

# **The Impact of Discovery Reform Implementation in New York**

**Report of a Defense Attorney Survey  
Conducted Jointly by:**

**Chief Defenders Association of New York  
New York State Defenders Association  
NYS Association of Criminal Defense Lawyers  
NYS Office of Indigent Legal Services**

March 28, 2022

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# Defense Attorney Survey About Discovery Reform Implementation

## Background

To assess the impact of New York’s 2019 discovery law reforms<sup>1</sup> on criminal defense practice and the fairness of criminal proceedings, the Chief Defenders Association of New York (CDANY), the New York State Defenders Association (NYSDA), the New York State Association of Criminal Defense Lawyers (NYSACDL), and the New York State Office of Indigent Legal Services (ILS) developed a survey for practicing criminal defense attorneys. On February 25, 2022, CDANY, NYSDA, and NYSACDL distributed the survey to their respective memberships, which include attorneys who engage in criminal defense representation for public defender offices or legal aid societies, attorneys who engage in criminal defense representation as part of an assigned counsel program (ACP), and attorneys who engage in criminal defense representation as a privately retained attorney. ILS created the survey link using SurveyMonkey. The survey was open until March 13, 2022, and during these two weeks, ILS received unique responses from 563 criminal defense attorneys.

Notably, because discovery reform has been discussed as a topic of potential legislative action this legislative session, we decided to provide the survey results as quickly as possible to inform decision-making about Criminal Procedure Law (CPL) Article 245. As a whole, these survey results show that discovery reform has had a significant positive impact on the quality of criminal defense representation and the fairness of criminal case processing. As we state further in this report, attorneys responding to this survey provided detailed and voluminous comments about discovery reform implementation, and thus, this survey is rich with information. We hope to conduct a deeper analysis of these comments in the future.

## Methodology

The survey included 16 questions: five demographic questions, 10 close-ended questions, and one open-ended question inviting attorneys to provide any “additional information about the implementation of discovery reform.” (The survey instrument is attached as Appendix A). Surveyed attorneys were also given the opportunity to provide additional comments under each of the 10 close-ended questions (Questions #6-15 of Appendix A).

Of the 563 unique survey participants, 509 completed the survey and 54 submitted an incomplete survey. After eliminating the incomplete survey responses, we analyzed the remaining 509 survey responses. The following analyses are based on the 509 respondents who completed the survey.

The survey results are divided into three parts. The first part is an analysis of the survey’s demographic questions, the second part is an analysis of the close-ended Questions #6-15, and the third part is an overview of the written comments attorneys provided in response to Questions #6-16.

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<sup>1</sup> See Part LLL of Chapter 59 of the Laws of 2019, codified in Criminal Procedure Law (CPL) Article 245.

## Conclusion

New York's previous criminal law discovery scheme, embodied in CPL Article 240, was considered by many to be one of the most regressive in the nation, and as a result was often referred to as the "blindfold law."<sup>2</sup> The enactment of CPL Article 245 sought to lift the blindfold to ensure more just and fair case outcomes.

The survey results below show that the vast majority of criminal defense attorneys believe that discovery reform has achieved the desired results and has positively impacted not only their ability to provide competent representation, but also the fairness of New York's criminal justice system. The survey results also suggest the need for more research on compliance with CPL Article 245 because, as defense attorneys aptly noted in their survey responses, the benefits of CPL Article 245 can be fully realized only if there is compliance.

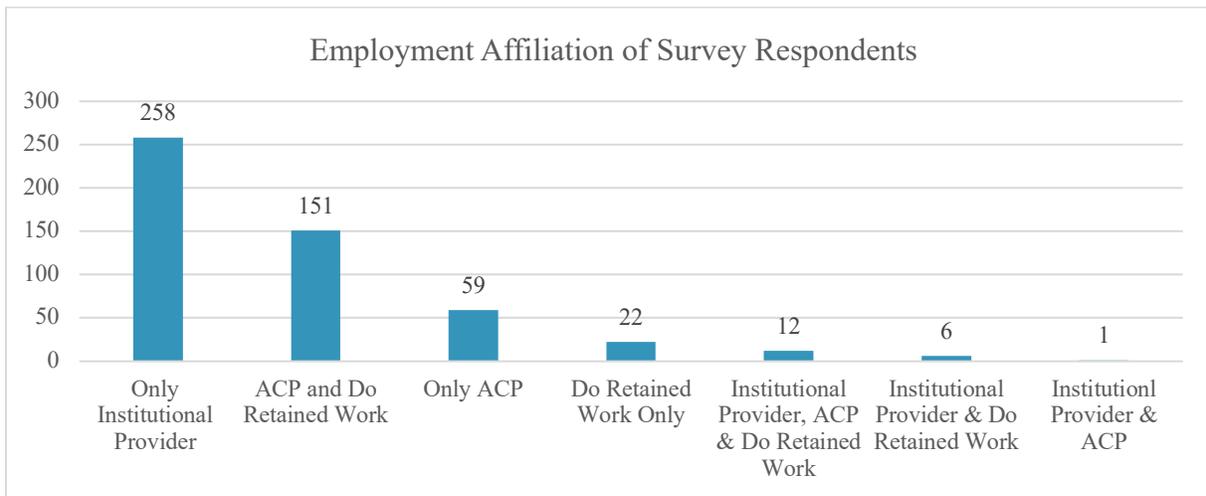
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<sup>2</sup> See, for example, the January 8, 2020 *Forbes* article describing New York's discovery reform, available at: <https://www.forbes.com/sites/insider/2020/01/08/blindfold-removed-from-justice-in-state-criminal-cases-in-2020/?sh=55e6e05c207c>.



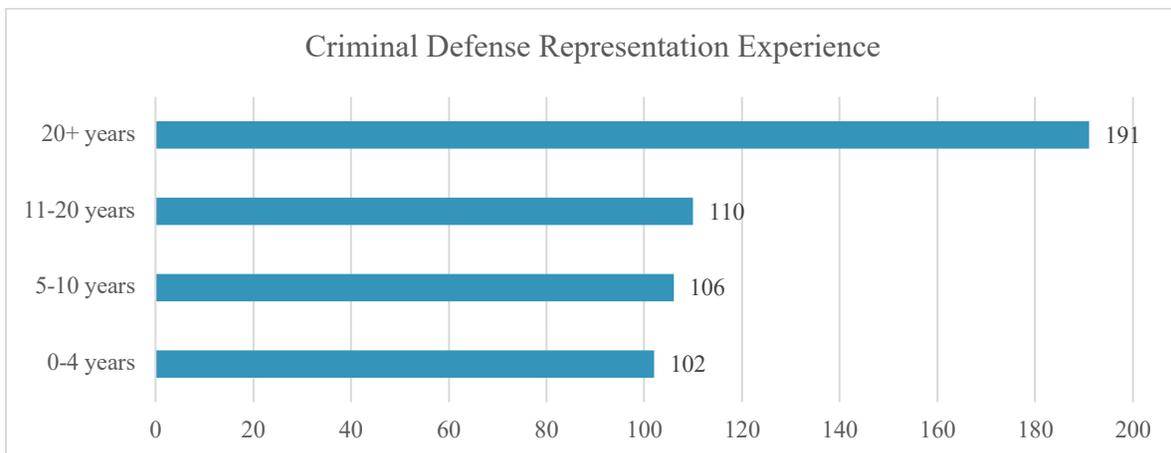
## Employment Affiliation of Responding Attorneys

Question #2 asked attorneys to indicate if they work for a Public Defender Office, Conflict Defender Office, or Legal Aid Society/Bureau, if they are assigned cases through one or more assigned counsel programs, or if they do retained work. Attorneys were instructed to check all these work situations that apply, and many did check more than one. Of the 509 responding attorneys, 51% (258) reported they only work for a Public Defender, Conflict Defender, or a Legal Aid Society (“institutional provider”). Thirty percent (151) of the attorneys perform a combination of assigned counsel program (ACP) and retained work. Twelve percent (59) indicated they only perform ACP work, and 4% (22) indicated they only do retained work.



