

STATE OF NEW YORK

6848

2017-2018 Regular Sessions

IN SENATE

August 9, 2017

Introduced by Sens. AVELLA, HAMILTON -- read twice and ordered printed,
and when printed to be committed to the Committee on Rules

AN ACT to amend the criminal procedure law and the penal law, in
relation to discovery, pretrial motions, securing attendance of
witnesses by subpoena, motion to suppress evidence, tampering with a
witness or intimidating a victim and to repeal article 240 of the
criminal procedure law relating to discovery

The People of the State of New York, represented in Senate and Assem-
bly, do enact as follows:

1 Section 1. Article 240 of the criminal procedure law is REPEALED.

2 § 2. The criminal procedure law is amended by adding a new article 245
3 to read as follows:

ARTICLE 245

DISCOVERY

6 Section 245.10 Availability of protective orders.

7 245.20 Phase one discovery obligation of prosecution.

8 245.30 Phase two discovery obligation of prosecution.

9 245.40 Reciprocal discovery obligation of the defendant.

10 245.45 Disclosure of prior misconduct or criminal acts.

11 245.50 Non-testimonial evidence from the defendant.

12 245.55 Court orders for preservation, access, discovery or DNA
13 comparison.

14 245.60 Diligent effort to ascertain existence of material and
15 information.

16 245.65 Certificates of compliance.

17 245.70 Court ordered procedures to facilitate compliance.

18 245.75 Continuing duty to disclose.

19 245.80 Work product.

20 245.85 Availability of remedies for violations.

21 245.90 Admissibility of discovery.

22 § 245.10 Availability of protective orders.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

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1 1. Any discovery subject to protective order. Upon a showing of good
2 cause by either party, the court may at any time order that discovery or
3 inspection of any kind of material or information under this article be
4 denied, restricted, conditioned or deferred, or make such other order as
5 is appropriate. The court may impose as a condition on discovery to a
6 defendant that the material or information to be discovered be available
7 only to counsel for the defendant; or, alternatively, that counsel for
8 the defendant, and persons employed by the attorney or appointed by the
9 court to assist in the preparation of a defendant's case, may not
10 disclose physical copies of the discoverable documents to a defendant or
11 to anyone else, provided that the prosecution affords the defendant
12 access to inspect redacted copies of the discoverable documents at a
13 supervised location that provides regular and reasonable hours for such
14 access, such as a prosecutor's office, police station, facility of
15 detention, or court. The court may permit a party seeking or opposing a
16 protective order under this section, or another affected person, to
17 submit papers or testify on the record ex parte or in camera. Any such
18 papers and a transcript of such testimony may be sealed and shall
19 constitute a part of the record on appeal. This section does not alter
20 the allocation of the burden of proof with regard to matters at issue,
21 including privilege.

22 2. Modification of time periods for discovery. Upon motion of a party
23 in an individual case, the court may alter the time periods for discov-
24 ery imposed by this article upon a showing of good cause.

25 3. Showing of good cause. Good cause under this section may include
26 constitutional rights or limitations; danger to the integrity of phys-
27 ical evidence; a substantial risk of physical harm, intimidation,
28 economic reprisal, bribery or unjustified annoyance or embarrassment to
29 any person; a substantial risk of an adverse effect upon the legitimate
30 needs of law enforcement, including the protection of the confidentiali-
31 ty of informants; danger to any person stemming from factors such as a
32 defendant's gang affiliation, prior history of interfering with
33 witnesses, or threats or intimidating actions directed at potential
34 witnesses; or other similar factors that also outweigh the usefulness of
35 the discovery.

36 4. Successor counsel or pro se defendant. In cases in which the attor-
37 ney-client relationship is terminated prior to trial for any reason, any
38 material or information disclosed subject to a condition that it be
39 available only to counsel for the defendant, or limited in dissemination
40 by protective order or otherwise, shall be provided only to successor
41 counsel for the defendant under the same condition or be returned to the
42 prosecution, unless the court rules otherwise for good cause shown or
43 the prosecutor gives written consent. Any work product derived from such
44 material or information shall not be provided to the defendant, unless
45 the court rules otherwise or the prosecutor gives written consent. If
46 the defendant is acting as his or her own attorney, the court may regu-
47 late the time, place and manner of access to any discoverable material
48 or information; and it may as appropriate appoint persons to assist the
49 defendant in the investigation or preparation of the case. Upon motion
50 or application of a defendant acting as his or her own attorney, the
51 court may at any time modify or vacate any condition or restriction
52 relating to access to discoverable material or information, for good
53 cause shown.

54 5. Expedited review of adverse ruling. (a) A party that has unsuccess-
55 fully sought, or unsuccessfully opposed the granting of, a protective
56 order under this section relating to the name, address, contact informa-

tion or statements of a person may obtain expedited review of that ruling by an individual justice of the intermediate appellate court to which an appeal from a judgment of conviction in the case would be taken.

(b) Such review shall be sought within two business days of the adverse or partially adverse ruling, by order to show cause filed with the intermediate appellate court. The order to show cause shall in addition be timely served on the lower court and on the opposing party, and shall be accompanied by a sworn affirmation stating in good faith (i) that the ruling affects substantial interests, and (ii) that diligent efforts to reach an accommodation of the underlying discovery dispute with opposing counsel failed or that no accommodation was feasible; except that service on the opposing party, and a statement regarding efforts to reach an accommodation, are unnecessary where the opposing party was not made aware of the application for a protective order and good cause exists for omitting service of the order to show cause on the opposing party. The lower court's order subject to review shall be stayed until the appellate justice renders decision.

(c) The assignment of the individual appellate justice, and the mode of and procedure for the review, are determined by rules of the individual appellate courts. The appellate justice may consider any relevant and reliable information bearing on the issue, and may dispense with written briefs other than supporting and opposing materials previously submitted to the lower court. The appellate justice may dispense with the issuance of a written opinion in rendering his or her decision, and when practicable shall render decision expeditiously. Such review and decision shall not affect the right of a defendant, in a subsequent appeal from a judgment of conviction, to claim as error the ruling reviewed.

6. Compliance with protective order. Any protective order issued under this article is a mandate of the court for purposes of the offense of criminal contempt in subdivision three of section 215.50 of the penal law.

§ 245.20 Phase one discovery obligation of prosecution.

