Supreme Court Special Committee

on

Discovery in Criminal and Quasi-Criminal Matters

February 21, 2012

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I. EXECUTIVE SUMMARY

The Supreme Court Special Committee on Discovery in Criminal and Quasi-Criminal Matters was appointed to recommend solutions to a variety of issues that had arisen as the result of the increasing use of electronically stored information in criminal cases. These issues had resulted in an increasing number of discovery disputes in the courts. The following is a summary of the *Committee's* recommendations.

A. RULE RECOMMENDATIONS

- **R. 1:11-2(a)(3)** – (new paragraph) would require that prior to being relieved as counsel by the trial judge, the withdrawing attorney provide the court with a certification stating that he or she has provided the substituting attorney with the discovery that was received from the prosecutor.

- **R. 3:5-6(c)** – would be amended to require that a search warrant and any accompanying papers be provided to defendant in discovery, and available for inspection and copying (which is the current rule) by any other person claiming to be aggrieved by an unlawful search and seizure.

  This same change is also proposed for **R. 7:5-1(b)**.

- **R. 3:9-1(a)** – would require that defense counsel pick up discovery prior to, or at, the pre-arraignment conference (which shall occur within 21 days of indictment). If the defendant is unrepresented and seeking representation by the Public Defender's Office, counsel would be required to obtain discovery at the arraignment/status conference – which would be held no later than 28 days after indictment.

  R. 3:9-1(a) - consistent with a proposed change to **R. 3:13-3(b)(1)** that would allow private defense attorneys to receive discovery by mail or e-mail, would revise one of the conditions for waiver of the pre-arraignment conference (PAC). This change would apply only to private defense attorneys. In order to waive the PAC, defense

counsel would be required to either request discovery in writing or affirmatively state that he/she will not be requesting discovery.

- **R. 3:9-1(b)** – would be amended to require that the prosecutor and defense counsel confer and attempt to resolve any discovery issues, including those related to discovery provided electronically, before bringing them to the court's attention at the arraignment/status conference.

  A similar change is also proposed for **R. 7:7-5(a)**, but only the word "discovery" would be added because of concerns that defense counsel in Alcotest cases would be forced to inform the court that the prosecutor hadn't provided all of the evidence necessary to convict his/her client.

- **R. 3:9-1(c)** – would be amended to require that if the defendant did not appear at the prearraignment conference, or was unrepresented at the prearraignment conference, the arraignment/status conference would be held within 28 days of indictment (rather than 50), unless the defendant is a fugitive.

- **R. 3:13-2(a)** – would be amended to expand the list of materials that must be produced in connection with the deposition of the testimony of a material witness who is unlikely to testify at trial due to death or physical or mental incapacity. This is consistent with changes proposed for **R. 3:13-3(b)(1)(A), -3(b)(1)(E) and -3(b)(2)(B)**.

  The same change is also proposed for **R. 7:7-6(a)**.

- **R. 3:13-3(a)** – would be amended to require that, unless the defendant agrees to more limited discovery, the prosecutor provide defense counsel with all available pre-indictment discovery when a plea offer is made, except (1) where the prosecutor determines that providing all discoverable material would hinder or jeopardize a prosecution or investigation, the prosecutor shall instead provide defense counsel with such relevant material as would not hinder or jeopardize the prosecution or investigation, and advise defense counsel that complete discovery has not been provided; and (2) where the prosecutor determines that delivery of the discoverable material would impose an unreasonable administrative burden on the prosecutor's office given the nature, format, manner of collation or volume of the discoverable material, the prosecutor may make

discovery available by permitting defense counsel to inspect and copy or photograph the material at the prosecutor's office.

- **R. 3:13-3(b)(1)** – would be amended to require that the prosecutor provide defense counsel with post-indictment discovery unless there is good cause for not doing so. "Good cause" shall include, but is not limited to, circumstances in which the nature, format, manner of collation or volume of discoverable materials would involve an extraordinary expenditure of time and effort to copy. In such cases, the prosecutor may make discovery available by permitting defense counsel to inspect and copy or photograph the material at the prosecutor's office. Defense counsel would also have an obligation to provide the prosecution with discovery. **(R. 3:13-3(b)(2))**

  R. 7:7-7(b) would be similarly amended to require that unless the defendant agrees to more limited discovery, the prosecutor must provide the defendant with all discovery,. In addition, **R. 7:7-7(c)** would be amended to impose that same obligation on the defendant. In Municipal Courts, however, discovery is provided upon written notice.

  R. 3:13-3(b)(1) - would also be amended to require that, along with the discovery, the prosecutor provide defense counsel with (1) a listing of the materials that have been supplied in discovery; and (2) a listing of any items that are missing, along with an explanation of why they have not been supplied. Defense counsel would also have that same obligation. **(R. 3:13-3(b)(2)).**

  The same change is also proposed for **R. 7:7-7(g)**

  R. 3:13-3(b)(1) - would also be amended to require prosecutors, upon receiving a written request from defense counsel, to mail or e-mail discovery within 3 business days. The decision to mail or e-mail the discovery would be within the prosecutor's discretion. Defense counsel's request, along with any request for waiver of the PAC, would also be required to be sent to Criminal Case Management. Again, this change is limited to private defense attorneys. Public Defenders would still be required to pick up discovery at the courthouse or prosecutor's office. If mailed, discovery would be mailed at the defendant's expense. If e-mailed, discovery would be provided free of charge.

- **R. 3:13-3(b)(1)** - would also be amended to require that the prosecutor make discovery available 7 days after indictment. (Currently, it is 14 days). Defense counsel's reciprocal discovery would be required 7 days before the arraignment/status conference. **(R. 3:13-3(b)(2)).**

- **R. 3:13-3(b)(1)(A), -3(b)(1)(E)** and **-3(b)(2)(B)** – would be amended to expand the list of materials that must be provided in discovery. This is intended to address concerns that the current rule does not account for a number of materials, including various forms of electronically stored information, that are commonly provided in discovery.

  The same changes were also proposed for **R. 7:7-7(b)(1), -7(b)(6)** and **-7(c)(2)**.

- **R. 3:13-3(b)(1)(B)** – would be amended to require that the prosecutor provide the defendant with transcripts of all of the defendant's electronically recorded statements or confessions on a date to be determined by the trial judge, but no later than 30 days before the trial date set at the pretrial conference. That same requirement would also apply to transcripts of all electronically recorded co-defendant and witness statements, but only if the prosecutor intends to call that co-defendant or witness as a witness at trial. **(R. 3:13-3(b)(1)(G)).** The defendant would have a similar obligation to the State. **(R. 3:13-3(b)(2)(D)).**

- **R. 3:13-3(b)(3**) – (new paragraph) would specifically authorize discovery to be provided via electronic means. Documents provided through electronic means would have to be in PDF format. All other discovery would have to be provided in an open, publicly available (non-proprietary) format compatible with any standard operating computer. If discovery is not provided in a PDF or open, publicly available format, the transmitting party would be required to include a self-extracting computer program that will enable the recipient to access and view the files that have been provided. This new paragraph would also allow, upon motion of the recipient and a showing of good cause, the court to order that discovery be provided in the format in which the transmitting party originally received it (native format). It would also require that in all cases involving the use of an Alcotest device, any Alcotest data shall, upon request, be provided in a readable digital database format generally available to consumers in the open market. Finally, in all cases in which

discovery was provided through electronic means, the transmitting party would also have to include a list of the materials that were provided; i.e., an index, and, in the case of multiple disks, the disk on which they can be located.

The same changes are also proposed for **R. 7:7-7(g)**.

- **R. 3:13-3(c) –** (new paragraph) would not allow a motion for discovery unless the moving party certifies that the prosecutor and defense counsel have conferred and attempted to reach agreement on any discovery issues.

  A similar change is also proposed for **new paragraph R. 7:7-7(h)**, but the wording differs to reflect that Municipal Court motions are typically made orally, rather than filed and certified.

- **New Rule - R. 3:13-5 – paragraph (a)** would establish uniform fees for discovery: 5 cents for a regular page; 7 cents for a legal size page; electronic materials and non-printed materials would be free unless the prosecutor wants to charge for the actual cost of the disk. These fees are identical to those charged under OPRA. **Paragraphs (b) and (c)** would provide that in certain circumstances a prosecutor may charge a special service charge for printed materials or electronic records, respectively. In that instance, defense counsel would have an opportunity to review and contest the special service charge prior to it being incurred.

  The same changes are also proposed for **new paragraphs R. 7:7-7(i)(1)-(3)**

B. NON-RULE RECOMMENDATIONS

RECOMMENDATION 1. **Videos that are provided as part of discovery should be in one of the following formats: (1) AVI; (2) Windows Media; (3) MPEG; (4) QuickTime; (5) RealVideo; or (6) Shockwave (Flash).**

RECOMMENDATION 2. **A standing committee should be created to periodically review the *Committee's* recommendations regarding the preferred formats for electronic discovery and ensure that they do not become obsolete.**

RECOMMENDATION 3. **The Conferences of Municipal Division Managers and Municipal Presiding Judges should create uniform procedures to ensure that pro se defendants are informed: (1) that they are entitled to discovery in certain cases; and (2) how to obtain that discovery.**

RECOMMENDATION 4. **The County jail and State correctional facilities should have uniform policies and procedures regarding (1) attorney visitation; (2) confidentiality; (3) accessibility to a language line or interpreters; and (4) dedicated, secure interview space.**

RECOMMENDATION 5. **Video conferencing capability should be universal for defense attorneys and Public Defenders.**

RECOMMENDATION 6. **All county jail and state correctional facilities should have dedicated phone lines so that**

inmates may discuss their cases with counsel.

RECOMMENDATION 7. **Assignment Judges, Presiding Judges of the Criminal Division and Presiding Judges of the Municipal Courts should meet with and discuss RECOMMENDATIONS 4-6 with their local and county jails.**

RECOMMENDATION 8. **The Judiciary should implement computer training courses for judges and attorneys, including courses for CLE credits.**

II. BACKGROUND

Issues regarding the transmission of electronic discovery in criminal cases were initially brought to the attention of the Criminal Practice Committee by a representative of the Office of the Public Defender, who reported that defense counsel was often unable to open or view discovery transmitted in an electronic format. This was largely due to the different types of equipment and software used to record and distribute electronic discovery. For example, the software used by the county prosecutors' offices, or by the Office of the Attorney General, was often incompatible with that used by the Office of the Public Defender. Similarly, equipment used by the New Jersey State Police, or by local police departments, was sometimes incompatible with that used by the county prosecutors. In addition, prosecutors often found it difficult to replicate surveillance video recorded by community businesses.

The issues regarding software and equipment incompatibility were becoming increasingly common, and had led to a number of discovery-related disputes in the courts. As a result, the Criminal Practice Committee considered whether it should draft a court rule that would require that discovery be transmitted in a more uniform manner and format, and at a more uniform cost. Such a rule would consider such issues as limiting the software programs used to record and collect electronic discovery, and limiting the costs charged for copying and

distributing that discovery. The Criminal Practice Committee, however, decided that such an effort should include other agencies not represented on the Criminal Practice Committee. The Committee was also of the opinion that since the discovery rules had remained virtually unchanged since 1994, those rules should be reviewed in detail. The Committee proposed that the New Jersey Supreme Court form a special committee to examine the many issues relating to the transmission of electronic discovery. At its January 5, 2009 Administrative Conference, the Court approved that proposal.

III. CHARGE TO THE COMMITTEE

In April 2009, Chief Justice Rabner appointed the Supreme Court Special Committee on Discovery in Criminal and Quasi-Criminal Matters (hereinafter *Committee*). The *Committee* was charged with examining the policy and financial implications of more uniform and compatible means of providing discovery. The *Committee* was also instructed to consider and balance the varying concerns of the range of interested stakeholders. Among the specific issues the *Committee* was asked to consider were whether the types of software used to record and distribute electronic discovery should be limited in some fashion, and whether the amount charged to transmit that discovery should also be limited. In addressing those issues, the *Committee* was asked to explore whether its recommendations would require amendments to the Rules of Court, or whether they could instead be accomplished through other formal or informal means.

IV. COMMITTEE COMPOSITION

Justice Virginia A. Long, Chair
Hon. Lawrence M. Lawson, A.J.S.C., Vice-Chair
Hon. Edwin H. Stern, P.J.A.D., Retired
Hon. Louis J. Belasco, P.J.M.C.
Hon. Steven P. Burkett, J.M.C.
Hon. Frank T. Carpenter, P.J.M.C.
Hon. Marilyn C. Clark, P.J.Crim.
Hon. Frederick P. DeVesa, P.J.Crim., Retired
Hon. Sheila A. Venable, P.J.Crim.
Joseph J. Barraco, Esq., Assistant Director for Criminal Practice, New Jersey Administrative Office of the Courts
Richard Burke, Esq., New Jersey Municipal Prosecutors Association
Carole A. Cummings, Esq., Cumberland/Gloucester/Salem County Municipal Division Manager, New Jersey Administrative Office of the Courts
Warren W. Faulk, Esq., Camden County Prosecutor, County Prosecutors Association of New Jersey
Bruno Giuliari, Assistant Director, Information Technology Office, New Jersey Administrative Office of the Courts
Christina Glogoff, Esq., Office of the Attorney General, Department of Law and Public Safety
Jeffrey E. Gold, Esq., New Jersey State Bar Association, Municipal Court Practice Section
Joseph C. Grassi, Esq., New Jersey Association for Justice
Sergeant Robert Grover, County Jail Warden's Association
Keith C. Harvest, Esq., Chief Assistant Prosecutor, Garden State Bar Association
Charles J.X. Kahwaty, Esq., New Jersey State Bar Association, Municipal Court Practice Section
Joseph Krakora, Esq., Public Defender, Office of the Public Defender
Chief Eric Mason, New Jersey Association of Chiefs of Police
John L. Molinelli, Esq., Bergen County Prosecutor, County Prosecutors Association of New Jersey
Brian J. Neary, Esq., New Jersey State Bar Association, Criminal Law Section
Jeffrey A. Newman, Deputy Clerk, Appellate Division, New Jersey Administrative Office of the Courts
Bettie Norris, Director of Operations, New Jersey Department of Corrections
Sonya Y. Noyes, Passaic County Municipal Division Manager, New

Jersey Administrative Office of the Courts
Dermot P. O'Grady, Esq., Office of the Attorney General, Department of Law and Public Safety
Chief Daniel Posluszny, New Jersey Association of Chiefs of Police
Andrew Chris Rojas, Esq., First Assistant Public Defender, Office of the Public Defender
Christopher S. Romanyshyn, Esq., Office of the Attorney General, Department of Law and Public Safety
Joseph D. Rotella, Esq., Association of Criminal Defense Lawyers of New Jersey
Staci Santucci, Esq., Administrative Director, Morris County Sheriffs Office, Sheriff's Association of New Jersey
Major Michael Schaller, New Jersey State Police
Robert W. Smith, Director of Trial Court Services, New Jersey Administrative Office of the Courts
Steven A. Somogyi, Chief, Municipal Court Services Division, New Jersey Administrative Office of the Courts
Mark Sprock, Cumberland/Gloucester/Salem County Trial Court Administrator, New Jersey Administrative Office of the Courts
Chief John Scott Thomson, New Jersey Association of Chiefs of Police
Robert K. Uyehara, Jr., Esq., Asian Pacific American Lawyers Association of New Jersey

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V. STATUS OF ELECTRONIC DISCOVERY IN CRIMINAL CASES

A. Committee Work Plan

In order to identify and more fully understand the issues related to the use of electronic discovery, the *Committee* spoke with judges, attorneys and Criminal Division staff. The *Committee* also met with representatives of the Office of the Public Defender and the New Jersey State Police to learn more about their computer systems and capabilities. The *Committee* also met with representatives of the Bergen and Camden County Prosecutor's Offices, which had implemented, or were in the process of implementing, their own systems for transmitting electronic discovery. In addition, the *Committee* reviewed case law, state and federal statutes and court rules in order to determine which jurisdictions across the United States had established procedures governing the transmission of electronic discovery in criminal cases, and heard from experts on the law regarding electronic discovery. Finally, the *Committee* split into subcommittees to address several broad categories of related issues.

B. Identification of Electronic Discovery Issues

1. Discussions with Attorneys and Court Staff

In order to understand the scope of the problems associated with the transmittal and receipt of electronic discovery, the *Committee's* first step was to identify the issues. The *Committee* spoke to a number of judges, prosecutors, defense attorneys and Criminal Division staff, and also heard

from its members. The following issues were elicited from these conversations:

- **Lack of Equipment** – Many defense attorneys simply did not have the equipment necessary to view or listen to electronic discovery. The main problem is that discovery can be provided in a variety of formats, including CD, DVD, or video or audio cassette. Depending on the format used, the defense attorney may need to find a computer, DVD player, CD player, VCR or tape recorder to view or listen to the discovery.

- **Incompatible Software** – Even if defense attorneys had the proper equipment, they often did not have the software necessary to open and view that discovery. Depending on the nature of the case, prosecutors collected discovery from a variety of sources, such as police, medical examiners, hospitals, doctors, forensic analysts, local businesses, credit card companies, internet service providers, schools, and telephone service providers. Each of those agencies, institutions and businesses may use different software to collect and store information electronically, and that software was not always compatible with that used by county prosecutors or, more commonly, by defense attorneys. It was also reported that the police departments throughout the state used different software. As a result, defense attorneys often found that they were unable to open and view certain files contained on DVD or CD, and sometimes could not open the disks at all. The Office of the Public Defender, for example, reported that it had a great deal of difficulty in opening disks that required "proprietary," or commercial, software.

  Another issue was that similar types of files were occasionally saved in different formats. For example, audio files might be saved in audio file formats such as WMV, or as data files such as MP3, each of which required the use of different types of software to open.

- **Costs of Discovery** – The costs of discovery, particularly for DVDs and CDs, were also reported to be an issue, with the prices varying from county to county. For example, some prosecutor's offices charged as much as $50.00 for each disk. Prosecutors reported that they often went through the time and expense of putting together discovery packages, only to have defense attorneys decline those packages. Defense attorneys, especially in cases with multiple defendants, occasionally requested that any DVDs or CDs

be removed from the discovery packages because they did not want to pay for them. Instead, they said, they would just borrow the DVD or CD from one of the other attorneys.

Another cost-related issue concerned the costs of transcripts. It was reported that discovery packages typically contained DVDs, CDs or videotapes of the defendants' custodial interrogations, but did not always contain the transcripts of those interrogations. Consequently, defense attorneys were frequently required to pay for transcripts to be made. In many instances, they were also required to pay for the translation of interrogations involving clients who did not speak English. In response, prosecutors noted that it would be both a waste of manpower and extremely expensive to transcribe every statement when only 5% of cases were tried.

Another issue was that the Attorney General occasionally took the position that it only had to make one set of the discovery available for inspection and copying. In one multi-defendant fraud case, for example, the discovery consisted of over 20,000 pages of documents and between 400-500 disks. As the cost for each set of discovery was over $5,000, the Attorney General provided just one set and left it to the defense to find a way to copy it for each of the other attorneys. Although that was all that the discovery rule required, it was felt that the Attorney General's position was not within the spirit of the discovery rule.

- **Indexing/Organization of Discovery** – Discovery collected and stored in an electronic format was seldom accompanied by an index or table of contents. As a result, the recipients of that discovery had no idea what to look for, or where to find it, without opening every file and viewing it in its entirety. Another issue was that the files were often vaguely or inaccurately labeled. For example, a file containing a defendant's statement recorded on May 1, 2009 might simply be labeled as "5-1-09," or a file entitled "autopsy report" might actually be a file of crime scene photos. In addition, there was often no indication as to where the key parts of a statement were located, so attorneys were required to view several hours of questioning before they learned what admissions were made by their clients. This was especially true in cases in which the DVDs, CDs or videotapes were not accompanied by transcripts.

- **Alcotest Discovery** – In DWI cases, the State must provide certain documents in discovery, such as certifications that the

Alcotest device was in working order and that the machine's operator was certified to operate that device. However, rather than providing those documents, the State Police and a number of municipal prosecutors had begun sending form letters that directed defense attorneys to the State Police website, or to local police websites, to find the necessary documents themselves. The documents, however, could not always be located, and there was no way for the prosecutor to confirm that the documents were available at a certain date and time, and no way for the defense attorney to prove that they were not there when he or she checked the site. This had led to a number of disputes in the municipal courts.

