Reform in Action: Discovery & Evidence-Sharing

Initial Findings on Implementing Discovery Reform in New York State

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CUNY INSTITUTE FOR STATE & LOCAL GOVERNANCE

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This is the fifth in a series of fact sheets that unpacks different provisions of the New York Criminal Justice Reform (NYCJR) Act. These fact sheets are part of a larger research project conducted by the CUNY Institute for State & Local Governance (ISLG), with support from Arnold Ventures, that seeks to understand the development and implementation of the 2020 laws across the state.[1]

Introduction

Discovery is the process of sharing materials and evidence between prosecutors and defenders. It is a critical part of ensuring the criminal legal process is fair, transparent, and efficient, and that both the prosecution and the defense can effectively prepare for trial by accessing the relevant case information.

Across the country, state laws generally outline discovery requirements, including the scope of evidence that must be shared and at which points in the case they must be shared; historically in New York, it was not uncommon for defense counsels to receive discovery from the prosecution on the eve of trial. The burden was put on the defense to request discovery and few sanctions were available to judges when prosecutors did not respond to discovery requests nor provide a sufficient reason to withhold it. As a result, state discovery laws were widely referred to by defenders and advocates as "blindfold laws" because defense cases routinely had to be crafted without all evidence.

As part of the overarching goal of creating a fairer and more equitable criminal legal system, the 2019 New York Criminal Justice Reform Act (Act) – while also making changes to bail, pretrial services, and appearance tickets – created more prescriptive guidelines around discovery procedures, requiring a broader scope of information to be shared among stakeholders earlier in the case. In addition to increased transparency, reform advocates believed the changes would reduce case processing times, which in turn would shorten stays in pretrial detention, reduce the likelihood of wrongful convictions, and ultimately lead to fairer case outcomes.

The CUNY Institute for State & Local Governance (CUNY ISLG), with support from Arnold Ventures, conducted a process evaluation assessing implementation across the Act's provision areas through a combination of interviews and focus groups with criminal legal system stakeholders, document reviews, and data analyses across the state, from New York City (NYC) to Monroe County. This brief details findings related to discovery, gathered from data collected between summer 2020 and winter 2022, including interviews and focus groups with 230 stakeholders total. This included interviews with 45

[1] An overview of the project and related briefs can be found at islg.cuny.edu/case-study-bail-reform-in-new-york

[2] NYPD participated in the study only to discuss appearance ticket provisions of the legislation. Interviews did not touch on other aspects of the reforms, including discovery; therefore, the agency is not represented in this brief.

staff from law enforcement agencies,[2] 64 staff from district attorney's (DA's) offices, 39 public defenders, and 22 people with lived experience, among others, from which these findings are based. Though receiving less public attention than the bail provisions of the Act, the discovery changes were an important and critical shift in the New York criminal legal landscape and, according to some on the ground, were arguably some of the most challenging provisions to implement. Including perspectives of criminal legal system actors from across the state provides a comprehensive look at variations in the implementation challenges and impacts between counties with differing infrastructure and caseloads.

How did the legislation change discovery policies?

The 2019 laws required a standard discovery process that was more open, automatic, and timely. Since the initial passage, amendments in 2020, 2022, and 2023 have created additional parameters around the reforms, including those that impact witness information and timelines. The reforms replaced the previous law with one that:

STANDARDIZED OPEN AND AUTOMATIC DISCOVERY SHARING

Eliminating the need for defense attorneys to make written requests to receive and review evidence, the prosecution must now automatically share all materials relating to the case whenever it is in their possession or the possession of someone under their direction, such as law enforcemement. In practice, this means that there are consequences for prosecutors for failing to turn over discovery even if police have not turned over the evidence to them. The statute also creates a "presumption of openness," meaning that judges are directed to favor disclosing information.