1. Timing of phase one discovery for the defendant. The prosecution shall perform its phase one discovery obligations under this section within fifteen calendar days after the defendant's arraignment on an indictment, superior court information, prosecutor's information, information, or simplified information. Portions of materials claimed to be non-discoverable may be withheld pending a determination and ruling of the court under section 245.10 of this article; but the defendant shall be notified in writing that information has not been disclosed under a particular subsection, and the discoverable portions of such materials shall be disclosed if practicable. When the discoverable materials are exceptionally voluminous, the time period in this subdivision may be stayed by up to an additional forty-five calendar days without need for a motion pursuant to subdivision two of section 245.10 of this article. When the prosecutor is engaged in an ongoing trial or does not report to work due to a vacation or similar reason during one or more days of the time period in this subdivision, that time period may be stayed by an additional seven calendar days without need for a motion pursuant to subdivision two of section 245.10 of this article.

2. Phase one discovery for the defendant. The prosecution shall disclose to the defendant as part of phase one discovery, and permit the defendant to discover, inspect, copy or photograph, each of the follow-

1 ing items and information when it relates to the subject matter of the
2 case:

3 (a) All electronically stored police reports and law enforcement agen-
4 cy reports that are in the possession, custody or control of the prose-
5 cution, or persons under the prosecution's direction and control.

6 (b) All written or recorded statements, and the substance of all oral
7 statements, made by the defendant or a co-defendant to a public servant
8 engaged in law enforcement activity or to a person then acting under his
9 or her direction or in cooperation with him or her, other than state-
10 ments made in the course of the criminal transaction.

11 (c) A list of all tangible objects obtained from, or allegedly
12 possessed by, the defendant or a co-defendant. The list shall include a
13 designation by the prosecutor as to which objects were physically or
14 constructively possessed by the defendant and were recovered during a
15 search or seizure by a public servant or an agent thereof, and which
16 tangible objects were recovered by a public servant or an agent thereof
17 after allegedly being abandoned by the defendant. If the prosecution
18 intends to prove the defendant's possession of any tangible objects by
19 means of a statutory presumption of possession, it shall designate that
20 intention as to each such object. If reasonably practicable, it shall
21 also designate the location from which each tangible object was recov-
22 ered.

23 (d) The names of, and addresses or adequate alternative contact infor-
24 mation for, all persons other than law enforcement personnel whom the
25 prosecutor knows to have evidence or information relevant to any offense
26 charged or to a potential defense thereto, including a designation by
27 the prosecutor as to which of those persons may be called as witnesses.
28 Information under this subsection relating to any person may be with-
29 held, and redacted from discovery materials, as provided in subdivision
30 three or four of this section. Information under this subsection relat-
31 ing to a confidential informant may be withheld, and redacted from
32 discovery materials, without need for a motion pursuant to section
33 245.10 of this article; but the defendant shall be notified in writing
34 that such information has not been disclosed, unless the court rules
35 otherwise for good cause shown.

36 (e) The name and work affiliation of all law enforcement personnel
37 whom the prosecutor knows to have evidence or information relevant to
38 any offense charged or to a potential defense thereto. Information under
39 this subsection relating to undercover personnel may be withheld, and
40 redacted from discovery materials, without need for a motion pursuant to
41 section 245.10 of this article; but the defendant shall be notified in
42 writing that such information has not been disclosed, unless the court
43 rules otherwise for good cause shown.

44 (f) When written and recorded statements are in the possession of the
45 prosecution (not solely in the possession of police or another law
46 enforcement agency), all statements, written or recorded or summarized
47 in any writing or recording, made by persons who have evidence or infor-
48 mation relevant to any offense charged or to a potential defense there-
49 to. Statements solely in the possession of police or another law
50 enforcement agency at the time of phase one discovery are discoverable
51 under paragraph (c) of subdivision two of section 245.30 of this arti-
52 cle.

53 (g) When it is known to the prosecution (not solely known to police or
54 another law enforcement agency), all evidence and information, whether
55 or not admissible or recorded in tangible form, that tends to (i) excul-
56 pate the defendant; (ii) mitigate the defendant's culpability as to a

1 charged offense; (iii) support a potential defense to a charged offense;
2 (iv) provide a basis for a motion to suppress evidence on constitutional
3 grounds; (v) significantly impugn the credibility of an important prose-
4 cution witness, informant or evidence; or (vi) mitigate punishment.
5 Favorable evidence and information known solely to police or another law
6 enforcement agency at the time of phase one discovery is discoverable
7 under paragraph (d) of subdivision two of section 245.30 of this arti-
8 cle. The prosecution shall disclose evidence or information under this
9 subsection expeditiously upon its receipt by the prosecutor, notwith-
10 standing the otherwise-applicable time periods for disclosure in this
11 article.

12 (h) Whether a search warrant has been executed and all documents
13 relating thereto, including but not limited to the warrant, the warrant
14 application, supporting affidavits, a police inventory of all property
15 seized under the warrant, and a transcript of all testimony or other
16 oral communications offered in support of the warrant application.

17 (i) The approximate date, time and place of the offense or offenses
18 charged and of the defendant's arrest.

19 3. Prosecutor's option to restrict disclosure of contact information
20 by arranging witness interview. Within the prosecutor's discretion, the
21 address, telephone number or similar contact information for any person
22 whose name is disclosed pursuant to paragraph (d) of subdivision two of
23 this section may be withheld, and redacted from other discovery materi-
24 als, without need for a motion pursuant to section 245.10 of this arti-
25 cle, if the prosecutor makes the person available to counsel for the
26 defendant for an in-person interview within the time period specified in
27 subdivision one of this section. In lieu of an in-person interview, a
28 telephone interview may be used where arranging an in-person interview
29 is not reasonably practicable or the person declines to participate in
30 an in-person interview; but law enforcement personnel shall not express-
31 ly or implicitly encourage a person to decline to participate in an
32 in-person interview. This subdivision does not create any right for the
33 defendant personally to attend or to participate in such an interview.
34 The prosecution shall provide counsel for the defendant with the other
35 materials discoverable under subdivision two of this section prior to
36 such an interview.

