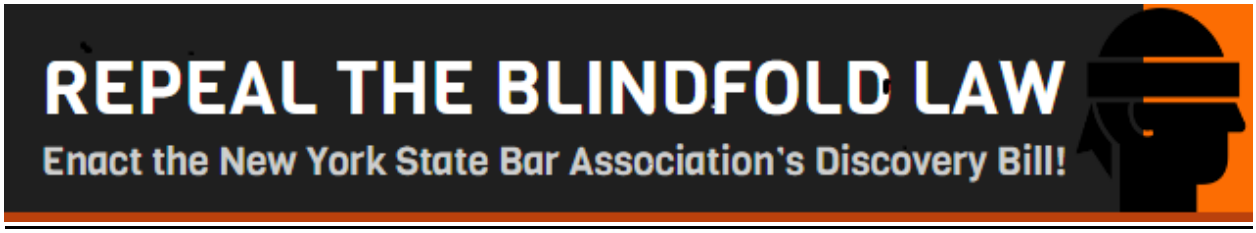

FAQs ABOUT DISCOVERY REFORM AND ENACTING THE NYSBA BILL (A-7292/S-6848)

WHAT IS DISCOVERY?

• Discovery is the process by which the law requires the parties in court cases to disclose their evidence to each other prior to a trial. In a criminal case, discovery materials include the evidence collected during the investigation and prosecution of the charges, such as police reports, statements of witnesses, scientific testing reports, video recordings, and exhibits.

• In civil cases when money is at stake, lawyers in New York get complete "discovery" of the opponent's case, and even the chance to interview all the witnesses in depositions.

• But in criminal cases where liberty is at stake, New York's current law does not require District Attorneys to turn over to defendants the police reports or witnesses' statements until the day trial actually begins. A person charged with a crime in New York doesn't even have a right to learn *who* is accusing them. This leaves defendants *blindfolded* to the evidence against them.

WHY SUPPORT CRIMINAL DISCOVERY REFORM?

• New York needs to bring its criminal discovery law in line with the rest of the country to ensure fairness and transparency in the criminal justice system. The law must require early discovery of police reports, witnesses and witness statements.

• Without access to discovery, while a person is awaiting trial, their defense attorney is unable to investigate the state's case against them or help innocent people to clear their names.

• Given that more than 95% of criminal cases end in a plea bargain, the vast majority of people accused of crimes may never see the evidence against them when making critical decisions about whether or not to accept a plea.

• New York is so far outside the mainstream that it's currently one of the *four states* with the most restrictive discovery rules – alongside Louisiana, South Carolina, and Wyoming.

• All states comparable to New York have long used broad and early discovery (such as New Jersey, Massachusetts, and 35 others). This means that they turn over critical information like

police reports and witness statement early on in the case, without requiring defendants to make motions to the court to obtain them.

• Traditionally Republican state governments, including Texas (2014), North Carolina (2004), and Ohio (2010), have enacted open discovery statutes in recent years, because they recognize it's essential for both fairness and efficiency.

• No state that has enacted more open discovery rules has later gone back to impose restrictive ones. These are well-tested, mainstream reforms that work.

• A 2016 study compared prosecutors' attitudes toward discovery in Virginia (a restrictive discovery state like New York) and North Carolina (which since 2004 has had open file discovery). 90% of North Carolina prosecutors approve of their open file system, citing increased efficiency, protection against inadvertent non-disclosure of exculpatory evidence, facilitating guilty pleas, and fairness and trust. It also found that "prosecutors in North Carolina tend not to see witness safety as a significant problem with open-file discovery," and that there is "little evidence that open-file discovery endangers the safety of witnesses, a common argument against the practice." (73 Wash. & Lee L. Rev. 285.)

• Broad discovery has already been shown to work in New York. The DAs in Brooklyn and a few other counties have *voluntarily* agreed to turn over the police reports and grand jury minutes to accused defendants in most cases for decades. Open discovery, when used, works in Brooklyn and it will work statewide. We need to change the law so that all District Attorneys are required to turn over discovery, because justice should not depend on where you are arrested.

