



## Improving Discovery in Criminal Cases in Texas: How Best Practices Contribute to Greater Justice

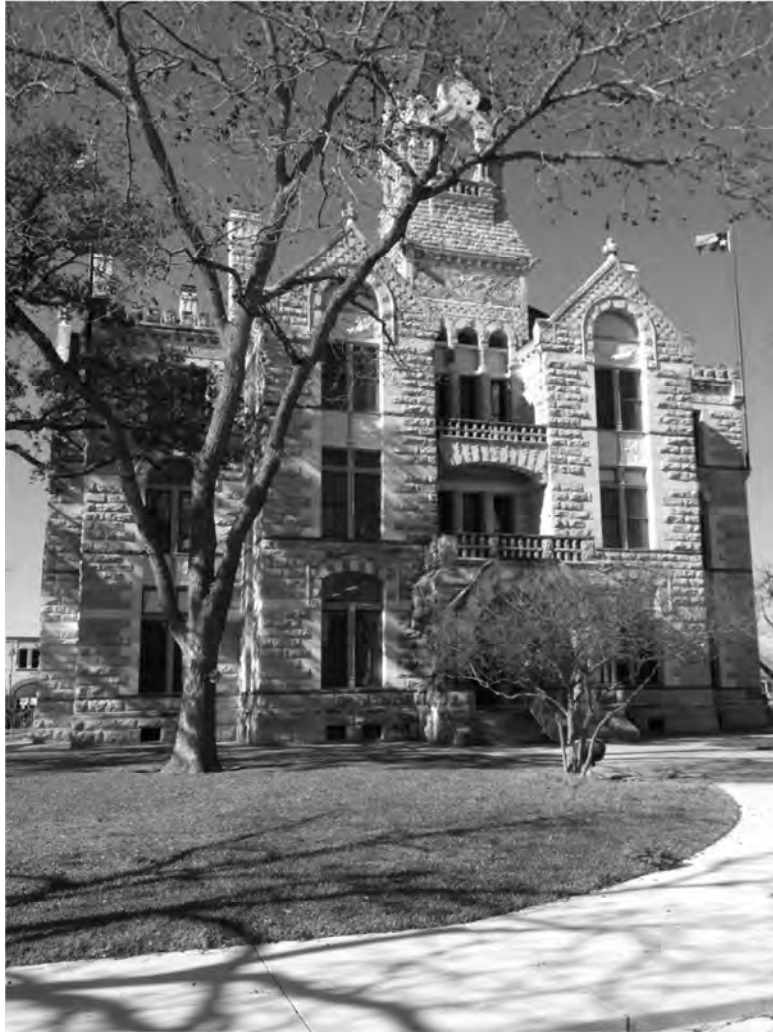
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# Improving Discovery in Criminal Cases in Texas: How Best Practices Contribute to Greater Justice



TEXAS APPLESEED  
TEXAS DEFENDER SERVICE

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# Acknowledgements

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# Improving Discovery in Criminal Cases in Texas: How Best Practices Contribute to Greater Justice

## Executive Summary

Discovery in a criminal case is the formal process by which prosecutors and defense attorneys exchange relevant information prior to trial—and it is critical to a fair and just criminal justice system. Robust and uniform criminal discovery laws increase fairness and access to justice, save state and attorney resources by limiting discovery disputes, promote efficient case resolution, and reduce the likelihood of wrongful convictions.

In Texas, criminal discovery varies greatly from one county to another. Recognizing that there are deficiencies in Texas' criminal discovery statute, Code of Criminal Procedure Article 39.14, most district attorneys' offices supplement that statute with their own discovery policies, which are usually more generous. *Unfortunately, the lack of uniformity in discovery policies in Texas makes access to justice dependent, in part, on where a defendant is charged.* Recent high-profile exonerations in Texas, coming after decades of incarceration, have served to spotlight how less than open file discovery practices can contribute to a miscarriage of justice.

In the interest of increasing access to justice and reducing the potential for wrongful convictions, **Texas Appleseed, Texas Defender Service**, and pro bono attorneys at **Locke Lord LLP** surveyed and researched discovery practices in more than 40 Texas counties, compared Texas' discovery statute to national best practices and to discovery statutes in other states, and recommend moving Texas towards a uniform discovery law guided by the American Bar Association's best practices.

## Why Is Discovery Important?

A robust and uniform open file criminal discovery process is critical for several reasons. First, discovery promotes the efficient resolution of criminal cases by informing the defense of the strength of the evidence against the defendant. For example, in a driving while intoxicated case, the prosecution might disclose to the defendant the results of a blood test with alcohol levels well above the legal limit, a police officer's report indicating that the defendant badly slurred his speech, and the witness statement of a

passenger who saw the defendant drinking all evening. Faced with these facts, the defendant is likely to accept a plea bargain rather than demand a lengthy and expensive trial.

Open file discovery creates further efficiencies by reducing the need for formal discovery motions and eliminating most disagreements over what evidence is subject to disclosure. By requiring the prosecution, with narrow exceptions, to tender the bulk of its file, there is no need for the defense to trouble the court or the district attorney's office with continuous requests for disclosure. Similarly, there will be far fewer arguments over what additional information the defense needs to prepare its case because the defense will have access to most of the State's file.

Simplifying and opening up defense access to discovery has a secondary benefit of saving the state and counties money on expenses submitted by appointed counsel for indigent defendants. Time spent by appointed counsel filing and arguing discovery motions and taking handwritten notes instead of receiving copies of documents is attorney time paid for from county coffers. According to the Texas Indigent Defense Commission, defense counsel is appointed in 71% of felony cases and 40% of misdemeanor cases statewide.<sup>1</sup> Improving the consistency and efficiency of criminal discovery will support Texas' substantial investment in and commitment to improving indigent defense.

A criminal discovery policy that is uniform across all jurisdictions also increases fairness. When discovery policies vary greatly from one district attorney's office to another, Texans charged with crimes in different counties have unequal access to justice. One defendant might have access to the bulk of the State's file, while another might lack access to basic information included in witness statements or police reports. All Texans should have equal opportunity to examine and investigate all evidence against them to ensure a just disposition of their case.

Most importantly, however, open file discovery policies reduce the likelihood of wrongful convictions. The stakes in a criminal trial are very high, and a defendant's liberty or life is at risk. A truly open file criminal discovery law increases the reliability of guilty verdicts and decreases the likelihood of wrongful convictions because the defendant has access to all available information and is provided with adequate time and opportunity to examine and investigate all the evidence.

## Methodology

For this study, the report authors submitted open records requests for relevant discovery policies, court orders, and agreements to 43 district attorney's offices throughout Texas. Counties that supplied responsive documents, or otherwise described their office's policies in writing included: Archer, Bandera, Bell, Brazoria, Brazos, Carson, Chambers, Coke, Collin, Crockett, Dallas, Denton, El Paso, Fort Bend, Galveston, Guadalupe, Harris, Haskell, Hays, Jackson, Kerr, Lubbock, McLennan, Midland, Nueces, Randall, Rockwall, Tarrant, Taylor, Travis, Victoria, Webb, and Williamson.<sup>2</sup>

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<sup>1</sup> E-mail communication from Wesley Shackelford, Deputy Director/Special Counsel, Texas Indigent Defense Commission to Texas Defender Service, February 6, 2013.

<sup>2</sup> Counties that reported having no responsive documents included: Cameron, Comal, Ector, Grayson, Hidalgo, Hunt, Jefferson, Kaufman, San Patricio, and Wise.

Additionally, at the beginning of the project, pro bono attorneys at Locke Lord LLP conducted over 60 telephone interviews with prosecutors and defense attorneys across Texas. Responses to these surveys informed various sections of the report.

All responses were analyzed to determine where they mirrored or diverged from best discovery practices identified by the American Bar Association (ABA). To best reflect the state as a whole, the surveyed counties were selected from counties of different sizes—large and small, urban and rural—and from different regions of the state. The counties profiled in this report reflect a range of discovery practices and are cited for illustration purposes only.

The provisions of Texas’ discovery statute, Code of Criminal Procedure Article 39.14, were also compared against the best criminal discovery practices identified by the American Bar Association,<sup>3</sup> The Timothy Cole Advisory Panel on Wrongful Convictions,<sup>4</sup> and The Justice Project.<sup>5</sup>

Finally, Texas’s discovery statute provisions were compared to discovery statutes in other states.

## Findings: Criminal Discovery in Texas

Our overall analysis produced the following findings:

- ▼ **Texas’ discovery statute requires significantly fewer disclosures by the prosecution than are recommended by the American Bar Association—including witness statements, police reports, and reports of experts. Furthermore, only minimal disclosure is required by the defense.**

In Texas, “[a] defendant in a criminal case does not have a general right to discovery of evidence in the possession of the State.”<sup>6</sup> The prosecution’s only obligation flows from federal case law and is to disclose to the defense evidence that tends to negate the guilt of the accused.<sup>7</sup> For example, if the prosecution’s investigation in a robbery case uncovers evidence that someone other than the defendant may have committed the crime, the evidence would tend to negate the guilt of the accused and the information must be disclosed.

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<sup>3</sup> American Bar Association Standards for Criminal Justice: Discovery and Trial by Jury (3d ed., 1996) (hereinafter “ABA”).

<sup>4</sup> Timothy Cole Advisory Panel on Wrongful Convictions: Report and Recommendations (2010) (hereinafter “Timothy Cole Report”). Timothy Cole was wrongfully convicted of a rape on the Texas Tech University campus and died in prison. Cole was posthumously exonerated on the basis of exculpatory DNA evidence.

<sup>5</sup> The Justice Project, “*Expanded Discovery in Criminal Cases*” (2007) (hereinafter “The Justice Project”).

<sup>6</sup> *Scaggs v. State*, 18 S.W.3d 277, 294-95 (Tex. App.—Austin 2000, pet. ref’d).

<sup>7</sup> The Supreme Court’s holding in *Brady v Maryland*, 373 U.S. 83 (1963) requires prosecutors to disclose exculpatory or impeaching information and evidence that is material to the guilt or innocence or to the punishment of a defendant.

Apart from the prosecution’s obligation to disclose evidence favorable to the accused, the defendant is not entitled to receive any other discovery under Texas law.<sup>8</sup> Under Texas Code of Criminal Procedure, Article 39.14, however, the defendant may file a motion with the court asking for greater discovery. In the motion, the defendant is required to show “good cause” as to why the discovery should be ordered.<sup>9</sup> If the defendant’s motion is granted, the court will order the prosecution to disclose to the defendant:

*... any designated documents, papers, written statement of the defendant, (except written statements of witnesses and except the work product of counsel in the case and their investigators and their notes or report), books, accounts, letters, photographs, objects or tangible things not privileged, which constitute or contain evidence material to any matter involved in the action and which are in the possession, custody or control of the State or any of its agencies.*<sup>10</sup>

Furthermore, Article 39.14 does not require the prosecution to disclose police reports, witness statements, expert reports, and other evidence that might shed light on the guilt or innocence of the accused. In fact, a group of experts on The Timothy Cole Advisory Panel<sup>11</sup> noted that “*Texas is in the distinct minority when it comes to limiting discovery in criminal cases.*”<sup>12</sup> The group further advised that “[w]ithout access to offense and expert reports until the time of trial, the ability for defense counsel to provide a meaningful defense is diminished.”<sup>13</sup>

Conversely, Article 39.14 does not require the defendant to disclose any evidence to the State, apart from the names and addresses of its expert witnesses. Best practices recommend that the defense disclose tangible evidence intended to be used at trial, names of witnesses intended to be called at trial (with their written statements), the reports of testifying experts, and notice of alibi or insanity defenses.

**v Within the surveyed district attorneys’ offices, a number employ open file discovery practices in line with most of the American Bar Association’s best practices—indicating that the ABA standards are practical and workable in Texas.**

The report highlights the written policies of Archer, El Paso, Galveston, and other counties that are committed to robust, open file criminal discovery. These counties routinely provide more than is required by Texas’ criminal discovery statute, including police reports, witness statements, expert reports, and full criminal histories.<sup>14</sup> The practices of these diverse counties make clear that a criminal discovery law based on the American Bar Association’s best practices is practical and workable in Texas.

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<sup>8</sup> The defense may receive further discovery through the Texas Rules of Evidence and other provisions of the Code of Criminal Procedure, but these measures require defense counsel to make a request or provide inadequate time to review the discovery. For a fuller discussion, see page 13, *infra*.

<sup>9</sup> Texas Code of Criminal Procedure Art. 39.14.

<sup>10</sup> *Id.*

<sup>11</sup> The 81<sup>st</sup> Texas Legislature established The Timothy Cole Advisory Panel on Wrongful Convictions to advise the Task Force on Indigent Defense in the preparation of a study on the causes of wrongful convictions and to make recommendations to prevent future wrongful convictions.