37 4. Prosecutor's option to restrict disclosure of contact information
38 in violent felony cases. (a) Where the defendant is charged with a
39 violent felony offense, within the prosecutor's discretion the address,
40 telephone number or similar contact information for any person whose
41 name is disclosed pursuant to paragraph (d) of subdivision two of this
42 section may be withheld, and redacted from other discovery materials,
43 without need for a motion pursuant to section 245.10 of this article;
44 except that a list of the addresses or adequate alternative contact
45 information for persons whose information has been withheld or redacted
46 shall be separately provided to counsel for the defendant in a document
47 clearly marked as confidential, unless a protective order pursuant to
48 section 245.10 of this article is issued by the court for good cause
49 shown. In addition discovery of this information may be conditioned on
50 the defendant's personal consent, given in open court in the presence of
51 the court at arraignment or at another time, to the use of the confiden-
52 tiality procedure set forth in this subdivision. The court shall specif-
53 ically caution the defendant, in the colloquy about use of this proce-
54 dure, concerning the offenses of tampering with a witness and
55 intimidating a victim or witness in article two hundred fifteen of the
56 penal law. Nothing in this subdivision precludes the court from issuing

1 a different protective order pursuant to section 245.10 of this article
2 for good cause shown.

3 (b) When the confidentiality procedure set forth in this subdivision
4 is used, the following requirements apply:

5 (i) Except as provided in subparagraph (ii) of this paragraph, counsel
6 for the defendant may not disclose or permit to be disclosed to a
7 defendant or to anyone else the list described in this subdivision or
8 its contents, unless specifically permitted to do so by the court for
9 good cause shown or unless the prosecutor gives written consent. The
10 court may allow a party seeking or opposing such permission, or another
11 affected person, to submit papers or testify on the record ex parte or
12 in camera. Any such papers and a transcript of such testimony may be
13 sealed and shall constitute a part of the record on appeal. The obli-
14 gation to maintain confidentiality described in this subdivision is a
15 mandate of the court for purposes of the offense of criminal contempt in
16 subdivision three of section 215.50 of the penal law.

17 (ii) Notwithstanding subparagraph (i) of this paragraph, counsel for
18 the defendant may disclose or permit to be disclosed the listed contact
19 information for a potential witness to persons employed by the attorney
20 or to persons appointed by the court to assist in the investigation or
21 preparation of a defendant's case if that disclosure is required for
22 that investigation or preparation. Persons provided this information by
23 the attorney shall be informed by the attorney that further dissem-
24 ination of the information, except as provided by this subdivision, is
25 prohibited. Within the prosecutor's discretion, discovery of the listed
26 contact information may be conditioned on service of a written statement
27 by counsel for the defendant of the names of any employees who may be
28 provided information pursuant to this subsection, and describing any
29 known prior connections between those employees and all defendants in
30 the case.

31 (iii) If the defendant is acting as his or her own attorney, in lieu
32 of use of the confidentiality procedure set forth in this subdivision,
33 the court shall consider any arguments of the defendant relating to a
34 need for contact information for a potential witness, and any counter-
35 vailing arguments of the prosecution or another affected person. Where
36 such arguments are made, the court shall then order as to each such
37 potential witness, as appropriate, that adequate contact information
38 either be provided or be withheld, or provide for contact with the
39 potential witness only through persons appointed by the court to assist
40 in the investigation or preparation of the defendant's case, or impose
41 any other reasonable restrictions on disclosure. Expedited review of a
42 ruling under this subparagraph may be sought as provided in subdivision
43 five of section 245.10 of this article.

44 (iv) If counsel for the defendant learns about any intentional or
45 unintentional breach of the confidentiality procedure set forth in this
46 subdivision that was attributable to conduct of a lawyer for any defend-
47 ant in the case, or conduct of a person employed by a lawyer in the case
48 or appointed by the court, he or she shall expeditiously notify the
49 court or the prosecutor.

50 § 245.30 Phase two discovery obligation of prosecution.

51 1. Timing of phase two discovery for the defendant. The prosecution
52 shall perform its phase two discovery obligations under this section
53 within ninety calendar days after the defendant's arraignment on an
54 indictment, superior court information, prosecutor's information, infor-
55 mation, or simplified information. Portions of materials claimed to be
56 non-discoverable may be withheld pending a determination and ruling of

1 the court under section 245.10 of this article; but the defendant shall
2 be notified in writing that information has not been disclosed under a
3 particular subsection, and the discoverable portions of such materials
4 shall be disclosed if practicable. When the discoverable materials are
5 exceptionally voluminous, the time period in this subdivision may be
6 stayed by up to an additional thirty calendar days without need for a
7 motion pursuant to subdivision two of section 245.10 of this article.

8 2. Phase two discovery for the defendant. The prosecution shall
9 disclose to the defendant as part of phase two discovery, and permit the
10 defendant to discover, inspect, copy or photograph, each of the follow-
11 ing items and information when it relates to the subject matter of the
12 case and is in the possession, custody or control of the prosecution or
13 persons under the prosecution's direction or control:

14 (a) All transcripts of the testimony of a person who has testified
15 before a grand jury, including but not limited to the defendant or a
16 co-defendant. If in the exercise of reasonable diligence, and due to the
17 limited availability of transcription resources, a transcript is
18 unavailable for disclosure within the time period specified in subdivi-
19 sion one of this section, that period may be stayed by up to an addi-
20 tional forty-five calendar days without need for a motion pursuant to
21 section 245.10 of this article; except that the disclosure shall be made
22 as soon as practicable and not later than thirty calendar days before a
23 scheduled trial date, unless an order is obtained pursuant to section
24 245.10 of this article. When the court is required to review grand jury
25 transcripts, the prosecution shall disclose them to the court expe-
26 ditiously upon their receipt by the prosecutor, notwithstanding the
27 otherwise-applicable time periods for disclosure in this article.

28 (b) All police reports and law enforcement agency reports, including
29 those not electronically stored. Reports previously disclosed pursuant
30 to paragraph (a) of subdivision two of section 245.20 of this article
31 need not be disclosed again.

32 (c) All statements, written or recorded or summarized in any writing
33 or recording, made by persons who have evidence or information relevant
34 to any offense charged or to a potential defense thereto, including
35 those that were solely in the possession of police or another law
36 enforcement agency at the time of phase one discovery. Statements
37 previously disclosed pursuant to paragraph (f) of subdivision two of
38 section 245.20 of this article need not be disclosed again.