A related issue was that if certain core foundational documents – documents that must be admitted into evidence - were missing, the defense attorney could not notify the prosecutor or the court, because doing so would alert the prosecutor that the State did not have all the evidence it needed to convict his or her client. Often, it was not until the case was being tried that defense attorneys learned whether the prosecutor was actually in possession of those core foundational documents, which put them at a disadvantage because they did not have a prior opportunity to review those documents.

- **Computer Literacy** – Many attorneys and judges were simply not very knowledgeable of, or comfortable with, computers and computer software. It was suspected that this lack of knowledge contributed greatly to the number of issues regarding electronic discovery, particularly issues regarding unreadable computer disks.

A somewhat related issue was that disks occasionally contained programs that were necessary to access certain files, but there were no instructions for downloading those programs or even notices that the programs had been provided. As a result, unless the recipient was fairly well-versed in computer software, he or she would more than likely not realize that the necessary programs had been provided with the discovery.

- **Discovery-Related Delays** - The Conference of Criminal Presiding Judges and the Conference of Criminal Division Managers advised the *Committee* of a number of general discovery issues. They reported that when there was a substitution of counsel, the new attorney often did not receive the discovery package from the former attorney in a timely manner. This issue typically did not come

to light until a subsequent court hearing, leading to delays in those cases.

Another cause of delay involved the timely preparation and receipt of discovery. Prosecutors often did not make discovery available, and defense attorneys often did not pick up discovery, in accordance with the current court rules. As a result, defense counsel often did not receive discovery until the Arraignment/Status Conference, which may occur as late as 50 days after indictment.

Another common cause of delay was that attorneys often reported late in the case that they had only recently discovered that they were missing a particular piece of discovery.

- **Attorney-Client Visitation in County Jails** – The county jails had no consistent, statewide policies regarding the use of laptop computers for attorney-client visits. Some jails allowed attorneys to use their own laptops to review electronic discovery with their clients, while others either provided laptop computers or prohibited them entirely. Similar inconsistencies existed regarding the hours during which attorneys could visit with their clients; the availability of private interview space; the availability of video teleconferencing and language lines; the materials that attorneys could bring into the jails; and whether the interview spaces were sufficiently clean and secure. These disparities serve to prevent defense attorneys from meeting and reviewing discovery with their clients, and from conversing with those clients in a confidential and meaningful manner.

- **General Discovery-Related Issues** – R. 3:13-3(b) currently requires that defense attorneys physically pick up discovery from the county prosecutor's office or the criminal division manager's office, both of which, along with public defenders, are based at or near the county courthouse. As a result, private attorneys, especially those who practice in multiple counties, must often travel significantly out of their way to pick up discovery. This places an unfair burden on private defense attorneys, particularly those who work in solo or smaller offices.

The *Committee* heard on several occasions that some of the common issues regarding electronic discovery could be the result of R. 3:17, which requires that all custodial interrogations conducted in a place

of detention must be recorded when the person is charged with certain offenses. Initially, R. 3:17's recordation requirement applied only to homicides that occurred on or after January 1, 2006. However, beginning on January 1, 2007, it also applied to several additional offenses occurring on or after that date.[1] As a result, the number of electronically recorded statements has grown exponentially in recent years. According to data collected from PROMIS Gavel, 15,921 people were charged with those offenses in 2010. When R. 3:17 was first proposed, by the Supreme Court Special Committee on Recordation of Custodial Interrogations, the Committee recommended that recordation be allowed through either audio or audio-visual means, and left to the discretion of law enforcement. See Report of the Supreme Court Special Committee on Recordation of Custodial Interrogations, at 36 (April 15, 2005).[2] In making that recommendation, the Committee noted that other states with a recordation requirement had not specified the method of recording, and anticipated that law enforcement would, over time, eventually transition to audio-visual recording. Id. at 36-37.

[1] The applicable offenses are now murder, kidnapping, aggravated manslaughter, manslaughter, robbery, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact, second degree aggravated assault, aggravated arson, burglary, violations of Chapter 35 of Title 2C that constitute first or second degree crimes, any crime involving the possession or use of a firearm, or conspiracies or attempts to commit such crimes.

[2] The report can be found at www.judiciary.state.nj.us/notices/reports/cookreport.pdf

2. Meeting with the Office of the Public Defender

In October 2009, several members of the *Committee* met with the Public Defender, Yvonne Smith Segars, and some of her staff in order to gain a better understanding of that office's computer equipment and software. During the *Committee's* initial discussions, it was suggested that due to budgetary issues, the Office of the Public Defender generally used older equipment and software than other government agencies. The *Committee* therefore hoped to learn whether any of the issues that had been brought to its attention were caused, at least in part, by the Public Defender's use of obsolete equipment or software.

It was reported that the Office of the Public Defender used standard equipment, each with the same specifications and software, and that it generally had access to the same programs used by other state agencies. In addition, the Office of the Public Defender was in the process of phasing out its older machines; namely, those that used the Windows '98 operating system. That process was eventually completed in early 2010. Its newer computers also used the same word processing program as the Judiciary and a significant number of law enforcement agencies, so the Office of the Public Defender expected to have fewer formatting issues in the future. It was also anticipated that within the next two years, one-in-ten computers would be laptop computers. As of October 2011, the Office of the Public Defender was in the process of providing laptops for each of its attorneys

and investigators. It was estimated that that project would be completed in approximately six months.

3. Meeting with the New Jersey State Police

The *Committee* also met with representatives of the New Jersey State Police to discuss delays in providing discovery. During its preliminary discussions, the *Committee* had heard anecdotally that the State Police were often slow to respond to discovery requests. The Committee hoped to learn whether that anecdotal information was true. The State Police reported that under the supervision of the Attorney General's Office, they had made a concerted effort to firm up their procedures for responding to discovery requests. As a result, they had significantly reduced the time that it took to answer requests for motor vehicle recordings, investigative reports, DWI discovery reports, lab reports and accident reports. For the time period of February 2011 through September 2011, staffing issues along with a significant increase in the number of requests resulted in an increase in the time it took the State Police to provide DIVR recordings, but the times for producing reports had largely remained the same.

The *Committee* also received an overview of the State Police Digital In-Vehicle Recorder (DIVR) program. In late 2009, the State Police began replacing their in-car VHS recorders with digital recording equipment. The DIVR system allowed for a much sharper picture and far more recording

space. In addition, the DIVR recordings of specific incidents could be retrieved and copied much quicker than VHS recordings, which allowed the State Police to provide those recordings more quickly. As of October 2011, the State Police had outfitted 767 cars with the DIVR equipment.

C. New Jersey and National Experience with Electronic Discovery in Criminal Cases

1. Review of Legal Authorities

In New Jersey, the law regarding electronic discovery in criminal cases is in its infancy. None of the statutes or court rules that govern criminal cases contain any references to "electronic discovery," "electronically stored information," or similar terms.[3] Similarly, no New Jersey published opinions directly address the delivery and use of electronic discovery in criminal cases.

In order to determine whether any other jurisdictions had developed procedures regarding the use of electronic discovery in criminal cases, the *Committee* reviewed statutes, court rules and case law from across the country. Similar to its experience with New Jersey, the *Committee* was unable to find any statutes, court rules or published opinions from any state in the United States that set forth procedures governing the use of electronic discovery in criminal cases. The *Committee* did, however,

[3] The civil discovery rule, R. 4:18-1, addresses the discovery of "electronically stored information" in civil cases. Similarly, the municipal court discovery rule, R. 7:7-7, allows the parties to exchange discovery through the use of "e-mail, internet or other electronic means." A number of other rules also address the discovery or production of "electronically stored information." See Rules 1:9-2, 4:5B-2, 4:10-2, 4:17-4, 4:23-6 and 7:7-8.

uncover a federal case, United States v. O'Keefe, 537 F. Supp.2d 14 (D.D.C. 2008), in which the United States District Court for the District of Columbia applied Rule 34 of the Federal Rules of *Civil* Procedure to a dispute regarding the form of production of electronic discovery in a criminal case. In doing so, the court noted that:

> In criminal cases, there is unfortunately no rule to which the courts can look for guidance in determining whether the production of documents by the government has been in a form or format that is appropriate . . . The Federal Rules of Civil Procedure in their present form are the product of nearly 70 years of use . . . It is foolish to disregard them merely because this is a criminal case . . . it is far better to use these rules than to reinvent the wheel when the production of documents in criminal and civil cases raises the same problems. Id. at 18-19.

The *Committee* also contacted the National Center for State Courts. The National Center was not aware of any jurisdiction that had addressed issues pertaining to the transmission of electronic discovery in criminal cases. Although issues concerning electronic discovery were fairly common in civil cases, they were issues of first impression in the criminal arena.

2. Alaska's Proposed Electronic Discovery System

The National Center for State Courts subsequently sent a query to court administrators throughout the United States, asking whether their states had any procedures in place for addressing electronic discovery issues in criminal cases. They only received one submission: a November

2008 proposal drafted by the Efficiencies Committee of Alaska's Criminal Justice Working Group that was intended to address discovery-related delays in Alaska's criminal courts. The proposal examined the discovery procedures in two of Alaska's biggest cities, Anchorage and Fairbanks, and recommended the development of a statewide, web-based system that would allow routine discovery to be posted electronically and accessed by prosecutors and defense attorneys. The proposal was outlined as follows:

- In Anchorage, patrol officers were supplied with laptop computers and software that enabled them to write reports in their vehicles or at the station and upload them into the department's records management system. The system tracked the dates and times that the reports were uploaded. Officers could also upload audio records, such as a defendant's recorded statement, into a digital library on the department's server. Digital photographs were placed on a "memory stick" and then turned over to the department's photo librarian for uploading. It was envisioned that, in the near future, officers would be able to directly upload photo and video evidence from their stationhouses. Prosecutors also had access to the system, but did not have access to the digital library. Although plans were reportedly in place to eventually allow prosecutors direct access to the digital library, as of November 2008, prosecutors wanting digital evidence had to request it by e-mail. The Anchorage Police Department estimated that it made prosecutors about 700 CDs each week. The Fairbanks Police Department apparently had a similar system for uploading, storing and accessing discovery electronically, but the details of that system were not included in the Efficiencies Committee's proposal.

- The Efficiencies Committee recommended the statewide use of the web-based discovery systems used in Anchorage and Fairbanks. Law enforcement would host and maintain the systems, which would store routine discovery such as police reports, photographs, and audio and videotapes. Prosecutors and defense attorneys would both have access to the materials over the internet,

and defense attorneys would be given passwords that would restrict their access to specific cases. The uploaded materials would be time-stamped, and e-mails would alert the attorneys when new materials were posted.

- It was expected that a web-based discovery system would result in fewer discovery-related delays and shorter case disposition times; would allow attorneys to reduce the amount of time spent on trial preparation; would reduce staff costs and courier expenses; searchable documents would reduce the amount of time needed to find specific information; and claims of ineffective assistance of counsel would be reduced, as fewer delays would lessen the defendant's perception that defense counsel was not diligently working on his or her case.

- Potential issues with the system were that several agencies felt that it should be hosted by prosecutors, rather than by law enforcement; that it might become necessary to create a system that could upload all documents to a single, centralized location, or that would require the use of standardized software; and that law enforcement would need the ability to segregate materials that would be subject to an in camera review, such as information that could jeopardize an ongoing investigation.

- The Efficiencies Committee did not provide an estimate of how much it would cost Alaska to implement web-based electronic discovery systems throughout the state. The Committee did note, however, that Anchorage and Fairbanks, two of the largest cities in Alaska, already had systems in place. So, in at least those two cities, a large portion of the costs had already been incurred or anticipated. The Efficiencies Committee believed that any additional costs, such as those associated with including other law enforcement agencies, integrating systems, and providing security measures and training, would be low compared to the amount saved by implementing web-based systems. In addition, prosecutors and public defenders did not foresee any significant costs to implement a system of electronic discovery, as those agencies already had computer systems that could store the discovery and make it accessible to their respective staffs.

As of October 2011, the Criminal Justice Working Group was preparing to begin a web-based electronic discovery pilot program in

Juneau, Alaska. The Juneau pilot program will use software that was specifically designed for that program, and which was reportedly more comprehensive than that used in either Anchorage or Fairbanks. The costs for designing that software, approximately $80,000, were paid from a federal grant. It was expected that the web-based discovery system would prove to be more efficient and cost-effective than the traditional exchange of hard copies of discovery, and would lead to fewer discovery-related disputes in Juneau's criminal courts.

3. Discussion with Experts on Electronic Discovery

The *Committee* heard from Fernando M. Pinguelo, Esq. and Kenneth N. Rashbaum, Esq., two nationally recognized experts on the law regarding electronic discovery in civil cases. The speakers discussed the law concerning electronic discovery in civil cases and its relation to criminal cases, as well as several common issues regarding electronic information in criminal cases.

The speakers discussed the 2006 amendments to the Federal Rules of Civil Procedure. They informed the *Committee* that one of the most important aspects of the 2006 amendments was the requirement contained in F.R.C.P. 26 that the parties meet and confer at an early stage of litigation to discuss any electronic evidence issues. That requirement forced attorneys to address any e-discovery issues, such as the scope of discovery and the format in which it should be produced, well before trial.

It also allowed the parties to work out issues regarding the preservation of electronically stored information, the timing of production, stipulations regarding its admissibility, and who would bear the costs of producing it.

The speakers noted that the courts often applied traditional Fourth Amendment search-and-seizure doctrine when considering the admissibility of electronic evidence, including whether the evidence in question was in plain view; whether it was the fruit of a poisonous tree; whether a search warrant was written with sufficient specificity; and whether exigent circumstances justified a warrantless search. The courts, however, differed in their treatment of searches involving electronic media. Some jurisdictions, for example, required law enforcement to obtain a search warrant in order to examine the contents of a cell phone. Others, however, recognized that some devices could be remotely wiped clean and upheld warrantless searches based upon exigent circumstances.

The speakers stated that law enforcement had to be very careful when drafting search warrants for the search of electronic media. Some courts invalidated warrants that were overly broad in scope, while others excluded evidence found outside the warrant's specifically drawn parameters. The tests used by the courts also differed, as some courts focused on what the government knew when it drafted the warrant, while others looked for some type of relationship between the media to be

searched and the alleged crimes, such as computer drives “related to child pornography.”

The speakers noted that e-mails, text messages and social media such as Facebook and Twitter could be potent sources of evidence, and were often among the first items that law enforcement examined. They also noted that just because an e-mail was deleted, that did not mean that it was gone forever. The deleted material actually remained on the computer until it was over-written, and could therefore be retrieved by investigators.

Finally, the speakers pointed out some of the differences between electronically stored information and hard copies. They noted, for example, that electronically stored information often contained metadata, a variety of useful information not found in hard copies, such as creation dates and times; the dates and times that the document was accessed; previous versions of the document; who the author was; login information; e-mail access lists; computer logs; and web-browsing history. In addition, electronically stored information was often more fragile and more easily subject to alteration, whether deliberate or inadvertent, than hard copies.

4. New Jersey's Electronic Discovery Systems

a. The Bergen County Prosecutor's Office's Document Scanning System

Shortly after the *Committee* began its work, it learned that the Bergen County Prosecutor's Office had been scanning discovery materials and providing them to defense attorneys on CD for the past several years. The scanning system, as well as the Scanning Policy and Procedures created to implement that system, were certified by New Jersey's Division of Archives and Records Management (DARM). Essentially, a DARM certification meant that the processes used to create and store a document were sufficient to allow that document to be considered an "original document" in court.[4]

The system used by the Bergen County Prosecutor's Office had cost approximately $1.5 million to implement. It was developed largely to combat two persistent problems: waste and a shortage of storage space. The Prosecutor's Office found that it was wasting a tremendous amount of time and money copying discovery packets that would go unused by defense attorneys. In addition, those unused discovery packets were taking up entire file cabinets in an office that already had a limited amount of storage space. Consequently, the Prosecutor's Office began to look for alternative ways of collecting and providing discovery.

[4] See N.J.S.A. 47:1-11.

Since instituting its discovery scanning system, the Bergen County Prosecutor's Office had experienced huge savings in terms of time and costs. Rather than making thousands of copies, office staff now scanned the discovery once and copied it onto a CD upon request. The time savings was especially noticeable in multi-defendant cases, as office staff was no longer required to spend hours copying discovery packets for each defendant. Another obvious benefit was that the Prosecutor's Office spent much less money on paper than it did in the past. The defense bar also benefited, as it paid only $1.25 per disk, rather than $.25 per page of paper discovery. Although there were exceptions, such as homicide and fraud cases, and long-term drug investigations, the discovery in most cases fit onto a single disk. In addition, if the discovery was less than 75 pages, the Prosecutor's Office can send it via e-mail.[5]

b. The Camden County Prosecutor's Office's Web-Based Discovery System

The *Committee* also learned that the Camden County Prosecutor's Office was in the process of developing a web-based discovery system.[6] The idea for the system was spurred by Camden County's jail overcrowding problem. The hope was that getting the discovery to

[5] An overview of the Bergen County Prosecutor's Office's document scanning system is contained in Appendix A.

[6] Currently, a total of fourteen county prosecutor's offices, as well as the Office of the Attorney General, Division of Criminal Justice, use the same vendor for their case management software. Each of those offices, however, have purchased different types of software to meet their respective needs.

defense attorneys sooner would lead to quicker resolution of cases, which would in turn alleviate jail overcrowding. It was expected that the Public Defender's Office would be able to access the web-based system in early 2012, and that the private bar would be provided access by June 30, 2012. Currently, both the Office of the Public Defender and the private bar receive discovery on disk or CD.

It was estimated that the Camden County Prosecutor's Office had spent roughly $2 million on its records management system. Once it is implemented, the Camden County Prosecutors' Office's web-based discovery system will initially be limited to providing documents and photographs in a PDF format. Storing and providing digital files, such as videos and audio recordings, will be addressed in a second implementation phase. The Prosecutor's Office is reportedly considering using a "cloud"-based storage and hosting system, in which those files would be available on demand on the Internet.[7]

5. Creation of Subcommittees

In order to address the large number and variety of issues that it had identified during its preliminary research and discussions, the *Committee* split into the following subcommittees:

[7] An overview of the Camden County Prosecutor's Office's web-based discovery system is contained in Appendix B.

a. The Rules Subcommittee

The Rules Subcommittee was charged with examining a broad range of discovery-related issues, and with considering which, if any, of those issues should be addressed by amending the Court Rules. The issues this subcommittee was asked to consider included, but were not limited to, the items that must be included in the discovery package; the timing of the delivery of discovery; and how to define "electronic discovery." The Rules Subcommittee was also asked to consider whether any of the provisions regarding electronic discovery contained in the civil rules, in the Federal Rules of Civil or Criminal Procedure, or in statutes or court rules from other states would be effective for resolving similar issues in criminal cases. It was also asked to consider whether the Court Rules should express a preference for certain forms of technology or software over others (such as a preference for CDs or DVDs over audio or videotapes); set limits on the prices charged for certain items; provide that any electronic discovery must be accompanied by an index; or set forth when transcripts should be provided and who should pay for them.

b. The Municipal Court Issues Subcommittee

The Municipal Court Issues Subcommittee was asked to examine issues that had a significant or disproportionate impact on the Municipal Courts, and if appropriate, to recommend changes to the Part VII Court Rules to address those issues. It was also asked to examine any

technological and educational issues that affected the municipal courts, and to recommend policies and training programs that would address those issues.

c. The Technology Issues Subcommittee

The Technology Issues Subcommittee was asked to examine the concerns caused by the various types of computer equipment and software used by law enforcement, county prosecutors, the Office of the Public Defender, the Office of the Attorney General, and the Judiciary, and to recommend policies or practices that would encourage more compatibility between agencies. This subcommittee was charged with examining the equipment and software used by those agencies, determining whether there was any common ground, and then considering whether there should be a preference for certain commonly used equipment, software or formats over others. It was also asked to consider ways to ensure that electronically stored documents and recordings were secure; and to examine whether there should be different standard procedures for recorded evidence, as opposed to electronically stored documents.

d. The Jail/Corrections Issues Subcommittee

The Jail/Corrections Issues Subcommittee was asked to examine the issues related to the review of discovery materials by inmates in county jails and state correctional institutions, and to consider whether the

creation of standard policies and procedures would resolve those issues. Among the issues this subcommittee was asked to consider was the ability of county jails and state correctional facilities to provide sufficient space for defense attorneys to privately review electronic discovery with their clients; and the ways in which those institutions could facilitate the ability of attorneys to review discovery with their incarcerated clients, particularly discovery stored on a disk or computer.

e. The Education Subcommittee

The Education Subcommittee was asked to consider whether any of the issues that had been brought to the *Committee's* attention could be addressed by providing attorneys with computer training. It was also asked to consider the specifics of any recommended training programs, including the topics that should be offered, who would offer the training, and whether training should be optional or mandatory.

