Meet Your SCBA Colleague — Jason A. Stern

By Laura Lane

Jason A. Stern, a commercial litigator who focuses on real estate development disputes, knew his calling would be to become an attorney as far back as high school.

What was the defining moment for you to become a lawyer? I was on the debate team, which I loved. I loved the argument, the strategy and the public speaking component. And I really loved speaking on my feet. As a young person you usually have your point of view and don't deviate. On the debate team at Baldwin High School I learned to consider both sides.

What was your experience like on the team? We'd get an issue in advance and had to prep for it, read up on it and were required to understand the other side, what they might say. We won many debates and I found I was good at it. I'm still doing what I learned there today.

Did you have any lawyers in the family? No. My parents hadn't graduated from college. They encouraged me to go to college. Getting an education was so important to them.

Straight out of law school you were offered a position as an associate at Anderson, Kill & Orlick in Manhattan. What was that experience like? I worked for them the summer before I became an attorney and did a lot of legal research. One category of cases involved so many witnesses they let the junior lawyers do the depositions. Then they hired me.

You worked there for two years and then went to Davis & Gilbert for two years, also in Manhattan. There are a lot of pluses and minuses to a big law firm. The minus is you don't get a lot of hands on lawyer experience. You are more in the background. I had a hunger to do more. I left Davis to go to Anderson & Ochs as an associate. I became a partner there in 2007.

What was the experience like there? It was a smaller boutique firm where we worked as a team. I handled my own cases and got into court. I got to be the lawyer I knew I could be.

You were offered a position in 2013 at the Weber Law Group in Melville as a partner and the director of litigation. Why did you leave Anderson? I am a lifelong resident of Long Island. As I commuted to the city to work at Anderson I was looking for a good fit at a firm on Long Island that would bring me closer to my community connections and my home. The opportunity at Weber came up. It was hand to glove what they were looking for and what I was looking for.

How was it different than your prior positions? The main change is here I am ultimately responsible for every major piece of litigation we deal with in terms of strategy and the results. It's a midsize law firm and it's very exciting. None of the other former roles had that degree of responsibility. Here I handle even the largest cases.

What are some of the challenges you face as an attorney? Sometimes I engage in cases where our opponent from a white shoe law firm has an advantage over us. But at the end of the day if we are more prepared, even with the amount of money they have, I am still successful. Preparation can overcome any shortcoming in a case.

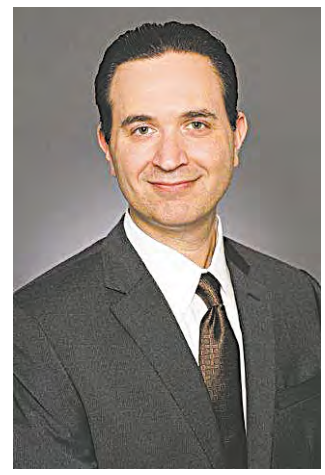
How have things changed generally in the profession? The amount of time spent on legal research compared to the past is comical. This is all due to technology. In the old days you went to the Sheppard books that indexed every decision, where you found the other cases. Then you looked at the Sheppard supplement book. You'd spend like five hours on that. Today I can do it in five minutes. Another thing that has changed is that midsize law firms can now compete with megafirms. And the information that was private before is now at your fingertips.

Do you mean through social media? Yes. It makes information so available and accessible. It can make the litigation and legal process much more proficient. And the information is more accessible to the client too. I had to hire a private investigator before. Now I push a button. There is more of a level playing field now.

What do you enjoy about being an attorney? I get a lot of personal satisfaction with the challenges. I get the same thrill I got in high school preparing for a debate. The clients think it's magic but an attorney understands the points that need to be made and anticipate them.

When did you join the Suffolk County Bar Association? About five or six years ago when I began working out here. I joined because I needed to introduce myself to the legal profession out here. Almost all of my work is Long Island litigation. I wanted to introduce myself to the judiciary as well.

Why did you decide to become the treasurer for the Academy this year? I wanted to become more involved. I also co-chaired the Allen Sak lecture, which was a CLE course on issues relating to land use, zoning and municipal law.



