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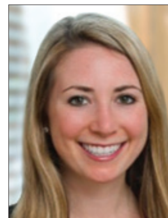
NY's Speedy Trial Laws In the Age of COVID-19



By **Michael C. Miller** And **Jennie Shulkin**

In the best of times, New York State's criminal speedy trial laws create formidable challenges for prosecutors, who are required to meet strict deadlines for answering ready for trial or face dismissal of their cases. 2020 was not the best of times. Between substantial amendments to discovery and speedy trial laws, the COVID-19 pandemic's profound impact on everything from routine court appearance to trials, an executive order granting a brief respite from the speedy trial rules for criminal cases, and a growing wave of unindicted felony cases, 2020 was an unusual year for New York State's criminal justice system.

As 2021 begins, this collision of once-in-a-lifetime events has created new challenges for prosecutors and ample opportunities for defense lawyers seeking dismissals on speedy trial grounds.

New Speedy Trial Laws

New York State's speedy trial laws, enacted in Criminal Procedure Law Section 30.30, require prosecutors to answer ready for trial within six months of commencing a criminal action for felony charges. For misdemeanor charges, the deadline is 90 or 60 days, depending on the seriousness of the charge. A wide array of reasons, however, including but not limited to delays occasioned by motion practice to adjournments on consent of the defendant, justify excludable time so that prosecutors can, colloquially speaking, "stop the [speedy trial] clock." Crim. Proc. Law §30.30(4).

"Stopping the clock" was much easier before 2020, though, when all prosecutors had to do was advise the court of their readiness to proceed to trial and their witnesses' availability to testify. As a practical matter, prosecutors answer ready for trial several times before the case actually proceeds to trial. And, before 2020, they could answer ready for trial without providing discovery to the defendant.

On Jan. 1, 2020, it became much harder for New York state prosecutors to satisfy the speedy trial laws. In response to significant concerns voiced over whether defendants in criminal cases were receiving enough timely information to make informed decisions on whether to plead guilty or proceed to trial, the New York state Legislature enacted new discovery and speedy trial laws which required that prosecutors comply with a broad array of discovery obligations *before* being able to answer ready for trial.

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The changes to New York State's discovery rules were significant. For example, Criminal Procedure Law §245.20(1) was enacted to require, among other things, that the prosecution turn over to the defendant twenty-one categories of discovery "as soon as practical," but not later than a specified period of time following the defendant's arraignment. The prosecutors were then required to file and serve a certificate of compliance (COC), stating that "after exercising

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due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery, the prosecutor has disclosed and made available all known material and information subject to discovery." Crim. Proc. Law §245.50(1).

Critical to our discussion, the new laws precluded prosecutors from answering ready for trial, and thus satisfying the speedy trial laws, without a valid COC. Id. at §245.50(3).

The New York state speedy trial statutes were similarly amended. Criminal Procedure Law §30.30 now requires that, when the prosecution states its readiness for trial, the court must "make an inquiry on the record as to their *actual readiness*." Id. at §30.30(5) (emphasis added). Importantly, "[i]f, after conducting its inquiry, the court determines that the People are not ready to proceed to trial, the prosecutor's statement or notice of readiness shall not be valid." Id.

These new laws were designed to protect important rights of defendants in the New York state courts. Along the way, they created new challenges for prosecutors wrestling with how to provide expedited discovery relating to potentially vulnerable victims or categories of police paperwork not previously covered by discovery rules.

As a result of these amendments, defendants for the last year have been permitted to challenge a prosecution's statement of readiness on two grounds: first, that the prosecution has not satisfied its new discovery obligations and thus did not file a valid COC, and second, that it is not actually ready for trial. These challenges are often successful.

Trials Amid COVID-19

Shortly after the new discovery laws and speedy trial amendment went into effect, COVID-19 struck the New York state court system. In March 2020, courts closed as administrators grappled with how to safely move cases forward with in-person and/or virtual court appearances. While prosecutors could still answer ready for trial by certifying that discovery had been completed and witnesses were available to testify, as a practical matter, jury trials ground to a stop. Bench trials fared no better. Indeed, according to a December 2020 *New York Times* article, the New York state courts in Manhattan held a total of *nine* criminal trials between March and December 2020.

For prosecutors, COVID-19 brought a seven-month reprieve from New York State's speedy trial laws. In March 2020, Governor Andrew Cuomo issued an executive order suspending the speedy trial rules (the speedy trial suspension). That meant that the speedy trial clock was frozen for all criminal cases that were commenced before the executive order went into effect, and the speedy trial clock did not begin to run on any case commenced while the executive order remained in effect.

> Defense lawyers will want to carefully balance the merits and risks of waiting for an opportunity to file a favorable speedy trial motion versus participating in virtual or in-person trials as they become more available over the coming months.

