

Joint Budget Committee Meeting with District Attorneys
Thursday, February 21, 2013
1:30 to 3:00 pm

Participants

- Tom Raynes, Executive Director of the Colorado District Attorneys' Council (CDAC) and any District Attorneys who are members of CDAC
- Denver District Attorney Mitch Morrissey

CDAC RESPONSES TO JBC QUESTIONS

Discussion Topics

Managing the Costs of Prosecuting Criminal Cases

1. Given that locally elected district attorneys are responsible for prosecuting criminal cases on behalf of the State, is there any way to contain the costs of litigating such cases?

It depends. The cost of litigating is not a one sided equation. Many things have changed in the discovery realm over the last decade. First, the extent of the material requested by the defense in any given case has increased. There has been a significant movement over the last several years by the defense bar to demand that everything, no matter how insignificant, be provided in discovery. The only way to remedy this issue would be to alter Rule 16 as to the type and timing of discovery mandated at different phases in the proceedings. Many states do this. For example, some states require prosecutors only provide discovery before the first witness testifies at a hearing or trial. Under this model, many plea dispositions are reached before any discovery is produced or costs are incurred. The advantage to such an approach is that it would greatly reduce the annual discovery costs on a statewide basis. Short of such modifications, it is unlikely that the volume of discovery the prosecution is required to provide will change. Our present commitment to providing discovery at such an early stage in the criminal process results in high discovery costs. If the state wishes to continue with this requirement, adequate funding is required.

Second, technology, both a blessing and a curse, provides us with a large amount of new and significant sources of information. While the obvious issues like DNA and other forensic evidence issues are certainly present, there are also a multitude of sources for other evidence now that have to be accounted for, collected and provided in discovery. Things such as cell phones, video cameras, social network information, and other “public” media that provide evidence and relevant information are coming forth from witnesses and passive surveillance cameras like never before. This is all extremely important information and must be provided in discovery for a defendant’s attorney to effectively assess the strengths and weaknesses of a case. Another evolving difference is the increased use and cost of expert witnesses. The use of experts increases every year and the discovery related to them is significant. It is unlikely that there is any way to limit this amount of new information without jeopardizing the rights of the defendant.

Further, the courts fail to adequately keep cases moving forward in a timely manner and grant continuances, to either side, far too liberally. Every delay in a case results in a backup of all cases and an increased cost in the litigation. Courts need to apply the relevant standard of “for good cause shown” before allowing a case to be continued and hold all parties fully accountable for timely case preparation and diligence in their review of cases prior to hearings. This is one area that could be affirmatively improved in a manner that could help reduce the cost of litigation.

Managing and Sharing Discoverable Materials

2. What short-term and long-term steps could the General Assembly take to reduce state and local costs associated with sharing discoverable materials?

The key to long term cost savings in this area is a statewide movement toward electronic discovery. The most effective long term solution the legislature could address is funding a single case management system and any necessary hardware for all of Colorado’s local law enforcement agencies. Some DA’s offices deal with twenty or more different law enforcement agencies and are responsible for receiving reports and other discoverable information in whatever format a given agency provides. Some have the ability to send their information to DAs electronically, but this is rare. Most provide paper, disks, tapes, photos etc... in a variety of formats. The DA is then responsible for collating, copying and disseminating this material to the defense bar. Some DAs offices are equipped and staffed with the ability to put a person at a scanner and run all the paper files through by hand. Others do not yet have machines with this capability and merely make Xerox hard copies.

The short term remedy might be to fund any DAs office without the necessary hardware in moving forward technologically. This means more than just scanners. For this evolution to make any sense in terms of efficiency and cost savings, these offices will need the ability to use the electronic format internally also. In other words, the lawyers need laptops and other technology to make the scanned information of practical use to them in the “paperless” work environment need to ultimately reduce state and local costs. Local jurisdictions do not have the money to fund this type of necessary change. Something like a one-time significant IT grant from the legislature to CDAC for local DAs offices might make sense here but would we would need time to survey the needs and estimate and reasonable amount for the legislature to fund.

