CRIMINAL DEFENSE/CONSTITUTIONAL

Criminal Discovery Odyssey: The Electronic Discovery Portal

By Cory Morris

The 2020 contagion at large has been the illusive coronavirus in our streets but perhaps data breaches, electronic viruses, or elusive hackers should be our greater concern, when it comes to electronic production of discovery materials. While prosecutors in Albany came together to state that "[r]eforms to the state's laws on criminal discovery will be difficult to implement, and could fail, without more funding from the state and upgrades to technology and infrastructure for local district attorneys,"[1] we are still without a uniform electronic system of production provided to criminal defense practitioners such as PACER[2] or, for civil practitioners, NYSCEF.[3]


Cory Morris

As local governments are subjected to enormous "hacks," together with data breaches from large companies like Home Depot, Target, Facebook and even some discrete dating websites, how can practitioners simultaneously ensure the security of the accused, together with the complainant, and those persons who testify in the grand jury without a uniform electronic system of discovery production?

The Criminal Discovery Odyssey continues as practitioners must navigate criminal discovery using otherwise unknown devices, discussed here is The Electronic Portal.

CPL Article 245 Discovery

Within Criminal Procedure Law ("CPL") § 245.20 is a list of records, some sensitive in nature, that should be provided to the accused without a written demand by defense counsel. Those records may contain personal health information, home addresses, contact information and other records. 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 and are thus subject to disclosure. To adjust to this mandate, local prosecutors, such as Nassau County District Attorney's Office, are now producing that discovery upon the condition that defense attorneys consent to use of a third party vendor, The Electronic Portal.

Local prosecutors who routinely answered "ready for trial" at arraignment no longer do so because 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. CPL "§245.70 [however,] per-

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Justice William Rebolini's Rule in His Courtroom is 'To Be Nice'

GETTING TO KNOW
OUR JUDGES

New York State Supreme Court Justice William Rebolini once thought his career would be in the field of broadcast journalism. Before considering the law, he contributed to his college newspaper and could be heard on the school's radio station. These prior experiences helped him to become a better attorney and later, a better judge, he said.

You studied at the College of Communications at Boston University and graduated with a bachelors in broadcast journalism. What types of experiences did you have there? I did the news at 5 a.m. for our AM station WTBU. And when I was an intern during the school year I also ran the teleprompter for the news anchor at a CBS affiliate. For NPR/WBUR I would help in the editing of programs that would air, which I did with a razor and scotch tape.

Why didn't you pursue broadcasting after college? I tried to look for a job in the field after graduation but I think my Long Island accent was not palatable to the rest of the nation. I only got one interview. So, a year later I decided to go to law school.

How did your major in broadcasting help you with law? It was my writing background that helped me most in law school.

When did you first consider law? Growing up I was interested in both journalism and law. I was first exposed to law when I went with my father to his attorney's office. My father was a builder. Then I'd go home and watch Walter Cronkite on the news. When I was in elementary school I thought of doing both careers.

While in law school at Hofstra you were an editor? I was one of the editors for one of

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325(D) "KNOCKDOWN" PART

325(d) "Knockdown" Part: How it Works

By Judge James F. Matthews

I have been assigned to the 325(d) so called "knockdown" part since January of 2019. As is often the case, a new judge will change the way a part runs to suit their approach and hopefully to make improvements. The purpose of this article is to report to the bar on how this part now works. As always, I welcome any and all suggestions to improve how we fairly and efficiently serve litigants and their counsel.

There is one general pre-trial conference calendar every Tuesday morning starting at 9:30 a.m. promptly in courtroom 405 (Judge Baisley's courtroom) at One Court Street. This is the only time of the week I am sitting at One Court Street. All other hearings, trials and conferences are held in my courtroom or chambers on the second floor of the Cromarty Criminal Court Building, 210 Center Drive. Therefore, unless you are scheduled for a Tuesday morning, you must appear for all trials, conferences or other appearances at the Criminal Courts Building.


James F. Matthews

Jury selection for Summary Jury Trials takes place in my courtroom in the Criminal Courts Building. Attorneys on all other jury trials report to CCP at One Court Street for jury selection. Prior to commencing jury selection at One Court Street, you need to confirm your trial start date with chambers or with the Court in Room 405 if you are selecting on a Tuesday morning. You will need to instruct the selected jurors that they are to report to the Criminal Courts Building on the date and time the trial is scheduled to begin.

Counsel may contact chambers preferably by fax to (631) 852-3225 or if necessary by telephone to (631) 852-3848. Diane Raia is the assistant for all purposes in this part. All communications normally go through Diane. Counsel are invited to setup a conference call through Diane in the event there is a discovery dispute or other important matter requiring the court's attention or ruling.

