Meet Your SCBA Colleague — Catherine E. Miller

By Laura Lane

Catherine E. Miller, a family and matrimonial law attorney as well as an attorney for children, is attracted to her chosen areas of law, she said, because it affords her with the opportunity to help people on a personal level.

What exactly do you mean by that? Working as an associate at my first job at Spada, Ardam, Ershowsky, I did do other types of law including real estate. But then I started doing divorce and I felt like I was helping people in a different way. In transactional law for example, there isn't much personal information exchanged. With family law you are trying to help people make things better, not just going about a business transaction.

When did you know that you wanted to become an attorney? I was a junior in high school and in a peer leadership group. I realized that as an attorney I could help people to solve problems, I could advise them so they could move on with their lives. I was an English and philosophy major at Siena College. In my senior year I took pre-law classes and realized that I liked looking at problems and finding solutions.

You worked at Spada right after law school for seven years. What was the experience like? When I started there were three partners. Then one left. I was handed over all of his cases and had to figure it out on my own.

How did you cope being so new to the profession? I had a lot of good mentors. I used my Suffolk County Bar Association resources. Donna England, Karen McGuire and Lynne Kramer were all so helpful to me.

Why did you leave to start your own firm in Smithtown? I wanted to become independent from the firm and make my own way.

What were some of your challenges? They were actually the same challenges I have now. It can be overwhelming to be a solo practitioner. Having to be in five places at one time isn't easy. I had a baby by then too, which was a struggle because I was basically a single mom. I was going through a divorce at the time so I knew what my clients were going through. Managing family life and giving clients the best service was challenging.

Your work must be painful at times. Some of the cases are emotional. No one realizes the pain that children are going through during a divorce.

You closed your practice in 2006 and went to work for Reynolds, Caronia, Gianelli, LaPinta & Hagney in Hauppauge. In law school I interviewed to work for the firm but the position was in criminal law. The firm had the best reputation but I didn't want to do criminal law. When I had my own firm, I had a case with one of the partners and afterwards I got a call to work in the matrimonial department.

What was your experience like there? I learned so much. And the partners were wonderful and believed that family was important. I worked really hard but was still able to be a mother.

What did you learn there? I learned how to better manage a calendar, how to handle clients and how to control the problems before me — to look at alternative solutions. I also learned business and office management and how to be a better attorney.

What made you decide to start your own firm again in 2012? Some of the partners retired. It was a mutual decision for me to leave but they gave me every opportunity to start a firm and gave me work referrals. I didn't pay rent or for a phone for a while as well. And I had more confidence after all that I had learned there and knew I could handle my own practice and be successful. I didn't need my colleagues to help me figure out the next step like I had needed as a new lawyer.

You've had your own practice twice during your career. How is it different this time than the last? I saw an old client recently which made me remember how I was before. Her case was emotionally draining for me. I remember feeling that her problems were my problems. It took a long time for me to realize that you can be supportive and guide your client without taking on the emotions.

Is this a challenge primarily for family law attorneys? It can be a problem for attorneys in general. Law can be very stressful. It's gotten better for me but it's still hard for me not to take home the kid's problems.

When did you become an attorney for the child? It was in 2006. I always knew I'd do a good job, that I could relate to the kids and talk to them with a level of respect so they'd feel comfortable. I wanted to be someone they knew would be in their corner.

What are the challenges? We could do an analysis before when we were law guardians. Now we have to go into court and do whatever a child wants even if the child is seven years old.

How have you seen the profession change? As a result of technology, we are expected to be on call 24/7. Clients email us at 4 a.m. and expect a response by 7 a.m.

Why did you develop and present a program pertaining to LGBTQ Youth for the Suffolk Academy of Law and the Criminal Bar Association? I have an LGBTQ child and saw a lot of what he went through at school and the problems he experiences in general. I learned that the judicial system was not helping this group of people. I wanted to see if we could change how things are being handled.