3. Identify those District Attorneys who currently provide discoverable materials in an electronic format, and any who are in the process of converting to an electronic format.

The public defender advises CDAC that he receives a little over 50% of his discovery electronically around the state. Several offices have moved toward complete electronic discovery. Others continue to attempt movement in that direction but are limited by funding and technology. The following jurisdictions provide some if not their entire discovery electronically: 1st, 4th, 5th, 6th, 8th, 10th, 17th, 18th, 19, 20th and 21st. The remaining jurisdictions provide some discovery in other non-paper format when viable such as zip drives, disks etc... Currently, CDAC is partnering with the 19th JD to create a completely electronic discovery program that will, upon completion, be transferable to all offices currently running the CDAC case management system, ACTION. What is yet to be

determined is the cost to the other offices to adapt and implement the use of this enhancement to the ACTION system. Non ACTION users could similarly adapt and provide such discovery in house.

All of this will require money. It should be noted that all of the developments and moves toward electronic discovery addressed in this answer have been locally funded. The CDAC case management system, ACTION, is funded through a combination of CDAC member assessments and federal grants. There is no state contribution to this system that is, in part, attempting to work toward a resolution of these discovery cost issues.

4. For those District Attorneys who provide discoverable materials in an electronic format:

- a. Describe the process of gathering and converting discoverable materials into an electronic format and how the process differs from a paper-based process.

The process mirrors providing all discovery via Xerox copies unless the law enforcement agencies have the ability (hardware and software) to send the entire discovery to the DA electronically. It requires a person at a scanner until the job is done.

- b. Describe the equipment, software, etc., that are used for this process.

Each office (and many jurisdictions have multiple offices) must, at a minimum, have people to do the work and a scanner, computers, and storage capability. An advanced version of Adobe software is typically necessary to create the .pdf files. Each office needs a computer network capable of handling the respective caseload.

- c. Provide any available information about the cost of converting from a paper-based to an electronic system, as well as the costs of maintaining such a system.

The primary and unavoidable cost in the absence of all law enforcement providing electronically to DAs, is the personnel and time required to go through the discovery and comply with statutory redaction requirements and then feed and organize the paper into the scanner. That person is then responsible for maintaining and providing all new information or discovery updates as they arrive in the office.

- d. Provide any available information about how an electronic discovery system affects the ongoing costs of a District Attorney's discovery unit.

The electronic discovery system focuses on the delivery of the discovery not the creation of it. Unless all law enforcement agencies have the ability to send all discovery to the DA in a complete and electronic format, there will always be the need for DA staff designated to the task of scanning the information into the system for production. One simple job of a staff member responsible for the scanning process is quality control. Discovery staff need to make sure everything is successfully downloaded and that if the material has to be printed out, defense is getting all of the appropriate information and not paying for duplicate or blank pages resulting from the scanning process.

Moreover, the obligation to review everything that comes in, whether in electronic format or not, will always remain an obligation of the DA's office prior to releasing discoverable information. The ethical rules require prosecutors to provide complete discovery to criminal defendants. As part of this duty to comply with all discovery requirements, prosecutors are held directly responsible for all discovery violations.

Finally, those responsible for discovery in each office are obligated to review every page of discovery received from law enforcement before it is provided to the defense. Generally speaking, these individuals also redact the personal and private information of victims and witnesses as required by law such as social security numbers. This is done in an effort to prevent identity theft and to ensure the safety of victims and witnesses.

5. Would District Attorneys support a long-term goal of transitioning to an electronic discovery system in all judicial districts (both for the prosecution and the defense)?

Yes.

6. If so, what are the short-term and long-term steps to achieving such a goal?

See answers to #1 and #2 above.

7. What role should the General Assembly play in achieving such a goal?

The General Assembly should engage in a meaningful examination of long term solutions with the District Attorneys and the defense bar to fund a transition toward a better statewide system for the 22 elected state officials, the DAs. The inherent flaw in our current funding system is that while the public defender, alternate defense counsel and judicial all have the ability to seek state funding for IT development and uniform case management, the District Attorneys operating budgets are locally funded and vary wildly in available resources. If the General Assembly seeks to create a meaningful and uniform approach to the discovery process on behalf of the criminal justice system in Colorado, it should consider funding this type of development for the prosecution side of the equation in a manner similar to the other pieces of the criminal justice system.

