

Discovery Dilemmas:
Keeping Your Cards Close To Your Chest
Legal Question of The Week
Vol. 2, Number 8
March 27, 2009

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Suppose you are playing a friendly game of No Limit Texas Hold'em, Gin Rummy, or my personal favorite, Crazy Eights.¹ You learn from an early age that you have to keep your cards close to your chest unless you want your opponent to know what you have in your hand and therefore give him an unfair advantage. Applying that lesson to our adversarial criminal justice system, we sometimes feel the need to hold back information from the defense so they don't gain an unfair advantage at trial.² The information shared between parties to a lawsuit (whether civil or criminal) is called discovery, and like everything else in our system is governed by both constitutional and statutory laws. In this update, we'll look together at what has to be turned over to the defense.

First of all, it is important that you realize that "discovery" is something that happens between attorneys on opposing sides of a lawsuit, not between law enforcement officers and defense attorneys. Any information turned over by you should go to the prosecutor, who may then turn it over to the defense attorney if it is appropriate to do so. Now, I am aware that in District Court it is not unusual for defense attorneys to approach you directly and ask to see your notes or a certain report. This is because you are sitting comfortably in the jury box while the prosecutor is running around with their hair on fire dealing with the other 500 cases that are on the docket for that day. Most prosecutors will not mind if you go ahead and show a document to the lawyer in that situation. But having said that, remember that you should always check with the district attorney if there is any question in your mind about whether it would be okay to show something to the defense. The prosecutor always makes the final call on this.

¹ Of course, none of these games would be played for money. I'm already in trouble enough with Tony Staley over the APPEARANCE that I might have possibly entered an NCAA tournament ~~pool~~ contest (maybe). And I purposely left strip poker off the list. This is a family publication, after all.

² I know that sometimes this is not about "advantage" or "disadvantage" at trial but the fact that the particular defense attorney that is asking for the information is a jerk, or worse. But the best revenge against unscrupulous or unethical attorneys is beating them over the head with a strong case that you have put together while following all laws and rules to the letter. Please do not stoop to the level of your adversaries by trying to cut corners and cleverly trick them with misdirection or outright deception. You will end up losing in the long run.

Once you have worked with a particular DA for a while, you'll have a pretty good idea of their "discovery philosophy." I was always an open file sort of guy. I figured if I didn't have the evidence to win without resorting to surprise tactics and hiding information, I shouldn't be prosecuting the case in the first place. I found that I got more guilty pleas and avoided more trials by being open than I did by being mysterious.³

Although it is a question which will ultimately be determined by a prosecutor, it is a good idea for you to know what the defense is entitled to have because you are ultimately the keeper of most of this evidence and there will be those times where a defense attorney will try to come to you directly.

The easiest rule to remember is the discovery rights of a defendant charged with a felony. A defendant charged with a felony⁴ is entitled to see EVERYTHING⁵ in the "complete files of all law enforcement agencies involved in the investigation of the crimes committed or the prosecution of the defendant." (N.C.G.S. 15A-903.)⁶ What do you have to turn over to the State? Everything. Say it out loud. "Everything." The law says that your file "includes the defendant's statements, the codefendants' statements, witness statements, investigating officer's notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant." (N.C.G.S. 15A-903(a)(1), emphasis added.) This definition may be tricky to memorize, so let me sum it up for you. Everything.⁷

But what about misdemeanors not attached to any felony charge? Let's start with discovery rights under the U.S. Constitution as interpreted by the U.S. Supreme Court. Starting with the famous case of Brady v. Maryland, 373 U.S. 83 (1963) and extending through Kyles v. Whitley, 514 U.S. 419 (1995) and beyond, the State has a constitutional duty under the due process clause to disclose to the defendant any material evidence that is favorable to the defense for trial or hearing. Legal careers have been made and destroyed fighting over the meaning of the terms "material" and "favorable," so I won't go into detail on those things here. Suffice it to say, for your purposes, you should make

³ WAR STORY ALERT! In Durham traffic court, I once had a DWI case where the lawyer was adamant that his client wanted a trial. Prior to trial, I had the officer show me the AIR form where the officer had asked the defendant (as was standard procedure in these cases) whether the defendant had any physical defects or deformities. The defendant (who was highly intoxicated, of course) replied (and I quote) "yeah, my member is way too big." After showing this to the defense attorney and telling him how much I was looking forward to cross-examining his client about the length of his member, the lawyer changed his tune and his client pled guilty as charged. To the DWI that is, not to having a too-large member.

