Open-File Discovery

Open-file discovery is the idea that the prosecution should provide the defense with everything in the prosecution's file—including witness statements and the names of witnesses, forensic evidence, and police reports. The defense would have access to this information without regard to the materiality of the evidence or the likelihood that the prosecution would introduce that evidence at trial.[1]

Open File includes: witness statements, information regarding lineups, physical evidence, exculpatory evidence, expert reports, police reports. Open file would not include: notes, theories, opinions, conclusions, or legal research conducted by the prosecution.

State Practices Vary Widely

Discovery obligations may be governed by: statute, court rule, the common law, judicial order, and the Constitution. Generally statutes govern criminal discovery and they establish the timelines as well as definition of what is discoverable.

The ABA Criminal Justice Section has created model discovery policies that have been implemented in whole or part by states.[2] The Federal government also has its own discovery policy[3]. The differences between the Federal and ABA models can be seen in their treatment of discovery of witness lists, information that is critical to defense counsel's ability to investigate. States that follow the ABA model generally require that the prosecution disclose to the defense both names and addresses of witnesses that the state intends to call. In contrast, the current federal rules do not allow for discovery of witness names and the restrictive discovery states follow this model.

As of 2004, approximately 1/3 of states have implemented discovery rules modeled on the ABA Standards.[4] Another 12 states have discovery rules similar to the more restrictive federal criminal case rules. The remaining states fall somewhere in between.

Reciprocal Discovery

In these jurisdictions defendants have a limited disclosure obligation as well. ABA standards require the defense to disclose: names and addresses of witnesses the defense intends to call at trial, experts' reports and statements made as a result of physical or mental examinations which the defense intends to introduce at trial, as well as those experts' qualifications. Defendants intending to offer an alibi defense may be required to provide notice of this fact.[5]

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[1] Interesting…. A LexisNexis terms and connectors search for "'open-file discovery' or 'open-file policy'" revealed that roughly half of all law review articles mentioning open-file discovery were published after t he Duke Lacrosse Case came to an end. *See* 89 Notre Dame L. Rev. at 426.

[2] See ABA Criminal Justice Standards 3-5.4 – 5.8, 4-4.5, *available at* http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html.

[3] Fed. R. Crim. P. 16

[4] These include CA, FL, NJ, IL, MI, and PA.

[5] Fla. R. Crim. Pro. 3.200. "A defendant in a criminal case who intends to offer evidence of an alibi in defense shall, not less than 10 days before trial or such other time as the court may direct, file and serve on the prosecuting attorney a notice in writing of an intention to claim an alibi, which notice shall contain specific information as to the place at which

Automatic Discovery
There is no time-consuming motions for discovery which must be answered by the opposing party and may require a hearing.

Open-File Discovery
The central premise of open-file discovery is that everything the prosecution knows should be revealed to the defendant. Nothing is held back—if the prosecution has a piece of evidence, the defense has access to that same piece. The leading argument for open-file discovery is that the "quest for truth" outweighs any possible arguments against broader discovery. The legal system is designed to seek out the truth, and the truth is most likely to emerge when each side seeks to take the other by reason rather than by surprise.

State Laws

COLORADO
Enacted broad discovery laws based on ABA Standards

- Permits the use of depositions
- Clearly defines that evidence qualifies as discoverable
- Clearly states that the state has a continuing obligation to disclose evidence it secures, incl. witness lists, police reports, experts statements, any electronic surveillance of statements involving the accused, written statements of Δ and co-Δ, as well as substance of oral statements, and any and all mitigating or exculpatory evidence.
- Discovery is automatic – no need to file a motion
- Not required to disclose work product or provide Δ with the names of informant's whose ID is a secret

NEW JERSEY

- In cases with pre-indictment plea offers, state law permits Δ to request to inspect and copy or photograph any relevant evidence that would have been discoverable if the case went to trial.
- State must disclose names of all people with relevant information about the crime, not just those that they intent to call as witnesses
- In a capital case, state must provide Δ with the indictment containing aggravating factors the state intends to prove during the penalty phase – this is reciprocal, and Δ must provide a list of mitigating factors.

OHIO

- Ohio amended Criminal Rule 16 in 2010 to include "open discovery" rules.
- The rules required the prosecution to share all exculpatory information to the defense.
- If the defense sends a discovery request, the defense has a "reciprocal duty of disclosure" to share their files with the state, even if the state never asked for them.

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the defendant claims to have been at the time of the alleged offense and, as particularly as is known to the defendant or the defendant's attorney, the names and addresses of the witnesses by whom the defendant proposes to establish the alibi."

- The prosecution is allowed to mark certain documents as for defense counsel eyes only.