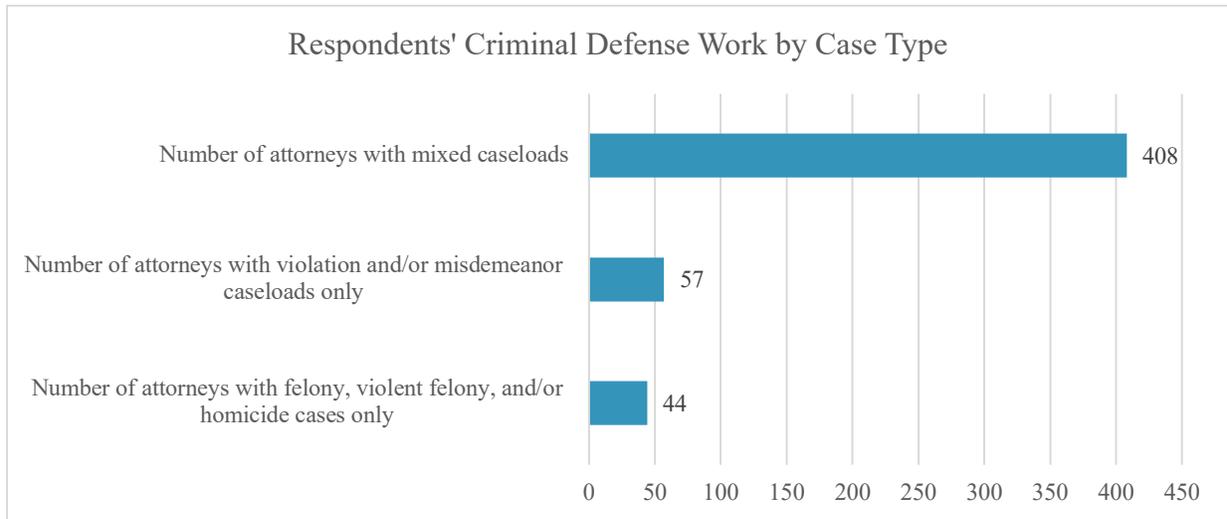
## Criminal Defense Experience of Responding Attorneys

Attorneys were asked to indicate how long they have been providing criminal defense representation in New York State. Thirty-seven percent (191) of the survey respondents have 20 or more years of experience, 22% (110) have 11-20 years of experience, 21% (106) have 5-10 years of experience, and 20% (102) have 0-4 years of experience in criminal defense representation in New York.

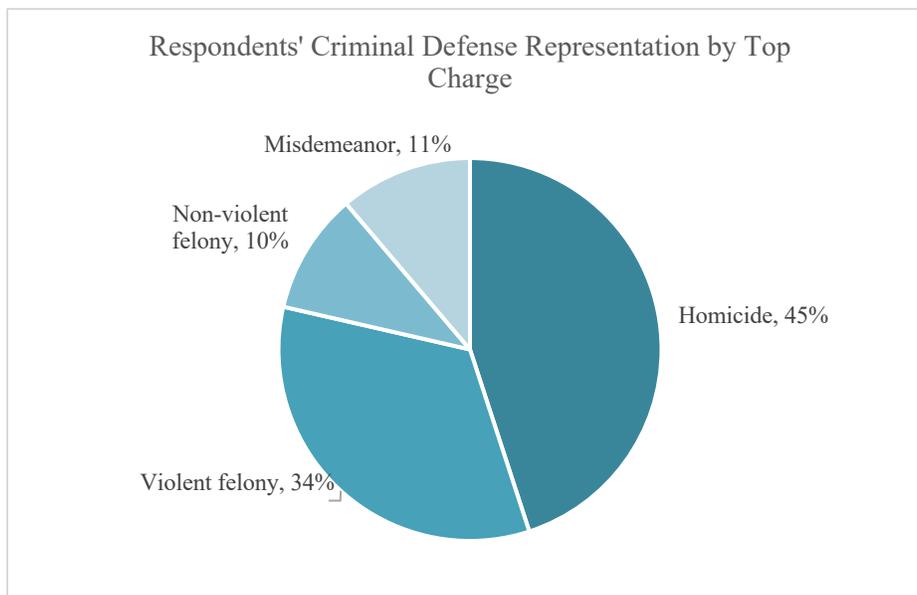


## Respondents' Criminal Defense Work by Case Type

Finally, attorneys were asked to indicate the type of cases on which they provide representation. The chart below depicts their responses, showing that nearly all attorney respondents represent clients in various types of criminal matters:



We also examined the responses based on the seriousness of the types of cases, by top-level charge, on which attorneys reported providing representation. Forty-five percent (229) of survey respondents listed homicide as the top-level charge on which they provide representation, 34% (171) of attorneys reported violent felony, 10% (52) of attorneys listed non-violent felony, and 11% (57) of attorneys selected misdemeanor as the top-level charge on which they provide representation.

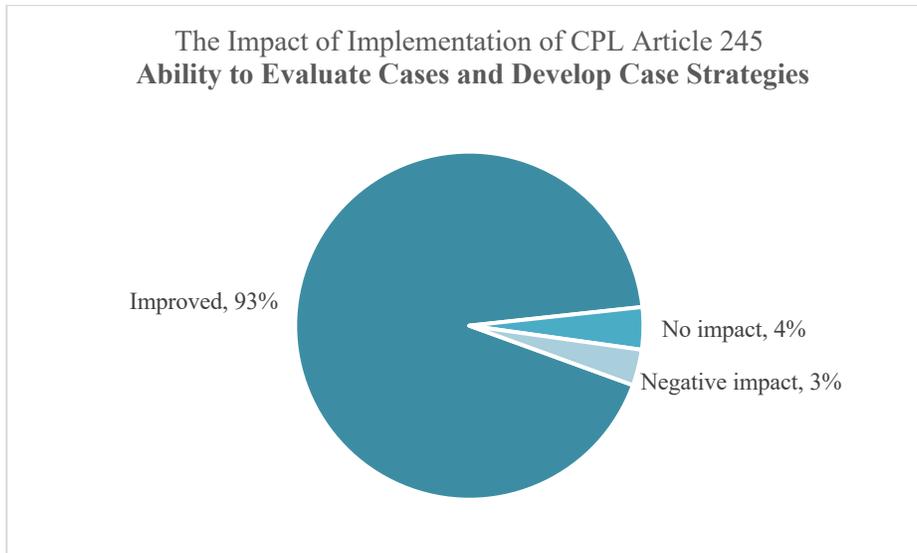


## Part II: Analysis of the Responses to the Closed-Ended Questions

Survey questions #6-15 were close-ended, each providing responding attorneys with three to four response options. Below is an analysis of attorney responses to these questions.

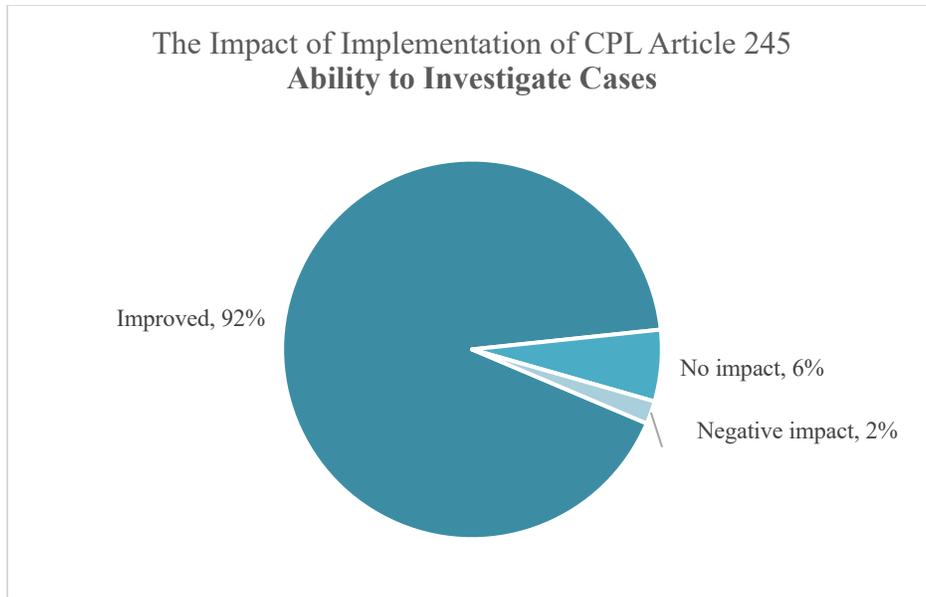
### Question #6: Ability to Evaluate Cases and Develop Case Strategies

Question #6 asked attorneys the following question: “Has the implementation of CPL Article 245 impacted your ability to evaluate your cases and develop case strategies?” The vast majority of survey respondents, 93% (472), checked that implementation of CPL Article 245 has improved their ability to evaluate cases and develop case strategies. Only 4% (20) of survey respondents checked that implementation of CPL Article 245 has had no impact, and 3% (17) of responding attorneys reported that implementation of discovery reforms has had a negative impact on their ability to evaluate cases and develop case strategies.



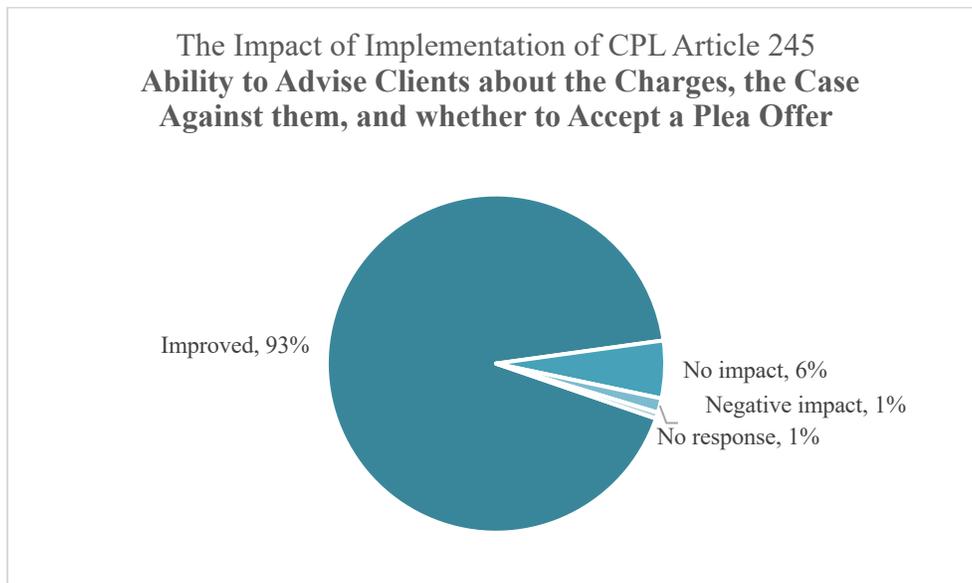
### Question #7: Case Investigation

To evaluate if discovery reform has had an impact on defense attorney case investigations, Question #7 asked: “Has the implementation of CPL Article 245 impacted your ability to investigate your cases?” Ninety-two percent (468) of attorneys responded that it has improved their ability to investigate their cases, 6% (31) indicated that it has no impact, and only 2% (10) responded that it negatively impacted their ability to investigate their cases.