<sup>12</sup> Timothy Cole Report at 23.

<sup>13</sup> *Id.*

<sup>14</sup> At least one county surveyed for this report, Brazoria, routinely cooperates with defense requests for recorded grand jury testimony, per a letter from Brazoria County District Attorney Jeri Yenne to Texas Appleseed (October 9,

- ✓ **Discovery rules vary between Texas counties and sometimes within a single district attorney's office—meaning access to justice can depend, in part, on where the case is filed.**

Local discovery practices are governed by statute, common law, and local policies. Many district attorneys' offices across Texas have recognized the need for discovery beyond the exculpatory evidence mandated by federal case law and provided by court order under Texas Code of Criminal Procedure, Article 39.14. These offices employ an open file policy where defense counsel is allowed access to the bulk of the State's file, including police and expert reports, witness statements, and criminal histories, and excluding attorney work product. In many districts this disclosure occurs as soon as an attorney is appointed or retained on a case.

Not all Texas' district attorneys' offices utilize open file policies, however. Some offices provide greater disclosure than required under Article 39.14, but stop short of completely opening their file. Others condition open file discovery on the defendant's waiver of certain statutory rights. Still others leave discovery to the discretion of individual prosecutors, some opting for open file, others not.

- ✓ **Some Texas counties require defendants to waive important statutory rights before they are given access to open file discovery.**

One county, for example, requires defendants to waive an examining trial; waive claims of inadequate notice, opportunity to review, and insufficient time under the Code of Criminal Procedure; agree not to object to a Certificate of Analysis or Chain of Custody Affidavit; and make a variety of other important waivers and agreements in exchange for open file discovery.<sup>15</sup>

- ✓ **Texas' limited discovery laws may increase the likelihood of wrongful convictions and Brady violations.<sup>16</sup>**

The Timothy Cole Advisory Panel observed that “[d]iscovery, as a component of effective counsel, is especially important in helping to guard against wrongful convictions.”<sup>17</sup> Additionally, the Texas District and County Attorneys Association (TDCAA) recently remarked that broader criminal discovery could have prevented wrongful convictions and *Brady* violations. In 2012, the TDCAA published a report, “*Setting the Record Straight on Prosecutorial Misconduct*,” and included the findings of a subcommittee charged with examining alleged cases of prosecutorial misconduct. The subcommittee identified four murder cases where “a *Brady* violation could have been avoided if the prosecutor’s office had an open-file policy that gave the defense access to witness statements and offense/expert reports prior to trial.”<sup>18</sup>

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2012). The ABA’s criminal discovery best practices do not address the pre-trial disclosure of grand jury testimony by the prosecution.

<sup>15</sup> See discussion of Victoria County District Attorney’s Office’s Discovery Agreement, page 27, *infra*.

<sup>16</sup> See note 7, *supra*.

<sup>17</sup> Timothy Cole Report at 23.

<sup>18</sup> Texas District and County Attorneys Association, “*Setting the Record Straight on Prosecutorial Misconduct*,” 14 (2012) (hereinafter TDCAA).

Since Texas Appleseed conducted its first survey of discovery practices in 15 Texas counties in 2005, there have been at least seven exonerations that have involved the suppression of evidence or other misconduct.<sup>19</sup>

- ✓ **Texas law requires no deadline by which discovery must occur, and further requires the defense to file a motion with the court before discovery will be ordered.**

Best practices recommend that discovery occur automatically, independent of motion or request.<sup>20</sup>

- ✓ **Texas' discovery statute does not require the prosecution and defense to operate under a continuing obligation to disclose information relevant to reaching a just resolution of a criminal case.**

This is inconsistent with American Bar Association best practices.<sup>21</sup>

- ✓ **Many Texas counties make discovery available digitally, but some counties still require defense counsel to hand-copy certain pretrial documents.**

Many counties make discovery available digitally, provide copies, or allow the local defense bar to maintain a copier at the district attorney's office. While advances in technology should facilitate the efficiency of discovery, that is not yet occurring in all parts of Texas.

## Discovery Practices in the 50 States

The survey of discovery practices among the 50 states found that Texas' discovery statute is out of step with discovery statute provisions in a majority of other states. For example, in contrast to Texas' discovery requirements:

- 84% of states DO NOT require a court order before the prosecution must disclose.
- Over 50% of states provide a specific time by which disclosure must occur.
- 92% of states place an explicit continuing obligation to disclose on both parties.
- 68% of states require the pre-trial disclosure of expert reports.
- 62% of states require the pre-trial disclosure of witness statements.
- 70% of states require the pre-trial disclosure of co-defendant statements.
- 62% of states require the pre-trial disclosure of the defendant's entire criminal history.
- 98% of states require reciprocal or mutual discovery from the defense.

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<sup>19</sup> Timothy Cole Report at 3 (identifying six exonerations involving the suppression of exculpatory evidence or other misconduct); see Chuck Lindell (December 19, 2011) "Charges against Morton formally dismissed; inquiry sought on prosecutor's actions," *The Austin American-Statesman*, available at <http://www.statesman.com/news/news/local/charges-against-morton-formally-dismissed-inquir-1/nRh9R/> (discussing the recent exoneration of Michael Morton).

<sup>20</sup> Timothy Cole Report at 23.

<sup>21</sup> ABA at 67 (Standard 11-4.1) (recommending that both parties be subject to a continuing obligation to disclose).

It is important to note that district attorneys' offices in Texas can—and many do—adopt discovery practices that exceed what is required under state statute. However, those policies are discretionary and can change at any time.

## Recommendations

Texas Appleseed and Texas Defender Service recommend that Texas amend its criminal discovery statute to move toward the best practice recommendations of criminal law experts. The American Bar Association's Standards for Criminal Justice and The Timothy Cole Advisory Panel's Wrongful Conviction Report offer guidance on best practices for criminal discovery. They are authored by respected prosecutors, defense attorneys, legislators, and judges from across Texas and the nation.

Specifically, it is recommended that Texas' discovery statute provide for:

- Automatic access to discovery, independent of motion or request;
- Open file discovery that always includes access to police reports, witness statements, expert reports, and criminal histories;
- Reciprocal or mutual discovery obligations for the defense, within the boundaries of the defendant's constitutional rights;
- Defined timelines for when discovery must be initiated; and
- An explicit continuing obligation to disclose.

If adopted, these best practices will increase fairness and efficiency, and will decrease the likelihood of wrongful convictions. By disclosing all relevant information, both parties are able to investigate and scrutinize the evidence against the accused. This increases the likelihood that a just result will be reached. Disclosure of all evidence also encourages efficient disposition of cases, because defense attorneys can educate their clients on the strength of the evidence against them and avoid lengthy trials in some instances. Furthermore, in juvenile cases, the decreased culpability and maturity of children necessitates full disclosure of all evidence to ensure effective representation.

Most importantly, a properly functioning open file policy will greatly reduce the likelihood of a *Brady* violation and decrease the likelihood of wrongful convictions. When the defense has access to most of the State's file, there are many fewer judgment calls that must be made by the prosecution about the exculpatory nature of the evidence. In many cases, everything exculpatory will have been disclosed automatically, and the defense will have all information necessary to investigate the case and prepare for trial.

# Texas' Criminal Discovery Statute

In Texas, criminal discovery is governed by the Code of Criminal Procedure, Article 39.14:

Witness statements are often crucial to the evaluation and defense of a criminal case. While most states require pre-trial disclosure of witness statements or lists, Texas does not.

Many states require the pre-trial disclosure of police reports. Because the reports are written communications between the State and its agents, the prosecution is not required to disclose them before trial.

(a) **Upon motion of the defendant showing good cause** therefore and upon notice to the other parties, except as provided by Article 39.15, the court in which an action is pending shall order the State before or during trial of a criminal action therein pending or on trial to produce and permit the inspection and copying or photographing by or on behalf of the defendant of any designated documents, papers, written statement of the defendant, (except **written statements of witnesses** and except the work product of counsel in the case and their investigators and their notes or report), books, accounts, letters, photographs, objects or tangible things not privileged, which constitute or contain evidence material to any matter involved in the action and which are in the possession, custody or control of the State or any of its agencies. **The order shall specify the time, place and manner** of making the inspection and taking the copies and photographs of any of the aforementioned documents or tangible evidence; provided, however, that **the rights herein granted shall not extend to written communications between the State or any of its agents or representatives or employees**. Nothing in this Act shall authorize the removal of such evidence from the possession of the State, and any inspection shall be in the presence of a representative of the State.

Unlike most states, where discovery is available automatically or upon written request, defense attorneys in Texas must file a motion with the court and show "good cause" before the court will order disclosure of evidence.

Most states specify a time by which disclosure must occur, or require that it occur "as soon as practicable." In Texas, this matter is left to the discretion of the court.

The Texas Code of Criminal Procedure, Article 39.14, **DOES NOT** require the pre-trial disclosure of:

- The names, addresses, and statements of all witnesses (although the court may order a list of witnesses to testify during its case-in-chief);
- Police reports;
- The reports, written statements, curriculum vitae, and proposed testimony of expert witnesses;
- Any record of criminal convictions of the defendant or co-defendant; and
- Oral (non-Mirandized) statements of the defendant or any statements of co-defendants.

## *Brady v. Maryland* and Texas' Discovery Law

Prosecutors in Texas have a long-standing duty, created by the United States Supreme Court in *Brady v. Maryland*,<sup>22</sup> to share certain favorable information with defense counsel in criminal cases. In this section, we provide a brief explanation of what we mean by “*Brady*” obligations, as well as a summary of related ethical duties, and discuss why changing Texas’ discovery law will simplify and facilitate compliance with *Brady*.

One of the few discovery obligations on prosecutors in Texas comes not from Texas statute or case law, but from the United States constitution. In *Brady v. Maryland*, the U.S. Supreme Court decided that the prosecution in a criminal case has a constitutional duty to share favorable evidence, or evidence that tends to negate the guilt of the accused, with the defense. This holding has been expanded over the years to include all favorable information regardless of whether it goes to the guilt or punishment phase of a criminal trial,<sup>23</sup> including impeachment evidence about government witnesses.<sup>24</sup> Prosecutors also have a duty to collect information from law enforcement and other investigators who work on the criminal case and review it for favorable information subject to disclosure.

Determining whether evidence is “*Brady*” material involves a judgment call about the favorable nature of the evidence. Because prosecutors are not positioned to understand what may or may not be favorable to the defense, what appears unimportant to a prosecutor may be important favorable evidence in the eyes of defense counsel. Broad open file discovery, however, will reduce the need for prosecutors to review their evidence for *Brady* material, because the bulk of their case documents and other evidence will have already been shared with the defense.

Some commentators have proposed that a prosecutor “*convinced of the righteousness of his case, may naturally become a zealous advocate for his client (the people of Texas) rather than an impartial administer of justice.*”<sup>25</sup> Convinced of the guilt of the accused, the prosecutor may develop “tunnel vision” and “*disregard or minimize subsequent evidence that contradicts his earlier conclusion of guilt.*”<sup>26</sup> Again, an open file discovery system would minimize the impact of cognitive bias because judgment need not be exercised regarding every piece of evidence, only those that fall into a narrow category excluded from automatic disclosure.

Finally, in its report “*Setting the Record Straight on Prosecutorial Misconduct*,” the Texas District and County Attorney’s Association identified four Texas murder cases where “a *Brady* violation could have been avoided if the prosecutor’s office had an open-file policy that gave the defense access to witness statements and offense/expert reports prior to trial.”<sup>27</sup> A clear, enforceable, open file statewide discovery law will help protect defendants from such future mistakes.

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<sup>22</sup> *Brady v. Maryland*, 373 U. S. 83 (1963).

<sup>23</sup> *United States v. Weintraub*, 871 F.2d 1257, 1265 (5<sup>th</sup> Cir. 1989).

<sup>24</sup> *Giglio v. United States*, 405 U.S. 150 (1972).

<sup>25</sup> TDCAA at 16.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 14.

# Introduction

Texas' criminal discovery statute, Code of Criminal Procedure, Article 39.14, does not require disclosure of some types of pretrial documents that are routinely shared under best discovery practices employed in most other states and recommended by the American Bar Association. Given the latitude for prosecutorial discretion in augmenting what is required under Article 39.14, criminal pre-trial discovery available to defendants and their attorneys can differ dramatically between district attorneys' offices across the state. The lack of uniformity in discovery policies in Texas makes access to justice depend, in part, on where a defendant is charged—a justice issue that must be addressed.

Texas Appleseed and Texas Defender Service undertook this study to document the range of varying criminal discovery practices in Texas—from open file pretrial sharing of documents, statements, reports, and witness lists to a much more restrictive approach prescribed in state statute.

