materials previously submitted to the lower court. The appellate justice may dispense with the issuance of a written opinion in rendering his or her decision, and when practicable shall render decision expeditiously. Such review and decision shall not affect the right of a defendant, in a subsequent appeal from a judgment of conviction, to claim as error the ruling reviewed.

> **COMMENT:** This new procedure for expedited and streamlined review of certain protective order applications adds an important "safety valve" in the discovery system. It will help ensure appropriate rulings and the safety of witnesses.
>
> The provision permits either party to present arguments before a single appellate justice – under flexible procedures to be set by the appellate court – when either the lower court denies a protective order and the prosecutor believes that a witness's safety could be jeopardized, or the lower court grants a protective order and the defense believes that the information is critical and there is an inadequate basis for withholding it from defense counsel. But the provision carefully minimizes burdens on the resources of appellate courts, by requiring certification that the contested issue is substantial and that diligent efforts at negotiated resolution have failed, and by allowing each appellate court to establish the mode and procedure for its review proceedings (*e.g.*, a court could permit telephone conferences with the appellate justice when appropriate, an informal hearing outside the courtroom, etc.).

6. Compliance with protective order. Any protective order issued under this article is a mandate of the court for purposes of the offense of criminal contempt in subdivision three of section 215.50 of the penal law.

> **COMMENT:** By specifying that criminal prosecution is an available consequence for any violation of a protective order, this provision will deter the possibility of misconduct by a lawyer or defense personnel in the discovery process.

245.20. Phase one discovery obligation of prosecution

1. Timing of phase one discovery for the defendant. The prosecution shall perform its phase one discovery obligations under this section within fifteen calendar days after the defendant's arraignment on an indictment, superior court information, prosecutor's information, information, or simplified information. Portions of materials claimed to be non-discoverable may be withheld pending a determination and ruling of the court under section 245.10 of this article; but the defendant shall be notified in writing that information has not been disclosed under a particular subsection, and the discoverable portions of such materials shall be disclosed if practicable. When the discoverable materials are exceptionally voluminous, the time period in this subdivision may be stayed by up to an additional forty-

five calendar days without need for a motion pursuant to subdivision two of section 245.10 of this article. When the prosecutor is engaged in an ongoing trial or does not report to work due to a vacation or similar reason during one or more days of the time period in this subdivision, that time period may be stayed by an additional seven calendar days without need for a motion pursuant to subdivision two of section 245.10 of this article.

> **COMMENT:** Providing basic discovery early in the case is extremely important to enable the defense lawyer to undertake viable investigations, to provide the accused with informed advice about plea offers, and to submit motions to suppress evidence in an orderly way. At the same time, discovery obligations must be achievable in practice by prosecutors and police. This provision allocates discovery into two carefully calibrated and achievable stages. Disclosure of certain items that are actually possessed by or readily accessible to prosecutors early in the case (such as electronically stored police reports) is required 15 days after arraignment on an indictment or information, without need for filing boilerplate "demands."
>
> This 15-day period does *not* begin from the initial court appearance after the arrest – it starts from the date of the defendant's arraignment on an *indictment* or a misdemeanor *information*. In many or most cases – and nearly always when there are considerable discovery materials – that means it will not begin until several days, and typically several weeks or months, after the arrest. Prosecutors also automatically receive a one-week extension if the prosecutor was on vacation or on trial during this period. Many States in fact use a similar period for more extensive discovery this (*e.g.*, Florida; New Jersey; etc.). While there are administrative costs in copying more documents, there will be great corresponding savings because *far more guilty pleas will be entered earlier in the case* when defendants receive a prompt opportunity to see the strength of the evidence, and the reasons for accepting plea bargains. The second discovery stage occurs after 90 days, as set forth in §245.30(1).

2. Phase one discovery for the defendant. The prosecution shall disclose to the defendant as part of phase one discovery, and permit the defendant to discover, inspect, copy or photograph, each of the following items and information when it relates to the subject matter of the case:

(a) All electronically stored police reports and law enforcement agency reports that are in the possession, custody or control of the prosecution, or persons under the prosecution's direction and control.

> **COMMENT:** This provision draws a pragmatic distinction between electronically stored police reports which are readily accessible to prosecutors earlier in the case and other less "formal" police documents (such as police memo book notes or vouchers) which may be harder to obtain. Police reports are a primary source of information for the defense to conduct an intelligent investigation, to plan an appropriate trial strategy, and to confirm the strength of the prosecution's evidence in considering a guilty plea.

(b) All written or recorded statements, and the substance of all oral statements, made by the defendant or a co-defendant to a public servant engaged in law enforcement activity or to a person then acting under his or her direction or in cooperation with him or her, other than statements made in the course of the criminal transaction.

COMMENT: Maintains the substance of current C.P.L. §240.20(1)(a).

(c) A list of all tangible objects obtained from, or allegedly possessed by, the defendant or a co-defendant. The list shall include a designation by the prosecutor as to which objects were physically or constructively possessed by the defendant and were recovered during a search or seizure by a public servant or an agent thereof, and which tangible objects were recovered by a public servant or an agent thereof after allegedly being abandoned by the defendant. If the prosecution intends to prove the defendant's possession of any tangible objects by means of a statutory presumption of possession, it shall designate that intention as to each such object. If reasonably practicable, it shall also designate the location from which each tangible object was recovered.

COMMENT: This provision maintains the substance of current C.P.L. §240.20(1)(f). It adds that the prosecutor should specify certain information pertinent to seeking suppression hearings. Notably, the courts have established that the issue of whether a defendant intentionally and voluntarily "abandoned" property prior to the arrest may be a determination for the court at a suppression hearing, so the defense lawyer needs to learn of such potentially suppressible property as well. In another part of the bill, a change is made to C.P.L. §255.20(1) – which sets a 45-day limitation to file motions – to provide that where the list of potentially suppressible tangible objects, or search warrants, are not timely provided, the defense may file its motions within 45 days of their disclosure (as that statute currently provides with respect to disclosure of eavesdropping warrants, and notices under C.P.L. §710.30, when they are provided after the date of arraignment).

(d) The names of, and addresses or adequate alternative contact information for, all persons other than law enforcement personnel whom the prosecutor knows to have evidence or information relevant to any offense charged or to a potential defense thereto, including a designation by the prosecutor as to which of those persons may be called as witnesses. Information under this subsection relating to any person may be withheld, and redacted from discovery materials, as provided in subdivision three or four of this section. Information under this subsection relating to a confidential informant may be withheld, and redacted from discovery materials, without need for a motion pursuant to section 245.10 of this article; but the defendant shall be notified in writing that such information has not been disclosed, unless the court rules otherwise for good cause shown.

COMMENT: All of the several dozen States with modern discovery rules have recognized that it is critical that both the defense and the prosecution receive enough information through discovery to locate and investigate witnesses as necessary (barring circumstances that justify a protective order). This means exchanging their names and addresses. Giving prosecutors additional flexibility beyond the rules of other States, this provision allows disclosure of *adequate alternative contact information* in lieu of addresses. In addition it lets the prosecution always withhold names and contact information of any confidential informants. And the bill gives prosecutors two alternative options for withholding witnesses' contact information from the defendant without making *any* showing, as set forth in §§245.20(3) and (4).

Based on recognition that potential witnesses for the defendant who are known to the prosecution should not in effect be hidden from the defense, it requires disclosure of "all persons" who the prosecutor knows have evidence or information relevant to a charged offense or to a potential defense, not just those witnesses the prosecutor intends to call. This standard, which is currently used in several States (*e.g.*, New Jersey; Florida; Minnesota; etc.), is designed to minimize possible "gamesmanship" in the discovery process, such as the prosecutor's selectively designating only certain witnesses as "intended" so as to prevent the defendant from obtaining written or recorded statements made by other witnesses. Equally important, it is designed to help to avoid constitutional violations, since it requires disclosure of potentially exculpatory ("*Brady*") witnesses.

(e) The name and work affiliation of all law enforcement personnel whom the prosecutor knows to have evidence or information relevant to any offense charged or to a potential defense thereto. Information under this subsection relating to undercover personnel may be withheld, and redacted from discovery materials, without need for a motion pursuant to section 245.10 of this article; but the defendant shall be notified in writing that such information has not been disclosed, unless the court rules otherwise for good cause shown.

COMMENT: As under current C.P.L. §240.50(4), the personal residence address of police and other law enforcement personnel is not discoverable. In addition the prosecution may withhold identifying information for any undercover personnel.

(f) When written and recorded statements are in the possession of the prosecution (not solely in the possession of police or another law enforcement agency), all statements, written or recorded or summarized in any writing or recording, made by persons who have evidence or information relevant to any offense charged or to a potential defense thereto. Statements solely in the possession of police or another law enforcement agency at the time of phase one discovery are discoverable under paragraph (c) of subdivision two of section 245.30 of this article.

COMMENT: Under current New York law, written and recorded statements of witnesses need not be turned over by the prosecution until after the jury has already been selected and sworn at a trial (the so-called "*Rosario* rule"). This highly restrictive discovery standard is inadequate. By that point in the case, guilty plea offers have been rejected based upon mere guesswork about the possible evidence; and it is usually impossible for the defense lawyer to undertake useful investigations of the new information during trial. Surprise evidence like this can readily produce unreliable verdicts and wrongful convictions.

As in all States with modern discovery rules, this provision requires early disclosure of this most critical type of discovery. Attorney "work product" is not discoverable, as set forth in §245.80. This provision requires early disclosure of statements that are actually in the prosecution's possession, but does not require prosecutors affirmatively to gather them from the police.

(g) When it is known to the prosecution (not solely known to police or another law enforcement agency), all evidence and information, whether or not admissible or

recorded in tangible form, that tends to (i) exculpate the defendant; (ii) mitigate the defendant's culpability as to a charged offense; (iii) support a potential defense to a charged offense; (iv) provide a basis for a motion to suppress evidence on constitutional grounds; (v) significantly impugn the credibility of an important prosecution witness, informant or evidence; or (vi) mitigate punishment. Favorable evidence and information known solely to police or another law enforcement agency at the time of phase one discovery is discoverable under paragraph (d) of subdivision two of section 245.30 of this article. The prosecution shall disclose evidence or information under this subsection expeditiously upon its receipt by the prosecutor, notwithstanding the otherwise-applicable time periods for disclosure in this article.

> **COMMENT:** New York's current discovery statute gives litigants and courts absolutely no guidance about the obligations for disclosing evidence and information that is exculpatory or favorable to the defendant. This omission has likely contributed to the recurring serious problems of suppression or belated disclosure of exculpatory information by some prosecutors in New York. This provision fixes that problem, providing guidance from established case law. Early disclosure of all favorable information will give the defense lawyer an opportunity to undertake intelligent investigations that can develop exculpatory leads and preserve exculpatory evidence. This reduces the possibility that innocent people will be convicted. The provision also mirrors a key ethical obligation that currently applies to prosecutors in New York. *See* N.Y.S. Rules of Professional Conduct, Rule 3.8(b) ("Special Responsibilities of Prosecutors and Other Government Lawyers").
>
> Notably, with respect to information that tends to *impeach* a prosecution witness's credibility, a different standard is used at each of the two stages of discovery. In the initial phase, the prosecutor must disclose known impeachment facts that would "significantly" undercut an "important" witness. In the second phase, the prosecutor must disclose all impeachment facts known to prosecutors and police. It would be impracticable to expect prosecutors with heavy case loads to contact all of the police officers – and to identify all of the plethora of impeachment information that could exist – within days of arraignment. Nevertheless, while prosecutors should be given a reasonable time to speak with police and to identify impeachment information, the constitutional *Brady* obligation requires them to turn over known exculpatory evidence promptly upon its receipt. Thus, the provision instructs that, where a prosecutor learns about exculpatory evidence after the initial discovery stage but prior to the second stage, she should disclose it expeditiously and should not wait to do so until the later discovery deadline. In sum, prosecutors will have adequate time in which to ask police about favorable information – but on learning it, they should provide it to the defense.