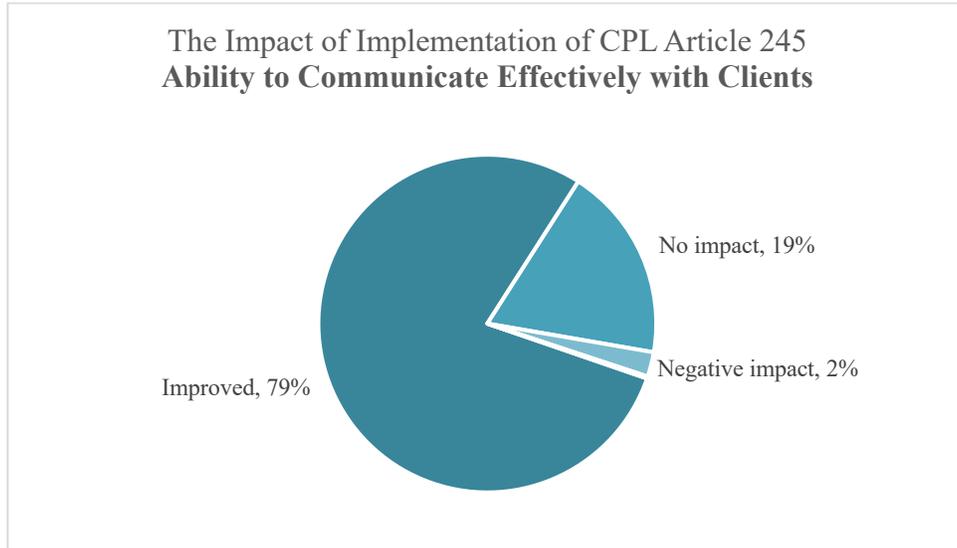


**Questions #8 and #12: Client Advice and Effectiveness of Client Communication**

Survey Question #8 asked attorneys: “Has the implementation of CPL Article 245 impacted your ability to advise your clients about the charges, the case against them, and whether to accept a plea offer?” Ninety-three percent (471) of the responding attorneys believe that the implementation of CPL 245 has positively impacted their ability to advise their clients, while 6% (28) responded that it has no impact on their ability to advise their clients, and 1% (7) of attorneys indicated that discovery reform has negatively impacted their ability to advise their clients.

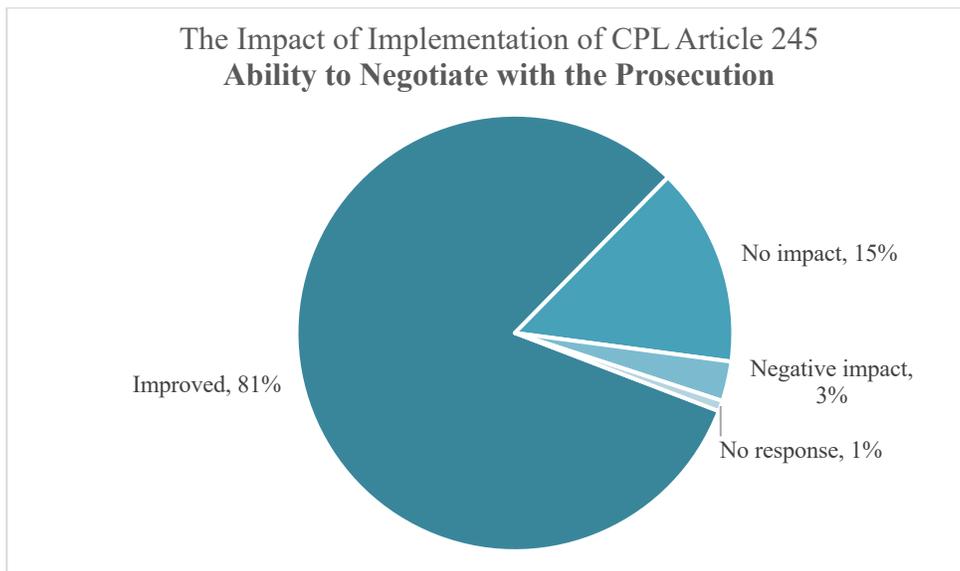


Relatedly, Question #12, asked attorneys the following question about client communication: “Has the implementation of CPL Article 245 impacted your ability to communicate effectively with your clients?” Seventy-nine percent (401) of responding attorneys believe it improved their client communication, approximately 19% (95) of respondents reported that it has had no impact on their ability to communicate with their clients, and 2% (12) of attorneys expressed it has a negative impact on their ability to provide effective client communication.



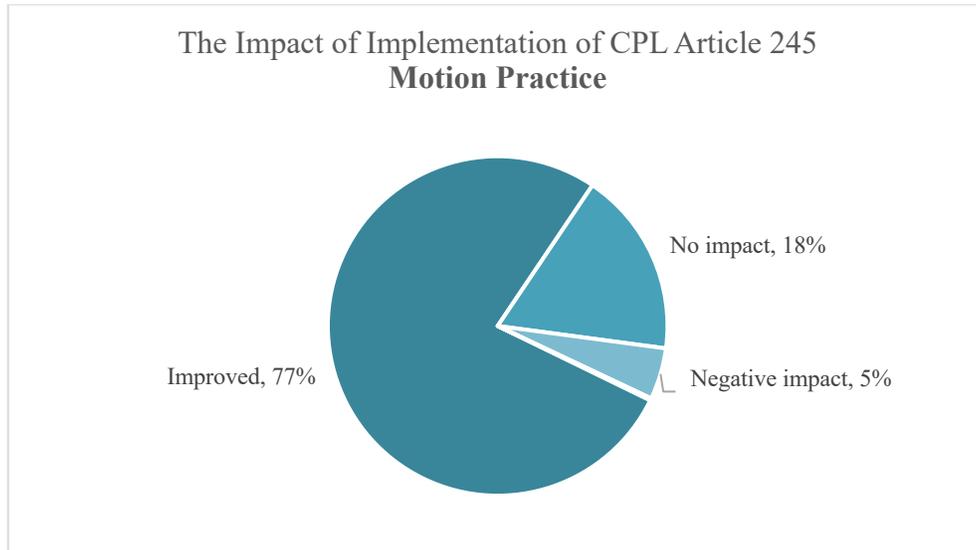
**Question #9: Ability to Negotiate with the Prosecution for a Disposition**

Question #9 asked attorneys to indicate if implementation of CPL Article 245 has improved their ability to negotiate with the prosecution for agreed upon dispositions in their cases. The vast majority – 81% (415) – of attorneys responded that it has had a positive impact on their ability to negotiate with the prosecution, while 15% (75) of attorneys indicated that it has no impact, and only 3% (15) of attorneys responded that it has negatively impacted their ability to negotiate with the prosecution.



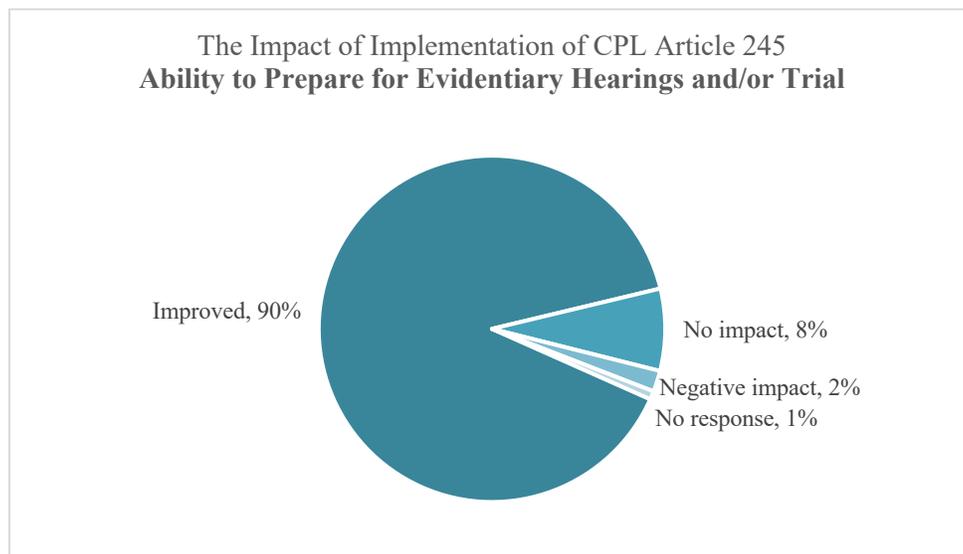
### Question 10: Motion Practice

Question #10 asked attorneys if discovery reform has had an impact on their motion practice. Seventy-seven percent (393) of responding attorneys reported that it has improved their motion practice; 18% (90) said it has had no impact on their motion practice, and 5% (25) responded it has had a negative effect on their motion practice.