In October 2020, the speedy trial suspension expired for all cases involving indicted felony and misdemeanor charges. But the suspension of speedy trial rules continues for unindicted felony cases. The disparate treatment for unindicted felony cases, due to the simple fact that grand juries cannot safely convene, has been extended through the end of February 2021 and is likely to be extended for the foreseeable future. Consequently, an enormous backlog of unindicted felony cases has built up over the last 10 months, leaving some counties to experiment with special courtrooms to resolve some of them.

With respect to indicted felonies and misdemeanors, however, the expiration of the speedy trial suspension in October 2020 has forced prosecutors and defense lawyers to wrestle with how to manage a large volume of older cases that is racing towards speedy trial deadlines. Unsurprisingly, many of the cases deemed less significant to prosecutors have been resolved with dismissals or non-criminal dispositions, like adjournments in contemplation of dismissal or guilty pleas to violations.

Speedy Trial Strategies In 2021

This year will feel the combined impact of 2020's new discovery and speedy trial laws, the court closures triggered by the COVID-19 pandemic, the speedy trial suspension and its expiration, and a growing wave of unindicted felonies. For example, on Jan. 5, 2021, prosecutors throughout New York State were required to answer ready for trial on all of the Class A misdemeanor cases which were commenced during the Speedy Trial Suspension. Not surprisingly, in early January 2021,

prosecutors dismissed many of these misdemeanors on their own initiative to focus on their higher priority cases, and defense lawyers filed motions to dismiss on others.

Prosecutors and defense lawyers alike face hard decisions about how to handle these waves of cases, particularly in an environment where the courts are not yet ready to resume in-person trials.

First, prosecutors will have to decide which indicted felony and misdemeanor cases to prioritize when expending limited resources to complete discovery obligations in time to timely and defensibly answer ready for trial. It will come as no surprise if prosecutors create lists to routinize the identification and dismissal of lower priority cases without waiting for defense motions.

Second, prosecutors and defense lawyers will want to look closely at whether and how to resolve cases involving unindicted felony charges. Prosecutors will wrestle with whether to enforce enhanced sentencing for defendants with prior convictions. And they will also have to decide whether to reduce unindicted felony charges to misdemeanors, which will mean that the reduced charges have to comply with speedy trial rules.

Third, defense lawyers will want to continue to closely scrutinize the cases on which prosecutors do answer ready for trial. Defense lawyers should contest, where appropriate, the prosecution's assertion that it has complied with its new discovery obligations. And defense lawyers should amply support the judicial investigation into the bona fides of statements of readiness for trial. If noncompliance is found with respect to either of these two areas, the speedy trial clock appropriately continues to run.

Fourth, defense lawyers will want to carefully balance the near-term benefits of accepting more lenient plea offers against the possibility that, with time, the prosecution will be unable to comply with speedy trial obligations—leading to dismissal of the case. Of course, there is a risk that rejecting a good offer today will result in a worse outcome tomorrow.

Fifth, defense lawyers should keep a careful tally of how many days have elapsed since the commencement of a case and should move to dismiss as soon and as often as they calculate that the deadline for answering ready for trial has lapsed. While the burden falls on the prosecution to prove that certain periods of time are excludable, defense attorneys should be prepared to counter in detail why those time periods are chargeable to the prosecution. Under Section 30.30, a speedy trial motion may be denied if the prosecution's present unreadiness is due to "exceptional circumstances" that are outside of the prosecution's control. Defense attorneys should expect prosecutors to argue that pandemic-related "exceptional circumstances" (even following the end of the Speedy Trial Suspension) create excludable time. For example, prosecutors may draw parallels between the COVID-19-era and other events where courts have found "exceptional circumstances," such as during courthouse closures following Hurricane Sandy or when witnesses are unavailable due to illness.

Finally, defense lawyers will want to carefully balance the merits and risks of waiting for an opportunity to file a favorable speedy trial motion versus participating in virtual or in-person trials as they become more available over the coming months. Of course, there are ample grounds for valuing in-person advocacy over litigating on video conferencing platforms. At the same time, defendants may also want to resist proceeding with in-person trials for the foreseeable future because of concerns over viral spread, especially in small, poorly-ventilated courtrooms or courtrooms with poorly-installed plexiglass shields.

Another concern is that potential prejudice will flow from client and counsel communicating at a social distance from each other during the trial. And there is the risk that COVID-19's disproportionate impact on the elderly, Black, and Latino members of New York state's population may result in jury pools being unrepresentative of a fair cross-section of the community.

Conclusion

The combination of 2020's discovery reform, the COVID-19 pandemic, the speedy trial suspension and the growing wave of unindicted felony cases has created a perfect storm that is bound to have a profound impact on criminal caseloads and trials for months to come, especially with respect to how prosecutors and defense lawyers handle the array of speedy trial-related issues.

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