Cases are transferred to the 325(d) part by the Supreme Court both before and after the note of issue is filed. While the transferring court is required to transfer cases based upon a determination of value, there is no monetary jurisdictional limit on any cases in this part. The County Court has limited equity jurisdiction; therefore, declaratory judgment actions, for instance, are not appropriate cases for transfer. Cases are identified for transfer at the DCM part as well as post-note of issue. In addition, cases that are not settled after an ADR conference are screened for transfer. In addition, Supreme Court Justices

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FAMILY

The Newton Principle

By Michael F. LoFrumento

It is well-settled that when parties enter into an agreement concerning the custody of their children, the agreement will "not be set aside unless there is a sufficient change in circumstances since the time of the stipulation." *McNally v. McNally*, 28 A.D.3d 526, 526, 816 N.Y.S.2d 98, 99 (2d Dept. 2006) (internal quotations and citations omitted). As seasoned practitioners are aware, a party seeking a change of custody is not automatically entitled to a hearing. *See Acworth v. Kollmar*, 119 A.D.3d 676, 989 N.Y.S.2d 612 (2d Dept. 2014) (where the Second Department held that the mother was not entitled to a hearing on her application to modify custody as she failed to make an evidentiary showing sufficient to warrant a hearing); *Grant v. Hunter*, 64 A.D.3d 779, 884 N.Y.S.2d 763 (2d Dept. 2009) (where the Second Department held that the mother failed to make an evidentiary showing sufficient to warrant a hearing based upon her unsubstantiated and conclusory allegations).


Michael F. LoFrumento

The moving party must establish the change in circumstances by a preponderance of the evidence and that the circumstances changed to such an extent warranting a modification. *See Abbott v. Abbott*, 96 A.D.3d 887, 888, 946 N.Y.S.2d 511, 512 (2d Dept. 2012) (where the Second Department held that "[a] party seeking to modify an existing custody arrangement must demonstrate by a preponderance of the evidence that there has been a change of circumstances such that a modification would be in the best interests of the subject children").

An application that fails to make a *prima facie* change in circumstances warranting a modification must be dismissed. *See Bacchus v. McGregor*, 147 A.D.3d 1049, 48 N.Y.S.3d 683 (2d Dept. 2017) (where the Second Department held that even accepting the father's alleged evidence as true and granting him the benefit of every reasonable inference, he failed to present evidence sufficient to establish a prima facie change of circumstances potentially warranting a modifying of custody and visitation); *Matter of Saldana v. Lopresti*, 133 A.D.3d 669, 20 N.Y.S.3d 382 (2d Dept. 2015) (where the Second Department held that the father failed to demonstrate a change of circumstances warranting a modification).

Recently, the Second Department in *Newton v. McFarlane*, 174 A.D.3d 67, 103 N.Y.S.3d 445 (2d Dept. 2019), issued a comprehensive and potentially ground breaking decision regarding applications to modify custody and/or visitation. In reversing the lower court's modification of a custody order after a hearing, the Second Department held:

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mits either party to move the trial court for a protective order limiting, upon a showing of good cause, the information to be turned over, by either denying, restricting, conditioning or deferring its disclosure."[4] What occurs if that production requires defense attorneys to submit to a third-party vendor that, among other things, may track data of the attorney, the accused, witnesses as well civilian and non-civilian governmental employees.

Electronic discovery

Without the Uniform Court System endorsement, lawyers generally look to the law. Civil Practice Law and Rules ("CPLR") § 2103(b)(7) provides for the delivery of papers "by transmitting the paper to the attorney by electronic means where and in the manner authorized by the chief administrator of the courts by rule." Perhaps the New York State legislator or chief administrator of the courts should act because, and the CPLR § 2103(b)(7) continues, "unless such rule shall otherwise provide, such transmission shall be upon the party's written consent." Some local prosecutors, like the Nassau County District Attorney's Office ("NCDA"), offers a one-page letter that requires the use of Justware, "an electronic sharing platform for discovery" that is allegedly "protected by dual layer security and designed to memorialize transmission and download activity to ensure integrity of service."[5] According to the NCDA, that consent is a condition: Without use of the system, JustWare in Nassau County, statutory and constitutional discovery production cannot be accessed by the accused.

Although used by the NCDA for data collection[6] prior to 2020, according to https://www.justware.com/, "In 1992, New Dawn started in a spare bedroom with a developer creating a case management solution for a statewide government customer. Since that original version, we have added extensive functionality and released versions of JustWare for all types of courts and justice agencies." Such software has various functions and is used by other law enforcement and prosecutor's offices, including, upon information and belief, the Suffolk County District Attorney's Office.