EXPANDED DISCOVERABLE MATERIALS

Under the previous discovery laws, prosecutors were only required to provide the materials they deemed "exculpatory" – evidence that may absolve alleged fault or guilt – to the defense, meaning other potentialy important material could be withheld, including related police reports and witness statements. Post-reform, prosecutors are now required to turn over all material that "relates to the subject matter of the case," the most controversial of which was the requirement to share witness contact information with the defense. *The 2020 amendments changed this to allow prosecutors to initially withhold witness identification with notice to the defense. For witnesses who provide testimony, information must be shared at least 15 days in advance of trial; however, the defense can file a motion to receive the information sooner.*

SPECIFIED A TIMELINE FOR PROSECUTORS TO SHARE DISCOVERY

The previous law did not specify when exculpatory materials must be shared, but when the defense filed a written motion to request these materials, the prosecution had 15 days to turn over discovery or indicate why they would not. If the prosecution failed to respond within 15 days, there were typically no sanctions. The reforms required prosecutors to automatically turn over all discovery no later than 15 days after arraignment for cases where the individual is detained in jail, and 20 days in cases where they are

not. If the prosecution offers a guilty plea to a lesser charge prior to indictment in a felony case, they are required to turn over discoverable materials at least three calendar days prior to the offer's expiration. This has made it possible for those considering plea offers to weigh more information, which can significantly impact case outcomes given the high percentage of cases (almost 100 percent) that are typically resolved by plea.

The 2020 amendments shifted the timeline to no later than 20 days after arraignment if the defendant was detained and no later than 35 days if they are not.

REQUIRED PROSECUTION TO SUBMIT CERTIFICATES OF COMPLIANCE (COC)

The prosecutor must provide a judge with a Certificate of Compliance (COC), which asserts that they have shared all information required by law with the defense within the required timelines. If the prosecution submits a supplemental COC to share additional discovery at a later time, or the defense files a motion challenging the validity of the COC due to missing discovery, a judge can invalidate the original COC if they determine the prosecutor did not make a "good faith" effort[3] to share all discovery prior to certifying their readiness for trial, risking case dismissal on speedy trial grounds or other sanctions specified in the statute.

The 2022 amendments further specified that a supplemental COC filed "in good faith and after exercising due diligence" will not require the invalidation of the initial COC. They also specify that the defense must inform the court and the prosecution of any missing discovery they are aware of, and any challenges to validity of a COC must be submitted in a written motion.

MANDATED DEFENSE SPECIFY THE EVIDENCE THEY INTEND TO OFFER AT TRIAL

Under their reciprocal discovery obligations, within 30 days of the COC, defense must also share information they intend to provide at trial, including any expert opinion evidence; tapes and electronic recordings; photographs or drawings produced from law enforcement; scientific reports and data; incentives offered to witnesses in exchange for testimony; and names and contact information of any witnesses.

TIED DISCOVERY REQUIREMENTS TO SPEEDY TRIAL PROVISIONS

Prior to reform, prosecutors were able to state they were "ready for trial" and stop the trial "clock" (i.e., not have days count towards disposition deadlines) before the defense had received all discovery, lengthening the amount of time an individual might be detained in jail if they had not posted bail or been released pretrial. Now, the prosecution has to file a COC with the court demonstrating "actual readiness" (i.e., that all discoverable materials have been shared with the defense), and if a case is not resolved within 180 days for a felony and 60 to 90 days for a misdemeanor, the case is at risk of dismissal.

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[3] The statute addresses "good faith" by stating that, for both prosecution and defense, "No adverse consequence . . . shall result from the filing of a certificate of compliance in good faith and reasonable under the circumstances; but the court may grant a remedy or sanction for a discovery violation" See more: (CPL) CHAPTER 11-A, PART 2, TITLE J, ARTICLE 245.

While the old discovery statute was not as explicit as the new one, prior to reform some DA's offices approached the discovery sharing process with greater openness than others. DA's offices with policies to practice "open file discovery" sought to turn over all discovery in their possession as early as possible instead of waiting until the eve of trial. However, even within these offices, the timing and completeness of discovery provided to the defense varied by case and individual prosecutor.

What were stakeholders' initial reactions?