NORTH CAROLINA

- The law was a result of the "tough on crime" mindset of the 1990s. It began as a political compromise to speed capital and post-conviction litigation, as well as executions (it was originally limited to capital cases).
- Discovery statute[6] requires prosecutors to share files in all felony cases with defense lawyers who request them prior to trial. Investigator notes, Δ and witness statements, test results and a list of probable witnesses for the trial must be included.
- Once Δ seeks discovery from the state, the prosecution has a right to the Δ's witness lists and details about the grounds on which it plans to make its case.
- Δ is also required to turn over such things as the state with witness lists and details about the grounds on which they plan to defend their client.

LOUISIANA

Went into effect in 2014 – amends LSA-C.Cr.P. Art. 716 -727

- Reciprocal discovery
- Upon motion by Δ, court shall order state to disclose the record of arrests and convictions of the Δ, any co-Δ , and any witness the state calls, or intends to call at trial; any inducement a state witness has been offered; however doesn't have to be disclosed until trial commences
- Δ has right to inspect and copy, photograph or otherwise reproduce law enforcement reports created and known to the prosecutor made in connection with the particular case, and to permit or authorize the defendant or an expert working with the defendant, to inspect, copy, examine, test scientifically, photograph, or otherwise reproduce books, papers, documents, photographs, tangible objects, buildings, places, or copies or portions thereof that are within the possession, custody, or control of the state, and that are intended for use by the state as evidence in its case in chief at trial, or were obtained from or belong to the Δ.
- State has a right to inspect and copy, photograph, or otherwise reproduce any results of reports, or copies thereof, of physical and mental examinations and of scientific tests or experiments, made in connection with the particular case, that are in the possession, custody, control, or knowledge of the Δ, and intended for use at trial. If the witness preparing the report will be called as an expert, the report shall contain the witness's area of expertise, his qualifications, a list of materials upon which his conclusion is based, and his opinion and the reasoning.
- Δ must disclose if he intends to use a defense based on a mental condition or alibi

TEXAS

The Michael Morton Act which was passed in 2013 amended the Texas Code of Criminal Procedure 39.14 codified open-file discovery policies statewide.[7] What it does:

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[6] N.C.G.S.A. § 15A-903

[7] This is an interesting 2 page article with a DA and defense attorney arguing their views of the Morton Act: Randall Sims & R. Marc Ranc, *Two Views of Morton*, Texas Bar (Dec. 2014), https://www.texasbar.com/AM/Template.cfm?Section=Past_Issues&Template=/CM/ContentDisplay.cfm&ContentID=27589

- *Easier Application Process:* Previously a Defendant would have to petition the Court and show "good cause" in order to get a limited amount of information — and a police report actually wouldn't have been one of the things a court would order to be given over under 39.14. Now a Defendant only needs to make a timely request directly to the prosecutor. The Defense no longer needs to apply to the Court to order disclosure and attempt to prove "good cause" — a maneuver which would typically engender resistance from prosecutors.
- *More Information*: The Act requires production of offense reports, recorded statements, witness statements, and police statements. The act even appears to allow discovery of work product of prosecutors and their investigators that are not "otherwise privileged."
- *Ease in Production*: Allows for electronic discovery and duplication which typically eases the process for everyone.
- *Post Conviction Discovery*: Requires production of exculpatory or mitigating evidence to the Defense which is not a new requirement. What is new is required production of exculpatory or mitigating evidence *even after a person is convicted*. This would almost certainly assist a person in clearing their name even after being convicted.

Examples of Open-File Implementation

Some jurisdictions have informal "open file" policies that permit defense attorneys to inspect and copy the "entire file" of information produced by the police, including the defendant's oral, written, and recorded statements; the defendant's criminal record; examination and test reports; documents and objects; and the content of expert testimony.[8]

- Tarrant County, Texas: the district attorney's office has instituted an "open file discovery matrix," requiring the entire prosecution file to be made available within 10 days after filing of charges (for minor cases) or 10 days following indictment
- In a few offices, the prosecution provides an inventory of materials produced.
- Dade County, Florida: defense attorneys are provided, at minimal cost, a CD-ROM containing these materials. A few but growing number of prosecutors provide the information via e-mail through PDF files. This provides a record of the items produced.
- Travis County, Texas: has an "open file" policy that permits the defense attorney to examine but not copy the file, and the attorney is restricted from taking verbatim notes of items in the file
- Brooklyn, New York: has an open file discovery policy that includes most non-work product material for criminal cases, but not for homicide cases. Disclosure of grand jury testimony is often dependent upon the individual assistant district attorney. In homicide cases, defense lawyers often object to the lack of timely disclosure to provide an adequate defense.
- Jefferson County, Louisiana: has made claims to "open discovery" to the press that have been disputed in the defense community because critical material is not produced.
- Arkansas: the open file policy does not include some information from the police file.
- Bexar County, Texas: open file discovery is conditioned upon the defense counsel signing an agreement that includes an acknowledgment that the "DA's office has no duty and will not

[8] Examples taken from Ellen Yaroshefsky, *Ethics & Plea Bargaining: What's Discovery Got to Do With It?* 22:3 ABA Crim. J. (2008), *available at http*://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_cjmag_23_3_yaroshefsky.authcheckdam.pdf.

supplement the discovery that has been granted by this agreement, including with any documents that are missing or that may be placed in the State's file at a later time."

