

CENTER FOR APPELLATE LITIGATION

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ISSUES TO DEVELOP AT TRIAL

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Welcome to this month's newsletter. In this issue, we bring to your attention Chief Judge DiFiore's newly issued "Brady rules," People v. Garrett (and resultant disclosure trends), and provide tips for making thorough Brady demands. We also provide some attachments we hope you will find helpful: a guide for procuring impeachment material underlying police misconduct civil suits, and a sample FOIL request.

Chief Judge DiFiore's Brady Rules

As you know, Brady material is information in the actual or constructive possession of the government that is exculpatory or impeaching, favorable to the defendant, and material as to suppression, guilt or punishment.

In November 2017, Chief Judge Janet DiFiore adopted new rules, eff. Jan. 2018, requiring criminal trial judges to issue Brady orders to prosecutors, i.e., orders to timely disclose exculpatory evidence favorable to the accused. Although courts may use the template order provided by Judge DiFiore or draft their own, these orders must:

1. Be issued by trial courts upon the defendant's written demand at arraignment or at the next scheduled date with counsel present
2. Be directed at the District Attorney and the assistant responsible for the case
3. Contain a statement that disclosure is presumptively timely if it was made no later than 30 days before trial in a felony case, 15 days before trial in a misdemeanor case, or, where bearing on suppression, 15 days before the scheduled hearing
4. Make specific reference to the types of material to be disclosed, including information which:
 - a. impeaches the credibility of witnesses
 - prior inconsistent statements; biases or motives to lie; impairments of the witness's ability to perceive, recall, or recount relevant events; uncharged convictions and uncharged criminal conduct; mental or physical illness; substance abuse; and any benefits, promises, or inducements made to a witness in connection with their testimony or cooperation
 - b. exculpates or reduces the degree of the defense,
 - c. mitigates the degree of the defendant's culpability or punishment,
 - d. supports a potential defense,
 - e. undermines evidence of the defendant's identity as a perpetrator or implicates another, or
 - f. affects suppression
5. Make no reference to materiality

If a Brady order is violated, the court may impose sanctions or take other appropriate action. We await information as to how these orders are playing out and whether courts are imposing appropriate sanctions.

This rule is the outcropping of a February 2017 Justice Task Force report recommending increased judicial oversight and a mechanism by which judges would have “an ability to enforce compliance with disclosure requirements.”

Practice Tip: Demand Brady orders at arraignment pursuant to Chief Judge DiFiore’s new rules. A template of Judge DiFiore’s Brady order can be found [here](#).

Disclosures After Garrett

In People v. Garrett, 23 N.Y.3d 878 (2014), the Court of Appeals agreed that civil suit allegations against police officers can constitute favorable impeachment evidence subject to Brady. Id. at 729.

Although the Court in Garrett went on to hold that the prosecution was not required to discover and disclose a prior civil lawsuit involving a testifying detective that was unrelated to the case at hand (of which the prosecution had no knowledge), appellate providers have been seeing what we colloquially refer to as “Garrett disclosures,” at least by the New York County District Attorney’s Office. These disclosures typically reveal the party names and index numbers of federal civil suits wherein police witnesses are named defendants.

It is important to remember, however, that the mere fact of a civil suit or settlement is not, itself, a proper ground for cross-examination. See People v. Smith, 27 N.Y.3d 652, 662 (2016):

Where a lawsuit has not resulted in an adverse finding against a police officer . . . defendants should not be permitted to ask a witness if he or she has been sued, if the case was settled (unless there was an admission of wrongdoing) or if the criminal charges related to the plaintiffs in those actions were dismissed.

Instead, defense counsel “should be permitted to ask questions based on the specific allegations of the lawsuit if the allegations are relevant to the credibility of the witness.” Id.

Practice Tip: **You should use Garrett disclosures as an investigatory aid rather than an end in themselves. Your goal is to acquire documents revealing the specific allegations against the officer who is the subject of a civil suit.** See CAL’s July 2016 newsletter, [here](#), for tips on using the information you ultimately gather. At the end of this newsletter is a step-by-step guide setting forth numerous ways to investigate police witnesses and uncover impeachment material. We have also posted it to CAL’s website, available [here](#).