Catherine E. Miller

What happened when you presented the lecture? The attorneys had a lot of questions and were curious why this is important. There are so many ways it is important. Housing is an issue, the use of language, what happens when they are in court and how they will be addressed. Things have gotten better in the last year.

What do you enjoy about being an attorney? I like problem solving and the intellectual aspect of the law. I enjoy speaking to my clients and finding solutions. And also, the comraderies of my colleagues.

When did you join the SCBA and why? I joined right after law school. I felt it was important to be part of a group of professional people to learn from them and participate in the classes. Now as a seasoned attorney I see my membership as an opportunity to advocate for my colleagues and make positive change.

Why do you believe it is important for attorneys to join the SCBA? For young lawyers it's important to meet more seasoned lawyers and meet the judges that you will work with on a regular basis. And membership is great for networking. You can build some great friendships at the Suffolk County Bar Association.

CRIMINAL

The Criminal Defense Discovery Odyssey

By Cory Morris

Cory Morris

Criminal defense attorneys should utilize discovery demands in 2020. While most people are aware of the sweeping criminal justice reforms that take effect on Jan. 1, 2020, this article discusses why the defense counsel demand, as opposed to a checklist, must occur to, *inter alia*, preserve evidence, the record for appeal and to ensure compliance of the prosecutor with *Brady v. Maryland.*

Of particular import here is the mandate that the prosecution shall not be deemed ready for trial for purposes of Criminal Procedure Law (CPL) § 30.30 until it has filed a proper certificate absent an individualized finding of exceptional circumstances. CPL § 245.20(2) requires that the prosecutor take affirmative steps to cause records to be made available for discovery where such records exist but are not within their control. Within CPL § 245.20 is a list of records/information that should be provided without a written demand by defense counsel. CPL § 245.55 states that all records in the possession of New York state or local police agencies shall be deemed to be within the possession of the prosecutor. While the reforms are sweeping, changing bail altogether and regularly exposing witness information and grand jury minutes to defense counsel, this article focuses on preservation, obtaining such material and demanding compliance with the constitutional mandate imposed by *Brady v. Maryland.*

Brady v. Maryland

Over half a century later, *Brady v. Maryland* is still good law, yet continued Brady violations highlight the enormous social impact of certain prosecutors and the complete lack of accountability for prosecutors who withhold exculpatory evidence. "New York state has had 234 cases since 1989 in which defendants have been exonerated, according to The National Registry of Exonerations. Eighty-eight involved the withholding of exculpatory evidence."[1] It is no wonder that the law changed as the New York State Justice Task Force stated that "there currently is a public perception that misconduct (particularly prosecutorial misconduct) is prevalent in the criminal justice system and that responsible attorneys are not being appropriately disciplined."

Prior to these reforms, irrespective of the defense counsel's request, "[t]he prosecution is required to disclose information that is both favorable to the defense and material to either defendant's guilt or punishment."[2] *Brady v. Marlyand ("Brady")* and its progeny hold that "[t]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[3] The "prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[4] "By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model. This is because the prosecutor's role transcends that of an adversary. The prosecutor is the representative not of an ordinary party to a controversy, but of a sovereignty … whose interest … in a criminal prosecution is not that it shall win a case, but that justice shall be done."[5]

Specific *Brady* demands should be placed in writing

Three decades ago, *People v. Vilardi*, 76

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has been much press about Bail Reform, and the potential consequences of releasing those accused of certain crimes without bail and, specifically the release in Suffolk and Nassau counties of inmates prior to Jan. 1 who no longer require bail as a condition of release. Criminal Procedure Law §500.10 et seq., now amends the definition of a "securing order" to an order that either releases the defendant on their own recognizance ("ROR"), releases the defendant under non-monetary conditions, fixes monetary bail or commits the defendant to the custody of the sheriff (remand without bail). For a "release under non-monetary conditions," the court must set the least restrictive conditions that will reasonable assure the defendant's return to court, such as contact with pre-trial services, travel restrictions, refrain from possessing a firearm, destructive device or dangerous weapon, or placement in pre-trial supervision.