(h) Whether a search warrant has been executed and all documents relating thereto, including but not limited to the warrant, the warrant application, supporting affidavits, a police inventory of all property seized under the warrant, and a transcript of all testimony or other oral communications offered in support of the warrant application.

> **COMMENT:** New York's discovery statute currently does not explicitly require the prosecution to disclose search warrants (although C.P.L. §700.70 requires the prosecution to disclose eavesdropping warrants, and in practice courts regularly order that search warrants be turned over upon defense motion). To avoid delays and allow

for informed pre-trial litigation of search warrants, this provision gives the defense timely access to search warrants and related documents. As with any other discovery, the prosecution may seek a protective order to withhold these materials whenever appropriate. A police inventory of property already is required by C.P.L. §690.50(4).

(i) The approximate date, time and place of the offense or offenses charged and of the defendant's arrest.

COMMENT: Maintains current C.P.L. §240.20(1)(i).

3. Prosecutor's option to restrict disclosure of contact information by arranging witness interview. Within the prosecutor's discretion, the address, telephone number or similar contact information for any person whose name is disclosed pursuant to paragraph (d) of subdivision two of this section may be withheld, and redacted from other discovery materials, without need for a motion pursuant to section 245.10 of this article, if the prosecutor makes the person available to counsel for the defendant for an in-person interview within the time period specified in subdivision one of this section. In lieu of an in-person interview, a telephone interview may be used where arranging an in-person interview is not reasonably practicable or the person declines to participate in an in-person interview; but law enforcement personnel shall not expressly or implicitly encourage a person to decline to participate in an in-person interview. This subdivision does not create any right for the defendant personally to attend or to participate in such an interview. The prosecution shall provide counsel for the defendant with the other materials discoverable under subdivision two of this section prior to such an interview.

COMMENT: Beyond letting prosecutors seek a protective order for any item or information at any point, this provision gives the prosecution an alternative option for withholding a witness's address and contact information even without applying for a protective order. If the prosecutor makes the person available to only counsel for the defendant for a timely in-person interview, disclosure of the person's contact information to the defense is not required. Nothing in this provision would *require* a witness to attend and participate in an interview with defense counsel involuntarily.

In situations where arranging an in-person interview is not practicable or the witness declines to participate in an in-person interview, a telephone interview is a permissible alternative. But the provision directs law enforcement personnel not to encourage a witness, either expressly or implicitly, to decline an in-person interview. This is because face-to-face interviews are clearly preferable, given that phone interviews often are more perfunctory and it is harder for the lawyer to evaluate the witness's demeanor and to have a useful discussion over the phone. Prosecutors and police are not limited to only phone interviews, and the lawyers for both parties ordinarily should have the chance to meet the witnesses given that witnesses "belong" to neither side. Excluding the defendant from such an interview is no different than the routine practice of defense lawyers and investigators interviewing witnesses in the field without the defendant's participation. The lawyer then can relate her impressions of the witness's demeanor and the substance of the interview to the defendant.

4. Prosecutor's option to restrict disclosure of contact information in violent felony cases. (a) Where the defendant is charged with a violent felony offense, within the prosecutor's discretion the address, telephone number or similar contact information for any person whose name is disclosed pursuant to paragraph (d) of subdivision two of this section may be withheld, and redacted from other discovery materials, without need for a motion pursuant to section 245.10 of this article; except that a list of the addresses or adequate alternative contact information for persons whose information has been withheld or redacted shall be separately provided to counsel for the defendant in a document clearly marked as confidential, unless a protective order pursuant to section 245.10 of this article is issued by the court for good cause shown. In addition discovery of this information may be conditioned on the defendant's personal consent, given in open court in the presence of the court at arraignment or at another time, to the use of the confidentiality procedure set forth in this subdivision. The court shall specifically caution the defendant, in the colloquy about use of this procedure, concerning the offenses of tampering with a witness and intimidating a victim or witness in article two hundred fifteen of the penal law. Nothing in this subdivision precludes the court from issuing a different protective order pursuant to section 245.10 of this article for good cause shown.

(b) When the confidentiality procedure set forth in this subdivision is used, the following requirements apply:

(i) Except as provided in subparagraph (ii) of this paragraph, counsel for the defendant may not disclose or permit to be disclosed to a defendant or to anyone else the list described in this subdivision or its contents, unless specifically permitted to do so by the court for good cause shown or unless the prosecutor gives written consent. The court may allow a party seeking or opposing such permission, or another affected person, to submit papers or testify on the record ex parte or in camera. Any such papers and a transcript of such testimony may be sealed and shall constitute a part of the record on appeal. The obligation to maintain confidentiality described in this subdivision is a mandate of the court for purposes of the offense of criminal contempt in subdivision three of section 215.50 of the penal law.

(ii) Notwithstanding subparagraph (i) of this paragraph, counsel for the defendant may disclose or permit to be disclosed the listed contact information for a potential witness to persons employed by the attorney or to persons appointed by the court to assist in the investigation or preparation of a defendant's case if that disclosure is required for that investigation or preparation. Persons provided this information by the attorney shall be informed by the attorney that further dissemination of the information, except as provided by this subdivision, is prohibited. Within the prosecutor's discretion, discovery of the listed contact information may be conditioned on service of a written statement by counsel for the defendant of the names of any employees who may be provided information pursuant to this subsection, and describing any known prior connections between those employees and all defendants in the case.

(iii) If the defendant is acting as his or her own attorney, in lieu of use of the confidentiality procedure set forth in this subdivision, the court shall consider any

arguments of the defendant relating to a need for contact information for a potential witness, and any countervailing arguments of the prosecution or another affected person. Where such arguments are made, the court shall then order as to each such potential witness, as appropriate, that adequate contact information either be provided or be withheld, or provide for contact with the potential witness only through persons appointed by the court to assist in the investigation or preparation of the defendant's case, or impose any other reasonable restrictions on disclosure. Expedited review of a ruling under this subparagraph may be sought as provided in subdivision five of section 245.10 of this article.

(iv) If counsel for the defendant learns about any intentional or unintentional breach of the confidentiality procedure set forth in this subdivision that was attributable to conduct of a lawyer for any defendant in the case, or conduct of a person employed by a lawyer in the case or appointed by the court, he or she shall expeditiously notify the court or the prosecutor.

> **COMMENT:** In cases involving a violent felony charge, this provision gives the prosecution another option to withhold witnesses' addresses or contact information from the defendant even without applying for a protective order. The prosecutor may disclose a confidential list containing adequate contact information for the witnesses that is available only to defense counsel and named defense personnel, who are prohibited from disclosing it to the defendant or anyone else. Prosecutors can also make disclosure of any contact information contingent upon the defendant's personal agreement in advance to the use of the attorney-only confidentiality procedure, after on-the-record warnings by the court against the offenses of witness tampering and intimidating a victim or witness. The defense lawyer has an affirmative duty to expeditiously report any known breach of the procedure.
>
> The main advantage of this "confidential document" procedure for the prosecution is that the prosecutor does not have to make any specific showing of good cause to obtain a protective order. For the defense, this procedure recognizes that the defendant himself – in contrast to the defense lawyer or investigator – does not in general have a legitimate need to learn witnesses' *addresses* and *phone numbers* (unlike their names, which often are essential to comprehending and discussing a case). In contrast, the defense lawyer in many cases is unable to investigate or to develop defenses until she is provided with contact information for finding and/or investigating the witnesses.

245.30. Phase two discovery obligation of prosecution

1. Timing of phase two discovery for the defendant. The prosecution shall perform its phase two discovery obligations under this section within ninety calendar days after the defendant's arraignment on an indictment, superior court information, prosecutor's information, information, or simplified information. Portions of materials claimed to be non-discoverable may be withheld pending a determination and ruling of the court under section 245.10 of this article; but the defendant shall be notified in writing that information has not been disclosed under a particular subsection, and the discoverable portions of such materials shall be disclosed if practicable. When the discoverable materials are exceptionally

voluminous, the time period in this subdivision may be stayed by up to an additional thirty calendar days without need for a motion pursuant to subdivision two of section 245.10 of this article.

> **COMMENT:** "Phase two" of the prosecution's discovery occurs within 90 days after arraignment on an indictment or information (*i.e.*, the time period does *not* begin from the initial court appearance after the arrest). This gives the prosecution reasonable time to communicate with police and to obtain and turn over the discoverable materials. It also provides considerable time to negotiate with the defense regarding the possibility of a guilty plea that would spare having to assemble and provide the full discovery. When the discovery is voluminous, the prosecutor automatically has 120 days to disclose it.

2. Phase two discovery for the defendant. The prosecution shall disclose to the defendant as part of phase two discovery, and permit the defendant to discover, inspect, copy or photograph, each of the following items and information when it relates to the subject matter of the case and is in the possession, custody or control of the prosecution or persons under the prosecution's direction or control:

(a) All transcripts of the testimony of a person who has testified before a grand jury, including but not limited to the defendant or a co-defendant. If in the exercise of reasonable diligence, and due to the limited availability of transcription resources, a transcript is unavailable for disclosure within the time period specified in subdivision one of this section, that period may be stayed by up to an additional forty-five calendar days without need for a motion pursuant to section 245.10 of this article; except that the disclosure shall be made as soon as practicable and not later than thirty calendar days before a scheduled trial date, unless an order is obtained pursuant to section 245.10 of this article. When the court is required to review grand jury transcripts, the prosecution shall disclose them to the court expeditiously upon their receipt by the prosecutor, notwithstanding the otherwise-applicable time periods for disclosure in this article.

> **COMMENT:** Transcripts of the grand jury testimony of the prosecution's witnesses are currently discoverable at the time of trial, and transcripts of defendants' and co-defendants' grand jury testimony are discoverable before trial. This provision makes all such transcripts available before trial. Because delays in producing these transcripts are common, this provision allows the discovery period to be automatically deferred by up to an additional 45 days. Yet because prompt review of grand jury minutes by the court in deciding motions is desirable, the rule directs prosecutors to disclose such minutes to the court expeditiously upon their receipt.
>
> Notably, this provision will reduce an unfair form of gamesmanship that commonly occurs under the current discovery rules. Specifically, some prosecutors regularly manipulate the current discovery requirements by choosing when possible to call *different witnesses* to key events in the case at the grand jury and then at trial. By doing so, the prosecutor is able to permanently withhold from the defense the grand jury testimony of the witnesses who were not called to testify a second time at the later proceedings, and thus he or she seeks to minimize impeachments of the

prosecution's witnesses. This tactic can subvert the truth-finding process and it unfairly limits defense investigations.

