

# Discovery

How to get what you need, and how  
to be a pain in the ass when you  
don't.

# PART ONE

What the State Must Disclose

# Misconceptions

- Discovery is a one-time exchange that is then “complete.”
  - No—it’s an ongoing obligation up to and even during trial.
- DA’s Open File policy means I don’t have to file a discovery demand.
  - No—obligations extend beyond what’s in the file.

# The Demand

- Always file a demand.
  - Most obligations only apply “upon demand.”
  - Need a record of demand to ask for sanctions.
- Demand must be filed with DA’s Office.
  - File with court if they will accept it.
- Demand should at least mirror the statute.
  - SPD has a pattern “kitchen sink” demand.
  - Specific demands for specific issues are best.

# The Statute

- Section 971.23(1) – What a district attorney must disclose to a defendant.
  - “Upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant...all of the following...if it is within the possession, custody, or control of the state.”

# General Problems

- “upon demand.”
- “a reasonable time before trial.”
- “if it is within the possession, custody, or control of the state.”
  - “State” – not DA
  - “Control” can include things that they don’t have but know they could easily get.
  - Does not say “exclusive.”

# What is in there? (1/6)

- (a) Written or recorded statements made by the defendant, and the names of any witnesses to these statements.
  - Could include officers or other witnesses not named in the reports.
    - For example, if there were three cops in the interview room and only one wrote a report, consider a specific demand for the identities of the other cops.

# What is in there? (2/6)

- (b) A written summary of all oral statements of the defendant which the district attorney plans to use, and the names of any witnesses to the statements.
- (bm) Wiretap evidence.
- (c) The defendant's criminal record.

# What is in there? (3/6)

- (d) List of witnesses the state intends to call at trial.
  - Requires only names and addresses.
  - State does not have to list witnesses that they have decided not to call.
  - State does not have to list rebuttal or impeachment witnesses, even if they have them under subpoena.

# What is in there? (4/6)

- (e) “Any relevant written or recorded statements of a witness named on a list under par. (d)...”
  - Not just police reports! Includes letters, emails, voicemails, victim impact statements.
  - Limited by the witness list.

# What is in there? (5/6)

- (e) (*continued*) ...including recordings of a child under 908.08, expert reports or a written summary of an expert's findings or proposed testimony, and the results of any physical or mental examination, scientific test, experiment, or comparison that the state intends to offer at trial.

# What is in there? (6/6)

- (f) Criminal record of any prosecution witness.
  - DA must make good faith efforts to obtain records from other jurisdictions if defense specifically asks. Jones v. State, 69 Wis. 2d 337 (1975)
- (g) Any physical evidence.
  - Usually need to demand inspection.
- (h) Any exculpatory evidence!

# Brady v. Maryland

- 373 U.S. 83 (1963)
- “We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”

# Continuing Duty

- 971.23(7): All of the obligations under 971.23 continue through and during trial.
- Requires each party to “promptly notify” the other party upon learning of new discoverable material.

# Specific Issues

- Inspection
- Preservation of Evidence
- Demand for Scientific Testing
- Cell Phones
- *In Camera* Inspections / Shiffra
- Specific Demand for DNA Cases
- Confidential Informants

# Inspection

- For physical evidence, usually takes place at the police department.
- You can bring investigators, experts, if applicable.
- May be restrictions on actually touching it, but you can inspect it thoroughly, take photos, etc.
- If they have video or computer evidence that they can't copy, they need to let you view it.

# Preservation of Evidence

- Key items of evidence may be destroyed if you don't act, and the remedies for the destruction are limited unless you can prove that the State knew the evidence was exculpatory.
- 911 calls, surveillance videos, automobiles, blood samples.
- A simple Demand for Preservation of Evidence puts them on notice.

# Demand for Scientific Testing

- 971.23(5) – Can file a motion for the production of any item of physical evidence for scientific analysis.
  - Under this section, you have to find and pay for your own expert.
- 165.79(1) – Allows felony defendant, with court approval, to use State Crime Lab for testing, and the results are privileged.

# Cell Phones

- Can make a generic demand for inspection, or a demand for scientific testing.
- Often, these demands result in a dump of all the data on the cell phone.
- Be careful what you wish for.

# *In Camera* Inspections

- General: 971.23(6m) allows either party to request an *in camera* inspection of any document for the purpose of redacting irrelevant material.
- Shiffra / Green: special motion for requesting privileged information, commonly medical or mental health records. State v. Green 2002 WI 68.

# DNA / Crime Lab Cases

- Specific demand for discovery will get you a wealth of information.
  - Make it separate from the general demand, and ask the DA to forward your demand to the Crime Lab.
  - Call your forensic practice coordinator for guidance.
- This is necessary if you want a second opinion, but also is vital for the cross of the lab analyst. If your case requires an effective cross of the analyst, you must have and understand the full file, not just the conclusions.