The subcommittees met separately to discuss and develop solutions for their particular issues, and then presented their recommendations to the full *Committee* for review and approval.

VI. RULE RECOMMENDATIONS

The *Committee* viewed its charge as quite broad and took a holistic approach in addressing discovery issues. Thus, while some of the *Committee's* rule recommendations go beyond "electronic discovery," the *Committee* viewed them as necessary to make the discovery process more efficient. These recommendations are intended to address many of the problems that the *Committee* identified during its preliminary discussions and meetings. They also codify several of the recommendations initially made by the non-rule subcommittees. The *Committee* recommends the following rule changes:

1:11-2. Withdrawal or Substitution

(a) Generally. Except as otherwise provided by R. 5:3-5(d) (withdrawal in a civil family action),

(1) prior to the entry of a plea in a criminal action or prior to the fixing of a trial date in a civil action, an attorney may withdraw upon the client's consent provided a substitution of attorney is filed naming the substituted attorney or indicating that the client will appear pro se. If the client will appear pro se, the withdrawing attorney shall file a substitution. An attorney retained by a client who had appeared pro se shall file a substitution, and

(2) after the entry of a plea in a criminal action or the fixing of a trial date in a civil action, an attorney may withdraw without leave of court only upon the filing of the client's written consent, a substitution of attorney executed by both the withdrawing attorney and the substituted attorney, a written waiver by all other parties of notice and the right to be heard, and a certification by both the withdrawing attorney and the substituted attorney that the withdrawal and substitution will not cause or result in delay.

(3) In a criminal action, no substitution shall be permitted unless the withdrawing attorney has provided the court with a document certifying that he or she has provided the substituting attorney with the discovery that he or she has received from the prosecutor.

(b) . . . No Change.

Note: Source – R.R. 1:12-7A; amended July 16, 1981 to be effective September 14, 1981; amended November 7, 1988 to be effective January 2, 1989; amended June 28, 1996 to be effective September 1, 1996; amended July 10, 1998 to be effective September 1, 1998; amended and paragraph designations and captions added January 21, 1999 to be effective April 5, 1999; paragraphs (a)(1) and (a)(2) amended July 27, 2006 to be effective September 1, 2006[.] new paragraph (a)(3) added to be effective .

COMMENTARY

During its discussion of potential rule amendments, the *Committee* became aware of an area in which discovery was delaying the efficient movement of criminal cases. The Criminal Presiding Judges and Criminal Division Managers reported that, in cases in which there was a substitution of counsel, the new attorney often did not receive the discovery package from the former attorney in a timely fashion, and that this issue typically did not come to light until a subsequent court hearing. To remedy this problem, the *Committee* is recommending that a new subparagraph be added to paragraph (a) of the rule to require that prior to being relieved as counsel by the trial judge, the withdrawing attorney must provide the court with a certification stating that he or she has provided the substituting attorney with the discovery that he or she previously received from the prosecutor.

3:5-6. Filing; confidentiality

(a) . . . No Change.

(b) . . . No Change.

(c) All warrants that have been completely executed and the papers accompanying them, including the affidavits, transcript or summary of any oral testimony, duplicate original search warrant, return and inventory, and any original tape or stenographic recording shall be confidential except that the warrant and accompanying papers shall be [available for inspection and copying by] provided to the defendant in discovery pursuant to [as provided in] R. 3:13-3 and available for inspection and copying by any person claiming to be aggrieved by an unlawful search and seizure upon notice to the county prosecutor for good cause shown.

NOTE: Source-R.R. 3:2A-5, 3:2A-9 (second paragraph). Amended June 29, 1973 to be effective September 10, 1973; amended July 26, 1984 to be effective September 10, 1984; paragraph designations and text of paragraph (b) adopted and paragraph (a) amended November 7, 1988 to be effective January 2, 1989; paragraphs (a) and (b) amended July 13, 1994, paragraph (c) amended December 9, 1994, to be effective January 1, 1995; paragraph (b) amended June 28, 1996 to be effective September 1, 1996; caption amended and paragraph (c) amended July 12, 2002 to be effective September 3, 2002[.]; paragraph (c) amended to be effective .

COMMENTARY

The *Committee* is proposing a change to paragraph (c) that would require that the executed search warrant, along with any accompanying papers, be provided to the defendant in discovery. This proposed change mirrors the changes proposed for R. 3:9-1 and R. 3:13-3, which would require the parties to automatically provide discovery to each other, rather than simply making it available for inspection and copying. This proposal, however, would not change the process when a person other than the defendant claimed to be aggrieved by an unlawful search and seizure. In that case, the executed search warrant and accompanying papers would still be made available for inspection and copying upon notice to the county prosecutor and a showing of good cause.

3:9-1. Prearraignment Conference; Plea Offer; Arraignment/Status Conference; Pretrial Hearings; Pretrial Conference

(a) Prearraignment Conference. Except for good cause shown, [A]after an indictment has been returned, or an indictment sealed pursuant to R. 3:6-8 has been unsealed, a copy of the indictment, together with the discovery for each defendant named therein, shall be either delivered to the criminal division manager's office, or be available [at] through the prosecutor's office, within [14] 7 days of the return or unsealing of the indictment. After the return or unsealing of the indictment the defendant shall be notified in writing by the criminal division manager's office to appear for a prearraignment conference which shall occur within 21 days of indictment. At the prearraignment conference the defendant shall be: informed of the charges; notified in writing of the date, place and time for the arraignment/status conference; and, if the defendant so requests, be allowed to apply for pretrial intervention. The criminal division manager's office shall not otherwise advise the defendant regarding the case. The criminal division manager's office shall ascertain whether the defendant is represented by counsel and, if not, whether the defendant can afford counsel. If indicated that the defendant cannot afford counsel, the defendant shall be required to fill out the Uniform Defendant Intake Report. If a defendant does not appear for a prearraignment conference, the criminal division manager shall notify the criminal presiding judge who may

issue a bench warrant. A defendant's attorney seeking discovery shall obtain a copy of the discovery from the prosecutor's office or the criminal division manager's office prior to, or at, the pre-arraignment conference. If the defendant is unrepresented and is seeking to be represented by the public defender's office, defense counsel shall obtain a copy of the discovery at the arraignment/status conference which shall occur no later than 28 days after the return or unsealing of the indictment. [shall obtain a copy of the indictment and discovery from either the criminal division manager's office, or the prosecutor's office, no later than 28 days after the return or unsealing of the indictment.] No prearraignment conference shall be required where the defendant has counsel and the criminal division manager's office has established to its satisfaction: (1) that an appearance has been filed under Rule 3:8-1; (2) that if the defendant is represented by the Office of the Public Defender, discovery has been obtained; or if the defendant has retained private counsel, discovery[, if] has been requested[,] pursuant to R. 3:13-3(b)(1), or counsel has affirmatively stated that discovery will not be requested; [has been obtained;] and (3) that defendant and counsel have obtained a date, place and time for the arraignment/status conference.

(b) Plea Offer. Prior to the arraignment/status conference the prosecutor and the defense attorney shall discuss the case, including any plea offer[,] and any outstanding or anticipated motions, [and discovery issues] and

report thereon at the arraignment/status conference. The prosecutor and defense counsel shall also confer and attempt to reach agreement on any discovery issues, including any issues pertaining to discovery provided through the use of CD, DVD, e-mail, internet or other electronic means. Any plea offer to be made by the prosecutor shall be in writing and forwarded to the defendant's attorney.

(c) Arraignment/Status Conference; In Open Court. The arraignment/status conference shall be conducted in open court no later than 50 days after indictment, unless the defendant did not appear at the prearraignment conference, or was unrepresented at the prearraignment conference. If the defendant did not appear at the prearraignment conference, or was unrepresented at the prearraignment conference, the arraignment/status conference shall be held within 28 days of indictment unless the defendant is a fugitive. The judge shall advise the defendant of the substance of the charge and confirm that the defendant has reviewed with counsel the indictment and the discovery. The judge shall inform all parties of their obligation to redact confidential personal identifiers from any documents submitted to the court in accordance with Rule 1:38-7(b). The defendant shall enter a plea to the charges. If the plea is not guilty counsel shall report on the results of plea negotiations, and such other matters, discussed pursuant to R. 3:9-1(b), which shall promote a fair and expeditious disposition of the case. At that time, the dates for hearing of

motions and a further status conference, if necessary shall be scheduled according to the differentiated needs of each case. Each status conference shall be held in open court with the defendant present.

(d) . . . No Change.

(e) . . . No Change.

NOTE: Source-R.R. 3:5-1. Paragraph (b) deleted and new paragraph (b) adopted July 7, 1971 to be effective September 13, 1971; paragraph (b) amended July 29, 1977 to be effective September 6, 1977; paragraph (a) amended and paragraph (b) deleted July 21, 1980 to be effective September 8, 1980; paragraph (a) amended July 14, 1992 to be effective September 1, 1992; first three sentences of former paragraph (a) amended and redesignated paragraph (c), last sentence of former paragraph (a) amended and moved to new paragraph (e), new paragraphs (a), (b), (d) and (e) adopted July 13, 1994 to be effective January 1, 1995; paragraph (e) amended July 12, 2002 to be effective September 3, 2002; paragraph (c) amended July 16, 2009 to be effective September 1, 2009[.]; paragraphs (a), (b) and (c) amended to be effective .

COMMENTARY

The timely preparation and receipt of discovery is a continuing problem in many counties in the Criminal Division. When discovery is not provided in a timely fashion, or is not complete, subsequent court events are meaningless and a waste of time for the judge, defendant, defense counsel and assistant prosecutor.

Current rules provide that discovery should be made available by the prosecutor within 14 days of the return or unsealing of an indictment. Defense counsel seeking discovery is then required to obtain discovery from the prosecutor's office within 28 days of the return, or unsealing, of an indictment. All too often discovery is not provided, either because it is not ready or because defense counsel does not pick it up from the prosecutor's or criminal division manager's office, until the Arraignment/Status Conference (A/S Conference) which, pursuant to R. 3:9-1(c), does not have to occur until 50 days after indictment.

The *Committee* believes that changes are necessary to ensure that discovery: (1) is ready to be picked up by defense counsel as soon as possible after indictment; and (2) is actually picked up by defense counsel. The *Committee* is proposing a series of amendments to R. 3:9-1 to accomplish these objectives.

Paragraph (a) – Prearraignment Conference

The return of an indictment, the formal charge in a criminal case, holds serious consequences for a defendant. Thus, the *Committee* starts with the premise that once an indictment has returned, the prosecution should be ready, in the vast majority of cases, to try the case. Thus, the *Committee* is proposing an amendment to paragraph (a) that would require that discovery be available for defense counsel at either the prosecutor's office or the criminal division manager's office[8] within 7 days of the return or unsealing of an indictment, unless there is good cause for why it cannot be produced. The *Committee* did not attempt to define good cause. However, the failure of a party to do something, such as send in a request for a lab report[9] in a timely fashion, would not necessarily constitute good cause. The *Committee* believes that the court should be able to rely on the prosecutor to do everything within his/her control to ensure that a complete discovery package is available within 7 days of indictment. And where discovery is not complete, the court should ask for an explanation and set realistic time parameters for its completion.

The *Committee* is also proposing amendments to paragraph (a) to ensure that defense counsel actually picks up discovery and does so in a

[8] The current rule allows local variation in where discovery is available, i.e. either at the criminal division manager's office or the prosecutor's office. The proposed revision is not intended to alter that practice.

[9] The *Committee* has been provided data by the New Jersey State Police that during 2011, the average time to produce a lab report from point of receipt of request was approximately 21 days.

timely fashion. As previously stated, the current rule allows defense counsel 28 days after the return or unsealing of an indictment to pick up discovery. Defense counsel, however, often does not pick up discovery until the A/S Conference, which may occur as late as 50 days after indictment. The *Committee* believes that because no meaningful court events can occur unless defense counsel first obtains discovery, the time allowed for defense counsel to pick up discovery must be shortened. In that regard, the *Committee* is proposing two amendments. First, the *Committee* is proposing an amendment to paragraph (a) that would require that defense counsel pick up discovery from the Prosecutor's Office or the Criminal Division Manager's Office prior to, or at, the Pre-arraignment Conference (PAC). The intent here is that if the defendant is represented, counsel should pick up discovery no later than at the PAC. The PAC occurs no later than 21 days after indictment. Counsel would have to appear at the PAC unless all the requirements for waiving this conference were satisfied prior to the date of the conference. The *Committee* understands that in some counties waiver of the PAC is allowed when attorneys have not satisfied all of the conditions for waiving this event. This unauthorized practice must be curtailed, and there must be strict adherence to the rule.

A second proposed amendment to paragraph (a) would address the situation where the defendant is not represented by counsel at the PAC,

which occurs mainly in cases where the defendant appears at the PAC and has sought representation by the Public Defender's Office. In those cases, defense counsel would be required to appear at the A/S Conference, which would occur no later than 28 days after indictment[10], and pick up discovery. In fact, some counties have already moved up the date of the A/S Conference for this very reason. The *Committee* recognizes that this is a change from the current practice, but believes that this change will tighten up the discovery practice, which will in turn expedite the movement of cases.

Finally, the *Committee* proposes an amendment to paragraph (a) that would modify the requirements for waiver of the PAC. The *Committee* believes that R. 3:9-1 and R. 3:13-3 place an unfair burden on private defense attorneys, particularly solo attorneys or those who work in smaller offices, by requiring them to physically pick up discovery at the courthouse or prosecutor's office. As a result, the *Committee* has proposed an amendment to R. 3:13-3(b)(1) that would require prosecutors, upon written request, to mail or e-mail discovery to private defense attorneys, rather than having those attorneys travel, sometimes to distant counties, to pick up the discovery at the courthouse or prosecutor's office. This amendment is consistent with the proposed amendment to R. 3:13-3(b)(1). Currently,

[10] R. 3:9-1(c) currently provides that the A/S Conference is to occur no later than 50 days after indictment. Over the years many counties have moved up the date of this conference because attorneys were not prepared for the conference for a number of reasons. Thus, this time was nothing more than dead time.

one of the requirements for waiver of the PAC is that the Criminal Division Manager establish that, if requested, discovery has been obtained. Under this proposal, the Criminal Division Manager would instead establish that (1) if the defendant is represented by the Office of the Public Defender, discovery has been obtained; or (2) if the defendant has retained private counsel, that counsel has either requested discovery pursuant to R. 3:13-3(b)(1), or has affirmatively stated that discovery will not be requested. The *Committee* notes that, because local Public Defender Offices are typically located in or near the various county courthouses, the Public Defender is not burdened by having to physically pick up the discovery. As a result, only private attorneys would be allowed to request that discovery be mailed or e-mailed pursuant to the proposed amendments to R. 3:9-1(a) and R. 3:13-3(b)(1). The *Committee* also notes that since the Office of the Public Defender represents an overwhelming majority of criminal defendants, any indirect costs to the State for mailing discovery to private defense attorneys would likely be minimal.

Paragraph (b) – Plea Offer

The *Committee* is proposing an amendment to paragraph (b) that would require the prosecutor and defense counsel to meet and confer and attempt to reach agreement on discovery issues prior to the A/S Conference. Fernando M. Pinguelo, Esq. and Kenneth N. Rashbaum, Esq., two e-discovery experts who addressed the *Committee*, noted that a

somewhat similar provision had been included among the December 1, 2006 amendments to the Federal Rules of Civil Procedure, in F.R.C.P. 26(f). That provision required the parties to meet and confer at an early stage of litigation to discuss any electronic evidence issues. As a result, attorneys were forced to become familiar with their clients' computer systems and IT structure before the meet-and-confer. They were similarly forced to address any e-discovery issues, such as the scope of discovery, the format in which it would be produced, the timing of production, and its costs, well before trial. The meet-and-confer requirement contained in F.R.C.P. 26(f) had reportedly been instrumental in dramatically reducing the number of discovery disputes in federal civil cases. The *Committee* believes that this proposed amendment would provide the same benefit in New Jersey criminal cases.

Paragraph (c) – Arraignment/Status Conference; In Open Court

As previously stated, this paragraph currently provides that the A/S Conference be conducted in open court no later than 50 days after indictment. The purposes of the A/S Conference are to: (1) advise the defendant of the charges against him or her; (2) confirm that defense counsel has received discovery and discussed it with the defendant; (3) have the defendant enter a plea; (4) have counsel report on plea discussions; (5) schedule dates for hearings; and, (6) set the date for a future status conference. To the extent that discovery has not been

provided, or that it is not complete, this event cannot accomplish what it is intended to accomplish. While the *Committee* recognizes that the changes it is proposing may not change that, it will ensure that discovery is provided and obtained no later than 28 days after indictment. Thus, the change being proposed to this paragraph will require that the A/S Conference occur no more than 28 days after indictment in cases where the defendant did not appear, or was unrepresented, at the PAC. If the defendant did not appear at the PAC conference, or was unrepresented at the PAC, the A/S Conference would be required to be held within 28 days of indictment, unless the defendant is a fugitive.

3:13-2. Depositions

(a) When Authorized. If it appears to the judge of the court in which a complaint, indictment or accusation is pending that a material witness is likely to be unable to testify at trial because of death or physical or mental incapacity, the court, upon motion and notice to the parties, and after a showing that such action is necessary to prevent manifest injustice, may order that a deposition of the testimony of such witness be taken and that any designated books, papers, documents or tangible objects, including, but not limited to, writings, drawings, graphs, charts, photographs, sound recordings, images, electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, into reasonably usable form, not privileged, be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, on written motion of the witness and upon notice to the parties, the court may direct that the witness's deposition be taken, and after the deposition has been subscribed the court may discharge the witness.

(b) . . . No Change.

(c) . . . No Change.

(d) . . . No Change.

NOTE: Source-R.R. 3:5-8(a)(b)(c)(d)(e). Text of former rule deleted and new rule adopted November 5, 1986 to be effective January 1, 1987; caption amended, R. 3:13-2 amended and redesignated as R. 3:13-1(a)

and (c) July 13, 1994 to be effective January 1, 1995; Rule redesignation of July 13, 1994 eliminated December 9, 1994, to be effective January 1, 1995[.]; paragraph (a) amended to be effective .

COMMENTARY

The *Committee* is proposing a change to paragraph (a) to make it consistent with proposed changes to R. 3:13-3(b)(1)(A), R. 3:13-3(b)(1)(E), and R. 3:13-3(b)(2)(B). The proposed changes to R. 3:13-3 would expand the list of materials that the parties must provide in discovery. The proposed change to this rule similarly expands the list of materials that must be produced in connection with the deposition of the testimony of a material witness who is unlikely to testify at trial due to death or physical or mental incapacity. It is intended to address concerns that the current rule does not account for a number of materials, including various forms of electronically stored information, that are commonly provided in discovery.

3:13-3. Discovery and Inspection

(a) Pre-Indictment Discovery. Unless the defendant agrees to more limited discovery, [W]where the prosecutor has made a pre-indictment plea offer, the prosecutor shall, at the time the plea offer is made, [upon request permit] provide defense counsel [to inspect and copy or photograph any] with all available relevant material which would be discoverable at the time of [following an] indictment pursuant to section (b)(1), except: [or (c).]