39 (d) All evidence and information, including that which was solely
40 known to police or other law enforcement agencies at the time of phase
41 one discovery, and whether or not it is admissible or recorded in tangi-
42 ble form, that tends to (i) exculpate the defendant; (ii) mitigate the
43 defendant's culpability as to a charged offense; (iii) support a poten-
44 tial defense to a charged offense; (iv) provide a basis for a motion to
45 suppress evidence on constitutional grounds; (v) impugn the credibility
46 of a prosecution witness, informant or evidence; or (vi) mitigate
47 punishment. Evidence or information previously disclosed pursuant to
48 paragraph (g) of subdivision two of section 245.20 of this article need
49 not be disclosed again. The prosecution shall disclose evidence or
50 information under this subsection expeditiously upon its receipt by the
51 prosecutor, notwithstanding the otherwise-applicable time periods for
52 disclosure in this article.

53 (e) A summary of all promises, rewards and inducements made to persons
54 who may be called as witnesses, as well as requests for consideration by
55 persons who may be called as witnesses, and copies of all documents
56 relevant to a promise, reward or inducement.

1 (f) All tangible property that the prosecution intends to introduce in
2 its case-in-chief at trial or a pre-trial hearing. Discovery of items
3 under this subsection may be conditioned on service of a demand to
4 produce made by the defendant, if in phase one discovery the prosecution
5 timely served notice on the defendant that a demand to produce items
6 under this subsection would have to be served on the prosecution within
7 thirty days of that notice. If in the exercise of reasonable diligence
8 the prosecutor has not formed an intention within the time period speci-
9 fied in this section that an item under this subsection will be intro-
10 duced at trial or a pre-trial hearing, that period shall be stayed with-
11 out need for a motion pursuant to subdivision two of section 245.10 of
12 this article; but the disclosure shall be made as soon as practicable
13 and subject to the continuing duty to disclose in section 245.75 of this
14 article.

15 (g) All tapes or other electronic recordings which the prosecution
16 intends to introduce at trial or a pre-trial hearing.

17 (h) All photographs and drawings made or completed by a public servant
18 engaged in law enforcement activity, or which were made by a person whom
19 the prosecutor intends to call as a witness at trial or a pre-trial
20 hearing, or which the prosecution intends to introduce at trial or a
21 pre-trial hearing.

22 (i) All photographs, photocopies and reproductions made by or at the
23 direction of law enforcement personnel of any property prior to its
24 release pursuant to section 450.10 of the penal law.

25 (j) All reports and documents concerning physical or mental examina-
26 tions, or scientific tests or experiments or comparisons, relating to
27 the criminal action or proceeding which were made by or at the request
28 or direction of a public servant engaged in law enforcement activity, or
29 which were made by a person whom the prosecutor intends to call as a
30 witness at trial or a pre-trial hearing, or which the prosecution
31 intends to introduce at trial or a pre-trial hearing.

32 (k) Expert opinion evidence, including the name, business address,
33 current curriculum vitae, and a list of publications of each expert
34 witness whom the prosecutor intends to call as a witness at trial or a
35 pre-trial hearing, and all reports prepared by the expert that pertain
36 to the case, or if no report is prepared, a written statement of the
37 facts and opinions to which the expert is expected to testify and a
38 summary of the grounds for each opinion. This paragraph does not alter
39 or in any way affect the procedures, obligations or rights set forth in
40 section 250.10 of this title. If in the exercise of reasonable diligence
41 this information is unavailable for disclosure within the time period
42 specified in subdivision one of this section, that period shall be
43 stayed without need for a motion pursuant to section 245.10 of this
44 article; except that the disclosure shall be made as soon as practicable
45 and not later than sixty calendar days before a scheduled trial date,
46 unless an order is obtained pursuant to section 245.10 of this article.
47 When the prosecution's expert witness is being called in response to
48 disclosure of an expert witness by the defendant, the court shall alter
49 a scheduled trial date, if necessary, to allow the prosecution thirty
50 calendar days to make the disclosure and the defendant thirty calendar
51 days to prepare and respond to the new materials.

52 (l) The results of complete criminal history record checks for all
53 defendants and all persons designated as potential prosecution witnesses
54 pursuant to paragraph (d) of subdivision two of section 245.20 of this
55 article, other than those witnesses who are experts or law enforcement
56 officers.

1 (m) When it is known to the prosecution, the existence of any pending
2 criminal action against all persons designated as potential prosecution
3 witnesses pursuant to paragraph (d) of subdivision two of section 245.20
4 of this article.

5 (n) In any prosecution alleging a violation of the vehicle and traffic
6 law, where the defendant is charged by indictment, superior court infor-
7 mation, prosecutor's information, information, or simplified informa-
8 tion, the most recent record of inspection, calibration and repair of
9 machines and instruments utilized to perform any scientific tests and
10 experiments and the certification certificate, if any, held by the oper-
11 ator of the machine or instrument, and all other disclosures required
12 under this article.

13 (o) In any prosecution alleging a violation of sections 156.05 or
14 156.10 of the penal law, the time, place and manner such violation
15 occurred.

16 § 245.40 Reciprocal discovery obligation of the defendant.

17 1. Timing of reciprocal discovery for the prosecution. The defendant
18 shall perform his or her reciprocal discovery obligations under this
19 section within thirty calendar days after being served with the prose-
20 cution's certificate of compliance pursuant to subdivision one of
21 section 245.65 of this article. Portions of materials claimed to be
22 non-discoverable may be withheld pending a determination and ruling of
23 the court under section 245.10 of this article; but the prosecution
24 shall be notified in writing that information has not been disclosed
25 under a particular subsection, and the discoverable portions of such
26 materials shall be disclosed if practicable.

27 2. Reciprocal discovery for the prosecution. The defendant shall,
28 subject to constitutional limitations, disclose to the prosecution, and
29 permit the prosecution to discover, inspect, copy or photograph, each of
30 the following items and information when it is within the defendant's or
31 counsel for the defendant's possession or control:

32 (a) The names, known aliases, addresses and birth dates of all persons
33 other than the defendant whom the defendant intends to call as witnesses
34 at trial or a pre-trial hearing. Disclosure of this information for a
35 person whom the defendant intends to call as a witness for the sole
36 purpose of impeaching a prosecution witness is not required until after
37 the prosecution witness has testified.

