DISCOVERY

Wis. Stat. § 971.23

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Revised by Attorney Manager Margaret Johnson
for Misdemeanors from A to Z--July 2010

The statute is organized into 5 major sections:

1. What a district attorney must disclose to the defense
2. What the defense must disclose to the district attorney
3. Protective orders and in camera proceedings
4. Sanctions
5. Notice of alibi

What a district attorney must disclose to the defense upon demand, within a reasonable time before trial:

Any written or recorded statement concerning the alleged crime made by defendant, including the testimony of the defendant in a secret proceeding under s. 968.26 or before a grand jury, and the names of witnesses to defendant's written statements. *Sec. 971.23(1)(a), Stats.*

• A written summary of all oral statements, of the defendant which the district attorney plans to use in the course of the trial and the names of witnesses to the defendant's oral statements. *Sec. 971.23 (1)(b), Stats.*

• Evidence obtained in the manner described under s. 968.31(2)(b) (electronic intercept), if the district attorney intends to use the evidence at trial.

– Sec. 968.31 Interception and disclosure of wire, electronic or oral communications prohibited.

• A violation is a class H felony; however, there are significant exceptions, including where the person is a party to the Communication or one of the parties to the communication has given prior consent to the interception

• Defendant's criminal record. *Sec. 971.23(1)(c), Stats.*
• A list of witnesses and their addresses whom the DA intends to call at trial. Previously this list had to be provided only if the defense offered a witness list to the state. Rebuttal witnesses or those called only for impeachment do not have to appear on this list. *Sec. 971.23(1)(d), Stats.*
• Results of any physical or mental examination, scientific testing, experiment, or comparison. This information is available upon demand; no motion required to be brought. *Sec. 971.23(1)(e), Stats.*
• Any relevant or recorded statements of a witness on the list above, including audiovisual recording of an oral statements of a child under section 908.08, Stats., *Sec. 971.23(1)(e), Stats.*

• 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. *Sec. 971.23(1)(e), Stats.*

• Criminal records of prosecution witnesses if known to DA. *Sec. 971.23(1)(f), Stats.*

• Physical evidence the state intends to offer at trial. This evidence is available upon demand; no motion required to be brought. *Sec. 971.23(1)(g), Stats.*

• Exculpatory evidence. *Sec. 971.23(1)(h), Stats.*

What a defense attorney must disclose to the prosecutor upon demand within a reasonable time before trial:

- A list of witnesses and their addresses, except the defendant, rebuttal witnesses, or impeachment witnesses. *Sec. 971.23(2m)(a), Stats.*
- Any relevant written or recorded statements of a witness on the list above; 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, including the results of any physical or mental examination, scientific test, experiment or comparison that the defendant intends to offer in evidence at trial. *Sec. 971.23(2m)(am), Stats.*

- Criminal record of defense witnesses other than the defendant if known to the defense attorney. *Sec. 971.23(2m)(b), Stats.*

- Physical evidence the defense intends to introduce at trial. *Sec. 971.23(2m)(c), Stats.*

Other portions of the statute
Protective orders are available under section 971.23(6), Stats.

- Protective orders are available to either party.
- Depositions may be ordered to preserve testimony of threatened witnesses. If the witnesses later become unavailable or change their testimony, the deposition is admissible at trial. Because the names of the witnesses may not be divulged before the taking of the deposition, this section may be subject to challenge as depriving the defendant of effective assistance of counsel since there is no opportunity to investigate the witness and develop appropriate questions for cross examination. (see, Washington v. Crawford)

- **In camera proceedings.** Either party may move for an in camera inspection by the court of any document required to be disclosed under sections 971.23(1) or (2m), Stats., for the purpose of masking or deleting any material that is not relevant to the case being tried. The court shall mask or delete any irrelevant material. *Sec. 971.23(6m), Stats.*
- (Note: if this editing occurs, an unedited copy of the inspected documents should be sealed for review by the appellate court, *State v. Van Ark,* 62 Wis. 2d 155, 215 N.W.2d 41 (1974).)

Continuing duty to disclose
Sec. 971.23(7), Stats

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

Sanctions for failure to comply
Sec. 971.23(7m), Stats.