(1) where the prosecutor determines that pre-indictment delivery of all discoverable material would hinder or jeopardize a prosecution or investigation, the prosecutor shall, consistent with the intent of this rule, provide to defense counsel at the time the plea offer is made, such relevant material as would not hinder or jeopardize the prosecution or investigation, and advise defense counsel that complete discovery has not been provided; or

(2) where the prosecutor determines that physical or electronic delivery of the discoverable material would impose an unreasonable administrative burden on the prosecutor's office given the nature, format, manner of collation or volume of discoverable material, the prosecutor may in his or her discretion make discovery available by permitting defense counsel to inspect and copy or photograph such material at the prosecutor's office.

(b) Post Indictment Discovery. [A copy of the prosecutor's discovery shall be delivered to the criminal division manager's office, or shall be available at the prosecutor's office, within 14 days of the return or unsealing of the indictment. Defense counsel shall obtain a copy of the discovery from the criminal division manager's office, or the prosecutor's office, no later than 28 days after the return or unsealing of the indictment. A defendant who does not seek discovery from the State shall so notify the criminal division manager's office and the prosecutor, and the defendant need not provide discovery to the State pursuant to sections (d) or (g), except as required by Rule 3:12-1 or otherwise required by law. Defense counsel will forward a copy of discovery materials to the prosecuting attorney no later than 7 days before the arraignment/status conference.]

[(c)] (1) Discovery by the Defendant. Except for good cause shown, a copy of the indictment, together with the prosecutor's discovery for each defendant named therein, shall be delivered to the criminal division manager's office, or shall be available through the prosecutor's office, within 7 days of the return or unsealing of the indictment. Good cause shall include, but is not limited to, circumstances in which the nature, format, manner of collation or volume of discoverable materials would involve an extraordinary expenditure of time and effort to copy. In such circumstances, the prosecutor may make discovery available by permitting defense counsel to inspect and copy or photograph discoverable materials

at the prosecutor's office, rather than by copying and delivering such materials. The prosecutor shall also provide defense counsel with a listing of the materials that have been supplied in discovery. If any discoverable materials known to the prosecutor have not been supplied, the prosecutor shall also provide defense counsel with a listing of the materials that are missing and explain why they have not been supplied. If the defendant is represented by the Office of the Public Defender, defendant's attorney shall obtain a copy of the discovery from the prosecutor's office or the criminal division manager's office prior to, or at, the pre-arraignment conference. However, if the defendant has retained private counsel, upon written request of counsel, submitted along with a copy of counsel's entry of appearance and received by the prosecutor's office prior to the date of the pre-arraignment conference, the prosecutor shall, within three business days, send the discovery to defense counsel by U.S. mail at the defendant's cost or by e-mail without charge, at the prosecutor's discretion. Defense counsel shall simultaneously send a copy of the request for mail or e-mail discovery, along with any request for waiver of the pre-arraignment conference under R. 3:9-1(a), to Criminal Case Management. If the defendant is unrepresented and is seeking to be represented by the public defender's office, defense counsel shall obtain a copy of the discovery at the arraignment/status conference which shall occur no later than 28 days after the return or unsealing of the indictment. [The

prosecutor shall permit defendant to inspect and copy or photograph the following relevant material] Discovery shall include, but is not limited to, the following relevant material: [if not given as part of the discovery package under section (b):]

[(1)] (A) books, tangible objects, papers or documents obtained from or belonging to the defendant, including, but not limited to, writings, drawings, graphs, charts, photographs, video and sound recordings, images, electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, into reasonably usable form;

[(2)] (B) records of statements or confessions, signed or unsigned, by the defendant or copies thereof, and a summary of any admissions or declarations against penal interest made by the defendant that are known to the prosecution but not recorded[;]. The prosecutor shall also provide the defendant with transcripts of all electronically recorded statements or confessions on a date to be determined by the trial judge, except in no event later than 30 days before the trial date set at the pretrial conference.

[(3)] (C) results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the matter or copies thereof, which are within the possession, custody or control of the prosecutor;

[(4)] (D) reports or records of prior convictions of the defendant;

[(5)] (E) books, papers, documents, or copies thereof, or tangible objects, buildings or places which are within the possession, custody or control of the prosecutor, including, but not limited to, writings, drawings, graphs, charts, photographs, video and sound recordings, images, electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, into reasonably usable form;

[(6)] (F) names, addresses, and birthdates of any persons whom the prosecutor knows to have relevant evidence or information including a designation by the prosecutor as to which of those persons may be called as witnesses;

[(7)] (G) record of statements, signed or unsigned, by such persons or by co-defendants which are within the possession, custody or control of the prosecutor and any relevant record of prior conviction of such persons[;]. The prosecutor shall also provide the defendant with transcripts of all electronically recorded co-defendant and witness statements on a date to be determined by the trial judge, except in no event later than 30 days before the trial date set at the pretrial conference, but only if the prosecutor intends to call that co-defendant or witness as a witness at trial.

[(8)] (H) police reports which are within the possession, custody, or control of the prosecutor;

[(9)] (I) names and addresses of each person whom the prosecutor expects to call to trial as an expert witness, the expert's qualifications, the subject matter on which the expert is expected to testify, a copy of the report, if any, of such expert witness, or if no report is prepared, a statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. [Except in the penalty phase of a capital case i]If this information is [requested and] not furnished 30 days in advance of trial, the expert witness may, upon application by the defendant, be barred from testifying at trial.

[(d)] (2) Discovery by the State. Defense counsel shall forward a copy of the discovery materials to the prosecuting attorney no later than 7 days before the arraignment/status conference. Defense counsel shall also provide the prosecuting attorney with a listing of the materials that have been supplied in discovery. If any discoverable materials known to defense counsel have not been supplied, defense counsel shall also provide the prosecuting attorney with a listing of the materials that are missing and explain why they have not been supplied. A defendant shall [permit] provide the State with all [to inspect and copy or photograph the following] relevant material, including, but not limited to, the following: [if not given as part of the discovery package under section (b):]

[(1)] (A) results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the matter or copies thereof, which are within the possession, custody or control of defense counsel;

[(2)] (B) any relevant books, papers, documents or tangible objects, buildings or places or copies thereof, which are within the possession, custody or control of defense counsel, including, but not limited to, writings, drawings, graphs, charts, photographs, video and sound recordings, images, electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, into reasonably usable form;

[(3)] (C) the names, addresses, and birthdates of those persons known to defendant who may be called as witnesses at trial and their written statements, if any, including memoranda reporting or summarizing their oral statements;

[(4)] (D) written statements, if any, including any memoranda reporting or summarizing the oral statements, made by any witnesses whom the State may call as a witness at trial[;]. The defendant shall provide the State with transcripts of all electronically recorded witness statements on a date to be determined by the trial judge, except in no event later than 30 days before the trial date set at the pretrial conference.

[(5)] (E) names and address of each person whom the defense expects to call to trial as an expert witness, the expert's qualifications, the subject matter on which the expert is expected to testify, and a copy of the report, if any, of such expert witness, or if no report is prepared, a statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. [Except in the penalty phase of a capital case i]If this information is [requested and] not furnished 30 days in advance of trial the expert may, upon application by the prosecutor, be barred from testifying at trial.

(3) Discovery Provided through Electronic Means. Unless otherwise ordered by the court, the parties may provide discovery pursuant to sections (a), (b) and (c) through the use of CD, DVD, e-mail, internet or other electronic means. Documents provided through electronic means shall be in PDF format. All other discovery shall be provided in an open, publicly available (non-proprietary) format that is compatible with any standard operating computer. If discovery is not provided in a PDF or open, publicly available format, the transmitting party shall include a self-extracting computer program that will enable the recipient to access and view the files that have been provided. Upon motion of the recipient, and for good cause shown, the court shall order that discovery be provided in the format in which the transmitting party originally received it. In all cases in which an Alcotest device is used, any Alcotest data shall, upon request,

be provided for any Alcotest 7110 relevant to a particular defendant's case in a readable digital database format generally available to consumers in the open market. In all cases in which discovery is provided through electronic means, the transmitting party shall also include a list of the materials that were provided and, in the case of multiple disks, the disk on which they can be located.

(c) Motions for Discovery. No motion for discovery shall be filed unless the moving party certifies that the prosecutor and defense counsel have conferred and attempted to reach agreement on any discovery issues, including any issues pertaining to discovery provided through the use of CD, DVD, e-mail, internet or other electronic means.

(d) [(e)] Documents Not Subject to Discovery. This rule does not require discovery of a party's work product consisting of internal reports, memoranda or documents made by that party or the party's attorney or agents, in connection with the investigation, prosecution or defense of the matter nor does it require discovery by the State of records or statements, signed or unsigned, of defendant made to defendant's attorney or agents.

(e) [(f)] Protective Orders.

(1) Grounds. Upon motion and for good cause shown the court may at any time order that the discovery [or inspection] sought pursuant to this rule be denied, restricted, or deferred or make such other order as is appropriate. In determining the motion, the court may consider the

following: protection of witnesses and others from physical harm, threats of harm, bribes, economic reprisals and other intimidation; maintenance of such secrecy regarding informants as is required for effective investigation of criminal activity; protection of confidential relationships and privileges recognized by law; any other relevant considerations.

(2) Procedure. The court may permit the showing of good cause to be made, in whole or in part, in the form of a written statement to be inspected by the court alone, and if the court thereafter enters a protective order, the entire text of the statement shall be sealed and preserved in the records of the court, to be made available only to the appellate court in the event of an appeal.

(f) [(g)] Continuing Duty to Disclose; Failure to Comply. [If subsequent to the compliance with a request by the prosecuting attorney or defense counsel or with an order issued pursuant to the within rule and prior to or during trial a party discovers additional material or witnesses previously requested or ordered subject to discovery or inspection, that party shall promptly notify the other party or that party's attorney of the existence thereof.] There shall be a continuing duty to provide discovery pursuant to this rule. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, it may order such party to permit the discovery [or inspection] of materials not previously disclosed, grant a

continuance or delay during trial, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems appropriate.

NOTE: Source-R.R. 3:5-11(a)(b)(c)(d)(e)(f)(g)(h). Paragraphs (b)(c)(f) and (h) deleted; paragraph (a) amended and paragraphs (d)(e)(g) and (i) amended and redesignated June 29, 1973 to be effective September 10, 1973. Paragraph (b) amended July 17, 1975 to be effective September 8, 1975; paragraph (a) amended July 15, 1982 to be effective September 13, 1982; paragraphs (a) and (b) amended July 22, 1983 to be effective September 12, 1983; new paragraphs (a) and (b) added, former paragraphs (a), (b), (c), (d) and (f) amended and redesignated paragraphs (c), (d), (e), (f) and (g) respectively and former paragraph (e) deleted July 13, 1994 to be effective January 1, 1995; Rule redesignation of July 13, 1994 eliminated December 9, 1994, to be effective January 1, 1995; paragraphs (c)(6) and (d)(3) amended June 15, 2007 to be effective September 1, 2007[.]; paragraphs (a) and (b), and former paragraphs (c), (c)(1), (c)(2), (c)(5), (c)(7), (c)(9), (d), (d)(2), (d)(4), (d)(5), (f)(1) and (g) amended; former paragraphs (c), (c)(1), (c)(2), (c)(3), (c)(4), (c)(5), (c)(6), (c)(7), (c)(8), (c)(9), (d), (d)(1), (d)(2), (d)(3), (d)(4) and (d)(5) redesignated paragraphs (b)(1), (b)(1)(A), (b)(1)(B), (b)(1)(C), (b)(1)(D), (b)(1)(E), (b)(1)(F), (b)(1)(G), (b)(1)(H), (b)(1)(I), (b)(2), (b)(2)(A), (b)(2)(B), (b)(2)(C), (b)(2)(D), (b)(2)(E), respectively; new paragraphs (b)(3) and (c) added and former paragraphs (e), (f) and (g) redesignated paragraphs (d), (e) and (f) respectively to be effective .

COMMENTARY

This is the main rule governing pre- and post-indictment discovery in criminal cases. The *Committee* is proposing a series of amendments to this rule.

Paragraph (a) – Pre-Indictment Discovery

This paragraph covers pre-indictment discovery. It currently provides that defense counsel be permitted to **inspect, copy or photograph** relevant material when the prosecutor has made a pre-indictment plea offer. The proposed amendments would require that unless the defendant agrees to more limited discovery, the prosecutor must **provide** defense counsel with all available discoverable material at the time a pre-indictment plea offer is made. Since no competent defense counsel would allow his or her client to plead guilty without first having seen the discovery, it makes sense that the prosecutor offering the plea should also provide all available discovery. To require defense counsel to inspect and copy materials at the prosecutor's office can cause unnecessary delay.

The proposed amendments to this paragraph also create two exceptions to the requirement that the prosecutor provide all discovery when a pre-indictment plea offer is made. First, in cases in which the prosecutor determines that delivering all pre-indictment discovery would hinder or jeopardize a prosecution or investigation, he or she must instead

provide defense counsel, at the time the plea offer is made, with any discoverable materials that would not harm the prosecution or investigation. The prosecutor must also inform defense counsel that not all discoverable material has been provided. Second, in cases involving a voluminous amount of discovery in which the prosecutor determines that providing the discovery would create an unreasonable administrative burden on his or her office, he or she may instead permit defense counsel to come to the prosecutor's office and inspect and copy or photograph the discoverable material. It is the *Committee's* understanding that, other than the provision requiring the prosecutor to inform defense counsel that not all discovery has been provided, both exceptions are consistent with the current practice.

There was significant disagreement regarding the proposed amendments to R. 3:13-3(a). The *Committee's* initial draft did not allow for any exceptions to the requirement that the prosecutor provide all available discovery when making a pre-indictment plea offer. One member of the *Committee*, however, in arguing that the rule should include exceptions for certain cases, noted that in cases involving criminal organizations such as gangs or the mob, the State often tried to gain the cooperation of at least one of the co-defendants. Typically, this involved a "show-and-tell" – a process in which the State revealed some of its evidence to a co-defendant and tried to get him or her to cooperate with the State's

investigation, often by offering a plea deal. As originally written, the proposed amendments to R. 3:13-3(a) made it easy for an unscrupulous defendant to accept a plea offer and then share the discovery with his or her co-defendants. Even if the State obtained a protective order, it could not govern whether or not a defendant shared the discovery with his or her co-defendants. As a result, it was felt that the original proposed amendments to R. 3:13-3(a) could hinder the manner in which the State conducted its investigation, particularly in cases in which additional arrests were possible.

Other *Committee* members also objected, noting that there were often substantial delays in multi-defendant cases that involved wiretapping, and as originally proposed, the amendments to R. 3:13-3(a) would make those delays a certainty. For example, in recent months, the Attorney General's Office had prosecuted two cases that each had well over 500 boxes of evidence. Under the current rule, the Attorney General's Office could allow defense counsel to inspect and copy that evidence pre-indictment. Under the *Committee's* initial draft, however, the Attorney General's Office would be required to provide defense counsel with copies of all 500-plus boxes of evidence. The tremendous amount of time and resources that it would take to produce such a voluminous amount of discovery would delay disposition of those cases for several months. As a result, the State would be reluctant to extend plea offers in those cases. It

was also noted that there were a variety of reasons why a prosecutor might be unwilling to provide the defense with pre-indictment discovery, so the proposed amendment to R. 3:13-3(a) could inhibit plea offers in more than just the big, multi-defendant cases.

A majority of the *Committee*, however, felt that the concerns noted above would affect only a very small percentage of cases. The majority view was that R. 3:3-13(a) presumed that a complaint had already been filed, which was not usually the case when a target was brought in for a "show and tell," so the discovery obligation did not exist at that point. The majority also felt that the *Committee's* initial draft was not much different from the current version of R. 3:3-13(a), which required a prosecutor making a pre-indictment plea offer to permit defense counsel to inspect, copy or photograph discovery upon request, and there did not seem to be any problems with the current rule. It was also noted that the proposal was not intended to hinder the State's investigation in any way, and in cases involving ongoing investigations or voluminous amounts of discovery, it was expected that the attorneys would be able to resolve any pre-indictment discovery issues amongst themselves. Nothing in the rule, for example, would prevent defense counsel from waiving the "production" of discovery and agreeing to "inspect and copy" it instead; from agreeing that only certain documents would be produced; or from entering into a consent order that discovery would not be copied or provided to anyone else. In

order to make it clear that the defendant had those options, the *Committee* amended its initial draft to specify that "[U]nless the defendant agreed to more limited discovery," the prosecutor had to provide all available discovery when making a pre-indictment plea offer.

Subsequently, the Office of the Attorney General, Division of Criminal Justice and the County Prosecutors Association filed a joint objection to the *Committee's* proposed amendments to R. 3:13-3(a). They felt that, as amended, the practical effect of R. 3:13-3(a) would be to impede, rather than facilitate, pre-indictment plea negotiations in certain cases; particularly multi-defendant cases in which the prosecution hoped to convince a defendant to become a cooperating witness against his or her co-defendants, and cases that involved a voluminous amount of discovery. In fact, they argued, in any case where the prosecutor was unwilling or unable to provide all available pre-indictment discovery, he or she would simply not make a plea offer at all, or would wait until all discovery-related issues were resolved before offering a plea deal – thus delaying the disposition of those cases. The Attorney General and County Prosecutors Association therefore proposed rule amendments that would allow for exceptions in those cases, and asked that the matter be re-opened.

Several members of the *Committee* objected to the rule amendments proposed by the Attorney General and County Prosecutors

Association. They stated that the *Committee* had already discussed, at length, the concerns noted by the Attorney General and County Prosecutors, and that those concerns had been addressed by clarifying that the defendant could agree to more limited discovery. They also felt that the rule amendments proposed by the Attorney General and County Prosecutors Association would grant prosecutors wide, unfettered discretion that could then be easily abused.[11] They believed that there was no need to reconsider the rule as approved by the *Committee*. However, as an alternative, they proposed that in such cases the State should be required to apply to the court, with notice to the defense, for another way of providing discovery consistent with the rule.

The *Committee* considered the two groups' opposing positions, and voted that the rule should include the exceptions suggested by the Attorney General and County Prosecutors Association. It is expected that in the overwhelming majority of cases, the prosecution will not have any issues with providing defense counsel with all discovery when making a pre-indictment plea offer. Consequently, the exceptions contained in R. 3:13-3(a) should be read as applying only to two extremely narrow classes of cases: (1) those in which providing all pre-indictment discovery would hinder or jeopardize a prosecution or investigation, such as multi-

[11] For a more complete discussion of this position, see Dissent 1 filed by Joseph D. Rotella, Esq., representing the Association of Criminal Defense Lawyers of New Jersey, at pages Dissent 1-1 to 1-2, and the Dissent 2 filed by Jeffrey E. Gold, Esq., representing the New Jersey State Bar Association, Municipal Court Practice Section, at pages Dissent 2-1 to 2-2.

defendant cases in which the prosecutor seeks to obtain the cooperation of a less culpable defendant in the prosecution against more culpable defendants; and (2) those involving such a voluminous amount of discovery that copying and providing it to defense counsel would create an unreasonable administrative burden on the prosecutor's office, such as cases in which the evidence was largely acquired through the use of electronic surveillance.

Paragraph (b) – Post Indictment Discovery

Current paragraph (b) covers post-indictment discovery by both the prosecutor and defense counsel. The first change proposed to this paragraph is structural. It would create subsections dealing separately with discovery by the prosecutor and defense counsel. Subsection (1) would deal with discovery by the defendant and subsection (2) would address discovery by the prosecutor. The second change is to delete the current language contained in this paragraph and replace it with revised language contained in subsections (b)1 and (2).

