DISCOVERY AND PROTECTIVE ORDERS

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The new discovery rules of 2020 (CPL 245.10, 245.20 et seq.), pretty much unlocked the gate to the People's stockade of available evidence that was heretofore accessible only upon demand (CPL 240.20), and within time frames that often permitted delay right up until the start of trial. (CPL 240.45).

Now, the People must disclose virtually all items and information in their custody and control (or in the custody of persons under their direction and control), that "relates to the subject matter of the case" (PL 245.20), within 20 days of the defendant's arraignment if he/she is in custody, (CPL 245.10[1][a][i]), and within 35 days if he/she is at liberty. (CPL 245.10[1][a][ii]).

Where the material is "exceptionally voluminous," (or is not in the People's possession despite good faith efforts to obtain it), the time period may be extended automatically up to 30 more days (i.e. without the need for a showing of GOOD CAUSE upon motion made pursuant to CPL 245.70[2]).

Under CPL 245.20, disclosure of some items of discovery may be DELAYED without the need for court intervention. For example, if a transcript of a witness' grand jury testimony is not available within the time frame set forth CPL 245.10, the time for disclosure will be STAYED AUTOMATICALLY for an ADDITIONAL 30 DAYS (but disclosure shall be NO LATER THAN 30 DAYS BEFORE TRIAL unless the court directs otherwise). (CPL 245.20[b]).

Other information may be AUTOMATICALLY REDACTED or WITHHELD including:

INFORMATION RELATING TO: the IDENTITY of a 911 CALLER, the VICTIM or WITNESS of an offense under PL 130.00 (sex offenses), sex trafficking (PL 230.34), sex trafficking of a child (PL 230.34-a), a CONFIDENTIAL INFORMANT (CI) or the VICTIM/WITNESS of a crime where the defendant has a SUBSTANTIATED AFFILIATION WITH A CRIMINAL ENTERPRISE (i.e. a group of persons sharing a COMMON PURPOSE of engaging in criminal conduct associated in an ascertainable structure distinct from just a pattern of criminal activity, and with a CONTINUITY OF EXISTENCE, STRUCTURE AND CRIMINAL PURPOSE BEYOND THE SCOPE OF INDIVIDUAL CRIMINAL INCIDENTS. (PL 460.10[3]). See People v Keschner 25 NY3d 704 [2015]). (CPL 245.20[3]).

If the People withhold such information, they must NOTIFY the defendant IN WRITING that it has not been disclosed (unless the court permits otherwise upon a showing of good cause).

Otherwise, names and contact information (excluding physical addresses unless the court orders otherwise upon a showing of good cause), for all persons (other than law enforcement), who the prosecutor knows to have evidence/information RELEVANT to any offense charged or to any potential defense thereto must be disclosed.

Similarly, information regarding undercover police personnel (245.20[d] need not be disclosed, and the identity of a 911 caller (CPL 245.20[g]), can be withheld unless the prosecutor intends

to call such person as a witness at a hearing or trial. In such case, the prosecutor must disclose the person's name and contact information no later than 15 days before such proceeding.

Also, disclosure of recordings exceeding 10 hours in duration can be limited to only those portions that the DA intends to introduce at trial. (The defense is entitled, however, to know the source and amount of any non-disclosed recordings and to be afforded an opportunity to obtain them within 15 days of such request [unless the DA obtains a protective order directing otherwise]).

Although the People are required under CPL 245.20(o) to provide timely discovery of all TANGIBLE PROPERTY relating to the subject matter of the case (and to disclose which items they intend to introduce in their case in chief), if they have not, despite reasonable diligence, yet decided what evidence they will introduce at trial, they may delay such disclosure without the need for a protective order (but should make such disclosure as soon as practicable, keeping in mind their on-going duty of disclosure under CPL 245.60).

With respect to electronically created or stored information obtained from the defendant (or other source), relating to the subject matter of the case, if the People are unable, despite due diligence, to disclose such evidence as required by CPL 245.10, the time will be stayed automatically (i.e. no need for a protective order), but the DA must notify the defendant in writing of such non-disclosure. In any event, discovery must be provided as soon as practicable, but no later than 45 days before the FIRST SCHEDULED TRIAL DATE (unless the court orders otherwise upon motion per CPL 245.70).

