

The Forensic Corner - The COVID Effect: Working with Forensic Laboratories During a Pandemic



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The COVID-19 pandemic has uprooted our criminal justice system since the spring of 2020, and it continues to do so as we are amid a second wave of infections. It's not just the daily operations of the courtroom that has been directly impacted, however; it's the local crime laboratories as well. The impact on New York state forensic labs has been profound and as crime rates across the state have spiked, especially during this past summer, the pandemic will have lasting implications for cases moving forward in 2021. ([Homicides, aggravated assaults on steep rise across U.S. during pandemic - The Washington Post](#)).

Most state crime laboratories have been operating on a reduced in-person staff since March 2020. Beyond working from home and limits on staffing capacity in the laboratory, analysts have been called upon to perform tasks far outside their typical job duties. In Illinois for example, the Illinois State Police Forensic Science Division had ten scientists and one research coordinator volunteer to assist the state's Department of Health with COVID-19 testing ([Illinois State Police Forensic Scientists to Assist with COVID-19 Testing \(forensicmag.com\)](#)). In an even more drastic measure, the Office of Chief Medical Examiner in New York City was forced to shut down their entire DNA laboratory in the spring in order to deploy 200 staff scientists to morgue operations, as the city's COVID-19 deaths skyrocketed. (<https://www.nytimes.com/2020/04/30/nyregion/coronavirus-nyc-funeral-home-morgue-bodies.html>). While the DNA laboratory is currently back up and running, the scientists are now facing large backlogs and longer turnaround times. This past summer New York City the turnaround time for firearm and suspect exemplars ballooned to almost 120 days as the OCME struggled to return to normal operations.

If your local forensic laboratory is currently up and running, delays can still be expected and are likely inevitable. What we learned during the Spring is that some tasks, such as report writing and technical reviews, can be successfully performed by analysts working from home. Obviously, the actual receipt, inspection and testing of the physical evidence cannot be. New cases will be placed into the testing queue behind hundreds of backlogged cases and the start date may be delayed. In turn this has and will continue to affect discovery and motion practice moving forward.

Lab shutdowns and staff shortages have greatly impacted the ability obtain and turn over forensic discovery as required under [CPL §245](#). The writing of reports and technical reviewing process has slowed and thus obtaining certified forensic files and the accompanying police paperwork is taking much longer. It is imperative that prosecutors discuss a realistic timeline with the court and defense counsel at the inception of the case if any forensic testing is involved. Note, filing a Certificate of Compliance can still be accomplished if the forensic reports and underlying data is not completed or testing is still in progress In *People v. Lustig*, **2020 NY Slip Op 20096**, the Defendant argued that the People’s Certificate of Compliance was invalid because, at the time it was filed, they had not provided to the defense raw data for DNA testing and the STRmix outputs conducted by the OCME. The Court disagreed and ruled, in part, that those documents were not within the People’s possession or control. Although prosecutors do not need to turn over items that do not actually exist yet, there is a continuing obligation requirement under [CPL §245](#) to turn over those items as they are created, or the prosecutor learns of the existence of these items. (See also, *People v. Alford*, **2020 NY Slip Op 50349**; *People v. Berkowitz*, **2020 NY Slip Op 51044**; *People v. Brabam*, Ind. No.: 5533/2018, Kings Co. Sup. Ct., March 2020).

One area of practice that has been particularly difficult to navigate during the pandemic has been the collection of DNA exemplars pursuant to a Motion to Compel. During the beginning of the pandemic in March when in-person appearances were greatly reduced or halted entirely, DNA orders could not be executed which resulted in huge backlogs in courthouses across the state. In August, when the Courts slowly began to reopen, many defendants refused to be swabbed and agencies were struggling with establishing new safety protocols. In New York City, the NYPD, Department of Corrections and District Attorney Offices worked out a new set of protocols for incarcerated and non-incarcerated defendants, including having defendants report to local precincts with their attorneys to be swabbed for DNA.

In New York City, the local laboratories have also been impacted by cost-cutting furloughs at the OCME and NYPD. (<https://www1.nyc.gov/office-of-the-mayor/news/674-20/mayor-de-blasio-expanded-furloughs-city-employees>). As budgetary concerns continue to loom statewide, possible layoffs may follow; this would undoubtedly lead to a reduced capacity for testing crime scene evidence, including hiring freezes and a deep reduction in laboratory operating hours and overtime.

Moving forward, there are some important questions offices may want to discuss with the local laboratory leadership, including:

- How much has the lab’s case backlog increased due to COVID-19? In other words, request the lab’s current turnaround time broken out by crime category. Review the matrix and discuss with the lab the possibility of diverting resources to areas or crime categories that your county might need assistance with;
- Does the lab have a specific plan in place for expediting cases? Courts and labs may close or reduce capacity, but the need for rush testing for public safety reasons does not go away. The lab should have a designated group of staff members able to work on these types of cases when needed;

- Is the lab prepared or have the capability of producing paperless discovery/electronic certified files moving forward?; and
- Does the lab have a plan or protocol in place if there is a COVID outbreak within the lab itself and employees must quarantine?

Open, honest lines of communication with the laboratory's management team are crucial-- prosecutors need to be able to set realistic expectations for the Court as to when we can anticipate receiving forensic results on cases and have expert testimony available for grand jury, preliminary hearings or trials now and in the future.