

# **RECIPROCAL DISCOVERY AND REPORT WRITING**

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## 1. **OVERVIEW OF RECIPROCAL DISCOVERY LAW**

- A. All discovery for both state and defense is now by demand. Used to be by both motion and demand. Demand means if they ask for it and it is an item listed under 971.23, must provide.
- B. 971.23 covers:
  - a. What a district attorney must disclose to the defense.
  - b. What the defense must disclose to the district attorney.
  - c. Protective Orders/ In camera Proceedings.
  - d. Sanctions/consequences for not complying.
  - e. Alibi.
- C. **DEFENSE NOW MUST PROVIDE DEFENSE WITNESS LIST UPON DEMAND BY STATE.**
  - a. Important for investigator to know of this because failure to get info to the attorney of helpful witnesses and addresses timely could result in sanctions.

## 2. **THE DISTRICT ATTORNEY OBLIGATIONS:**

A district attorney must disclose to the defense **upon demand**, *within a reasonable amount of time* before trial:

DEMAND: A request

Reasonable amount of time before trial: Not set in stone. Know local practices.

- a. Written or recorded statements concerning the alleged crime made by defendant, a summary of defendant's statements concerning the crime and the names of witnesses to defendant's written statements. 971.23(1)(a)(b).
- b. Defendant's criminal record. 971.23(1)(c).
- c. Physical evidence the state intends to offer at trial.
- d. Results of scientific testing, experiment or comparison, including the results of any physical or mental examination. 971.23(1)(e).
- e. Criminal records of state witnesses. 971.23(1)(f).
- f. A list of witnesses *and their addresses* that the state intends to call at trial. Rebuttal witnesses or those called solely for impeachment do not have to appear on the list. 971.23(1)(d).
- g. Any relevant or recorded statements of a witness on the state's witness list. Includes videotaped oral statements of a child under 908.08, any reports or statements of experts made in connection with the case or, if an expert does not prepare a report or statement, a written summary of the expert's findings or the subject matter of his testimony. 971.23(1)(e).
- h. Any exculpatory evidence. 971.23(1)(h).

### 3. **THE DEFENSE OBLIGATIONS:**

The defense must disclose to the state **upon demand** *within a reasonable amount of time* before trial:

- a. A list of witnesses and their addresses. This does NOT include witnesses who are *solely* rebuttal witnesses or impeachment witnesses. 971.23(2m)(a). Constitutionality upheld in St v. Revels, 221 Wis. 2d 315 (1998).

b. Any relevant written or recorded statements of a witness on the defense list, any reports or statements of experts made in connection with the case, or, if an expert does not prepare a report or statement, a written summary of the expert's findings or the subject matter of their testimony, includes result of any physical or mental examination, scientific test, experiment or comparison *that the defense intends to offer in evidence at trial.* 971.23(2m)(am).

Often the investigator is being called for impeachment or purposes. In those circumstances, investigator need not be on the list. However, be careful. Must be solely for impeachment or rebuttal.

c. Criminal record of any defense witnesses if known to defense. 971.23(2m)(b).

Does not include defendant.

Always run record check on any potential defense witnesses. Can't claim I didn't look, so I didn't know. Records too easy to search for today.

d. Physical Evidence the defense intends to introduce at trial. 971.23(2m)(c).

4. **Protective Orders are available.** 971.23(6)

a. available to either party.

5. **In-camera Inspections.** 971.23(6m).

a. Either party may move for an in-camera inspection by the court of any document required to be disclosed under the discovery statute for the purpose of masking or deleting any material which is not relevant to the case being tried. The court *shall* mask or delete any irrelevant material.

6. **BOTH PARTIES OBLIGATIONS: CONTINUING DUTY TO DISCLOSE.** 971.23(7).

a. If, subsequent to compliance with discovery and prior to or *during* trial, a party discovers additional material or witnesses, they *shall* promptly notify the other party of the existence of the same.

b. Includes changes in address. Important for investigators to be aware of this requirement. Even if after interview and investigation of witness completed.

DAs offices not very good at all in this regard. How many times do you get investigation request with an address based on police report or original witness list and the individual has moved.

This obligation applies to defense as well.

7. **SANCTIONS/CONSEQUENCES FOR FAILING TO COMPLY.** 971.23(7m).