The defense should be mindful of its RECIPROCAL DISCOVERY OBLIGATIONS under CPL 245.20 with respect to: (1)(f) experts; (1)(g) tapes and electronic recordings; (1)(h) photographs and drawings; (1)(j) scientific test reports; (1)(l) promises/inducements; (1)(o) tangible property to be introduced at trial as well as the names, addresses, d.o.b.'s and any statements of intended witness whom they intend to have testify. (CPL 245.20[4][a]). If the witness will be called solely to impeach a prosecution witness, such disclosure need not be made until AFTER the prosecution witness has testified. (CPL 240.20[4][b]).

Otherwise, the defense should comply with its discovery obligations WITHIN 30 DAYS of being served with the prosecution's CERTIFICATE OF COMPLIANCE (COC) with discovery (CPL 245.10[2]) which is necessary for their declaration of trial readiness.

Per CPL 245.20(4)(c), if the defense is unable, despite due diligence, to comply with the time limits of CPL 245.10(2), such time period will be STAYED (without the need for a motion for a protective order under CPL 245.70), BUT disclosure must be made AS SOON AS PRACTICABLE and subject to the obligation of continuing disclosure under CPL 245.60.

> As stated in CPL 245.20(5), the provisions of CPL 245.20(1)(2)(3) and (4) are deemed to have the FORCE AND EFFECT of a COURT ORDER, and failure to comply MAY RESULT in application of an appropriate remedy under CPL 245.80(2) (including a further discovery order, a continuance, re-opening of a hearing, re-calling of a witness, an adverse inference instruction, striking or precluding all or part of a witness' testimony, admitting or excluding evidence, granting a mistrial, dismissing some or all charges, (keeping in mind that any sanction against a defendant for non-compliance must comport with his/her constitutional rights including the right to put on a defense. Preclusion of a defense witness is permissible only where non-compliance with discovery was WILLFUL and MOTIVATED by a desire to obtain a TACTICAL ADVANTAGE).

PROTECTIVE ORDERS:

CPL 245.10 states that “portions of discovery claimed to be non-discoverable (other than those automatically excluded), MAY BE WITHHELD pending a determination and ruling of the court under (CPL 245.70). However, as previously noted, the defendant “shall be notified in writing that information has not been disclosed under a particular subdivision (of CPL 245.20), and the discoverable portions of such materials shall be disclosed to the extent practicable.” (CPL 245.10[1][a]).

Correspondingly, CPL 245.70(2) states that 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.”

THE KEY TO THE ISSUANCE OF A PROTECTIVE ORDER IS GOOD CAUSE:

CPL 245.70(1) states that upon such showing 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, including allowing a transcript of a 911 call be provided in lieu of the recording).

The court may also permit disclosure of discoverable material/information to COUNSEL BUT NOT TO THE DEFENDANT HIM/HERSELF, or direct that counsel (and his/her employees or anyone appointed by the court to assist in defense preparation), NOT DISCLOSE physical copies of the discoverable documents to the defendant or anyone else, (PROVIDED that the People afford the defendant access to INSPECT REDACTED COPIES at a supervised location [e.g. DA’S office, police station, detention center, court house], that provides regular and reasonable hours access).

If the court limits access to material/information to DEFENSE COUNSEL ONLY, the court shall INFORM THE DEFENDANT on the record that his/her attorney is prohibited by law from disclosing same to the defendant.

The court may permit a party SEEKING or OPPOSING a protective order, (or an 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.

It should be noted that Rule of Professional Conduct (RPC) 3.5(a)(2) generally prohibits ex parte communications with a judge in adversarial proceedings EXCEPT: i. in the course of official proceedings in the matter, ii.in a writing cc’d to opposing counsel (or a pro se party), iii. orally on notice or iv. as OTHERWISE AUTHORIZED BY LAW. (It would appear that CPL 245.70 would qualify under this latter subsection).

3. PROMPT HEARING:

Absent the defendant's voluntary consent to a protective order, the court should conduct an APPROPRIATE HEARING within three business days to determine whether good cause exists and, when practicable, RENDER A DECISION EXPEDITIOUSLY.

Any materials submitted and a transcript of the proceedings MAY BE SEALED and shall constitute part of the record on appeal.

When the defendant is charged with a Class A felony or a VIOLENT felony, the court MAY, at the DA'S request, and for GOOD CAUSE shown, conduct such hearing IN CAMERA and OUTSIDE the defendant's presence. (This section shall not, however, affect the rights of the court to receive testimony or papers ex parte or in camera pursuant to subdivision one).