This report is organized as follows:

- The first chapter compares Texas' criminal discovery statute to the best discovery practices promulgated by the American Bar Association, The Timothy Cole Report, and The Justice Project's policy review, "*Expanded Discovery in Criminal Cases*."
- The next chapter profiles a range of discovery practices in some of the 43 Texas counties surveyed for this report and the different technologies used to convey pretrial discovery—from scanning and photocopying to requiring handwritten copying of documents (largely confined to a smaller number of rural counties).
- What follows is a discussion of how Texas' criminal discovery statute fails to distinguish between cases involving juveniles and adults—and why open file discovery, a national best practice, should be applied in all cases, but particularly when defendants—in an even more vulnerable position due to their youth—are facing criminal charges.
- The final chapter compares Texas' criminal discovery statute to those in other states, as regards their compliance with a number of recognized national best practices. A spreadsheet, providing a more detailed state-by-state comparison of discovery statutes in the 50 states, is provided at the end of the report.

The report concludes with recommendations for bringing Texas' criminal discovery statute in line with national best practices—which is critical to limiting the opportunity for wrongful convictions traceable to limited pre-trial discovery, while maximizing the opportunity for just resolution of criminal cases.

# Criminal Discovery Best Practices: How Texas' Statute Compares

Criminal discovery in Texas is governed by Texas Code of Criminal Procedure, Article 39.14. This section compares Article 39.14 to the best practices identified by The American Bar Association, The Timothy Cole Report, and The Justice Project's policy review, *"Expanded Discovery in Criminal Cases."* A brief introduction to the cited reports is provided below:

## **American Bar Association Standards for Criminal Justice: Discovery and Trial by Jury, 3d ed.**

The American Bar Association (ABA) published these standards in 1996 after observing *"a growing recognition on the state and federal levels that expanded pretrial discovery in criminal cases is beneficial to both parties and promotes the fair administration of the criminal justice system."*

The drafters *"sought to produce a revised set of standards that would be widely implemented across the United States,"* and that would *"be perceived as fair by both prosecutors and defense attorneys, be consistent with the defendant's constitutional rights, and also serve the interests of the criminal justice system as a whole."*

Report authors and their advisors included well-respected judges, prosecutors, and defense attorneys from across the country.<sup>28</sup>

## **The Timothy Cole Advisory Panel on Wrongful Convictions' Report to the Texas Task Force on Indigent Defense ("Timothy Cole Report")**

Following the posthumous exoneration of Timothy Cole for the rape of a Texas Tech University student, the 81<sup>st</sup> Texas Legislature passed House Bill 948 creating The Timothy Cole Advisory Panel to advise the Texas Task Force on Indigent Defense about the causes of wrongful convictions and procedures that may be implemented to prevent future wrongful convictions.

Observing that *"Texas is in the distinct minority when it comes to limiting discovery in criminal cases,"* the panel advised widespread discovery reform, favorably citing the ABA Standards for Criminal Justice.

Panel members and contributors to the report included legislators from both parties, current and former prosecutors, defense attorneys, and judges.

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<sup>28</sup> The standards were officially adopted by the ABA House of Delegates as official policy. Commentary to the standards is unofficial.

## The Justice Project’s “Expanded Discovery in Criminal Cases”

The Justice Project was a “non-profit, non-partisan organization dedicated to improving the fairness and accuracy of the criminal justice system.” In 2007, The Justice Project released its report identifying “*the best practices to help protect against wrongful convictions due to inadequate discovery laws.*”

These three reports, described here, speak to discovery practices of both the defense and the prosecution.

## Disclosures by the Prosecution

The American Bar Association<sup>29</sup> and The Justice Project’s “*Expanded Discovery in Criminal Cases*”<sup>30</sup> recommend the following pre-trial disclosures by the prosecution:

- Written<sup>31</sup> and oral statements of the defendant or any co-defendant;
- Names and addresses of all persons known to the prosecution to have information concerning the offense, regardless of whether they will be called at trial, along with all written statements of any such person. The prosecution shall also identify the persons it intends to call as witnesses<sup>32</sup> at trial;
- The nature of any relationship, agreement, or inducement for cooperation between any witnesses and the prosecution;
- The reports or written statements of experts, along with their curriculum vitae, the substance of their proposed testimony, their opinion, and the underlying basis for their opinion;
- Any tangible objects which pertain to the case or were obtained from the defendant;
- The record of any criminal convictions, pending charges, or probationary status of the defendant, any co-defendant, as well as any of these items that may be used to impeach any witness called at trial;
- Any material relating to lineups, show-ups, and picture or voice identifications;
- Any material or information within the prosecutor’s possession or control that would tend to negate the guilt or reduce the punishment of the defendant;
- The substance of any character, reputation, or other act evidence the prosecution intends to use;
- If the defendant’s conversations or premises have been subject to electronic surveillance, the prosecution should inform the defendant of this fact; and
- If any tangible object which the prosecutor intends to offer at trial was obtained through a search and seizure, the prosecution should disclose to the defense any information, documents, or other material relating to the acquisition of such objects.

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<sup>29</sup> ABA at 11-12 (Standard 11-2.1).

<sup>30</sup> The Justice Project at 21.

<sup>31</sup> “Written statement,” as used in this standard, is defined to include not only documents created or adopted by the person, but also other records of any type that embody or summarize the person’s statements (tape recordings, interview notes, letters, memoranda, and so forth).

<sup>32</sup> The Justice Project recommends that witness’ oral statements also be disclosed. See note 30, *supra*.

The Timothy Cole Report favorably cited to these standards,<sup>33</sup> and The Justice Project’s “*Expanded Discovery in Criminal Cases*” further recommends the pre-trial disclosure of police reports.<sup>34</sup>

**CURRENT TEXAS LAW:** Texas’ discovery law requires significantly fewer disclosures. Specifically, Texas Code of Criminal Procedure Article 39.14 **does not** require the pre-trial disclosure of:

- Oral (non-Mirandized) statements of the defendant or any statements of co-defendants;
- The names, addresses, and statements of all witnesses (the court may order the parties to produce lists of witnesses who will testify at trial);
- The reports, written statements, curriculum vitae, and proposed testimony of expert witnesses; and
- Any record of criminal convictions of the defendant or co-defendant.

Other Texas statutes provide access to some of these items in specific situations. Under Rule of Evidence 404(b), for example, the defense may request reasonable notice of the prosecution’s intent to introduce prior bad acts as propensity evidence. Under Rule of Evidence 705, the judge may order the disclosure of the facts and data underlying an expert’s opinion. Code of Criminal Procedure 37.07 allows the defense to request reasonable notice of the defendant’s prior criminal record for sentencing. Rule of Evidence 615 allows for the inspection of a witness’ prior statements in between direct and cross examination.

These statutes, however, place the onus of requesting discovery on the defense (404(b) and 37.07), allow little or no time to react and investigate the disclosure (Rule 615), or do not require the court to ultimately order production (705). These rules cannot always be relied on to supplement what Article 39.14 does not now provide.

## The Importance of Open File Discovery

A broad discovery policy requiring all the disclosures detailed above, sometimes referred to as an “open file” policy, will create a more just and efficient criminal system.<sup>35</sup> Prosecutors currently have ***sole discretion*** in determining whether evidence is exculpatory and thus, whether to disclose it. A properly functioning open file discovery policy removes this subjectivity and reduces the likelihood of *Brady* violations (withholding evidence favorable to the defense) and wrongful convictions.<sup>36</sup>

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<sup>33</sup> Timothy Cole Report at 25-26.

<sup>34</sup> The Justice Project at 5.

<sup>35</sup> ABA at 2.

<sup>36</sup> See, e.g., TDCAA at 14 (noting that a subcommittee formed to examine alleged prosecutorial misconduct found that in four Texas murder cases, including that of former death row prisoner and exoneree Anthony Graves, “a *Brady* violation could have been avoided if the prosecutor’s office had an open-file policy that gave the defense access to witness statements and offense/expert reports prior to trial.”).

Open file discovery also encourages plea agreements in cases where the evidence is substantial by assisting the defense bar in educating defendants as to the strengths and weaknesses of their cases.<sup>37</sup>

Open file discovery will further enable prosecutors to fulfill one of Texas law's most basic mandates:

*It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done. They shall not suppress facts or secrete witnesses capable of establishing the innocence of the accused.*<sup>38</sup>

Open file discovery prioritizes justice over conviction, and increases the likelihood that only willful suppression will keep exculpatory evidence from the accused.

An open file policy will also narrow the gap between Texas' criminal discovery and its civil discovery procedures. Texas Rule of Civil Procedure 192 provides that parties may obtain generally discovery regarding:

*. . . any matter that is not privileged and is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party.*

Civil discovery is broader than criminal discovery by any measure. Because a criminal case may place an individual's liberty or life at stake, there should be greater parity between the two systems, particularly when it comes to disclosures by the State. An open file criminal discovery policy will increase fairness and decrease the likelihood of wrongful convictions. When individual life or liberty is at stake, justice demands access to open file discovery.

## Disclosures by the Defense

The American Bar Association<sup>39</sup> and The Justice Project<sup>40</sup> recommend the following pre-trial disclosures by the defense:

- The names and addresses of all witnesses, other than the defendant, whom the defense intends to call at trial, together with all written statements of such witnesses;
- Any reports or written statement made in connection with the case by experts whom the defense intends to call at trial. For each testifying expert witness, the defense should also furnish to the prosecution a C.V. and written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion;
- Any tangible objects, including books, papers, documents, photographs, places, or any other objects, which the defense intends to introduce as evidence at trial; and

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<sup>37</sup> The Justice Project at 4.

<sup>38</sup> Texas Code of Criminal Procedure Art. 2.01.

<sup>39</sup> ABA at 36-37 (Standard 11-2.2).

<sup>40</sup> The Justice Project at 23.

- If the defense intends to rely upon a defense of alibi or insanity, the defense should notify the prosecution of that intent and of the names of the witnesses who may be called in support of that defense.

The Timothy Cole Report<sup>41</sup> also endorses reciprocal discovery.

**CURRENT TEXAS LAW:** Currently, there is no statutory requirement that the defense provide any of the discovery listed above, apart from providing notice to the State of an insanity defense and providing the names and addresses of expert witnesses.

Almost all states (98%) require some measure of mutual or reciprocal discovery from the defense.<sup>42</sup> Reciprocal discovery gives both sides adequate time to examine and develop responses to the evidence, and reduces delay by handling more discovery issues pre-trial.

Reciprocal discovery must not compromise the defendant's constitutional rights, however. The Justice Project Report notes that "[i]t is vital . . . that reciprocal disclosure violate neither attorney-client privilege nor the Fifth Amendment right not to give self-incriminating testimony."<sup>43</sup> The ABA Report's best practices governing defense disclosure<sup>44</sup> include:

- Limiting disclosure to information which will be produced at trial. Therefore, the defense may limit its disclosures in discovery to the same extent it could limit its disclosures at trial by availing itself of the Fifth Amendment protection against self-incrimination; and
- Protecting the defendant against self-incrimination by not requiring disclosure of statements of the defendant, not requiring disclosure of whether the defendant intends to testify at trial, and not requiring the defendant to be deposed.

A measure of reciprocal discovery, within the bounds of the defendant's constitutional protections, provides each side with time to respond to the evidence presented by the other, increasing fairness and efficiency<sup>45</sup> in Texas courts.

## Timing of Disclosure Obligations

The American Bar Association<sup>46</sup> and The Justice Project<sup>47</sup> recommend the following pre-trial discovery timing measures:

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<sup>41</sup> Timothy Cole Report at 23.

<sup>42</sup> See the 50 state survey on page 38, *infra*.

<sup>43</sup> The Justice Project at 1.

<sup>44</sup> ABA at 39.

<sup>45</sup> *Id.* at 38.

<sup>46</sup> ABA at 67 (Standard 11-4.1).

<sup>47</sup> The Justice Project at 23-24.

- The time limit should be such that discovery is initiated as early as practicable in the process and completed sufficiently early in the process that each party has sufficient time to use the disclosed information adequately to prepare for trial;
- Generally, disclosure should first be made by the prosecution, then by the defense within a certain time period after the prosecutor's disclosure; and
- Both parties have a continuing duty to disclose.

The Timothy Cole Report<sup>48</sup> and The Justice Project<sup>49</sup> further recommend that disclosure of discovery should occur automatically, independent of motion or request.

**CURRENT TEXAS LAW:** There is no time limitation on any required discovery apart from the 20-day advance-of-trial deadline for providing the defense with a copy of a defendant's written statement or tape-recorded (Mirandized) oral statement it intends to introduce into evidence, the Notice of Insanity defense by the defense, or completion of the exchange of expert information when required by Court order.

Furthermore, discovery is not automatic, and requires the defense to file a motion showing good cause and obtain a ruling from the court.