38 (b) All statements, written or recorded or summarized in any writing
39 or recording, made by all persons other than the defendant whom the
40 defendant intends to call as witnesses at trial or a pre-trial hearing;
41 except that disclosure of such statements made by a person whom the
42 defendant intends to call as a witness for the sole purpose of impeach-
43 ing a prosecution witness is not required until after the prosecution
44 witness has testified.

45 (c) A summary of all promises, rewards and inducements made to persons
46 whom the defendant intends to call as witnesses at trial or a pre-trial
47 hearing, as well as requests for consideration by such persons, and
48 copies of all documents relevant to a promise, reward or inducement.

49 (d) All tangible property, including but not limited to tapes or other
50 electronic recordings and photographs and drawings, that the defendant
51 intends to introduce in the defendant's case-in-chief at trial or a
52 pre-trial hearing. If in the exercise of reasonable diligence counsel
53 for the defendant has not formed an intention within the time period
54 specified in this section that an item under this subsection will be
55 introduced at trial or a pre-trial hearing, that period shall be stayed
56 without need for a motion pursuant to subdivision two of section 245.10

1 of this article; but the disclosure shall be made as soon as practicable
2 and subject to the continuing duty to disclose in section 245.75 of this
3 article.

4 (e) All reports and documents concerning physical or mental examina-
5 tions, or scientific tests or experiments or comparisons, which the
6 defendant intends to introduce at trial or a pre-trial hearing, or which
7 were made by a person whom the defendant intends to call as a witness at
8 trial or a pre-trial hearing.

9 (f) Intended expert opinion evidence, including the name, business
10 address, current curriculum vitae, and a list of publications of each
11 expert witness whom the defendant intends to call as a witness at trial
12 or a pre-trial hearing, and all reports prepared by the expert that
13 pertain to the case, or if no report is prepared, a written statement of
14 the facts and opinions to which the expert is expected to testify and a
15 summary of the grounds for each opinion. This paragraph does not alter
16 or in any way affect the procedures, obligations or rights set forth in
17 section 250.10 of this title. If in the exercise of reasonable diligence
18 this information is unavailable for disclosure within the time period
19 specified in subdivision one of this section, that period shall be
20 stayed without need for a motion pursuant to section 245.10 of this
21 article; except that the disclosure shall be made as soon as practicable
22 and not later than thirty calendar days before a scheduled trial date,
23 unless an order is obtained pursuant to section 245.10 of this article.

24 § 245.45 Disclosure of prior misconduct or criminal acts.

25 1. Use at trial. Not later than fifteen calendar days before a sched-
26 uled trial date, the prosecution shall disclose to the defendant a list
27 of all misconduct and criminal acts of the defendant not charged in the
28 indictment, superior court information, prosecutor's information, infor-
29 mation, or simplified information, which the prosecution intends to use
30 at trial for purposes of:

31 (a) Impeaching the credibility of the defendant; or

32 (b) As substantive proof of any material issue in the case.

33 2. Notification for what purpose. In addition the prosecution shall
34 designate whether it intends to use each listed act for impeachment
35 and/or as substantive proof.

36 § 245.50 Non-testimonial evidence from the defendant.

37 1. Availability. After the filing of an accusatory instrument, and
38 subject to constitutional limitations, the court may, upon motion of the
39 prosecution showing probable cause to believe the defendant has commit-
40 ted the crime, a clear indication that relevant material evidence will
41 be found, and that the method used to secure it is safe and reliable,
42 require a defendant to provide non-testimonial evidence, including to:

43 (a) Appear in a lineup;

44 (b) Speak for identification by a witness or potential witness;

45 (c) Be fingerprinted;

46 (d) Pose for photographs not involving reenactment of an event;

47 (e) Permit the taking of samples of the defendant's blood, hair, and
48 other materials of the defendant's body that involves no unreasonable
49 intrusion thereof;

50 (f) Provide specimens of the defendant's handwriting; and

51 (g) Submit to a reasonable physical or medical inspection of the
52 defendant's body.

53 2. Limitations. This section shall not be construed to alter or in any
54 way affect the issuance of a similar court order, as may be authorized
55 by law, before the filing of an accusatory instrument, consistent with
56 such rights as the defendant may derive from the state constitution or

1 the United States constitution. This section shall not be construed to
2 alter or in any way affect the administration of a chemical test where
3 otherwise authorized. An order pursuant to this section may be denied,
4 limited or conditioned as provided in section 245.10 of this article.
5 § 245.55 Court orders for preservation, access, discovery or DNA compar-
6 ison.

7 1. Order to preserve evidence. At any time, a party may move for a
8 court order to any individual, agency or other entity in possession,
9 custody or control of items which relate to the subject matter of the
10 case or are otherwise relevant, requiring that such items be preserved
11 for a specified period of time. The court shall hear and rule upon such
12 motions expeditiously. The court may modify or vacate such an order upon
13 a showing that preservation of particular evidence will create signif-
14 icant hardship, on condition that the probative value of that evidence
15 is preserved by a specified alternative means.

16 2. Order to grant access to premises. At any time, the defendant may
17 move for a court order to any individual, agency or other entity in
18 possession, custody or control of a crime scene or other premises that
19 relates to the subject matter of the case or is otherwise relevant,
20 requiring that counsel for the defendant be granted prompt and reason-
21 able access to inspect, photograph or measure that crime scene or those
22 premises, and that the condition of the crime scene or premises remain
23 unchanged in the interim. The court shall hear and rule upon such
24 motions expeditiously. The court may modify or vacate such an order upon
25 a showing that granting access to a particular crime scene or premises
26 will create significant hardship, on condition that the probative value
27 of that location is preserved by a specified alternative means.

28 3. Discretionary discovery by order of the court. The court in its
29 discretion may, upon a showing by the defendant that the request is
30 reasonable and that the defendant is unable without undue hardship to
31 obtain the substantial equivalent by other means, order the prosecution,
32 or any individual, agency or other entity subject to the jurisdiction of
33 the court, to make available for disclosure to the defendant any materi-
34 al or information which potentially relates to the subject matter of the
35 case and is reasonably likely to be material. A motion under this subdi-
36 vision must be on notice to any person or entity affected by the order.
37 The court may, upon request of any person or entity affected by the
38 order, modify or vacate the order if compliance would be unreasonable or
39 will create significant hardship. The court may permit a party seeking
40 or opposing a discretionary order of discovery under this subdivision,
41 or another affected person or entity, to submit papers or testify on the
42 record ex parte or in camera. Any such papers and a transcript of such
43 testimony may be sealed and shall constitute a part of the record on
44 appeal.

