

WAIVER OF DISCOVERY

Revised, effective May 3, 2020¹

The following colloquy may be used when a defendant either waives discovery pursuant to CPL 245.75 or pleads guilty without having received all of the discovery the defendant is entitled to under Article 245 of the Criminal Procedure Law.

It is a “work-in-progress,” submitted as a suggested guide while the courts gain experience in fulfilling the law’s requirements. The Committee invites the bench to share its experiences and any colloquy recommendations that flow from those experiences.

Whether a defendant can enter a valid guilty plea prior to receiving required discovery under the new discovery statute without a written or oral discovery waiver is a complex question, subject to conflicting interpretations, in the absence, thus far, of appellate authority. That question must be answered primarily in the context of CPL 245.75 and 245.25.

Under CPL 245.75, as amended by L. 2020, c. 59, Part HHH, a defendant “who does not seek discovery from the prosecution” shall so notify the prosecutor at arraignment or “expeditiously thereafter but before receiving discovery from the prosecutor” and then need not provide reciprocal discovery. “A waiver shall be in writing, signed for the individual case by the counsel for the defendant and filed with the court. The court shall inquire of the defendant on the record to ensure that the defendant understands his or her right to discovery and right to waive discovery.” The prosecution may not condition a guilty plea offer on the defense’s execution of a waiver under this section.” It is clear under this provision that where a defendant seeks to waive discovery in order to not provide reciprocal discovery, the waiver must be in writing signed by the defendant’s counsel. A written discovery waiver form has been created by the Office of Court Administration and is available on the criminal justice legislation sharepoint site (form CJL Disc 07).

What is not clear is whether this written waiver provision applies where a defendant pleads guilty without having received all the discovery to which the defendant is entitled.

Under CPL 245.25(1), where a prosecutor makes a pre-indictment guilty plea offer on a felony complaint requiring a plea to a crime, the prosecutor must provide required discovery at least three calendar days prior to the expiration date of a plea offer set by the prosecutor or the court. With respect to guilty plea offers on other accusatory instruments, CPL 245.25(2) requires discovery must be provided at least seven calendar days prior to the expiration of a prosecutor’s offer requiring a plea to a crime.² Both subdivisions of CPL 245.25 state that “[a] defendant may waive his or her rights [under these provisions] but a guilty plea offer may not be conditioned on such waiver.” Neither subdivision requires that the waiver be in writing, and neither makes reference to CPL 245.75. Whether or not the court decides to employ a written waiver, the following suggested colloquy ensures that defendants who accept such “time limited” plea offers knowingly waive their discovery rights.

There is also a difference of opinion as to whether CPL 245.25 requires a waiver of discovery where a plea offer is not time limited and the defendant has not received the required discovery. The following suggested colloquy, however, is also designed to ensure in that situation that defendants who plead guilty pursuant to non-time limited plea offers are aware of the discovery rights they forgo by pleading guilty.

TO THE DEFENDANT:

(1) Has your attorney advised you of your right to discovery and your right to waive discovery?

(2) Do you understand that the right to discovery means you are entitled to all items and information that relate to the subject matter of your case that are in the possession, custody, or control of the prosecution or of the police or other persons under the prosecution's direction or control?

Add if the defendant is waiving discovery and not entering a plea of guilty:

(3) Do you understand that you may waive your right to discovery; and that by waiving your right to discovery you will not receive any [further] discovery; and that the prosecutor is not permitted to condition a plea of guilty offer upon your waiver of discovery?

(4) Do you wish to waive your right to [further] discovery?

(5) Do you do so voluntarily, of your own free will?

Add if the defendant is waiving discovery and entering a plea of guilty:

(3) *Add if the defendant is accepting a plea offer which included a deadline imposed by the prosecutor or the court and the discovery has not yet been completed:*

Do you understand that if you did not plead guilty today, the discovery that you have not yet received that is now in the possession, custody or control of the prosecution would have to be given to you in not less than:

Select appropriate alternative:

three [if the defendant is charged in a felony complaint]

seven [if the defendant is charged in any other accusatory instrument]

calendar days before the expiration date of the plea offer [or the deadline imposed by the court for acceptance of the guilty plea offer].

(4) Do you understand that the prosecution did not condition this plea offer on your waiver of discovery?

(5) Do you understand that by taking this plea you will not receive any [further] discovery? ³

¹ The May, 2020 revision was for the purpose of incorporating an amendment to CPL 245.75 as amended by L. 2020, c. 59, Part HHH, effective May 3, 2020, which requires a court on a defendant's waiver of discovery under that section to "inquire of the defendant on the record to ensure that the defendant understands his or her right to discovery and right to waive discovery."

2. Note that CPL 245.20(1) requires disclosure of "all items and information that relate to the subject matter of the case and are in the possession, custody or control of the prosecution or persons under the prosecution's direction or control," while CPL 245.25(1) and (2) require the disclosure of only those items and information then "in the possession, custody or control of the prosecution."

3. For a guilty plea, the traditional guilty plea colloquy questions about voluntariness should suffice to establish the voluntariness of the discovery waiver.