Early discovery disclosure is important for several reasons. First, it lessens the risk that some material evidence will be provided without adequate time for appropriate use, or even missed entirely.<sup>50</sup> Timely discovery allows defense attorneys to conduct critical pretrial investigations and allows for greater scrutiny of evidence before trial.<sup>51</sup> Early disclosure of information, especially police reports and witness statements, is essential to locating and memorializing potentially relevant evidence.<sup>52</sup>

Timely disclosure “*levels the playing field and provides for a more fair and accurate analysis of disclosed information, allowing the defense to adequately prepare for trial when a client's personal liberty is at stake.*”<sup>53</sup> For example, if a party is not provided with witness statements until after the witness has testified, they have only moments to prepare for cross-examination, creating an environment of “*trial by ambush.*”<sup>54</sup>

Finally, Texas is in the distinct minority of states that requires the defense to file a motion showing “good cause” before the court will order discovery.<sup>55</sup> This requirement creates a barrier to obtaining discovery, and burdens courts and practitioners with paperwork that slows down the process.

<sup>48</sup> Timothy Cole Report at 23.

<sup>49</sup> The Justice Project at 21.

<sup>50</sup> *Id.* at 19.

<sup>51</sup> *Id.* at 1.

<sup>52</sup> *Id.* at 5.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 18.

<sup>55</sup> See Texas Code of Criminal Procedure Art. 39.14.

## Additional Disclosure Obligations

The American Bar Association<sup>56</sup> and The Justice Project<sup>57</sup> recommend the following best practices impacting disclosure:

- The obligations of the prosecuting attorney and of the defense attorney under these standards extend to material and information in the possession or control of members of the attorney's staff and of any others who either regularly report to or, with reference to the particular case, have reported to the attorney's office;
- If the prosecution is aware that information, which would be discoverable if in the possession of the prosecution, is in the possession or control of a government agency not reporting directly to the prosecution, the prosecution should disclose the existence of such information to the defense; and
- Upon a showing that items not covered in the foregoing standards are material to the preparation of the case, the court may order disclosure of the specified material or information.

**CURRENT TEXAS LAW:** Texas' discovery statute requires none of these measures.

The ABA recommendation specifically requires the prosecution to investigate the materials in the possession or control of its staff and any others who report to the district attorney's office. *"The effect of this standard is to charge each attorney with responsibility for information known to people within his or her scope of authority. In responding to a discovery request, the attorney must search for materials and information held by any member of the defense or prosecuting team, including investigators."*<sup>58</sup>

ABA best discovery practices require the prosecution to alert defense counsel to discoverable information not within its control, but of which it is aware. This disclosure puts the defense on notice of the need to seek a subpoena or other judicial remedy to obtain the information.<sup>59</sup>

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<sup>56</sup> ABA at 71-72 (Standard 11-4.3).

<sup>57</sup> The Justice Project at 24.

<sup>58</sup> ABA at 73.

<sup>59</sup> *Id.* at 75.

## Protective Orders

The American Bar Association<sup>60</sup> and The Justice Project<sup>61</sup> recommend that:

- Upon a showing of good cause, the court may order that specified disclosures be restricted, conditioned upon compliance with protective measure, or deferred or make such other order as is appropriate, provided that all material and information to which a party is entitled is disclosed in sufficient time to permit counsel to make beneficial use of the disclosure.

The ABA observes that, “[w]hile those opposing pretrial discovery in criminal cases have traditionally cited the fear that such disclosures will subject victims and witnesses to threats or other abuse, lead to the loss or destruction of physical evidence, or otherwise adversely affect the integrity of the case to be presented at trial, experience suggests that discovery does not pose such problems in the vast majority of cases. In those unusual cases where such problems are presented, protective orders are an appropriate method of ensuring that pretrial disclosures will not jeopardize victims, witnesses, or evidence.”<sup>62</sup>

**CURRENT TEXAS LAW:** Protective orders are available under Article 17.292 and Article 7A.01 of the Texas Code of Criminal Procedure. However, the protective orders proscribed by Article 17.292 are available to protect victims of family violence or stalking. The protective orders proscribed by Article 7A.01 are available to protect victims of family violence or sexual assault. While useful in these limited contexts, Texas criminal law does not expressly provide for protective orders for “general purpose” use by prosecution, defense, and third parties in a criminal case.

Protective orders should be narrowly tailored to meet the particular interests at stake, and avoided where a less restrictive solution is available.<sup>63</sup> Also, the opposing party must receive the protected material in time to make use of it at trial.<sup>64</sup> “For example,” the ABA explains, “where disclosure of witnesses is delayed or withheld due to concerns for their safety, there must be some provision made to allow the defense to learn the necessary information in time to prepare for trial.”<sup>65</sup>

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<sup>60</sup> ABA at 101 (Standard 11-6.5).

<sup>61</sup> The Justice Project at 24.

<sup>62</sup> ABA at 102-03.

<sup>63</sup> *Id.* at 103.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

## Manner of Performing Disclosure

The American Bar Association<sup>66</sup> and The Justice Project<sup>67</sup> recommend that:

- Absent agreement of the parties, the party with the burden of disclosure should notify opposing counsel that the discovery items can be inspected, tested, copied or photographed at reasonable times.

The Timothy Cole Report explicitly recommends that “*in accordance with policy that best prevents wrongful convictions, either photocopying of, or electronic access to, discoverable materials be required.*”<sup>68</sup>

**CURRENT TEXAS LAW:** Texas Code of Criminal Procedure Article 39.14 provides that, after the court grants a motion for discovery, the State must produce and permit the inspection and copying or photographing by the defense.

Telephone surveys conducted with 30 defense counsel from counties across Texas revealed that, in some jurisdictions, absent a court order, defense counsel is only permitted to make handwritten notes about what is in the State’s file. This means defense counsel may spend hours taking notes from records they could easily have received in electronic form or photocopied. For indigent defense counsel who are paid by the counties, this practice costs counties money better spent on improving access to investigative resources and other tools in appointed cases. For their part, retained counsel have less time to devote to their client’s defense when they must hand-copy documents or make notes on the file. Requiring electronic reproduction of discovery documents saves time and money in a criminal justice system often squeezed by case backlogs and limited resources.

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<sup>66</sup> ABA at 70 (Standard 11-4.2).

<sup>67</sup> The Justice Project at 24.

<sup>68</sup> Timothy Cole Report at 23.

# Determining How Criminal Discovery Works in Texas

To better understand how Texas' many district attorneys' offices conduct criminal discovery, Texas Appleseed sent open records requests to 43 district attorney's offices across the state asking for copies of any records that discussed their criminal discovery practices and procedures. Of these, 33 provided discovery office policies, court orders, and/or proposed agreements with defense counsel. Some offices also provided written explanations of their discovery policies.<sup>69</sup>

A review of these documents highlights several important points discussed in detail in this report:

- Several district attorney's offices already employ criminal discovery practices in line with most of the American Bar Association's recommendations, indicating that the standards are practical and workable in Texas.
- Criminal discovery policies can vary widely from one county to another, even between counties describing themselves as having open file policies. Two Texas defendants charged with the same crime may have access to very different levels of discovery.
- Some counties require defendants to waive important statutory rights in exchange for access to open file discovery.
- Many counties make discovery available digitally, provide copies, or allow the local defense bar to maintain a copier at the district attorney's office. Advances in technology have simplified discovery sharing.
- Discovery granted by district attorneys that exceeds what is outlined in the Texas Code of Criminal Procedure, Article 39.14 can be revoked by any prosecutor in any case at any time without explanation or notice.

Most of the discovery policies discussed in this report were in effect prior to the November 2012 election, but may have changed under newly elected district attorneys. Still, these policies are relevant for the purpose of this study because they are or were recently used by a district attorney's office in Texas.

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<sup>69</sup> Counties that reported having responsive documents, or otherwise described their offices' policies in writing included: Archer, Bandera, Bell, Brazoria, Brazos, Carson, Chambers, Coke, Collin, Crockett, Dallas, Denton, El Paso, Fort Bend, Galveston, Guadalupe, Harris, Haskell, Hays, Jackson, Kerr, Lubbock, McLennan, Midland, Nueces, Randall, Rockwall, Tarrant, Taylor, Travis, Victoria, Webb, and Williamson. Counties that reported having no responsive documents included: Cameron, Comal, Ector, Grayson, Hidalgo, Hunt, Jefferson, Kaufman, San Patricio, and Wise.

## Best Practice “Open File Policies”: Galveston and El Paso Counties

Open records requests revealed that a number of district attorney’s offices employ robust open file discovery policies. **Donna Cameron, First Assistant of the Galveston County District Attorney’s Office**, describes her office’s open file policy as “*more expansive than what is set out in Art. 39.14 of the Code of Criminal Procedure.*”<sup>70</sup>

*“Each attorney of record is allowed to view and copy offense reports, relevant records, defendant and witness statements, lab reports, expert reports, photographs, audio and video recordings, and access to stored evidence maintained by law enforcement.”*<sup>71</sup>

Galveston includes offense reports and witness statements in their disclosure. These two items are not required to be disclosed after a discovery order under Article 39.14.

*“We maintain a file inventory and have the attorney of record sign for either the review or the receipt of evidence and documents,”* Cameron said.<sup>72</sup>

Requiring that defense attorneys certify that they have received or reviewed particular evidence or documents protects the district attorney’s office from accusations of failure to disclose, and prevents a “he said she said” discovery dispute over whether documents were shared.

Similarly, **El Paso County District Attorney Jaime Esparza** explains (in a letter to defense attorneys) that his office provides an open file discovery policy in order to “*facilitate open discovery and cooperation, [] to eliminate the need for formal discovery, [and to] satisfy our duty to disclose any exculpatory or mitigating evidence.*”<sup>73</sup> The office makes available “*all information contained in [their] files not excluded by law.*”<sup>74</sup>

Importantly, only information that must be excluded by law is omitted from “open discovery” in El Paso County. A truly open file policy such as this decreases the likelihood of *Brady* violations, eliminates most discovery disputes, and increases the likelihood that justice will be done.

## Increasing Transparency - Defining What is Not in an Open File: Tarrant County

The Tarrant County’s District Attorney’s Office provided Texas Appleseed with a copy of their discovery policy, which explains that “*[t]he Tarrant County District Attorney’s Office has an open file policy. This means that defense attorneys may have access to the State’s file.*”<sup>75</sup>

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<sup>70</sup> Letter from Galveston District Attorney’s Office First Assistant Donna Cameron to Texas Appleseed (October 15, 2012).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Letter from El Paso County District Attorney Jaime Esparza to Defense Attorneys (undated), received by Texas Appleseed October 22, 2012 through open records request.

<sup>74</sup> *Id.*

<sup>75</sup> Internal Discovery Procedure Memorandum from Tarrant County District Attorney’s Office (undated), received by Texas Appleseed October 16, 2012 through open records request.

The policy further notes that some items “*are NOT included as part of the OPEN file unless it contains ‘Brady’ information, these items shall not be released without a written court order signed by the Judge.*” These items include: “1) Child Video, 2) CPS Records, 3) Medical or Mental Health Records, 4) Grand Jury Testimony and Materials Received by Grand Jury Subpoena, 5) TCIC (Texas Crime Information Center)/NCIC (National Crime Information Center), 6) Victim Assistance Information, and 7) Nude images of any person under 18.”<sup>76</sup>

Tarrant County’s policy makes two important points. First, by articulating what evidence is *not* included in the open file, the policy allows defense counsel to determine whether the excluded records might be relevant to the case and, if so, whether they should ask the court to require their disclosure.

Second, the policy reminds all parties that *Brady* material supersedes all privacy concerns. Information that a prosecutor might normally exclude from an open file must be disclosed when it tends to negate the guilt of the accused.

## Following ABA Guidelines in Smaller Texas Jurisdictions: Archer County

Robust discovery policies may also be found in smaller jurisdictions. Archer County’s District Attorney’s Office employs several of the ABA guidelines.

**District Attorney Jack McGaughey** explains that “[m]aterials always provided are police reports, witness statements and witness contact information, laboratory and medical reports, TCIC and NCIC criminal records of defendants and witnesses.”<sup>77</sup>

He said no exceptions are made in discovery procedures for any case, “*unless a determination is made that release of confidential information identity would compromise such person’s safety. In such instances, the State seeks an order from the Court directing non-disclosure.*”<sup>78</sup>

This discovery policy goes well beyond what is required to be disclosed under an Article 39.14 order, by providing, *with little exception*, police reports, witness statements, and TCIC/NCIC records of defendants and witnesses. These items are frequently the cause of discovery disputes. Mr. McGaughey further explains that “[a]ll discovery is emailed to the defense attorney as a matter of routine, after indictment and the appearance of counsel.”<sup>79</sup>

## Agreed Discovery Order: Brazoria County

In response to an open records request, **Brazoria County District Attorney Jeri Yenne** provided Texas Appleseed with a copy of their office’s “Agreed Discovery Order” that details discovery in criminal cases.