Professional conduct and technology

Can defense attorneys ethically consent to the use of a third-party vendor to obtain statutory and constitutional discovery?[7] Comment 8 to New York Rules of Professional Conduct ("RPC") 1.1 states: "To maintain the requisite knowledge and skill, a lawyer should… (ii) keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information." As early as 2004, N.Y.S. Bar Association Ethics Opinion 782 opined that a lawyer who uses technology to communicate with clients must use reasonable care with respect to such communication and therefore must assess the risks attendant to the use of that technology.

The NCDA Electronic Portal, for example, requires an electronic mail address, approval by the NCDA administration and "[t]he first time you log in to JusticeWeb, you will be prompted to accept NCDA terms of use" and "[a] record of site, upload, and download activity is maintained within the DA case management system." What does a defense attorney get for all of this? The NCDA instructions say "[c]lick on download to retrieve the zipped discovery packet." Presumably, the same discovery packet received online by the NCDA was what defense attorneys would traditionally receive in hard copy format prior to 2020. Both the Civil Practice Law and Rules and the United States Constitution does not require compliance with a third party vendor. The NCDA terms of use and common sense dictate that the same Nassau County that almost lost nearly a million dollars because of a data breach can neither be trusted no more than held accountable for the release of sensitive client data.

Moving forward

A secured uniform electronic delivery system is required for discovery otherwise defense attorneys must ensure that their participation in The Electronic Portal will not subject such attorney to liability under the RPC.

We cannot trust the NCDA's use of a third party vendor any more than one can trust the veracity of the Nassau County Crime Lab.[8] Case in point, "In October 2019, [Nassau] County Comptroller Jack Schnirman's office fell victim to a phishing scam that resulted in the county paying $710,000 to fraudsters instead of a county contractor."[9] Interestingly, "The scammers posed as a vendor who does business with the county and sent an email to the comptroller's office to change the payment method and have the money sent to a new account." It seems the bank and not the county caught this suspicious transaction. The difference between a data breach of credit card information as opposed to the scandalous material that can follow an accused for the rest of his or her life is enormous.

The clarion call for prosecutor funding has fallen short when considering security and efficiency. Not here, however, as Suffolk County's current district attorney, Tim Sini,[10] spoke about the program "called JustWare [which] costs approximately $300,000 a year and it's a far inferior product" compared to other options, some of which were adopted by 52 other counties within New York State according to our prosecutor, Mr. Sini.

Practitioners must pay attention and comply with the RPC. Our greater legal community, however, should focus on exploring solutions as we continue to steer towards transparency and positive criminal justice reform in New York's Criminal Discovery Odyssey.

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 Dan M. Clark, *Prosecutors Warn of Rough Transition to New Discovery Laws Without More Funding*, New York Law Journal (Sept. 9, 2019), http://bit.ly/2vCNW1B.
2 See www.PACER.Gov (Public Access to Court Electronic Records).
3 See https://iapps.courts.state.ny.us/nyscef/Login (New York State Courts Electronic Filing).
4 Donna Aldea, *Wave of Change: The Expansion of Appellate Review in Criminal Cases Pursuant to Newly-Enacted Discovery Statute, CPL Article 245*, New York Law Journal (August 16, 2019), http://bit.ly/38n5FYB.
5 Available at: https://www.nassauda.org/DocumentCenter/View/979/JusticeWeb-Invite-Guide.
6 New York State, *New York State Motor Vehicle Theft and Insurance Fraud Prevention Board, 2017 Annual Report*, New York State Division of Criminal Justice Services (2018), available at: https://www.criminaljustice.ny.gov/crimnet/ojsa/FINAL%202017%20MVTIFP%20Annual%20Report%20.pdf ("The [NCDA's] JustWare Case Management System allows data analysis in tracking vehicle theft and insurance fraud cases to better follow and report these charges, analyze the types of offenses seen and the dispositions of these matters.")
7 See, e.g., *The People v. Purify*, 253 N.E.2d 437, 43 Ill. 2d 351 (1969) ("we must agree with the defense that the statutory provision does not permit the State to condition production upon the stipulation here requested."
8 Stefanie Dazio, *New crime lab to open after slipshod work forced its closing in 2011*, Newsday (April 10, 2019), https://www.newsday.com/long-island/nassau/nassau-crime-lab-law-accrediting-1.29636203.
9 Alex Costello, *Nassau County Investigating, Training In Wake Of Cyber Scam*, Patch (January 30, 2020), https://patch.com/new-york/massapequa/nassau-county-investigating-training-wake-cyber-scam.
10 Special Meeting of the Public Safety Committee of the Suffolk County Legislature, October 16, 2019, at 9:30 a.m., to discuss the matter of the 2020 Operating Budget; http://bit.ly/2Ih79ss.