45 4. DNA comparison order. Where property in the prosecution's
46 possession, custody, or control consists of a deoxyribonucleic acid
47 ("DNA") profile obtained from probative biological material gathered in
48 connection with the investigation or prosecution of the defendant, and
49 the defendant establishes (a) that such profile complies with federal
50 bureau of investigation or state requirements, whichever are applicable
51 and as such requirements are applied to law enforcement agencies seeking
52 a keyboard search or similar comparison, and (b) that the data meets
53 state DNA index system or national DNA index system criteria as such
54 criteria are applied to law enforcement agencies seeking such a keyboard
55 search or similar comparison, the court may--upon motion of a defendant
56 against whom an indictment, superior court information, prosecutor's

1 information, information, or simplified information is pending--order an
2 entity that has access to the combined DNA index system or its successor
3 system to compare such DNA profile against DNA databanks by keyboard
4 searches, or a similar method that does not involve uploading, upon
5 notice to both parties and the entity required to perform the search,
6 upon a showing by the defendant that such a comparison is material to
7 the presentation of his or her defense and that the request is reason-
8 able. For purposes of this paragraph, a "keyboard search" shall mean a
9 search of a DNA profile against the databank in which the profile that
10 is searched is not uploaded to or maintained in the databank.

11 § 245.60 Diligent effort to ascertain existence of material and informa-
12 tion.

13 The prosecutor shall make a diligent, good faith effort to ascertain
14 the existence of material or information discoverable under sections
15 245.20 or 245.30 of this article and to cause such material or informa-
16 tion to be made available for discovery where it exists but is not with-
17 in the prosecutor's possession, custody or control; provided that the
18 prosecutor shall not be required to obtain by subpoena duces tecum mate-
19 rial or information which the defendant may thereby obtain. This
20 provision shall not require the prosecutor to ascertain the existence of
21 witnesses not known to police or another law enforcement agency, or the
22 written or recorded statements thereof, under paragraph (d) of section
23 245.20 and paragraph (c) of section 245.30 of this article.

24 § 245.65 Certificates of compliance.

25 1. By the prosecution. When the prosecution has provided the discovery
26 required by sections 245.20 and 245.30 of this article, except for any
27 items or information that are the subject of an order pursuant to
28 section 245.10 of this article, it shall serve upon the defendant and
29 file with the court a certificate of compliance. The certificate shall
30 state that, after exercising due diligence and making reasonable
31 inquiries to ascertain the existence of material and information subject
32 to discovery, the prosecutor has disclosed and made available all known
33 material and information subject to discovery. It shall also identify
34 the items provided. If additional discovery is subsequently provided
35 prior to trial pursuant to section 245.75 of this article, a supple-
36 mental certificate shall be served upon the defendant and filed with the
37 court identifying the additional material and information provided. No
38 adverse consequence to the prosecution or the prosecutor shall result
39 from the filing of a certificate of compliance in good faith; but the
40 court may grant a remedy for a discovery violation as provided in
41 section 245.85 of this article.

42 2. By the defendant. When the defendant has provided all discovery
43 required by section 245.40 of this article, except for any items or
44 information that are the subject of an order pursuant to section 245.10
45 of this article, counsel for the defendant shall serve upon the prose-
46 cution and file with the court a certificate of compliance. The certif-
47 icate shall state that, after exercising due diligence and making
48 reasonable inquiries to ascertain the existence of material and informa-
49 tion subject to discovery, counsel for the defendant has disclosed and
50 made available all known material and information subject to discovery.
51 It shall also identify the items provided. If additional discovery is
52 subsequently provided prior to trial pursuant to section 245.75 of this
53 article, a supplemental certificate shall be served upon the prosecution
54 and filed with the court identifying the additional material and infor-
55 mation provided. No adverse consequence to the defendant or counsel for
56 the defendant shall result from the filing of a certificate of compli-

1 ance in good faith; but the court may grant a remedy for a discovery
2 violation as provided in section 245.85 of this article.

3 § 245.70 Court ordered procedures to facilitate compliance.

4 To facilitate compliance with this article, and to reduce or stream-
5 line litigation of any disputes about discovery, the court in its
6 discretion may issue an order:

7 1. Requiring that the prosecutor and counsel for the defendant dili-
8 gently confer to attempt to reach an accommodation as to any dispute
9 concerning discovery prior to seeking a ruling from the court;

10 2. Requiring a discovery compliance conference at a specified time
11 prior to trial between the prosecutor, counsel for all defendants, and
12 the court or its staff;

13 3. Requiring the prosecution to file an additional certificate of
14 compliance that states that the prosecutor and/or an appropriate named
15 agent has made reasonable inquiries of all police officers and other
16 persons who have participated in investigating or evaluating the case
17 about the existence of any favorable evidence or information within
18 paragraph (d) of subdivision two of section 245.30 of this article,
19 including such evidence or information that was not reduced to writing
20 or otherwise memorialized or preserved as evidence, and has disclosed
21 any such information to the defendant; and/or

22 4. Requiring other measures or proceedings designed to carry into
23 effect the goals of this article.

24 § 245.75 Continuing duty to disclose.

25 If either the prosecution or the defendant subsequently learns of
26 additional material or information which it would have been under a duty
27 to disclose pursuant to any provisions of this article at the time of a
28 previous discovery obligation or discovery order, it shall expeditiously
29 notify the other party and disclose the additional material or informa-
30 tion as required for initial discovery under this article. This
31 provision also requires expeditious disclosure by the prosecution of
32 material or information that became relevant to the case or discoverable
33 based upon reciprocal discovery received from the defendant pursuant to
34 section 245.40 of this article.

35 § 245.80 Work product.

36 This article does not authorize discovery by a party of those portions
37 of records, reports, correspondence, memoranda, or internal documents of
38 the adverse party which are only the legal research, opinions, theories
39 or conclusions of the adverse party or its attorney or the attorney's
40 agents, or of statements of a defendant, written or recorded or summa-
41 ri-ized in any writing or recording, made to the attorney for the defend-
42 ant or the attorney's agents.