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<sup>76</sup> *Id.*

<sup>77</sup> Letter from Archer County District Attorney Jack McGaughey to Texas Appleseed (October 24, 2012).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

The extremely thorough order requires the prosecution to “*maintain an open file with the exception of work product,*” and to “*provide defense counsel viewing access to all offense materials and witness statements . . . and audio access to any recorded witness statements.*”<sup>80</sup>

Additionally, the order explicitly requires the district attorney’s office to disclose:

- 1) the list of all witnesses the state intends to call on in the case in chief;
- 2) a list of witnesses the state intends to call to testify as expert(s);
- 3) all written or recorded statements of the defendant . . . and access to all portions of offense reports containing a verbatim account of same;
- 4) [n]otice of all extraneous offenses, with date and place, which may be admissible against defendant;
- 5) [a]ll items seized from defendant;
- 6) [a]ll items seized from any co-defendant or accomplice;
- 7) [a]ll physical objects to be introduced as part of the State’s case;
- 8) [a]ll documents and photographs and investigative charts or diagrams to be introduced at trial;
- 9) [a]ll contraband, weapons, implements of criminal activity seized or acquired by the state or its agents in the investigation;
- 10) [a]ll records of conviction which may be admissible in evidence or used for impeachment of defendant;
- 11)[a]ll tangible items of physical evidence collected by the State or its agents concerning the alleged offense, including latent fingerprints, hairs, fibers, fingernail scrapings, body fluids, tire tracks, paint scrapings, etc.;
- 12) [a]ll psychiatric and psychological reports known to the State which concern the defendant;
- 13) [a]ll complaints, search warrants and related affidavits, autopsy reports and laboratory reports of all examinations of contraband, fluids, hairs, fingerprints, blood samples, ballistics, soil, fibers, and paints; and
- 14) [a]ll business reports or governmental records expected to be introduced by the State.

The order also requires the State to “inform” defense counsel of:

- 1) all promises of benefit or leniency afforded to any accomplice or prospective witness in connection with his/her proposed testimony or cooperation with regard to the offense;

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<sup>80</sup> Brazoria County District Attorney’s Office Agreed Discovery Order, received by Texas Appleseed October 11, 2012 through open records request.

2) [a]ll known convictions which are admissible for impeachment concerning any accomplice proposed to be used as a witness by the state;

3) [a]ll known convictions, pending charges or suspected criminal offenses concerning any accomplice proposed to be used as a witness by the State; and

4) [a]ll exculpatory evidence pursuant to *Brady v. Maryland* and related cases. The above disclosures required by the Agreed Order go far beyond those required by Art. 39.14. Specifically, the order requires the State to furnish some of the items not found in Art. 39.14 that are the most frequent source of discovery disputes: police reports, witness statements, and criminal records of the defendant, co-defendant, or accomplices.<sup>81</sup>

The State is further required to “furnish all of such items as set out above which are in the possession of the State’s attorneys or which are known with the exercise of due diligence known to be in the possession of the investigating officers or other agents of the State.”<sup>82</sup>

Ms. Yenne also notes that “It is the policy of this office to allow defense counsel in every criminal case to see all grand jury testimony in regards to the criminal case, and we agree to a particularized need in each criminal case in which there is recorded grand jury testimony.”<sup>83</sup>

## Restrictive Discovery Policy: Williamson County

Newly elected Williamson County **District Attorney Jana Duty** campaigned last fall on the need for a “fair and open file discovery process,”<sup>84</sup> but her predecessor’s discovery practices—in place in 2012—exemplify one of the more restrictive approaches to criminal discovery in Texas.

The Williamson County District Attorney’s Office manual, provided last fall in response to an open record’s request, set out this restrictive discovery policy:

*“Absent a sound strategic reason, in advance of trial, all prosecutors should always provide defense attorneys with a copy of (1) the complaint and any search or arrest warrants, (2) the results of any scientific testing, (3) any written or recorded statement of the defendant to law enforcement, (4) timely notice of any outcry, extraneous crimes/bad acts or expert witness and (5) a list of witnesses expected to testify at trial. In addition, if requested, all prosecutors should arrange for the defense attorney to view any physical evidence seized by the police.”*<sup>85</sup>

The manual does not explain what “strategic reason[s]” might qualify any of these items for non-disclosure, or why “strategy” has any role in deciding what items to disclose. Nor does the manual explain what “in advance of trial” means in terms of timing.

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Letter from Brazoria County District Attorney Jeri Yenne to Texas Appleseed (October 9, 2012).

<sup>84</sup> ABC News affiliate KVUE interview with Jana Duty, May 29, 2012, available at <http://www.kvue.com/news/Wilco-voters-to-decide-heated-race-for-District-Attorney-155511995.html>.

<sup>85</sup> Williamson County District Attorney’s Office Manual, received by Texas Appleseed October 15, 2012 through open records request.

Application of this discovery policy surfaced as a campaign issue last fall with the exoneration of Williamson County resident Michael Morton on charges he killed his wife. His exoneration based on DNA evidence came after more than *two decades* spent in prison. Hearings are currently being held to determine whether the prosecution withheld key statements from the defense during pre-trial discovery that could have cleared Morton and implicated another party (since charged) in the crime.

District Attorney Duty said that the Michael Morton case “*is not an anomaly. There are still many cases of evidence not being revealed. We need to have a fair and open file, open discovery process so that does not happen again.*”<sup>86</sup>

## **Discovery Policy Variations Between Prosecutors: Randall County (2011) and Taylor County**

Discovery policy can even vary greatly from prosecutor to prosecutor within a single district attorney’s office. For example, Randall County District Attorney’s Office currently employs a broad, open file policy that allows defense attorneys to “*inspect and copy the contents of the State’s files with the exception of victim information and work product.*”<sup>87</sup> This open file policy is largely in line with ABA guidelines and should be commended.

But, as recently as 2011, the same office allowed prosecutors to keep their files open or closed, on a case-by-case basis.

In response to an open records request, the office provided Texas Appleseed with a copy of the office’s previous policy which states: “*No copies will be provided under the new office policy. [E]ach prosecutor will have discretion in each case to extend his or her version of an open file, or to require the defense to abide by the rules of discovery under the Code of Criminal Procedure.*”<sup>88</sup>

Under the county’s previous discovery policy, two defendants charged with the same crime in the same county could be subjected to vastly different discovery privileges. One defendant, whose case is assigned to Prosecutor A, could receive access to police reports, witness statements, criminal histories, and everything else contained in the State’s file. Another defendant, whose case is assigned to Prosecutor B, might receive only what is ordered under Article 39.14.

This policy is no longer in place in Randall County, but other Texas counties still allow prosecutorial discretion to impact discovery practices. The Taylor County District Attorney’s Office, for example, provides defense counsel in felony cases “all discoverable materials which are expressly set out in Article 39.14 Criminal Code of Procedure.”<sup>89</sup>

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<sup>86</sup> See note 84, *supra*.

<sup>87</sup> Randall County District Attorney’s Office “Policy Regarding Inspection, Copying, & Disclosure of Files” 2011, received by Texas Appleseed through open records request.

<sup>88</sup> Randall County District Attorney’s Office “Notice of Changes in Open File Policy Effective October 8, 2007,” received by Texas Appleseed October 17, 2012 through open records request.

<sup>89</sup> Letter from Taylor County District Attorney James Eidson to Texas Appleseed (January 24, 2013).

Some defendants may receive broader discovery, however, because “[t]he prosecutor assigned to the case is also allowed to exercise discretion in the discovery process.”<sup>90</sup> And, in cases involving violent crimes, the office “[does not] furnish witness statements.”<sup>91</sup> Therefore, the level of discovery a defendant receives may turn on the prosecutor to whom the case is assigned.

## Waiving Statutory Rights in Exchange for Discovery: Jackson and Victoria Counties

Texas’ current discovery statute vests so much power in the State that some district attorney’s offices are able to require counsel and defendants to waive important rights in exchange for the possibility of receiving more information about the case against the defendant.

For example, in response to an open records request, Jackson County District Attorney’s Office provided Texas Appleseed with a copy of an “Open File Agreement” that offers an open file in exchange for the waiver of several important rights.

The agreement requires that *“in exchange for Mr. Bell’s (district attorney’s) ‘open file’ policy, that [defense counsel] will not request, nor will Mr. Bell be required to list any witness which the State intends to offer in the trial of my client, nor will Mr. Bell be required to comply with a 404(b), 609 (Rules of Evidence), or a 37.07 (Code of Criminal procedure).”*<sup>92</sup>

Specifically, the agreement requires the waiver of: witness lists (presumably including experts), notice of propensity evidence, and notice of conviction evidence used to impeach witnesses. Absent the waiver, defense counsel would be entitled these disclosures under Texas law. A criminal case can turn on any of these pieces of evidence.

In a letter to Texas Appleseed, **District Attorney Robert Bell** addressed the “Open File Policy” and the waivers:

*I have an “Open File Policy” on all of my criminal cases, which means that we will not only make copies of my entire file for the defense attorney (excluding my handwritten notes and Grand Jury notes and information) of everything contained within their client’s file, but I will also allow them to come at any time and look through those files for any possible updates.*<sup>93</sup>

Regarding the waivers, Mr. Bell noted that *“all of that information is contained within my files and since I handle hundreds of felony cases, requiring such a list would mean virtually all of my time would be spent on preparing such a list.”*<sup>94</sup>

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Jackson County District Attorney’s Office “Open File Agreement,” received by Texas Appleseed January 11, 2013 through open records request.

<sup>93</sup> Letter from Jackson County District Attorney Robert Bell to Texas Appleseed (January 7, 2013).

<sup>94</sup> *Id.*

It is significant, however, that the “Open File Agreement” contains no definition of “open file.” Without a definition of what “open file” does or does not include, the defense is at the mercy of the prosecution. Only an explicit definition of “open file” would enable defense counsel to make an informed decision about whether this is an agreement he or she should accept.

By way of comparison, the **Victoria County District Attorney’s Office** provided Texas Appleseed with a copy of their discovery agreement that requires many promises, agreements, and waivers on behalf of the defense in exchange for an open file policy. Discovery policies cited earlier in this report, however, provide even more than this agreement and require no such waivers on behalf of the defense.

In total, in exchange for open file discovery, the agreement requires the defense attorney to:

- 1) Waive an examining trial;
- 2) Waive any claim of inadequate notice and opportunity to review under Code of Criminal Procedure Article 38.071 Sec. 5 (a)(8) and Article 38.072 Sec. 2 (b)(1);
- 3) Waive any claim of insufficient time under Code of Criminal Procedure 38.22 Sec. 3(a)(5);
- 4) Waive the right to motion for a list of State’s witnesses;
- 5) Agree not to ask for additional time to review previously provided documents under the “Gaskins Rule,” “Use before the Jury,” or Rule 612;
- 6) Waive any claim of inadequate notice or disclosure of facts and data underlying testimony and opinion by the State’s expert under Rule 705 of the Texas Rules of Evidence or Article 39.14 of the Code of Criminal Procedure;
- 7) Agree not to object to a Certificate of Analysis or Chain of Custody Affidavit;
- 8) Waive any claims of privacy violation and further notice of any evidence of “Other Crimes, Wrongs or Acts,” “Evidence of Prior Criminal Record,” or “[A]ny other evidence of an extraneous crime or bad act”;
- 9) Provide the State the full name, date of birth, and social security number of any witness it should call; and
- 10) Provide the State notice of any testifying experts including a Curriculum Vitae and a report summarizing the Opinion as well as the facts and data underlying the opinion and any process used.<sup>95</sup>

Additionally, the Victoria County discovery agreement is an “all-or-nothing” proposition. The agreement explains in the second paragraph that

*THOSE REFUSING THIS DISCOVERY AGREEMENT IN ANY PART OR PHASE AND/OR THOSE FILING MOTIONS IN CONTRAVENTION OR ADDITION TO THE DISCOVERY PROVIDED IN THIS AGREEMENT, WILL NOT HAVE ACCESS TO THE STATE’S FILE UNLESS AND UNTIL THEY OBTAIN COURT ORDER COMPLIANT WITH ART. 39.14 AND CASE LAW.*<sup>96</sup>

The defense attorney must choose between agreeing to all promises and waivers in exchange for whatever the district attorney offers, or receiving only the minimal discovery granted by Article 39.14.

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<sup>95</sup> Victoria County District Attorney’s Office “Discovery Agreement,” received by Texas Appleseed January 29, 2013 through open records request.

<sup>96</sup> *Id.* (emphasis in original).

Disagreement with any single part of the policy, or the filing of any motion requesting additional discovery, revokes the defense attorney's privileges.

