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DISCOVERY IN NEW YORK CRIMINAL COURTS

SURVEY REPORT & RECOMMENDATIONS

This Report was approved by the Board of Directors of the New York County Lawyers' Association at its regular meeting on March 13, 2006.

The New York County Lawyers' Association
Criminal Courts Task Force
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Susan J. Walsh
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EXECUTIVE SUMMARY¹

In the spring of 2005, a subcommittee of the Criminal Courts Task Force designed a comprehensive survey to distribute to an array of professionals engaged in the discovery processes of misdemeanor cases in the Criminal Court of the City of New York. The goal of the survey was to identify actual discovery practices in four boroughs in the City of New York notwithstanding the codified procedure in the Criminal Procedure Law (C.P.L.). Three surveys were custom designed to address the perspective of the target group respondents (prosecution, defense and judiciary), and attempted to capture similar data from each of the respective groups on the same topics. Judges and practitioners in Manhattan, Queens, Brooklyn and the Bronx were surveyed. The volume of returns varied from borough to borough and practice area. However, almost every response that was legible and internally consistent was used in drafting this report, without regard to accepted sampling or survey techniques.

The subcommittee mailed 750 anonymous surveys, the vast majority in pre-paid return envelopes and in some instances by email, to all Criminal Court Judges, Legal Aid Society attorneys in each borough, all members of the Assigned Counsel Plans and five alternate defense providers in four boroughs. Respondents were asked to quantify their primary borough of practice and self-identify their type of practice and their organizational affiliation, if any. The response time for return of the surveys was extended until December 2005 to achieve maximum participation. The subcommittee tabulated 131 responses to write this report.

The results of the surveys indicate that discovery practice in misdemeanor cases are at great variance from borough to borough and to some extent from courtroom to courtroom. In general, Kings, Queens and Bronx Counties employ a more liberal disclosure policy than required by the C.P.L. – disclosing more substantive information to the defense earlier in the process, loosening temporal requirements and often eliminating the requirement of formal written discovery demands or motions. In all three boroughs, the majority of respondents indicated that formal written defense motions are often waived in exchange for hearings on consent and “open file” discovery or “discovery by stipulation.” Of the four boroughs, only Manhattan maintains a policy of limited pre-trial disclosure, requiring written discovery demands and motions, and closely adhering to the substantive and temporal requirements of the C.P.L. The Manhattan District Attorney employs a more formulaic disclosure based upon a form commonly referred to by both prosecution and defense as a “VDF.” The Manhattan and Queens District Attorneys’ Offices were both critical of the lack of defense disclosure and a reported absence of judicial enforcement of such disclosure. Of the four boroughs, Queens County reported the most autonomy for Assistant District Attorneys in the misdemeanor courtrooms, in terms of discretion to decide what information to disclose and when on a case-by-case basis.

Of the four boroughs surveyed, Kings County respondents reported the most universal

¹ Kristine Hamann, a member of the Task Force, supports the report to the extent that it accurately states the results of the survey; however, she does not join in the recommendations of the report.

and complete satisfaction with the current “open file discovery” policy. This came from every type of practitioner or judge who responded, and generally noted the elimination of needless paperwork and the overall expedition of cases to disposition. Manhattan respondents, with the exception of the District Attorney’s Office, were on the whole most critical of the current policy employed in that borough, generally noting unnecessary motion practice, judicial engagement in the process and the general prolonging of the length of cases.

Of those boroughs that employ a more liberal discovery policy, survey respondents almost universally embraced and endorsed the practice – noting the expedition of case resolution and the reduction of unnecessary adversarial posturing and applauding the elimination of unnecessary boilerplate motion practice as the fundamental advantages of the policies. In Manhattan, defense attorneys and judges were almost universally critical of the District Attorney’s discovery policy, endorsing the more liberal procedures used in neighboring boroughs.

Also notable from the responses was the lack of any consistent, institutional publication of the respective District Attorneys’ Office policy with respect to misdemeanor discovery practice. Almost every respondent, regardless of his/her role in the criminal justice process, reported learning of the institutional policy by word of mouth or through practical courtroom experience within the respective borough. Only the Kings County District Attorney reported a written form for “discovery by stipulation”; nevertheless, most respondents learned of that borough’s policy through “on-the-job” courtroom experience or word of mouth.

Although every borough reported some level of formal written discovery or motion practice, Manhattan respondents indicated that they generated the greatest percentage of written discovery requests. No marked disparity in the volume of litigated discovery issues between boroughs was evident in the survey responses, regardless of the borough’s policy, with the majority of respondents in all boroughs reporting that litigation on misdemeanor discovery issues is rare or infrequent.

The fundamental conclusions and recommendations of the Task Force, based upon the responses and the great variance in discovery practices from borough to borough are: (1) those boroughs with more liberal disclosure report the most universal satisfaction with the practice regardless of position within the system and (2) steps should be taken in every borough to more formally inform practitioners of the existing policy. On the whole, more open and earlier disclosure of discoverable material without formal demand or motion is the preferred practice among all sectors of the Criminal Courts’ practice. The burden on the defense, prosecution and judiciary -- in terms of time and resources devoted to drafting, responding and deciding formal demands -- appears to prolong the process and delay informed decision-making toward ultimate case disposition until later in the process. It also decreases overall satisfaction with the efficient performance of our high-volume system and may in fact hinder the expeditious disposition of cases. Underlying notions of earlier disclosure and more timely disposition is the concept that when the individuals accused are privy to more information sooner, informed choices can be made earlier in the process. Having access to information earlier in the process enables informed choices earlier in the process. Greater “efficiency” in the discovery context is synonymous with

fairness and justice.²

The Task Force thus recommends that open file discovery or discovery by stipulation policies be instituted citywide; that the policy once adopted contain an ongoing duty to disclose materials as they are received by the prosecution throughout the proceedings; and that timely and reciprocal discovery be provided by the defense commensurate with the disclosure policy in each borough. In addition, the Task Force acknowledges that untimely disclosure in some boroughs, even those with open file discovery policies, may be the result of a lack of institutional mechanisms to foster transmittal of materials from the police and other agencies in possession of the materials. Accordingly, the Task Force recommends that internal policies be reviewed and developed, including the possibility of electronic discovery transmittal, to facilitate the more timely transmittal of materials with the full support of the organized bar. The Task Force further recommends that the policies and procedures in each borough be formally published and disseminated at the earliest opportunity.

² It should also be noted that in the recently released Interim Report to the Chief Judge of the State of New York, the Commission on the Future of Indigent Defense Services included “prosecutorial resistance to more open discovery procedures” in a list including “the most troubling systemic problems that emerged from the testimony at the Commission’s four public hearings.” Specifically, the Commission reported that “[p]rosecutorial resistance to more open discovery procedures is extensive in many counties, thereby impeding efficient expedition of cases, investigation by the defense, including the location of witnesses, and thus gives rise to unfairness.” *Interim Report* at p. 24.

Discovery in New York City Criminal Courts

Recommendation Highlights

- Discovery practices vary greatly among the boroughs.
- Boroughs with more liberal disclosure practices report the highest level of satisfaction among judges and lawyers.
- More open and earlier disclosure of discoverable material without formal demand or motion is the preferred practice among all sectors of the criminal justice system.
- Reliance upon formal discovery motion practice appears to prolong the process and delay informed decision-making, hindering expeditious disposition of cases.
- When the accused are privy to more information at an earlier stage, informed choices are made earlier in the process.
- Greater efficiency in the discovery process promotes fairness and justice.
- Open file discovery or discovery by stipulation should be instituted citywide.
- The defense should have a reciprocal duty to provide timely discovery commensurate with the prosecution's discovery policy in each borough.
- Internal policies and procedures should be developed to facilitate more timely transmittal of materials, including the possible use of electronic discovery transmittal.
- Policies and procedures in each borough should be formally published and disseminated at the earliest opportunity.