The new discovery provisions were one of the most complex aspects of the legislation, and a large portion of CUNY ISLG interviews focused on the challenges the new requirements surfaced for agencies, particularly with respect to law enforcement, prosecution, and defense. Study participants described the discovery reforms as a "sea change" that would dramatically shift how prosecutors and defenders practiced law, and how people facing trial would navigate plea negotiations.

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Defenders participating in the process evaluation felt strongly that the discovery reforms would have a tremendous influence on the way they are able to represent their clients, subsequently affecting case outcomes in positive ways. They shared that receiving evidence much earlier gave them more leverage during plea negotiations, given they would be able to do a more thorough case assessment before advising clients to either accept a guilty plea offer or take the case to trial, potentially risking a harsher sentence if convicted.

In initial interviews, prosecutors acknowledged the anticipated benefits of the discovery provisions, though they saw gaps in the legislation they claimed would have significant impacts on practice. Prior to the reforms, prosecutors only had to collect and share all discoverable material for cases that went to trial, which most DA's offices interviewed cited were less than 5 percent of their total caseload. Post-legislation, however, prosecutors explained during interviews that the discovery reforms now required them to be "trial ready" on all cases regardless of whether the case was likely to go to trial, which in practice meant they had to collect, process, and share with the defense all discoverable materials within the first few weeks of each case. Without substantial funding for additional staff and new technology, study participants from DA's offices did not think the new requirements were feasible and feared that cases would be dismissed due to missing discovery that was not necessarily additive to the strength of a case.

As preparations for the law were being made leading up to January 2020, prosecutors and law enforcement agencies were also concerned over the protection of witnesses. The reforms made it clear that prosecutors were to provide individuals and their counsel with contact information of victims and witnesses associated with the case. Prosecutors and law enforcement officers expressed concerns about these provisions, as they believed these requirements could threaten witness safety, leading to decreased cooperation from witnesses in the long run. As mentioned above, amendments were passed that addressed these concerns by allowing prosecutors to withhold identifying information in the earliest stages of the case with notice to the defense.

How did stakeholders respond to discovery reform?

Discovery reforms changed operational procedures as well as required shifts to practice to facilitate earlier and more robust information sharing. The changes required significant infrastructural investment – which included more robust technological capacity to electronically store information – and streamlined coordination and flow of information across law enforcement, prosecution, and defense. Though the 2019 version of the legislation did not provide additional resources devoted to discovery implementation, subsequent amendments did funnel some money to prosecutors offices to facilitate their efforts.

NEW TECHNOLOGY WAS CRITICAL TO SUPPORT DISCOVERY REFORMS

Technology was a critical component for agencies across the state to successfully implement the discovery provisions between the Act's passage and implementation in January 2020. Because of the increased volume of discovery that needed to be collected, stored, and shared between agencies, the discovery provisions required counties to shift from traditional paper discovery sharing to "e-Discovery" systems, also called "discovery portals," that facilitate quicker and more efficient information sharing. Leading up to January 1, these types of portals were typically set up by each county DA's office in coordination with county police departments, which included system training. Counties varied in the extent they were able to successfully shift to these new e-Discovery systems in the short, nine-month timeline before the law went into effect. However, some prosecutor agencies had begun the process of shifting to an e-Discovery system prior to the passage of the legislation and described being in a better position to have their discovery portals up and running in time, with time to coordinate across user agencies (police and defense) and pilot any new processes that were required prior to full roll-out.

The reforms also had operational impacts for defenders, who had to plan to receive a much larger volume of discovery than before. Public defender agencies looked to support staff (e.g., paralegals, discovery clerks) to process the e-Discovery transmitted by the prosecution for each case, and required additional funding for server space to store large amounts of files over long time periods. One of the biggest operational challenges that many defenders shared with CUNY ISLG was the need for electronic information to be properly indexed prior to receipt, instead of stored in a complex series of folders and subfolders without clear labels to determine their contents. However, defenders reported that the benefits to their clients far outweighed the logistical challenges that came with the expanded requirements, and they felt that they were able to properly review the large volume of discovery and effectively advise their clients.