Practice Takeaways:

A comprehensive review of Brady is beyond the scope of this newsletter, nor would a one-size-fits-all template be possible or appropriate. Nonetheless, here are a few takeaways to help you formulate thorough demands that will also best preserve issues for future appeal:

- Ask for Brady disclosures early, often, and on the record. This means pre-trial, during trial, and before closing and sentencing. Where your investigation into police misconduct reveals additional information, make follow-up requests. By putting the prosecution on notice of specific instances of misconduct you may be able to force additional disclosures.
- Demand Brady orders at arraignment pursuant to Chief Judge DiFiore's new rules.
- Explicitly cite Brady, the federal constitution, and the state constitution in your demands.

Note: Under New York State law, a specific request from defense counsel lowers the materiality standard to “reasonable possibility” rather than the federal “reasonable probability” standard; materiality is established where there is “a ‘reasonable possibility’ that [the suppressed material] would have changed the results of the proceedings.” People v. Fuentes, 12 N.Y.3d 259, 263 (2009). This is because, where information has been specifically requested, “heightened prosecutorial attention is appropriate,” People v. Scott, 88 N.Y.2d 888, 890-91 (1996), and “the failure to make any response is seldom, if ever, excusable,” People v. Vilardi, 76 N.Y.2d 67, 74 (1990).

- Make requests specific to the witnesses and issues in your case as well as broader, catch-all requests. Use the language “including, but not limited to.”
- Be sure your demand covers:
 - All regulatory, licensing, governmental, or quasi-governmental investigations or proceedings against any prospective prosecution witness, whether pending, closed, discontinued, settled or completed
 - All criminal and immoral conduct, including juvenile conduct, committed by any prospective prosecution witness, regardless of conviction
 - All information bearing on the truthfulness, bad character, or bad reputation of any prosecution witness, including any past instances of dishonesty, fraud, lying, or violence

Note: Impeachment evidence must be turned over even if it has nothing to do with the accused's innocence.

- Ask the prosecution to search specific places for relevant material, such as NYPD disciplinary records, the District Attorney's Public Integrity Bureau database, Internal Affairs records, CCRB records, etc.
- Investigate Garrett disclosures, recognizing that the fact of a civil suit or settlement is not a permissible ground for cross-examination.
- Get the prosecution's responses in writing or on the record.
- Before making your next Brady demand, review Kyles v. Whitley, 514 U.S. 419 (1995), for a thorough exploration of the wide variety of information falling under the prosecution's Brady obligations.



Investigating Police Witnesses

A Practical Guide

Whether your starting point is information gathered from your client, a disclosure from the DA's Office, or the officers' names alone, there are numerous routes available for investigating police witnesses and procuring impeachment material. Below is a non-exhaustive resource list to aid you in your investigations.

FEDERAL LAWSUITS

PACER:

PACER is an electronic public access service that allows online users to obtain case and docket information from the federal court system. Users must register for an account in order to access records, but need only provide basic contact information and select a username and password to do so. Upon completion of the online registration form, the PACER Service Center will mail the user a registration code with the final few steps required to set up an account.

- Note that each federal district in NY has its own home page and database. It is wise to check all four districts, although SDNY and EDNY will likely be the most fruitful starting points for NYPD officers.
 - A directory of court home pages can be found at <https://www.pacer.gov/psco/cgi-bin/links.pl>
- Once you have arrived at your chosen court homepage, you may search for case information by clicking "Query" in the top left-hand corner of the page and inputting index numbers and/or party names.
- After clicking on a case result, users have the option of viewing a few different categories of information. The most useful starting point is "Docket Report," which displays a timeline of the case with case filings attached as .pdf files, where available.
 - The most useful documents tend to be complaints, amended complaints, and stipulations of settlement.
- Record-access cost is assessed by the page, at a nominal rate (as of September 2018, \$.10 per page).
- If cost is a concern:
 - PACER may be accessed for free at the SDNY and EDNY courthouses, and paper files may be ordered for free with the relevant index number.
 - Alternatively, consider downloading the RECAP Google Chrome Browser Extension, which alerts the browser when the document in question has already been downloaded and made available for free elsewhere.
 - Learn more by searching for "RECAP" at <https://chrome.google.com/webstore/>