43 § 245.85 Availability of remedies for violations.

44 1. Need for remedy. (a) When material or information is discoverable
45 under this article but is disclosed belatedly, the court shall impose an
46 appropriate remedy if the party entitled to disclosure shows that it was
47 significantly prejudiced. If the untimely disclosure occurred because
48 the party responsible failed to make reasonably diligent efforts to
49 comply with this article, the court has discretion to impose an appro-
50 priate remedy if the party entitled to disclosure shows some prejudice.
51 Regardless of a showing of prejudice the party entitled to disclosure
52 shall be given reasonable time to prepare and respond to the new materi-
53 al.

54 (b) When material or information is discoverable under this article
55 but cannot be disclosed because it has been lost or destroyed, the court
56 shall impose an appropriate remedy if the party entitled to disclosure

1 shows that the lost or destroyed material may have contained some infor-
2 mation relevant to a contested issue. The appropriate remedy is that
3 which is proportionate to the potential ways in which the lost or
4 destroyed material reasonably could have been helpful to the party enti-
5 tled to disclosure.

6 2. Available remedies. For failure to comply with any discovery order
7 imposed or issued pursuant to this article, the court may make a further
8 order for discovery, grant a continuance, order that a hearing be
9 reopened, order that a witness be called or recalled, instruct the jury
10 that it may draw an adverse inference regarding the noncompliance,
11 preclude or strike a witness's testimony or a portion of a witness's
12 testimony, admit or exclude evidence, order a mistrial, order the
13 dismissal of all or some of the charges, or make such other order as it
14 deems just under the circumstances; except that any sanction against the
15 defendant shall comport with the defendant's constitutional right to
16 present a defense, and precluding a defense witness from testifying
17 shall be permissible only upon a finding that the defendant's failure to
18 comply with the discovery obligation or order was willful and motivated
19 by a desire to obtain a tactical advantage.

20 3. Consequences of nondisclosure of statement of testifying prose-
21 cution witness. The failure of the prosecutor or any agent of the prose-
22 cutor to disclose any written or recorded statement made by a prose-
23 cution witness which relates to the subject matter of the witness's
24 testimony shall not constitute grounds for any court to order a new
25 pre-trial hearing or set aside a conviction, or reverse, modify or
26 vacate a judgment of conviction, in the absence of a showing by the
27 defendant that there is a reasonable possibility that the non-disclosure
28 materially contributed to the result of the trial or other proceeding;
29 provided, however, that nothing in this section shall affect or limit
30 any right the defendant may have to a reopened pre-trial hearing when
31 such statements were disclosed before the close of evidence at trial.
32 § 245.90 Admissibility of discovery.

33 The fact that a party has indicated during the discovery process an
34 intention to offer specified evidence or to call a specified witness is
35 not admissible in evidence or grounds for adverse comment at a hearing
36 or a trial.

37 § 3. Subdivision 1 of section 255.20 of the criminal procedure law, as
38 amended by chapter 369 of the laws of 1982, is amended to read as
39 follows:

40 1. Except as otherwise expressly provided by law, whether the defend-
41 ant is represented by counsel or elects to proceed pro se, all pre-trial
42 motions shall be served or filed within forty-five days after arraign-
43 ment and before commencement of trial, or within such additional time as
44 the court may fix upon application of the defendant made prior to entry
45 of judgment. In an action in which either (a) material or information
46 has been disclosed pursuant to paragraphs (c) or (h) of subdivision two
47 of section 245.20, (b) an eavesdropping warrant and application have
48 been furnished pursuant to section 700.70 or (c) a notice of intention
49 to introduce evidence has been served pursuant to section 710.30, such
50 period shall be extended until forty-five days after the last date of
51 such service. If the defendant is not represented by counsel and has
52 requested an adjournment to obtain counsel or to have counsel assigned,
53 such forty-five day period shall commence on the date counsel initially
54 appears on defendant's behalf.

55 § 4. Subdivision 8 of section 450.20 of the criminal procedure law is
56 amended to read as follows:

1 8. An order suppressing evidence, entered before trial pursuant to
2 section 710.20, or an order precluding evidence, entered before trial
3 pursuant to section 710.30; provided that the people file a statement in
4 the appellate court pursuant to section 450.50.

5 § 5. Section 450.50 of the criminal procedure law is amended to read
6 as follows:

7 § 450.50 Appeal by people from order suppressing or precluding evidence;
8 filing of statement in appellate court.

9 1. In taking an appeal, pursuant to subdivision eight of section
10 450.20, to an intermediate appellate court from an order of a criminal
11 court suppressing or precluding evidence, the people must file, in addi-
12 tion to a notice of appeal or, as the case may be, an affidavit of
13 errors, a statement asserting that the deprivation of the use of the
14 evidence ordered suppressed or precluded has rendered the sum of the
15 proof available to the people with respect to a criminal charge which
16 has been filed in the court either (a) insufficient as a matter of law,
17 or (b) so weak in its entirety that any reasonable possibility of prose-
18 cuting such charge to a conviction has been effectively destroyed.

19 2. The taking of an appeal by the people, pursuant to subdivision
20 eight of section 450.20, from an order suppressing or precluding
21 evidence constitutes a bar to the prosecution of the accusatory instru-
22 ment involving the evidence ordered suppressed or precluded, unless and
23 until such suppression or preclusion order is reversed upon appeal and
24 vacated.

25 § 6. Subdivision 3 of section 610.20 of the criminal procedure law is
26 amended and a new subdivision 4 is added to read as follows:

27 3. An attorney for a defendant in a criminal action or proceeding, as
28 an officer of a criminal court, may issue a subpoena of such court,
29 subscribed by himself, for the attendance in such court of any witness
30 whom the defendant is entitled to call in such action or proceeding. An
31 attorney for a defendant may not issue a subpoena duces tecum of the
32 court directed to any department, bureau or agency of the state or of a
33 political subdivision thereof, or to any officer or representative ther-
34 eof, unless the subpoena is indorsed by the court and provides at least
35 three days for the production of the requested materials. In the case of
36 an emergency, the court may by order dispense with the three-day
37 production period. [~~Such a subpoena duces tecum may be issued in behalf~~
38 ~~of a defendant upon order of a court pursuant to the rules applicable to~~
39 ~~civil cases as provided in section twenty-three hundred seven of the~~
40 ~~civil practice law and rules.~~]

41 4. The showing required to sustain any subpoena under this section is
42 that the testimony or evidence sought is reasonably likely to be rele-
43 vant and material to the proceedings, and the subpoena is not overbroad
44 or unreasonably burdensome.