- The court shall exclude any witness not listed or evidence not presented for inspection and copying ***unless good cause is shown for failure to comply. The court may in appropriate*** cases grant an opposing party a recess or continuance.
- The court may 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.

Notice of Alibi
Sec. 971.23(8), Stats.

- Notice of alibi must be given at least **thirty (30)** days before trial, stating particularly 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. Enlargement of time for cause can be sought. *Sec. 971.23(8), Stats.*

• The federal and state courts are split as to whether notice is required when only the defendant testifies. Alicea v. Gagnon, 675 F.2d 913, 924-25, (7th Cir. 1982) (no notice required); State v. Burroughs, 117 Wis. 2d 293, 304-05, 344 N.W.2d 149 (1984) (notice required, despite Alicea).

• Within twenty (20) days after receipt of the notice of alibi, the district attorney must furnish the names and addresses of witnesses in rebuttal to discredit the defendant's alibi. *Sec. 971.23(8)(d).*

• 971.23(8)(e), cross-references with witness lists under subsection under (1)(d) or (2m)(a) and requires this witness list to be disclosed in addition to the regular witness list.

Payment of costs

- Section 971.23(10), Stats., requires the state public defender to pay for photocopying of discovery materials, but imposes no such requirement on prosecutors.

Other statutory sections

- **Crime Lab Testing. See section 971.23, Stats., and** section 165.79, Stats. **Evidence privileged. "Evidence,** information and analyses of evidence obtained from law enforcement officers by the laboratories is privileged and not available to persons other than law enforcement officers nor is the defendant entitled to an inspection of information and evidence submitted to the laboratories by the state or of a laboratory's findings, or to examine laboratory personnel as witnesses concerning the same, prior to trial, except to the extent that the same is used by the state at a preliminary hearing and except as provided in sec. 971.23."

- **Revocation Hearings. Sections 304.06(3d) and** 973.10(2g), Stats., are created to require a district attorney to disclose the existence of any videotaped oral statements of a child under section 908.08 to the defense upon demand before a revocation hearing and to arrange for the defense to view the video.

- **Jury Trials. Section 972.10(5), Stats., is amended to** state that "No instruction regarding the failure to call a witness at the trial shall be made or given if the sole basis for such instruction is the fact that the name of the witness appears upon a list furnished pursuant to sec. 971.23."

What is a "statement of a witness"?

- Section 971.23(2m)(am), Stats.
  - – Statements of witnesses that must be provided to the state are limited to those which are "relevant written or recorded statements."
  - – This language is virtually identical to the old statute, sec. 971.24, Stats., which defined statements as those that were "written or phonographically recorded."
  - – The Wisconsin statute differs from California's, which also requires that reports of statements of witnesses be produced.

- Case Law
  – This definition does not include attorney notes, investigators' notes, or summaries of what a witness told the investigator. In State v. Hereford, 195 Wis. 2d 1054, 537 N.W.2d 62 (Ct. App. 1995), the court ruled that under former section 971.24, statements required to be produced must be "written or phonographically recorded." Therefore, 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. This holding is consistent with prior Supreme Court rulings in Pohl v. State, 96 Wis. 2d 290, 310-311, 291 N.W.2d 554 (1980) and State v. Lenarchick, 74 Wis. 2d 425, 247 N.W.2d 80 (1974).

– If the investigator takes the stand to impeach a witness, the investigator's report becomes discoverable under United States v. Nobles, 422 U.S. 225 (1975). However, since the investigator is a rebuttal or impeachment witness, the statute does not require disclosure to the State in advance of trial. Memo books of the investigator, as well as reports, are producible under State v. Groh, 69 Wis. 2d 481, 485, 230 N.W.2d 745 (1975), if the investigator testifies.

– Be aware that one can make investigative reports discoverable statements under the statute and case law by doing any of the following: the investigator reads back his or her notes to the witness and has the witness acknowledge they are accurate; the investigator has the witness sign the notes; the investigator takes a written or recorded statement from the witness. Goldberg v. United States, 425 U.S. 94, 98, 96 S. Ct. 1338 (1976).