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Court Listener: RECAP Archive

The RECAP Archive is a free searchable collection of millions of PACER documents and dockets, created and managed by the Free Law Project in partnership with The Center for Information Technology Policy at Princeton University.

- No account or user-registration is necessary to search this database.
- Users may search by jurisdiction, docket number, document, case name, judge, case type, party name, and attorney name.
- Visit the RECAP Archive at <https://www.courtlistener.com/recap/>

STATE LAWSUITS

Bronx County Clerk's Office Online Database

The Bronx County Clerk's Office maintains an online database of court records and case filings. The search-engine is imperfect and the records are not necessarily complete, but with some elbow-grease, this resource can provide a wealth of information.

- No account or user-registration is necessary to search this database, but NYS attorneys may request a special account in order to view additional information not available to the public.
- Users may search by index number, party name, firm name, and filing date.

Note: Searching by party name seems to be the least reliable, while searching by index number seems to be the most reliable.

- Visit the Bronx County Clerk's Office Online Database at <https://iapps.courts.state.ny.us/ctclrk/>

The NYC Comptroller's Office and Law Department

- State court civil suits against NYPD officers all commence with the NYC Comptroller's Office by the filing of a Notice of Claim.
- After notice has been filed, a formal lawsuit may be filed 30 days later. However, the City has the option of taking testimony at a "50-h" hearing beforehand. See N.Y. Gen. Mun. L. § 50-H (2014).
 - The utility of 50-h hearing transcripts cannot be overstated, as they often provide narratives and a level of detail far exceeding that of notices of claim or verified complaints.
- The Comptroller's Office settles a significant number of suits against police officers before they ever reach the court system. Although inadmissible in and of themselves, stipulations of settlement revealing a significant settlement amount may still be helpful in establishing a good faith basis for cross-examination on the underlying allegations.
- In the event a claim is not settled with the Comptroller's Office, the verified complaint filed in NYS Supreme Court is another potential source of specific allegations of misconduct against police witnesses.

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- In a great majority of police misconduct civil suits, the NYS Law Department serves as counsel to the NYPD and named-defendant police officers.
- As city agencies, the Comptroller's Office and Law Department maintain litigation records, including deposition transcripts, that (subject to certain exceptions) the public is entitled to access. See Public Officers L., Art. 6, §§ 84-90.
- Notices of claim, 50-h testimony transcripts, verified complaints, deposition testimony transcripts, and settlement stipulations are often accessible via FOIL request (see below) or, where applicable, the Bronx County Clerk's Office Online Database.

GENERAL INVESTIGATION TECHNIQUES

Begin investigating police witnesses at the earliest possible point. Even before disclosures from the prosecution, a careful client interview can reveal officers' names, shield numbers, and misconduct, as well as officers' reputations in the community.

Search Social Media

- Your police witness likely has a social media profile, and it may provide investigatory leads. Be sure to search for the officer by name on Facebook, Instagram, Twitter, and other platforms.
- Alternatively, UVRX.com is a search-engine, similar to Google, which allows you to search multiple social media platforms at the same time, in one fell swoop. To use this feature, visit <http://www.uvr.com/social.html>

Search Westlaw and LexisNexis

- A search of our trusty mainstays, Westlaw and LexisNexis, may reveal that a police witness has had their own run-ins with the legal system, has been deemed incredible as a matter of law, or has even been convicted of perjury. Be sure to search both state and federal records.