THE REPORT

Survey Introduction

On October 18, 2003, the New York County Lawyers' Association (NYCLA) and the Fordham University School of Law's Louis Stein Center on Law and Ethics hosted more than 100 professionals having diverse roles within the criminal justice system in the five boroughs of New York City at a *Conference on New York City's Criminal Courts*. The goal was to identify, evaluate and begin to solve some of the complex problems firmly embedded in the culture, operations and practice in our City's Criminal Courts.³

Following the conference, NYCLA President Norman L. Reimer appointed a Task Force on the Criminal Courts.⁴ The Task Force consists of a diverse cross-section of professionals who have volunteered to work collaboratively and creatively to more closely evaluate the proposals and issues raised during the conference.

One area identified as demanding closer analysis is the discovery process and practice in misdemeanor cases. Information garnered during the October 2003 conference indicated that, notwithstanding the codification of criminal court discovery practice, *see* N.Y. Crim. Proc. Law Article 240 (2005), misdemeanor discovery procedures and practices are at great variance in each borough and sometimes from part to part within a borough.⁵

After a more in-depth vetting of the issue, the Task Force recommended that a comprehensive survey be sponsored by the NYCLA Justice Center and distributed to representative practitioners and judges throughout four boroughs.⁶

Discovery: An Overview

Article 240 of the Criminal Procedure Law regulates discovery in state court criminal cases. The statutory procedures involve the exchange of written notices between the parties, called "demands," for enumerated items. Court involvement theoretically only comes into play when one party: (1) moves for a court order following the opposing party's refusal to comply with a discovery demand; (2) moves for a protective order for a particular piece of evidence; or

³ A full report of the 2003 conference is available in the Fordham Urban Law Journal, V. XXI, No. 4, *A Conference on New York City's Criminal Courts*, May 2004.

⁴ The New York County Criminal Courts Task Force: Susan J. Walsh, Chair; Jenny Roberts and Michael Yavinsky, Discovery Survey Subcommittee Co-Chairs; Members: Cassandra Abodeely; Pat Almonrode; Adele Bernard; Frank Bress; Hon. John Carter; Hon. Cheryl Chambers; Mari Curbelo; Lisa Cunningham-Lindsay; Tigran Eldred; Hon. Ralph Fabrizio; Rachel Ferrari; Robert Frazer; Molly Gallivan; Bruce Green; Kristine Hamann; Hon. Pat Henry; Thomas Hickey; Kirk Hoffman; K. Babe Howell; Peter Kiers; Josh LaRocca; Robert Mandelbaum; Jerome McElroy; Shari Michels; Deidra Moore; Martha Rayner; McGregor Smyth; Hon. Deborah Stevens-Modica; Vincent Rivellese; Richard White; Catherine O'Hagan Wolfe; Steve Zeidman; and Jonathan Zucker.

⁵ Article 240 of the New York Criminal Procedure Law provides, *inter alia*, that except to the extent protected by court order, disclosure of particularized information shall be made by both sides upon demand. *See* N.Y. Crim. Proc. Law Article 240 (2005).

⁶ Staten Island, although represented at the conference, was not included in the survey distribution due to practical limitations on the subcommittee's volunteer resources. However, a number of respondents did identify it as a borough in which they practiced. None indicated that Staten Island was their primary area of practice.

(3) requests the imposition of a sanction for non-compliance with the mandates of Article 240. The items that are discoverable under this statutory scheme are listed generally as “property.” Property is defined as “any existing tangible personal or real property, including but not limited to books, records, reports, memoranda, papers, photographs, tapes or other electronic recordings, articles of clothing, fingerprints, blood samples, fingernail scrapings and handwriting specimens, but excluding attorneys’ work product.” C.P.L. § 240.10(3).

The timetable outlined in the statutory scheme requires that demands be exchanged amongst the parties during approximately the same time that the parties are engaged in motion practice. However, Article 240 does not require that all discoverable property be disclosed during the motion stage of the case. The prior statements, criminal convictions and/or pending criminal cases of any witness either side intends to call do not need to be turned over until after the conclusion of the witness’s direct examination at a pre-trial hearing. If a witness does not testify until trial, that same information does not need to be turned over until after the jury has been sworn but before the prosecution’s opening argument (for prosecution witnesses), or before the defendant’s direct case begins (for defense witnesses).

The four District Attorneys’ Offices involved in our Discovery Survey (i.e., Bronx County, Kings County, New York County and Queens County) each has an office policy on how it processes discovery. As the surveys of all who replied will bear out, those District Attorneys’ Office policies are what drive the exchange of discoverable property between the parties in each county. These policies vary from requiring strict adherence to the Article 240 procedures and timetables (in New York County) to open file discovery by the prosecutor in exchange for a waiver of omnibus motion and formal discovery demand and pre-trial hearings on consent (Kings County). [Both the Bronx County District Attorney’s Office and the Queens County District Attorney’s Office fall squarely in between these two polar opposite policies.]

In comparing and contrasting the different policies of each District Attorney’s Office, it is important to keep in mind two major issues:

1. Timing - the point during the course of the criminal action when the discoverable property will be turned over. The early exchange of discovery (Kings County) is very different than the statutorily prescribed timetables for the exchange of discovery (New York County).
2. In Writing or Not in Writing - whether or not the parties are required to preliminarily exchange papers before the discoverable property is exchanged. There is a substantial difference between agreeing to waive motion practice (and written discovery demands) in exchange for discoverable property and requiring that the parties put their discovery requests, oppositions to discovery requests, motions for discovery, and oppositions to motions for discovery all in writing (as required under the C.P.L).

The discussion that follows comparing these policies revolves around the positive and the negative aspects of these two issues. It is important to note, however, that regardless of which office policy is being applied, the same information will eventually be turned over to the

opposing side as the case proceeds to its ultimate disposition. **The central issue is when and how much.**

The Survey⁷

The purpose of the survey was to collect and preserve data on actual misdemeanor discovery practices. The goal was to determine what is really occurring in our Criminal Courts, regardless of policy or statute. The subcommittee did not use accepted sampling or survey techniques. Surveys were distributed to target representative groups, including District Attorneys' Offices, Legal Aid attorneys and private practitioners, as well as Assigned Counsel and alternate providers, with an aim to get as universal a cross-section of practitioners as possible.⁸

A total of 750 surveys were mailed with a postage-paid return envelope to facilitate response and in some instances were transmitted by email. Surveys were sent to Criminal Court Judges in all four boroughs, each Legal Aid office in each borough, Assigned Counsel practitioners in each borough, and every alternate defender in each borough. Survey respondents were requested to remain anonymous to foster candid responses. Each survey was specifically tailored to the target group, but the questions were universal in topic/subject matter and tailored only to reflect the perspective of the individual respondent. Of the 750 surveys distributed, 131 responses were used to write this report.⁹ For ease of reference, the returns in

⁷A copy of the actual surveys distributed are annexed as Appendix I.

⁸All four District Attorneys' and Legal Aid Offices were contacted to preserve universality and a balanced presentation in the survey response. In addition, all institutional offices were urged to permit those attorneys who practice in the misdemeanor parts to participate in the survey. No surveys were distributed to institutional attorneys without the express consent of the offices. No District Attorney's Office agreed to further dissemination of the surveys to actual Assistant District Attorneys who practice law in the various misdemeanor parts, but all four did submit a single response from the Office.

⁹ Respondents to all surveys, with the exception of judges and prosecutors, were asked to identify themselves as either private, alternate provider (including assigned counsel) or Legal Aid and were also asked to identify by percentage their primary borough of practice.