Furthermore, the agreement advises defense counsel that "work product" will not be made available. This is a generally acceptable practice, but the agreement's definition of "work product" is unusually expansive:

*Work product includes prosecution files and papers; police, offense, and investigation reports; worksheets; and factual memoranda concerning the arrest of the defendant or investigation of the case by the State, the names and statements of persons interviewed at the scene and of witnesses to be called at trial, along with all documents, reports and arrest records concerning appellant, work product of counsel in the case and their investigators, and their notes or reports.*<sup>97</sup>

Several of the offices highlighted earlier in this report (such as Galveston and Archer District Attorney's Offices) provide many of these materials (police reports, witness statements, and arrest records) as a matter of course.

More confusing is the section (7) explaining that "State's counsel agrees to provide all written witness statements and reports it has in its possession to defense counsel."<sup>98</sup> Thus, one section of the agreement states that these materials are work product that will be withheld, while another section explicitly states that these materials will be provided.

In addition, a separate section (6) addresses statements by the defendant:

#### **6. AUDIO, VIDEO OR WRITTEN STATEMENTS BY THE DEFENDANT**

*As part of the open file policy of the Victoria County District Attorney's Office, State's counsel agrees to provide audio and video materials, if any, to defense counsel to promote evaluation of evidence against the defendant, facilitate negotiation, minimize claims of ineffective assistance of counsel, and avoid delays at trial.*

*In exchange, Defense counsel agrees to waive any claim of insufficient time under Art. 38.22 Sec. 3 (a)(5) Tex. Code of Criminal Procedures (Vernon Supp. 2006).*<sup>99</sup>

The heading of the section mentions statements, including written ones, by the defendant. But, the body of the section makes no mention of any written statements whatsoever, creating some confusion. The defense, however, is required to make another waiver: any claim of insufficient time.

These waivers and requirements stand in stark relief against counties that provide open file discovery but require no waivers by the defense. Finally, section 13 of the Victoria County agreement, "VIOLATIONS OF THIS AGREEMENT," ends the contract the same way it began, with a fierce warning that deviations from or contraventions of the agreement will be punished by leaving defense counsel to the discovery provided by Article 39.14:

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

*A bad faith violation by any member of the Defense team terminates this agreement causing the State to withdraw its agreement/ belief in good cause to provide or produce. The State will then revert to discovery pursuant to Court order following hearings under Article 28.01 and in accord with 39.14 of the Texas Code of Criminal Procedure.*

*Such bad faith violations include but are not limited to refusing to sign receipts of records of discovery obtained, filing motions in contravention of or in addition to the discovery provided in this agreement, attempting to obtain discovery through the Public Information Act (Tex. Gov't Code Ann. 552.147) outside this agreement and without a hearing before the criminal court hearing this case, losing control of discovery materials, providing copies of discovery materials to an inmate, unauthorized release of discovery material to third parties, and violation of the privacy rights of any witness or persons listed in documents provided in discovery.<sup>100</sup>*

This section effectively precludes the defense from litigating whether they have received everything to which they are entitled in discovery.

## **Leveraging Technology for Fairer, More Efficient Discovery: Nueces, Fort Bend, and Eastland Counties**

Requiring defense attorneys to handwrite notes from the State's file still occurs in at least several Texas counties. Defense counsel from **Hidalgo, Johnson, Val Verde, and Ector** counties told Texas Appleseed in interviews last fall that they have been required to take handwritten notes of discovery.

The commentary to the ABA Guidelines advises that the party producing the discovery should provide suitable copying or access to facilities for testing evidence (noting further that, as to non-indigent defendants, the government may require the defense to reimburse copying costs where there are voluminous records in a case).<sup>101</sup>

Several Texas counties provide discovery to defense attorneys digitally over the internet, or otherwise make copies readily available to defense counsel.

**Nueces County District Attorney Mark Skurka**, for example, recently announced: "*Welcome to the 21<sup>st</sup> Century! In efforts to bring the Nueces County District Attorney's Office ('DAO' hereinafter) into the modern-age, we are now implementing electronic or 'paperless' discovery. The DAO still has its open file policy and welcomes you to view our files (as that policy allows), however, in order to be more efficient and green, we are now providing standard discovery packets in electronic format.*"<sup>102</sup>

The office utilizes the cloud-service called "DropBox" and uploads the discovery for the defense attorney to download and view at her convenience. This eliminates excessive trips to the DA's office and time wasted copying notes by hand.

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<sup>100</sup> *Id.*

<sup>101</sup> ABA at 71.

<sup>102</sup> Letter from Nueces County District Attorney Mark Skurka to Defense Attorneys, October 1, 2012, received by Texas Appleseed October 15, 2012 through open records request.

In a letter to Texas Appleseed, **Fort Bend District Attorney John Healey** explained that, “*in addition to individualized standard discovery orders employed by many of Fort Bend County’s judges, we have a practice of allowing attorneys who are members of the Fort Bend County Bar Association to scan our files, absent that which is prohibited by law from disclosure.*”<sup>103</sup> Allowing attorneys to scan files is a cost effective and efficient way to provide counsel with copies of discovery.

**Eastland County District Attorney Russell Thomason** has implemented an electronic discovery system that is fair, efficient, and inexpensive. District Attorney Case Search (DACS) allows defense attorneys to view the bulk of the prosecutor’s file (including police reports, witness statements, and criminal histories) from any computer at any time.

Immediately after a defense attorney is appointed or retained, they are given access to the files through the system with a user name and password. Functionality is being added to the system that will alert defense attorneys by e-mail when their client’s file has been updated.

In an e-mail to Texas Appleseed, District Attorney Thomason explained that, “*the policies and the system that we now have in place with online discovery have not only proved to be more efficient for all concerned—my office, the defendant, and the court—but it also should build/restore/maintain confidence in the criminal justice system. It demonstrates that the State has nothing to hide and makes it convenient for the defense to see the strengths and weaknesses of the case. Additionally, our office has no expense for copying or mailing and the Defense attorneys do not have to come to the office to obtain their discovery. Defense attorneys have had no complaints about the system.*”<sup>104</sup>

The most striking aspect of Eastland County’s system is its cost. DACS was developed with the NetData Corporation out of Sulphur Springs, Texas. Installing the system cost under \$10,000 (including scanners, software, etc.). Eastland County has a population of about 18,000 people. If Eastland County can implement such an electronic discovery system, there seems to be little reason that other Texas counties cannot pursue the same.

## Discovery as a “Privilege” Extended at Prosecutor’s Discretion

In the Bell County District Attorney’s Office’s “*general written policy as to discovery in felony criminal cases,*” **District Attorney Henry Garza** explains that the policy “*is viewed by [his] office as a privilege. Each Assistant District Attorney will have full authority to make the decision on what to provide and when to revoke a Defense Attorney’s privileges based on an abuse or abuses.*”<sup>105</sup>

Similarly, **El Paso District Attorney Jaime Esparza** advises defense attorneys that their “*open file policy, though not required by law, is a courtesy we offer to all defense attorneys to facilitate open discovery and cooperation, and to eliminate the need for formal discovery.*”<sup>106</sup>

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<sup>103</sup> Letter from Fort Bend County District Attorney John Healey, Jr. to Texas Appleseed (November 5, 2012).

<sup>104</sup> E-mail from Eastland County District Attorney Russell Thompson to Texas Appleseed (February 1, 2013).

<sup>105</sup> Memo from Bell County District Attorney Henry Garza to All Attorneys, July 26, 2007, received by Texas Appleseed on October 11, 2012 through an open records request.

<sup>106</sup> See note 73, *supra*.

Mr. Esparza adds that the “*new policy of copying murder and capital murder files [is] not required by law and [is] offered solely at our discretion; therefore, we reserve the right to terminate this mode of discovery, in whole or part, when necessary or should the information obtained from our files be misused or improperly disseminated in any way.*”<sup>107</sup>

Bell and El Paso District Attorneys’ Offices are not identified in this section for the purposes of casting a negative light on their discovery policies. In fact, El Paso was identified earlier in this report as having a policy in line with many of the ABA Guidelines.

Instead, their policies are quoted here because they succinctly put into writing what everyone already knows to be true: All discovery provided to the defense beyond what can be ordered pursuant to Article 39.14 can be revoked in any case, at any time, for any reason.

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<sup>107</sup> *Id.*

## Two banned from Burgess' court

Prosecutors accused of withholding key evidence in assault trial

By Donna Fielder / Staff Writer

Published: 07 April 2012 10:48 PM

A state district judge has banned two assistant district attorneys assigned to his courtroom from returning, ruling that they committed prosecutorial misconduct and don't have "the innate intellect of a fifth-grader."

Last spring, two Denton County Assistant District Attorneys were banned from practice in one district court for failing to disclose exculpatory evidence to the defense before trial.

District Judge Steve Burgess ruled that the prosecutors, trying an aggravated assault with a deadly weapon case, willfully withheld evidence that should have been shared with the defense. This evidence, called *Brady* evidence (*see 9, supra*), should have been disclosed to the defense before trial.

During the trial, a key eye witness testified that she could not identify the attacker by his face, but only by smell and the attacker's boots. The witness testified that she told this to the prosecutors before trial. The defense argued that it should have received this information under *Brady*, and that it was inconsistent with the witness' prior testimony.

First Assistant District Attorney Jamie Beck advised the *Denton Record-Chronicle* that she did not believe that the two prosecutors were guilty of prosecutorial misconduct, but noted that they would be required to take remedial courses about *Brady* and exculpatory evidence. The office has also defended the Assistant District Attorneys' conduct before the state bar as an unintentional withholding of evidence.

In its response to Texas Appleseed's open records request, Denton County described their policy as "open file" and stated that the "DA's office provides all evidence" to defense counsel through discovery.

### BEST PRACTICES

District Attorney Paul Johnson and First Assistant Jamie Beck argued that the failure to disclose was not a willful *Brady* violation (withholding of exculpatory evidence), but rather a lack of understanding about the law. Regardless, the best practices recommended by the American Bar Association's Criminal Discovery Standards and The Justice Project may have prevented this entire episode.

**OPEN FILE DISCOVERY:** Both the American Bar Association and The Justice Project recommend that the State disclose all witness statements to the defense. In this case, that would have included the eye witness' statement that she could only identify the attacker by smell and shoes.

# THE DAILY NEWS

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## Two prosecutors out at DA's office

**By Chris Paschenko**  
The Daily News

Published October 3, 2012

**GALVESTON — One prosecutor was fired and another resigned the same day, but officials aren't saying whether the shake-up at the district attorney's office is related to recent allegations of prosecutorial misconduct.**

Late last fall, one Assistant District Attorney was terminated and another resigned from the Galveston County District Attorney's Office. Both faced accusations that they withheld evidence in criminal cases. The judge in a July 2011 robbery trial claimed that one prosecutor "secreted" evidence, including a 911 tape, from defense counsel. The court ordered the jury to acquit the defendant.

Following the incident, Galveston County District Attorney Jack Roady implemented a new policy that required documentation of what is provided to defense attorneys.

In another case, where the defendant was charged with fracturing her newborn's skull, the court declared a mistrial following accusations that the state improperly bolstered the credibility of a state's witness whose testimony was inconsistent.

District Attorney Roady said at the time that he disagreed with the allegations of prosecutorial misconduct, but noted that the prosecutor should have disclosed the witness' inconsistent statement to the defense before the trial.

This action by the Galveston County District Attorney's Office mirrors the written policy of the Dallas County District Attorney's Office, which has new assistant district attorneys sign an agreement acknowledging that they may be terminated for failing to share *Brady* material with defense counsel.

### BEST PRACTICES

The Galveston County District Attorney's Office is cited earlier in this report for having a broad discovery policy that is far more expansive than Code of Criminal Procedure Article 39.14. The removal of these prosecutors suggests that District Attorney Jack Roady takes seriously his office's discovery policy and commitment to follow *Brady*.

**CERTIFICATION OF DISCOVERY:** The Justice Project recommends, and The Timothy Cole Report favorably cites, the best practice of certification. "*A discovery certificate should be filed by the District Attorney's Office with the court during pretrial procedures,*" The Justice Project explains, "*and should specify when evidence was exchanged and by what method of delivery.*"

District Attorney Roady recently implemented a measure of certification. "*We maintain a file inventory and have the attorney of record sign for either the review or the receipt of evidence and documents,*" explained First Assistant Donna Cameron in a letter to Texas Appleseed. This system creates a clear record of what disclosures were made to the defense, and may eliminate some accusations of non-disclosure.

In The  
Court of Appeals  
Fifth District of Texas at Dallas

\*\*\*\*\*  
No. 05-12-00225-CV  
\*\*\*\*\*

\*\*\*\*\*  
IN RE CRAIG WATKINS, CRIMINAL DISTRICT  
ATTORNEY OF DALLAS, TEXAS, Relator  
\*\*\*\*\*

Last summer (June 8, 2012), The Court of Appeals of the Fifth District of Texas in Dallas issued a writ of mandamus after a trial court ordered discovery in a criminal case beyond the bounds of Texas Code of Criminal Procedure Article 39.14.