The other significant change is the repeal of Criminal Procedure Law §240, which has been replaced with Criminal Procedure Law §245, and now requires the prosecuting attorney to provide discovery material within a 15-day window. Again, there has been great concern about how this will all play out and having a sufficient workforce in the District Attorney's Office to meet these new deadlines.

While I do not practice criminal law, I have had the opportunity to participate in numerous meetings within the court system to address the logistics of implementing these new rules and regulations. As with many legislative changes, especially ones of this scope, an adjustment period is to be expected. Whether we agree or not with the reforms is a matter of debate, but I can assure you that all stakeholders in Suffolk County, including the judiciary, and especially District Administration Judge C. Randall Hinrichs and our supervising judges, Probation Department, Sheriff's Office and court officers, have been actively working to make these transitions as seamless as possible.

With the New Year comes the bar association's annual swearing in of our newly elected judges on Jan. 13, 2020 at Touro Law School. This is always a very special event, as we honor our newly elected and re-elected justices and judges and share this joyous occasion with their family and friends. I wish to congratulate those being elevated to the judiciary and/or to newly elected or appointed positions within the judiciary: Supreme Court Justice Stephen J. Lynch, Court of Claims Judge Maureen T. Liccione, Family Court Judge Victoria Gumbs Moore, Family Court Judge Andrea H. Schiavoni, District Court Judge Rosann O. Orlando, District Court Judge John Kelly, District Court Judge Cheryl M. Helfer and District Court Judge Edward J. Hennessey. I have had the privilege to practice before or with almost all of these newly elected judges. I am confident that our community has chosen wisely, and that each and every one of these judges will do their utmost to uphold the rule of law and serve the bench, bar and litigants in Suffolk County in the most exemplary manner.

As always, and especially in the start of this new year and new decade, the SCBA remains open to your participation and new ideas. We may not be able to tackle issues of global significance, but we can do our own small part to make our world and this year a bit better than the last. Through our Charity Foundation, Pro Bono Foundation, Lawyers' Assistance Foundation, our Academy of Law or numerous committees, there is a place for everyone. We all have much to give. I welcome you all to let us know what your concerns and interests are and, for sure, I will find a place for you to assist and belong to this great association.

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NY2d 67 (1990) ("*Vilardi*"), the New York Court of Appeals held that greater protections were afforded to defendants in New York than that of the Federal Constitution "where the prosecutor was made aware by a specific discovery request that the defendant considered the material important to the defense" there was a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Vilardi* informs defense counsel that specific *Brady* demands should be utilized in criminal practice and says nothing about the use of a checklist.

The criminal defense attorney's new demand should include a litigation hold or demand for preservation of records, *Brady* demands, a certification of the voluntary disclosure requirements imposed upon defense counsel and discovery demands pursuant to CPL Article 245 or the Public Officers Law, depending on the nature of the prosecution and as further described below.

Preservation notice

Sometimes referred to as a litigation hold notice in the civil context, CPL § 245.30(1) allows a defense attorney to obtain a court order requiring an agency to preserve evidence, essentially the demand for records and electronically stored information that this article suggests defense attorneys routinely make. Additionally, and particularly relevant to Suffolk County, is CPL § 245.55(3)(b) instructs courts that failure by prosecution and/or law enforcement to disclose electronic recordings of specific items under 245.20(l){e)(g)(k), 911 calls, radio runs, body cameras, *Rosario*[6] material, defendant statement, or exculpatory[7]/*Giglio*[8] material, shall result in an appropriate sanction and/or remedy under this section. What those sanctions ultimately look like and the situations in which such sanctions arise will likely be determined by case law.