Pros & Cons of Open File Discovery

PRO OPEN FILE

Fairness
The goal of expanded discovery laws is to improve procedural transparency and to ensure both the fairness of a trial and of the outcome. Defendants are almost always operating with a significantly smaller budget. Thus, it is unjust to allow the side with more resources to control the disposition of a criminal case merely because a defendant cannot afford to perform independent investigation.

Just verdicts
By providing all evidence against a defendant, the defendant may prove more likely to agree to a plea agreement, sparing both the prosecutor's office and the courts the burden of going to trial. Better-informed defendants will lead to more efficient dispositions of criminal cases. Defendants can make informed decisions about whether to proceed to trial or plead guilty when they know the full weight of the evidence against them.

Efficient Use of Judicial Resources
When faced with all of the evidence, more defendants are likely to plead guilty, thus the prosecutor can avoid the time and expense of a trial. The moral justifications for permitting defendants access to prosecutors' files, combined with the cost savings for prosecutors, make open-file discovery a "win-win."

Eliminates "grey-area" decisions by prosecutors
Open-file discovery creates a more level playing field by ensuring that evidence can be meaningfully challenged and tested by removing much of the uncertainty inherent in the discretionary disclosure decisions prosecutors now have to make. Any possible risks associated with open-file discovery are greatly outweighed by the benefits because it can eliminate one of the most dangerous and widespread prosecutorial errors – the inadvertent suppression of potentially exculpatory evidence.[9]

OPPOSITION ARGUMENTS AGAINST OPEN FILE DISCOVERY

Discovery dumps
Even when prosecutors provide an open file to the defense, the open file may end up being a "discovery dump." One way to hide critical evidence is to give the defense so much evidence to look for that discovering the exculpatory evidence is like finding a needle in a haystack.[10] Open-file discovery could create a situation in which prosecutors could overwhelm defense counsel with evidence, either intentionally or unintentionally, and frustrate defense counsel's ability to locate and synthesize critical evidence.

Open File is expensive and will overburden defenders

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[9] John Terzano, *Expanding Discovery in Criminal Cases*, DAILY KOS (Dec. 10 2008), http://www.dailykos.com/story/2008/12/10/671500/-Expanding-Discovery-in-Criminal-Cases#

[10] Laurie Levenson, *Discovery From the Trenches: The Future of Brady*, 60 UCLA L. REV. DISC. 74 (2013)

Open-file discovery policies compound the problem of providing adequate representation to defendants. In light of the fact that the overwhelming majority of defendants are represented by publicly funded counsel, any attendant benefits received by a single defendant under an open-file discovery regime would be largely outweighed by the costs to defendants as a whole and to the judicial system. The economic consequences of open-file discovery would be disastrous in the current judicial environment and would serve as nothing more than a shifting of burdens from the prosecution to the defense. The effect of this burden shifting would lead to more overworked public defenders and lower quality representation for indigent defendants.[11]

The façade of open file
When an open policy is not truly open file because prosecutors intentionally or unintentionally do not include records from law enforcement files, defendants can be lulled into a false sense that they are actually getting access to all exculpatory evidence.

Prosecutor should not have to do defense attorneys' jobs for them
Defendants already have enough of an advantage in our adversarial system because the state carries the burden of persuasion. The prosecutor should not have to do the defense attorney's job for him/her.

If a defendant is entitled to a copy of the prosecution's playbook, the defendant could more readily tailor his defense to combat the prosecution (e.g., defendant perjury[12]). With broader, more detailed discovery, defendants could more easily concoct detailed alibis to effectively manufacture reasonable doubt.

Witness intimidation
This is frequently cited, but almost every statute and Rule 3.8 provide exceptions when there is a demonstrated concern for witness safety or even potential harm to someone else.[13] Federal law mandates that witness identification must be revealed to the defense only after the witness has testified.[14]

ON-GOING ISSUES

Timing
Timing of discovery is essential to make meaningful light of the evidence. Early discovery is essential to actually assist the defense. The ABA criminal discovery standards recommend that state establish timelines early in the process to allow each party to make adequate use of the evidence before trial. This again raises the issues regarding discovery rights for defendants who plea.

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[11] Brian Fox, *An Argument Against Open File Discovery*, 89 Notre Dame L. Rev. at 425 (2013).

[12] Robert P. Mosteller, Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery, 15 GEO. MASON L. REV. 257 (2008)

[13] However, see MICHAEL H. GRAHAM, WITNESS INTIMIDATION 4 (1985) (noting also that 39% of witnesses were "very much afraid of revenge by defendants"). The study included only witnesses in cases where the crime was reported and an arrest was made— thus, the proportion of actual witness intimidation may in fact be higher due to instances in which the witness did not report the crime out of fear of the defendant.

[14] Jencks Act, 18 U.S.C. § 3500(a).