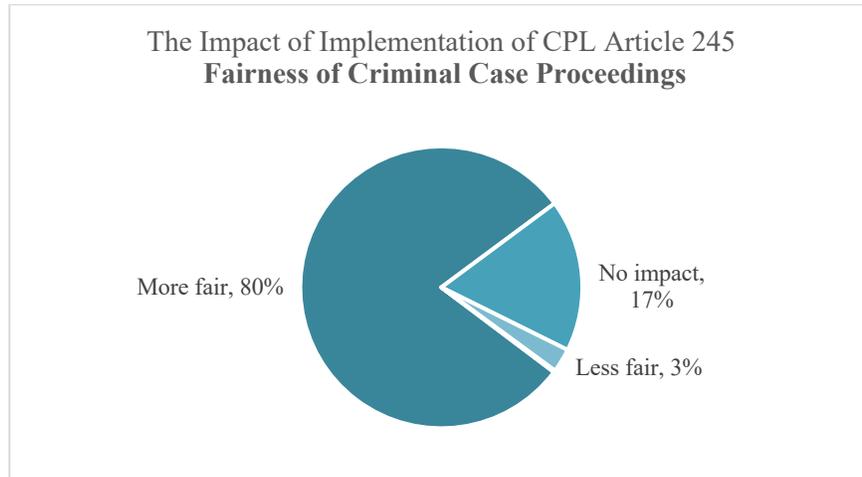
### Question #11: Ability to Prepare for Evidentiary Hearings, Trial, or Both

Question #11 asked attorneys to indicate if discovery reform has impacted their ability to prepare for evidentiary hearings, trials, or both. Ninety percent (456) of responding attorneys reported that it has had a positive impact, 8% (39) expressed that it has no impact, and 2% (10) indicated it has a negative impact on their ability to prepare for evidentiary hearings, trials, or both.



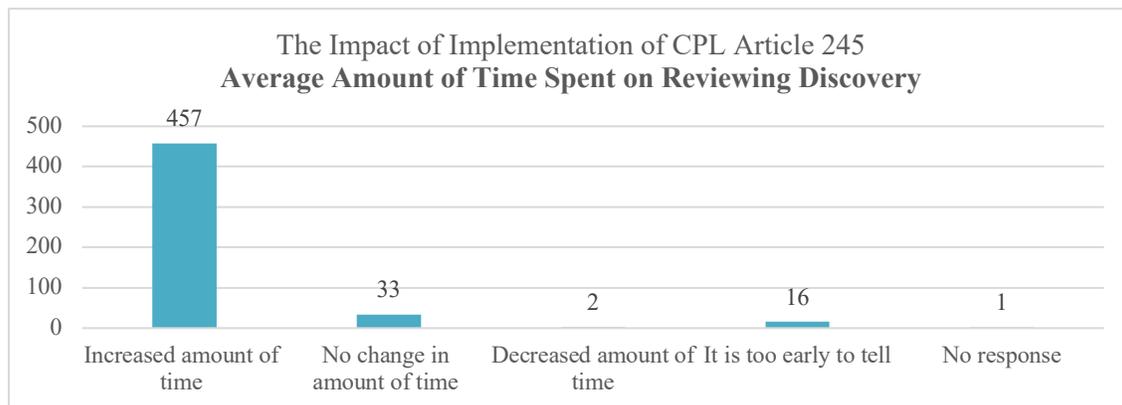
### Question #13: Fairness of Criminal Case Proceedings

Question #13 asked attorneys if discovery reform has impacted the fairness of criminal case proceedings. The vast majority – 80% (405) - of the attorneys responded that it has made criminal case proceedings fairer, while 17% (89) feel that it has no impact on the fairness of criminal case proceedings. Only 3% (14) believe it has made criminal case proceedings less fair.

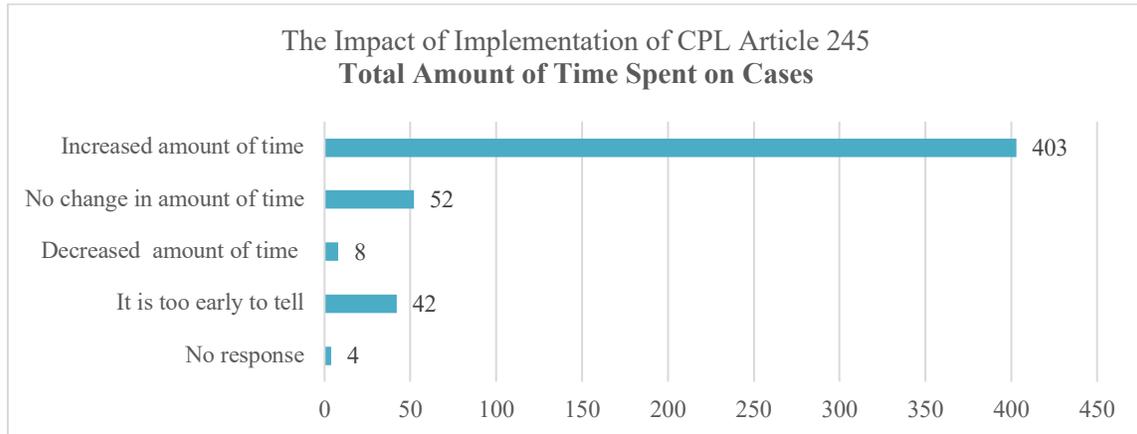


### Questions #14 and #15: Time Spent Reviewing Discovery and Time Spent on Cases Overall

Finally, the survey asked the criminal defense attorneys two questions regarding the amount of time they now spend on discovery review and on their cases to determine if they are now spending more time than prior to discovery reform. The first question addressed the time spent reviewing discover, asking “Has the implementation of CPL Article 245 changed the average amount of time you spend reviewing discovery?” Approximately 90% (457) of the survey respondents report that they are now spending more time on discovery review. Only 6% (33) indicate that their time spent on discovery review has not changed. A small number - 3% (16) – reported that it is too early to tell. Only two attorneys responded that they are now spending less time now reviewing discovery.



The survey also asked the attorneys: “Has the implementation of CPL Article 245 changed the total amount of time you spend on cases?” Seventy-nine percent (403) of attorneys said it has increased their total time spent on cases, 10% (52) reported that it has no effect on the amount of time they spend on cases, and 8% (42) believe it is too early to tell. Only 3% (8) of attorneys reported that it has decreased the amount of time they spent on cases.



### Part III: Overview of Written Comments

In addition to the quantitative analysis of the responses to the survey questions, this preliminary report provides an overview of the written comments to the survey questions. For each of Questions #6–15, defense attorneys were invited to submit written comments. Additionally, Question #16 invited defenders “to describe any additional information about the implementation of discovery reform.” Many of the 509 survey respondents accepted the invitation to provide written comments, and as a result, there are approximately 69 pages of comments.

Consistent with the percentage of defense attorneys who responded that discovery reform has had a positive impact, an overwhelming majority of these written comments elaborated on the positive impact enactment of CPL Article 245 has had on improving both criminal defense practice and the fundamental fairness of criminal proceedings. Of the much smaller number of comments indicating that discovery reform has had no impact or has had a negative impact, most defense attorneys wrote about the lack of prosecutorial and judicial compliance, the challenge of reviewing voluminous amounts of information disclosed, and the timeframes (most often the defense’s obligation to challenge Certificates of Compliance filed by prosecutors within 30 days).

Comments are organized below by the most common themes that emerged. The 69 pages of comments are rich with information, and we hope to conduct a more detailed analysis of the comments at a future date. For purposes of this overview, however, the thematic approach punctuated by use of representative defense attorney comments serves as an effective manner by which to capture the tone and substance of the survey’s written comments.

#### **1. Discovery reform has significantly improved the fairness of criminal proceedings.**

Throughout the survey, defense attorneys commented on the enhanced fairness of criminal proceedings since implementation of CPL Article 245. The following phrases are repeated throughout their written comments: “levels the playing field;” “no longer ambushed;” “no longer defending in the dark;” “defendants now know the evidence against them when making decisions;” “greater accountability;” “transformative;” “best thing that has happened to criminal practice;” “a blessing;” “much needed reform;” “life changing;” “long overdue.”

Many defense attorneys characterized New York’s prior criminal discovery scheme as “fundamentally unfair” and still others noted that the previous scheme most certainly led to wrongful convictions. Others acknowledged the costs of discovery reform, given the voluminous information typically disclosed, but noted that the benefit of increased fairness outweighs the costs. As one defense attorney wrote:

“The amount of Brady [exculpatory] information found in the Discovery is significant. It means for years the prosecutors have not turned over information which was required. The man hours to review everything and then hire experts to provide greater understanding of the information has increased dramatically. The cost of storage of the discovery is astronomical. The costs are worth it; the outcomes are far more fair than before discovery.”