8. What state agencies, organizations, or individuals should be involved in preparing a more formalized action plan to achieve such a goal?

CDAC, Denver DA, PD, ADC, Attorney General, State Judicial and maybe both a rural and metro rep from both the Chiefs and one the Sheriffs.

The District Attorneys' legal obligation to provide Discovery (United States and Colorado Constitutions, Colorado Rules, and Sanctions)

I. U.S. AND COLORADO CONSTITUTION: A defendant has no constitutional right to discovery, *per se* (*Weatherford v. Bursey*, 429 U.S. 545 (1977)), but the prosecution has a constitutional duty under certain circumstances to disclose information to the defense under the due process clauses of the 5th Amendment (in federal cases) and 14th Amendment (in state cases). *United States v. Agurs*, 427 U.S. 97 (1976).

- **Brady Doctrine:** A defendant has a constitutional right to discovery of exculpatory information. (*Brady v. Maryland*, 373 U.S. 83 (1963); *People v. Villano*, 181 P.3d 1225 (Colo. Appl. 208). The *Brady Doctrine* is applicable to exculpatory and impeachment evidence. (*United States v. Bagley*, 473 U.S. 667 (1985); *People v. District Court (El Paso)*, 790 P.2d 332 (1990)).
- **Materiality:** In cases where evidence may be withheld by the prosecution, a standard of materiality will be applied by the Court. A defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the [State's] files," (*Pennsylvania v. Ritchie*, 480 U.S. 39 (1987)). "If a defendant is aware of specific information contained in the file...he is free to request it directly from the court, and argue in favor of its materiality." *People v District Court (El Paso)*, 790 P.2d 332 (Colo. 1990).

II. RULE 16: State courts may afford a criminal defendant greater protection under the due process clause of the state constitution than do federal courts under the federal constitution. In Colorado, this is Rule of Criminal Procedure 16. The rights and duties of discovery are defined and limited by the rule. Crim.P. 16 provides defendant with 3 potential means for obtaining disclosure: 1) automatic disclosures; 2) *Brady* disclosures, and 3) discretionary disclosures.

- **Automatic Disclosures:** Crim. P. 16(I)(a)(1) – Police, Arrest and crime or offense reports, including statements of all witnesses; grand jury transcripts and tangible evidence presented to grand jury; reports or statements of experts; any books, papers, documents, photographs or tangible objects held as evidence; records of prior criminal convictions; tapes and transcripts of electronic surveillance; written list of names and addresses of witnesses; in joint trials, any written or recorded statements made by defendant or co-defendant. (Compliance dates range from 20 days after 1st appearance, to 35 days before trial).
- **Brady Disclosures:** Crim. P. 16 (I)(a)(2) – Any material or information within the Prosecuting Attorney's possession or control which tends to negate the guilt of the accused as to the offense charged or would tend to reduce the punishment thereof.
- **Discretionary Disclosures:** Crim. P. 16(1)(d) – The court in its discretion may, upon motion, require disclosure to the defense of relevant material and information not covered by Parts I (a), (b), and (c), upon a showing by the defense that the request is reasonable.

III. SANCTIONS: For violations of discovery, sanctions can be imposed on the District Attorney's office, and the individual deputy district attorney. Mistakes of a law enforcement agency are imputed to the district attorney's office.

The District Attorneys' Process of Providing Discovery and Alternatives to Shifting the Cost Burden

Overview of Discovery

In Colorado, public policy and the law require prosecutors to provide discovery to the defense at the earliest stages of the criminal proceedings (see attached *DAs' Legal Obligations*). Generally, discovery must be made available to the defense no later than twenty (20) calendar days after the defendant's first appearance. Crim. P. 16(I)(b)(1). The policy favoring early disclosure is borne from a commitment to fairness, enabling defendants to make informed decisions in plea negotiations and evaluate the strengths and weaknesses of the prosecution's case. It also allows the defense an opportunity to investigate the case, interview the prosecution's witnesses, and develop their defense for trial. Our current approach has been hailed as a model for other states. (See *Criminal Discovery Reform in New York*, Legal Aid Society, April 2009).