(b) All police reports and law enforcement agency reports, including those not electronically stored. Reports previously disclosed pursuant to paragraph (a) of subdivision two of section 245.20 of this article need not be disclosed again.

COMMENT: This provision completes the discovery of police reports begun in "phase one" discovery, and requires disclosure of less "formal" police documents – such as police memo book notes or vouchers – that were not electronically stored and were not in the prosecution's possession early in the case.

(c) All statements, written or recorded or summarized in any writing or recording, made by persons who have evidence or information relevant to any offense charged or to a potential defense thereto, including those that were solely in the possession of police or another law enforcement agency at the time of phase one discovery. Statements previously disclosed pursuant to paragraph (f) of subdivision two of section 245.20 of this article need not be disclosed again.

COMMENT: This provision completes the discovery of written and recorded witness statements begun in "phase one" discovery, and requires disclosure of materials that were not yet in the prosecution's possession early in the case.

(d) All evidence and information, including that which was solely known to police or other law enforcement agencies at the time of phase one discovery, and whether or not it is admissible or recorded in tangible form, that tends to (i) exculpate the defendant; (ii) mitigate the defendant's culpability as to a charged offense; (iii) support a potential defense to a charged offense; (iv) provide a basis for a motion to suppress evidence on constitutional grounds; (v) impugn the credibility of a prosecution witness, informant or evidence; or (vi) mitigate punishment. Evidence or information previously disclosed pursuant to paragraph (g) of subdivision two of section 245.20 of this article need not be disclosed again. The prosecution shall disclose evidence or information under this subsection expeditiously upon its receipt by the prosecutor, notwithstanding the otherwise-applicable time periods for disclosure in this article.

COMMENT: This provision completes the discovery of favorable evidence and information begun in "phase one" discovery, and includes such materials that were known solely to police or another law enforcement agency early in the case. To comport with the constitutional "*Brady*" standards, it specifies that the prosecutor must turn over the information to the defense promptly upon learning it.

(e) A summary of all promises, rewards and inducements made to persons who may be called as witnesses, as well as requests for consideration by persons who may be called as witnesses, and copies of all documents relevant to a promise, reward or inducement.

COMMENT: Because promises, rewards, or inducements made to a testifying witness often are highly significant to the jury's evaluation of the witness's possible

bias, interest or reasons to fabricate, this subdivision separately highlights this category of information in order to ensure scrupulous disclosures and to minimize constitutional "*Brady*" violations. Notably, the reciprocal discovery provision in §245.40(2)(c) requires defendants to disclose any promises, rewards and inducements made to intended defense witnesses as well, and due process requires that all categories of discovery from the defense also must be provided by the prosecution.

(f) All tangible property that the prosecution intends to introduce in its case-in-chief at trial or a pre-trial hearing. Discovery of items under this subsection may be conditioned on service of a demand to produce made by the defendant, if in phase one discovery the prosecution timely served notice on the defendant that a demand to produce items under this subsection would have to be served on the prosecution within thirty days of that notice. If in the exercise of reasonable diligence the prosecutor has not formed an intention within the time period specified in this section that an item under this subsection will be introduced at trial or a pre-trial hearing, that period shall be stayed without need for a motion pursuant to subdivision two of section 245.10 of this article; but the disclosure shall be made as soon as practicable and subject to the continuing duty to disclose in section 245.75 of this article.

COMMENT: There is currently no obligation in New York (unlike in federal cases) for either the prosecution or the defense to provide discovery before trial of all the exhibits they plan to introduce on their cases in chief. This can result in unfair surprise at trial and needless delays. This provision requires such discovery. Notably, it will include certain important types of intended exhibits that are not always discoverable under the current New York discovery statute, such as phone records, computer or email records, business records offered in evidence, etc.

The prosecution may condition discovery of its exhibits on a timely demand to produce them made by the defense. Confirming in advance that the defense has a genuine interest in access to all of the exhibits will prevent wasted efforts in certain cases. Because it may not be practicable for the prosecutor to identify all of the exhibits until close to the time of trial, the provision makes the time frame for these disclosures more flexible without need for court orders.

(g) All tapes or other electronic recordings which the prosecution intends to introduce at trial or a pre-trial hearing.

COMMENT: Maintains the substance of current C.P.L. §240.20(1)(g), and extends it to pre-trial hearings.

(h) All photographs and drawings made or completed by a public servant engaged in law enforcement activity, or which were made by a person whom the prosecutor intends to call as a witness at trial or a pre-trial hearing, or which the prosecution intends to introduce at trial or a pre-trial hearing.

COMMENT: Maintains the substance of current C.P.L. §240.20(1)(d), and extends it to pre-trial hearings.

(i) All photographs, photocopies and reproductions made by or at the direction of law enforcement personnel of any property prior to its release pursuant to section 450.10 of the penal law.

COMMENT: Maintains the substance of current C.P.L. §240.20(1)(e).

(j) All reports and documents concerning physical or mental examinations, or scientific tests or experiments or comparisons, relating to the criminal action or proceeding which were made by or at the request or direction of a public servant engaged in law enforcement activity, or which were made by a person whom the prosecutor intends to call as a witness at trial or a pre-trial hearing, or which the prosecution intends to introduce at trial or a pre-trial hearing.

COMMENT: Maintains the substance of current C.P.L. §240.20(1)(c), and extends it to pre-trial hearings.

(k) Expert opinion evidence, including the name, business address, current curriculum vitae, and a list of publications of each expert witness whom the prosecutor intends to call as a witness at trial or a pre-trial hearing, and all reports prepared by the expert that pertain to the case, or if no report is prepared, 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. This paragraph does not alter or in any way affect the procedures, obligations or rights set forth in section 250.10 of this title. If in the exercise of reasonable diligence this information is unavailable for disclosure within the time period specified in subdivision one of this section, that period shall be stayed without need for a motion pursuant to section 245.10 of this article; except that the disclosure shall be made as soon as practicable and not later than sixty calendar days before a scheduled trial date, unless an order is obtained pursuant to section 245.10 of this article. When the prosecution's expert witness is being called in response to disclosure of an expert witness by the defendant, the court shall alter a scheduled trial date, if necessary, to allow the prosecution thirty calendar days to make the disclosure and the defendant thirty calendar days to prepare and respond to the new materials.

COMMENT: Current New York law provides for minimal discovery of expert witness information from both the prosecution and the defense. But as technical and scientific evidence become increasingly complex and specialized, competent preparation and full and fair cross-examination require that the lawyers receive advanced notice of the substance of experts' testimony.

This provision (like the corresponding rule for discovery from the defense in §245.40[2][f]) significantly broadens such disclosures, by requiring details of the witness's credentials and a summary of the expected testimony in situations where the expert has not prepared a report. This is similar to the discovery rule used in civil cases in New York. Because consulting an expert and obtaining a report or written summary of the prospective testimony normally takes considerable time, the rule makes the time frame for disclosure more flexible without need for court orders.

(l) The results of complete criminal history record checks for all defendants and all persons designated as potential prosecution witnesses pursuant to paragraph (d) of subdivision two of section 245.20 of this article, other than those witnesses who are experts or law enforcement officers.

COMMENT: Under current New York law, prosecutors only must disclose their witnesses' prior criminal histories when they are actually known by the prosecutor to exist, and the prosecutor has no obligation affirmatively to run criminal record searches. Yet many defense lawyers lack access to a database for obtaining this information. Because the current discovery rules also do not require pre-trial disclosure of witness lists, often defense counsel does not even know the witness's identity until the trial is underway and as a result lacks time to research their records. Knowing the criminal history of all defendants (who may testify adversely to each other) also is important for proper representation, but this information is not timely provided in some parts of New York.

Disclosure of this information in advance of trial is very important, so that the defense lawyer will have a reasonable opportunity to gather related documents and materials from underlying public court files and to investigate. The provision does not require fingerprinting of witnesses.

(m) When it is known to the prosecution, the existence of any pending criminal action against all persons designated as potential prosecution witnesses pursuant to paragraph (d) of subdivision two of section 245.20 of this article.

COMMENT: Maintains the substance of current C.P.L. §240.45(1)(c), but requires disclosure in advance of the trial date.

(n) In any prosecution alleging a violation of the vehicle and traffic law, where the defendant is charged by indictment, superior court information, prosecutor's information, information, or simplified information, the most recent record of inspection, calibration and repair of machines and instruments utilized to perform any scientific tests and experiments and the certification certificate, if any, held by the operator of the machine or instrument, and all other disclosures required under this article.

COMMENT: Maintains the substance of current C.P.L. §240.20(1)(k).

(o) In any prosecution alleging a violation of sections 156.05 or 156.10 of the penal law, the time, place and manner such violation occurred.

COMMENT: Maintains the substance of current C.P.L. §240.20(1)(j).

245.40. Reciprocal discovery obligation of the defendant

1. Timing of reciprocal discovery for the prosecution. The defendant shall perform his or her reciprocal discovery obligations under this section within thirty calendar days after being served with the prosecution's certificate of compliance pursuant to subdivision one of section 245.65 of this article. Portions of materials claimed to be non-discoverable may be

withheld pending a determination and ruling of the court under section 245.10 of this article; but the prosecution shall be notified in writing that information has not been disclosed under a particular subsection, and the discoverable portions of such materials shall be disclosed if practicable.

> **COMMENT:** Under current New York law, the prosecution is denied adequate and timely discovery from the defense. In particular, the defendant need not reveal his or her intended witnesses before trial, and the written and recorded statements of defense witnesses need not be turned over until *after* the prosecution has presented its case. This provision requires defendants to provide much greater and earlier discovery. But like the current reciprocal discovery rule in C.P.L. §240.30, expanded discovery from the defense may – because of constitutional protections that apply only to the defendant and place limitations on possible discovery – include only witnesses and items that the defense "intends to introduce" at trial.
>
> Before the defense must produce its discovery, it needs enough time to review and synthesize the prosecution's discovery materials, and to undertake investigations to ascertain which evidence and witnesses it "intends to introduce" at trial. The prosecution has already had the time it needed to build a case against the defendant, before bringing the charges or before indictment. But receipt of the prosecution's discovery typically is the first time the defendant will possess enough information to determine the likely defense witnesses and to begin to prepare a trial strategy. Thus, the provision gives the defense 30 days to complete discovery. Notably, the constitutionality of rules that require discovery from defendants, such as those in this bill, is well established and they are common in other States.

2. Reciprocal discovery for the prosecution. The defendant shall, subject to constitutional limitations, disclose to the prosecution, and permit the prosecution to discover, inspect, copy or photograph, each of the following items and information when it is within the defendant's or counsel for the defendant's possession or control:

(a) The names, known aliases, addresses and birth dates of all persons other than the defendant whom the defendant intends to call as witnesses at trial or a pre-trial hearing. Disclosure of this information for a person whom the defendant intends to call as a witness for the sole purpose of impeaching a prosecution witness is not required until after the prosecution witness has testified.

> **COMMENT:** The defendant's discovery includes providing the names and addresses of all defense witnesses other than the defendant (unlike under current New York law). So that the prosecution can run criminal record checks, it also requires disclosure of the witnesses' known aliases and dates of birth.

(b) All statements, written or recorded or summarized in any writing or recording, made by all persons other than the defendant whom the defendant intends to call as witnesses at trial or a pre-trial hearing; except that disclosure of such statements made by a person whom the defendant intends to call as a witness for the sole purpose of impeaching a prosecution witness is not required until after the prosecution witness has testified.