- Previously, statements taken from witnesses were discoverable under section 971.24 regardless of who called the witness. State v. Lenarchick, 74 Wis.2d 425, 451, 247 N.W.2d 80 (1974). The new statute limits the discoverability of witness statements to those witnesses a party intends to call at trial.

Prior Statements of Witnesses
Section 906.13, Stats.

- Section 906.13 is an evidentiary statute, not a discovery statute.
- It applies to prior statements of witnesses, whether written or not, and requires that a prior statement made by a witness must be disclosed to opposing counsel only upon opposing counsel's request and only after the witness has been examined concerning the statement.
- If one examines a witness at trial on direct or cross examination about a statement made to a defense investigator, the statement becomes discoverable under section 906.13, and the investigative report containing the statement must be turned over to the prosecutor upon request. Hereford, 195 Wis. 2d at 1076-77.

Expert Witnesses

What is discoverable - California Law (Wisconsin's discovery statute is based on California's discovery statute.)

• Original documentation of expert's examinations, including handwritten notes of expert's findings, are discoverable. Hines v. Superior Court, 20 Cal. App. 4th 1818, 25 Cal. Rptr.2d 712, 714 (Ct. App. 1993). "Findings" are defined as factual determinations of the expert from observations made during an examination. All random notes that might be lodged in an expert's file are not discoverable. Id.

• Pretrial discovery of subsidiary information (such as reports of other examiners) upon which an expert relies, but which will not be offered into evidence, is not permissible. Id., 25 Cal. Rptr.2d at 715.

• Defendant required to disclose responses to standardized tests administered by psychologist when psychologist relied on defendant's responses in forming an opinion and psychologist was identified as a defense expert. Woods v. Superior Court, 25 Cal. App.4th 178, 30 Cal. Rptr.2d 182, 184 (1994).

- Portions of psychologist's report that reflect defendant's statements about the charged offense held privileged communication and therefore did not have to be provided to prosecutor in pretrial discovery. Andrade v. Superior Court, 46 Cal. App. 4th 1609, 54 Cal. Rptr. 2d 504, 507-08 (Ct. App. 1996). But see subsections B.4. and B.5. below, for important differences in Wisconsin law.

Expert Witnesses
Wisconsin Law

• The Wisconsin discovery statute, unlike California's, contains a provision that if the expert does not prepare a report or statement, a written summary of the expert's findings or subject matter of his or her testimony must be provided to the opposing party. *Secs. 971.23(1)(e) & (2m)(am), Stats. The two statutes are otherwise* identical regarding reports of experts.

• Defendant is entitled to a pretrial psychological examination of the victim when State gives notice that it intends to introduce evidence generated by experts hired specifically for purpose of examining victim and supplying testimony at trial. State v. Maday, 179 Wis. 2d 346, 357-58, 507 N.W.2d 365 (Ct. App. 1993).

• Section 905.04(c), Stats., provides that the doctorpatient privilege does not apply when the patient's mental condition is an element of a claim or defense. Thus, a plea of NGI (insanity) waives the confidentiality of relevant treatment records. State v. Taylor, 142 Wis.2d 36, 41, 417 N.W.2d 192 (Ct. App. 1987). Also, after entry of a NGI plea, the State may obtain reports upon which an expert relies in reaching an opinion about the defendant's mental responsibility. State v. Jacobsen, 164 Wis.2d 685, 686-87, 476 N.W.2d 22 (Ct. App. 1991).

• In a homicide trial, the doctor-patient privilege does not protect statements relating "directly to the facts or immediate circumstances of the homicide." *Sec. 905.04(d), Stats.*

Remedies for Delays and Failures to Provide Discovery

Duty of the Parties to Provide Discovery

• Duty rests upon prosecution to obtain all evidence in possession of investigative agencies of the state. Wold v. State, 57 Wis.2d 344, 349, 204 N.W.2d 482 (1973). Wisconsin case law states the test is due diligence, id. at 349-350; the district attorney is not required to consult every law enforcement officer who conceivably could have information about a case under investigation, State v. Maass, 178 Wis.2d 63, 71, 502 N.W.2d 913 (Ct. App. 1993).

• Additional material that comes to the district attorney before or during the trial is still admissible if the district attorney promptly reports the discovery of such evidence to defense counsel. Id., 178 Wis.2d at 72-73.