One technological concern, particularly outside of NYC, was that legislators had not sufficiently considered the variation in infrastructure across counties that could affect implementing the discovery reforms. NYC has a centralized police system where the same technology is used by all precincts across the city. This meant the DA's offices only had to coordinate with a single system with a consistent set of policies when receiving police information. DA's offices outside of NYC, however, were required to create a system to receive discovery from law enforcement agencies with different case management systems, and prosecutors described challenges with the compatibility of some of those systems with the new discovery portals. For example, in Westchester

County there are 45 local police departments to coordinate with, many of which had different case tracking systems that varied in their compatibility to the system created by the county DA's office.

DEFENDERS OBSERVED MORE TRANSPARENCY & FAIRER CASE OUTCOMES

All defenders from offices across the state had anticipated that the discovery provisions would improve fairness and transparency in the process. Ultimately, they reported observing much better case outcomes for their clients once the changes went into effect, such as better plea offers, more favorable outcomes at trial (e.g., more community based sentencing options), and more case dismissals. One public defender from Dutchess County shared: "It's been awesome, [we've been] able to achieve much better results, [we've been] able to go through things in so much detail and can negotiate with the DA for a better deal, while also letting the client know the reality of their case. [We are] able to prep cases for trial from the beginning as opposed to receiving a discovery dump two weeks before trial. [It has been] really beneficial to us as lawyers, and more importantly for clients, to get the best results."

They also reported that more information was shared with them more quickly, leading to quicker case resolution – meaning people spent less time in jail and missing work, family events, or other prosocial engagements to attend court cases. Defenders noted they were able to discuss the facts of their cases much earlier and much more thoroughly with their clients: "I don't know what the numbers are – and it's anecdotal – but certainly I am confident that people who are now charged with crimes are making far better, informed decisions."

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More specifically, defenders participating in interviews suggested that having full discovery at the earliest stages of the case gave them more leverage during the plea negotiation process, which they incorporated into their defense strategy. Because the new discovery laws required prosecutors to certify trial readiness when all discovery had been shared, many defender agencies created office policies that aligned the timing of plea negotiations to COC filing so all information would be available when assessing a deal. For example, many public defender offices shared that they would not consider plea offers until prosecutors filed a COC with the court, and would not waive their right to receive additional discovery while considering a plea offer. As defense attorneys believed prosecutors had routinely withheld discovery prior to reform, some public defender's offices also shared they had developed policies to challenge COCs on all cases to determine if any discovery was missing.

Some prosecutors accused defenders of engaging in "gamesmanship" by allowing the speedy trial clock to run when they were aware discoverable materials had not been shared and filing late challenges to the COC in order to increase the risk of case dismissal by speedy trial violation. All Assistant District Attorneys (ADAs) participating in the study expressed frustration over the defense strategy to challenge the majority of COCs, with one prosecutor from a DA's office in NYC suggesting that the statute " . . . encourages gamesmanship and destroyed those relationships [between prosecutors and defenders]."

Though frustrated with the outcomes, some prosecutors said they did understand the practice, suggesting it is defense attorneys' constitutional duty to prioritize achieving the best case outcome for their client even if, at times, it comes at the expense of justice for victims. Public defenders challenged the portrayal, arguing that both sides had a tremendous volume of discovery to review, and that it is difficult for them to know when there is missing discovery earlier in the process if prosecutors and law enforcement are the only parties aware of what discovery actually exists prior to sharing it.

Defenders reported observing increased dismissals when they did not receive complete discovery in a timely fashion. Dismissal data collected by the New York State Division of Criminal Justice Services (DCJS) illustrates an increase in dismissals from 37 percent pre-reform in 2019 to 41 percent in 2020, 53 percent in 2021, and 48 percent in 2022. Dismissal due to speedy trial violations nearly doubled between 2021 and 2022, going from 12 percent to 23 percent. In 2020, dismissal due to speedy trial violations were at 1 percent given timeline suspensions due to COVID-19 and no data was available pre-reform to assess that level of change.[4]