COMMENT: Unlike the current rule in New York that discovery of defense witnesses' statements occurs *during the trial*, this provision requires the defendant to provide *pre-trial* disclosure of all written and recorded statements of defense witnesses other than the defendant. (The defendant's own statements are not included for constitutional reasons.)

(c) A summary of all promises, rewards and inducements made to persons whom the defendant intends to call as witnesses at trial or a pre-trial hearing, as well as requests for consideration by such persons, and copies of all documents relevant to a promise, reward or inducement.

COMMENT: Unlike under current New York law, the defendant's discovery includes providing the prosecution with a summary of any rewards, promises, and inducements that have been made to the intended defense witnesses, and any related documents.

(d) All tangible property, including but not limited to tapes or other electronic recordings and photographs and drawings, that the defendant intends to introduce in the defendant's case-in-chief at trial or a pre-trial hearing. If in the exercise of reasonable diligence counsel for the defendant has not formed an intention within the time period specified in this section that an item under this subsection will be introduced at trial or a pre-trial hearing, that period shall be stayed without need for a motion pursuant to subdivision two of section 245.10 of this article; but the disclosure shall be made as soon as practicable and subject to the continuing duty to disclose in section 245.75 of this article.

COMMENT: Unlike under current New York law, the defendant's discovery includes *all* intended exhibits (not merely photos, drawings, tapes and electronic recordings). As with the prosecution's obligation set forth in §245.30(2)(f), the provision makes the time frame for these disclosures more flexible without need for court orders.

(e) All reports and documents concerning physical or mental examinations, or scientific tests or experiments or comparisons, which the defendant intends to introduce at trial or a pre-trial hearing, or which were made by a person whom the defendant intends to call as a witness at trial or a pre-trial hearing.

COMMENT: Maintains the substance of current C.P.L. §240.30(1)(a), and extends it to pre-trial hearings.

(f) Intended expert opinion evidence, including the name, business address, current curriculum vitae, and a list of publications of each expert witness whom the defendant intends to call as a witness at trial or a pre-trial hearing, and all reports prepared by the expert that pertain to the case, or if no report is prepared, 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. This paragraph does not alter or in any way affect the procedures, obligations or rights set forth in section 250.10 of this title. If in the exercise of reasonable diligence this information is unavailable for disclosure within the time period specified in subdivision one of this section, that period shall be stayed

without need for a motion pursuant to section 245.10 of this article; except that the disclosure shall be made as soon as practicable and not later than thirty calendar days before a scheduled trial date, unless an order is obtained pursuant to section 245.10 of this article.

COMMENT: The defendant's discovery includes considerably broader and earlier disclosures relating to intended expert witnesses than under current New York law. As with the prosecution's obligation set forth in §245.30(2)(k), the time frame for disclosure is more flexible without need for court orders. The current requirements for the defendant to file written notice when he or she intends to introduce psychiatric evidence are unaffected.

245.45. Disclosure of prior misconduct or criminal acts

1. Use at trial. Not later than fifteen calendar days before a scheduled trial date, the prosecution shall disclose to the defendant a list of all misconduct and criminal acts of the defendant not charged in the indictment, superior court information, prosecutor's information, information, or simplified information, which the prosecution intends to use at trial for purposes of:

(a) Impeaching the credibility of the defendant; or

(b) As substantive proof of any material issue in the case.

2. Notification for what purpose. In addition the prosecution shall designate whether it intends to use each listed act for impeachment and/or as substantive proof.

COMMENT: Under current New York law, there is no statutory requirement to disclose the defendant's prior uncharged misconduct or criminal acts that will be offered on the prosecution's case-in-chief; and such information that will be offered as impeachment evidence need be disclosed only at the time of the trial.

This provision requires pre-trial disclosure of both types of information. But it uses a different timetable than for other discovery, because often a prosecutor will not know until she has begun to prepare for trial which specific bad acts of the defendant will be offered as substantive or impeachment evidence. Providing 15 days of advance notice to defense counsel will help to minimize unfair surprise and afford adequate time to investigate, research, and prepare.

245.50. Non-Testimonial Evidence from the Defendant

1. Availability. After the filing of an accusatory instrument, and subject to constitutional limitations, the court may, upon motion of the prosecution showing probable cause to believe the defendant has committed the crime, a clear indication that relevant material evidence will be found, and that the method used to secure it is safe and reliable, require a defendant to provide non-testimonial evidence, including to:

(a) Appear in a lineup;

(b) Speak for identification by a witness or potential witness;

(c) Be fingerprinted;

(d) Pose for photographs not involving reenactment of an event;

(e) Permit the taking of samples of the defendant's blood, hair, and other materials of the defendant's body that involves no unreasonable intrusion thereof;

(f) Provide specimens of the defendant's handwriting; and

(g) Submit to a reasonable physical or medical inspection of the defendant's body.

2. Limitations. This section shall not be construed to alter or in any way affect the issuance of a similar court order, as may be authorized by law, before the filing of an accusatory instrument, consistent with such rights as the defendant may derive from the state constitution or the United States constitution. This section shall not be construed to alter or in any way affect the administration of a chemical test where otherwise authorized. An order pursuant to this section may be denied, limited or conditioned as provided in section 245.10 of this article.

> **COMMENT:** Maintains the substance of current C.P.L. §240.40(2), while also codifying well-settled case law regarding the foundational showing needed for the prosecution's motions to obtain non-testimonial evidence.

245.55. Court orders for preservation, access, discovery or DNA comparison

1. Order to preserve evidence. At any time, a party may move for a court order to any individual, agency or other entity in possession, custody or control of items which relate to the subject matter of the case or are otherwise relevant, requiring that such items be preserved for a specified period of time. The court shall hear and rule upon such motions expeditiously. The court may modify or vacate such an order upon a showing that preservation of particular evidence will create significant hardship, on condition that the probative value of that evidence is preserved by a specified alternative means.

> **COMMENT:** Either party can move for an expedited court order that will require preservation and non-spoliation of perishable and potentially probative evidence, so that it will remain available for use in the case. This affords additional time and flexibility in which to subpoena or otherwise obtain the materials, with the assurance that the individual or entity in possession of them will not destroy or otherwise dispose of them. In particular it gives the defense lawyer added time within which to comply with the requirement of current New York law that a defense application for a judicial subpoena *duces tecum* to a government agency must be on notice to the subpoenaed governmental agency and to the prosecution. The court has the discretion to grant or deny the motions.

2. Order to grant access to premises. At any time, the defendant may move for a court order to any individual, agency or other entity in possession, custody or control of a crime scene or other premises that relates to the subject matter of the case or is otherwise relevant,

requiring that counsel for the defendant be granted prompt and reasonable access to inspect, photograph or measure that crime scene or those premises, and that the condition of the crime scene or premises remain unchanged in the interim. The court shall hear and rule upon such motions expeditiously. The court may modify or vacate such an order upon a showing that granting access to a particular crime scene or premises will create significant hardship, on condition that the probative value of that location is preserved by a specified alternative means.

> **COMMENT:** New York's discovery statute does not currently include any mechanism for a defense lawyer to obtain prompt access to inspect, photograph, measure, or diagram a private or otherwise restricted crime scene connected to the case. Yet it is basic to constitutionally effective representation that the defense lawyer have visited the crime scene, so as to properly cross-examine and to ensure that the jury will adequately assess any limitations in the witnesses' contentions. A reasonable investigation sometimes may require seeing a location before it is cleaned.
>
> Usually there is no difficulty in obtaining the custodian's permission to perform such investigations, and the police investigators will have already completed their evidence collection at the scene before the defendant was charged. This provision lets a defense lawyer move for an expedited order granting access when permission has been refused. A similar option is available in civil cases in New York, under C.P.L.R. §3120(1)(ii). The court has the discretion to grant or deny the motions. Any affected party may apply for modification or vacatur of such orders, as needed.

3. Discretionary discovery by order of the court. The court in its discretion may, upon a showing by the defendant that the request is reasonable and that the defendant is unable without undue hardship to obtain the substantial equivalent by other means, order the prosecution, or any individual, agency or other entity subject to the jurisdiction of the court, to make available for disclosure to the defendant any material or information which potentially relates to the subject matter of the case and is reasonably likely to be material. A motion under this subdivision must be on notice to any person or entity affected by the order. The court may, upon request of any person or entity affected by the order, modify or vacate the order if compliance would be unreasonable or will create significant hardship. The court may permit a party seeking or opposing a discretionary order of discovery under this subdivision, or another affected person or entity, to submit papers or testify on the record ex parte or in camera. Any such papers and a transcript of such testimony may be sealed and shall constitute a part of the record on appeal.

> **COMMENT:** Discovery in New York currently is strictly limited to only those items listed in the statute and any constitutionally required disclosures. But as in many other States' discovery statutes, judges should also have the authority to permit discovery of items needed for a complete investigation or a fair trial. This "catch-all"-type discovery provision permits the court, within its discretion and based upon an appropriate showing of need, to grant access to potentially important evidence that is not otherwise discoverable. The motion must be on notice to an affected person or entity, and the affected party may apply for modification or vacatur of such an order. Situations where resort to this discovery mechanism would be needed presumably would be rare.

4. DNA comparison order. Where property in the prosecution's possession, custody, or control consists of a deoxyribonucleic acid ("DNA") profile obtained from probative biological material gathered in connection with the investigation or prosecution of the defendant, and the defendant establishes (a) that such profile complies with federal bureau of investigation or state requirements, whichever are applicable and as such requirements are applied to law enforcement agencies seeking a keyboard search or similar comparison, and (b) that the data meets state DNA index system or national DNA index system criteria as such criteria are applied to law enforcement agencies seeking such a keyboard search or similar comparison, the court may – upon motion of a defendant against whom an indictment, superior court information, prosecutor's information, information, or simplified information is pending – order an entity that has access to the combined DNA index system or its successor system to compare such DNA profile against DNA databanks by keyboard searches, or a similar method that does not involve uploading, upon notice to both parties and the entity required to perform the search, upon a showing by the defendant that such a comparison is material to the presentation of his or her defense and that the request is reasonable. For purposes of this paragraph, a "keyboard search" shall mean a search of a DNA profile against the databank in which the profile that is searched is not uploaded to or maintained in the databank.

> **COMMENT:** Maintains the substance of current C.P.L. §240.40(1)(d). The court may order a "keyboard search" in which the DNA profile obtained from case evidence is compared to DNA profiles contained in a DNA databank. This gives the defendant the same opportunity to use DNA evidence that the prosecution has. The defendant need not settle for a non-match between the defendant and the case evidence. The defendant may seek to show that the case evidence matches a previously convicted person who is already in the databank.
>
> The defendant is not required to show that a "match" with another person would be conclusive of the defendant's innocence (if it were, the non-match to the defendant would probably already have led the prosecution to dismiss). Rather, the defendant must show that the comparison is "material" to the presentation of his or her defense and that the request is reasonable.