• However, the United States Supreme Court has held that a district attorney has the duty to consult with law enforcement agencies when providing discovery and that merely providing what is in a DA's file may not be enough - see Kyles v. Whitley, 115 S. Ct. 1555 (1995).

- Parties should limit witness lists to witnesses they have serious intention to call; discovery not to be used to harass or place opposite party under unreasonable burden of preparation. Irby v. State, 60 Wis. 2d 311, 320-321, 210 N.W.2d 755 (1973).
- Defense cannot be required to disclose identity of expert witness if undecided whether expert will testify at trial. Sandeffer v. Superior Court, 18 Cal. App. 4th 672, 22 Cal. Rptr. 2d 261, 264 (Ct. App. 1993).
- 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, 5 Cal. 4th 122, 851 P.2d 42, 51 (Cal. 1993).

• Court may exclude defense witness testimony if defense counsel failed to turn over witness' statement in discovery when witness was listed on defense witness list.

– Statements of witnesses who are strictly impeachment or rebuttal witnesses do not have to be disclosed; however when defense wants the option of

calling the witness for other purposes, witness must be disclosed on list and relevant written or recorded statements of the witness must be turned over to the prosecution.

State v. Gribble, 2001 WI App 227.

Exclusion of Evidence

• Failure to comply with discovery may result in exclusion of evidence. *Sec. 971.23(7m)(a), Stats.; State v. Ruiz,* 118 Wis.2d 177, 197, 347 N.W.2d 352 (1984).

– "The court **shall exclude any witness not listed or evidence not presented for inspection or copying** required by this section, **unless good cause is shown for failure to comply." (Emphasis added)** *Sec. 971.23(7m)(a), Stats.; see also State v. Wild,* 146 Wis.2d 18, 429 N.W.2d 105 (Ct. App. 1988).

• Negligence or the absence of bad faith does not necessarily constitute "good cause." State v. Martinez, 166 Wis.2d 250, 259, 479 N.W.2d 224 (Ct. App. 1991). Inadequate trial preparation is not good cause. Wold v. State, 57 Wis. 2d 344, 350-51, 204 N.W.2d 482 (1973). The burden of showing good cause is on the party who failed to comply with discovery. Martinez, 166 Wis.2d at 257.

• Despite the statute's mandatory language and the case law on "good cause," an argument can be made that in lieu of excluding evidence, the court may advise the jury of the discovery violation. See *sec. 971.23(7m)(b), Stats.*

Constitutional limits on exclusion of defense evidence

- The U.S. Supreme Court has ruled that exclusion of a defense witness' testimony may be an appropriate sanction and does not violate the compulsory process clause when there is evidence that defense counsel, intending to gain a tactical advantage at trial, deliberately withheld listing a prospective defense witness. Taylor v. Illinois, 484 U.S. 400, 415, 108 S. Ct. 646 (1988).
- Exclusion is not permissible every time a discovery rule is violated. Alternative sanctions are adequate and appropriate in most cases. Michigan v. Lucas, 500 U.S. 145, 152, 111 S. Ct. 1743 (1991).

• California courts have held that exclusion sanctions may be imposed against a criminal defendant only for the most egregious discovery abuse. People v. Edwards, 17 Cal. App.4th 1248, 22 Cal. Rptr.2d 3, 12 (1993). Reliance on Edwards is erroneous; Edwards is based on the California statute; the Wisconsin statute on the other hands mandates suppression as a remedy/sanction unless there is good cause for the discovery violation.

• It is not prejudicial error for court to permit testimony by witnesses omitted from State's witness list when defense does not claim surprise or prejudice. Kutchera v. State, 69 Wis.2d 534, 543, 230 N.W.2d 750 (1975).

• Destruction of evidence will not necessarily mandate exclusion; one must be able to demonstrate two facts:

  – The evidence possessed an exculpatory value that was apparent to those who had custody of it before it was destroyed, and;

  – The evidence was of such a nature that the defendant could not obtain comparable evidence by other reasonably available means. Arizona v. Youngblood, 488 U.S. 51, 56-59, 109 S. Ct. 333 (1988); California v. Trombetta, 467 U.S. 479, 488-89, 104 S. Ct. 2528; State v. Oinas, 125 Wis.2d 487, 490, 373 N.W.2d 463 (Ct. App. 1985); State v. Pankow, 144 Wis. 2d 23, 42-43, 422 N.W.2d 913 (Ct. App. 1988).