The trial court used a “Standard Order of Discovery,” an order that the court entered in every criminal case. The Court of Appeals observed that the order provided that “*the state must make certain categories of materials and information available to the defense, including NCIC and TCIC records of the state’s witnesses.*” (These are the witness’ criminal records.)

After the trial court entered its standard order, the prosecution objected and asked the Court of Appeals for relief. The Court of Appeals sided with the prosecution, and explained that:

*This order appears to require production of more than is required under Brady v. Maryland, 373 U.S. 83 (1963). There is no requirement in the standing order that the defense make any motion or demonstrate good cause in order to be entitled to the items identified in the standard order. By not requiring defendants to file a motion and show good cause before being entitled to discovery, the trial court circumvented art. 39.14 of the code of criminal procedure.*

The trial court was then required to withdraw the standing order of discovery. Therefore, the defense could only receive discovery by filing a motion with the court that showed “good cause,” or by the good will of the district attorney’s office. The defense would not receive the full criminal records under an Article 39.14 court order.

## BEST PRACTICES

**AUTOMATIC DISCOVERY:** The standing court order would have required the State to provide discovery automatically, without waiting for the defense to file a motion. The Timothy Cole Report and The Justice Project both recommend that discovery be automatic, independent of a motion by the defense. This eliminates extra litigation and provides discovery as early as possible.

**CRIMINAL HISTORIES:** The standing court order would have also required the State to disclose the criminal histories of the State’s witnesses. The American Bar Association and The Justice Project both recommend that the State disclose the criminal records, so far as they may be used to impeach the State’s witnesses, before trial.

**BALANCE OF POWER:** Even though standard orders used throughout Texas frequently employ some of the American Bar Association and The Justice Project’s best practices, these orders are only legitimate to the extent that the prosecution chooses to comply with them. Any standing court order that requires discovery beyond 39.14 or without a motion by the defense can be appealed and rendered unenforceable by the State.

# Discovery in Juvenile Cases

The Texas Family Code provides that discovery in juvenile cases is governed by the same laws as an adult criminal case: “*Discovery in a proceeding under this title is governed by the Code of Criminal Procedure and by case decisions in criminal cases.*”<sup>108</sup>

Whatever the arguments for or against discovery reform for adult criminal cases, the vulnerable nature of children and their decreased culpability should merit greater discovery than that provided by Texas Code of Criminal Procedure 39.14. Defense counsel for children should be provided with every opportunity to prove their clients’ innocence and lessened culpability, including access to police reports, witness statements, and all other information called for under American Bar Association best practices.<sup>109</sup>

Ironically, a provision of the Texas Family Code enacted to protect juveniles is actually impairing their effective representation. The El Paso Public Defender’s Office reports that, although they receive copies of offense reports in adult cases, their attorneys representing children do not receive offense report copies and are obligated to take hand written notes from offense reports in juvenile cases. Texas Family Code Sec. 58.007 states that these records are open to “inspection,” but does not provide for “copying.” This provision comes from an understanding of juveniles deserving extra privacy protections, making their offense reports confidential. In addition to overall discovery reform, this practice should be changed to enable attorneys representing juveniles in criminal matters to have more efficient access to offense reports, both in order to facilitate better representation and save the counties from paying more for indigent juvenile defense by eliminating time wasted hand-copying reports.

Texas has long recognized the need to treat children charged with crimes differently from adults.<sup>110</sup> Texas’ juvenile courts were established to rehabilitate children, not punish them, and this mission is reflected in various procedural and substantive differences between juvenile and adult court systems.<sup>111</sup> In Texas, two of the most important differences are the right to appointed counsel in every juvenile case<sup>112</sup>, and a civil, rather than criminal, disposition.<sup>113</sup> Recent language from the Supreme Court of the United States has highlighted the importance of treating children differently from adults. In *Roper v. Simmons*<sup>114</sup>, the Supreme Court struck down the death penalty as applied to juveniles, and noted three general differences between juveniles and adults in support of its finding:

- A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults;

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<sup>108</sup> Texas Family Code § 51.17(b).

<sup>109</sup> Steven A. Drizin & Greg Luloff, “Are Juvenile Courts a Breeding Ground for Wrongful Convictions?”, 34 N. Ky. L. Rev. 257, 263 (2007) (discussing why juveniles are at a greater risk for wrongful convictions).

<sup>110</sup> See *Dendy v. Wilson*, 142 Tex. 460, 464-68 (Tex. 1944).

<sup>111</sup> *Id*; see also Shay Bilchik, *Juvenile Justice: A Century of Change*, Office of Juvenile Justice and Delinquency Prevention, 2 (1999).

<sup>112</sup> Texas Family Code § 51.10(f).

<sup>113</sup> Texas Family Code § 51.13(a).

<sup>114</sup> 543 U.S. 551 (2005).

- Juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and
- The character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.<sup>115</sup>

In *Graham v. Florida*, prohibiting life without parole for youth convicted of non-homicide offenses, the Court observed that, “A juvenile is not absolved of responsibility for his actions, but his transgression ‘is not as morally reprehensible as that of an adult.’”<sup>116</sup> More importantly, the Court noted that juveniles are inherently disadvantaged in criminal proceedings because:

- Juveniles mistrust adults and have limited understanding of the criminal justice system and the roles of the institutional actors within it;
- They are less likely than adults to work effectively with their lawyers to aid in their defense; and
- Juveniles have difficulty weighing long-term consequences, a corresponding impulsiveness, and a reluctance to trust defense counsel viewed as part of the “adult world” a rebellious youth rejects.<sup>117</sup>

All of the above can lead to poor decision-making by juvenile defendants.

The Court has not limited its special treatment of juveniles to the realm of sentencing. In *J.D.B. v. North Carolina*<sup>118</sup>, the Court held that a child’s age must factor into whether a police officer is required to inform the child of his or her *Miranda* rights prior to questioning. The court observed that, “the legal disqualifications placed on children as a class – e.g., limitations on their ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent – exhibit the settled understanding that the differentiating characteristics of youth are universal.”<sup>119</sup>

The differences between juveniles and adult criminal defendants, evidenced by Texas’ creation of a wholly separate system for their adjudication and by the legal decisions of the nation’s highest court, necessitate that defense counsel for juveniles be provided with the broadest discovery possible. Juvenile discovery that complies with the American Bar Association’s best practices will decrease the likelihood of wrongful convictions and allow counsel to better defend juvenile clients who are more vulnerable and less mature than their adult peers.

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<sup>115</sup> *Id.* at 569-70.

<sup>116</sup> 130 S. Ct. 2011, 2026 (2010).

<sup>117</sup> *Id.* at 2032.

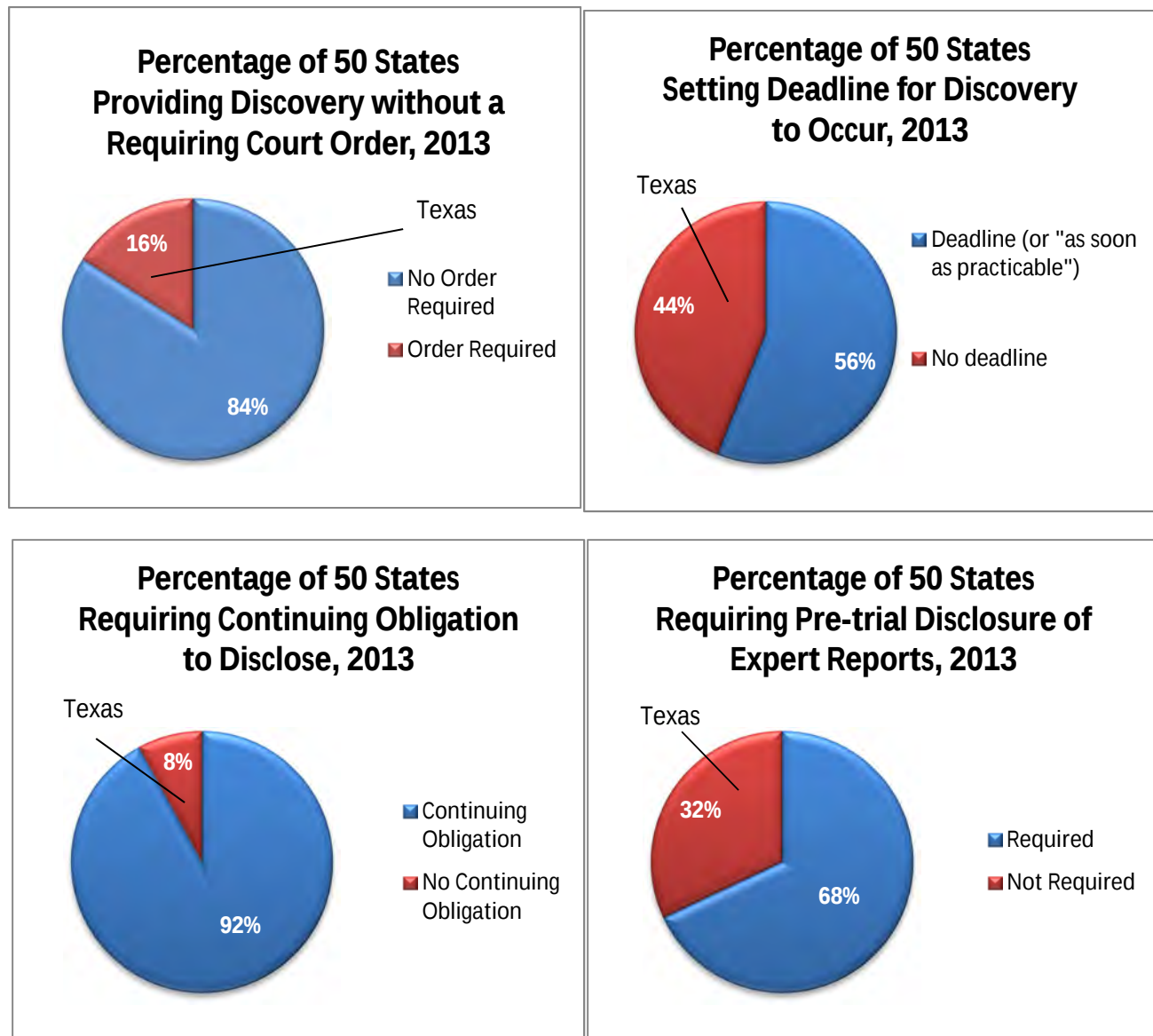
<sup>118</sup> 131 S. Ct. 2394 (2011).

<sup>119</sup> *Id.* at 2403-04.

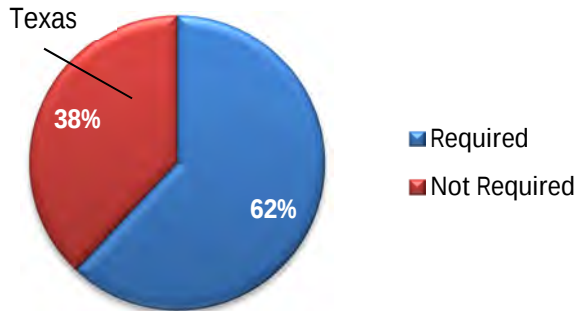
# How Texas' Discovery Statute Compares to Statutes in the 50 States

This section examines the criminal discovery statutes of all 50 states in the context of several best practices identified by the American Bar Association, The Timothy Cole Report, and The Justice Project.

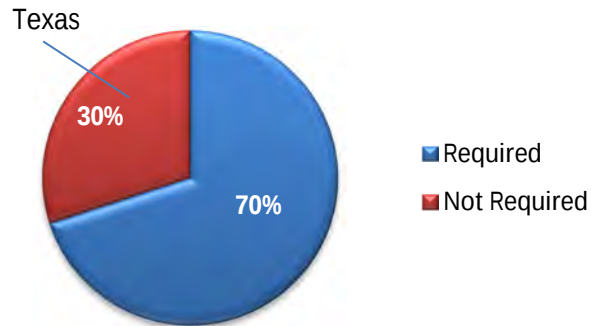
The charts below illustrate the percentage of states that embody certain best practices recommended by the American Bar Association or the Timothy Cole Report. Each chart also indicates Texas' current practice.



