

# I Object!

– James Eckert, Esq.

## Discovery

There are areas of the law where being a prosecutor is always considered "good cause". One of them is discovery. CPL 240.90 requires the DA to make any discovery motion within 45 days of arraignment. The statute also says that late motions may be filed for "good cause", but the cases say we have to show prejudice (*People v Davis*, 21 AD3d 1336 [4th Dept 2005]; *People v Lewis*, 44 AD3d 422 [1st Dept 2007]). It's difficult to produce an exhaustive list of all the other areas where being a prosecutor constitutes good cause - they generally involve criminal law.

But discovery does have some benefits for the defense. Anything discoverable under CPL 240.20 is supposed to be provided fifteen days after demanded, under CPL 240.80. Fifteen days after the demand is not the same as the day before trial. If not provided, it must be formally refused, in writing. The ADA has a continuing duty to disclose and provide discoverable material which they obtain later (CPL 240.60).

Under CPL 240.20(2), the ADA has responsibilities with regard to discoverable material which the ADA does not possess, and some which they are not even aware of. They must "make a diligent, good faith effort to ascertain the existence of demanded property and to cause such property to be made available for discovery where it exists but is not within the prosecutor's possession, custody or control". Saying "I don't have it" until someone hands you the material might not be a diligent good faith effort to ascertain the existence of that material. Likewise, saying "good luck with that" probably does not constitute a diligent good faith effort to make material available to the defense which the prosecution does not possess. The fact that the ADA does not have to subpoena things for us does not mean that they have no responsibility whatever. Most of these duties have a reciprocal provision for the defense.

The key concern regarding a remedy for the late disclosure of Rosario material (which is codified in CPL 240.45) is "the overriding need to eliminate prejudice to the defendant", *People v Martinez*, 71 NY2d 937 (1988). I would argue that this applies to discovery generally - where the prosecution fails to meet their obligations under CPL 240, the first object of any remedy should be "the overriding need to eliminate prejudice to the defendant". This will only rarely involve preclusion of evidence or witnesses, though both are possible remedies under CPL 240.44. More likely is an adjournment sufficient to eliminate prejudice to the defendant. If such a - necessary - adjournment, both for investigation and preparation, delays the trial or otherwise inconveniences the prosecutor, this may be good cause to follow the rules of discovery.