Continuance or Adjournment

- The court must determine the reason for noncompliance or tardy delivery of discovery. State v. Wild, 146 Wis.2d 18, 27-28, 429 N.W.2d 105 (Ct. App. 1988).
- Good cause found when the State made a good faith effort to obtain and deliver discoverable records but received such records late. Id.
- Granting of continuance or recess to aggrieved party is preferable to disqualifying a witness. Jones v. State, 69 Wis.2d 337, 352, 230 N.W.2d 677 (1975); Irby v. State, 60 Wis.2d 311, 322, 210 N.W.2d 755 (1973); Wild, 146 Wis.2d at 30.
- In determining whether a continuance is appropriate, the court must balance the nature of the discovery violation, the prejudice caused by the violation, and the prompt and efficient administration of justice. Wild, 146 Wis.2d at 29.

Other Sanctions

• The Wisconsin law allows the court to instruct the jury on a party's failure to comply with discovery. Sec. 971.23(7m)(b),Stats. A California opinion has approved the practice of instructing the jury that a party failed to comply with an order to produce discoverable evidence. People v. Edwards, supra, 22 Cal. Rptr.2d at 13. The court noted that such a sanction serves the purpose of discovery by allowing the prosecutor to argue that the defense concealed a potentially unfavorable document.

• Many courts have upheld contempt sanctions against counsel as an appropriate remedy for discovery violations; the initial draft of section 971.23 contained such a sanction, but it was removed. Nonetheless, the court has general contempt power under chapter 785, Stats.

• Under the subsection entitled "Protective order," sec. 971.23(6), the court has the broad authority to "make other appropriate orders" in the context of a motion regarding discovery. Although there is no similar language in the subsection on sanctions, some courts may attempt to impose costs or fashion other remedies for noncompliance. See also *sec. 804.12, Stats.* (sanctions for failure to comply with discovery in civil cases).

Ethical and Tactical Issues

- Duties to client: SCR 20:1.1 (competence); 20:1.3 (diligence); 20:1.6 (confidentiality); 20:1.7(b) (conflict between interests of client and attorney).
- Interactions with witnesses: SCR 20:1.7 (conflict of interest); 20:4.3 (dealing with unrepresented person); State v. Fosse, 144 Wis.2d 700, 706-07, 424 N.W.2d 725 (Ct. App. 1988) (defense attorney improperly advised witnesses about their rights).
- Candor with court and opposing party: SCR 20:3.3 (candor toward tribunal); 20:3.4 (fairness to opposing party).
- Supervision of and instructions to investigator or other non-lawyer: SCR 20:5.3 (responsibility regarding nonlawyer assistants).

What is a "reasonable period of time" before trial to disclose names, addresses, and statements of witnesses?

- Does reciprocal mean simultaneous?
  - – Sections 971.23(1) (prosecution's duties) and (2m) (defense's duties) both mandate discovery a "reasonable time before trial," so defense may have to convince the court to allow defense to provide discovery later than prosecution.
  - – Consider filing a motion in limine seeking to prevent discovery by the state of names & addresses & statements of defense witnesses unless the state then be required to turn over the same with respect to its rebuttal witnesses. Rely on Wardius V. Oregon, supra. Also see Caccitolo v. State, 69 Wis 2d 102.(1975). If the court denies, an interlocutory appeal can be taken.

• Under prior law, the Wisconsin Supreme Court approved the time period of fifteen to thirty days before trial as realistic for discovery of witness lists. State v. Irby, 60 Wis.2d 311, 319-20, 210 N.W.2d 755 (1973). The court acknowledged that in most criminal cases, "serious preparation is not commenced until shortly before trial." Id.

• Since defense investigative resources are limited and investigation is based in part upon materials obtained from prosecution, simultaneous discovery may impose an unreasonable burden upon the defense. See Irby, 60 Wis. 2d at 320-21 (purpose of discovery is to increase fairness of trial, not to place unreasonable burden on a party).