22 Judicial Districts and 260-plus reporting Agencies

The District Attorneys' Offices from throughout the state correspond to the 22 judicial districts of the state, varying in both geographic and numerical diversity. Heavily-populated districts comprise just one county, whereas less-populated rural districts can comprise more than five counties. Each DA's office is funded through budget allocations made by local County Commissions. The State also provides budgetary support through "mandated costs." Currently, all DAs' offices implement some form of a cost-recovery mechanism for the provision of discovery, per C.R.S. 16-18-101 and C.R.S. 13-3-104.

Initial criminal investigations statewide derive from over 264 different law enforcement agencies. Judicial districts have as few as 3 reporting law enforcement agencies to the locally elected DA, to as many as 23. The law enforcement agencies utilize a wide-variety of information management systems to manage their report-writing functions – some that are compatible with the IT systems of DAs' offices and to each other, and some that are not. Each elected DA utilizes a varying degree of processes to comply with the discovery procedures as mandated by law, based primarily on staff capability, technological resources, and the number of reporting law enforcement agencies. This can range from a manual photo-copying system of reports, to the uploading of documents directly from law enforcement agencies to a secure website accessible by the Defense. Over time, costs for discovery on a per-case basis have increased due to the increasing complexity of investigations.

The extent of Discovery and Associated Costs

On average, several DA's Offices provide more than 800,000 pages of printed material on a yearly basis, comprising annual costs of several hundred thousand dollars. This is exclusive of any electronic media and scientific evidence (e.g., audio/video/DNA). Establishing and maintaining a diverse set of systems to manage this influx of information comes at significant expense to the District Attorneys' Offices statewide. Many offices retain multiple FTEs solely devoted to discovery functions to comply with legal obligations.

Offices choose to provide discovery in their selected method, despite potential for significant losses to departmental budgets (e.g., the 1st Judicial District offers per page discovery at a loss of 40% of actual costs). At present, Offices incur costs that range from anywhere from .20 cents to .50 cents for each page produced for the defense. Some only charge criminal defendants a percentage of the actual cost of production. As a result, Offices often absorb a significant percentage of the actual cost of production to make discovery available.

Senate Bill 13-122 proposes to provide discovery to criminal defendants at “no cost.” The bill completely fails, however, to consider how the counties would absorb these costs. This unfunded mandate would have a tremendous impact on the District Attorneys’ Offices and the counties statewide. The proposed savings of \$2 million projected in the fiscal note will directly be borne at the local level, for what is essentially a state obligation in the prosecution of state-level crimes. This is not reform; it simply shifts the burden. If this burden is shifted in such a manner, the District Attorneys’ Offices statewide would be forced to again change their processes, as they could not maintain the current improving standards or approaches underway. Further, the provision of ‘no-cost’ discovery is not a “defendant’s rights” matter, but an issue of practical resource management and flow of information to all who are entitled to it.