In New York County, five defense attorneys identified the majority of their practice as alternate provider work; four as primarily private counsel; and 25 as Legal Aid attorneys. Of the assigned and private defense counsel, three attorneys identified themselves as multi-borough practitioners with more than 50 percent of their practice in New York County and were accordingly counted among the New York County surveys. Six New York judges responded.

In Queens, six self-identified private attorneys, 20 alternate providers and ten Legal Aid lawyers responded. Of those with mixed borough practices, five identified themselves as having a practice of which more than 50 percent was in Queens and accordingly those were counted among the Queens County surveys. Three judges responded.

In Kings County, 12 alternate providers, five private practitioners and 20 Legal Aid attorneys responded. Of those attorneys with multi-borough practices, three identified Brooklyn as comprising more than 50 percent of their practice and accordingly were counted among the Kings County surveys. Seven Kings County Judges responded.

In the Bronx, one attorney self identified as private, and one as an alternate provider; one judge also responded. No responses were received from Legal Aid.

All four boroughs' District Attorneys' Offices participated in the survey. All were urged to distribute the anonymous surveys to the assigned assistants with misdemeanor practices in order to get more direct data from those entrusted with prosecuting criminal cases on a daily basis in the Criminal Courts. All four declined to do so, submitting a single response on behalf of the office.

this report are divided by category of response: Judiciary, District Attorney or public defender, as well as by borough. Obviously, overall response to the survey was dependent on individuals' willingness to participate.

Survey Respondents' Understanding of the Current Official Policy in Their Borough

Kings: All judicial responses to the Kings County survey acknowledged that the official misdemeanor discovery practice in the borough was "open file" or "discovery by stipulation."¹⁰ One response noted that most defense attorneys generally consent to open file discovery or discovery by stipulation in cases of incarceration, with both sides consenting to pre-trial hearings and additional materials provided early in the process. It was also noted that often times Assistant District Attorneys consent to *Mapp* and *Huntley* hearings without the necessity of a formal defense motion.¹¹

All alternate providers surveyed recognized that "open file" or "discovery by stipulation" without formal written motions or demands was the official policy in Kings County. Of the five who found the question about whether the "official" policy was written anywhere applicable, one indicated the belief that it was a written policy and four learned essentially through practice. Similarly, all private practitioners acknowledged that the policy in Kings County was "open file" or "by stipulation" and all learned of it through practice in the courtroom.

The overwhelming majority of Legal Aid respondents recognized the open file discovery (OFD) or discovery by stipulation (DBS) policy in Kings County, with OFD encompassing written materials covered by Article 240 of the C.P.L. and DBS, provided that hearings are stipulated to by both sides, allowing broader disclosure that includes *Rosario* materials.¹² Only four found the question as to how they became aware of the policy applicable, and they noted awareness of the policy by practice or written agreement. The vast majority of Legal Aid respondents indicated that the policy was uniformly followed.

According to the Kings County District Attorney's Office, the current discovery practice is "Discovery By Stipulation."¹³ Consistent with the policy, "[t]he People, in lieu of written motion practice, provide discovery to the defense on an ongoing basis. Based on a review of each case, we consent to appropriate hearings." There is a point person for discovery in the borough, and the office listed eight names of those supervising the process. The policy is preserved in writing in as much as a "Discovery By Stipulation" agreement is provided by the

¹⁰ Questions posed: Please describe the current "official" misdemeanor discovery practice in your borough (not Article 240, but what the DA's office actually does). Is this policy written anywhere? If not, how are you aware of it?

¹¹ *Mapp* and *Huntley* hearings are pretrial suppression hearings to determine, respectively, the legality of the seizure of physical evidence and of defendant's statements that the prosecution indicates it intends to introduce in its case-in-chief. See *Mapp v. Ohio*, 367 U.S. 643 (1961); *People v. Huntley*, 15 N.Y.2d 72 (1965).

¹² *People v. Rosario*, 9 N.Y.2d 296 (1961). *Rosario* materials are distinguished from other discovery materials in that they include prior statements of witnesses and are not required to be disclosed prior to jury selection or, in the case of a pre-trial hearing, at the conclusion of direct examination of the witness. See N.Y. Crim. Proc. Law 240.44, 240.45 (codifying *Rosario* rule).

¹³ The Office provided a sample stipulation that is included in Appendix II.

prosecution. According to the District Attorney's Office, "this has been the policy in Kings County for many years."

New York: The judicial responses to the New York County survey indicated that the official policy was only "on motion" written by the defense with a Voluntary Disclosure Form (VDF) furnished by the prosecution in response.¹⁴

Four of five alternate providers indicated that their understanding of the policy in New York County is that discovery is not provided until trial and that they became aware of the policy through courtroom experience. One found the question not applicable. Of the private practitioners in New York County, the majority (three of four) noted that the official discovery procedure was on written motion and that they were aware of this through practical courtroom experience.

Twelve of 25 Legal Aid respondents indicated that disclosure is generally not made until the eve of hearing or trial. Six characterized the official discovery practice as "non-existent," and all lamented a lack of disclosure of discoverable materials early in the proceedings. Most respondents acknowledged implicitly or explicitly that the practice is in writing, and were aware that the policy is on written motion by the defense with a limited amount of information supplied by the prosecution in the form of a VDF. The VDF was characterized as "pre-printed," "minimal," "incomplete" and "non-responsive." All were aware of the policy from courtroom practice and the majority indicated that the prosecution consistently followed the policy.

According to the Manhattan District Attorney's Office, the "current official misdemeanor practice includes a Voluntary Disclosure Form (VDF) provided during motion practice. Medical records and electronic recordings are provided within a reasonable time after receipt ... physical and photographic evidence may be inspected upon arrangement." Although there is no point person in the office for criminal court discovery issues, each of the six trial bureaus has a supervisor who serves one to two years. The office noted that this policy is not written but judges and regular practitioners are aware of it through longstanding practice; others are informed orally or upon being served. There is no enhanced discovery in exchange for waiver of certain motions in New York County.

Queens: The judicial responses to the Queens County survey indicated that the unwritten practice is open file discovery but only if defense motions -- particularly *Wade* and *Huntley* hearings -- are waived.¹⁵ Judges noted that the materials supplied are sometimes "sparse" and do not include 911 calls or medical records, which are often provided later.

Alternate providers universally recognized the practice of open file discovery in misdemeanor parts. Eight of the ten alternate providers who found the question applicable learned of the policy through in-court practice; one said it was publicized and one learned from "hearsay."

¹⁴One judicial response indicated that there was no official policy.

¹⁵ *Wade* hearings are pre-trial hearings concerning police-arranged identifications.

Private practitioners in Queens also universally recognized the open file policy in Queens and noted they learned of the policy through actual courtroom experience.

Legal Aid respondents also acknowledged the OFD policy in Queens, noting that if motions are filed, OFD is more limited. All were aware of the policy by “daily practice” in the parts. The majority indicated that the policy was followed uniformly.

The Queens District Attorney’s Office indicated that “the office follows the process set out by statute in instances where a defendant has filed written motions. If all parties are in agreement, however, ADA’s are authorized to consent to appropriate hearings and voluntary discovery in lieu of defendants’ written motions. The policy is not written anywhere but Queens County judges are aware of the procedure and ask defendants their preference during calendar calls. Additionally, ADA’s will offer voluntary discovery in court and will consent to hearings in appropriate cases. There is a point person in the office for Criminal Court discovery issues. Although no standardized waiver form is used, the office noted that “if agreeable, we provide voluntary discovery and consent to hearings as early as possible, without exacting a waiver of any of the defendant’s rights. If an agreement cannot be reached as to which hearings will be granted, a defendant may of course file written motions.”