45 § 7. Section 710.30 of the criminal procedure law, as separately
46 amended by chapters 8 and 194 of the laws of 1976, is amended to read as
47 follows:

48 § 710.30 Motion to suppress evidence; notice to defendant of intention
49 to offer evidence.

50 1. Whenever the people intend to offer at a trial (a) evidence of a
51 statement made by a defendant to a public servant, which statement if
52 involuntarily made would render the evidence thereof suppressible upon
53 motion pursuant to subdivision three of section 710.20, or (b) testimony
54 regarding an observation of the defendant either at the time or place of
55 the commission of the offense or upon some other occasion relevant to
56 the case, to be given by a witness who has previously identified him as

1 such, or (c) tangible objects obtained from the defendant or a place or
2 entity in which a court may rule that the defendant had standing, they
3 must serve upon the defendant a notice of such intention, specifying the
4 evidence intended to be offered. Where notice is given under subdivision
5 two of this section, such notice shall specify all identification proce-
6 dures in which the witness participated, including photographic proce-
7 dures, regardless of whether the particular procedure will be offered at
8 trial.

9 2. Such notice must be served within fifteen days after arraignment
10 and before trial, and upon such service the defendant must be accorded
11 reasonable opportunity to move before trial, pursuant to subdivision one
12 of section 710.40, to suppress the specified evidence. [~~For good cause~~
13 ~~shown, however~~] Where the people establish that they acted with due
14 diligence, the court may permit the people to serve such notice, there-
15 after and in such case it must accord the defendant reasonable opportu-
16 nity thereafter to make a suppression motion.

17 3. In the absence of service of notice upon a defendant as prescribed
18 in this section, no evidence of a kind specified in subdivision one may
19 be received against him upon trial unless he has, despite the lack of
20 such notice, moved to suppress such evidence and such motion has been
21 denied and the evidence thereby rendered admissible as prescribed in
22 subdivision two of section 710.70.

23 4. On an appeal from a judgment of conviction, a defendant who moved
24 to suppress evidence after having unsuccessfully sought preclusion of
25 such evidence under this section may challenge both the denial of
26 preclusion and the denial of suppression.

27 § 8. Section 215.11 of the penal law, as added by chapter 664 of the
28 laws of 1982, is amended to read as follows:

29 § 215.11 Tampering with a witness in the third degree.

30 A person is guilty of tampering with a witness in the third degree
31 when, knowing that a person is about to be called as a witness in a
32 criminal proceeding:

33 1. He wrongfully compels or attempts to compel such person to absent
34 himself from, or otherwise to avoid or seek to avoid appearing or testi-
35 fying at such proceeding by means of instilling in him a fear that the
36 actor will cause physical injury to such person or another person; or

37 2. He wrongfully compels or attempts to compel such person to swear
38 falsely by means of instilling in him a fear that the actor will cause
39 physical injury to such person or another person.

40 Tampering with a witness in the third degree is a class [E] D felony.

41 § 9. Section 215.12 of the penal law, as added by chapter 664 of the
42 laws of 1982, is amended to read as follows:

43 § 215.12 Tampering with a witness in the second degree.

44 A person is guilty of tampering with a witness in the second degree
45 when he:

46 1. Intentionally causes physical injury to a person for the purpose of
47 obstructing, delaying, preventing or impeding the giving of testimony in
48 a criminal proceeding by such person or another person or for the
49 purpose of compelling such person or another person to swear falsely; or

50 2. He intentionally causes physical injury to a person on account of
51 such person or another person having testified in a criminal proceeding.

52 Tampering with a witness in the second degree is a class [D] C felony.

53 § 10. Section 215.15 of the penal law, as added by chapter 667 of the
54 laws of 1985, is amended to read as follows:

55 § 215.15 Intimidating a victim or witness in the third degree.

1 A person is guilty of intimidating a victim or witness in the third
2 degree when, knowing that another person possesses information relating
3 to a criminal transaction and other than in the course of that criminal
4 transaction or immediate flight therefrom, he:

5 1. Wrongfully compels or attempts to compel such other person to
6 refrain from communicating such information to any court, grand jury,
7 prosecutor, police officer or peace officer by means of instilling in
8 him a fear that the actor will cause physical injury to such other
9 person or another person; or

10 2. Intentionally damages the property of such other person or another
11 person for the purpose of compelling such other person or another person
12 to refrain from communicating, or on account of such other person or
13 another person having communicated, information relating to that criminal
14 transaction to any court, grand jury, prosecutor, police officer or
15 peace officer.

16 Intimidating a victim or witness in the third degree is a class [E] D
17 felony.

18 § 11. Section 215.16 of the penal law, as added by chapter 667 of the
19 laws of 1985, is amended to read as follows:

20 § 215.16 Intimidating a victim or witness in the second degree.

21 A person is guilty of intimidating a victim or witness in the second
22 degree when, other than in the course of that criminal transaction or
23 immediate flight therefrom, he:

24 1. Intentionally causes physical injury to another person for the
25 purpose of obstructing, delaying, preventing or impeding the communi-
26 cation by such other person or another person of information relating to
27 a criminal transaction to any court, grand jury, prosecutor, police
28 officer or peace officer or for the purpose of compelling such other
29 person or another person to swear falsely; or

30 2. Intentionally causes physical injury to another person on account
31 of such other person or another person having communicated information
32 relating to a criminal transaction to any court, grand jury, prosecutor,
33 police officer or peace officer; or

34 3. Recklessly causes physical injury to another person by inten-
35 tionally damaging the property of such other person or another person,
36 for the purpose of obstructing, delaying, preventing or impeding such
37 other person or another person from communicating, or on account of such
38 other person or another person having communicated, information relating
39 to a criminal transaction to any court, grand jury, prosecutor, police
40 officer or peace officer.

41 Intimidating a victim or witness in the second degree is a class [D] C
42 felony.

43 § 12. This act shall take effect immediately.