Public Officers Law, Freedom of Information Law ("FOIL") Demand

Local government agencies, inclusive of the district attorney's office, see, e.g., *People v. Ulett*, 2019 NY Slip Op 5060 (2019) ("*Ulett*"), are subject to FOIL albeit some material may be considered exempt or duplicative of the documentation to be produced voluntarily. One should note that FOIL mandates that within five business days of receiving a request for a record, an agency shall either make the record available to the requestor; deny the request in writing; or furnish a written acknowledgment of the receipt of the request with a statement setting forth the approximate date when the request will be granted or denied.[9]

Your request for, *inter alia*, preservation and records should be addressed to all foreseeable entities (even non-governmental entities) involved and served in open court. Accordingly, the agency in receipt of such request should be able to explain if a particular category of record is too voluminous or contains information that will be the subject of a protective order within those five business days. If there is a denial of records under FOIL, an administrative appeal must be had prior to commencing a special proceeding under Article 78 of the Civil Practice Law and Rules. Public Officers Law § 89(4)(c) now mandates an award of reasonable attorney's fees and other litigation costs under certain circumstances.

Certification of defense counsel

The new law states that defense counsel shall, ''subject to constitutional protections," disclose and permit the prosecution to "discover, inspect, copy or photograph" any material and relevant evidence within the defendant's or counsel's possession or control that is discoverable under CPL § 245.20(l)(f)(g)(h)(j)(i) or (o) which the defendant intends to introduce at trial or hearing.

It goes without saying that defendants bear no burden in a criminal prosecution and, some legal scholars would argue, have no discovery obligations.

However, most defense attorneys know that certain information will likely be provided absent a demand that does not necessary harm (and may in some cases help) a defendant in favorably resolving the case. A suggested best practice is to provide this certification as soon as possible so that the prosecutor cannot later claim non-compliance with defense counsel's requirements which may, in turn, alleviate a prosecutor's obligation to certify readiness for trial.

"If you don't ask, you don't get it."

In this Brave New World of discovery, criminal defense attorneys just received reassurance from New York state that demanding compliance with speedy trial and the release of evidence favorable to the defense before the prosecutor can be "ready" for trial is a good thing.

While there are no police officer depositions (like other states have), criminal defense attorneys should arm themselves with something a bit more than a checklist to ensure that discovery is preserved and produced. As in the case of *Ulett*, sometimes a simple FOIL request can provide defense counsel with the video capturing video of the murder scene.

The best practice for traversing this new terrain is to simply file a demand to ensure the People of the State of New York comply with their requirements under the law.

Note: Named a SuperLawyer, Cory Morris is admitted to practice in NY, EDNY, SDNY, Florida and the SDNY. Mr. Morris holds an advanced degree in psychology, is an adjunct professor at Adelphi University and is a CASAC-T. The Law Offices of Cory H. Morris focuses on helping individuals facing addiction and criminal issues, accidents and injuries, and, lastly, accountability issues.

1 Susan DeSantis, Judges Ordered to Direct Prosecutors to Turn Over Information Favorable to Defense, NY Law Journal (Nov 08, 2017 at 10:28 AM), https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2017/11/07/judges-ordered-to-direct-prosecutors-to-turn-over-information-favorable-to-defense/.

2 People v. Ulett, 2019 NY Slip Op 5060 (2019).

3 Brady v. Maryland, 373 U.S. 83, 87 (1963).

4 Kyles v. Whitley, 514 US 419, 437 (1995).

5 United States v. Bagley, 473 U.S. 667 (1985) (quoting Berger, 295 U.S. at 88.)

6 People v. Rosario, 9 NY2d 286 (1961).

7 See, e.g., People v. Francis, 2017 NY Slip Op 50509 (App Term 2d, 11th & 13th Jud Dists), People v. Tumminello, 53 Misc 3d 34 (App Term 9th & 10th Jud Dists 2016), People v. Estrada, 2016 NY Slip Op 50036 (App Term 9th & 10th Jud Dists).

8 Giglio v. United States, 405 US 150 (1972).

9 Public Officers Law § 89 (3)(a)