Possible Alternatives to Shifting the Cost Burden

- 1. Reform Discovery Requirements.** In other states, prosecutors are not required to provide discovery until much later in the criminal process. For example, some states require prosecutors to only provide discovery before the first witness testifies at a hearing or trial. Many plea dispositions would be reached before any discovery is produced or costs incurred. The advantage to such an approach is that it would greatly reduce the annual discovery costs statewide. Such a discovery rule, however, prohibits the defense from making a fully informed decision about plea offers. It also reduces the time with which the defense may prepare for trial.
- 2. Limit the Amount of Discovery Provided.** The Legislature could explore whether more limited discovery could be provided in the early stages of a criminal prosecution, by modifying Colorado Criminal Rule of Procedure 16. For example, the law could be changed to require that only police arrest reports be provided to the defense, until the defendant declines a plea offer. This would limit the costs incurred in cases where a disposition is likely to be reached.
- 3. Develop Electronic Discovery Tools for District Attorneys and Public Defenders.** Throughout Colorado, the District Attorneys’ Offices use different equipment and methods for producing discovery. In order to develop a uniform approach and cost, the State could develop an electronic discovery system for all prosecutors, as well as computer programs for the Public Defender’s Office to download the electronic discovery. At present, there are Public Defender’s Offices that are unable to accept electronic discovery due to barriers presented by their funding and/or computer services.
- 4. The Legislature Should Adopt Laws Consistent with Electronic Discovery.** The courts interpret the “actual costs” requirement of Rule 16 differently. Specifically, there is disagreement about whether “actual costs” includes the time and labor associated with providing discovery. The Legislature should clarify that “actual costs” includes the time and labor of the employees required to provide discovery. Such clarification would further encourage the use of electronic discovery, along the same lines of the process used in several jurisdictions.
- 5. Require Other Agencies to Provide Discovery.** The Legislature could examine whether the discovery obligations should be placed upon other law enforcement agencies, rather than prosecutors. For example, as in other states, the Probation Department could be required to provide the parties with a record of all convictions, complaints, and indictments against all of the prospective prosecution witnesses and all defendants, within 5 days of the prosecution’s disclosure of its witnesses’ names and addresses to the defense. *See Mass. R. Crim. P. 14(a)(1)(D); see also Mass. R. Crim. P. 14(a)(1)(A)(iv).*

By shifting responsibility to other agencies, the Legislature would reduce the costs upon the District Attorneys’ Office. The problem with such an approach is that the ethical rules require prosecutors to provide complete discovery to criminal defendants. Prosecutors are held responsible for complying with all discovery requirements, even though they are often not in direct control of the management of the underlying information.

**EXHIBIT A
DISCOVERY REVENUES**

Judicial District	2012	2011	2010	CHARGE TO DEFENSE COUNSEL
1 ST Jefferson Gilpin	\$495,969.90			.59 per page No individual charge for CD's/DVD's
2nd Denver	Public Defender 421,503.00 ADC 124,372.34 Private 181,849.70 Total 727,725.04	Public Defender 399,539.48 ADC 107,958.50 Private 166,441.86 Total 673,939.84	Public Defender 223,199.60 ADC 70,739.65 Private 154,040.59 Total 447,979.84	Discovery Fees: Copies \$.50 per page Audio Cassettes \$15.00 each CD's* \$15.00 each DVD's \$18.00 each Videotapes \$15.00 each Copies of photos \$1.00 per page (Black/white copy machine copies of photographs) Insufficient Funds \$25.00 fee assessed on all returned checks (*911 Recordings and original photos are ordered through the Denver Police Department Civil Liabilities Bureau at 720- 913-6400. If 911 recordings are discovered through our office the fee is \$20.00 per recording.)
11 th Chaffee Custer Fremont Park	\$98,881			.50 per page
18 th Arapahoe Douglas Elbert Lincoln	Arapahoe: \$241,700 Douglas: \$125,800 Elbert: \$10,200 Total \$377,700			
19 th Weld	\$88,623	\$91,278	\$79,050	Paper discovery Retrieval fee (one-time charge) \$2.00 Document (per page) \$.25 Electronic discovery Initial Retrieval fee(one-time charge) \$2.00

				Supplemental discovery retrieval fee \$1.00 Document(per page) \$.15 <u>Evidence disk discovery</u> CD, DVD (per disk) \$10.00 Public Defender No Charge.
20 th Boulder	\$126,699	\$110,642	\$107,139	\$.25 per page (all misdo and traffic are done on paper) \$15.00 per CD/DVD up to 1000 pages scanned. Over 1000 pages = \$50 per disk (most felony is done on disk) \$5.00 per audio tape \$5.00 to mail discovery
21 st Mesa				No charge. Upload docs to a secure website and refer defense counsel to LE for audio/video/photos, etc. LE charges \$5 per cd.