Jason A. Stern

What do you enjoy about being a member? The best thing is when you go into court, which can be intimidating for new lawyers. To see a familiar face is valuable. Being a member is a great way to make yourself more comfortable when you get down to the practice of law. I know members in the Academy and from committees. Some are adversaries. When I deal with them it's in a friendly way and that makes court more professional and comfortable. Membership in the SCBA makes it easier to do that.

How do you see the profession changing? Other than what I already said about technology there is the downside of a loss of civility, which I think may be due to social media or society? I'm not sure why. People don't interact with people anymore. They interact with screens and websites. And they tend to read only what they agree with. These days people don't want to hear the other side. The human element of discussion and conversation may be disappearing.

You had an experience with the New York State Court of Appeals. I had been there a few times as second chair but then a few years ago I was first chair. It was an unbelievable experience. Being in that courthouse, being a part of the process in a court that decides for the entire state was quite an experience.

How did it go? Representing a small to midsize firm I utilized technology. All of the arguments for the Court of Appeals are online. I spent three weeks leading up to my argument watching arguments and the types of questions that judges asked. So, I got a sense of these question and was almost able to predict what I'd be asked. We ended up being more prepared than the 800 pound gorilla and won unanimously. It was a tremendous accomplishment for us.

CRIMINAL

Criminal Discovery Odyssey: The Order to Show Cause

By Cory Morris

Cory Morris

2020 is bringing enormous changes, locally and nationally. But the change that occurred in criminal law is truly unprecedented insofar as the prosecution shall not be deemed ready for trial for purposes of Criminal Procedure Law (CPL) § 30.30 until it has filed a proper certificate absent an individualized finding of exceptional circumstances. Local prosecutors who routinely answered "ready for trial" at arraignment no longer do so because the need to comply with providing the accused discovery made prosecutors who were instantaneously ready for trial previously suddenly constrained to observe the statutory speedy trial rights of the accused.

The Criminal Discovery Odyssey continues as practitioners must navigate criminal discovery using otherwise foreign procedural devices, discussed here is The Order to Show Cause.

CPL Article 245 Discovery

CPL § 245.20(2) requires that the prosecutor take affirmative steps to cause records to be made available for discovery where such records exist but are not within their control. Within CPL § 245.20 is a list of records/information that should be provided without a written demand by defense counsel. CPL § 245.55 states that all records in the possession of New York state or local police agencies shall be deemed to be within the possession of the prosecutor. C.P.L. "§245.70 [however,] permits either party to move the trial court for a protective order limiting, upon a showing of good cause, the information to be turned over, by either denying, restricting, conditioning, or deferring its disclosure."[1]

If there is a protective order, the trial court should make its best efforts to detail the records and information that is subject to that order. Afterwards, "[e]ither party can obtain expedited review by a single appellate justice of a ruling that grants or denies a protective order relating to the name, contact information or statements of a person."[2] An enormous amount of case law will likely develop out of such disputes and, of course, "unless the defense consents to the People's request for a protective order, the trial court must hold a prompt hearing within three business days and render a decision expeditiously."[3] How defense counsel could make such a waiver without placing the reasons for such waiver on the record, in itself, may become an issue in the future.

The Order to Show Cause

Throughout Long Island, the CPL Article 245 Order to Show Cause (OSC) application should be made "to the [Second Department] Court within two days of the ruling sought to be reviewed..."[4] and "[t]he OSC [must be] supported by a sworn affirmation which contains a statement, represented to be made in good faith that (a) the ruling affects substantial interests and (b) diligent efforts to reach an accommodation of the underlying discovery dispute with opposing counsel failed or that no accommodation was feasible, which statement is supported by an argument in support of these assertions..." The necessity of detailing diligent efforts to resolve a discovery dispute is very similar to *meet and confer* requirements mandated throughout the United States District Courts.

The Second Department requires that all orders to show cause (and their supporting papers) seeking review pursuant to CPL § 245.70(6) and 22 NYCRR § 1250.11(ii) shall either be presented in person at the Clerk's Office at 45 Monroe Place, Brooklyn, New York, or e-mailed in pdf format to the Clerk's Office at AD2-CPL245.70.6applications@nycourts.gov.