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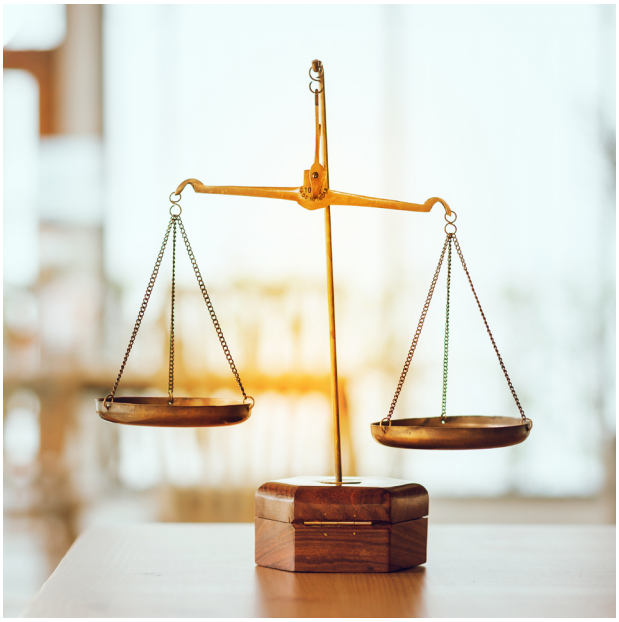
PROSECUTORS TRIAGED CASES TO AVOID DISCOVERY DISMISSALS

Prosecutors in counties across the state supported the goals of discovery reform, but questioned whether the amount of discovery and the short timelines required to share it were necessary to achieve fairer outcomes. For example, many ADAs shared anecdotes that electronic links to discovery files had expired after months of not being opened by the defense counsel, indicating that the defense also did not have the capacity to review the increased volume of discovery. In these instances, though the defense did not have the time to open the files, the case could have been at risk of dismissal had prosecutors not turned over that information within the specified timelines.



Prosecutors felt that, despite them voicing concerns early, lawmakers had not considered the practical implications of the changes on their work and as a result, prosecutors did not have enough support staff or funding to track down the wide range of materials that were now discoverable for all of their cases. They worried that even cases with strong evidence suggesting guilt could be dismissed because a single piece of paper was not

[4] NY Courts Division of Technology & Court Research, "Pretrial Release Data," *NYCourts.Gov,* August 2023, https://ww2.nycourts.gov/pretrial-release-data-33136.

turned over to the defense, and that such case dismissals would increasingly occur for missing discovery that had no bearing on the case.

To address this, many DA's offices, particularly in counties with high caseloads, shared that they developed policies to "triage" their caseloads to keep their heads above water. They began to prioritize the more serious cases, including declining to prosecute cases they felt they may have normally pursued before reform. For some cases, they only moved forward with discovery if the complainant or witness was cooperative and willing to submit a supporting deposition, and dropped the case if they did not. Prioritizing cases in this way did provide some relief; however, despite these solutions, prosecutors still reported observing high rates of dismissal on cases they felt likely should have move forward in the court process, claiming a direct link between dismissal and missing discovery.

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Case dismissal statistics presented above support prosecutorial sentiments that dismissals are on the rise, though it is difficult to ascertain specific dismissal reasons in the data. That said, a 2022 OCA survey found that 78 percent of NYC judges believed that speedy trial dismissals either moderately or greatly increased as a direct result of the discovery reforms.[5] In the survey, judges in counties with high caseloads reported discovery obligations were most commonly not met when discoverable materials were too voluminous, there were disputes over whether materials were discoverable, there was a lack of due diligence in collecting discoverable materials, or the materials were not in the prosecution's control or custody. Prosecutors described running out of time while tracking down discovery that either could not be found or that agencies refused to turn over, which resulted in issues filing the required COC in addition to speedy trial violations, both of which increase the threat of case dismissal.

As mentioned previously, the concern over case dismissals was less pronounced in counties with lower caseloads, such as those outside of NYC. The same survey of judges conducted by OCA found that only 35 percent of judges outside NYC felt that the discovery reforms either greatly or moderately increased speedy trial dismissals compared to 78 percent of surveyed judges in NYC.