Bronx: According to the judicial response in the Bronx, the “official misdemeanor” discovery policy is “scattershot” and varies from ADA to ADA and bureau to bureau. The alternate provider counsel characterized the policy as “very open file” and indicated that they became aware of the policy because the prosecution states it on the record in court. The private practitioner found the question inapplicable.

According to the Bronx District Attorney, the current “official” misdemeanor discovery practice is that once the defense files a discovery motion, they are “provided with discoverable materials, plus Rosario materials and non-discoverable materials such as police reports. The defense is not required to waive motions, and the defense motions ... [are] viewed as a matter of timing, not a limit on what is provided. Further additional materials are provided as it is [sic] received.” There is no point person in the Bronx office for discovery issues. The policy is not written and defense attorneys and judges are made aware of it “through supervisor contact with judges and defender organizations, and through practice.”

Departures from Stated Policy Borough to Borough

Kings: Judicial responses indicated that if the defense files discovery motions in this open file borough, discovery is not forthcoming absent a court order and acknowledged that “sometimes” ADA’S are late in providing discovery. The departures were dependent upon the defense attorney’s insistence on litigating, “laziness” or upon the ADA’s inability to locate materials or relevant police officers. Only three judicial responses found these questions

applicable. Of those three, two found that the departures differed from ADA to ADA and one did not.

Of 12 alternate providers, four indicated that the policy is followed; four indicated “mostly” but “not completely”; two indicated that it is not followed or not as well as in felony practice; and one found the question inapplicable. The alternate providers noted that departures happened sometimes in sex cases or in cases where the materials were not readily available; they also wrote that production was sometimes “slow.” Most alternate providers did not find the departures dependent on the particular ADA. All private practitioners stated that the policy is followed in Kings County.

Legal Aid attorneys in Kings County noted that departures, if any, were usually dependent on the ADA, and the majority found those departures attributable to the ADA not having possession of the documents.

The District Attorney’s Office indicated that ADA’s always follow the policy with respect to misdemeanor cases.¹⁶

New York and Queens: Almost all judicial responses indicated that there was no departure from the stated policy in either borough or that the question was “not applicable.” Judges reported that the policy did not differ from ADA to ADA in either borough.

In New York, three of six alternate providers found the question applicable and indicated that the policy is generally followed, with departures in cases where items are specifically requested or in clearly contentious cases. Four of the five alternate providers noted that the departures differ from ADA to ADA. One did not.

Private New York County practitioners noted that the stated policy is generally followed in practice, with two noting some variance depending on the individual ADA handling the case, and one noting that the departure, if any, was later disclosure, “never earlier.” One attributed departures to “DA case overload.”

Legal Aid attorneys in New York County varied in their response to when departures from the stated policy occur. Of the 15 who found the question applicable, more than four implied that departures occur only with the involvement of the court. Legal Aid responses were evenly divided as to whether or not departures were dependent on the individual ADA.

The New York County District Attorney’s Office indicated that Assistants follow the

¹⁶ The Kings County DA’s Office reported that after a misdemeanor arraignment, the Office generally received the following: memobooks for officers, sprint report, 911 and radio runs, Detective DD5s, aided and accident reports, narcotic and ballistics lab reports, narcotics officers’ paperwork, chemist’s notes and medical records. Lab and ballistics reports are usually available fairly promptly; the materials that are turned over to the Office later are not available at the time the case is written up in the Complaint Room. At arraignment, the Criminal Court file usually contains: the complaint, the defendant’s rap sheet, a screening sheet and a synopsis of the case, the complaint report, the arrest report, various DA paperwork, supporting depositions of police officers and narcotics field tests, if applicable.

office's practice with departures possible in exceptional circumstances, such as with a large volume of discovery material, with supervisory approval. Departures occur "to facilitate plea negotiations or the commencement of trials." Such departures are "case related."¹⁷

Queens: Fifty percent of Queens alternate providers who responded to the survey indicated that the policy is generally followed; three found adherence to the policy mixed and the remainder found the question inapplicable. Only three alternate providers of 20 respondents indicated that there was any variance between ADA's in the departures from the policy.

Three of five private practitioners found that the policy is followed in Queens County. One was unsure and one found the question not applicable. Those that noted some departure from the policy in practice found that it happened in "multiple defendant cases" or "close" contested hearings, significant departures did not depend on which individual ADA handled the case.

Legal Aid respondents indicated in general that there are few instances of departure from the policy and were evenly split as to whether departures were dependent on the individual ADA when they did occur.

In Queens, the District Attorney's Office reported that "ADA's have discretion to either offer voluntary discovery or demand written motions in a case by case basis." Written motions are normally requested in more complex cases. The reason provided for departures by the Queens District Attorney was that "early voluntary discovery is a benefit conferred upon a defendant by the District Attorney. It is not a right...the statutory motion practice does not penalize a defendant, it merely requires written requests for evidence. ...the receiving of voluntary discovery does not give a defendant something that the defendant would not otherwise receive, albeit perhaps a little later."¹⁸

Bronx: The judicial response indicated that it was "scattershot" and varied from ADA to ADA. The alternate provider indicated that the stated policy was followed with respect to misdemeanor discovery and indicated no instances of departure from the policy. However, he/she did note that any occasional departure was dependent on the particular ADA. The private practitioner indicated that the DA's office follows the stated policy and that any departures were attributable to "accident or oversight," and dependent on the individual ADA involved in the case. The Bronx DA's Office reported that ADA's follow the practice.¹⁹

¹⁷ The District Attorney's Office indicated that the materials in the Criminal Court file at the time of arraignment include: "the accusatory instrument, DA data sheet; CJA interviewing report; CJS criminal history, arrest report and on-line booking sheet. Supporting depositions, complaint reports and vouchers are included sometimes. Field tests, DMV abstracts and DWI reports are included as appropriate and available."

¹⁸ With respect to police and other agency paperwork in misdemeanor cases, the Queens District Attorney's Office indicated: "the only police paperwork generated after arraignment are the omniform complaint and arrest forms, vouchers and memobook entries. Depending on the complexity of the case, there may be additional paperwork." Most additional materials are sought after it has been determined that a defendant is not seeking a swift resolution of the case and that trial is likely.

¹⁹ The Bronx District Attorney's Office indicated that in most misdemeanor cases after arraignment the office receives "sprint reports, 911 calls, follow-up police reports, complaint follow-ups sometimes weeks and sometimes months" after arraignment. The Office indicated that the materials are turned over later due to "NYPD

Does the Stated Policy Work or Not Work?

Kings: Judicial responses indicated almost unanimously that the policy in their borough “worked,”²⁰ that open file discovery or discovery on consent reduced unnecessary motion practice and judicial intervention in “petty discovery disputes,” reduced boilerplate motions, and often provided the defense with more information than that required by statute.

Eight alternate providers found that the policy and practice worked, “reducing useless motion practice,” and providing information “faster” and “earlier.” Only one indicated that the prosecution does not comply with the agreements and the policy is not enforced; one noted that it works because judges enforce the policy.

Private practitioners in Kings found that the policy worked, “saved mountains of pointless motion papers,” and “expedites the time from arraignment to trial.”

The majority of Legal Aid attorneys indicated that the process in their borough “worked” when it was followed, reducing motion practice and expediting the process, although several noted that the “agreements” for OFD or DBS were not universally enforced by the judiciary.

The Kings County DA’s Office reported that the official misdemeanor discovery practice in the borough works because the practice “expedites cases. There is no need for defense attorneys to file motions or for our Assistants to answer these motions.”

New York: Judicial responses indicated that the current policy was “a complete waste of time” and “too lengthy” and prosecutorial disclosure is often late. One specifically indicated that the cases would be resolved sooner if discovery was provided at the time of complaint conversion and that when motions are waived, no discovery is provided.²¹

Alternate providers noted that better advice to clients could be rendered and calendar congestion could be reduced if the policy were different. Two found the question inapplicable.