As for oral argument and service, "reply papers are not permitted, and no provision for oral argument will be made in the OSC[5]…Proof of service of the application shall be filed on or before 10 a.m. on the day prior to the return date. Failure to timely file proof of service shall result in the dismissal of the application…"

People v. Branton

The defendant in *People v. Branton (Branton)* appealed the lower court's ruling pursuant to CPL § 245.70(6).[6] CPL § 245.70(1) provides that, upon a showing of good cause by either party, the court may order that disclosure and inspection be denied, restricted, conditioned, or deferred, or make such order as appropriate. *Branton* is a case where the defendant was accused of rape, murder, kidnapping and assault. The lower court issued an order allowing the people to "withhold the names, addresses, and identifying information of certain witnesses." The defendant sought review under the new law.

Justice Alan D. Scheinkman, writing for the Second Department in *Branton*, determined that because the "issue involves balancing the defendant's interest in obtaining information for defense purposes against concerns for witness safety and protection, the question is appropriately framed as whether the determi-

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nation made by the trial court was a provident exercise of discretion"[7] in determining the standard of review under these circumstances.

The legislature requires that, "[i]n determining whether good cause for a protective order exists, the court may consider" the factors set forth in CPL § 245.70(4). Among those factors are "the nature of the stated reasons in support of a protective order…and other similar factors found to outweigh the usefulness of the discovery." As noted throughout the changes brought about by the Legislature, the burden falls squarely upon the prosecutor in coming forward with reasons to prevent disclosure.

In *Branton*, Justice Alan D. Scheinkman noted that "the People's affirmation was unaccompanied by any affidavit from anyone with personal or direct knowledge of the relevant circumstances" and that "while alleging that a witness had been approached in person and by use of social media by 'associates' of the defendant, the People did not set forth the name of any such associate, the relationship between the defendant and any associate, the date or approximate date of the alleged improper approach, or even a general description of the incident." There was no social medial information or records and the court noted that "the sealed affirmation submitted to justify the issuance of the protective order is vague, speculative, and conclusory." Ultimately, "the affirmation was legally insufficient to support the granting of the relief sought" although the prosecutor here will be allowed to make another application.

The instruction from the Second Department is clear that "[u]nder the new statute, the People, in seeking a protective order, and defense counsel, in opposing an application for a protective order, should provide a sufficiently detailed factual predicate to enable the courts to evaluate the applicability of the statutory factors governing the issuance of protective orders, assess the weight to be given to each factor, and draw an appropriate balance." Additionally, the lower court is instructed to "examine[], as now expressly authorized, whether the information previously redacted could be appropriately disclosed only to defense counsel and the defense investigator"[8]

Vacating the lower court's ruling, Presiding Justice Alan D. Scheinkman in *People v. Branton* noted that courts and practitioners alike will need to adapt to the new practices, "a process that will inevitably take both time and experience," for which lower courts are reminded to evaluate alternatives, making a record in the process, and for which practitioners must become familiar with both the procedural and substantive requirements under the new law.

Note: Named a SuperLawyer, Cory Morris is admitted to practice in NY, EDNY, SDNY, Florida and the SDNY. Mr. Morris holds an advanced degree in psychology, is an adjunct professor at Adelphi University and is a CASAC-T. The Law Offices of Cory H. Morris focuses on helping individuals facing addiction and criminal issues, accidents and injuries, and, lastly, accountability issues.