GOOD CAUSE: (FACTORS):

4. In determining good cause, the court may consider:

Constitutional rights/limitations;
Danger to the integrity of PHYSICAL EVIDENCE;
Risk of: INTIMIDATION, ECONOMIC REPRISAL, BRIBERY, HARASSMENT/ UNJUSTIFIED ANNOYANCE OR ALARM TO ANY PERSON (and the nature, severity and likelihood of such risk);
Risk of: an ADVERSE EFFECT on the LEGITIMATE NEEDS of LAW ENFORCEMENT (including PROTECTING the CONFIDENTIALITY of CI'S (and the nature/ severity of such risk);
The nature and circumstances of the FACTUAL ALLEGATIONS in the case;
Whether the defendant has a HISTORY of WITNESS INTIMIDATION or TAMPERING (and the nature of such history);
The nature of the STATED REASONS in support of the application;
The option of employing adequate alternative contact information;
DANGER to any person due to the defendant's affiliation with a CRIMINAL ENTERPRISE;
Other similar factors that outweigh the usefulness of the discovery.

5. SUCCESSOR COUNSEL:

An order limiting disclosure to "counsel only" applies to any successor counsel unless the court determines otherwise for good cause shown. No attorney work product derived from such disclosure may be given to the defendant unless the court says otherwise or the People consent in writing.

If the defendant is pro se, the People may regulate his/her access to discoverable material/information. The court may appoint persons to assist the defendant in the preparation of his/her defense, and the court may MODIFY or VACATE any restriction/ condition regarding access to discoverable material/information.

6. EXPEDITED REVIEW OF ADVERSE RULINGS:

a. A party who has UNSUCCESSFULLY SOUGHT OR OPPOSED the granting of a protective order RELATING TO THE NAME, ADDRESS, CONTACT INFORMATION OR statements of a person may obtain EXPEDITED REVIEW of such ruling by an INDIVIDUAL JUSTICE of the INTERMEDIATE APPELLATE COURT.

b. Such review shall be sought WITHIN TWO BUSINESS DAYS of the adverse (or partially adverse) ruling, by ORDER TO SHOW CAUSE (OSC) filed with the appellate court.

The application must also be TIMELY SERVED on the lower court and the opposing party and contain a SWORN AFFIRMATION stating in GOOD FAITH that:

i. the ruling AFFECTS SUBSTANTIAL INTERESTS, and
ii. that diligent efforts were made with opposing counsel to reach an ACCOMMODATION of the discovery dispute but either failed or were not feasible.

HOWEVER, service on the opposing party (of the OSC) and a statement of failed or unfeasible accommodation attempts are NOT NECESSARY where the party was NOT ADVISED of the application for a protective order, and GOOD CAUSE is shown for not serving the OSC on the opposing party.

The lower court's protective order is STAYED while it is under review until the appellate justice renders a determination.

c. Assignment of the appellate justice and the mode of proceedings/review are set by the rules of the individual appellate courts.

The appellate justice may consider any RELEVANT and RELIABLE information bearing on the issue (of whether the lower court providently exercised its discretion in granting or denying the protective order in whole or in part), and may dispense with written briefs other than the supporting opposing materials previously submitted to the lower court.

The appellate justice may also DISPENSE with issuing a WRITTEN OPINION in rendering a decision, and, when practicable, should RENDER A DECISION AND ORDER EXPEDITIOUSLY.

Such review, decision and order shall NOT affect the right of the defendant (in a subsequent APPEAL from a judgment of conviction), to claim ERROR in the ruling reviewed.

7. A protective order is a MANDATE of the court for purposes of a prosecution for Criminal Contempt 2d degree (PL 215.50[3]) for intentional disobedience or resistance to the lawful process or mandate of a court. (CPL 245.70[1]).

SOME RECENT CASES:

In People v Beaton 179 AD3d 871 (2d dep't 1/17/20), the court, in this murder/kidnapping case, vacated a protective order (PO) issued by the lower court (with leave to seek a new order upon a proper factual showing of good cause), because the People's ex parte application to withhold the names, addresses and identifying information of witnesses was devoid of factual support for the People's claim that disclosure would put them in harm's way.

The People alleged that "associates" of the defendant's threatened certain witnesses but they provided no particulars with respect to the identity of the witnesses, how when and where they were threatened and by whom (also not mentioning how the alleged offenders were associated with the defendant).

Similarly, allegations of Face Book threats were not supported by any documentary evidence such as messages and/or screen shots.