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INCREASED VOLUME LED TO STAFF BURN OUT & ATTRITION IN PROSECUTOR OFFICES

Rather than the traditional job responsibilities of preparing legal strategy for their cases and working with and supporting victims, prosecutors saw a tremendous increase in the time they spent doing paperwork and tracking down discovery. There was a general sentiment that prosecutors had to work much longer hours to fulfill

[5] Amaker, Honerable Tamiko A., *2022 Judiciary Annual Report on the Implementation and Impact of CPL Aricle 245*, (New York: New York State Unified Court System, 2022), https://www.nycourts.gov/legacypdfs/court-research/Judicial_Discovery_Report_12_2022.pdf

their victim support responsibilities because they were now responsible for tracking down an abundance of paperwork. As one prosecutor interviewed shared, many people felt that "...all they are doing with their time is chasing down discovery because they are terrified their cases are going to get dismissed or penalized for missing discovery. It's a nightmare."

While many ADAs shared that they believed the statute would put pressure on law enforcement to turn arrest information over faster than under previous discovery laws, law enforcement agencies struggled with the expanded discovery requirements and shorter timeline as well. One upstate officer explained, "If you have one man getting arrested for grand larceny, getting released and doing it again right away, the manpower for him alone has officers spending over 20 to 24 hours just downloading and documenting video from those incidents. Every part of it is an event. From body cameras, to cameras at our station, and then booking desk, then back to booking and finger print, and cell block has to be downloaded, then out to public defender . . . All of that video has to be downloaded and turned over. In the past, we had more time to gather and turn over (video). Same thing in terms of report writing. Overtime is going up because officers have to finish the paperwork before they go home. They used to be able to do it later, but now have to do it before they go home. And it's an unfunded mandate, no extra money for it, but people are requiring more overtime to do discovery in a timely manner."

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To keep up with the increased volume of discovery, both defenders and prosecutors needed to hire new staff to process and share discovery materials, but the DA's offices had a larger burden. Prosecutors were responsible for collecting all evidence and information from law enforcement and other agencies involved in the case, processing these materials, and sharing them with the defense in the weeks after arraignment. Many of the DA's offices participating in this study discussed creating discovery expeditor and paralegal roles to track down all of the information, process it, and share it with the attorneys assigned to cases, but counties varied in how much they were willing to commit for additional staff. One prosecutor from the Westchester DA's office shared, "We needed many more assistants and paralegals, and we explained why, and it was denied [by our county]. They gave us one or two . . . The county and board of legislatures ... didn't want to allocate money to the DA's office, [despite this being] an extraordinary change . . . The city offices got funding, we did not. And we still are very much strapped for resources."

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However, due to the onset of COVID-19, even counties that did secure funding for new staff faced hiring freezes and many were unable to fill positions well into 2020. Additionally, all staff had to be trained on new operational procedures around the new process, e-Discovery systems, and how to interpret the often vague discovery statutes. Many ADAs interviewed felt that the discovery requirements were so onerous that no training could have adequately prepared them for the changes to their practice and their day-to-day work prosecuting cases.

In terms of staffing, DA's offices have to compete with private practice law firms who offer more

flexible hours, better pay, and more manageable case loads; prosecutors interviewed said the stress caused by increased discovery volume, rising case dismissal rates, and shifting roles caused prosecutors to leave DA's offices for private practice at high rates. This, interviewees said, impacted the offices' ability to maintain necessary staffing levels and effectively prosecute cases. Since the reforms went into effect, ADAs shared that many more experienced prosecutors have been leaving DA's offices, resulting in difficult cases being placed in the hands of more junior ADAs. One ADA shared, "Attrition has had a major impact, and we are still vastly understaffed – especially with mid-level ADAs. Younger ADAs are handling more serious cases. That's trickled down to having an adverse effect on the low-level felonies."

