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On Professionalism, Civility, & Discovery

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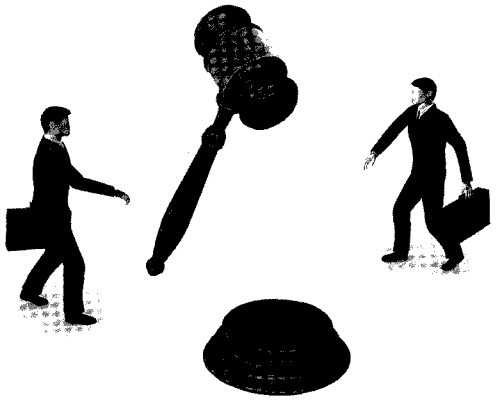
by Kathryn Todryk

Criminal trials in Virginia are conducted by ambush; only a small portion of the evidence in a case must be disclosed to the defense by the police and prosecutor. And, although the Supreme Court of Virginia is currently considering amending the discovery rule, the Virginia Association of Commonwealth's Attorneys vehemently opposes the amendments proposed by the Virginia State Bar's Indigent Defense Task Force. All the while, attorneys are contentiously litigating the current statutory discovery scheme. Colloquially, defense attorneys and prosecutors refer to this ongoing dispute as "Discovery Wars."



One of the battles centers the requirement that written discovery responses, including copies of documents and videos subject to discovery, are not being uniformly complied with throughout the Commonwealth. I have heard from defense attorneys who, when requesting the minimum discovery provided by rule, receive a response stating that the attorney may view the applicable discovery at the prosecutor's convenience. Such a response can be onerous because while a prosecutor may cover a single or limited geographical jurisdiction, defense attorneys often cover multiple jurisdictions and may not reside in the city or county where the discovery material is located. As Onerous as it is, however, some prosecutors believe that this constitutes ample compliance with the rule. It should be noted that some jurisdictions and Commonwealth's Attorney's Offices follow better practices than others.

Another questionable discovery response from prosecutors tasks defense counsel with contacting the police department to see if there is any information, documents, videos, or other tangible evidence that may be the subject of discovery or *Brady v. Maryland*. While I empathize with those prosecutors who do not have a good working relationship with their respective police departments, such a lack of rapport does not excuse violating the rule and passing the responsibility to the defense counsel. It is the prosecutor who is tasked with reviewing information to determine whether material is exculpatory and discoverable, and the prosecutor must be held accountable.

One of the reasons cited by the Virginia Commonwealth's Attorneys Association for their opposition to increased discovery is witness safety. Having worked in a jurisdiction known primarily for its gang violence, I recognize this as a real concern. However, this particular concern applies in a minority of cases. Outside of my own experience, I was unable to find any studies on the number of cases in which witness safety is an integral issue in

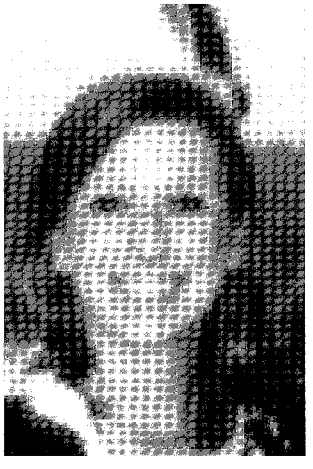
the prosecution. Defense attorneys, however, are sensitive to this issue, and revised ethical guidelines permit discovery without disclosing witness addresses. Additionally, this information is easy to redact from written discovery, and there can be an agreed order to prohibit the dissemination of that information in open-file discovery. In such cases, there must also be an agreed index and order for the purposes of appeal. Prosecutors, however, decry this approach claiming that redacting discovery is time consuming. But, consider the defense position: defense attorneys, particularly public defenders, can, like prosecutors, carry a caseload from 100 to 250 open cases. Such a caseload, coupled with in-office client meetings, jail visits, and witness interviews, leaves little time to visit prosecutors' offices to review their files or canvass local police departments looking for discoverable material.

So, why is there so much controversy and discord? Unfortunately, it is not as simple as, "can't we all just get along?" We have fundamentally divergent interests in an adversarial system. However, civility and honesty among colleagues, even opposing counsel, go a long way toward ameliorating the problem of discovery. This means that the level of candor one should pay towards opposing counsel is the same as you would owe to the court. Courtesy and honesty by counsel make negotiations easier in an overburdened criminal justice system. I have found that a good working relationship, predicated on one's honesty and reputation as defense counsel, makes prosecutors more forthcoming with discovery. Similarly, police officers are more likely to advise defense counsel of information if they respect and know that the attorney deals with them and other witnesses fairly and honestly.

In addition, ethics should prompt prosecuting attorneys to be more forthcoming with discovery. For example, prosecutors should be encouraged to go beyond the scant statutory rule by providing additional inculpatory information, and early disclosure of *Brady* material (exculpatory, mitigating, and impeaching information). In providing such information prior to trial, the prosecutor will have less to fear from a wrongful conviction or reversal. Furthermore, increased information sharing will foster plea agreements and ease heavy dockets, when appropriate. It is no secret that it is much easier to advise a client about his or her options (trial or plea, jury, or bench trial), when defense counsel knows all of the evidence likely to be presented at trial.

Ultimately, it is in everyone's best interest to be honest with all parties involved in criminal litigation, to provide, at a minimum, the statutorily required discovery and Brady material well in advance of trial, and to maintain one's reputation for professionalism, honesty, and civility. In my opinion, open discovery can only further these ends and will benefit us all as we seek to uphold our oaths to provide competent, zealous representation to our respective clients.

About the AUTHOR



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