BACKGROUND ON THE PROPOSED LAW (A-7292/S-6848)

• **People have been fighting for this for over 40 years – why could it actually pass now?**

▪ For the first time in 40 years, a broad coalition has united behind a single discovery reform proposal – the New York State Bar Association's bill (A-7292/S-6848). This coalition includes citizens' groups like Discovery for Justice, clergy, former NYPD officers, the Innocence Project, the Chief Defenders Association, the main New York bar associations, and many others.

▪ The general public will no longer accept New York's being grouped with Louisiana, South Carolina, and Wyoming at the bottom nationally on this core criminal justice issue.

• **Is the NYSBA bill different from prior proposals?**

▪ The NYSBA bill is a breakthrough proposal because it comes from a statewide Task Force composed of prominent judges, prosecutors, defense lawyers, and academics. They worked for two years to make compromises, and to address all stakeholders' objections to ensure that these reforms will work. The bill is evenhanded. It was approved *unanimously* by NYSBA's Executive Committee and House of Delegates.

▪ The Chair of the Task Force was Justice Mark Dwyer – a universally respected judge, who previously worked for the Manhattan DA for over 30 years (the office with the most restrictive discovery policy), but who has become convinced of the urgent need for reforms.

- **Is there any Republican support on the issue of criminal discovery reform?**

▪ Yes! It's been *mostly* a Republican issue nationally in recent decades. The last 3 states to enact broad discovery are Texas, North Carolina, and Ohio.

▪ As the Governor of Texas put it: "Texas is a law-and-order state, and with that comes a responsibility to make our judicial process as open as possible." States from every position on the political spectrum use broad discovery. Fairness and efficiency are bipartisan.

- **What would be the economic impacts of the NYSBA bill?**

▪ When DAs review their evidence earlier, they make fairer plea offers. And when guilty defendants can actually see the evidence against them, they accept pleas earlier in the case.

▪ That means great cost savings for the state. Court backlogs clear up, and there's less costly pre-trial incarceration. Discovery reform will also eliminate much pointless paperwork that currently bogs down the system (discovery "demands" and motions).

▪ As for the administrative costs of printing, copying and turning over materials, practitioners in other states report that they are outweighed by the great savings as more cases get disposed of by earlier guilty pleas. There's also far less time-consuming litigation over discovery disputes. The DAs offices simply hire a few clerks to print out documents and copy files (except for attorney work-product), and defense lawyers come pick them up.

- **Is there data showing broad discovery results in earlier guilty pleas and is more efficient?**

▪ Because nearly all of the large states (except New York and Virginia) have used broad discovery for decades, it hasn't been studied much in the professional literature and there is virtually no hard data.

▪ But there is very broad agreement anecdotally in other states that because the defense lawyer is able to show the defendant the evidence, the common result is earlier guilty pleas. The Chief Resource Prosecutor of North Carolina has reported this was the effect after that state enacted open file discovery in 2004, and that finding is confirmed by a 2016 study that surveyed North Carolina prosecutors statewide. (Note that Brooklyn's voluntary "open file" policy doesn't give good data because there's widespread untimely compliance by ADAs, which results from the lack of any statutory mandate for judges to enforce.)

- **Will discovery reform help the Governor's and New York City Mayor's plan to close Rikers?**

  ▪ Yes. City and State officials have demonstrated their commitment to ending the horror of the Rikers Island jail, but will need to significantly decrease case processing times in order to move everyone off Rikers Island.

  ▪ After objectively studying the issue, the Mayor's Office of Criminal Justice in NYC agreed in 2017 that "standardized broader and earlier exchange of discovery materials can promote quicker case resolutions."

  ▪ Data from public defenders in Brooklyn show that in cases where discovery is turned over, cases resolve, on average, 6 months faster than in cases where it is not turned over.

  ▪ Efforts to make cases move more quickly through the court system will continue to fail until defendants are entitled to the evidence against them, so that they can properly assess the government's case against them and make a timely and informed decision about a plea.

- **Doesn't *Brady* already require discovery for the defense?**

  ▪ The *Brady* rule is important – but it's not working. Violations are routine and ongoing.