Three of four private practitioners indicated that earlier disclosure than the normal policy was preferable and would avoid “boilerplate demands”; one preferred having suppression hearing motion issues “on paper.”

Legal Aid attorneys almost universally noted that limited discovery in New York is inefficient because it does not permit early case assessment, prolongs the length of some cases and contributes to congestion.

The Manhattan DA indicated that the policy “works” insofar “as it seeks to strike a fair

volume.” At the time of arraignment the Criminal Court file contains the complaint report and arrest report.

²⁰Only one response indicated that the question was not applicable.

²¹In New York County, waiver of motions can occur when defense counsel intends to expedite the matter toward trial. The use of the term waiver, in this context, is not meant to convey the waivers that occur in some boroughs to expedite discovery disclosure.

balance between the defendant's needs and the People's case management in Criminal Court where caseloads are very heavy."

Queens: Judicial responses indicated that although there is sometimes a delay in disclosure of 911 or medical records, generally the policy works. It "expedites the resolution of cases," reduces "rote motions, rote responses and rote decisions" and generally avoids unnecessary hearings and trials.²²

About half of all alternate providers indicated that the Queens policy works in that cases are handled "more expeditiously," "more information up-front = more pleas earlier," and there is a reduction in unnecessary litigation. Approximately 25 percent indicated that not all information is in fact provided notwithstanding the policy.

Queens Legal Aid respondents were generally critical of the policy to the extent that it did not provide enough disclosure.

The Queens District Attorney indicated that the current policy works in that borough, noting that "67 % of misdemeanor cases are disposed of at arraignments. Preparing additional paperwork for every misdemeanor case, including those that are disposed of at those early stages, would not only significantly increase costs but would also delay our ability to provide defendants with a speedy arraignment. Whenever practical, voluntary discovery is provided, but it is not believed that voluntary discovery in all cases would significantly reduce arraignment to disposition time. As such, this office is comfortable with its current approach."

Bronx: The judicial response indicated that whether the stated policy works is largely dependent on the individual. The alternate provider indicated that the policy works and eliminates formal motion practice.

The Bronx District Attorney's Office also reported that the official borough policy "works," since the defense is provided with material in excess of C.P.L. 240's substantive and temporal limits. Defense is not required to waive motions. Prosecution benefits because there is minimal discovery litigation and the prosecution does not agree to obtain material (such as medical reports) which is discoverable by the defense, unless the prosecution actually possesses such material."

In What Form Are Discovery Requests Made If At All?

Kings and New York: According to all judges surveyed, discovery demands are made as part of an omnibus motion in both boroughs, as opposed to a separate discovery demand -- if they are made at all. However, Kings County judges said such requests are made in very few cases: five said in less than five percent of all cases; one indicated less than 20 percent, and one indicated that the question was not applicable, presumably due to the discovery by stipulation or open file discovery policy in the borough.

²² One of the three responses found the question not applicable.

Four of the six alternate providers in Kings County who answered the question indicated that any requests are made by demand; two listed omnibus motion as the relevant form for discovery requests. Very few private practitioners in Kings indicated that, regardless of the policy, sometimes formal demands are made for discovery. Of the three who found the question applicable to Kings County, the average number of cases in which such formal demands were made is three percent and answers ranged from motion to omnibus motion to separate demand. Formal discovery demands or motions are also rare among Kings County Legal Aid attorneys, with the majority of respondents characterizing the practice as rare, “1%” or less. Those that did file such demands were divided almost equally in the method used, including demand letter and omnibus motion.

The Brooklyn District Attorney reported that formal demand by defense attorneys for discovery does occur, albeit rarely, and usually “with attorneys who are not familiar with the practice in Kings County.” Such demands are in omnibus motions or by formal demand.

In New York County, four of six judges indicated that such a demand was made in virtually every case. One indicated the question was inapplicable and one said five percent.

Four out of five New York County alternate providers indicated that they file formal discovery demands in their misdemeanor practice, all by omnibus motion. One found the question inapplicable. Very few alternate providers indicated they filed formal demands in any significant percentage of their cases if at all. The highest percentage noted by those who responded was ten percent. The majority of private practitioners who responded indicated that they request disclosure by formal demand. They indicated that formal demands are made in percentages that ranged from five to 95 percent of the time and that when demands are made, they are done in a variety of forms: letters, demands and omnibus motions.

Every Legal Aid attorney indicated that formal discovery requests are made in virtually all misdemeanor cases, always as a part of an omnibus motion.

The New York County District Attorney’s Office indicated that defense attorneys file formal demands or motions “in the vast majority of cases (over 90%),” almost always as a part of an omnibus motion.

Queens: Of the two judges who responded, the answers were in conflict. One indicated that discovery requests are generally a part of an omnibus motion, although they are sometimes made by separate demand. The other indicated requests are usually by separate demand. One judge found the question inapplicable. The estimated number of cases in which such demands are made ranged in the responses from five to 20 percent.

Alternate providers indicated that the percentage of cases in which formal demands are filed is less than 20 on average, although one indicated 80 percent as the relevant number and one said in all “motion cases.” In those cases where they made a formal demand, the majority of alternate providers did so as part of an omnibus motion.

Five of the six private practitioners indicated that they sometimes make a formal demand

for discovery, notwithstanding the policy, on average in 20 percent of cases.²³ Two of the five private practitioners did so by omnibus motion, one by separate demand.

Legal Aid responses to the inquiry into the form of discovery demands varied widely. Four of the seven who found it applicable indicated they filed formal demands in 50 percent or more of their cases and three indicated 30 percent or less. The method used by those who did file formal demands was also split among Queens Legal Aid attorneys, with almost half listing omnibus motion and the other half formal, separate demand.

The Queens DA reported that defendants file written motions in “approximately 20 - 25% of cases not disposed of at arraignment or initial Criminal Court appearances.” Formal demands are made both by omnibus motion or a Bill of Particulars and Demand for Discovery.

Bronx: According to the judicial response in the Bronx, the form of discovery requests is generally by omnibus motion with a follow-up demand which are made in 25 percent of all cases. The alternate provider indicated that a formal demand was made in almost every case either by demand or omnibus motion. The private practitioner indicated that such a demand was made in “100%” of all cases by separate demand.

The Bronx District Attorney noted that motions and demands are made by the defense in the Bronx, “as a matter of timing, not a limit on what is provided,” and when they are requested they are in the form of an omnibus motion.

Judicial Orders for Early Disclosure of Materials

Kings: In Kings, none of the judicial respondents indicated that they had ever ordered the disclosure of materials earlier than required under Article 240.²⁴ Only one private practitioner found that such disclosure occurred “in special circumstances.” The Brooklyn DA found this question inapplicable.

New York: Those three judges who found the question applicable indicated that they had sometimes ordered earlier disclosure of materials to “facilitate the trial process,” to give the defense adequate time to prepare, and noted, as an example, medical or psychiatric records where the defense may wish to hire an expert.

Private practitioners unanimously found this question inapplicable.

The District Attorney’s Office noted that judges sometimes do order disclosure earlier than provided by the C.P.L. in the following instances: Driving While Intoxicated cases, after demands for specific items are argued, upon court inspection of certain materials or because a judge may not be well versed in the law of discovery. The DA also noted that the timing of the receipt of discovery materials from the Police Department and other agencies “varies

²³ Responses included answers as high as 50 percent and as low as “less than 5 percent.”

²⁴ However, it should be noted that since Kings County has an open file discovery policy, such an order would be unnecessary.

considerably” and disclosure depends on the availability of officers, responsiveness of clerks and the type of material.