Some defense attorneys who have practiced in other jurisdictions, who have been prosecutors, or who have handled civil matters commented. Their unique perspectives are reflected below:

“Having worked for several years in a jurisdiction with open discovery (FL) prior to working in NY State, I was shocked, appalled, and horrified that discovery was not available to criminal defendants. It is impossible to have a fair proceeding, effectively negotiate, or advise clients without open and available discovery. It boggles my mind that it was allowed to go on for so long in NY. After discovery reform, it’s much easier (and now possible!) to strategize, prepare motions, negotiate, advise clients, and prepare for trial. Clients don’t have to make decisions that will impact their lives significantly with zero information or go into a hearing or trial blindfolded. It is much better for judicial efficiency if everyone has the same information so appropriate pleas can be negotiated and appropriate cases taken to trial.”

“I used to work as a defender in NJ which has open file discovery, and the Superior Court prosecutors there had no issue collecting discovery from dozens of municipal police departments and handing it over to the defense within 5 days of arrest.”

“I am a former prosecutor and have been doing defense work for over 20 years since. This discovery change has been monumental in basic fundamental fairness. In the past, discovery was withheld until the last minute on criminal cases where a client’s liberty or freedom was a risk, yet in civil cases - disputes over money- discovery was provided well in advance of trial. Thank you for eliminating the antiquated unfair discovery procedures of the past.”

“I would never handle a civil case without the opportunity for discovery in the way we used to handle criminal cases before the new discovery rules.”

Many defenders compared their defense practices prior to discovery reform to their practices post discovery reform, establishing a vivid “before and after” picture. The comment below is illustrative:

“My first felony case I went to trial with one police report in my hand. 10 pieces of paper for a client facing a mandatory life sentence. In contrast, the hearings I did this year, I have nearly 1000 pages of discovery in each case and ended up with two suppressions because I actually knew what I was walking into, instead of being totally blindfolded.”

The following comment perhaps best captures the overall sentiment of the defense attorney responses about discovery reform’s positive impact on the fairness of criminal proceedings:

“One of the most important acts in criminal justice reform. Thank you to the legislature for delivering this for our clients.”

## **2. Discovery reform has improved criminal defense attorneys' ability to meaningfully investigate their cases.**

Many defense attorneys commented on the positive impact CPL Article 245 has had on defense investigations. Because evidence must be disclosed early in the case, the defense can now investigate before evidence is lost or spoiled, which decreases the chances of wrongful convictions, as discussed in the comments below:

“Knowing early what the issues may be allow us to search for cameras that may be helpful before the information is over-written, speak to witnesses [while] the events are fresh in their minds and before things like address and phone numbers change. It is a huge benefit.”

“Having evidence early on means the ability for the investigator to go to [the] scene and speak with witnesses prior to evidence spoiling and memory fading.”

Moreover, defense attorneys now know what investigation leads to follow and who to question, as opposed to investigations under the prior discovery scheme in which they usually had to speculate. Defense attorneys commented on the fact that they can now use investigators and other experts more effectively, as captured in the following:

“Getting body cam, grand jury testimony, witness lists surveillance, etc., has allowed better investigator requests. Prosecution witnesses have given recorded statements contradicting police reports and testimony, or their own prior statements to the police or the grand jury.”

“A sea-change - allows a more focused investigation by narrowing the factual areas needed to be explored early on, allowing for the preservation of evidence/locating & interviewing witnesses.”

“[H]aving names and contact information provided has made it a lot easier to give the investigators directions rather than a wild goose chase sometimes.”

Defense attorneys also noted that because they can now initiate informed case investigations earlier in the case, they are no longer forced to rely on law enforcement's characterization of the evidence. They can make their own assessments, and at times, find evidence or locate witnesses overlooked by law enforcement:

“Being able to see all the parties present on BWC [body worn camera] during an arrest has allowed me to investigate individuals outside of those named on paperwork.”

“Getting access early and fully to the discovery materials enables the defense to investigate the allegations, interview witnesses and locate additional witnesses and evidence that may be inculpatory or exculpatory, depending on the circumstances.”

“Discovery [reform] has allowed me to identify witnesses and surveillance that show what really happened.”

Some defense attorneys noted that because they are carefully reviewing evidence and engaging in better case investigations, the prosecution is also now scrutinizing evidence more carefully, enhancing the opportunity for more timely dismissal of cases for lack of evidence, as noted in the comment below:

“Disclosure of all witnesses under the new laws allows more time for investigators to speak to witnesses and develop trial strategy. In turn, it prompts the DA to investigate earlier, resulting in the timely dismissal of cases that cannot ultimately be proven. Before, without the [CPL Article] 245 requirements, cases lingered longer, clogging up the system and putting the accused at risk of collateral consequences.”

Finally, prior to discovery reform, defense attorneys who sought discovery earlier in their cases were typically met with the response: “Ask your client.” The following written comment channels that oft-heard phrase to serve as a reminder that assuming clients can identify evidence undermines the presumption of innocence:

“I now know what and whom to investigate. It is particularly helpful with clients who are innocent who can provide zero guidance as to what happened.”

### **3. Discovery reform enables defense attorneys to develop informed case strategies and provide their clients with informed advice about the charges against them and possible case strategies, including potential plea negotiations.**

A significant majority (92.73%) of the 509 defense attorneys who completed the survey responded that discovery reform has positively impacted their ability to evaluate their cases and develop case strategies. A similar percentage (92.53%) of defense attorneys responded that discovery reform has positively impacted their ability to advise their clients about the charges, the case against them, and whether to accept a plea offer. Their comments reveal that the two concepts are linked: being able to develop an informed strategy early in the case is foundational to advising clients about the case against them, whether to engage in plea negotiations and if so, determining an effective negotiation strategy. The comments below speak to this link:

“Seeing the evidence early on against my client has allowed me to effectively advise my client as to whether to testify before the Grand Jury, waive time to negotiate a pre-indictment plea, or whether to file motions or try to resolve a case.”

“The amount of information we now can access, especially pre-indictment, is staggering compared to before discovery reform. I am now much more able to formulate defenses and better advise clients in plea negotiations.”

“Because discovery is required to be provided before the case can move forward, I can evaluate whether there is a good defense to the charges against my client or whether we should consider taking a plea more readily.”

“CPL Article 245 has had an invaluable impact on my ability to counsel my clients about defenses [and] ways to proceed. Although the DA’s office does not abide by the statutory timelines, getting full discovery before an ADA can announce ready for trial facilitates open and honest discussions with clients about the strength of a DA’s case and potential defenses.”

“Discoverable information is provided earlier in the adjudicative process, permitting a fuller and more immediate understanding of the client’s potential liability and improving the quality of my counsel regarding possible trial outcomes and the advisability of entering a plea agreement.”

Some defense attorneys noted that the ability to determine earlier in the case if resolution via plea negotiations is the best strategy has, at times, negated the need for extensive litigation, as reflected in this comment:

“While it has improved my motion practice when I have had to make motions it has also allowed for better plea negotiations and therefore alleviating the need for motion practice on every file.”

Defense attorneys also commented that discovery reforms have allowed them to learn of evidentiary weakness in the prosecution against their clients, and that this information can lead to better litigation strategy, plea negotiations, or both:

“As a result of open discovery, I have been able to file real motions to dismiss indictments, uncovered some standard inappropriate grand jury techniques, and actually to prepare for hearings in a meaningful way. I hear about more successful motions to dismiss and suppressions than I ever have in 8 years. The fact that we were ever expected to practice in the dark is abhorrent.”

“Things like seeing body camera footage, finding out about prior police misconduct, and getting witness contact information can all be helpful in identifying arrests not supported by probable cause or other suppression issues. That information is certainly useful in plea negotiations.”

Finally, defense attorneys wrote of the importance of no longer being “blind” or “blindfolded” by lack of information when talking with their clients about case strategy, and now being able to provide informed answers to questions instead of speculation:

“Access to the complete Discovery package makes everything better. Conversations with my clients don’t need to rely on hypotheticals. Can find mitigating information to adjust an offer, and occasionally have exculpated my clients completely.”

“Before discovery reform our county’s DA Office took the prior discovery law literally and would not give us any discovery. Our client would plead in the dark and in a lot of instances, go to trial in the dark. On the Friday before a jury trial, the defense attorney could expect to pick up a 200–500-page packet of Rosario material. Discovery reform has been a complete awakening from the dark age, a renaissance in this county. It has completely transformed our practice. I can’t believe it was ever otherwise.”

#### **4. Discovery reform has enhanced clients’ trust in their defense attorneys and in the criminal legal system.**

Defenders noted that the previous discovery scheme often placed them in the untenable position of having to tell their clients that they had little to no access to the prosecution’s evidence. This lack of information required the defense attorneys to speculate about the evidence against their clients and, as a result, created a wedge between defense attorneys and their clients. Under CPL Article 245, defense attorneys have more information earlier in the case, which fosters the better attorney-client relationships, as highlighted by the comments below:

“The lack of early and complete discovery regularly threatened the functionality of the attorney-client relationship. Clients were incredulous in the past when their attorney told them that we did not have access to all of the evidence. They struggled to trust us because we could not get them the information they understandably felt they deserved. Now, we can represent that we have all of the same information as the prosecutor. This enhances our ability to form productive relationships with our clients that result in clients accepting our advice about the plea v. trial decision.”