• Under prior law, the deadline for a discovery motion was ten days after arraignment. See State v. Humphrey, 107 Wis.2d 107,114, 318 N.W.2d 386 (1982). The new statute contains no specific time limits for discovery demands, motions to compel discovery, or motions for protective orders. Courts are likely to adopt local rules or policies in response to the probable increase in contested discovery issues.

What advice should be given to witnesses regarding potential interviews by police officers or prosecution investigators?

- Because of the holding in State v. Fosse, supra, counsel may want to provide witnesses with a brief written summary of their right either to speak or not to speak with anyone seeking to interview them about the case.

Motion for in camera inspection
Sec. 971.23(6m), Stats.

- This motion seeks judicial review of potential evidence to determine whether it should be disclosed before trial. The in camera procedure balances the defendant's due process rights against confidentiality interests. See, e.g., Pennsylvania v. Ritchie, 480 U.S. 39, 56-61, 107 S. Ct. 989 (1987); State v. Shiffra, 175 Wis.2d 600, 605, 499 N.W.2d 719 (Ct. App. 1993); State v. Migliorino, 170 Wis.2d 576, 585-596, 489 N.W.2d 678 (Ct. App. 1992).

• Counsel should consider a motion for in camera inspection of documents that are otherwise unavailable. Treatment records, personnel files, and social service records are among the types of documents that may be appropriate for in camera inspection. The defense may obtain in camera review of materials in the possession of a third party (for example, a treatment provider), as well as materials in the State's possession. See State v. Behnke, 203 Wis.2d 43, 55-57, 553 N.W.2d 265 (Ct. App. 1996); Shiffra, 175 Wis.2d at 606-07, State v. Navarro, 2001 WI App 225

• Before an in camera inspection occurs, the moving party must make a preliminary showing that the materials in question contain relevant evidence that may be helpful to the defense or necessary to a fair determination of guilt or innocence. Shiffra, 175 Wis.2d at 608. The materials sought must be material to the defense. Jessica J.L v. State, 223 Wis. 622 (Ct. App. 1998).

• If the complaining witness (or other record custodian) refuses to release records for in camera review, the court may suppress the witness' testimony. Behnke, 203 Wis.2d at 56; Shiffra, 175 Wis.2d at 612. The Shiffra court rejected the State's argument that in lieu of suppressing testimony, the court should allow evidence of the witness' refusal to waive confidentiality. 175 Wis. 2d at 612-13 n.4.

Others methods to obtain discovery

• In preparing for trial, remember that the discovery statute is not the only legal authority for access to potential evidence. The defense has a constitutional right to obtain exculpatory evidence. See, e.g., United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375 (1985); United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392 (1976); Ruiz v. State, 75 Wis.2d 230, 249 N.W.2d 277 (1977). The defense should make a specific motion for exculpatory evidence, describing with particularity the type of information sought. See State v. Humphrey, 107 Wis.2d 107, 115, 318 N.W.2d 386 (1982).

• Counsel should also consider using an open records request under Chapter 19, General Duties of Public Officials, and specifically sec. 19.35, Stats., “Access to Records, Fees”, or a subpoena duces tecum to gain access to evidence not available through the discovery statute.

Interlocutory appeal of adverse Rulings

- Order to disclose privileged or irrelevant material.

- Order denying access to discoverable material.

- Petition for leave to appeal must be filed within ten days of entry of written order. Sec. 809.50(1), Stats. Counsel may also need to obtain a stay of trial court proceedings.

Objection at trial to evidence withheld from discovery materials

- If State cannot show good cause for untimely disclosure, seek exclusion of evidence as mandatory remedy. See sec. 971.23(7m)(a), Stats.
- Alternatively, seek other remedies (e.g., adjournment, mistrial, jury instruction).
- Request opportunity to make a complete record regarding the discovery violation and its prejudicial effect. It may be necessary to conduct out-of-court investigation before making an adequate record.
- On appeal, a discovery error will probably be deemed harmless absent proof that the defense would have effectively rebutted the evidence if given advance notice.

Investigation

- Review all reports
- Meeting with investigator
  - Determine theory of defense
  - Due dates
- Visit Crime Scene
- Interview witnesses
- View Evidence