  ▪ *Brady* also is extremely limited and hard to implement – it asks the DA who believes beyond a reasonable doubt that the defendant is *guilty* to recognize and turn over information showing he may be *innocent*. Discovery reform fixes the main *Brady* problems by removing those judgment-calls and requiring DAs to just turn over the police reports.

- **Why can't you litigate this problem in the courts as a constitutional right?**

  ▪ Courts have ruled that discovery is up to legislatures – it's not a constitutional right.

- **Why does the defense need to be given information about witnesses?**

  ▪ Disclosure of witness information is essential for case investigations and for informed decision-making – as every other state that has reformed its discovery rules has recognized. Under current New York law, the defense is required to turn over the names and addresses of its potential alibi defense witnesses early in the case, so that the DA can investigate and interview them. Everyone agrees that's basic to a fair system. The same is true for the DA's witnesses (unless there are credible safety concerns, when withholding would be allowed).

  ▪ The constitution *requires* defense lawyers to try to meaningfully investigate the case – and even under the "Blindfold Law," often the defense is able to locate and interview witnesses. But the "Blindfold Law" creates a wasteful system where taxpayers pay one party to hide the information, and the other party to waste limited resources trying to uncover it. (Witnesses are never obligated to talk to an investigator – but in practice, most witnesses do want to discuss the case, when approached professionally and respectfully.)

- **Would repealing the "Blindfold Law" jeopardize witnesses, or reporting of crimes?**

  ▪ No. The NYSBA bill was specifically drafted to address those concerns. It includes every measure for protecting witnesses (as needed) that has been used in the 50 states. All materials are subject to withholding by "protective order" if any factor outweighs the usefulness of the discovery, and there are many other provisions to ensure witness safety.

  ▪ Broad discovery has been proven to work nationwide, including in large cities such as Los Angeles, Houston, Boston, Miami, Chicago, Newark, Detroit and others. When DAs from states with broad discovery come to New York, they say they strongly support it – it's more fair and efficient, they have the tools to protect witnesses, and they can't understand why some New York DAs still *oppose* it. These rules would not have continued in place for decades if they resulted in widespread problems jeopardizing witnesses or reporting crimes.

  ▪ For example, when the Pennsylvania legislature established a statewide Task Force on witness intimidation in 2013, its report urged prosecutors to provide *even earlier discovery*. No member – in either the majority or dissenting statements – suggested changing the state's broad discovery rules.

  ▪ Even in New York, the DAs in every county (except Manhattan) already routinely disclose the name of the complainant in the charging document in nearly all cases – which shows that "witness safety" claims are overblown. The few DAs who sensationalize witness safety risks act as if every case is a "gang" case – but they aren't! And in actual gang cases, the NYSBA bill specifically allows withholding of witness information.

  ▪ If the opponents of open discovery truly believe that providing expanded discovery is dangerous, then why aren't they moving to *ban the practice* by their many fellow New York District Attorneys who already provide it (such as the Brooklyn DA and others)?

- **What specific things does the NYSBA bill do to ensure safety of witnesses?**

  ▪ The NYSBA bill includes numerous protective procedures that go well beyond those used successfully in other states for decades, including:

  ▪ (1.) Whenever any factor outweighs the usefulness of the discovery, judges can issue a "protective order" that allows withholding. The provision specifically highlights gang cases, where the vast majority of witness tampering problems occur.

  ▪ (2.) Confidential informants and undercover personnel are automatically exempted.

  ▪ (3.) DAs are allowed to provide "adequate alternative contact information" for witnesses, rather than home addresses.

  ▪ (4.) DAs have the option to withhold a witness's contact information even without a protective order, by making the person available to defense counsel only (not the defendant personally) for a timely interview.

▪ (5.) DAs have the option in violent felony cases to disclose a confidential list containing contact information for the witnesses that would be available only to defense counsel, who then is prohibited from disclosing it to the defendant or others. Lawyers would be subject to criminal contempt if they violate the procedure.

▪ (6.) In appropriate cases, physical copies of the discovery materials can be restricted to only the lawyer (not the defendant), when the defendant is given reasonable access to inspect (not obtain copies of) the materials at a supervised location.

▪ (7.) The bill raises the penalties for offenses of witness tampering or intimidation.