“Engenders so much trust when you can show your client all the evidence that exists. Really important for lawyer/client relationships.”

“I think the more we are armed with information about a case and able to have meaningful conversations with clients about the strengths and weaknesses of cases, to discuss defenses, and to combat prosecution arguments, the more we build trust in the attorney client relationship -- all of which leads to better communication and overall representation.”

“I cannot stress enough how hamstringing defense counsel by withholding information is bad for the public's trust in the system, for the accused, and for the ability of the parties to get to a fair result that protects the rights of the accused and the safety of the community.”

**5. For plea negotiations, discovery reform has levelled the playing field, allowing the defense to identify weaknesses in the prosecution’s case and to meaningfully discuss exculpatory and mitigating information.**

Because defenders can now evaluate and vet the prosecution’s evidence and discover weaknesses and inaccuracies in the case against their clients, they can engage in more meaningful plea negotiations. Below are example comments:

“I have had two cases in which I got favorable dispositions by pointing out certain evidence to the DA. Both times I was asked where I got that information. My response was to watch the entire video from beginning to end as opposed to the ‘good parts.’”

“Often, I can use the discovery provided to show the ADA why they can’t prove their case at trial, which has resulted in good plea offers.”

“It has immensely impacted negotiations. I have been able to demonstrate for the ADA why their case is weak, in addition to providing mitigating information and have obtained so many more reductions or ACDs for my clients than I did prior to discovery reform. These are reductions and ACDs that made sense given the weight and quality or sometimes lack of evidence.”

Some defense attorneys commented that discovery reform has resulted in prosecutors now reviewing the evidence more carefully. For example, in responding that discovery reform has had a positive impact on plea negotiations, this defense attorney commented:

“Mostly because the Assigned ADA knows his or her case better and sooner, so a disposition can be reached sooner.”

Other defense attorneys noted that discovery reform has exposed the fact that prosecutors do not always review all the evidence, as reflected in the comment below:

“I have heard complaints that the new discovery obligations are a burden on prosecutors. But it is obvious that many prosecutors don’t even take the time to review the discovery before providing it to the defense - they simply email a download received from law enforcement to the defense. This often raises issues about whether the People are in fact fulfilling their statutory duty of due diligence; how can you say you’ve exercised due diligence to gather and produce discovery when you’ve never even looked at what the police have given you and what you’ve passed on to the defense? I recall in one case I complained to an ADA that I couldn’t access a body cam video the People had produced. The ADA responded that he couldn’t access it either -- but the People had already filed a Certificate of Compliance affirming that after due diligence they had produced everything they were supposed to produce.”

## **6. Discovery reform has allowed defense attorneys to file more substantive and meaningful motions.**

In describing their motion practice since implementation of CPL Article 245, defense attorneys repeatedly used these or similar terms: “reasoned and researched;” “grounded in information;” “relevant;” “strategic;” “substantive;” “effective;” “specific and targeted;” “meaningful;” “informed;” and “focused.” Many described the “boilerplate motions” they previously filed as a relic of the past. Other general comments about improved motion practice include the following:

“With the information, drafting motions to dismiss are a better quality than before.”

“Being able to have a document stating whether there are tangible items to challenge in suppression makes certain motion practice much more straight forward. It also allows for a more focused and specific approach since we do not have to rely on scattershot blanket motions when we already have substantial evidence to review.”

“Boilerplate motions are largely a thing of the past now. We definitely file more motions now, but they are meaningful and often successful.”

Many defense attorneys emphasized the importance of receiving grand jury testimony early in the case as opposed to the previous discovery scheme in which the defense generally did not receive grand just testimony unless the case was tried, and even then, only on the eve of trial. Defense attorneys noted that getting the grand jury testimony allows them to identify fact-based arguments to dismiss the case for lack of sufficient evidence, as opposed to guessing what happened during the grand jury proceedings and making arguments based on “information and belief.” The following comments are typical of the many written comments about the importance of receiving grand jury testimony early in the case:

“My omnibus motions actually mean something now. I can actually challenge the sufficiency and the integrity of the Grand Jury presentation and not just file a meaningless boiler plate motion. I got one indictment dismissed and the ADA never re-presented [the case to a new grand jury] b/c once it was re-assigned the new ADA realized how ridiculous the case was. This never would have happened before.”

“Receiving grand jury minutes prior to making motions had led to many dismissals and reductions of indictments.”

Some defense attorneys noted that because of discovery reform, they are filing fewer motions, as reflected in this comment:

“Less motions are necessary, and we are not wasting valuable court resources quibbling over discovery. Motions, when necessary, are much more focused and specific, since we have the information needed.”

Others wrote however, that they are filing more motions, typically to ensure compliance with CPL Article 245. Ultimately, of those who commented about motion practice, most agreed that

there would be a decreased need to file motions if the prosecution more consistently complied with CPL Article 245. Indeed, the few defense attorneys who responded that discovery reform has not had a positive impact on their motion practice tended to focus on the need to litigate compliance with CPL Article 245. Defense attorney comments about compliance are discussed further below.

**7. Defense attorneys acknowledged that the discoverable information disclosed is often voluminous, and they expressed concerns about the disorganized way this voluminous information is disclosed.**

A salient theme emerging from the survey comments is the voluminous amount of discovery that is now disclosed and the increased amount of time that defense attorneys must spend to review discovery. Below are typical comments:

“The amount of discovery is extensive. Some cases involve voluminous discovery. It can be a time consuming and taxing process going through it all. Sometimes it is under rushed circumstances, especially if discovery is provided late and not in accordance with the [CPL] 245.10 timelines.”

“The time necessary to review discovery is significant. For example, yesterday we received 163 videos which we will need to review and then set aside the time to review all of them with our client.”

“Although often more voluminous discovery packets have added to the time required to review and expense to the payor (client, county in assigned cases, etc.), it has resulted in more honest and, in some cases, earlier negotiations with the prosecution resulting in more informed and better outcomes generally.”

“Time has increased because now I have all discovery to review & evaluate a case before a plea is considered. I believe this allows me to be a more effective counsel.”

Defense attorneys also noted that discovery is typically disclosed electronically via password protected links or portals. Some attorneys commented that they prefer having discovery disclosed in paper format, while others noted the convenience of electronic disclosure. The comments below reflect the differing opinions on paper versus electronic disclosure:

“The electronic discovery programs the DA’s use are HORRIBLE. Why do the passwords expire after a short period of time? Frequently I download zip files only to be unable to open them up later, and then I can’t access the materials without a new password. Also, additional discovery is uploaded without notice, or notice goes to SPAM. I miss the days of paper discovery and USB drives.”

“I appreciate being able to have the entire file, including digital images and video, on file with me in court. All files were paper before.”

When commenting about the voluminous nature of the information disclosed, most attorneys expressed concerns about the disorganized way it is disclosed, adding to the time involved in organizing, reviewing, and evaluating it. Defense attorneys noted that prosecutors tend to disclose information in a “discovery dump,” without labeling, indexing, or organizing information and with duplicate information. The video information often requires different types of software (media players) to view, causing technical difficulty in viewing the evidence. Defense attorneys also noted that prosecutors tend to supplement the information originally disclosed without notifying the defense. Finally, some defense attorneys commented that the electronic portal or link for discovery is kept open for a limited amount of time. Below are representative comments:

“Having discovery available to defense attorneys is crucial for the best representation of clients. But it needs to be provided in a format that is organized and labeled with a link that does not expire. If requested, we should also be provided the same discovery in hard copy form--paper and CD/DVD/thumb drives.”

“The delivery of discovery is horrendous. District Attorneys use links that expire and don’t send alerts when new files are added. I constantly check for new materials by going back and forth to the links before they expire. Once accessed, the files are often lumped into giant PDFs with no clear label. The PDFs then must be separated so that documents can be sorted, labelled, organized, and reviewed. The audio / visual files are too large to download and due to propriety software can often only be viewed while accessing the DA's cloud service. It’s close to impossible to gather and send this discovery and the ability to review it to clients.”

“Access to electronic files [is] not user friendly and requires downloading of often voluminous number of files in multiple locations. Files and documents (both video and audio) expire after thirty days, placing burden on counsel to assume measures to protect discovery materials. Permanent file access must be provided rather than present dysfunctional system.”

Some defense attorneys had specific suggestions for improving electronic access to information, as reflected below:

“It would be preferable to have the People copy all Discovery: documents & video on a 2 TB Harddrive supplied by the Attorney rather than via Microsoft One Drive. Allows shareable with Client & does not expire before resolution of the case.”

“The reform is excellent. NYS needs a statewide online system to distribute discovery to counsel. Now each county uses a different system. Also, video and audio files are slow to download, and some need special viewers or players. This needs to be corrected. Lastly, a system needs to be developed for counsel to forward discovery directly to clients. This will provide a more secure and uniform discovery process and provide for greater transparency.”