Paragraph (b)(1) – Discovery by the Defendant

This paragraph, and the subparagraphs that follow, cover discovery by the defendant. This subparagraph mirrors very closely the changes being proposed for R. 3:9-1. It would require that, except for good cause shown, discovery be delivered to the criminal division manager's office, or be made available for pickup, at the prosecutor's office within 7 days of the

return or unsealing of an indictment for each defendant named in the indictment. “Good cause” includes, but is not limited to, circumstances in which the nature, format, manner of collation or volume of discoverable materials would involve an extraordinary expenditure of time and effort to copy. In such circumstances, the prosecutor may make discovery available by permitting defense counsel to inspect and copy or photograph discoverable materials at the prosecutor’s office, rather than by copying and delivering such materials. This paragraph would also retain the current provision that allows defense counsel to decide not to seek discovery, in which case reciprocal discovery would not have to be provided. It would also require that defense counsel pick up discovery prior to, or at, the PAC, or at the A/S Conference if they did not present the defendant until after the PAC. See Commentary to R. 3:9-1(a) at pages 45-48, supra.

Additionally, another change proposed to this paragraph would require that the prosecutor provide defense counsel with a list of the materials that have been provided in discovery. This provision codifies the current practice, as a majority of county prosecutor’s offices already provide such a list along with the discovery. The prosecutor must also provide defense counsel with a list of discoverable materials known to him or her that have not been provided and explain why they have not been provided. This provision is intended to alert defense counsel of any missing discovery early on in the case, and to identify any causes of delay.

Another proposed change to paragraph (b)(1) would allow private defense attorneys to receive discovery by mail or e-mail, instead of having to physically pick it up at the courthouse or prosecutor's office. While prosecutors and public defenders are both based in or near the courthouse, private attorneys must often travel significantly out of their way to pick up discovery. The *Committee* believes that this places an unfair burden on private defense attorneys, particularly solo attorneys or those who work in smaller offices. As a result, the *Committee* is proposing an amendment to R. 3:13-3(b)(1) that would require prosecutors, upon written request, to mail or e-mail discovery to private defense attorneys within three business days. The decision whether to mail or e-mail the discovery would be at the prosecutor's discretion. Defense counsel's written request, along with a copy of his or her entry of appearance, must be received by the prosecutor's office prior to the date of the pre-arraignment conference. Counsel would also be required to simultaneously send a copy of the request, along with any request for waiver of the pre-arraignment conference under R. 3:9-1(a), to Criminal Case Management. Discovery would be provided at the defendant's cost if sent by U.S. mail, and there would be no charge if discovery was sent by e-mail.

As noted above, local Public Defender Offices are typically located in or near the various county courthouses, and so the Public Defender is not similarly burdened by the requirement to physically pick up discovery. As

a result, only private attorneys would be permitted to request that discovery be mailed or e-mailed pursuant to this proposed amendment. Attorneys employed by the Office of the Public Defender would still be required to pick up discovery at the courthouse or the prosecutor's office. In addition, as the Office of the Public Defender represents an overwhelming majority of criminal defendants, the *Committee* believes that any indirect costs to the State for mailing discovery to private defense attorneys would likely be minimal.

Paragraph (b)(1)(A)

The change being proposed in paragraph (b)(1)A, formerly paragraph (c)(1), expands the list of materials belonging to the defendant that the prosecutor must provide in discovery. This proposal mirrors the list of materials that must be provided in civil cases pursuant to R. 4:18-1(a)(1). It is intended to address concerns that the current rule does not account for a number of materials, including various forms of electronically stored information, that are commonly provided in discovery.

Paragraph (b)(1)(B)

Current paragraph (c)(2) requires that the prosecutor turn over in discovery records of statements or confessions, signed or unsigned, by the defendant or copies thereof, and a summary of any admissions or declarations against penal interest made by the defendant that are known to the prosecution but not recorded. The change proposed in paragraph

(b)(1)B, formerly paragraph (c)(2), would require that the prosecutor turn over any transcripts of those documents on a date to be determined by the trial judge, except in no event later than 30 days before the trial date set at the pretrial conference.

Paragraph (b)(1)(C)

This paragraph was formerly paragraph (c)(3). There have been no changes to this paragraph other than to designate it as paragraph (b)(1)(C).

Paragraph (b)(1)(D)

This paragraph was formerly paragraph (c)(4). There have been no changes to this paragraph other than to designate it as paragraph (b)(1)(D).

Paragraph (b)(1)(E)

The change being proposed in paragraph (b)(1)(E), formerly paragraph (c)(5), expands the list of materials that the prosecutor must provide in discovery. This proposal mirrors the list of materials that must be provided in civil cases pursuant to R. 4:18-1(a)(1), and is identical to the change proposed in paragraph (b)(1)(A). It is intended to address concerns that the current rule does not account for a number of materials, including various forms of electronically stored information, that are commonly provided in discovery.

Paragraph (b)(1)(F)

This paragraph was formerly paragraph (c)(6). There have been no changes to this paragraph other than to designate it as paragraph (b)(1)(F).

Paragraph (b)(1)(G)

Current paragraph (c)(7) requires that the prosecutor turn over in discovery records of statements, signed or unsigned, by such persons or by co-defendants which are within the possession, custody or control of the prosecutor and any relevant record of prior conviction of such persons. The change proposed in paragraph (b)(1)(B), formerly paragraph (c)(2), would require that the prosecutor turn over any transcripts of those statements on a date to be determined by the trial judge, except in no event later than 30 days before the trial date set at the pretrial conference, if the prosecutor intends to call the co-defendant or witness at trial.

Paragraph (b)(1)(H)

This paragraph was formerly paragraph (c)(8). There have been no changes to this paragraph other than to designate it as paragraph (b)(1)(H).

Paragraph (b)(1)(I)

This paragraph was formerly paragraph (c)(9). There have been no changes to this paragraph other than to designate it as paragraph (b)(1)(I).

Paragraph (b)(2) - Discovery by the State

Current paragraph (d) is being re-designated paragraph (b)(2). This paragraph, and the subparagraphs under it, cover discovery by the State. The current rule paragraph (b) requires that a defendant who is seeking discovery from the State provide reciprocal discovery no later than 7 days before the A/S Conference. That would remain unchanged. The rule would also require, similar to a parallel provision regarding discovery by the State, that defense counsel provide the prosecutor with a listing of the materials that have been provided in discovery. If any discoverable materials have not been provided, defense counsel must also provide the prosecutor with a listing of the materials known to him or her that are missing and explain why they have not been provided. This provision is intended to alert the prosecutor of any missing discovery early on in the case, and to identify any causes of delay.

Paragraph (b)(2)(A)

This paragraph was formerly paragraph (d)(1). There have been no changes to this paragraph other than to designate it as paragraph (b)(2)(A).

Paragraph (b)(2)(B)

The change being proposed in paragraph (b)(1)B, formerly paragraph (d)(2), expands the list of materials that defense counsel must provide in discovery. This proposal mirrors the list of materials that must

be provided in civil cases pursuant to R. 4:18-1(a)(1), and is nearly identical to the changes proposed in paragraphs (b)(1)A and (b)(1)E. It is intended to address concerns that the current rule does not account for a number of materials, including various forms of electronically stored information, that are commonly provided in discovery.

Paragraph (b)(2)(C)

This paragraph was formerly paragraph (d)(3). There have been no changes to this paragraph other than to designate it as paragraph (b)(2)(C).

Paragraph (b)(2)(D)

Current paragraph (d)(4) requires that defense counsel turn over in discovery written statements, if any, including any memoranda reporting or summarizing the oral statements, made by any witnesses whom the State may call as a witness at trial. The proposed amendment would require that the defendant provide the State with transcripts of all electronically recorded witness statements no later than 30 days before the trial date set at the pretrial conference. The intent is to require the defendant to provide the prosecutor with any statements taken during the defendant's interviews of the state's witnesses.

Paragraph (b)(2)(E)

This paragraph was formerly paragraph (d)(5). There have been no changes to this paragraph other than to designate it as paragraph (b)(2)(E).

Paragraph (b)(3) - Discovery Provided Through Electronic Means

This proposed paragraph is new. The first sentence, which specifies that the parties may provide discovery through electronic means, mirrors a sentence currently contained in the corresponding Part VII rule, R. 7:7-7(g). However, in order to be consistent with the current practice, the *Committee* has included CD and DVD among the acceptable formats in which discovery may be provided.

This paragraph sets forth the recommendations regarding the preferred formats for providing discovery electronically: (1) documents provided electronically are to be in PDF format; (2), all other items, such as photographs, or audio and video recordings, are to be provided in an open, publicly available (non-proprietary) format that is compatible with any standard operating computer; and (3) if discovery is not provided in one of these formats, the party transmitting the discovery is to include a self-extracting computer program that will enable the receiving party to access and view the files that have been provided.

The *Committee* found that the PDF format was widely used for providing documents electronically, and that the software necessary to create documents in that particular format was readily available on the Internet at no charge to the user. In addition, PDF documents were searchable, which some *Committee* members viewed as an essential feature, so readers could search for certain key words or phrases rather than reading the entire document. Furthermore, on July 1, 2008, the International Organization for Standardization (ISO), a group comprised of representatives from 163 countries that develops and publishes international standards, adopted the PDF format as the standard for archiving electronic documents. Given its widespread use, availability, searchability, and status as a worldwide standard, the *Committee* recommends that any electronic documents provided in discovery be in the PDF format.

The *Committee* also recommends that all other items provided electronically, including photographs, or audio and video recordings, be provided in an open, publicly available (non-proprietary) format that is compatible with any standard operating computer. The *Committee* recognized from the outset that in order to lessen the problems caused by the use of incompatible software, it would be necessary to limit the types of software used in the exchange of electronic discovery. In addition, given that the majority of difficulties were reportedly due to the use of proprietary

software, which could also be fairly expensive, the *Committee* felt that the best course was to promote the use of the cost-free formats that were readily available on the Internet. The *Committee* intentionally kept the wording of the rule somewhat broad so that it would not endorse the use of certain formats over others. The *Committee* also hoped to avoid the need to constantly revise the rule as technology changed and current formats became obsolete. The *Committee* did, however, recommend that video recordings be provided in certain preferred formats, as that would provide notice to law enforcement of the video formats that they should use. That recommendation, as well as the list of preferred video formats, can be found on pages 127-129, infra.

The *Committee* was sensitive to the fact that most agencies, institutions and businesses tend to use the software that best fits their needs, and that software may not always be compatible with that used by law enforcement, defense attorneys or the Judiciary. In addition, some agencies, institutions and businesses may be locked into multi-year contracts with their computer equipment or software providers, or may otherwise be unwilling or unable to use another type of software due to economic, security or other concerns. The *Committee* therefore recommends that if electronic discovery is not provided in an open, publicly available (non-proprietary) format that is compatible with any standard operating computer, the party providing the discovery should also include

the appropriate self-extracting software program so that the receiving party can open the disks and view the files contained on them.

By limiting the formats in which discovery may be provided electronically, the *Committee* hopes to address the most commonly reported complaint regarding electronic discovery: an inability to open the disks and access the files due to the use of incompatible software.

This paragraph would also require the court, upon motion of the receiving party, to order that discovery be provided in the same format in which it was received by the transmitting party; i.e., its "native" format. However, because of concerns that it could become quite expensive to require a party to produce electronic discovery in more than one format, the receiving party must first establish good cause. In drafting this provision, the *Committee* considered whether the rule should require that electronic discovery generally be provided in its native format. It was noted that both Rule 34(b)(2)(E) of the Federal Rules of Civil Procedure and New Jersey's civil rule, R. 4:18-1(b)(2), stated that if a discovery request did not specify the format for producing electronically stored information, it must be produced in a form in which it is ordinarily maintained, or in a reasonably useable form. It was also noted that federal case law also supported a preference for providing discovery in its native format. The *Committee*, however, rejected that suggestion, noting that it was the proliferation of incompatible native formats in criminal and quasi-

criminal cases that had led to the creation of the *Committee* in the first place; that it would have been contrary to the Technology Subcommittee's recommendations, which were designed to lead to a greater use of publicly available, non-proprietary formats; that there was no need for discovery to be provided in its native format in the vast majority of cases; and that in those cases in which it *was* important for discovery to be provided in its native format, the rule allowed that upon a showing of good cause.

This paragraph would also require that in all cases involving the use of an Alcotest device, the Alcotest data must, upon request, be provided for any Alcotest 7110 relevant to a particular defendant's case in a readable digital database format generally available to consumers in the open market. This provision is identical to one proposed for R. 7:7-7(f), and is similar to the language contained in a recommendation in the State v. Chun Report of the Special Master.[12] That recommendation was later adopted by the Court in State v. Chun.[13] The *Committee* felt that because there were cases in which a DUI was an element of an indictable offense and therefore heard in Superior Court, the same provision should be included in this rule.

Finally, this paragraph provides that when discovery is provided electronically, the transmitting party shall also include a list or index of the

[12] See Michael Patrick King, State v. Chun, Report of the Special Master, at 234 (February 13, 2007).

[13] State v. Chun, 194 N.J. 54, 90 (2008).

materials that were provided. This provision is intended to address another common complaint regarding electronic discovery: that the recipient must often search through every file on every disk in order to learn what materials have been provided and where they can be found.

One member of the *Committee* strongly objected to this proposed addition to R. 3:3-13(b)(3). He felt that requiring his office to include an index or list along with the materials provided in discovery would be a tremendous burden on his office, as it would be hugely time-consuming and labor intensive to produce those lists. He noted that he had tested the effect that providing a list would have on his office, and found that it slowed down case processing 34%. As a result, he would need to hire 3.2 additional people to comply with that requirement. He also noted that his office was not currently required to provide a list or index along with any paper discovery, and that electronic discovery should not be any different.

The *Committee* disagreed. It was noted that a list would protect both the State and the defense, because the opposing party would not be able to later claim that they had not received a particular document. It was also noted that although it was not required by the Court Rules, several Prosecutor's Offices did in fact provide a list or index along with any paper discovery. It was also suggested that no one should be allowed to turn over bulk discovery, whether it was paper or transmitted electronically, without providing a list of the materials that were being provided.

In light of the claims raised above, the *Committee* reexamined its original proposal. The *Committee* decided to clarify its proposed amendment by removing the reference to "an index," and by specifying that when discovery is provided on multiple disks, the transmitting party must list the materials that were included on each disk. The *Committee* also considered whether its proposal should be phased in over a 5-year period, so that prosecutors would have time to develop or adapt their systems and procedures for creating a list of the materials that were provided electronically. The *Committee*, however, felt that there was no need for a phase-in period, and that it was important to require a list sooner rather than later. Finally, the *Committee* also conducted an informal survey, and learned that of the 14 prosecutor's offices that responded, 12 currently provided some sort of list or inventory along with their paper discovery. As a result, the *Committee* agreed that R. 3:13-3 should also require that a list or inventory accompany any paper or non-electronic discovery. See R. 3:13-3(b)(1) and R. 3:13-3(b)(2).

Paragraph (c) - Motions for Discovery

This proposed paragraph is new. It would require that, prior to filing a motion for discovery, the moving party certify that they have met and conferred with their adversary and attempted to reach agreement on any discovery issues. This rule is a companion to the amendment proposed for R. 3:9-1(b), which would require the parties to meet and confer to

discuss any discovery issues prior to the arraignment/status conference. Taken together, these proposals are intended to reduce the number of discovery motions by forcing the parties to meet, and hopefully resolve, any discovery issues well before trial.

Paragraph (d) - Documents Not Subject to Discovery

This paragraph was formerly paragraph (e). There have been no changes to this paragraph other than to designate it as paragraph (d).

Paragraph (e) - Protective Orders

This paragraph was formerly paragraph (f). It has been redesignated as paragraph (e). In addition, in paragraph (e)(1), the phrase "or inspection" has been deleted. This is consistent with the proposed changes to paragraphs (a) and (b)(2), which would require both the prosecutor and the defense to simply provide discovery, rather than making it available for inspection, copying or photographing.

Paragraph (f) - Continuing Duty to Disclose; Failure to Comply

This paragraph was formerly paragraph (g). The *Committee* is proposing that the first sentence of this paragraph be deleted. The gist of the long-winded first sentence of former paragraph (g) was to set forth the requirement of the continuing duty to discovery. The *Committee* has substituted a much less complex sentence that establishes the same requirement.

3:13-5. Discovery Fees

(a) Standard Fees. The prosecutor may charge a fee for a copy or copies of discovery. The fee assessed for discovery embodied in the form of printed matter shall be $0.05 per letter size page or smaller, and $0.07 per legal size page or larger. From time to time, as necessary, these rates may be revised pursuant to a schedule promulgated by the Administrative Director of the Courts. If the prosecutor can demonstrate that the actual costs for copying discovery exceed the foregoing rates, the prosecutor shall be permitted to charge a reasonable amount equal to the actual costs of copying. The actual copying costs shall be the costs of materials and supplies used to copy the discovery, but shall not include the costs of labor or other overhead expenses associated with making the copies, except as provided for in section (b) of this rule. Electronic records and non-printed materials shall be provided free of charge, but the prosecutor may charge for the actual costs of any needed supplies such as computer discs.

(b) Special Service Charge for Printed Copies. Whenever the nature, format, manner of collation, or volume of discovery embodied in the form of printed matter to be copied is such that the discovery cannot be reproduced by ordinary document copying equipment in ordinary business size, or is such that it would involve an extraordinary expenditure of time and effort to copy, the prosecutor may charge, in addition to the actual copying costs, a special service charge that shall be reasonable and shall

be based upon the actual direct costs of providing the copy or copies. Pursuant to R. 3:10-1, defense counsel shall have the opportunity to review and object to the charge prior to it being incurred.

(c) Special Service Charge for Electronic Records. If defense counsel requests an electronic record: (1) in a medium or format not routinely used by the prosecutor; (2) not routinely developed or maintained by the prosecutor; or (3) requiring a substantial amount of manipulation or programming of information technology, the prosecutor may charge, in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the prosecutor or attributable to the prosecutor for the programming, clerical, and supervisory assistance required, or both. Pursuant to R. 3:10-1, defense counsel shall have the opportunity to review and object to the charge prior to it being incurred.

NOTE: Adopted to be effective .

COMMENTARY

R. 3:13-5 is a new rule designed to set standard discovery fees. The proposed rule was modeled after N.J.S.A. 47:1A-5(b) – (d), one of the statutes that comprise the "Open Public Records Act" (OPRA). See also Directive #15-05, issued on October 14, 2010 by Acting Administrative Director Glenn A. Grant, advising that the Supreme Court had adopted a fee structure for Judiciary records that mirrors the copy fees provided for in OPRA even though OPRA does not apply to the Judiciary.[14] During the course of the *Committee's* discussions, the Office of the Public Defender provided a chart that showed a huge variation in the amount that the different county prosecutors charged that office for discovery, both generally and for different pieces of discovery. For example, some prosecutor's offices did not charge the Public Defender's Office for discovery, or charged only a nominal fee, while others charged much higher amounts. The total amounts charged by various county prosecutors for the one-year period from February 2009 to February 2010 ranged from zero to just under $58,000. The prices for individual items also varied greatly. Some counties, for example, did not charge the Public Defender for CDs or DVDs, while others charged $25 and $50, respectively, for

[14] The Directive also provided that the Judiciary's usual fees charged for copies of court records would be waived when federal, state or local governmental entities request a small number of copies of documents. The rationale for this was that other governmental agencies are presumptively functioning in the public interest. The *Committee* did not reach the issue of whether this same rationale would apply to discovery fees.

those items. Similar disparities existed in the fees charged for paper copies, videotapes, audiotapes and photos.

Initially, it was suggested that the issue of uniform discovery fees might more appropriately be a matter for the Legislature or the Executive branch to examine. However, given the Appellate Division's opinion in Constantine v. Twp. of Bass River, 406 N.J. Super. 305 (App. Div. 2009), the *Committee* believed that it was within its authority to address this inconsistency in discovery charges across the state. In Constantine, the plaintiff, who had paid twenty dollars for three pages of discovery related to a speeding summons, filed a class action complaint against the Township of Bass River, as well as several other municipalities, alleging that those towns charged excessive fees for written discovery. The Appellate Division affirmed the trial court's dismissal of the plaintiff's complaint, but referred the discovery fee issue to the Attorney General, noting that the Attorney General had the power, absent specific legislation, to direct municipal prosecutors regarding the discovery fees that they may appropriately charge.[15] Id. at 329. The court also invited the Legislature to address the issue of discovery fees[16], and, while offering no opinion on whether the Supreme Court should set a fee schedule, noted that the

[15] The *Committee* subsequently contacted a representative from the Attorney General's Division of Criminal Justice, who reported that the Attorney General's Office did not plan to develop a fee schedule for Municipal Court discovery, as that was viewed as a Legislative matter.