Queens: Two of three judges indicated that they had ordered early disclosure or “persuaded the people to do it in the interest of justice”; one had ordered both sides to do it to move more complicated cases more quickly. The Queens District Attorney did not report notable early disclosure orders by the Criminal Courts.

Bronx: The judicial response from the Bronx indicated that early disclosure is ordered in cases with a large volume of discovery or untranscribed tapes. The private practitioner found the question “not applicable.”

The Bronx District Attorney reported that judges in the Bronx will “sometimes order discovery to expedite proceedings, even if non-discoverable materials are involved.”

Subpoena Practice

Kings: Three out of seven judges surveyed indicated that subpoena practice for discovery was inapplicable. Four indicated that they would sign subpoenas primarily for medical records - for the prosecution if they are complainant’s records and for the defendant if the defense seeks them. One indicated that a so ordered subpoena will issue in cases where the prosecution has indicated that they will supply materials and have not supplied them, or if the materials appear to be exculpatory and the prosecution is not otherwise obligated to provide the materials to the defense.

Fifty percent of Kings County alternate providers who responded to the survey found judges willing to sign subpoenas, particularly for medical records, and three out of five private practitioners agreed. Similarly, half of Legal Aid respondents found judges willing to sign subpoenas for discoverable materials, usually for medical or phone records.

The District Attorney’s Office reported that judicially ordered subpoenas occur “very rarely.”

New York: Of the New York County judges surveyed, three would issue subpoenas for hospital, phone and 911 records. Alternate providers found that judges generally will sign subpoenas pursuant to the C.P.L.R. if the requests are timely or the defense is otherwise “denied access.” Two of four private practitioners found judges willing to sign subpoenas under some circumstances.

Half of all Legal Aid respondents indicated that judges will sign subpoenas for a variety of discoverable materials.

The District Attorney’s Office noted that judges are willing to sign subpoenas - when “so ordered” subpoenas are required, e.g., medical records, or, less frequently, requested, e.g., police reports.

Queens: One judge indicated that judicial subpoenas are considered in all circumstances; one for medical records, 911 tapes or *in camera* inspection of school or telephone records. Fifteen alternate providers found judges willing to sign subpoenas, particularly for 911 or medical records. Two noted that subpoenas must be on notice to the prosecution. The majority of private practitioners in Queens found judges willing to sign subpoenas for discoverable materials. Seven of ten Legal Aid attorneys indicated that judges will sign subpoenas for discoverable materials, all seven listing 911 tapes as the circumstances under which judges would sign. The District Attorney's Office noted that subpoena practice is done usually for medical records, when required by certain medical providers.

Bronx: The judicial response indicated that subpoenas will be granted in cases of exigency or risk of destruction, as well as for 911 tapes. The alternate provider reported that judges will sign subpoenas for medical records or 911 calls; the private practitioner found this question inapplicable. The Bronx District Attorney's office reported that judges are willing to order subpoenas.

Frequency and Subject Matter of Litigated Discovery Issues

Kings: Six judicial responses indicated a range of zero to 20 as the percentage of misdemeanor cases with litigated discovery issues in misdemeanor cases. Alternate providers universally noted that litigation in Kings County over discovery issues in misdemeanor cases is "rare" to "never." Private practitioners also found that litigation in discovery was extremely rare, with answers ranging from "never" to "not too often."

Kings County Legal Aid respondents all indicated that litigated discovery in misdemeanor cases is rare. The District Attorney's Office reported that discovery issues are "occasionally" litigated in Kings County, most commonly when "defense attorneys advocate that if [the office] has not turned over all documents in a timely fashion [the office] cannot announce ready for trial on a case."

New York: Judicial responses to the percentage of misdemeanor cases that involved litigation in the discovery process ranged from 100 to none. One response indicated that 90 percent of all cases involved pre-trial discovery litigation and two characterized the percentage as "very few." Three of five alternate providers in New York indicated that litigation over discovery issues was rare and usually involved missing documents or *Brady* material.²⁵ Of the private practitioners responding, three of four found litigation of discovery issues in New York "rare." Telephone records was reported as the most common issue litigated.

Legal Aid attorneys indicated that litigation over discovery issues in misdemeanor cases is rare - some have never done it and most characterized the process as rare.

The District Attorney's Office also reported that litigation over discovery in misdemeanor cases is "infrequent."

²⁵ *Brady v. Maryland*, 373 U.S. 83 (1963) (due process clause of U.S. Constitution requires disclosure to the defense of material, exculpatory information in the prosecution's possession or control).

Queens: Judicial responses ranged from never to less than five percent for cases involving litigation at the discovery stage. Alternate provider responses also indicated that litigation over discovery issues was rare, with the most commonly noted litigation involving 911 calls. Private practitioners also found that litigation over discovery occurred “rarely” to “never,” noting that if it did occur, the most common subject matter was medical or scientific issues.²⁶ Legal Aid attorneys in Queens indicated almost unanimously (one found the question inapplicable) that litigation was “rare,” “seldom” or “never.” The District Attorney’s office characterized litigation as occurring “occasionally.”

Bronx: The one judicial response indicated that discovery issues are litigated in 25 percent of misdemeanors. The alternate provider found discovery litigation in misdemeanor cases to be rare, and the private practitioner found that it “never” occurred. The Bronx District Attorney’s office reported that “perhaps 10% of the time” discovery issues are litigated in misdemeanor cases. The most common issue identified was “requiring the prosecution to obtain materials which it does not possess and does not intend to introduce at trial.”

What Is the Percentage of Formal or Informal Requests for Discovery of Witness Names or Addresses?²⁷

Kings: All judges indicated that they do not often grant such a request unless it involves *Brady* (exculpatory) material and one indicated that such an order might be warranted in a non-violent case. Responses ranged from “very rare” and “less than 20% to 35% maximum.”

New York: Responses from the bench varied widely. Three ranged from five percent to never and one indicated it was ordered in “virtually every case”; another ordered such discovery only on written motion and one in all trial-ready cases. One judge indicated that witness name disclosure would be granted in cases to ensure that the jury “was not familiar with witnesses.”

Queens: The unanimous response from the three responding Queens County judges was that they never received requests for witness names (zero percent). However, two judges indicated that they might grant such a request provided there was no evidence of likely harm to the witness or where there was a high number of witnesses without any issue of danger that might move the case more expeditiously.

Bronx: The Bronx judicial response indicated that such requests are made in less than ten percent of cases.

Judicial Discretion to Order Discovery Beyond C.P.L. 240.20

Kings: All responding judges in Kings County indicated that the question about whether they are asked to -- or ever do -- exercise discretion to order discovery beyond that required by statute was inapplicable. This is presumably due to the open file policy in the borough.

²⁶ Search warrants and “drug cases” were also listed as areas where litigation did occur, if ever.

²⁷ This question was included only on those surveys distributed to judges.

New York: Judges indicated that such a request or the exercise of such discretion was rare.

Queens: Only one judge found this question applicable, indicating that such discretion would be exercised if “it will assist in the resolution of the case, is fair to both sides and will not cause danger to any witness.”

Bronx: The judicial response from this borough found the question not applicable.

Most Commonly Litigated Discovery Issues

Kings: Among Kings County judges responding, no specific pattern of commonly litigated issues was identified; only one judge specified that timeliness of disclosure was the most common issue. The majority of alternate providers in Kings County found this question inapplicable. Legal Aid responses produced no consistent pattern in terms of the most common issues. The District Attorney’s Office noted that the most commonly litigated issue is when “defense attorneys advocate that if [the office] has not turned over all documents in a timely fashion [the office] cannot announce ready for trial on a case.”