245.60. Diligent Effort to Ascertain Existence of Material and Information

The prosecutor shall make a diligent, good faith effort to ascertain the existence of material or information discoverable under sections 245.20 or 245.30 of this article and to cause such material or information to be made available for discovery where it exists but is not within the prosecutor's possession, custody or control; provided that the prosecutor shall not be required to obtain by subpoena duces tecum material or information which the defendant may thereby obtain. This provision shall not require the prosecutor to ascertain the existence of witnesses not known to police or another law enforcement agency, or the written or recorded statements thereof, under paragraph (d) of section 245.20 and paragraph (c) of section 245.30 of this article.

> **COMMENT:** This provision maintains the requirements of current C.P.L. §240.20(2), which states: "The prosecutor shall make a diligent, good faith effort to ascertain the existence of demanded property and to cause such property to be made

available for discovery where it exists but is not within the prosecutor's possession, custody or control; provided, that the prosecutor shall not be required to obtain by subpoena duces tecum demanded material which the defendant may thereby obtain."

The bill adapts the language in current C.P.L. §240.20(2) to fit the new statute. It omits the reference to "demanded property," since the bill eliminates discovery "demands." It applies the prosecutor's duty of diligence to both "phases" of the discovery process. But it pragmatically limits the prosecutor's duty by making clear that, despite the broader discovery obligations for witnesses and witness statements that apply under the new statute, prosecutors are not obligated to undertake investigations to ascertain the existence all "relevant" witnesses who may exist (or to obtain their statements) even where those persons are unknown to police. A contrary requirement would be unfeasible and would go well beyond the purpose of this provision, which is simply to ensure reasonable diligence in obtaining and turning over discovery materials.

245.65. Certificates of compliance

1. By the prosecution. When the prosecution has provided the discovery required by sections 245.20 and 245.30 of this article, except for any items or information that are the subject of an order pursuant to section 245.10 of this article, it shall serve upon the defendant and file with the court a certificate of compliance. The certificate shall state that, after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery, the prosecutor has disclosed and made available all known material and information subject to discovery. It shall also identify the items provided. If additional discovery is subsequently provided prior to trial pursuant to section 245.75 of this article, a supplemental certificate shall be served upon the defendant and filed with the court identifying the additional material and information provided. No adverse consequence to the prosecution or the prosecutor shall result from the filing of a certificate of compliance in good faith; but the court may grant a remedy for a discovery violation as provided in section 245.85 of this article.

2. By the defendant. When the defendant has provided all discovery required by section 245.40 of this article, except for any items or information that are the subject of an order pursuant to section 245.10 of this article, counsel for the defendant shall serve upon the prosecution and file with the court a certificate of compliance. The certificate shall state that, after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery, counsel for the defendant has disclosed and made available all known material and information subject to discovery. It shall also identify the items provided. If additional discovery is subsequently provided prior to trial pursuant to section 245.75 of this article, a supplemental certificate shall be served upon the prosecution and filed with the court identifying the additional material and information provided. No adverse consequence to the defendant or counsel for the defendant shall result from the filing of a certificate of compliance in good faith; but the court may grant a remedy for a discovery violation as provided in section 245.85 of this article.

COMMENT: These provisions require both the prosecutor and the defense lawyer to file "certificates of compliance" upon completing their discovery. When additional

items are found and turned over later in the case, the lawyers must then file supplemental certificates of compliance. Importantly, the prosecutor's certificate also serves as the triggering date for the defense's 30-day period to provide reciprocal discovery.

This procedure has been used in Massachusetts. It is designed to help foster compliance and personal responsibility by lawyers in the discovery process, and to create a reviewable record of disclosures and thereby reduce discovery litigation. The certificates are a tool to formalize responsibilities, avert disputes, and document stages in the case – they are emphatically not a basis for litigation, or for threatening penalties against or demeaning any lawyers acting in good faith. This provision explicitly makes that clear, by specifying that "no adverse consequence" to a lawyer or to a party can result from the filing of a certificate of compliance in good faith.

245.70. Court ordered procedures to facilitate compliance

To facilitate compliance with this article, and to reduce or streamline litigation of any disputes about discovery, the court in its discretion may issue an order:

1. Requiring that the prosecutor and counsel for the defendant diligently confer to attempt to reach an accommodation as to any dispute concerning discovery prior to seeking a ruling from the court;

2. Requiring a discovery compliance conference at a specified time prior to trial between the prosecutor, counsel for all defendants, and the court or its staff;

3. Requiring the prosecution to file an additional certificate of compliance that states that the prosecutor and/or an appropriate named agent has made reasonable inquiries of all police officers and other persons who have participated in investigating or evaluating the case about the existence of any favorable evidence or information within paragraph (d) of subdivision two of section 245.30 of this article, including such evidence or information that was not reduced to writing or otherwise memorialized or preserved as evidence, and has disclosed any such information to the defendant; and/or

4. Requiring other measures or proceedings designed to carry into effect the goals of this article.

COMMENT: This provision authorizes (but does not require) judges to use reasonable procedures that can improve compliance with discovery obligations and enhance court efficiency, such as pre-trial discovery conferences.

245.75. Continuing duty to disclose

If either the prosecution or the defendant subsequently learns of additional material or information which it would have been under a duty to disclose pursuant to any provisions of this article at the time of a previous discovery obligation or discovery order, it shall expeditiously notify the other party and disclose the additional material or information as required for initial discovery under this article. This provision also requires expeditious

disclosure by the prosecution of material or information that became relevant to the case or discoverable based upon reciprocal discovery received from the defendant pursuant to subdivision section 245.40 of this article.

COMMENT: Maintains the substance of current C.P.L. §240.60.

245.80. Work product

This article does not authorize discovery by a party of those portions of records, reports, correspondence, memoranda, or internal documents of the adverse party which are only the legal research, opinions, theories or conclusions of the adverse party or its attorney or the attorney's agents, or of statements of a defendant, written or recorded or summarized in any writing or recording, made to the attorney for the defendant or the attorney's agents.

COMMENT: This provision puts into statute form the definition of "attorneys' work product" that currently exists in C.P.L. §240.10(2) – *i.e.*, "property to the extent that it contains the opinions, theories or conclusions of the prosecutor, defense counsel or members of their legal staffs." The provision also includes opinions, theories or conclusions of *agents* such as investigators, since as the Supreme Court has recognized: "attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial," and "[i]t is therefore necessary that the [work product] doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself." *See United States v. Nobles*, 422 U.S. 225, 238-39 (1975); *see also* C.P.L.R. §3101(c), (d); *People v. Kozlowski*, 11 N.Y.3d 223, 243-49 (2008). A defendant's statements to defense counsel or to defense personnel also are exempted from discovery under this provision and §245.40(2)(b), which comports with the Fifth Amendment privilege against self-incrimination.

245.85. Availability of remedies for violations

1. Need for remedy. (a) When material or information is discoverable under this article but is disclosed belatedly, the court shall impose an appropriate remedy if the party entitled to disclosure shows that it was significantly prejudiced. If the untimely disclosure occurred because the party responsible failed to make reasonably diligent efforts to comply with this article, the court has discretion to impose an appropriate remedy if the party entitled to disclosure shows some prejudice. Regardless of a showing of prejudice the party entitled to disclosure shall be given reasonable time to prepare and respond to the new material.

(b) When material or information is discoverable under this article but cannot be disclosed because it has been lost or destroyed, the court shall impose an appropriate remedy if the party entitled to disclosure shows that the lost or destroyed material may have contained some information relevant to a contested issue. The appropriate remedy is that which is proportionate to the potential ways in which the lost or destroyed material reasonably could have been helpful to the party entitled to disclosure.

COMMENT: This provision simply codifies the legal standards for granting of remedies or sanctions for discovery violations that have been developed in case law

by the Court of Appeals. They are forgiving standards, which are designed to rectify harm and not to create a windfall for mere mishaps. Preclusion of evidence and dismissal of charges are sanctions that courts may not employ, except when the prejudice cannot be rectified by any lesser measure. Currently C.P.L. §240.70(1) provides little insight about the applicable analysis for gauging *when* a remedy is appropriate and *what* the remedy should be – so this rectifies that shortcoming.

The provision uses only the term "remedy" – not "sanction" – based upon a proper recognition that the purpose of the discovery rules is not to "penalize" prosecutors, police officers, or defense lawyers for inevitable lapses during the process, despite their reasonably diligent efforts to comply in good faith. Instead, for rule violations and lapses that will occur in any discovery process despite the parties' reasonable efforts to comply, courts should simply "remedy" those violations that are significantly prejudicial.

2. Available remedies. For failure to comply with any discovery order imposed or issued pursuant to this article, the court may make a further order for discovery, grant a continuance, order that a hearing be reopened, order that a witness be called or recalled, instruct the jury that it may draw an adverse inference regarding the noncompliance, preclude or strike a witness's testimony or a portion of a witness's testimony, admit or exclude evidence, order a mistrial, order the dismissal of all or some of the charges, or make such other order as it deems just under the circumstances; except that any sanction against the defendant shall comport with the defendant's constitutional right to present a defense, and precluding a defense witness from testifying shall be permissible only upon a finding that the defendant's failure to comply with the discovery obligation or order was willful and motivated by a desire to obtain a tactical advantage.

COMMENT: For the convenience of litigants and the courts, this provision itemizes all of the available types of remedies for discovery violations that are currently recognized and approved in New York case law in various situations. It aims to provide useful guidance for ascertaining the most appropriate remedy.

3. Consequences of nondisclosure of statement of testifying prosecution witness. The failure of the prosecutor or any agent of the prosecutor to disclose any written or recorded statement made by a prosecution witness which relates to the subject matter of the witness's testimony shall not constitute grounds for any court to order a new pre-trial hearing or set aside a conviction, or reverse, modify or vacate a judgment of conviction, in the absence of a showing by the defendant that there is a reasonable possibility that the non-disclosure materially contributed to the result of the trial or other proceeding; provided, however, that nothing in this section shall affect or limit any right the defendant may have to a reopened pre-trial hearing when such statements were disclosed before the close of evidence at trial.

COMMENT: Maintains the substance of current C.P.L. §240.75, which was enacted in 2000 to overturn the so-called "*Ranghelle* rule." That rule had required automatic reversal of a defendant's conviction on appeal – without regard to the existence or non-existence of prejudice – whenever a testifying prosecution witness's written or recorded statement was not disclosed to the defense at trial as required by C.P.L. §240.45(1)(a) and *People v. Rosario*, 9 N.Y.2d 286 (1961). This provision

leaves unchanged the Legislature's determination that such discovery errors are better addressed on appeal by using a "harmless error" standard of review.

245.90. Admissibility of discovery

The fact that a party has indicated during the discovery process an intention to offer specified evidence or to call a specified witness is not admissible in evidence or grounds for adverse comment at a hearing or a trial.

COMMENT: Maintains the substance of current C.P.L. §240.70(2).

* * *

Amendments to Other Criminal Procedure Law Provisions Relating to Discovery and Access to Information

255.20. Pre-trial motions; procedure

1. Except as otherwise expressly provided by law, whether the defendant is represented by counsel or elects to proceed pro se, all pre-trial motions shall be served or filed within forty-five days after arraignment and before commencement of trial, or within such additional time as the court may fix upon application of the defendant made prior to entry of judgment. In an action in which **EITHER (a) MATERIAL OR INFORMATION HAS BEEN DISCLOSED PURSUANT TO PARAGRAPHS (C) OR (H) OF SUBDIVISION TWO OF SECTION 245.20, (b)** an eavesdropping warrant and application have been furnished pursuant to section 700.70, or **(c)** a notice of intention to introduce evidence has been served pursuant to section 710.30, such period shall be extended until forty-five days after the last date of such service. If the defendant is not represented by counsel and has requested an adjournment to obtain counsel or to have counsel assigned, such forty-five day period shall commence on the date counsel initially appears on defendant's behalf.