[16] The *Committee* also contacted the AOC's Director of Professional and Governmental Services, who oversees the Judiciary's Legislative Services Unit. He was not aware of any pending legislation that would set uniform discovery fees.

Court had the Constitutional authority to "make rules governing the administration of all courts, as well as “the practice and procedure in all such courts.” Id. at 329-330.

As Constantine made it clear that it was within the Court’s rule-making authority to set fees for discovery, the *Committee* decided to look more closely at that issue. Thus, this rule is designed to set standard, reasonable costs for discovery, to allow exceptions in certain instances, and to allow defense counsel to object to those charges that it deems to be excessive.

Paragraph (a) – Standard Fees

This paragraph specifically provides that prosecutors may charge a fee for copies of discovery, and sets the standard fee for discovery in the form of printed matter at $0.05 per letter size page and $0.07 per legal size page. Electronic records and non-printed materials are to be provided free of charge, but the prosecutor may charge for the actual costs of any necessary supplies, such as computer disks. These are the same fees that may be charged under OPRA, pursuant to N.J.S.A. 47:1A-5(b), for government records. This paragraph also provides that these rates may be revised from time to time pursuant to a schedule promulgated by the Administrative Director of the Courts. In addition, if the prosecutor can show that the actual copying costs exceeded those rates, he or she may charge a reasonable amount equal to those costs. That amount, however,

may only be for the costs of materials and supplies used in copying the discovery, and may not, in most cases, include the costs for labor and overhead.

Paragraph (b) – Special Service Charge for Printed Copies

Paragraph (b) allows the prosecutor to charge a reasonable special service charge in cases in which the copying cannot be accomplished by ordinary copying equipment, or in which copying would involve an extraordinary expenditure of time and effort. In those instances, the prosecutor may charge an amount equal to the actual direct costs of copying. Defense counsel, however, would be provided an opportunity to review and object to the charge prior to it being incurred.

Paragraph (c) – Special Service Charge for Electronic Records

Similar to paragraph (b), paragraph (c) allows the prosecutor to charge a reasonable special charge in certain instances for the production of electronic records. Specifically, if defense counsel requests an electronic record (1) in a medium or format not routinely used by the prosecutor; (2) not routinely developed or maintained by the prosecutor; or (3) requiring a substantial amount of manipulation or programming of information technology, the prosecutor may charge an amount based on the cost of any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred or attributable to the programming, clerical, and supervisory assistance

required, or both. Also, similar to paragraph (b), defense counsel would be provided an opportunity to review and object to the charge prior to it being incurred.

7:5-1. Filing

(a) . . . No Change.

(b) Providing to Defendant; Inspection. All completely executed warrants, together with the supporting papers and recordings described in paragraph (a) of this rule, shall be [available for inspection and copying by] provided to the defendant in discovery pursuant to R. 7:7-7 and, upon notice to the county prosecutor and for good cause shown, available for inspection and copying by any other person claiming to be aggrieved by the search and seizure.

NOTE: Source-R. (1969) 3:5-6(a), (c). Adopted October 6, 1997 to be effective February 1, 1998[.] ; paragraph (b) amended to be effective .

COMMENTARY

The *Committee* is proposing a change to paragraph (b) that would require that the executed search warrant, along with any supporting papers and recordings, be provided to the defendant in discovery. This proposed change mirrors the changes proposed for R. 7:7-7, which would require the parties to provide discovery to each other upon written notice, rather than simply making it available for inspection and copying. This change also mirrors the change proposed for the corresponding Part III rule, R. 3:5-6(c). This proposal, however, would not change the process when a person other than the defendant claimed to be aggrieved by an unlawful search and seizure. In that case, the executed search warrant and supporting papers and recordings would still be made available for inspection and copying upon notice to the county prosecutor and a showing of good cause.

7:7-5. Pretrial Procedure

(a) Pretrial Conference. At any time after the filing of the complaint, the court may order one or more conferences with the parties to consider the results of negotiations between them relating to a proposed plea, discovery, or to other matters that will promote a fair and expeditious disposition or trial. With the consent of the parties or counsel for the parties, the court may permit any pretrial conference to be conducted by means of telephone or video link.

(b) . . . No Change.

NOTE: Source-Paragraph (a): new; paragraph (b): R. (1969) 7:4-2(d), 3:9-1(d). Adopted October 6, 1997 to be effective February 1, 1998; paragraph (a) amended July 16, 2009 to be effective September 1, 2009[.]; paragraph (a) amended to be effective .

COMMENTARY

The *Committee* is proposing an amendment to paragraph (a) that expressly permits the court to order a pretrial conference with the parties in order to discuss the results of any negotiations concerning pretrial discovery issues. The *Committee's* original proposal was consistent with a proposed change to the corresponding Part III rule, R. 3-9-1(b), and permitted the court to order the parties to meet in order to attempt to reach agreement on any discovery issues. That proposal, however, raised concerns that defense counsel in some cases would be put in the position of having to assist the State in its attempt to convict the defendant by being required to reveal deficiencies in the State's case. For example, in State v. Chun, 194 N.J. 54 (2008), the New Jersey Supreme Court held that the State must provide certain foundational documents as part of discovery in DWI cases, such as documents certifying that the Alcotest device was in working order and that the machine's operator was certified to operate that device. Some of those documents, known as "core" foundational documents, were necessary for the State to prove its case. The concern was that, as originally drafted, if the court in a DWI case asked defense counsel whether he or she had received all of the necessary discovery after conferring with the prosecutor, defense counsel could be required to outline deficiencies in the State's evidence against defendant by alerting the state that it hadn't provided all of the documentation necessary to

convict his or her client. Therefore, in order to avoid any potential Constitutional issues that might be implicated by requiring the parties to confer and attempt to reach agreement on any discovery issues, the *Committee* changed the language to simply reflect that a pretrial conference may be held in order to discuss the results of any negotiations between the parties regarding discovery.

7:7-6. Depositions

(a) When Authorized. If it appears to the judge of the court in which a complaint is pending that a witness is likely to be unable to testify at trial because of impending death or physical or mental incapacity, the court, upon motion and notice to the parties, and after a showing that such action is necessary to prevent manifest injustice, may order that a deposition of the testimony of that witness be taken and that any designated books, papers, documents or tangible objects, including, but not limited to, writings, drawings, graphs, charts, photographs, sound recordings, images, electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, into reasonably usable form, not privileged, be produced at the same time and place.

(b) . . . No Change.

(c) . . . No Change.

NOTE: Source-R. (1969) 7:4-2(h), 3:13-2(a),(b),(c). Adopted October 6, 1997 to be effective February 1, 1998[.]; paragraph (a) amended to be effective .

COMMENTARY

The *Committee* is proposing a change to paragraph (a) of the rule to make it consistent with proposed changes to R. 7:7-7(b)(1), R. 7:7-7(b)(6), R. 7:7-7(c)(2), and also with proposed changes to the corresponding Part III rules - R. 3:13-2(a), R. 3:13-3(b)(1)(A), R. 3:13-3(b)(1)(E), and R. 3:13-3(b)(2)(B). The proposed changes to R. 7:7-7 would expand the list of materials that the parties must provide in discovery. The proposed change to this rule similarly expands the list of materials that must be produced in connection with the deposition of the testimony of a material witness who is unlikely to testify at trial due to death or physical or mental incapacity. It is intended to address concerns that the current rule does not account for a number of materials, including various forms of electronically stored information, that are commonly provided in discovery.

7:7-7. Discovery and Inspection

(a) Scope. If the government is represented by the municipal prosecutor or a private prosecutor in a cross complaint case, discovery shall be available to the parties only as provided by this rule, unless the court otherwise orders. All discovery requests by defendant shall be served on the municipal prosecutor, who shall be responsible for making government discovery available to the defendant. If the matter is, however, not being prosecuted by the municipal prosecutor, the municipal prosecutor shall transmit defendant's discovery requests to the private prosecutor in a cross complaint case, pursuant to R. 7:8-7(b).

(b) Discovery by Defendant. Unless the defendant agrees to more limited discovery, [I]in all cases, the defendant, on written notice to the municipal prosecutor or private prosecutor in a cross complaint case, shall be [allowed to inspect, copy, and photograph or to be] provided with copies of [any] all relevant material, including, but not limited to, the following:

(1) books, tangible objects, papers or documents obtained from or belonging to the defendant, including, but not limited to, writings, drawings, graphs, charts, photographs, video and sound recordings, images, electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, into reasonably usable form;

(2) records of statements or confessions, signed or unsigned, by the defendant or copies thereof, and a summary of any admissions or declarations against penal interest made by the defendant that are known to the prosecution but not recorded;

(3) grand jury proceedings recorded pursuant to R. 3:6-6;

(4) results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the matter or copies of these results or reports, that are within the possession, custody or control of the prosecuting attorney;

(5) reports or records of defendant's prior convictions;

(6) books, originals or copies of papers and documents, or tangible objects, buildings or places that are within the possession, custody or control of the government, including, but not limited to, writings, drawings, graphs, charts, photographs, video and sound recordings, images, electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, into reasonably usable form;

(7) names and addresses of any persons whom the prosecuting attorney knows to have relevant evidence or information, including a designation by the prosecuting attorney as to which of those persons the prosecuting attorney may call as witnesses;

(8) record of statements, signed or unsigned, by the persons described by subsection (7) of this rule or by co-defendants within the possession, custody or control of the prosecuting attorney, and any relevant record of prior conviction of those persons;

(9) police reports that are within the possession, custody or control of the prosecuting attorney;

(10) warrants, that have been completely executed, and any papers accompanying them, as described by R. 7:5-1(a).

(11) the names and addresses of each person whom the prosecuting attorney expects to call to trial as an expert witness, the expert's qualifications, the subject matter on which the expert is expected to testify, a copy of the report, if any, of the expert witness, or if no report was prepared, a statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. If this information is requested and not furnished, the expert witness may, upon application by the defendant, be barred from testifying at trial.

(c) Discovery by the State. In all cases, the municipal prosecutor or the private prosecutor in a cross complaint case, on written notice to the defendant, shall be [allowed to inspect, copy, and photograph or to be] provided with copies of [any] all relevant material, including, but not limited to, the following:

(1) results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the matter or copies of these results or reports within the possession, custody or control of the defendant or defense counsel;

(2) any relevant books, originals or copies of papers and other documents or tangible objects, buildings or places within the possession, custody or control of the defendant or defense counsel, including, but not limited to, writings, drawings, graphs, charts, photographs, video and sound recordings, images, electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, into reasonably usable form;

(3) the names and addresses of those persons known to defendant who may be called as witnesses at trial and their written statements, if any, including memoranda reporting or summarizing their oral statements;

(4) written statements, if any, including any memoranda reporting or summarizing the oral statements, made by any witnesses whom the government may call as a witness at trial; and

(5) the names and addresses of each person whom the defense expects to call to trial as an expert witness, the expert's qualifications, the subject matter on which the expert is expected to testify, and a copy of the report, if any, of such expert witness, or if no report is prepared, a

statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. If this information is requested and not furnished, the expert may, upon application by the prosecuting attorney, be barred from testifying at trial.

(d) . . . No Change.

(e) Reasonableness of Cost. Upon motion of any party, the court may consider the reasonableness of the cost of discovery ordered by the court to be disseminated to the parties. If the court finds that the cost charged for discovery is unreasonable, the court may order the cost reduced or make such other order as appropriate.

(f) Protective Orders.

(1) Grounds. Upon motion and for good cause shown, the court may at any time order that the discovery [or inspection, copying or photographing] sought pursuant to this rule be denied, restricted, or deferred or make such other order as is appropriate. In determining the motion, the court may consider the following: protection of witnesses and others from physical harm, threats of harm, bribes, economic reprisals and other intimidation; maintenance of such secrecy regarding informants as is required for effective investigation of criminal activity; protection of confidential relationships and privileges recognized by law; and any other relevant considerations.

(2) Procedures. The court may permit the showing of good cause to be made, in whole or in part, in the form of a written statement to be inspected by the court alone. If the court enters a protective order, the entire text of the statement shall be sealed and preserved in the court's records, to be made available only to the appellate court in the event of an appeal.

(g) Time and Procedure. A defense request for discovery shall be made contemporaneously with the entry of appearance by the defendant's attorney, who shall submit a copy of the appearance and demand for discovery directly to the municipal prosecutor. If the defendant is not represented, any requests for discovery shall be made in writing and submitted by the defendant directly to the municipal prosecutor. The municipal prosecutor shall respond to the discovery request in accordance with paragraph (b) of this rule within 10 days after receiving the request. Unless otherwise ordered by the judge, the defendant shall provide the prosecutor with discovery, as provided by paragraph (c) of this rule, within 20 days of the prosecuting attorney's compliance with the defendant's discovery request. If any discoverable materials known to a party have not been supplied, the party obligated with providing that discovery shall also provide the opposing party with a listing of the materials that are missing and explain why they have not been supplied. Unless otherwise ordered by the judge, the parties may provide [exchange] discovery pursuant to

sections (a), (b) and (c) through the use of CD, DVD, e-mail, internet or other electronic means. Documents provided through electronic means shall be in PDF format. All other discovery shall be provided in an open, publicly available (non-proprietary) format that is compatible with any standard operating computer. If discovery is not provided in a PDF or open, publicly available format, the transmitting party shall include a self-extracting computer program that will enable the recipient to access and view the files that have been provided. Upon motion of the recipient, and for good cause shown, the court shall order that discovery be provided in the format in which the transmitting party originally received it. In all cases in which an Alcotest device is used, any Alcotest data shall, upon request, be provided for any Alcotest 7110 relevant to a particular defendant's case in a readable digital database format generally available to consumers in the open market. In all cases in which discovery is provided through electronic means, the transmitting party shall also include a list of the materials that were provided and, in the case of multiple disks, the disk on which they can be located.

(h) Motions for Discovery. No motion for discovery shall be made unless the prosecutor and defendant have conferred and attempted to reach agreement on any discovery issues, including any issues pertaining to discovery provided through the use of CD, DVD, e-mail, internet or other electronic means.

(i) Discovery Fees.

(1) Standard Fees. The municipal prosecutor, or a private prosecutor in a cross complaint case, may charge a fee for a copy or copies of discovery. The fee assessed for discovery embodied in the form of printed matter shall be $0.05 per letter size page or smaller, and $0.07 per legal size page or larger. From time to time, as necessary, these rates may be revised pursuant to a schedule promulgated by the Administrative Director of the Courts. If the prosecutor can demonstrate that the actual costs for copying discovery exceed the foregoing rates, the prosecutor shall be permitted to charge a reasonable amount equal to the actual costs of copying. The actual copying costs shall be the costs of materials and supplies used to copy the discovery, but shall not include the costs of labor or other overhead expenses associated with making the copies, except as provided for in subsection (2). Electronic records and non-printed materials shall be provided free of charge, but the prosecutor may charge for the actual costs of any needed supplies such as computer discs.

(2) Special Service Charge for Printed Copies. Whenever the nature, format, manner of collation, or volume of discovery embodied in the form of printed matter to be copied is such that the discovery cannot be reproduced by ordinary document copying equipment in ordinary business size, or is such that it would involve an extraordinary expenditure of time and effort to copy, the prosecutor may charge, in addition to the actual

copying costs, a special service charge that shall be reasonable and shall be based upon the actual direct costs of providing the copy or copies. Pursuant to R. 7:7-1, the defendant shall have the opportunity to review and object to the charge prior to it being incurred.

(3) Special Service Charge for Electronic Records. If the defendant requests an electronic record: (1) in a medium or format not routinely used by the prosecutor; (2) not routinely developed or maintained by the prosecutor; or (3) requiring a substantial amount of manipulation or programming of information technology, the prosecutor may charge, in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the prosecutor or attributable to the prosecutor for the programming, clerical, and supervisory assistance required, or both. Pursuant to R. 7:7-1, the defendant shall have the opportunity to review and object to the charge prior to it being incurred.

(j) Continuing Duty to Disclose; Failure to Comply. [If a party who has complied with this rule discovers, either before or during trial, additional material or names of witnesses previously requested or ordered subject to discovery or inspection, that party shall promptly notify the other party or that party's attorney of the existence of these additional materials and witnesses.] There shall be a continuing duty to provide discovery pursuant

to this rule. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order that party to provide [permit] the discovery[, inspection, copying or photographing] of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed or enter such other order as it deems appropriate.

NOTE: Source-Paragraph (a): new; paragraph (b): R. (1969) 7:4-2(h), 3:13-3(c); paragraph (c): R. (1969) 7:4-2(h), 3:13-3(d); paragraph (d): R. (1969) 7:4-2(h), 3:13-3(e); paragraph (e): R. (1969) 7:4-2(h), 3:13-3(f); paragraph (f) new; paragraph (g): R. (1969) 7:4-2(h), 3:13-3(g). Adopted October 6, 1997 effective February 1, 1998; paragraph (c) amended July 5, 2000 to be effective September 5, 2000; paragraph (f) amended July 16, 2009 to be effective September 1, 2009; paragraphs (a), (b), and (c) amended, new paragraph (e) caption and text adopted, former paragraphs (e), (f), and (g) redesignated as paragraphs (f), (g), and (h) July 21, 2011 to be effective September 1, 2011[.];paragraphs (b), (b)(1), (b)(6), (c), (c)(2), (e)(1), and (f) amended, new paragraphs (h) and (i) added and former paragraph (h) amended and redesignated as paragraph (j) to be effective .

COMMENTARY

This rule governs discovery in municipal court cases. The *Committee* is proposing a series of amendments to this rule.

Paragraph (b) - Discovery by the Defendant

This paragraph currently provides that in all cases that involve a consequence of magnitude, or when ordered by the court, the defendant, upon written notice to the municipal or private prosecutor, shall either be permitted to **inspect, copy or photograph** any relevant discovery, or shall be provided a copy of it. The *Committee's* proposed amendment would require that unless the defendant agrees to more limited discovery, the prosecutor must simply **provide** defense counsel with all relevant materials. The *Committee* recognizes that requiring defense counsel, or the defendant, to travel to the prosecutor's office to inspect and copy materials in the prosecutor's file can cause unnecessary delay. The *Committee* also recognizes, however, that it is not always necessary to provide discovery in every municipal court case, as allowing defense counsel, or the defendant, to inspect and copy the discovery is occasionally sufficient to move a case forward. This proposed change is intended to provide a measure of flexibility in municipal court cases. It is also consistent with the change proposed to the corresponding Part III rule – R. 3:13-3(a).

Paragraph (b)(1)

The change proposed in paragraph (b)(1) expands the list of materials belonging to the defendant that the prosecutor must provide in discovery. This proposal mirrors the list of materials that must be provided in civil cases pursuant to R. 4:18-1(a)(1), and is identical to the change proposed for the corresponding Part III rule - R. 3:13-3(b)(1)(A) (formerly R. 3:13-3(c)(1)). It is intended to address concerns that the current rule does not account for a number of materials, including various forms of electronically stored information, that are commonly provided in discovery.

Paragraph (b)(6)

The change proposed in paragraph (b)(6) expands the list of materials that the prosecutor must provide in discovery. This proposal mirrors the list of materials that must be provided in civil cases pursuant to R. 4:18-1(a)(1), and is identical to the changes proposed in paragraph (b)(1) and in the corresponding Part III rule - R. 3:13-3(b)(1)(E) (formerly R. 3:13-3(c)(5)). It is intended to address concerns that the current rule does not account for a number of materials, including various forms of electronically stored information, that are commonly provided in discovery.