New York: Judicial responses varied widely in New York County with two judges finding the question inapplicable. One judge indicated “medical records,” another listed the issue of the prosecution’s “custody or control” of documents as the most common and a third simply indicated with reference to pre-trial suppression of statements, “Dunaway.” Alternate providers indicated that the most common discovery issue litigated involved missing documents or *Brady* material. Of the private practitioners responding, three of four found litigation of discovery issues in New York County “rare.” Telephone records was the most common issue litigated. Legal Aid respondents to this question produced no consistent pattern in terms of the most commonly litigated discovery issues. The District Attorney’s Office noted that, although litigation is rare, a “common exception” is a request for a complainant’s mental health records.

Queens: Judicial responses in Queens also varied widely with answers that ranged from and included: 911 tapes, videotapes, redaction issues and whether disclosure was complete. Alternate providers indicated that 911 calls were the most common discovery issue litigated. Private practitioners also found that litigation over discovery occurred “rarely” to “never”; the most common litigation, when it did occur, was over medical or scientific issues.²⁸ Legal Aid respondents to this question produced no consistent pattern in terms of the most commonly litigated discovery issue. The District Attorney’s Office reported the most common litigation issue to be motions to quash subpoenas directed to the Police Department.

Bronx: The Bronx judicial respondent found this question inapplicable as did the private practitioner. The alternate provider listed three areas: ACS, search warrants and Civilian Complaint Review Board documents. The District Attorney’s Office identified the most commonly litigated issue as “requiring the prosecution to obtain materials which it does not possess and does not intend to introduce at trial.”

²⁸ Search warrants and “drug cases” were also listed as areas where litigation, although rare, did occur.

What If Any Reforms Would You Like To See?

Kings: Three of the seven judicial responses who found the question applicable to their county endorsed the Kings County open file policy, indicating that it “generally works well;” one judge endorsed state-wide adoption of the Brooklyn model.

Alternate providers also universally endorsed the Kings County policy, noting the “streamlining of the process”; several called for more judicial enforcement of the OFD policy. The majority of private practitioners in Kings County did not call for any reform, with one calling for the “abolition” of omnibus motion practice in favor of “OF/DBS city-wide.”

Legal Aid attorneys generally called for greater judicial enforcement of the OFD and DBS policies as the primary area ripe for reform.

The District Attorney’s Office reported that the discovery by stipulation policy in Kings County has been a success. As stated above, this policy expedites cases and also eliminates the need for motions and answers.”

New York: Four of the six judges endorsed an “open file policy” for discovery. One found the question inapplicable and one indicated that the current Criminal Procedure Law is “completely ignored” and the bar should adhere to those procedures with timely demands by the defense and specific and timely response from the prosecution.

Three of the five alternate providers in New York County called for more discovery, earlier in the process; two found the question inapplicable. Three of four private practitioners called for earlier disclosure in New York County for reasons such as to “rid [the process] of boilerplate demands,” and “aid in possible dispositions”; the fourth found the question inapplicable. Legal Aid respondents universally called for open file discovery earlier in the process.

The District Attorney’s Office noted that the filing of “boilerplate” defense motions can impede the discovery process, such as when requests are made for items not at all relevant to the cases. The Office’s response suggested that judges need to enforce more strictly the prosecution’s reciprocal discovery requests.

Queens: Two of the three judges who answered the question endorsed an open file policy; one called for disclosure at arraignment. The majority of alternate providers in Queens suggested fuller compliance with the policy in place as the most notable area for reform. Most private practitioners called for earlier or more complete disclosure of materials as an area for reform in Queens.

Legal Aid respondents generally suggested reform through earlier and more complete and timely disclosure.

The District Attorney noted that their “primary obligation is to do justice” for both the

defendant and the prosecution, reporting that their responsibility includes the protection of witnesses from physical harm and unwarranted invasions of privacy. The Office remarked that “the current discovery statutes provide an appropriate balance between the interests of the defendant and those of the People. Discovery that is provided outside the statutory framework is, as previously noted, a privilege not a right - and that is how it should be. We can weigh the risks to our witnesses and to our evidence better on a case by case basis far better [sic] than any statutory framework. Using that case by case analysis we often give far more voluntarily than any current or proposed statute would mandate. The only change that we would propose is adding meaningful reciprocal discovery. Rarely do we as prosecutors receive any meaningful discovery from the defense. Defense experts are routinely directed not to prepare written reports so that there is nothing to turn over to the People. Discovery should be available to both sides within a statutory framework.”

Bronx: The judiciary and the private practitioner both indicated that this question was not applicable. The alternate provider suggested that a broader range of materials be included in discovery. The Bronx District Attorney’s Office suggested that “it is possible that a system of electronic discovery could obviate the need to reproduce and distribute vast volumes of paper documents, and also speed up the process.”

CONCLUSIONS

There are a number of significant conclusions that can be drawn from this survey and the representative groups who responded. The practice within the New York City Criminal Courts offers an opportunity for a great experiment, as some boroughs utilize some form of open file discovery and others do not.

1) All respondents within those boroughs with some level of liberal departure from the requirements of the C.P.L. §240.10(3) (Kings and Queens Counties) endorsed a more liberal discovery policy, one that authorized both broader and earlier disclosure. In these boroughs, all parties almost universally report full satisfaction with the elimination of formal discovery demands. The survey results in those boroughs did not demonstrate any marked difference in the level of satisfaction among different types of respondents: judges, defense lawyers or prosecutors.

2) Of the four boroughs, Kings County’s open file discovery process -- which eliminates the need for formal written demands, employs a limited discovery by stipulation and allows for pre-trial hearings on consent -- far outnumbered any borough in terms of the number of overall respondents (from all sectors) who expressed satisfaction with the policy. With the exception of the Manhattan District Attorney’s Office, overall responses in the borough of Manhattan reported the highest level of dissatisfaction with the current policy.

3) Of those boroughs that employ a more liberal discovery policy, survey respondents noted the expedition of case resolution and the reduction in unnecessary adversarial posturing and applauded the elimination of unnecessary boilerplate motion practice as the fundamental advantage of the policies. In Manhattan, defense attorneys and judges were almost universally

critical of the District Attorney's discovery policy, endorsing the more liberal procedures utilized in neighboring boroughs.

4) Queens County reported the most autonomy among practicing Assistant District Attorneys with respect to disclosure or non-disclosure of discoverable materials.

5) Notwithstanding the differing policies, discovery-related litigation in all four boroughs is rare.

6) No borough appears to employ a formal notification of the discovery policy or procedure. Instead, each borough relies on "longstanding practice," word of mouth or courtroom experience with the policy to educate practitioners in the borough.

TASK FORCE RECOMMENDATIONS²⁹

On the whole, more and earlier disclosure of discoverable material without formal demand or motion is the preferred practice among all sectors of the New York City Criminal Courts practice. The burden on the defense, prosecution and judiciary -- in terms of time and resources devoted to drafting, responding and deciding formal demands -- appears to prolong the process of ultimate case disposition. It also decreases overall satisfaction with the efficient performance of our high-volume system and may, in fact, hinder the expeditious disposition of cases. While most of the questions and answers to the survey were framed in terms of efficiency and expediency, the Task Force notes that primary to any inquiry into the court system is fundamental fairness. Underlying the notions of earlier disclosure and more timely disposition is the concept that when the individuals accused are privy to more information sooner, informed choices can be made earlier in the process. Greater "efficiency" in the discovery context is synonymous with fairness and justice.³⁰ For these reasons, the Task Force recommends that:

- Open file discovery or discovery by stipulation policies be instituted citywide. Further, that open file discovery should be ongoing, a continuing duty to disclose throughout the process as materials are received by the prosecution, with a concomitant disclosure by the defense, commensurate with the prosecution's disclosure.