Maximize News Articles

- A quick Google search may reveal a news article about the police witness in your case, but don't stop there. A growing contingent of reporters specialize in criminal justice issues, and police misconduct specifically, and are happy to speak with attorneys about their research, sometimes going so far as to share resources, index numbers, and party names.
- Reporters' twitter accounts and webpages often list their email addresses or other contact information.

Submit Freedom of Information Law (FOIL) Requests

- The Freedom of Information Law ("FOIL"), which is governed by Public Officers Law, Article 6, Sections 84-90, was designed to ensure public access to NYS agencies' records.

- All NYS and NYC agencies are subject to FOIL with the exception of the judiciary and the state legislature.
- All agency records are presumptively open to inspection unless specifically exempted by the Public Officers Law, see § 87(2), and agencies have the burden of showing that an exemption applies.
- There is no limit on the number of FOIL requests you can make.
- Although most requests will incur a per page copying fee, you may specify a particular format (".pdf") or medium ("disc").
- FOIL requests may be made to many NYC agencies through the NYC Open Records Portal at <https://a860-openrecords.nyc.gov/request/new>
 - Alternatively, a list of Records Access Officers for every NYC agency can be found at http://home2.nyc.gov/html/records/downloads/pdf/FOIL%20Officer%20Contact%20Information_February%202015.pdf
- Initial productions may be sparse and under-inclusive, but an appeal can produce a wealth of additional documents. Appeals must be submitted within 30 days of the agency's determination.
 - The Committee on Open Government prepares written FOIL advisory opinions in response to particular sets of facts and circumstances. For guidance on meritorious bases for appeal, visit https://www.dos.ny.gov/coog/foil_listing/findex.html
- **A sample FOIL request is attached to this guide.**
- *Note:* As of December 2017, the Comptroller's Office categorizes its records by claimant, NOT by defendant or other named party. As such, requests for "all records relating to 'X' officer" will not be successful. The Law Department, however, is able to respond to officer-centered requests

Contact Plaintiff's Counsel

- If you have already identified a specific civil suit against a police witness, pull plaintiff's counsel's contact information from the last page of the complaint. Counsel can serve as an invaluable resource, both for court filings and background information on the officer and case in question.

Keep an eye out for the unveiling of The Legal Aid Society's Cop Accountability Project and Database website, which will provide public access to a portion of Legal Aid's growing database of police misconduct records. *Note:* institutional defenders have direct access to the full database through their offices.

LETTERHEAD



September 25, 2018

New York City Law Department

Re: Freedom of Information Law Request

Records Access Officer:

This letter constitutes a request under the New York Freedom of Information Law (“FOIL”), N.Y. Pub. Off. Law § 87, for all records that the New York City Law Department has related to [INSERT NAME] (Shield/Tax Number: [INSERT NUMBER]) (hereafter “[INSERT LAST NAME]”) including, but not limited to, the following:

- 1) A list of all state and federal lawsuits wherein [INSERT OFFICER] is a named defendant;
- 2) The subject matter and specific allegations made within those lawsuits;
- 3) How many of those suits were settled, tried, dismissed, and/or are pending;
- 4) If settled, the amount of money those suits were settled for.

I also request disclosure of any records that clarify how these records were used, stored, shared, maintained or destroyed.

Please furnish these records to the following address: [INSERT ADDRESS]. The records may also be emailed to the following email address [INSERT EMAIL] or faxed to the following phone number [INSERT PHONE NUMBER]. Pursuant to N.Y. Pub. Off. Law § 89(3)(a), I expect a response within the five (5) day statutory time limit.

If this Request is denied in whole or in part, I ask that you justify all deletions by reference to specific exemptions of the FOIL. I expect release of all segregable portions of otherwise exempt material.

Further, recognizing that it may take longer to provide certain documents than others, I request that you provide documents as they become available rather than waiting for the complete set. If possible, I would prefer that these documents be provided via email, or via computer disc.

If you have any questions in processing this request, I can be contacted at the address or phone number above.

Sincerely,

cc:

NYS Committee on Open Government
Department of State
One Commerce Plaza
99 Washington Ave, Suite 650
Albany, NY 12231