• **Where would the NYSBA reform bill put New York nationally (if enacted)?**

▪ New York would be in the middle of the 50 states. The NYSBA proposal is a moderate bill that has already been heavily negotiated by DAs and judges on the Task Force. It goes to great lengths to ensure it will be achievable in practice (including a calibrated, two-stage discovery time frame). Currently, the states that give defendants the broadest discovery are North Carolina, Florida, and New Jersey.

▪ Example: The NYSBA bill gives DAs 90 days from indictment (which can be months after the defendant's arrest) to obtain all of the discovery materials from the police. New Jersey's rule gives 7 days from indictment, and Florida's gives 15 days from the demand.

• **Why does the NYSBA bill require prosecutors to disclose "all" witnesses who have relevant information about the case, rather than only their "intended" witnesses?**

▪ The NYSBA bill requires disclosure of written/recorded statements by all persons who the prosecutor knows have relevant information about a charged offense or potential defense, regardless of whether the prosecutor considers the content exculpatory or intends to have the witness testify at trial. This standard, which is currently used in several States (*e.g.*, New Jersey; Florida; Minnesota; etc.), is based on recognition that potential witnesses for the defendant who are known to the prosecution should not in effect be hidden from the defense.

▪ The effect of this standard is to remove the subjective determination of whether a given statement is exculpatory or not – all relevant statements will be disclosed. This will minimize "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. It is also designed to help to avoid constitutional violations, since it requires disclosure of potentially exculpatory ("*Brady*") witnesses.

- **Won't early discovery let defendants "tailor" false stories?**

  ▪ That idea is by now widely discredited, and even opponents of repealing the "Blindfold Law" don't argue that. The legislatures in Texas, North Carolina and elsewhere rejected it. Also, discovery takes place after indictment – and before a defendant testifies – anyway.

- **Will more evidence be suppressed and will DAs be penalized for technical violations?**

  ▪ No. The NYSBA Task Force stressed that any violations or lapses during discovery (which are inevitable) will receive a "remedy" – *not* a sanction – only if "significant prejudice" is shown. The bill uses a very forgiving standard for DAs. If prosecutors act in good faith, they won't lose evidence.

- **Does the NYSBA bill require pre-plea discovery?**

  ▪ No. We think it's a good idea – but, again, the NYSBA bill is a very moderate proposal.

  ▪ While the NYSBA bill doesn't require discovery before all pleas, discovery would occur earlier than under the "Blindfold Law." That will enable defense lawyers to give more informed advice on plea offers. Today, their advice is often reduced to merely a mathematical calculation of risks: "You're facing 5 years' prison – I can't tell you anything more about the evidence. Do you want the plea?"

- **Does the NYSBA bill also broaden discovery from the defense?**

  ▪ Yes. When the DA completes discovery, the defense then has to turn over similar information (intended witnesses, their recorded statements, etc.). The NYSBA bill is evenhanded.

- **Does the NYSBA proposal require depositions?**

  ▪ No. There are no depositions under the NYSBA bill.

- **Does the NYSBA proposal require DAs to disclose their "attorney work product"?**

  ▪ No. It keeps an exemption for "work product," just like under current New York law. Opinions, conclusions, and theories of the prosecutor are not discoverable.

- **The NYSBA bill repeals the entire statute – isn't there a way to amend CPL 240?**

  ▪ The NYSBA Task Force studied this issue and determined that amending the current statute would be impracticable. You can't take a fundamentally restrictive statute and transform it into an open statute.

- **Where did the "bottom 4 states" information come from (LA, SC, WY and NY)?**

  ▪ The NYSBA Task Force's report examined discovery in the 50 states in great detail. Although a major criminal procedure treatise had put New York in the "bottom 14," the Task Force found that actually in ten states whose main discovery statute does not require DAs to disclose witnesses' names and addresses, other procedures are available for learning such information (*e.g.*, either it must be included in the indictment, or there are required preliminary hearings – unlike in New York) (*see* NYSBA report, footnotes 4 and 17).

- **What about the discovery rules in the federal system – how does it work there?**

  ▪ The federal system closely resembles New York's "Blindfold Law" – so it's also fundamentally flawed. By now, 35 states have rejected that unfair and inefficient model.