COMMENT: In paragraphs (c) and (h) of section 245.20(2) of this bill, the prosecution would be required to disclose a list of all tangible objects that the defendant or a co-defendant possessed (without regard to whether they are suppressible), and any search warrants executed in connection with the case. That information is discoverable early in the case to facilitate efficient suppression motion practice by the defendant. Just as C.P.L. §255.20(1) currently allows for an automatic extension of the 45-day period for the defense to file its motions when either eavesdropping warrants or notices of potentially suppressible statements or identification testimony under C.P.L. §710.30 are turned over after the date of the defendant's arraignment, this amendment would allow for similar extension of the 45-day period when either the list of potentially suppressible tangible objects or information about search warrants is disclosed after the date of arraignment.

450.20. Appeal by people to intermediate appellate court; in what cases authorized

An appeal to an intermediate appellate court may be taken as of right by the people from the following sentence and orders of a criminal court:

1. An order dismissing an accusatory instrument or a count thereof, entered pursuant to section 170.30, 170.50 or 210.20, or an order terminating a prosecution pursuant to subdivision four of section 180.85;

1-a. An order reducing a count or counts of an indictment or dismissing an indictment and directing the filing of a prosecutor's information, entered pursuant to subdivision one-a of section 210.20;

2. An order setting aside a verdict and dismissing an accusatory instrument or a count thereof, entered pursuant to paragraph (b) of subdivision one of section 290.10 or 360.40;

3. An order setting aside a verdict, entered pursuant to section 330.30 or 370.10;

4. A sentence other than one of death, as prescribed in subdivisions two and three of section 450.30;

5. An order, entered pursuant to section 440.10, vacating a judgment other than one including a sentence of death;

6. An order, entered pursuant to section 440.20, setting aside a sentence other than one of death;

7. An order denying a motion by the people, made pursuant to section 440.40, to set aside a sentence other than one of death;

8. An order suppressing evidence, entered before trial pursuant to section 710.20, **OR AN ORDER PRECLUDING EVIDENCE, ENTERED BEFORE TRIAL PURSUANT TO SECTION 710.30**; provided that the people file a statement in the appellate court pursuant to section 450.50.

9. An order entered pursuant to section 460.30 of the penal law setting aside or modifying a verdict of forfeiture.

10. An order, entered pursuant to paragraph (e) of subdivision twelve of section 400.27, finding that the defendant is mentally retarded.

11. An order granting a motion, made pursuant to subdivision one-a of section 440.30, for forensic DNA testing of evidence.

450.50. Appeal by people from order suppressing OR PRECLUDING evidence; filing of statement in appellate court

1. In taking an appeal, pursuant to subdivision eight of section 450.20, to an intermediate appellate court from an order of a criminal court suppressing **OR PRECLUDING** evidence, the people must file, in addition to a notice of appeal or, as the case may be, an affidavit of errors, a statement asserting that the deprivation of the use of the evidence ordered suppressed **OR PRECLUDED** has rendered the sum of the proof available to the people with respect to a criminal charge which has been filed in the court either (a) insufficient as a matter of law, or (b) so weak in its entirety that any reasonable possibility of prosecuting such charge to a conviction has been effectively destroyed.

2. The taking of an appeal by the people, pursuant to subdivision eight of section 450.20, from an order suppressing **OR PRECLUDING** evidence constitutes a bar to the prosecution of the accusatory instrument involving the evidence ordered suppressed **OR PRECLUDED**, unless and until such suppression **OR PRECLUSION** order is reversed upon appeal and vacated.

> **COMMENT:** Interlocutory appeals are rare in New York criminal cases. But an appeal by the prosecution is permitted when a trial court suppresses evidence pursuant to C.P.L. §710.20. To restrict the numbers of appeals, the law obliges the prosecution to stipulate that if its appeal is unsuccessful, the case will be dismissed. Preclusion orders under C.P.L. §710.30 have the same effect as suppression orders, as to the same evidence. Logic would dictate that they be appealable in the same way that suppression orders are appealable. But the Court of Appeals has decided that the current provisions authorizing People's appeals apply only to merits suppression orders, and do not apply when evidence is precluded for untimely or inadequate notice under C.P.L. §710.30. *See People v. Laing*, 79 N.Y.2d 166 (1992). To eliminate this arbitrary distinction, the bill amends §450.20(8) and §450.50 to permit appeals by the People from preclusion orders, if they file a statement that the case will not go forward if the appeal is unsuccessful.

610.20. Securing attendance of witnesses by subpoena; when and by whom subpoena may be issued

1. Any criminal court may issue a subpoena for the attendance of a witness in any criminal action or proceeding in such court.

2. A district attorney, or other prosecutor where appropriate, as an officer of a criminal court in which he is conducting the prosecution of a criminal action or proceeding, may issue a subpoena of such court, subscribed by himself, for the attendance in such court or a grand jury thereof of any witness whom the people are entitled to call in such action or proceeding.

3. An attorney for a defendant in a criminal action or proceeding, as an officer of a criminal court, may issue a subpoena of such court, subscribed by himself, for the attendance in such court of any witness whom the defendant is entitled to call in such action or

proceeding. An attorney for a defendant may not issue a subpoena duces tecum of the court directed to any department, bureau or agency of the state or of a political subdivision thereof, or to any officer or representative thereof**, UNLESS THE SUBPOENA IS INDORSED BY THE COURT AND PROVIDES AT LEAST THREE DAYS FOR THE PRODUCTION OF THE REQUESTED MATERIALS. IN THE CASE OF AN EMERGENCY, THE COURT MAY BY ORDER DISPENSE WITH THE THREE-DAY PRODUCTION PERIOD**~~Such a subpoena duces tecum may be issued in behalf of a defendant upon order of a court pursuant to the rules applicable to civil cases as provided in section twenty-three hundred seven of the civil practice law and rules~~.

COMMENT: This amendment streamlines the current inefficient and burdensome requirements which incorporate C.P.L.R. §2307 for defense subpoenas served on governmental agencies. That provision requires the defense attorney to give both the governmental agency and the prosecution "at least one day's notice" that the defense intends to issue such a subpoena. If the court agrees to indorse the subpoena, the defense attorney must then re-serve the subpoena on both the governmental agency and the prosecution, "at least twenty-four hours before the time fixed for the production of such records." This multi-step service process is unnecessarily burdensome: there is no reason the defense attorney should have to serve the same subpoena on the same two agencies on consecutive days. It also fails to provide the subpoenaed agency with adequate time in which to consider and prepare any response, and/or to provide the subpoenaed materials. Another recurring problem is that the footage from government-operated surveillance cameras, which may be key evidence in a criminal case, is frequently automatically deleted within short periods (such as seven days). If the multi-step process required by the statute is not initiated right away and promptly concluded, such evidence may be permanently lost.

The bill dispenses with the requirement of providing one day's advanced notice, but extends the period for the agency's compliance with a court-indorsed subpoena to three days. That would provide the agency with more reasonable time to consider the subpoena, and to move to quash if appropriate or to provide the materials. And it eliminates the inefficient and costly run-around of serving the same document on multiple parties on consecutive days. The modification also dispenses with the requirement that the defense must notify the "adverse party" (the prosecution) in advance about its intended subpoenas. This is appropriate for two main reasons. First, the original purpose of C.P.L.R. §2307 and its predecessor provisions in the Civil Practice Act and the Code of Civil Procedure was simply to prevent governmental agencies from having to produce original documents "when a copy thereof will answer the requirement of the litigants." The idea was that the notice period would give the parties the opportunity to agree to stipulate to the use of copies, rather than originals. Where one party refused to stipulate, the judge would issue a subpoena for the production of the originals, but could impose costs on the refusing party. Those concerns are moot in the era of photocopies and electronically stored information.

Second, requiring the defense to give the prosecution advanced notice of its subpoenas – without any comparable requirement on the part of the prosecutor – is unbalanced and gives prosecutors the unfair advantage of being able to monitor the defense's investigations, which inhibits full defense investigations in practice. It also arguably runs afoul of the constitutional due process requirement of reciprocity in notice rules. *See Wardius v. Oregon*, 412 U.S. 470, 475 (1973). If any materials that

the defense obtains by subpoena come within the discovery law, they will of course be disclosed to the prosecution by that means prior to trial.

4. THE SHOWING REQUIRED TO SUSTAIN ANY SUBPOENA UNDER THIS SECTION IS THAT THE TESTIMONY OR EVIDENCE SOUGHT IS REASONABLY LIKELY TO BE RELEVANT AND MATERIAL TO THE PROCEEDINGS, AND THE SUBPOENA IS NOT OVERBROAD OR UNREASONABLY BURDENSOME.

COMMENT: Appellate courts have in recent years strictly limited the use of subpoenas that may be served on third parties under C.P.L. §610.20(3) by requiring the attorney for the defendant to make a showing – when a subpoena is challenged – that the subpoenaed items are reasonably likely to be "relevant and *exculpatory*," not merely that they are reasonably likely to be "relevant and *material*." *See, e.g.*, *Matter of Constantine v. Leto*, 77 N.Y.2d 975 (1991); *People v. Bagley*, 279 A.D.2d 426 (1st Dept. 2001). In practice, it is often impossible for the defense to make such a showing, even where the items are plainly important. For example, the defense should be allowed to subpoena and review surveillance footage from a third party business, even if that footage is reasonably likely to be incriminating and counsel is unable to demonstrate in advance a likelihood that it would be "exculpatory."

Just as prosecutors regularly use subpoenas to obtain potentially "material" evidence without knowing in advance whether it will be inculpatory or exculpatory, the defense should be entitled to use subpoenas to obtain potentially "material" evidence without having to show in advance that the item is likely to be exculpatory. This amendment makes the standard for sustaining a subpoena a showing of *materiality*. It does not alter other important related aspects of current subpoena law, such as that a subpoena must be a demand for production of specific items, not merely an effort to ascertain the existence of evidence; and that courts may quash an improperly overbroad or unreasonably burdensome subpoena.

710.30. Motion to suppress evidence; notice to defendant of intention to offer evidence

1. Whenever the people intend to offer at a trial (a) evidence of a statement made by a defendant to a public servant, which statement if involuntarily made would render the evidence thereof suppressible upon motion pursuant to subdivision three of section 710.20, or (b) testimony regarding an observation of the defendant either at the time or place of the commission of the offense or upon some other occasion relevant to the case, to be given by a witness who has previously identified him as such, **OR (C) TANGIBLE OBJECTS OBTAINED FROM THE DEFENDANT OR A PLACE OR ENTITY IN WHICH A COURT MAY RULE THAT THE DEFENDANT HAD STANDING**, they must serve upon the defendant a notice of such intention, specifying the evidence intended to be offered. **WHERE NOTICE IS GIVEN UNDER PART (B) OF THIS PARAGRAPH, SUCH NOTICE SHALL SPECIFY ALL IDENTIFICATION PROCEDURES IN WHICH THE WITNESS PARTICIPATED, INCLUDING PHOTOGRAPHIC PROCEDURES, REGARDLESS OF WHETHER THE PARTICULAR PROCEDURE WILL BE OFFERED AT TRIAL**.