In vacating the PO based on an improvident exercise of discretion by the lower court, the Appellate Justice held that the applicant for a PO (here, the People), must provide a SUFFICIENTLY DETAILED FACTUAL PREDICATE to enable the court to: evaluate the relevant GOOD CAUSE factors (under CPL 245.70(4), assess their weight and properly balance the defendant's need for information to prepare a defense against the safety of witnesses.

The lower court also failed to address defense counsel's fall-back request for release of the information to counsel only.

Similarly, in People v Singh 2020 NY Slip Op. 05479 (2d dep't 10/6/20), the court noted that the People should SPECIFY exactly what material or information they are seeking to protect and why (and for which a PO is necessary), so that the court does not have to guess what factors the People are relying on.

There, County Court granted the People's application for a PO (after a hearing), but only to the extent of allowing them to withhold the name of a CI until 15 days before trial (or hearing).

Upon expedited review upon the People's application, the Appellate Justice modified the order by delaying disclosure of the CI (as well as the names and work affiliations of certain undercover police personnel), until the commencement of trial. The court also modified the PO to permit defense counsel to view video and audio tapes (at the DA's office) of the alleged drug transactions.

The court also noted that inasmuch as CPL 245.20 permits the People to withhold information with respect to CI'S and undercover police personnel without court intervention, they should only seek a PO with respect to information that they are otherwise required to disclose.

See also People v Jeanty 2020 NY Slip Op 5555 (2d dep't 10/7/20): where the Appellate Justice, on application by the People pursuant to CPL 245.70(6), modified the PO by allowing the People to withhold the identity of CI'S and undercover police personnel until commencement of trial (as opposed to 15 days before trial or hearing), and directed that defense counsel be allowed to view audio/video tapes of the alleged drug transaction at the DA's office. (Same outcome in People v Zayas 2020 NY Slip Op. 05236 [2d dep't 9/30/20]).

In People v Mena 2020 NY Slip Op. 62173 (1st dep't 1/31/20), the court vacated a PO which granted the People's request to withhold certain Grand Jury testimony based on unspecified concerns about witness safety and claims of grand jury secrecy. The court noted that the People failed to demonstrate how any risk to witness safety would have been increased by disclosure of such testimony (the witness' identity was already known to the defense), and claims of "grand jury secrecy" cannot overcome the disclosure mandate of CPL 245.20(1)(b).

But see People v Stroud 2021 NY Slip Op. 00101 (3d dep't 1/8/21). The defendant in that case was arraigned on 12/14/20 upon an indictment charging him with Murder 2d degree and Criminal Possession of a Weapon 3d degree. Four days later, the People moved ex parte for a PO, seeking to prevent disclosure of the grand jury testimony, identification procedures and interviews of certain witnesses. After an ex parte hearing, the court issued a PO delaying such disclosure until 30 days before trial.

The defendant argued that the court improperly granted the PO WITHOUT PRIOR NOTICE of the application or the hearing. The Appellate Justice noted, however, that Article 245 specifically allows a court, where appropriate, to consider evidence and arguments EX PARTE when deciding whether to issue a PO. (citing People v People v Bonifacio 179 AD3d 977,979 [2d dep't 11/23/20]) where the court noted that while CPL 245.70[6][b][ii] recognizes that PO applications can be made without notice to defense counsel, such proceedings "should be entirely ex parte ONLY where the applicant has demonstrated the CLEAR NECESSITY for the entirety of the application [and any submissions in support thereof], to be shielded."

In Bonifacio, the court held that the lower court abused its discretion in denying defense counsel an opportunity to be heard after the court granted the People's ex parte application (in this Attempted Spousal Murder case), to withhold disclosure of witness information until the completion of jury selection. In the court's view, the need for appellate intervention could well have been avoided if the lower court had given defense counsel the time of day (i.e. opportunity to make arguments on the matter of good cause). Accordingly, the summary denial of counsel's request (coupled with the absence of any record evidence of the need for ex parte proceedings), constituted an improvident exercise of judicial discretion.

In Stroud, however, the court held that in light of the "extremely sensitive nature of the information," ('not specified in the opinion), it was appropriate for the application and the proceedings in connection therewith to be conducted on an entirely ex parte basis.

The court noted, however, that the BETTER PRACTICE, in most cases, would be for the People to provide the defendant with ADVANCED WRITTEN NOTICE (by Order to Show Cause), that a PO was being sought with respect to certain information that the applicant seeks to withhold.