- That a more coordinated internal mechanism to facilitate agency disclosure to the prosecutors' offices be instituted with the full support of the organized bar and that electronic transmission of discovery materials between agencies and adversaries be further explored to facilitate the process. The Task Force notes that delayed disclosure in all boroughs is, in part,

²⁹ Kristine Hamann, a member of the Task Force, supports the report to the extent that it accurately states the results of the survey, however, she does not join in the recommendations of the report.

³⁰It should also be noted that in the recently released Interim Report to the Chief Judge of the State of New York, the Commission on the Future of Indigent Defense Services included "prosecutorial resistance to more open discovery procedures" in a list including "the most troubling systemic problems that emerged from the testimony at the Commission's four public hearings." Specifically, the Commission reported that "[p]rosecutorial resistance to more open discovery procedures is extensive in many counties, thereby impeding efficient expedition of cases, investigation by the defense, including the location of witnesses, and thus gives rise to unfairness." *Interim Report* at p. 24.

attributable to the untimely receipt of materials by the prosecution from the Police Department and other agencies.

- That the policies and procedures in each borough be formally published and disseminated at the earliest opportunity.

January 23, 2006

New York County Lawyers' Association
Criminal Courts Task Force
Susan J. Walsh, Chair

MISDEMEANOR DISCOVERY SURVEY

Please note that all questions on this survey are directed at discovery practice in criminal court; we ask you to limit your answers to misdemeanor cases.

JUDICIARY

A. County

1. Please note the borough in which you sit in Criminal Court

_____ Queens _____ Brooklyn _____ Bronx _____ Manhattan

B. Discovery Practice

1. Please describe the current “official” misdemeanor discovery practice in your borough (not Article 240, but what the DA’s office actually does).

2. Is this “official” policy written anywhere?

- a. If not, how are you aware of the policy?
- b. Does the DA’s office follow this stated policy with respect to misdemeanor discovery?
- c. If not, in what instances are there departures from the stated policy on misdemeanor cases (i.e. are there particular types of cases where disclosure is earlier, such as when there is a large volume of material)?
- d. Why are there such departures in misdemeanor cases, if you know?
- e. Do these departures differ from one ADA to another?

3. In your opinion, does the current official misdemeanor discovery practice in your borough work?

_____ Yes _____ No

a. Please explain why it works/does not work.

4. Are requests for disclosure of discovery materials by formal demand ever filed for misdemeanors that you preside over, regardless of the DA’s office policy?

_____ Yes _____ No

- a. If yes, how often (in approximately what percentage of total cases that you hear)?
- b. If such requests for discovery by formal demand are filed in your court, please indicate in

what form such demand is made (for example, as part of an omnibus motion, or as a separate demand).

5. Have you ever ordered disclosure of materials earlier than required under Article 240 of the C.P.L.?
 - a. If so, under what circumstances (please also indicated the type/s of case/s in which this has occurred and whether the order was for the prosecution or defense to disclose)?
6. In approximately what percentage of misdemeanor cases are you asked to sign subpoenas for discoverable materials?
 - a. Under what circumstances have/will you sign such a subpoena?
7. How often (in approximately what percentage of misdemeanors before you) are discovery issues litigated in misdemeanor cases in your courtroom?
 - a. Please indicate the most common issues to be litigated
8. In approximately what percentage of cases do you get formal or informal requests for disclosure of witness names and/or addresses?
 - a. In what type of misdemeanor case would you grant such a request?
9. Are you ever asked by either defense counsel or the prosecution to exercise your discretionary power to order discovery beyond that delineated in C.P.L. 240.20 and 240.30?
 - a. If so, under what circumstances have/will you exercise that power?
10. Do you ever order disclosure pursuant to C.P.L. 240.40 based on a prosecutor's failure to either comply or refuse to comply within the statutorily-mandated period set out in 240.80?
11. What, in your opinion, are the most commonly-litigated discovery issues?
12. What, if any, reform/s of discovery would you like to see, and why?

MISDEMEANOR DISCOVERY SURVEY

Please note that all questions on this survey are directed at discovery practice in criminal court; we ask you to limit your answers to misdemeanor cases.

DISTRICT ATTORNEYS' OFFICES

We ask that you please distribute these surveys to all Assistants with a misdemeanor practice.

1. Please note the borough in which your office is located

_____ Queens _____ Brooklyn _____ Bronx _____ Manhattan

2. Is there a point person in your office for criminal court discovery issues?

- a. If so, what is the name and title of this person?
- b. If not, what is/are the name/s of the criminal court supervisor/s?

3. Please describe the current “official” misdemeanor discovery practice in your borough (not Article 240, but the actual policy of your office).

4. Is this “official” policy written anywhere?

- a. If not, how do you make defense attorneys and/or judges aware of the policy?
- b. Do ADAs always follow this stated policy with respect to misdemeanor discovery?
- c. If not, in what instances are there departures from the stated policy on misdemeanor cases (i.e. are there particular types of cases where disclosure is earlier, such as when there is a large volume of material)?
- d. Why are there such departures in misdemeanor cases, if you know?
- e. Do these departures differ from one ADA to another?

5. In your opinion, does the current official misdemeanor discovery practice in your borough work?

_____ Yes _____ No

a. Please explain why it works/does not work.

6. Do defense attorneys ever request disclosure of discovery materials by formal demand, regardless of your office policy?

_____ Yes _____ No

- a. If yes, in what percentage of misdemeanor cases does this happen?
- b. If defense attorneys request discovery by formal demand, please indicate in what forms such demands are made (for example, as part of an omnibus motion, or as a separate

demand).

7. In your experience, have judges ordered disclosure of materials earlier than that required under Article 240?
 - a. If so, in your opinion why has this occurred (please also indicate the type/s of case/s in which this has occurred)?
8. Is it your experience that judges are willing to sign subpoenas for discoverable materials?
 - a. If so, under what circumstances?
9. How often does your office litigate discovery issues in misdemeanor cases?
 - a. Please indicate the most common issues to be litigated.
10. What materials, if any, does your office receive from the police department and other agencies after a misdemeanor arraignment?
 - a. How long after arraignment do you receive these materials?
 - b. Why are these materials turned over to your office later than the other materials?
 - c. Could you receive these materials earlier upon request?
 - 1) If not, why?
 - d. What materials are usually in the criminal court file at the time of arraignment?
11. If your office provides enhanced discovery in exchange for waiver of certain motions, do you use a standardized waiver form?
 - a. If not, why?
 - b. If you do use such a form, would you please enclose one with your response to this survey?
12. What, if any, reform/s of discovery would you like to see, and why?

MISDEMEANOR DISCOVERY SURVEY

Please note that all questions on this survey are directed at discovery practice in criminal court; we ask you to limit your answers to misdemeanor cases.

DEFENSE ATTORNEYS

A. Your Misdemeanor Practice

1. County/ies in which you handle **misdemeanor** cases (if you have a multi-county practice, please break it down by percentage. For example, 50% New York, 25% Kings, 25% Queens.):

_____ New York
 _____ Kings
 _____ Queens
 _____ Bronx
 _____ Staten Island

2. Type of **misdemeanor** practice (if you are not employed by Legal Aid or an alternate provider, please break down your practice by percentage. For example, 30% assigned counsel and 70% private)

_____ Legal Aid Society _____ Assigned Counsel
 _____ Alternate Provider _____ Private Counsel
 _____ Bronx Defenders
 _____ Queens Law Associates
 _____ Brooklyn Defender Services
 _____ New York County Defender Services
 _____ Neighborhood Defender Services of Harlem

B. Discovery Practice

Note: If you practice in more than one borough, please respond to this section with respect to the borough in which the majority of your practice takes place.

1. Please describe the current “official” misdemeanor discovery practice in your borough (not Article 240, but what the DA’s office actually does).
2. Is this “official” policy written anywhere?
 - a. If not, how are you aware of the policy?

