

Comments on Proposed Rules Regarding Disclosure Obligations of Prosecutors and Defense Counsel in Criminal Matters

CRIMINAL JUSTICE SECTION

CJS #3

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The Criminal Justice Section of the New York State Bar Association submits the following comments with respect to the Proposed Rules Regarding Disclosure Obligations of Prosecutors and Defense Counsel in Criminal Matters.

While criminal discovery is strictly regulated by statute CPL 240.20 and case law, the proposed Order will go a long way in establishing a reminder to prosecutors as to the “best practices” relating to timely disclosure of discovery, and their obligation to provide Brady material as soon as they become aware of it. The Order will also alert defense counsel as to their obligation to provide effective assistance to their clients. The Orders should not be used to sanction any counsel unless their conduct results in a deliberate and intentional violation of their discovery obligations, or their obligation to their clients.

The New York State Bar Association has longstanding policies in support of reform of the criminal discovery process and the establishment of effective assistance of counsel standards. NYSBA’s Reports on Wrongful Convictions and Discovery Reform clearly establish the rationale for these policies. In addition, the Committee on Mandated Representation has set forth minimum standards for defense counsel to follow in order to afford their clients effective representation. The Proposed Rules by establishing “best practices” in these areas should improve the practice of criminal law, and result in a fairer and more just criminal justice system.

The Criminal Justice Section, while generally supportive of the intent of the Proposed Rules, nonetheless specifically objects to the “presumptive” time periods set forth in the Proposed Rules. *Brady* material must be turned over immediately by prosecutors. Getting *Brady* 30 days before trial may very well prevent effective use of the material. Additionally, plea negotiations are conducted well before this time period and the prosecutor must turn over *Brady* when it becomes known and not rely on the “presumptive” date in the Proposed Rules. As all practitioners are aware, “trial dates” are moving targets and should not be the “measuring stick” for when discovery or statutory

notices are presumed to be “timely.” The one “known” date is the arraignment on the Information or Indictment. Any time periods should be measured from that date. The Excellence Initiative, which has been put in place in some counties, has caused trial dates to be advanced rather than delayed. Thus compliance with the 30 day presumptive period will be impossible. By measuring the “presumptive” time period from arraignment, all counsel will have guidance as to when to comply with their obligations.

The Criminal Justice Section would like to thank the Chief Judge and the Justice Task Force for undertaking a review of the issues relating to discovery and the role of counsel in criminal matters. As a Section composed of Judges, prosecutors and defense counsel, we are keenly aware of the difficulty in forming a consensus on such a complex issue.

Chair, Criminal Justice Section: Tucker Stanclift, Esq.