# Confidential Informants

- 905.10 - Creates a government privilege for informants, but if the informant's testimony is "necessary to a fair determination...of guilt or innocence" or "relied upon to establish the legality of the means by which evidence was obtained," the judge can order an *in camera* disclosure. If the judge determines that disclosure is necessary, it can be ordered.

# PART TWO

This isn't a fair trial, it's a criminal trial! (Or, what you have to disclose.)

# The Big Difference

- There is no defense Brady. Your obligations are solely statutory, and you do not have any general duty to disclose inculpatory evidence.

# Our Statute – 971.23(2m)

- Same general limitations:
  - Upon demand
  - Within a reasonable time
  - Materials within our possession, custody, or control.
- Same requirement to disclose a witness list, criminal record of our witnesses, and any physical evidence.

# Defense Witness Statements

- 971.23(2m)(am) – We have to disclose relevant written or recorded statements of our witnesses.
  - We do not have to provide a summary of oral statements, like the State does for the defendant's statements.
  - That means interviews and conversations with our witnesses to not have to be disclosed. (Unless we want to)

# Investigator's Reports

- Your investigator's notes are typically not a statement of the witness, and therefore not discoverable unless:
  - The witness actually writes out a statement.
  - The witness reads the investigator's reports or notes and signs it or otherwise adopts it as his or her statement.
- If the witness testifies, and then you call the investigator to impeach the witness, then the investigator's report becomes discoverable.
  - Since this is rebuttal / impeachment, you technically don't have to list your investigator as a witness or turn over the report until you actually call your investigator to the stand.

# Strategic Concerns

- Depending on your jurisdiction, your prosecutor, and the merits of your case, you may wish to disclose more than you are strictly required to disclose.
- Depending on your judge and prosecutor, you may wish to avoid being accused of “trial by ambush” even when you are legally in the clear.
  - Judge could allow a continuance or even exclude evidence under 904.03 if it’s a major surprise to the prosecutor.

# Alibi – 971.23(8)

- You must disclose an alibi defense at least 30 days before trial, or all alibi evidence can be excluded.
- Have to disclose the location and the names and addresses of any witnesses.
- **WARNING:** If your theory involves your client being in any different physical location than the state's theory, that could be construed as an alibi, even if you don't have any alibi witnesses:
  - Mistaken ID
  - OWI – Client was in the passenger seat, someone else was driving.
- Play it safe, or you could be foreclosed from arguing your theory of defense.

# PART THREE

How to be a pain in the ass: deadlines, motions to compel, and sanctions.

# You're not getting what you want. Now what?

- Consider filing a motion to establish a schedule for discovery.
  - Some counties may have a court rule or practice for this, some may not.
  - If discovery seems to be taking longer than normal, consider filing a motion for continuance (if client is on board with delay) along with your scheduling motion. Efficiency-oriented judges may take notice that State is clogging their calendar, and you are setting up to establish speedy trial complaints later.

# Now What? (continued)

- A motion to compel.
  - Very straightforward—we are entitled to X, we properly demanded X, we believe we have passed the “reasonable time prior to trial” point, and the State has not provided X.
  - Ask for a hearing.
  - Normally, this gets a response from the DA.
- (Be advised that a motion to compel is typically seen as a pretty aggressive move. You should be pretty sure that the DA is in the wrong and has had a fair chance to make it right. Talk to a mentor.)

# Late Disclosure

- What do you do if new witnesses, new reports, or other new evidence is sprung on you at the last minute before, or during, trial?
- Request for Sanctions, 971.23(7m)

# Sanctions - The Basics

- Three Step Analysis for a Late Disclosure:
  - (1) Was there a proper discovery demand?
  - (2) Did the State fail to comply within a “reasonable time prior to trial”?
  - (3) Was there good cause for the failure to comply?

# Good Cause

- Information that the DA claims he or she did not have until the last minute.
  - Be careful about this excuse—the discovery obligation applies to materials within the possession, custody, or control of “the state,” not the prosecutor. Information that was known to the police but not part of the prosecutor’s file is still discoverable, and the prosecutor should have systems in place to ensure that all discoverable information is provided to his or her office in a timely fashion.

# Then What Happens?

- 971.23(7m) – Language of statute suggests that exclusion of the evidence is the default remedy.
  - “The court may in appropriate cases grant the opposing party a recess or a continuance.”
- Case law suggests that a continuance is actually preferred over excluding evidence.
  - Irby v. State 60 Wis. 2d 311, 210 N.W.2d 755 (1973), among many others.

# Uncommon Sanctions

- The statute authorizes the court to advise the jury of a failure or refusal to disclose information, or of an untimely disclosure of information.
  - Normally, either the evidence is excluded, or you've been given a continuance, so I don't know what the instruction really accomplishes.
- The court has contempt powers—unusual, but a refusal to comply with a direct order to produce discovery by a certain date might open the DA up to contempt.

# Conclusion – Discovery is a Start

- Discovery only gets you what the State has.
- Talk to your client
- Talk to witnesses
- Subpoena duces tecum – cell phone records, financial records, etc.
- Open records requests