Paragraph (c) - Discovery by the State

This paragraph, and the subparagraphs under it, cover discovery by the State. This paragraph currently provides that in all cases that involve a consequence of magnitude, or when ordered by the court, the municipal or

private prosecutor, upon written notice to the municipal or private prosecutor, shall either be permitted to **inspect, copy or photograph** any relevant discovery, or shall be provided a copy of it. The *Committee's* proposed amendment would require that the defendant simply **provide** the prosecutor with all relevant materials, as requiring the prosecutor to travel to inspect and copy materials in defense counsel's, or the defendant's, file may cause unnecessary delay. This proposal mirrors the *Committee's* proposed change to paragraph (b), which would create an identical obligation for municipal and private prosecutors. It is also consistent with the change proposed to the corresponding Part III rule – R. 3:13-3(b)(2) (formerly R. 3:13-3(d)).

Paragraph (c)(2)

The change proposed in paragraph (c)(2) expands the list of materials that defense counsel must provide in discovery. This proposal mirrors the list of materials that must be provided in civil cases pursuant to R. 4:18-1(a)(1), and is identical to the changes proposed in paragraphs (b)(1) and (b)(6). It also mirrors the change proposed to the corresponding Part III rule - R. 3:13-3(b)(2)(B) (formerly R. 3:13-3(d)(2)). It is intended to address concerns that the current rule does not account for a number of materials, including various forms of electronically stored information, that are commonly provided in discovery.

Paragraph (f) – Protective Orders

Paragraph (f)(1), which governs the grounds for issuing a protective order, has been amended by deleting the phrase "or inspection, copying or photographing." This proposed change is consistent with the proposed changes to paragraphs (b) and (c), which would require both the prosecutor and the defense to simply provide discovery, rather than making it available for inspection, copying or photographing.

Paragraph (g) – Time and Procedure

The *Committee* is proposing several changes to this paragraph, which governs the time and procedure for requesting and providing discovery.

First, the *Committee* proposes adding a provision that would require that if any discoverable materials known to a party have not been provided, the party obligated with providing that discovery must provide the opposing party with a listing of the materials that are missing and explain why they have not been provided. This provision is intended to alert the opposing party of any missing discovery early on in the case, and to identify any causes of delay. It is similar to provisions that the *Committee* has proposed for the corresponding Part III rule, R. 3:13-3, in paragraphs (b)(1) and (b)(2).

The *Committee* also proposes a series of amendments to paragraph (f) that mirror the changes proposed to the corresponding Part III rule, R.

3:13-3(b)(3). First, the *Committee* proposes that the paragraph be amended to clarify that the parties may "provide," rather than "exchange," discovery pursuant to sections (a), (b) and (c) through electronic means. However, in order to be consistent with the current practice, the *Committee* has included CD and DVD among the acceptable formats in which discovery may be provided.

This paragraph sets forth the recommendations regarding the preferred formats for providing discovery electronically: (1) documents provided electronically are to be in PDF format; (2), all other items, such as photographs, or audio and video recordings, are to be provided in an open, publicly available (non-proprietary) format that is compatible with any standard operating computer; and (3) if discovery is not provided in one of these formats, the party transmitting the discovery is to include a self-extracting computer program that will enable the receiving party to access and view the files that have been provided.

The *Committee* found that the PDF format was widely used for providing documents electronically, and that the software necessary to create documents in that particular format was readily available on the Internet at no charge to the user. In addition, PDF documents were searchable, which some *Committee* members viewed as an essential feature, so readers could search for certain key words or phrases rather than reading the entire document. Furthermore, on July 1, 2008, the

International Organization for Standardization (ISO), a group comprised of representatives from 163 countries that develops and publishes international standards, adopted the PDF format as the standard for archiving electronic documents. Given its widespread use, availability, searchability, and status as a worldwide standard, the *Committee* recommends that any electronic documents provided in discovery be in the PDF format.

The *Committee* also recommends that all other items provided electronically, including photographs, or audio and video recordings, be provided in an open, publicly available (non-proprietary) format that is compatible with any standard operating computer. The *Committee* recognized from the outset that in order to lessen the problems caused by the use of incompatible software, it would be necessary to limit the types of software used in the exchange of electronic discovery. In addition, given that the majority of difficulties were reportedly due to the use of proprietary software, which could also be fairly expensive, the *Committee* felt that the best course was to promote the use of the cost-free formats that were readily available on the Internet. The *Committee* intentionally kept the wording of the rule somewhat broad so that it would not endorse the use of certain formats over others. The *Committee* also hoped to avoid the need to constantly revise the rule as technology changed and current formats became obsolete. The *Committee* did, however, recommend that video

recordings be provided in certain preferred formats, as that would provide notice to law enforcement of the video formats that they should use. That recommendation, as well as the list of preferred video formats, can be found on pages 127-129, infra.

The *Committee* was sensitive to the fact that most agencies, institutions and businesses tend to use the software that best fits their needs, and that software may not always be compatible with that used by law enforcement, defense attorneys or the Judiciary. In addition, some agencies, institutions and businesses may be locked into multi-year contracts with their computer equipment or software providers, or may otherwise be unwilling or unable to use another type of software due to economic, security or other concerns. The *Committee* therefore recommends that if electronic discovery is not provided in an open, publicly available (non-proprietary) format that is compatible with any standard operating computer, the party providing the discovery should also include the appropriate self-extracting software program so that the receiving party can open the disks and view the files contained on them.

By limiting the formats in which discovery may be provided electronically, the *Committee* hopes to address the most commonly reported complaint regarding electronic discovery: an inability to open the disks and access the files due to the use of incompatible software.

This paragraph would also require the court, upon motion of the receiving party, to order that discovery be provided in the same format in which it was received by the transmitting party; i.e., its "native" format. However, because of concerns that it could become quite expensive to require a party to produce electronic discovery in more than one format, the receiving party must first establish good cause. In drafting this provision, the *Committee* considered whether the rule should require that electronic discovery generally be provided in its native format. It was noted that both Rule 34(b)(2)(E) of the Federal Rules of Civil Procedure and New Jersey's civil rule, R. 4:18-1(b)(2) stated that if a discovery request did not specify the format for producing electronically stored information, it must be produced in a form in which it is ordinarily maintained, or in a reasonably useable form. It was also noted that federal case law also supported a preference for providing discovery in its native format. The *Committee*, however, rejected that suggestion, noting that it was the proliferation of incompatible native formats in criminal and quasi-criminal cases that had led to the creation of the *Committee* in the first place; that it would have been contrary to the Technology Subcommittee's recommendations, which were designed to lead to a greater use of publicly available, non-proprietary formats; that there was no need for discovery to be provided in its native format in the vast majority of Municipal Court cases; and that in those cases in which it *was* important for discovery to be

provided in its native format, the rule allowed that upon a showing of good cause.

This paragraph would also require that in all cases involving the use of an Alcotest device, the Alcotest data must, upon request, be provided for any Alcotest 7110 relevant to a particular defendant's case in a readable digital database format generally available to consumers in the open market. This provision codifies the current practice, in which the State provides Alcotest data in a sortable spreadsheet format. It also addresses the *Committee's* concerns that the State's centralized database of Alcotest data,[17] which the Supreme Court had ordered in State v. Chun, 194 N.J. 54, 153 (2008), might be provided in an unsortable PDF format. The *Committee* felt that data provided in a PDF format would be of far less use to defense attorneys than the current sortable database format, and would lead to defense attorneys making motions in practically every Alcotest case requesting that they be provided with a sortable database. The *Committee's* proposal tracks the language contained in a

[17] This database, which is being created under the direction of the Attorney General's Office, has not yet been completed. The *Committee* spoke to a representative of the Attorney General's Office, who reported that the database is expected to be completed during the first quarter of 2012.

recommendation in the State v. Chun Report of the Special Master.[18] That recommendation was later adopted by the Court in State v. Chun.[19]

Finally, this paragraph provides that when discovery is provided electronically, the transmitting party shall also include a list or index of the materials that were provided. This provision is intended to address another common complaint regarding electronic discovery: that the recipient must often search through every file on every disk in order to learn what materials have been provided and where they can be found.

Paragraph (h) - Motions for Discovery

This paragraph is new. It would require that, prior to making a motion for discovery, the prosecutor and defendant must have met and conferred and attempted to reach agreement on any discovery issues. This rule is a companion to the amendment proposed for R. 7:7-5(a), which would allow the court to order a pretrial conference with the parties to consider the results of any negotiations relating to discovery. Taken together, these proposals are intended to reduce the number of discovery motions by forcing the parties to meet, and hopefully resolve, any discovery issues well before trial. The *Committee* has proposed similar changes to the corresponding Part III rules, R. 3:9-1(b) and new R. 3:13-3(c).

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[18] See Michael Patrick King, State v. Chun, Report of the Special Master, at 234 (February 13, 2007).

[19] State v. Chun, 194 N.J. 54, 90 (2008).

Paragraph (i) - Discovery Fees

This paragraph is designed to set standard discovery fees. It is identical to a proposed new Part III rule, R. 3:13-5, and was modeled after N.J.S.A. 47:1A-5(b) – (d), one of the statutes that comprise the "Open Public Records Act" (OPRA). See also Directive #15-05, issued on October 14, 2010 by Acting Administrative Director Glenn A. Grant, advising that the Supreme Court had adopted a fee structure for Judiciary records that mirrors the copy fees provided for in OPRA even though OPRA does not apply to the Judiciary.[20] During the course of the *Committee's* discussions, the Office of the Public Defender provided a chart that showed a huge variation in the amount that the different county prosecutors charged that office for discovery, both generally and for different pieces of discovery. For example, some prosecutor's offices did not charge the Public Defender's Office for discovery, or charged only a nominal fee, while others charged much higher amounts. The total amounts charged by various county prosecutors for the one-year period from February 2009 to February 2010 ranged from zero to just under $58,000. The prices for individual items also varied greatly. Some counties, for example, did not charge the Public Defender for CDs or

[20] The Directive also provided that the Judiciary's usual fees charged for copies of court records would be waived when federal, state or local governmental entities request a small number of copies of documents. The rationale for this was that other governmental agencies are presumptively functioning in the public interest. The Committee did not reach the issue of whether this same rationale would apply to discovery fees.

DVDs, while others charged $25 and $50, respectively, for those items. Similar disparities existed in the fees charged for paper copies, videotapes, audiotapes and photos. Although the chart only listed the fees that county prosecutors charged the Public Defender's Office, it was reported that similar disparities existed among the various municipalities.

Initially, it was suggested that the issue of uniform discovery fees might more appropriately be a matter for the Legislature or the Executive branch to examine. However, given the Appellate Division's opinion in Constantine v. Twp. of Bass River, 406 N.J. Super. 305 (App. Div. 2009), the *Committee* believed that it was within its authority to address this inconsistency in discovery charges across the state. In Constantine, the plaintiff, who had paid twenty dollars for three pages of discovery related to a speeding summons, filed a class action complaint against the Township of Bass River, as well as several other municipalities, alleging that those towns charged excessive fees for written discovery. The Appellate Division affirmed the trial court's dismissal of the plaintiff's complaint, but referred the discovery fee issue to the Attorney General, noting that the Attorney General had the power, absent specific legislation, to direct municipal prosecutors regarding the discovery fees that they may appropriately charge.[21] Id. at 329. The court also invited the Legislature to

[21] The *Committee* subsequently contacted a representative from the Attorney General's Division of Criminal Justice, who reported that the Attorney General's Office did not plan to develop a fee schedule for Municipal Court discovery, as that was viewed as a Legislative matter.

address the issue of discovery fees[22], and, while offering no opinion on whether the Supreme Court should set a fee schedule, noted that the Court had the Constitutional authority to "make rules governing the administration of all courts, as well as "the practice and procedure in all such courts." Id. at 329-330.

As Constantine made it clear that it was within the Court's rule-making authority to set fees for discovery, the *Committee* decided to look more closely at that issue. Thus, this rule is designed to set standard, reasonable costs for discovery, to allow exceptions in certain instances, and to allow defense counsel to object to those charges that it deems to be excessive.

Paragraph (1) – Standard Fees

This paragraph specifically provides that prosecutors may charge a fee for copies of discovery, and sets the standard fee for discovery in the form of printed matter at $0.05 per letter size page and $0.07 per legal size page. Electronic records and non-printed materials are to be provided free of charge, but the prosecutor may charge for the actual costs of any necessary supplies, such as computer disks. These are the same fees that may be charged under OPRA, pursuant to N.J.S.A. 47:1A-5(b), for government records. This paragraph also provides that these rates may

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[22] The *Committee* also contacted the AOC's Director of Professional and Governmental Services, who oversees the Judiciary's Legislative Services Unit. He was not aware of any pending legislation that would set uniform Municipal Court discovery fees.

be revised from time to time pursuant to a schedule promulgated by the Administrative Director of the Courts. In addition, if the prosecutor can show that the actual copying costs exceeded those rates, he or she may charge a reasonable amount equal to those costs. That amount, however, may only be for the costs of materials and supplies used in copying the discovery, and may not, in most cases, include the costs for labor and overhead.

In drafting this rule, the *Committee* recognized that the role of the municipal prosecutor was much different than that of a county prosecutor. It was noted, for example, that the majority of municipal prosecutors were private practitioners who bore the costs of providing discovery out of their own pockets. As a result, the costs in attorney and secretarial time would far exceed the fees charged under the proposed rule. Consequently, the *Committee* considered whether it might be more appropriate to set a flat fee for discovery in Municipal Court cases. After debating the issue, however, the *Committee* acknowledged that no matter what level the fee was set at, it would almost never reflect the actual costs of providing discovery - it would either be excessive or insufficient. The *Committee* therefore agreed to leave the rule as is, and to let discovery fees be set on a case-by-case basis.

Paragraph (2) – Special Service Charge for Printed Copies

Paragraph (2) allows the prosecutor to charge a reasonable special service charge in cases in which the copying cannot be accomplished by ordinary copying equipment, or in which copying would involve an extraordinary expenditure of time and effort. In those instances, the prosecutor may charge an amount equal to the actual direct costs of copying. Defense counsel, however, would be provided an opportunity to review and object to the charge prior to it being incurred.

Paragraph (3) – Special Service Charge for Electronic Records

Similar to paragraph (2), this paragraph allows the prosecutor to charge a reasonable special charge in certain instances for the production of electronic records. Specifically, if defense counsel requests an electronic record (1) in a medium or format not routinely used by the prosecutor; (2) not routinely developed or maintained by the prosecutor; or (3) requiring a substantial amount of manipulation or programming of information technology, the prosecutor may charge an amount based on the cost of any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred or attributable to the programming, clerical, and supervisory assistance required, or both. Also, similar to paragraph (2), defense counsel would be provided an opportunity to review and object to the charge prior to it being incurred.

Paragraph (j) Continuing Duty to Disclose; Failure to Comply

This paragraph was formerly paragraph (g). The *Committee* is proposing that the first sentence of this paragraph be deleted. The gist of the long-winded first sentence of former paragraph (g) was to set forth the requirement of the continuing duty to discovery. The *Committee* has substituted a much less complex sentence that establishes the same requirement.

VII. NON-RULE RECOMMENDATIONS

As previously noted with regard to the *Committee's* rule recommendations, the *Committee* viewed its charge as being quite broad. Thus, while some of its recommendations apply to discovery in general, rather than just to "electronic discovery," the *Committee* felt that those recommendations were necessary to make the discovery process more efficient. The following non-rule recommendations are intended to address the issues that the *Committee's* rule recommendations did not address.

A. Recommended Video Formats

RECOMMENDATION 1. **Videos that are provided as part of discovery should be in one of the following formats: (1) AVI; (2) Windows Media; (3) MPEG; (4) QuickTime; (5) RealVideo; or (6) Shockwave (Flash).**

In both R. 3:13-3(b)(3) and R. 7:7-7(g), the *Committee* recommended that other than electronically provided documents, all electronic discovery should be provided in an open, publicly available (non-proprietary) format that is compatible with any standard operating computer. The *Committee* intentionally used broad language in those rules to avoid: (1) endorsing certain formats over others; and (2) having to constantly revise the rules as technology changed and current formats became obsolete. The *Committee* felt, however, that the preferred formats for video recordings should be specifically listed in order to provide notice to law enforcement of the video formats that should be used. The

Committee therefore recommends that any video recordings provided in discovery be in one of the following commonly used formats:

1. The AVI Format

The AVI (Audio Video Interleave) format was developed by Microsoft. The AVI format is supported by all computers running Windows, and by all the most popular web browsers. It is a very common format on the Internet, but not always possible to play on non-Windows computers.

Videos stored in the AVI format have the extension .avi.

2. The Windows Media Format

The Windows Media format is developed by Microsoft.

Windows Media is a common format on the Internet, but Windows Media movies cannot be played on non-Windows computer without an extra (free) component installed. Some later Windows Media movies cannot play at all on non-Windows computers because no player is available.

Videos stored in the Windows Media format have the extension .wmv.

3. The MPEG Format

The MPEG (Moving Pictures Expert Group) format is the most popular format on the Internet. It is cross-platform, and supported by all the most popular web browsers.

Videos stored in the MPEG format have the extension .mpg or .mpeg.

4. The QuickTime Format

The QuickTime format is developed by Apple.

QuickTime is a common format on the Internet, but QuickTime movies cannot be played on a Windows computer without an extra (free) component installed.

Videos stored in the QuickTime format have the extension .mov.

5. The RealVideo Format

The RealVideo format was developed for the Internet by Real Media.

The format allows streaming of video (on-line video, Internet TV) with low bandwidths. Because of the low bandwidth priority, quality is often reduced.

Videos stored in the RealVideo format have the extension .rm or .ram.

6. The Shockwave (Flash) Format

The Shockwave format was developed by Macromedia.

The Shockwave format requires an extra component to play. This component comes preinstalled with the latest versions of Netscape and Internet Explorer.

Videos stored in the Shockwave format have the extension .swf.

B. Creation of a Standing Committee

RECOMMENDATION 2. **A standing committee should be created to periodically review the *Committee's* recommendations regarding the preferred formats for electronic discovery and ensure that they do not become obsolete.**

Given the rapid changes and improvements in computer technology and software, the *Committee* recommends that a standing committee be created to periodically review its recommendations regarding the preferred formats for electronic discovery, and to suggest changes, if necessary, to ensure that they do not become obsolete.

C. Discovery for Pro Se Defendants

RECOMMENDATION 3. **The Conferences of Municipal Division Managers and Municipal Presiding Judges should create uniform procedures to ensure that pro se defendants are informed: (1) that they are entitled to discovery in certain cases; and (2) how to obtain that discovery.**

The *Committee* recognized that there were many pro se defendants in the Municipal Courts, and many of those defendants did not realize that they were entitled to discovery or know how to go about obtaining that discovery. The *Committee* therefore felt that there was a need for some type of uniform mechanism that would inform pro se defendants of those facts. For example, the court could read a standard statement at the defendant's first appearance, or provide a form that listed the defendant's principle rights and responsibilities in Municipal Court. If the latter, the defendant would sign the form to acknowledge that he or she had been informed of those rights and responsibilities. In addition, to avoid bogging down the Municipal Courts with discovery requests in every case, the statement or warning would only be provided in cases that involved a consequence of magnitude. The *Committee* therefore recommends that this matter be referred to the Conferences of Municipal Division Managers and Municipal Presiding Judges for the development of uniform procedures, such as the creation of a standard form or an appropriate

statement, that would explain to pro se defendants in certain cases that (1) they were entitled to discovery; and (2) how to go about obtaining that discovery.

D. Jail/Corrections Discovery Issues

RECOMMENDATION 4. **The County jail and State correctional facilities should have uniform policies and procedures regarding (1) attorney visitation; (2) confidentiality; (3) accessibility to a language line or interpreters; and (4) dedicated, secure interview space.**

During the *Committee's* preliminary discussions, it learned of several jail and corrections-related issues that impeded the ability of defense attorneys to freely review discovery with their clients. It was reported, for example, that there were no consistent county jail or corrections policies regarding the use of laptop computers. Some jails and correctional facilities allowed attorneys to bring in their own laptops to view electronic discovery with their clients, while others only allowed the use of jail-owned laptops. Each jail and correctional facility also had different policies regarding the hours in which attorneys could visit with their clients. Another concern was that a number of jails did not have sufficient space set aside for attorneys to meet privately with their clients, or only had open, shared meeting areas in which conversations could be overheard. In one county, public defenders occasionally had to view discovery with their clients at the county prosecutor's office. In other jails, there were an

insufficient number of "language lines," which hindered the ability of attorneys to communicate with clients who did not speak English.