⁴ This would also cover any related misdemeanor charges.

⁵ A noun meaning "an amount or quantity from which nothing is left out or held back: aggregate, all, entirety, gross, sum, total, totality, whole."

⁶ As I have said from time to time, this is the LAW. It is the policy of the HPPD to follow the LAW.

⁷ The ONLY caveat to this is that discovery does not have to be provided until the case is in Superior Court, usually by way of an indictment. And I am ignoring for now the rule that the identity of confidential informants need not be disclosed. Read my next update for more on that.

sure the prosecutor knows about evidence and witnesses that hurt your case because he is going to be required to turn that over to the defense if it is “Brady material.”⁸

Apart from “Brady material,” there are no additional rights to discovery in misdemeanor cases. N.C.G.S. 15A-901 spells out that the discovery statutes only apply to “cases within the original jurisdiction of the superior court” (felonies). That means that the State (and by extension, a law enforcement officer) is not required to turn over anything to the defense prior to trial.⁹ This gives the State the right to refuse to show the defense any of your notes and reports before trying the case. Remember that this is the State’s right and not yours, however, you always have the right to tell the defense attorney to go through the prosecutor to get that information.

My Unsolicited Practical Advice

1. Make sure you know what your prosecutor’s feelings are concerning discovery in District Court. Does he or she want everything to go through them? Are they comfortable with you sharing reports with defense attorneys when they ask for them? Most importantly, will they back you up when you don’t wish to share your notes or reports?

If you and the prosecutor aren’t on the same page, one of two things is going to happen. Either you will look foolish while the prosecutor fusses at you for showing something to the defense attorney without checking with them or you will look foolish when you refuse to show something to the defense attorney only to have the prosecutor take it from you and show it to them anyway. Remember that it is really the prosecutor who is in control of what information is shared.

2. Again, my philosophy has always been to be as open as you can with the information that you have. I believe that this cultivates your reputation as a fair officer which pays off huge dividends for you in the long run. It also leads to more guilty pleas and less trials, which pays off by getting you out of the courtroom and back on the street protecting the public.

I know that there are some attorneys that you just don’t like.¹⁰ You may even despise them. But District Court is not the time to deal with these personal feuds. In almost all cases, even if the prosecutor backs up your decision not to share what is in your report or in your notes, the defense attorney is going to be entitled to look at those things during the trial because you will be testifying as a witness and will have used your report and your notes to refresh your memory prior to the trial!

⁸ This Constitutional law also applies to felony charges, of course. But if you are already turning over everything in your files (as you are required to do), you shouldn’t have to worry about not having turned over any Brady material. See the definition of “everything” in footnote 7.

⁹ I must point out that there are some items that have to be turned over to give the defendant notice but generally these will be in the court “shuck” which is accessible to the defense attorney anyway. One specific example that comes to mind is the requirement under case law and statute that the defendant be informed of the results of any chemical tests (breath or blood) in a DWI case.

¹⁰ Heck, that’s true of everybody, isn’t it?

There will probably be a few instances where you legitimately want to limit access to your file. In these cases, let the prosecutor know beforehand about your concerns so that you can work together to determine the best course of action.

IMPORTANT HELPFUL HINT MOSTLY UNRELATED TO DISCOVERY

For those of you who have accounts on any of the social networking sites such as MySpace or Facebook, please be careful and watch what types of things you post, lest they come back and bite you.

A New York police officer lost a case in court when the defense attorney argued that his client had been framed. As evidence of that theory, he was allowed to introduce the officer's MySpace page where the officer had put his mood as "devious." In addition, the jury was told of the officer's Facebook status which read "Vaughn is watching 'Training Day' to brush up on proper police procedure."¹¹ The officer had also commented on a video clip where an officer punched a handcuffed man saying "If he wanted to tune him up some, he should have delayed cuffing him" and "If you were going to hit a cuffed suspect, at least get your money's worth 'cause now he's going to get disciplined for" a relatively light punch.

These types of comments would most likely be admitted into evidence here in North Carolina as well. Any hard-working, thorough attorney can use things said in a joking fashion on one of these sites and use them against you in front of a jury. Just be careful what you put out there. You can read the article about this case at

http://www.nytimes.com/2009/03/11/nyregion/11about.html?_r=2&scp=2&sq=myspace&st=cse

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¹¹ "Training Day" is a movie starring Denzel Washington as a rogue and dirty vice detective. While Denzel is a brilliant actor, his character most definitely did NOT employ "proper police procedure."