## 8. Defense attorneys expressed concerns about compliance with CPL Article 245.

The survey did not specifically ask defense attorneys about or otherwise seek to obtain information about compliance with CPL Article 245. Nonetheless, the lack of compliance emerged as a theme in the written comments. Many of the defense attorneys who responded that discovery reform has had no impact or has had a negative impact cited compliance as a reason for their responses. But even defenders who responded positively about the impact of discovery reform qualified their answers, emphasizing that the full positive impact is realized only if there is compliance. As one defender succinctly cautioned in responding that discovery reform has had a positive impact, “When actually enforced.” The comment below captures what other defense attorneys wrote about compliance:

“Discovery reform removed the blindfold that prevented fair outcomes. We still need more discovery sooner and we need judges to actually enforce the discovery requirements the law imposes instead of constantly excusing DAs’ failures to provide statutorily required materials, but it’s impossible to overstate the importance of the changes that discovery reform already has brought.”

Other comments discussed prosecutors filing Certificates of Compliance when, in fact, they have not disclosed all the information required. Sample comments include the following:

“These reforms should have happened a long time ago. Glad that they’re finally here. I wish that judges would actually deem the government’s certificates of compliance invalid when they so clearly have not turned over all of the discovery in their possession. That has become the new battle.”

“[Discovery reform] has definitely helped [case evaluation] but everything is more time-consuming because there are still some things that DA’s ‘dump’ on us without necessarily explaining what they are or labeling them (like body cam - none of them are labeled as to which officer they pertain to and/or whether there is any info in them directly related to the case). AND there are still things we have to litigate because ADAs don't believe they have to turn over certain things (sometimes even things we used to get).”

Some defense attorneys identified issuance of discovery protective orders as a problem. CPL § 245.70 authorizes judges, at the request of the prosecution, to issue an order prohibiting defense attorneys from disclosing certain information to their clients. Several defense attorneys opined that there is an overreliance upon such protective orders:

“I am a HUGE fan of [CPL Article] 245’s discovery rules, however, there are situations, especially with respect to protective orders, where 245 can be weaponized by a Court or prosecutor to drive a wedge between attorney and client.”

“Overall [attorney-client relationships have] improved, but on virtually all my homicides and the majority of my violent felony cases, DAs are getting protective

orders (often with “for attorney's eyes only” provisions) so then I have the added burden of having to make I do not disclose info in violation of the court order.”

“While [CPL Article] 245 helps in many cases, the Protective Order option by the DAs has been pursued in too many cases and approved by too many judges. Those cases have had negative consequences for the client and the cases, including a client who was wrongfully incarcerated for nearly 2 years after a PO was granted.”

In this regard, defense attorneys commented on the need for judges to be more vigilant about compliance overall. Sample comments include the following:

“It would be nice if the Judges had more instruction as to recourse for failure to comply with CPL 245. I have had some blatant violations where there are no repercussions to the DA.”

“As a retired County Court Judge, in my opinion the biggest impediment to discovery reform is the court not following the plain language of the statute and still allowing the prosecution to delay or not provide discovery without any consequence. This is particularly true with police disciplinary records.... The relationship between the certificate of compliance and a valid declaration of readiness is also an issue to be clarified. Some courts are simply allowing prosecutors to file supplemental certificates of compliance at their leisure with no discussion of whether due diligence was exercised prior to the initial filing of the certificate of compliance and announcement of readiness. In addition, the good faith component is being completely misused to allow non-compliance, again because the due diligence component is being ignored. The speedy trial relationship to the valid certificate of compliance is also being ignored by the courts to avoid dismissals on speedy trial grounds....”

Others had legislative suggestions for achieving better compliance with CPL Article 245, such as the following:

“The new law is certainly a massive improvement, but there are few ways that it could be better. The legislature could clarify that there is no time excluded grace period for discovery compliance in [CPL] 30.30(4) that some judges are reading into it and that “substantial compliance” is not a permissible substitute for complying with the law. Too many DAs are filing certificate of compliance without actually furnishing all the discovery required by [CPL Article] 245 and claiming that they’ve “substantially complied,” (rather than avail themselves of the other mechanisms within 245 to get more time). The legislature should also specify that either discovery compliance must be complete before motion practice or that motion practice does not stop the clock until discovery compliance is complete. Otherwise, too many judges are setting omnibus motion schedules regardless of discovery compliance, effectively relieving the DA’s Office of the primary inducement to comply within [CPL Article] 245's timeframe, the ticking speedy trial clock.”

In responding to questions about how enactment of CPL Article 245 has impacted their motion practice, some defenders commented that they are often litigating compliance, and that better prosecutorial compliance would not only reduce the amount of time the defense spends on motions it would also reduce burdens on the judiciary. As one defender succinctly stated: “It’s very time consuming just trying to get DAs to comply.” Another defense attorney noted that improved compliance with CPL Article 245 would diminish the number of motions that need to be filed:

“There is no doubt that the new law has increased the number of pre-trial motions filed. However, if the ADA complies with [CPL Article 245], there should be no reason for so many. COC challenges are frequent at present, but as the court adjusts to the requirements of Article 245 and the ADA improves compliance, that issue should be alleviated.”

This preliminary report does not examine the extent to which compliance with CPL Article 245 varies among jurisdictions and prosecutors, though the comments suggest such variance, with compliance better in some jurisdictions than others. Though this survey did not specifically ask defense attorneys about compliance with CPL Article 245, the sheer number of comments about compliance indicates that this is an issue that warrants further research.

#### **9. Survey responses suggest that defense attorneys who are solo practitioners face particular challenges in managing the amount of information disclosed.**

The fact that a very small percentage of defense attorneys indicated that discovery reform has had a negative impact provided us an opportunity to look more deeply at this group. Specifically, the number of defense attorneys who responded negatively ranged from seven (for Question #8) to 25 (for Question #10). We looked at the type of practice for these defense attorneys and learned that for each question, those who identified as attorneys who do assigned counsel (ACP) and retained work constituted the biggest percentage of defenders who responded negatively. This is detailed in Appendix B.

A review of these defense attorneys’ written comments suggests that many are solo practitioners and that their negative responses illuminate the unique challenges they have faced in adjusting to the change in practice that discovery reform requires. The following comment best captures this unique challenge:

“As a solo practitioner I don’t have the staff and resources to download, label, organize and digest the discovery. I also don’t have the technical knowledge of the various players that are needed for the different types of media files. While the panel members do have access to discovery management paralegals, there are not enough to go around and there is a long wait to find one available to work on the case with me. There is no funding available to 18B attorneys for technology purchases or training, so we have to purchase it ourselves and absorb the cost on our own. Panel members are getting cases at the ‘tail end’ (eve of trial) and often receive multiple cases ready to proceed to trial. There is a lot of pressure to take these cases and the judges are reluctant to grant the time to fully prepare. The discovery laws and

processes are too time-consuming to allow for attorneys to ‘inherit’ cases on the eve of trial and be ready in a short period of time. Judges still seem to think that a few weeks ‘turnaround’ time from assignment to trial is still possible.”

As with the issue of compliance, this is another issue that warrants further research and, with more time, a deeper analysis of the information set forth in this survey.

# **APPENDIX A**

## Defense Community Survey About Discovery Reform

### Introduction

**This survey was developed to assess the impact of the 2019 discovery law reforms on criminal defense practice in New York State and the fairness of criminal proceedings. It was developed through coordination between the Chief Defenders Association of New York (CDANY), the New York State Association of Criminal Defense Lawyers (NYSACDL), the New York State Defenders Association (NYSDA), and the New York State Office of Indigent Legal Services (ILS).**

**The survey contains 16 questions about the impact that implementation of Criminal Procedure Law Article 245 has had and continues to have on your case strategies, investigations, plea deals, dispositions, motion practice, client communication, etc. It should take approximately 10-15 minutes to complete. At the end of the survey, you will have an opportunity to provide additional information you consider relevant to the impact of the 2019 discovery law reforms.**

**Your participation will better allow policymakers and the public to understand the impact that the discovery law reforms have had on criminal defense attorneys and their practice. Survey responses will be reported in the aggregate, and your identity will be kept anonymous. We recognize that you may receive more than one email with a link to this survey; please complete the survey just one time. However, note that we are asking your name, so if you complete more than one survey, we will be able to eliminate the duplicate survey. Please complete and submit the survey by March 11, 2022.**

## Defense Community Survey About Discovery Reform

### Basic Demographic Information

\* 1. Your Name

\* 2. Check all that apply:

- I work for a Public Defender Office, a Conflict Defender Office, or a Legal Aid Society/Bureau
- I am assigned cases through one or more Assigned Counsel Programs
- I do retained work

\* 3. In what county/counties have you provided representation over the past year? (check all that apply)

- Albany County
- Allegany County
- Broome County
- Cattaraugus County
- Cayuga County
- Chautauqua County
- Chemung County
- Chenango County
- Clinton County
- Columbia County
- Cortland County
- Delaware County
- Dutchess County
- Erie County
- Essex County
- Franklin County
- Fulton County
- Genesee County
- Greene County
- Hamilton County
- Herkimer County