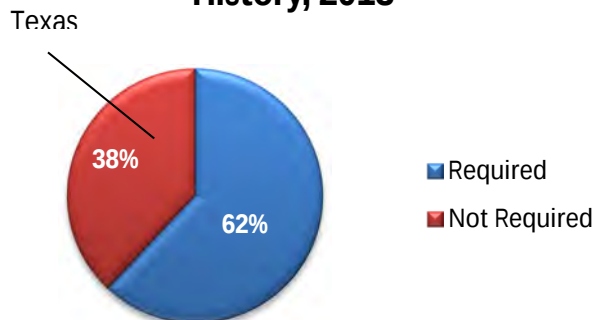
**Percentage of 50 States  
Requiring Pre-trial Disclosure of  
Witness Statements, 2013**



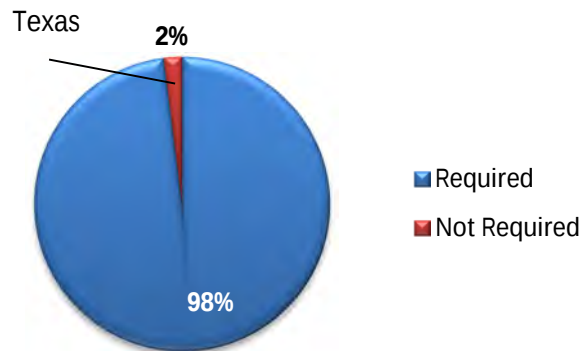
**Percentage of 50 States  
Requiring Pre-trial Disclosure of  
Co-Defendant Statement, 2013**



**Percentage of 50 States  
Requiring Pre-trial Disclosure of  
Defendant's Full Criminal  
History, 2013**



**Percentage of 50 States  
Requiring Mutual or Reciprocal  
Discovery, 2013**



## Conclusion

Amending Texas' discovery statute to provide for more robust, open file discovery is important for several reasons. It *promotes the efficient resolution of criminal cases* by educating both parties on the strength of the evidence, reducing the need for formal discovery motions, and eliminating most disagreements over what evidence is subject to disclosure. It also *promotes fairness and improves access to justice*. When discovery policies vary greatly from one district attorney's office to another, Texans charged with crimes in different counties have unequal access to justice.

Most importantly, it *decreases the likelihood of wrongful convictions* because the defendant has access to all available information and is provided with adequate time and opportunity to examine and investigate all the evidence.

In too many instances, as documented by this report, Texas is among the minority of states that do not follow best discovery practices established by national legal experts and endorsed by the American Bar Association.

Texas' statute gives the State (district attorneys' offices) discretion to broaden discovery sharing above and beyond the statutory requirements—and, fortunately, many do that to varying degrees. Because access to pretrial discovery is far from uniform, however, and because the policy can change at any time for any reason—even changing with the election of a new district attorney, potential barriers to fair resolution of criminal cases exist in Texas. And, as highly publicized cases attest, after-the-fact arguments over discovery frequently resurface in the publicity over tragic miscarriages of justice and the conviction and lengthy incarceration of innocent people.

It is time for Texas' criminal discovery statute to reflect these national best practices:

- Automatic access to discovery, independent of motion or request;
- Open file discovery, including access to police reports, witness statements, expert reports, and criminal histories;
- Reciprocal or mutual discovery obligations for the defense, within the boundaries of the defendant's constitutional rights;
- Defined timelines for when discovery must be initiated; and
- An explicit continuing obligation to disclose.

These changes in state discovery statute will ensure greater justice for both juvenile and adult defendants.

|                | Is a Court Motion<br>Required to Initiate<br>Discovery? | Is There a Time Limit on<br>When Disclosure Must<br>Occur? | Is There a<br>Continuing<br>Obligation to<br>Disclose? | Must Expert Reports<br>be Disclosed? | Must Police Reports<br>be Disclosed? | Must Witness<br>Statements be<br>Disclosed? | Must Co-Defendant<br>Statements be<br>Disclosed? | Must the Defendant's<br>Entire Criminal History<br>be Disclosed? | Is Reciprocal/Mutual<br>Discovery Provided For? |
|----------------|---------------------------------------------------------|------------------------------------------------------------|--------------------------------------------------------|--------------------------------------|--------------------------------------|---------------------------------------------|--------------------------------------------------|------------------------------------------------------------------|-------------------------------------------------|
| ALABAMA        | NO                                                      | YES                                                        | YES                                                    | NO                                   | NO                                   | NO                                          | YES                                              | NO                                                               | YES                                             |
| ALASKA         | NO                                                      | NO                                                         | YES                                                    | YES                                  | NO                                   | YES                                         | YES                                              | YES                                                              | YES                                             |
| ARIZONA        | NO                                                      | YES                                                        | YES                                                    | YES                                  | YES                                  | YES                                         | YES                                              | NO                                                               | YES                                             |
| ARKANSAS       | NO                                                      | YES                                                        | YES                                                    | YES                                  | NO                                   | NO                                          | YES                                              | NO                                                               | YES                                             |
| CALIFORNIA     | NO                                                      | YES                                                        | YES                                                    | YES                                  | NO                                   | YES                                         | YES                                              | NO                                                               | YES                                             |
| COLORADO       | NO                                                      | YES                                                        | YES                                                    | YES                                  | YES                                  | YES                                         | YES                                              | YES                                                              | YES                                             |
| CONNECTICUT    | NO                                                      | YES                                                        | YES                                                    | YES                                  | YES                                  | NO                                          | YES                                              | YES                                                              | YES                                             |
| DELAWARE       | NO                                                      | NO                                                         | YES                                                    | YES                                  | NO                                   | NO                                          | YES                                              | YES                                                              | YES                                             |
| FLORIDA        | NO                                                      | YES                                                        | NO                                                     | YES                                  | YES                                  | YES                                         | YES                                              | NO                                                               | YES                                             |
| GEORGIA        | NO                                                      | YES                                                        | YES                                                    | NO                                   | NO                                   | YES                                         | YES                                              | YES                                                              | YES                                             |
| HAWAII         | NO                                                      | YES                                                        | YES                                                    | YES                                  | NO                                   | YES                                         | YES                                              | YES                                                              | YES                                             |
| IDAHO          | NO                                                      | NO                                                         | YES                                                    | YES                                  | YES                                  | YES                                         | YES                                              | YES                                                              | YES                                             |
| ILLINOIS       | YES                                                     | YES                                                        | YES                                                    | YES                                  | NO                                   | YES                                         | YES                                              | NO                                                               | YES                                             |
| INDIANA        | -                                                       | -                                                          | -                                                      | -                                    | -                                    | -                                           | -                                                | -                                                                | -                                               |
| IOWA           | YES                                                     | NO                                                         | YES                                                    | NO                                   | NO                                   | NO                                          | YES                                              | YES                                                              | YES                                             |
| KANSAS         | NO                                                      | YES                                                        | YES                                                    | NO                                   | NO                                   | NO                                          | NO                                               | NO                                                               | YES                                             |
| KENTUCKY       | NO                                                      | NO                                                         | YES                                                    | YES                                  | YES                                  | NO                                          | NO                                               | NO                                                               | YES                                             |
| LOUISIANA      | YES                                                     | NO                                                         | YES                                                    | NO                                   | NO                                   | NO                                          | YES                                              | YES                                                              | YES                                             |
| MAINE          | NO                                                      | YES                                                        | YES                                                    | YES                                  | NO                                   | YES                                         | NO                                               | NO                                                               | YES                                             |
| MARYLAND       | NO                                                      | NO                                                         | YES                                                    | YES                                  | NO                                   | YES                                         | YES                                              | NO                                                               | YES                                             |
| MASSACHUSETTS  | NO                                                      | NO                                                         | YES                                                    | YES                                  | YES                                  | YES                                         | YES                                              | YES                                                              | YES                                             |
| MICHIGAN       | NO                                                      | YES                                                        | YES                                                    | YES                                  | YES                                  | YES                                         | YES                                              | NO                                                               | YES                                             |
| MINNESOTA      | NO                                                      | YES                                                        | YES                                                    | YES                                  | NO                                   | YES                                         | YES                                              | YES                                                              | YES                                             |
| MISSISSIPPI    | NO                                                      | NO                                                         | YES                                                    | YES                                  | NO                                   | YES                                         | NO                                               | NO                                                               | YES                                             |
| MISSOURI       | NO                                                      | YES                                                        | YES                                                    | YES                                  | NO                                   | YES                                         | YES                                              | NO                                                               | YES                                             |
| MONTANA        | NO                                                      | NO                                                         | YES                                                    | YES                                  | NO                                   | YES                                         | YES                                              | NO                                                               | YES                                             |
| NEBRASKA       | YES                                                     | NO                                                         | YES                                                    | NO                                   | NO                                   | NO                                          | NO                                               | YES                                                              | YES                                             |
| NEVADA         | NO                                                      | YES                                                        | YES                                                    | NO                                   | NO                                   | YES                                         | NO                                               | NO                                                               | YES                                             |
| NEW HAMPSHIRE  | NO                                                      | YES                                                        | YES                                                    | YES                                  | YES                                  | YES                                         | NO                                               | YES                                                              | YES                                             |
| NEW JERSEY     | NO                                                      | YES                                                        | YES                                                    | YES                                  | YES                                  | YES                                         | YES                                              | YES                                                              | YES                                             |
| NEW MEXICO     | NO                                                      | YES                                                        | YES                                                    | NO                                   | NO                                   | YES                                         | YES                                              | YES                                                              | YES                                             |
| NEW YORK       | NO                                                      | YES                                                        | YES                                                    | NO                                   | NO                                   | NO                                          | YES                                              | NO                                                               | YES                                             |
| NORTH CAROLINA | YES                                                     | NO                                                         | YES                                                    | YES                                  | YES                                  | YES                                         | YES                                              | YES                                                              | YES                                             |
| NORTH DAKOTA   | NO                                                      | NO                                                         | YES                                                    | YES                                  | NO                                   | YES                                         | YES                                              | YES                                                              | YES                                             |
| OHIO           | NO                                                      | NO                                                         | NO                                                     | NO                                   | YES                                  | YES                                         | YES                                              | YES                                                              | YES                                             |
| OKLAHOMA       | NO                                                      | YES                                                        | YES                                                    | YES                                  | YES                                  | YES                                         | YES                                              | YES                                                              | YES                                             |
| OREGON         | NO                                                      | YES                                                        | YES                                                    | YES                                  | NO                                   | YES                                         | YES                                              | NO                                                               | YES                                             |
| PENNSYLVANIA   | YES                                                     | NO                                                         | YES                                                    | YES                                  | NO                                   | YES                                         | YES                                              | YES                                                              | YES                                             |
| RHODE ISLAND   | NO                                                      | YES                                                        | YES                                                    | NO                                   | NO                                   | YES                                         | YES                                              | YES                                                              | YES                                             |
| SOUTH CAROLINA | NO                                                      | YES                                                        | YES                                                    | NO                                   | NO                                   | NO                                          | NO                                               | YES                                                              | YES                                             |
| SOUTH DAKOTA   | NO                                                      | NO                                                         | YES                                                    | YES                                  | NO                                   | NO                                          | NO                                               | YES                                                              | YES                                             |
| TENNESSE       | NO                                                      | NO                                                         | YES                                                    | NO                                   | NO                                   | NO                                          | YES                                              | YES                                                              | YES                                             |
| <b>TEXAS</b>   | <b>YES</b>                                              | <b>NO</b>                                                  | <b>NO</b>                                              | <b>NO</b>                            | <b>NO</b>                            | <b>NO</b>                                   | <b>NO</b>                                        | <b>NO</b>                                                        | <b>NO</b>                                       |
| UTAH           | NO                                                      | YES                                                        | YES                                                    | NO                                   | NO                                   | NO                                          | YES                                              | YES                                                              | YES                                             |
| VERMONT        | NO                                                      | YES                                                        | YES                                                    | YES                                  | NO                                   | YES                                         | YES                                              | YES                                                              | YES                                             |
| VIRGINIA       | YES                                                     | NO                                                         | YES                                                    | NO                                   | NO                                   | NO                                          | NO                                               | NO                                                               | YES                                             |
| WASHINGTON     | NO                                                      | YES                                                        | YES                                                    | YES                                  | NO                                   | YES                                         | YES                                              | YES                                                              | YES                                             |
| WEST VIRGINIA  | NO                                                      | YES                                                        | NO                                                     | YES                                  | NO                                   | NO                                          | NO                                               | YES                                                              | YES                                             |
| WISCONSIN      | NO                                                      | NO                                                         | YES                                                    | YES                                  | NO                                   | YES                                         | NO                                               | YES                                                              | YES                                             |
| WYOMING        | NO                                                      | NO                                                         | YES                                                    | YES                                  | NO                                   | NO                                          | NO                                               | YES                                                              | YES                                             |
| FEDERAL        | NO                                                      | NO                                                         | YES                                                    | YES                                  | NO                                   | NO                                          | NO                                               | YES                                                              | YES                                             |
| TOTAL "YES"    | 16%                                                     | 56%                                                        | 92%                                                    | 68%                                  | 26%                                  | 62%                                         | 70%                                              | 62%                                                              | 98%                                             |

NOTES:

1) States that require disclosure to be made "as soon as practicable," counted as "YES" for the time limit category.

2) Indiana has no state-wide discovery statute, only local rules.





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