The court also noted that upon receipt of the PO and notification that certain grand jury testimony, identification procedures and interviews of some witnesses need not be disclosed until 30 days before trial, the defendant took advantage of the opportunity under the statute to to present relevant information on the issue of good cause. Under the circumstances, the court held that good cause had been established for the issuance of the PO.

It should be noted that while some applications may proceed entirely ex parte (and others upon notice), courts may also conduct mixed proceedings where some parts are conducted in private and other parts upon an opportunity to be heard. (see, for example, People v Brown 181 AD3d 1107 (2d dep't 3/25/20). In this Assault 1st degree case, the People moved ex parte (upon an affidavit with supporting exhibits submitted under seal), to withhold certain witness identifying information until the jury was sworn, and to permit defense counsel to view an unredacted surveillance video (at the DA's office), depicting the defendant and the witnesses,

(but redacting certain still photos from the video to exclude any witness identifying information).

The court's order followed discussion and agreement between the parties with respect to counsel's viewing of the unredacted video, receipt of redacted still photos and being provided with witness statements (with the names and any other identifying information redacted).

Inasmuch as the order was based, at least in part, on defense counsel's input and represented an accommodation between the parties, any claim of error was deemed to have been waived for appeal purposes. Also, the defendant's argument that he should have been provided with a copy of the surveillance video to review with counsel, raised for the first time on appeal, was deemed unpreserved.

SOME OTHER CASES:

In People v Taggart 2020 NY Slip Op. 05020 92d dep't 2020), the court held that County Court erred in denying the People's application for a PO in its entirety and modified it by limiting disclosure of certain witness identifying information (and certain documentary evidence) to defense counsel (and those employed by him or appointed by the court to assist with the defense).

But see People v Clarke 2020 NY Slip Op. 05221 (2d dep't 9/30/20) where the lower court was deemed to have erred in granting a PO that permitted defense counsel to share certain recordings only with those people who were APPROVED BY THE COURT (as necessary to assist with the defense). Under CPL 245.70(1), while the court can limit disclosure to defense counsel, counsel's employees and anyone appointed by the court to assist in the preparation of the defense, defense counsel should not have to seek subsequent court approval (upon a finding of necessity) before sharing such information with those individuals.

People v Brown 180 AD3d 1107 (2d dep't 2/28/20): In view of considerations of witness safety (CPL 245.70[4[), the lower court improvidently exercised its discretion in ordering IMMEDIATE DISCLOSURE of witness information to defense counsel and investigators. The order was MODIFIED to delay disclosure until 45 days before trial. (see also People v Reyes 180 AD3d 967 (2d dep't 2/21/20).

In People v Harrigan 2020 NY Slip Op. 05612 92d dep't 2020), the court held that the PO improperly granted IMMEDIATE DISCLOSURE of the names of certain witnesses (and of their parents) to the defense. The Appellate Justice, therefore, modified the order to delay disclosure of the witnesses until the commencement of trial (to defense counsel only), and of the parents until 15 days before trial, (also to defense counsel only).

Once counsel learns that certain information is being (or, in the case of an ex parte application), has been withheld from disclosure, counsel should request an opportunity to be heard, if for no other reason than to compel the People to demonstrate (if only in general terms), the factual basis for seeking such relief. If they claim "witness safety," then counsel should ask the court to make sure that the People's application (and any supporting exhibits) provided a sufficiently detailed FACTUAL PREDICATE, as opposed to conclusory allegations (People v Beaton supra), and that there was a CLEAR NECESSITY for proceeding on an ex parte basis.

Counsel should also take every opportunity to press prosecutors, (if only informally) to explain their reasons for non-disclosure and see if there is any room for an accommodation to be reached (e.g. disclosure to counsel and assistants only). Trial judges would much rather have the parties agree upon a resolution under the rules rather than be told by an appellate justice

that they abused their discretion in an over-abundance of caution that may not have been warranted under the circumstances of the particular case.

Gone are the days when prosecutors could treat disclosure as if it were a game of poker. Now that the rules have dealt the defense a much better hand than ever before (e.g. presumption in favor of disclosure, automatic discovery within specified time frames and certified compliance before the People can declare ready for trial), counsel should play every card and push the prosecution to reveal its cards (i.e. factual bases for good cause). And, if the court grants a PO that allows them to conceal their aces, counsel should not be hesitant to seek prompt review by an appellate justice to determine whether the trial court abused its discretion. If nothing else, trial courts will be be less likely to grant such orders reflexively without a clear demonstration of good cause that favors witness safety over prompt disclosure.