- Jefferson County
- Lewis County
- Livingston County
- Madison County
- Monroe County
- Montgomery County
- Nassau County
- New York City
- Niagara County
- Oneida County
- Onondaga County
- Ontario County
- Orange County
- Orleans County
- Oswego County
- Otsego County
- Putnam County
- Rensselaer County
- Rockland County
- St. Lawrence County
- Saratoga County
- Schenectady County
- Schoharie County
- Schuyler County
- Seneca County
- Steuben County
- Suffolk County
- Sullivan County
- Tioga County
- Tompkins County
- Ulster County
- Warren County
- Washington County
- Wayne County

Westchester County

Wyoming County

Yates County

\* 4. How long have you been providing criminal defense representation in New York State? (check one)

0-4 years

5-10 years

11-20 years

20+ years

\* 5. Indicate the type of cases on which you provide representation (check all that apply):

Violation cases

Misdemeanor cases

Non-violent, non-homicide felony cases

Violent felony cases

Homicide cases

## Defense Community Survey About Discovery Reform

### Impact of Discovery Reform

**Enacted in April 2019 to take effect January 1, 2020, the new discovery statute, Criminal Procedure Law (CPL) Article 245, requires greater openness and the sharing of discoverable information earlier in the case. This survey explores the impact implementation of CPL Article 245 has had on the quality of representation and the overall fairness of the criminal case processing. Please note that each question has space for you to explain or comment on your answer if you wish to do so.**

6. Has the implementation of CPL Article 245 impacted your ability to evaluate your cases and develop case strategies?

- It has **improved** my ability to evaluate cases and develop case strategies
- It has had **no impact** on my ability to evaluate cases and develop case strategies.
- It has had a **negative impact** on my ability to evaluate cases and develop case strategies.

Explanation or comment:

7. Has the implementation of CPL Article 245 impacted your ability to investigate your cases?

- It has **improved** my ability to investigate my cases.
- It has had **no impact** on my ability to investigate my cases.
- It has had a **negative impact** on my ability to investigate my cases.

Explanation or comment:

8. Has the implementation of CPL Article 245 impacted your ability to advise your clients about the charges, the case against them, and whether to accept a plea offer?

- It has **improved** my ability to advise my clients about the charges, the case against them, and whether to accept a plea offer.
- It has had **no impact** on my ability to advise my clients about the charges, the case against them, and whether to accept a plea offer.
- It has had a **negative impact** on my ability to advise my clients about the charges, the case against them, and whether to accept a plea offer.

Explanation or comment:

9. Has the implementation of CPL Article 245 impacted your ability to negotiate with the prosecution for agreed upon dispositions in your cases?

- It has **improved** my ability to negotiate with the prosecution for agreed upon dispositions in cases.
- It has had **no impact** on my ability to negotiate with the prosecution for agreed upon dispositions in cases.
- It has had a **negative impact** on my ability to negotiate with the prosecution for agreed upon dispositions in cases.

Explanation or comment:

10. Has the implementation of CPL Article 245 impacted your motion practice?

- It has **improved** my motion practice.
- It has had **no impact** on my motion practice.
- It has had a **negative impact** on my motion practice.

Explanation or comment:

11. Has the implementation of CPL Article 245 impacted your ability to prepare for evidentiary hearings and/or trials in your cases?

- It has **improved** my ability to prepare for evidentiary hearings and/or trial in your cases.
- It has had **no impact** on my ability to prepare for evidentiary hearings and/or trial in your cases.
- It has had a **negative impact** on my ability to prepare for evidentiary hearings and/or trial in your cases.

Explanation or comment:

12. Has the implementation of CPL Article 245 impacted your ability to communicate effectively with your clients?

- It has **improved** my ability to communicate effectively with my clients.
- It has had **no impact** on my ability to communicate effectively with my clients.
- It has had a **negative impact** on my ability to communicate effectively with my clients.

Explanation or comment:

13. Has the implementation of CPL Article 245 impacted the fairness of criminal case proceedings?

- It has made criminal case proceedings **fairer**.
- It has had **no impact** on the fairness of criminal case proceedings.
- It has made criminal case proceedings **less fair**.

Explanation or comment:

14. Has the implementation of CPL Article 245 changed the average amount of time you spend reviewing discovery?

- It **increased** the amount of time I spend reviewing discovery
- There is **no change** to the amount of time I spend reviewing discovery
- It **decreased** the amount of time I spend reviewing discovery
- It is too early to tell

Explanation or comment:

15. Has the implementation of CPL Article 245 changed the total amount of time you spend on cases?

- It has **increased** the amount of time I spend on cases
- There has been **no change** on the amount of time I spend on cases
- It has **decreased** the amount of time on spend on cases
- It is too early to tell

Explanation or comment:

16. Please use the space below to describe any additional information about the implementation of discovery reform.

# **APPENDIX B**

## Attorneys Who Responded that Discovery Reform Has Had a Negative Impact: Employment Affiliation/Practice Type

A very small number of attorneys responded that discovery reform has had a negative impact. To learn more about these attorneys, we examined their employment affiliation/practice type. For all questions, attorneys who indicated that they do assigned counsel (ACP) and retained work constituted most of the attorneys who responded negatively, as the charts below reveal:

Q6: Implementation of CPL Article 245 has had a negative impact on my ability to evaluate cases and develop case strategies.

Employment Affiliation/Type of Practice	Total #	% Total Responses	% Negative Impact Responses
ACP and Do Retained Work	14	2.75%	82.35%
Only ACP	1	0.20%	5.88%
Only Institutional Provider	2	0.39%	11.77%
<b>Total</b>	<b>17</b>	<b>3.34%</b>	<b>100%</b>

Q7: Implementation of CPL Article 245 has had negative impact on my ability to investigate your cases.

Employment Affiliation/Type of Practice	Total #	% Total Responses	% Negative Impact Responses
ACP and Do Retained Work	9	1.77%	90%
Only ACP	1	0.20%	10%
<b>Total</b>	<b>10</b>	<b>1.96%</b>	<b>100%</b>

Q8: Implementation of CPL Article 245 has had a negative impact on my ability to advise clients about the charges, the case against them, and whether to accept a plea offer.

Employment Affiliation/Type of Practice	Total #	% Total Responses	% Negative Impact Responses
ACP and Do Retained Work	5	0.98%	71.42%
Institutional Provider, ACP & Do Retained Work	1	0.20%	14.29%
Only Institutional Provider	1	0.20%	14.29%
<b>Total</b>	<b>7</b>	<b>1.38%</b>	<b>100%</b>

Q9: Implementation of CPL Article 245 has had a negative impact on my ability to negotiate with the prosecution for agreed upon dispositions in cases.

<b>Employment Affiliation/Type of Practice</b>	<b>Total #</b>	<b>% Total Responses</b>	<b>% Negative Impact Responses</b>
ACP and Do Retained Work	7	1.38%	46.66%
Institutional Provider, ACP & Do Retained Work	1	0.20%	6.67%
Both Institutional Provider & Do Retained Work	1	0.20%	6.67%
Only Institutional Provider	4	0.79%	26.66%
Only ACP	2	0.39%	13.34%
<b>Total</b>	<b>15</b>	<b>2.95%</b>	<b>100%</b>

Q10: Implementation of CPL Article 245 has had a negative impact on my motion practice.

<b>Employment Affiliation/Type of Practice</b>	<b>Total #</b>	<b>% Total Responses</b>	<b>% Negative Impact Responses</b>
ACP and Do Retained Work	13	2.55%	52%
Only Institutional Provider	6	1.18%	24%
Only ACP	4	0.79%	16%
Only Do Retained Work	2	0.39%	8%
<b>Total</b>	<b>25</b>	<b>4.91%</b>	<b>100%</b>

Q11: Implementation of CPL Article 245 has had a negative impact on my ability to prepare for evidentiary hearings and/or trial in my cases.

<b>Employment Affiliation/Type of Practice</b>	<b>Total #</b>	<b>% Total Responses</b>	<b>% Negative Impact Responses</b>
ACP and Do Retained Work	7	1.38%	70%
Institutional Provider, ACP & Do Retained Work	1	0.20%	10%
Only ACP	1	0.20%	10%
Only Institutional Provider	1	0.20%	10%
<b>Total</b>	<b>10</b>	<b>1.96%</b>	<b>100%</b>

Q12: Implementation of CPL Article 245 has had a negative impact on my ability to communicate effectively with clients.

<b>Employment Affiliation/Type of Practice</b>	<b>Total #</b>	<b>% Total Responses</b>	<b>% Negative Impact Responses</b>
ACP and Do Retained Work	9	1.77%	75%
Institutional Provider, ACP & Do Retained Work	2	0.39%	16.67%
Only Institutional Provider	1	0.20%	8.33%
<b>Total</b>	<b>12</b>	<b>2.36%</b>	<b>100%</b>

Q13: Implementation of CPL Article 245 has made criminal case proceedings less fair.

<b>Employment Affiliation/Type of Practice</b>	<b>Total #</b>	<b>% Total Responses</b>	<b>% Negative Impact Responses</b>
ACP and Do Retained Work	9	1.77%	64.29%
Institutional Provider, ACP & Do Retained Work	1	0.20%	7.14%
Only Institutional Provider	4	0.79%	28.57%
<b>Total</b>	<b>14</b>	<b>2.75%</b>	<b>100%</b>