COMMENT: Section 710.30 currently requires the prosecution to give notice to the defendant, within 15 days of arraignment, of its intent to introduce evidence of statements made by the defendant and identification evidence by a witness who has made a prior identification of the defendant. This notice facilitates the efficient filing of motions to suppress evidence. It also greatly assists defendants in intelligently evaluating guilty plea offers, and provides a check against unscrupulous witnesses who might later "remember" new evidence. Under current law, a failure to provide timely notice generally requires *preclusion* of the relevant evidence. This bill makes five changes to §710.30, including significantly easing the strict preclusion sanction.

Two of those changes are made in this subdivision: providing for notice of suppressible physical evidence that the prosecution intends to offer; and providing for notice of photographic identification procedures. Assuming that the strict current requirement in §710.30 that failure to provide timely notice of statements or identification testimony generally requires preclusion of the evidence is eased – as this bill does in subdivision two – there is no longer a reason not to include in §710.30 a requirement of notice of potentially suppressible physical evidence. Currently physical property seized by the police is not subject to the notice rule, perhaps on the theory that the defendant will know what physical property was taken from him. But a defendant (and his attorney) often will not know what was recovered in a search conducted pursuant to a warrant, possibly while the defendant was absent. Nor will the defendant necessarily be aware of what was recovered in a search of premises remote from the time or place of the arrest, or of a car after the defendant has been removed from that car, etc. Equally important, often the defendant does not know what property the prosecution intends to offer at trial, including items that are routinely taken by police for safekeeping after arrest, such as money or phones.

Currently notice of the defendant's potentially suppressible *statements* is required under both C.P.L. §240.20(1)(a) and §710.30(1)(a). There is no anomaly, therefore, that under this bill notice of potentially suppressible property would be given under both §245.20(2)(c) and §710.30(1)(c). Timely notice ensures that the defense will know what potentially suppressible property the prosecution intends to offer, which would facilitate efficient and properly tailored suppression motions.

The second change in this subdivision involves notice of photographic identifications. Currently §710.30 provides that when identification testimony will be heard at trial from a witness who has previously identified the defendant, the People must provide notice specifying the evidence intended to be "offered" at trial. It sometimes happens that identification procedures occur which will not be discussed at trial. For example, under current law, where a witness picks the defendant out of a photo array and then a lineup, the jury will learn only about the lineup – and if an in-court identification is made, about that identification as well. Under the language of the statute, the People need not give the defendant notice before trial about the photo array, evidence of which cannot be "offered" at trial. But information about identification procedures may be quite relevant to the defense strategy at the suppression stage, as well as at trial, even if the prosecution cannot place the results of those proceedings before the jury. Unfairness in an identification proceeding that will not be addressed on the prosecution's direct case at trial could be the very basis for a motion to suppress the identification evidence that the prosecution does intend to present. The bill therefore requires the People to give notice of all identification proceedings in which the witness participated, including photographic ones.

2. Such notice must be served within fifteen days after arraignment and before trial, and upon such service the defendant must be accorded reasonable opportunity to move before trial, pursuant to subdivision one of section 710.40, to suppress the specified evidence. ~~For good cause shown, however~~**WHERE THE PEOPLE ESTABLISH THAT THEY ACTED WITH DUE DILIGENCE**, the court may permit the people to serve such notice~~,~~ thereafter**,** and in such case it must accord the defendant reasonable opportunity thereafter to make a suppression motion.

> **COMMENT:** Currently the People's failure to provide notice under §710.30 within 15 days virtually always requires *preclusion* of the relevant evidence. This is because the Court of Appeals has interpreted the "good cause" language of the statute very strictly. Thus notice coming after the 15th day requires preclusion of statement and identification evidence, even if the prosecutor did not learn of the evidence in that period and even if the defense has not been harmed by the delay. *See People v. O'Doherty*, 70 N.Y.2d 479 (1987). The bill removes the "good cause" language that is the basis of this strict interpretation, and instead permits a prosecutor to file late notice when necessary provided that he or she has acted with due diligence.
>
> Retaining a due diligence showing is appropriate because there remains a special need for notice well before trial – without it, the defense cannot intelligently and efficiently make its pretrial suppression motions. The requirement to provide notice early in the case also greatly assists defendants in intelligently evaluating guilty plea offers, and serves as an important check against an unscrupulous witness who might otherwise "remember" or "tailor" new statements as a case develops in the pre-trial period or even during trial. In short, maintaining the burden to show reasonable diligence ensures that a meaningful incentive still exists for routinely providing early notice, and thus will help to avoid gamesmanship and delay.

3. In the absence of service of notice upon a defendant as prescribed in this section, no evidence of a kind specified in subdivision one may be received against him upon trial unless he has, despite the lack of such notice, moved to suppress such evidence and such motion has been denied and the evidence thereby rendered admissible as prescribed in subdivision two of section 710.70.

> **COMMENT:** Because the bill eases the standard for the prosecution to provide late notice of evidence subject to §710.30 where a prosecutor has acted with due diligence in providing notice, this subdivision of the statute – which makes evidence inadmissible where the prosecution has given *no* notice (unless the defendant unsuccessfully moved to suppress it despite the lack of notice) – remains unchanged. It provides the incentive for prosecutors to serve these important notices at all.

4. ON AN APPEAL FROM A JUDGMENT OF CONVICTION, A DEFENDANT WHO MOVED TO SUPPRESS EVIDENCE AFTER HAVING UNSUCCESSFULLY SOUGHT PRECLUSION OF SUCH EVIDENCE UNDER THIS SECTION MAY CHALLENGE BOTH THE DENIAL OF PRECLUSION AND THE DENIAL OF SUPPRESSION.

> **COMMENT:** In most circumstances a defendant who fails to obtain relief on one ground can make an argument in the alternative without forfeiting appellate review of

his or her initial claim. But the Court of Appeals has ruled that when a defense application for preclusion of evidence under §710.30 is made but the trial court denies it on a finding that notice was not late or otherwise deficient, a subsequent motion to suppress the evidence that also is denied waives the preclusion claim on appeal. *See People v. Kirkland*, 89 N.Y.2d 903 (1996). Accordingly, under current law, a defense attorney with an arguably sound preclusion argument and an arguably sound suppression argument must choose between them. This is arbitrary and compels an unjustified "Sophie's choice." The bill adds this provision, therefore, to reflect that a defendant may litigate the merits of a suppression claim without thereby waiving a notice preclusion claim that has been denied.

Amendments to Penal Law Provisions Relating to Offenses Against a Victim or Witness

215.11. Tampering with a witness in the third degree

A person is guilty of tampering with a witness in the third degree when, knowing that a person is about to be called as a witness in a criminal proceeding:

1. He wrongfully compels or attempts to compel such person to absent himself from, or otherwise to avoid or seek to avoid appearing or testifying at such proceeding by means of instilling in him a fear that the actor will cause physical injury to such person or another person; or

2. He wrongfully compels or attempts to compel such person to swear falsely by means of instilling in him a fear that the actor will cause physical injury to such person or another person.

Tampering with a witness in the third degree is a class ~~E~~**D** felony.

215.12. Tampering with a witness in the second degree

A person is guilty of tampering with a witness in the second degree when he:

1. Intentionally causes physical injury to a person for the purpose of obstructing, delaying, preventing or impeding the giving of testimony in a criminal proceeding by such person or another person or for the purpose of compelling such person or another person to swear falsely; or

2. He intentionally causes physical injury to a person on account of such person or another person having testified in a criminal proceeding.

Tampering with a witness in the second degree is a class ~~D~~**C** felony.

215.15. Intimidating a victim or witness in the third degree

A person is guilty of intimidating a victim or witness in the third degree when, knowing that another person possesses information relating to a criminal transaction and other than in the course of that criminal transaction or immediate flight therefrom, he:

1. Wrongfully compels or attempts to compel such other person to refrain from communicating such information to any court, grand jury, prosecutor, police officer or peace officer by means of instilling in him a fear that the actor will cause physical injury to such other person or another person; or

2. Intentionally damages the property of such other person or another person for the purpose of compelling such other person or another person to refrain from communicating, or on account of such other person or another person having communicated, information relating to that criminal transaction to any court, grand jury, prosecutor, police officer or peace officer.

Intimidating a victim or witness in the third degree is a class ~~E~~**D** felony.

215.16. Intimidating a victim or witness in the second degree

A person is guilty of intimidating a victim or witness in the second degree when, other than in the course of that criminal transaction or immediate flight therefrom, he:

1. Intentionally causes physical injury to another person for the purpose of obstructing, delaying, preventing or impeding the communication by such other person or another person of information relating to a criminal transaction to any court, grand jury, prosecutor, police officer or peace officer or for the purpose of compelling such other person or another person to swear falsely; or

2. Intentionally causes physical injury to another person on account of such other person or another person having communicated information relating to a criminal transaction to any court, grand jury, prosecutor, police officer or peace officer; or

3. Recklessly causes physical injury to another person by intentionally damaging the property of such other person or another person, for the purpose of obstructing, delaying, preventing or impeding such other person or another person from communicating, or on account of such other person or another person having communicated, information relating to a criminal transaction to any court, grand jury, prosecutor, police officer or peace officer.

Intimidating a victim or witness in the second degree is a class ~~D~~**C** felony.

> **COMMENT:** The bill contains numerous provisions that give prosecutors and courts a range of options to use to help ensure the safety of witnesses as necessary. These go well beyond those available in other States' discovery statutes. As a further counterpart of broadening discovery, the bill also raises the level of and penalties for several offenses of tampering with a witness and intimidating a victim or witness.

This will further deter defendants and others from misusing information provided through the discovery process. Specifically, the bill elevates the crimes of tampering with a witness in the third degree and intimidating a victim or witness in the third degree from Class E felonies to Class D felonies; and the crimes of tampering with a witness in the second degree and intimidating a victim or witness in the second degree from Class D felonies to Class C felonies. The much more rare first-degree offenses are already Class B felonies punishable by 25 years' imprisonment.

MEMORANDUM IN SUPPORT OF LEGISLATION

TITLE OF BILL:

An act to amend the criminal procedure law and the penal law, in relation to criminal discovery, and to repeal certain provisions of the criminal procedure law relating thereto; to amend the criminal procedure law, in relation to pre-trial motions, appeal by the people to an intermediate appellate court, securing attendance of witnesses by subpoena, and notice to the defendant of intention to offer evidence; and to amend the penal law, in relation to offenses of tampering with a witness and intimidating a victim or witness.

PURPOSE:

To modernize and make more fair the criminal discovery rules, while providing measures to ensure the safety of witnesses. The criminal discovery rules are set forth in criminal procedure law Article 240. This bill would repeal Article 240 and enact a new Article 245. It would eliminate inefficiencies of current discovery practice, improve both parties' access to information, reduce the possibility of wrongful convictions, and facilitate more prompt disposition of criminal cases. It would also amend other provisions relating to pre-trial disclosure of and access to evidence.