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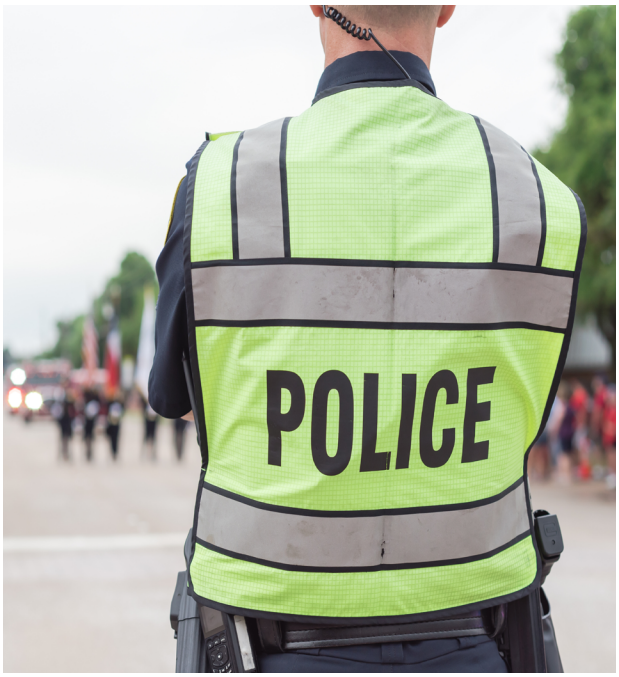
The departure of a prosecutor in the middle of a case also significantly increases the chance of discovery deadlines being missed, which has the potential to result in case dismissal.

STAKEHOLDERS NOTED THE REFORM HAS THE POTENTIAL TO ERODE PUBLIC TRUST

Beyond operational and practical changes to policies, stakeholders had differing perspectives when it came to how the reforms changed how the public viewed the criminal legal system and community safety. While many of these concerns were addressed in subsequent amendments, many prosecutors and law enforcement officials felt that things had shifted too far in favor of the defense at the expense of victims and witnesses, public safety, and justice more broadly. Fewer cases were being pursued, and police officers were less present in their communities due to the amount of time spent processing arrest paperwork.

As a result, they observed that many victims and witnesses had lost faith in the criminal legal system because they did not understand why their cases were not being pursued. One upstate police officer shared they were concerned that the amount of paperwork required for each arrest was keeping officers from doing their jobs: "Arrests take a lot more time. Officers are off the street a lot more time to build files and videos. Lack of community connection – whether it's community policing, response times can be longer, just the amount of time to build the record. It becomes more frustrating on the appearance ticket aspect of it when people are back out there committing crimes while we are still doing the paperwork."



Prosecutors and law enforcement shared that one reason some cases were not pursued was because victims and witnesses expressed safety concerns relating to retaliation due the new requirements to turn over witness contact information to the defense as a part of discovery. An officer from an upstate police department explained, "In quite a few of the murders we had, people will tell us who it is but nobody would testify. 20 days after the person is arrested, the entire case turned over. The DA has to request from the judge if the witness' name can be redacted. Our policy is, there is no guarantee that your name will be kept out of this. [Before reform], it may have been 7, 8, 9 months before someone knew who the witness was, now is less than 30 days."

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Similarly, a police officer in another upstate police department claimed "we've had people [complainants] that have said 'I do not want them [the accused individual] arrested because I don't want them to have my name.'"

On the other hand, defenders felt many of these concerns were unfounded and argued that this information is necessary for defenders to gather their own information from witnesses to prepare their case. Prosecutors do have the ability to file protective orders in cases where witness safety is threatened, and both prosecutors and defenders shared that requests for these orders from prosecutors have increased to address these concerns. DA's offices have taken other steps to protect witness safety: the Manhattan DA's Office, as one example, implemented WitCOM – an app developed by a private vendor – to allow defense attorneys to contact witnesses without sharing their names or contact information.

As mentioned previously, amendments allowed prosecutors to withhold identifying information early in the case with justification submitted in writing. All said, aside from anecdotal evidence, available data does not prove either side; further research must be done to uncover more data regarding changes in rates of victim and witness cooperation resulting increased dropped cases as due to the reforms.

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