1 Donna Aldea, *Wave of Change: The Expansion of Appellate Review in Criminal Cases Pursuant to Newly-Enacted Discovery Statute, CPL Article 245*, New York Law Journal (August 16, 2019), http://bit.ly/38n5FYB.
2 John Schoeffel, *2019 Criminal Justice Reforms—Preliminary Advisory*, NYSBA (reproduced from *NYSBA Criminal Justice Section's NY Criminal Law Newsletter*, Spring 2019) available at: http://bit.ly/2NGSgCE.
3 Aldea, supra note i.
4 Second Judicial Department, *Protocol for Processing Applications pursuant to CPL 245.70(6),* NY Courts (last accessed on January 18, 2020), http://www.courts.state.ny.us/courts/ad2/forms/Protocol_for_Processing_CPL245.70(6)_Applications.pdf; see also http://www.courts.state.ny.us/courts/ad2/forms/CPL245.70_review-Order_to_Show_Cause.pdf.
5 Oral Argument can be requested, however, "prior to the return date by e-mail to AD2-CPL245.70.6applications@nycourts.gov and counsel shall be advised by return e-mail prior to the return date as to whether a request for oral argument has been granted."
6 *People v. Branton*, 2020 NY Slip Op. 000372 (2d Dep't. Jan. 17, 2020).
7 *People v. Branton*, 2020 NY Slip Op. 000372, *2-3 (2d Dep't. Jan. 17, 2020) (citing (see *People v Frost*, 100 NY2d 129, 137 (2003)).
8 *People v. Branton*, 2020 NY Slip Op. 000372, *3 (2d Dep't. Jan. 17, 2020).

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since it no longer evidences the "essential features" of a tax; it no longer produces revenue for the government.

- If found to be unconstitutional could the Mandate nevertheless be severed from the remainder of the ACA, thus saving the constitutionality of the entire Act, or would severance from the other provisions of the ACA render the entire Act inoperable, unworkable or ineffective, hence "invalid?" The majority said "maybe" and remanded to the district court for additional consideration and analysis of the severability question. The District Court also must consider whether the constitutionality of the entire Act may be saved by enjoining enforcement of only those provisions of the ACA that injure the plaintiffs or, alternatively, by declaring the ACA unconstitutional only as to the plaintiff states and the two individual plaintiffs.

On Jan. 21 SCOTUS denied motions to fast-track consideration of the appellant's petitions for *certiorari*. This means that responses are not due until early February and the petition likely will not be the subject of conferences until early March. That is too late for oral argument to be scheduled for the current term even if *certiorari* is granted, by no means a certainty.

Besides the political fallout and consequences there are real operational risks for the entire health care industry, including hospitals, states and municipalities. If we include in the mix the results of Medicaid eligibility expansion provisions in the ACA, some $21 million people might lose health insurance coverage. (States that expanded Medicaid may determine that they no longer could afford to maintain the program without the federal subsidies, and decisions to stick with the program could result in tax hikes to make up for shortfall, obviously a real issue in states already running huge operating deficits.) The dramatic increase in uninsured patients will impact hospital and other health provider revenue streams, already seriously strained in many areas of the country (as evidenced locally by current news reports about the dire straits in which NuHealth and the Nassau University Medical Center find themselves). Some 130 million Americans with pre-existing conditions might lose important eligibility and insurability protections and find that carriers will decline renewal or deny their applications outright. Plans that continue to offer coverage for high risk patients will demand greater premiums for the same levels of coverage, which many patients with chronic illnesses will not be able to afford.

Speaking of coverage, plans no longer will be obliged to provide coverage for all of the "essential health benefits" mandated by the ACA. One very unfortunate consequence also may be that many healthier individuals once again will forgo health insurance altogether.

Often overlooked because not directly related to care is that the fraud and financial abuse protections in the ACA, such as disclosures of conflicting financial interests and other Stark and anti-kickback like provisions, will go away. Operationally, contractual relationships between health care providers and health insurers will experience dramatic disruptions, causing significant instability in what already is a seriously unstable health care delivery system.

Notwithstanding any of this, we must hearken back to our lessons in Con Law. SCOTUS is obliged to interpret the Constitution with one eye on the intent of the founders and the other on the needs of a national government functioning in a post-modern 21st century democratic society. Add to this a volatile political environment and the outcome is anyone's guess.

Note: James Fouassier, Esq. is an associate with the Department of Managed Care at Stony Brook University Hospital, Stony Brook, New York and former co-chair of the Association's Health and Hospital Law Committee. His opinions are his own. He may be reached at: james.fouassier@stonybrookmedicine.edu

* I am indebted to the publication for some of the information that I present in this article.