SUMMARY OF MAIN PROVISIONS:

Section 245.10 (Protective Orders): Either party may withhold any kind of discoverable item or information, when there is a basis to believe a protective order would be appropriate. The court may issue any type of protective order, or alter the time periods for discovery, for good cause shown. The standard for a showing of good cause is broad, flexible and realistic. Courts shall consider specified factors relating to ensuring safety of witnesses. Expedited and streamlined review of adverse rulings on certain protective order applications is available before a single appellate justice, adding an important "safety valve" in the discovery system.

Sections 245.20 and 245.30 (Prosecution's Discovery In Two Stages): The prosecution's discovery occurs in two phases. Phase One includes types of materials possessed by or readily obtainable by prosecutors early in the case (*e.g.*, electronically stored police reports; etc.). Phase Two includes materials that take longer for prosecutors to obtain (*e.g.*, less formalized documents from police files; transcripts; etc.). The need for written demands for discovery is eliminated. Disclosures are earlier and broader than under current law.

Section 245.20 (Phase One Discovery): The prosecution automatically discloses Phase One materials to the defense within 15 days of arraignment. This includes types of information needed for the defense to file pre-trial motions; to perform investigations when witnesses and evidence are still available; and to make more informed decisions about pleas. The prosecutor automatically has an extra week to perform discovery if he or she was on vacation or otherwise engaged for one or more days during this period.

Section 245.30 (Phase Two Discovery): The prosecution automatically discloses Phase Two materials to the defense within 90 days of arraignment, and then the prosecutor files a "certificate of compliance." This includes types of information needed for evaluating potential defenses and for trial preparation.

Sections 245.20(3),(4) (Procedures for Witnesses): In addition to protective orders, the prosecutor has the option to withhold any witness's address or contact information, without having to apply for a protective order, by making the witness available to only counsel for the defendant for an interview. In cases charging a violent felony offense, the prosecutor has the additional option to withhold any witness's address or contact information, without having to apply for a protective order, by providing adequate contact information in a confidential document accessible only to defense counsel, and not to the defendant. This discovery can also be made contingent upon the defendant's personal consent to use of the attorney-only confidentiality procedure, after in-court warning against witness tampering.

Section 245.40 (Discovery From Defense): The defense automatically discloses its reciprocal discovery to the prosecution within 30 days after the prosecution's certification that its discovery is complete, and then the defense lawyer files a "certificate of compliance." Reciprocal discovery from the defense is earlier and broader than under current law.

Section 245.85 (Remedies for Violations): If an item is disclosed late, a remedy at trial is provided if the party entitled to disclosure can demonstrate significant prejudice. If an item is lost or destroyed, the court imposes a remedy at trial that is proportionate to the harm.

Section 610.20 (Subpoenas): The current inefficient and burdensome requirement for service of defense subpoenas on governmental agencies is fixed by dispensing with the rule mandating one day's advanced notice, but extending the period for the agency's compliance with a court-indorsed subpoena to three days. The showing to sustain a subpoena is specified to be that the testimony or evidence sought is reasonably likely to be "material."

Section 710.30 (Notice of Intended Evidence): The People may avoid the harsh sanction of automatic preclusion of evidence, in situations where they have served untimely notice of intent to offer such evidence, by establishing that the prosecutor acted with due diligence.

JUSTIFICATION:

This bill codifies the recommendations of the New York State Bar Association's Task Force on Criminal Discovery. The Association's House of Delegates and Executive Committee both adopted these recommendations *without a single dissenting vote* – a strong sign that the Task Force's effort to address the urgent need for improving fairness in discovery, while providing ample measures to ensure safety of witnesses, was successful and groundbreaking.

This bill represents tremendous efforts to reach compromises by all sides on this crucially important issue. It is balanced, fair and realistic. In short, it finally solves the key problems that have long stalled these necessary changes in New York State's discovery system.

Under New York's current criminal discovery statute, defendants are denied vitally important information that is essential to make rational decisions about their pending cases. The limited information they receive is also turned over so late that it is often impossible to intelligently investigate the facts, to secure and use exculpatory evidence, to fairly weigh a guilty plea offer, or to develop a trial strategy.

New York's antiquated criminal discovery rules inhibit, at great taxpayer cost, prompt guilty pleas from people who would be willing to resolve their cases if shown the evidence against them. They also force defense lawyers and prosecutors to inundate each other and the court system with boilerplate "demands" and responses for no sound purpose.

This restrictive discovery system is in stark contrast to the discovery rules that apply in civil cases in New York. In civil cases, both parties receive an opportunity through discovery to learn what they should know about the other side's case. Yet in criminal cases, where liberty is at stake, the current rules systematically block innocent or over-charged defendants from investigating and formulating a proper strategy of defense prior to the trial.

The criminal discovery system is also out of step with those in other States. A leading treatise identifies the following fourteen States as those that provide criminal defendants with the *least* discovery in the nation: "Alabama, Georgia, Iowa, Kansas, Kentucky, Louisiana, *New York*, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, and Wyoming." This list actually *understates* New York's restrictiveness, as at least ten of these "bottom fourteen" States have other procedures that result in the defense receiving crucial information, such as requiring lists of the witnesses' names or addresses in the indictment or granting access to grand jury minutes.

Most recently, Texas (2014) and North Carolina (2004) enacted open discovery statutes, and Ohio (2010) made its already broad discovery rules even more expansive. Large States with big cities that are similar to New York – including California, Florida, Illinois, Massachusetts, Michigan, New Jersey and North Carolina – have utilized broad criminal discovery for years.

This bill will overhaul New York's criminal discovery rules and accomplish two key things: it will help innocent or over-charged defendants fairly prepare for trial, and it will encourage guilty defendants to plead guilty without needless and costly delays.

The bill is even-handed. It requires both the prosecution and the defendant to provide the opposing party with extensive discovery early in the case. It eliminates unduly burdensome requirements of routine discovery paperwork. By employing new mechanisms to address concerns about key issues, it also represents a major advance from other proposals for criminal discovery reform that have been put forward in New York in past decades.

There is a broad consensus nationwide that the principal benefits of discovery reform hinge on requiring *early* disclosure. But meaningful discovery reform also requires that the obligations actually be achievable by prosecutors and police.

To ensure that its mandates are feasible, this bill establishes that the prosecution's discovery is provided in two calibrated stages. Key items possessed by or readily accessible to

prosecutors (such as electronically stored police reports) are discoverable fifteen days after arraignment. Other items – like grand jury transcripts, exhibits, and less "formal" witness statements such as police memo book notes or vouchers, which may be harder for a prosecutor to obtain and may not be in electronic form – are discoverable after ninety days.

The bill requires disclosure of witness information. Well over thirty States currently require that both parties disclose their witnesses' names and addresses, subject to a protective order. No State that has modernized its criminal discovery rules has failed to include such a discovery obligation, and all of them permit prosecutors to withhold witness information from the defense only after the court has issued a protective order allowing non-disclosure.

This uniform practice in modern discovery statutes is based upon the bedrock legal principle that witnesses "belong" to neither party. In addition, it recognizes that having contact information for witnesses is frequently essential to enable an intelligent investigation of the charges; to evaluate and develop available defenses; to find and use exculpatory evidence; and to provide the defendant with informed advice about the advisability of a plea. Just as prosecutors have a crucial need for information to investigate *alibi defense* witnesses, it is vital for both parties to exchange information for investigating *other* witnesses as well.

The bill requires the prosecution to disclose names and addresses (or alternative contact information) for *all persons* known to have information relevant to any offense charged or to a potential defense, not merely of "intended" witnesses. This standard is recommended by the American Bar Association and used in States such as New Jersey, Florida and Minnesota. It recognizes that prosecutors should not refrain from also disclosing information about potential *defense* witnesses. It will thus reduce possible "gamesmanship" during discovery, and also help to avoid constitutional violations.

Whereas other States rely solely on the court's issuance of a protective order if the prosecution wishes to withhold a witness's name or address, this bill includes additional tools that will assist courts, prosecutors and defense lawyers in ensuring the safety of witnesses.

The bill specifies a robust and flexible standard to be employed when evaluating any application for a protective order. The standard highlights factors such as a defendant's gang affiliation, and it allows withholding of any item where other factors outweigh its usefulness. In addition, it provides for an alternative procedure, used in other States when a protective order is issued, under which *physical copies* of discovery documents can be turned over to only the defense lawyer, not to the defendant or others, when the defendant is given supervised access to inspect (not obtain copies of) redacted versions of those documents. It also permits expedited review, before a single appellate justice, when the lower court denies a protective order and the prosecutor believes that a witness's safety could be jeopardized.

The bill gives prosecutors the alternative option, in any case, to withhold a witness's address and contact information, without having to show good cause or to obtain a protective order, by making the person available to only counsel for the defendant for an interview.

In any case involving a violent felony charge, the bill further gives prosecutors the alternative option to withhold any witness's address or other contact information, without having to

apply for a protective order. Adequate contact information for the witness is then separately disclosed in a confidential document available only to defense counsel and named defense personnel, who are prohibited from disclosing it to anyone else. Prosecutors may also make disclosure of such information contingent upon the defendant's personal consent to the use of the attorney-only confidentiality procedure. This approach recognizes that the defendant, in contrast to the lawyer or investigator, does not in general need to learn witnesses' addresses (unlike their names, which often are essential to comprehending and discussing a case).

The bill actually will *improve* witness safety in many cases, because it regulates the exchange of information between defense counsel and the defendant by bringing that information into the open and placing strict limitations on disclosure. Defense lawyers currently have a duty to attempt to identify witnesses and investigate them, and frequently get results – and usually it is easiest to find witnesses in the most violent and notorious offenses, such as homicides and shootings. Absent a legal directive, however, the attorney has no ethical right to withhold information from her clients simply because she has a "bad feeling" about it. Indeed, without disclosure, sometimes the only resources defense counsel has to locate witnesses is the defendant and the defendant's friends, and it becomes necessary to disclose whatever information defense counsel has to these individuals in order to attempt to contact witnesses. Thus, one of the great advantages of this bill is that, by obtaining a protective order, the prosecutor can place limits on the defense lawyer's disclosure of information to the defendant in situations where it is inappropriate. In the absence of this change in New York law, such limitations would not be available where defense counsel is obtaining the information independently.

It is virtually inevitable in any court system that parties sometimes will overlook disclosure of certain items or make mistakes about discovery. With respect to the potential *consequences* for violations, this bill employs the term "remedy," not "sanction." This terminology underscores that the purpose of the rules is simply to ensure that both parties receive as much discovery as is feasible, as early as possible (consistent with witness safety) – it is not to "penalize" prosecutors or police or defense lawyers for inevitable lapses during the discovery process despite their reasonably diligent efforts to comply.

If any discoverable material is disclosed belatedly, the bill instructs courts to provide a "remedy" at trial if the party entitled to disclosure is able to show significant prejudice. If any discoverable material is lost or destroyed, the bill instructs courts to provide a "remedy" at trial that is proportionate to how the item reasonably might have been helpful. These are forgiving standards, designed to rectify harm and not to create a windfall for mere mishaps.

This bill's system of automatic, early, and broad discovery will enhance fairness, reliability, and overall efficiency. It will permit adequate case investigations, properly informed decisions on guilty pleas, more fair and orderly trials, and minimize the risk of wrongful convictions. Replacing the outmoded current framework of Article 240 with this internally consistent and balanced Article 245 will accomplish these goals. And it will restore New York State's criminal justice system to a sound position within the national mainstream.