- a. Sanctions implies only the lawyer is getting spanked. But the client and their case can also suffer, so it can really be consequence to them.
- b. Court shall exclude any witness not listed or evidence not presented for inspection and copying unless good cause is shown for failure to comply. Court may grant continuances or recess. Within trial court's discretion. State v. Hahn, 221 Wis. 2d 670 (1998).
- c. The court can advise the jury of any failure or refusal or of any untimely disclosure of material or information required to be disclosed by the prosecution or the defense.

8. **NOTICE OF ALIBI.** 972.23(8).

- a. Must be given 30 days before trial stating with particularity where the defendant claims to have been when the crime is alleged to have occurred along with the names and addresses of witnesses to the alibi who will testify. 972.23(8).

In addition to witness list upon demand.

9. **FAILURE TO CALL WITNESS ON A LIST**

- a. Jury never hears that a party failed to call a witness listed on a witness list.

Can still argue missing witness(es) but just can't cite witness list.

## 10. DEFENSE INVESTIGATOR REPORTS

- a. A "statement of a witness"  
Under 971.23(2m)(am), statements of witnesses that must be provided to the state are limited to those which are "relevant written or recorded statements."

\*must be relevant written or recorded statements

- b. This definition does not include attorney notes, investigator notes or summaries of what a witness told the investigator.

State v. Hereford, 195 Wis. 2d 1054 (1995).

Hereford case was before the discovery law was changed, but the language of the new statute concerning definition of statement of witness is virtually identical to that of old law.

In Hereford, the court ruled that under 971.24 (the old discovery law), statements required to be produced must be "written or phonographically recorded" and that the statute did not apply to notes of defense counsel of interviews with witnesses; or to lengthy and detailed reports by a defense investigator summarizing what witnesses told him in pretrial interviews. Also see Pohl v. State, 96 Wis. 2d 290 (1980) and State v. Lenarchick, 74 Wis. 2d 425 (1974).

- c. If the defense investigator takes the stand to impeach a witness, the investigator's report becomes discoverable. However, as long as for rebuttal or impeachment, not required to provide this to state in advance. But be careful because must be limited to rebuttal or impeachment. Includes memo books of the investigator as well as reports.

- d. Discoverability of statements of witnesses limited under the discovery statute to those which a party intends to call at trial.

**11. OPENING THE DOOR TO MAKING THE UNDISCOVERABLE DISCOVERABLE!!!**

a. HOW TO MAKE YOUR REPORTS DISCOVERABLE:

1. Have the witness sign your notes or report.
2. Read the notes back to the witness and have them acknowledge the accuracy of the notes.
3. Have the investigator testify.
4. If the defense attorney examines the witness about a statement to the investigator. (becomes discoverable at that point).
5. Taking a written or recorded statement from the witness. NOTE: statute limits the discoverability of statements of witnesses to those which a party intends to call.

**12. WHAT DOES ALL THIS MEAN ABOUT WRITING INVESTIGATIVE REPORTS**

- A. You are performing work on each case under the license of the attorney assigned to the case, so always check with them about whether they want an actual report from you.
- B. Always pay attention to whether what you are obtaining is for impeachment (discrediting) or is it new information.
- C. Rarely get called as a witness but don't drop your guard or get complacent. Always write report as if you are going to have to testify and defend your work on the case. A good, solid, detailed report will help the attorney know all the information and will stand up well in court. About the time you think you won't be called as a witness, you will! You know how we pick

apart reports of police officers. A seasoned prosecutor will do the same to yours.

- D. Prosecutors don't like the principles in Hereford and are looking for the right case to try to get it overturned with respect to defense investigator notes and reports. Probably will never be successful in doing so, but they will be trying.
- E. Judges are probably not familiar with Hereford.
- F. Even if witness wants to give you a written statement, defense is under no duty to take one. Check with the attorney handling the case.
- G. Defense cannot deliberately fail to acquire addresses of witness whom defense intends to call at trial in order to avoid disclosure to prosecutor. In re Littlefield, 851 P. 2d 42 (Cal. 1993).
- H. To write v. not to write.... Check with the attorney on the case. This decision should probably not be based on concern of having to turn report over to state (in light of Hereford) but on issues such as time, need, likelihood of trial, etc.