The *Committee* subsequently reviewed several sections of the Administrative Code, which governs adult county correctional facilities and attorney visitation. Although the Administrative Code set forth the county jails' requirements regarding inmate access to the courts and attorney visitation, the Code's provisions were broadly written, and relevant terms were rarely defined. For example, N.J.A.C. 10A:31-15.4(a), which governs access to attorneys and court-related personal visits, reads as follows:

> (a) Suitable meeting facilities shall be provided for inmates to meet with attorneys and representatives of attorneys in privacy with reasonable comfort.

The Code, however, does not define what qualifies as "suitable" meeting facilities, or as "reasonable" comfort. Similarly, N.J.A.C. 10A:31-15.4(c) states that attorney visits "shall be permitted without notice, or upon reasonable notice, during at least six hours each business day." Not only does that section of the Code give county sheriffs and jail wardens the option of requiring attorneys to provide notice of their intent to visit with their clients, but there is no definition of what constitutes "reasonable" notice. All that is required is that there be at least six hours set aside each business day for attorney visitation. Consequently, county sheriffs and jail wardens have wide latitude in instituting their policies and procedures

regarding attorney visitation, and those policies and procedures vary widely from jail to jail.

The *Committee* also conducted two separate surveys. The first was a survey of county jails regarding their visiting hours; the availability of video teleconferencing; any restrictions on attorney visitation; the availability of private interview rooms; the materials that attorneys were regularly allowed to bring into the facility; whether laptop computers were allowed, and if so, whether they were generally permitted or had to be scheduled; whether the internet was available; and whether the jail had a written policy regarding attorney visitation. The second survey asked public defenders from each of the twenty-one counties about several collateral issues associated with the exchange and discussion of discovery between lawyer and client in the county jails, including whether there was sufficient interview space; whether the space was confidential; whether clients were accessible and could be interviewed without delay; whether the interview space contained appropriate technological and communications support, including a language line; whether there was sufficient security available; whether the space was clean and relatively comfortable; and whether video conferencing was available.

The *Committee's* surveys of county jails and public defenders revealed that there were no uniform, consistent policies in county jails regarding almost any aspect of attorney visitation. In one jail, for example,

attorney visiting hours ended at 3:15 p.m., while in another they ended at 11:00 p.m., and in a third they were by appointment only. There were also different policies regarding the items that attorneys were allowed to bring into the facilities and whether they were required to leave during certain times of day. Some jails allowed attorneys to bring in anything that they wanted, with the caveat that all items were subject to a search. Other jails, however, only allowed attorneys to bring in case-related files and folders and prohibited everything else, including briefcases. Similarly, some facilities required attorneys to leave during meals, head counts and lockdowns; some allowed attorneys to stay; and others only required attorneys to leave during emergent operations. In addition, although the majority of county jails were able to quickly accommodate attorneys who wished to meet with their clients, long delays were common in others.

Similar disparities existed with regard to the space set aside for attorney/client meetings. Some jails reportedly had sufficient space set aside for attorney/client meetings, while others did not. Some jails offered private, sound-proof rooms for attorneys to meet with their clients, while others provided cubicles in large, open rooms. In some jails, space was set aside strictly for Public Defenders and their clients. In others, space was set aside for all attorney/client meetings; and in some, attorneys competed for space with probation officers, parole officers and criminal case management employees. In addition, while the interview spaces

were viewed as secure in the majority of jails, it was felt that some jails had security issues because there were no “panic buttons,” or because the guards’ sight-lines could be easily obstructed. Similarly, while the interview space in the majority of jails was described as clean, comfortable and habitable, in at least one jail the interview space was often used as a dining area and was described as “filthy.”

It was also reported that the county jails differed in the amount of technological support that they were willing to provide. While the majority of county jails provided space with working electrical and telephone outlets and language lines, some reportedly did not. In addition, some jails reportedly made it extremely difficult for attorneys to bring interpreters with them when meeting with clients who did not speak English, even interpreters who had been admitted into those same jails on previous occasions.

The *Committee* is fully aware that safety – of staff, inmates and visitors – is the primary concern of county sheriffs and jail wardens. The *Committee* is also aware that some, perhaps many, of the differences noted above are because the various county sheriffs and jail wardens have instituted policies and procedures that address safety concerns at their individual facilities. The *Committee* also recognizes that many county jails and correctional facilities are overcrowded and have severe space limitations. Finally, the *Committee* acknowledges that budgetary concerns

may also be responsible for some of these differences. The *Committee* also believes, however, that these disparities serve to inhibit an attorney's ability to meet with his or her clients, review discovery with those clients, and to otherwise converse in a confidential and meaningful fashion with those clients. The *Committee* therefore recommends that the Sheriffs Association of New Jersey and the New Jersey County Jail Wardens' Association work together to develop uniform policies and procedures regarding (1) all aspects of attorney visitation; (2) the availability of sufficient confidential space for attorneys to meet with their clients; (3) accessibility to a language line or interpreters; and (4) the availability of dedicated, secure interview space.

RECOMMENDATION 5. Video conferencing capability should be universal for defense attorneys and Public Defenders.

Video conferencing is available within State correctional facilities and almost all county jails. However, because video conferencing enables defense attorneys to engage in private, meaningful conversations with their clients while avoiding the difficulties associated with visiting county jails and State correctional facilities, the *Committee* believes that it should be universally available.

RECOMMENDATION 6. **All county jail and state correctional facilities should have dedicated phone lines so that inmates may discuss their cases with counsel.**

In order to further enable inmates to discuss their cases with their attorneys, the *Committee* recommends that all county jails and State correctional facilities provide dedicated phone lines for that purpose.

RECOMMENDATION 7. **Assignment Judges, Presiding Judges of the Criminal Division and Presiding Judges of the Municipal Courts should meet with and discuss RECOMMENDATIONS 4-6 with their local and county jails.**

The *Committee* believes that in order to ensure that its recommendations are implemented, and that any ensuing difficulties are resolved, the Judiciary must maintain a dialogue with county and local jail officials. The *Committee* therefore recommends that Assignment Judges, Criminal Presiding Judges, and Presiding Judges of the Municipal Courts meet with their county and local jail officials to discuss these proposals and devise implementation plans. Thereafter, periodic meetings should be held to discuss the plans' progress.

E. Educational Issues

RECOMMENDATION 8. The Judiciary should implement computer training courses for judges and attorneys, including courses for CLE credits.

The *Committee* acknowledged early on that many attorneys were simply not very knowledgeable of, or comfortable with, computers and computer software. It was believed that this lack of knowledge was a significant factor in many of the issues regarding electronic discovery, particularly issues pertaining to unreadable computer disks. The same held true for judges. A number of judges reported that there were times when they wished to view a video related to a particular case, but had difficulty playing it. Consequently, there appeared to be a need for training in computer basics for attorneys and judges.[23]

In order to obtain information from attorneys regarding the specific operating systems that their computers used, and the problems that they had encountered in the receipt and use of electronic discovery, the *Committee* developed a brief survey. The survey was sent to the Attorney General, County Prosecutors, the Attorney General Division of Criminal Justice, the Public Defender and Deputy Public Defenders, the County Bar

[23] The *Committee* subsequently contacted the AOC's Assistant Director of Judicial Education and Development, who reported that he was not aware of any agency that offered basic computer training for attorneys and/or judges.

Presidents, and the Chairs of the State Bar Committees on Criminal Law and Municipal Practice for distribution among their respective members.

The *Committee* received a total of 40 completed surveys, almost half of which were from the Somerset County Prosecutor's Office. The *Committee* also received a 12-page summary of responses from the Office of the Public Defender's regional offices. Although there was a tremendous variety of responses, the survey results essentially confirmed what the *Committee* had already heard: that the most common problem regarding electronic discovery was that attorneys were often unable to open the disks that they received, either because of incompatible equipment or software, or because the receiving agency did not have the software necessary to open the disk. The survey also confirmed that there were many different practical issues involving the use of electronic discovery, and that attorneys had developed many different ways to resolve those issues.

Regarding educational issues, it was clear that the attorneys generally did not know very much about computer operating systems and the software that they used on a daily basis. For example, although the majority of responses to the *Committee's* survey were from two agencies, the Somerset County Prosecutor's Office and the Office of the Public Defender, there was a good deal of variation in the responses to a question regarding the operating systems and software that attorneys from

those agencies used. Presumably, the attorneys within those agencies would all use or have access to the same operating systems and software, so the responses to that question should have been similar. Only a small number of responses touched upon the need for computer training for attorneys, and only one response provided concrete suggestions for what that training should include: (1) methods for coping with technical issues, including "troubleshooting" common problems; (2) techniques for organizing and indexing digital files; and (3) developing the skills to use electronic equipment in court and in front of a jury.

Based upon the survey results, as well as its substantive discussions, the *Committee* recommends that the Judiciary implement computer training courses for judges and attorneys, including courses for CLE credits. The *Committee* believes that these training courses would very substantially assist judges and attorneys in the area of electronic discovery.

The *Committee* also recommends that courses be offered to judges who wish to have further training regarding computer use. A training course could, for example, be offered at the annual Judicial College.

VIII. OTHER ISSUES CONSIDERED

The *Committee* also considered a number of other discovery-related issues, some of which were resolved in one fashion or another, and one of which remains open.

A. Resolved Issues

1. Alcotest Discovery in DWI Cases - State Police Procedures in Supplying Alcotest Documents

In State v. Chun, 194 N.J. 54 (2008), the New Jersey Supreme Court held that the State must provide certain foundational documents as part of discovery in DWI cases, such as documents certifying that the Alcotest device was in working order and that the machine's operator was certified to operate that device. Some of those documents, known as "core" foundational documents, were necessary for the State to prove its case.

Most municipalities provided hard copies of the foundational documents, and the New Jersey State Police once provided hard copies as well. The State Police, however, had begun sending form letters to all municipal prosecutors that directed them to the State Police website to find the necessary foundational documents (Alcotest cards, calibration records, certificates of accuracy, etc.) themselves. The State Police website served as a kind of warehouse that contained the foundational documents for State Police Alcotest devices and operators throughout the state.[24] The problem, as reported to the *Committee*, was that the relevant documents, which were updated and supplemented regularly, could not always be found on the website. The documents might be there when the municipal

[24] See www.njsp.org/Alcotest/.

prosecutor checked the website, but not when the defense attorney searched for them. As the State Police website did not have a mechanism to confirm who downloaded information, what was downloaded, or when it was downloaded, there was no way for the prosecutor to confirm that the documents were available at a certain date and time, and no way for the defense attorney to prove that they were not there when he or she checked the site. Further complicating the issue was that the defense attorney could not always inform the prosecutor when the documents were missing. If the foundational documents were missing from the website, the defense attorney could always file a motion with the court. However, if the core foundational documents (those that Chun directed must be admitted in evidence) were missing, the defense attorney could not notify the prosecutor or the court, because doing so would alert the prosecutor that the State did not have all the evidence it needed to convict his or her client. Often, it was not until the case was in trial that the defense attorney learned whether the prosecutor was actually in possession of the core foundational documents, which put them at a disadvantage because they did not have a prior opportunity to review those documents. The trial court, in turn, was then placed in the position of having to decide a motion to exclude while in the middle of a trial.

As the problems regarding Alcotest and the State Police website were reportedly quite common, and because it would be several months

before any proposed rule amendments were before the Supreme Court, the *Committee* contacted representatives of the State Police in order to determine whether something could be done to resolve those problems more quickly. In response, the State Police offered three potential solutions: (1) they could modify their website by creating subdirectories for each document type and date and time-stamping each document that was posted on the site; (2) upon locating the relevant documents on the State Police website, municipal prosecutors could print the documents and include them in the discovery packages they send to defense attorneys, or alternatively, include the links to the documents in the discovery packages; or (3) the State Police could return to mailing hard copies of the Alcotest documents to the parties.

The *Committee* met with representatives from the State Police to discuss these potential solutions, as well as another option: the State Police could e-mail the discovery to prosecutors, who in turn would e-mail it to the defense. The State Police, however, objected to that option, noting that e-mail was not a guaranteed delivery system because e-mails did not always reach their intended recipients. Eventually, the State Police felt that the best option would be to return to mailing hard copies of the Alcotest documents to the prosecutor. The *Committee* agreed, as mailing the Alcotest documents was not only the simplest solution to implement, it

would also provide a mechanism in which delivery and receipt of the necessary documents could be assured.

Since meeting with the *Committee* in July 2010, the New Jersey State Police no longer maintain their Alcotest website (although it is still accessible), and its Criminal Justice Records Bureau now includes Alcotest documents as a standard part of the discovery package that is mailed to prosecutors.

2. Alcotest Discovery in DWI Cases - Proposed Revision to R. 7:7-7(g)

The *Committee* also considered an amendment to R. 7:7-7, the Municipal Court discovery rule, in order to address the issues regarding Alcotest discovery in DWI cases. This rule was originally proposed by the *Committee's* Municipal Court Issues Subcommittee, which felt that while R. 7:7-7(g) allowed the parties to "exchange discovery through the use of e-mail, internet or other electronic means," it was questionable whether there was actually an "exchange of discovery" when the defense attorney was simply directed to find the necessary documents on a website that contained dozens of similar documents. In addition, there was no way to confirm whether an "exchange" actually took place, because there was no way to confirm when the documents were posted onto the State Police website, and no way to confirm when a defense attorney searched for those documents on the site. The *Committee* discussed these issues

extensively, and eventually recommended that R. 7:7-7(g) be amended to specify that if discovery was exchanged via electronic means, it did not relieve the parties of their obligation to provide discovery in accordance with R. 7:7-7.

Subsequently, the *Committee's* Rules Subcommittee recommended that both R. 3:13-3 and R. 7:7-7 be amended to delete the option of offering the opposing party an opportunity to inspect, copy or photograph any discovery. Instead, the parties would simply *provide* each other with the discovery at the appropriate times. In light of those proposed revisions, the *Committee* decided to delete its previous amendment to R. 7:7-7(g).

3. Standards or Preferences Regarding Computer Equipment

In October 2009, several members of the *Committee* met with the Public Defender, Yvonne Smith Segars, and some of her staff in order to gain a better understanding of that office's computer equipment and software. The *Committee* had previously heard reports that due to budgetary issues, the Office of the Public Defender generally used older equipment and software than other government agencies. The *Committee* hoped to learn whether any of the issues that had been brought to its attention were caused, at least in part, by the Public Defender's use of obsolete equipment or software - and whether there was therefore a need

to develop and recommend minimum standards for computer equipment used in the transmission or receipt of electronic discovery.

The *Committee* learned that the Office of the Public Defender was in the process of phasing out its older machines, a process that was expected to be completed by the end of the year. In early 2010, the *Committee* asked for an update on the Public Defender's efforts to phase out its older computers. It was reported that the Office of the Public Defender had nearly completed the process of replacing its outdated computers with newer machines. The *Committee* agreed that the Office of the Public Defender's efforts to upgrade its computer equipment would put it on a more even footing with the Judiciary and many law enforcement agencies. As a result, the *Committee* did not see a need to set any standards or express any preferences regarding the types of computer equipment that should be used in connection with electronic discovery.

4. "60-Day Rule" for DWI Cases; Requirement that Municipal Prosecutors Respond to Discovery Requests within 10 Days

The *Committee* also discussed two somewhat related issues: Supreme Court Directive #1-84, which directs that DWI cases be disposed of within 60 days of filing; and R. 7:7-7(g), which requires that municipal prosecutors respond to discovery requests within 10 days of receiving such requests. It was suggested that both rules were impractical, and that it was nearly impossible for municipal prosecutors to comply with the 10-

day time limit set forth in R. 7:7-7(g). In response, it was noted that the 60-day time limit set forth in Supreme Court Directive #1-84 was a guideline, not a firm rule, and that in any event a sizeable percentage of the State's DWI cases were in fact resolved within 60 days. It was also noted that R. 7:7-7(g) only required the prosecutor to respond to a discovery request within 10 days, not to actually provide discovery within that time frame. As long as prosecutors sent some sort of reply within 10 days, they would be in compliance with the rule. Therefore, the *Committee* agreed that there was no need to change either of those rules at this time.

5. State v. W.B.

The *Committee* considered amending both R. 3:13-3(b)(1)(H) and R. 7:7-7(b)(9) to codify the Supreme Court's holdings in State v. W.B., 205 N.J. 588 (2011). In W.B., the Court reiterated its previous holding that "law enforcement officers may not destroy contemporaneous notes of interviews and observations at the scene of the crime after producing their final reports." Id. at 607. The Court further held that R. 3:13-3 "encompasses the writings of any police officer under the prosecutor's supervision as the chief law enforcement officer of the county." Id. at 608. The *Committee*, however, could not agree on the specific language to include in the rules, whether W.B.'s holding was limited to only indictable offenses, or whether, if worded too broadly, any potential rule amendments would infringe on law enforcement's work product. As a result, the

Committee's initial proposal was referred to the Criminal Practice and Municipal Court Practice Committees for their respective thoughts on the proposed Part III and Part VII rule amendments.

The Municipal Court Practice Committee submitted a slightly amended version of the *Committee's* initial rule proposal. The Criminal Practice Committee, however, was split as to whether the *Committee's* initial rule proposal was consistent with W.B., or whether the rule should also (1) include that law enforcement officers had a duty to preserve their contemporaneous notes; and (2) impose appropriate sanctions when those notes were not preserved. The Criminal Practice Committee was also informed that, in response to W.B., the Office of the Attorney General had recently issued *Attorney General Directive No. 2011-2, Regarding Retention and Transmittal of Contemporaneous Notes of Witness Interviews and Crime Scenes* (May 23, 2011). That Directive requires "law enforcement officers" to preserve their contemporaneous notes taken during witness interviews or at a crime scene and to provide copies of those notes to the prosecutor. Some members of the Criminal Practice Committee therefore felt that the term "police officers" was too narrow, because it could be read as not including prosecutors' or attorney general investigators. It was similarly suggested that the phrase "which are within the possession, custody, or control of the prosecutor" was unnecessarily limiting and should be deleted.

Given that the Criminal Practice and Municipal Court Practice Committees had been asked for a fairly quick turnaround time, and that the Criminal Practice Committee had not had an opportunity to fully discuss the issues noted above, the *Committee* referred the matter back to both Committees for further review.

6. Training for Police Officers

Although the *Committee* had been asked to examine whether some type of basic computer training should be offered to attorneys, it also considered whether training should be offered for police officers. Some *Committee* members reported that they had seen police videos in which the sound was missing or muffled; or in which police officers inadvertently wandered in front of the camera; or in which the camera was set up at a poor angle and provided poor views of the suspect and interrogating officers. It was suggested that training police officers on how to set up and use the recording equipment would eliminate many of these issues.

In order to determine whether there was a need for police training, the *Committee* engaged in an extensive discussion regarding State and local police procedures and equipment, including the procedures governing the use of Digital In-Vehicle Recorder (DIVR) systems; the procedures for recording defendant and witness statements and for writing police reports; and the procedures for providing and tracking discovery. The *Committee* learned that law enforcement agencies generally provided

their officers with in-house training, and consequently felt that there was no need to recommend additional training for police officers.

B. Open Issue

1. Status of Centralized Statewide Alcotest Database Ordered in State v. Chun

The *Committee* also discussed the creation of a centralized, statewide database of downloaded Alcotest results, which the Supreme Court had ordered in State v. Chun. That database was to contain the results from every test administered by every Alcotest machine throughout the state. In Chun, the Court ordered that the State create, and maintain, such a database *forthwith*, and make the data, following the appropriate redactions of personal identification, available to defendants and counsel. State v. Chun, 194 N.J. 54, 153 (2008). Although more than 3 ½ years have passed since the Court issued its decision in Chun, the centralized database has not yet been completed.

In December 2010, the *Committee* met with a representative from the Office of the Attorney General's Division of Criminal Justice. The *Committee* learned that although the database project was moving forward, it was moving at a much slower pace than expected. Several factors had contributed to the delays, including bureaucratic "red tape"; changes in administration; and a series of unanticipated funding, programming and security issues.

Another possible issue regarding the centralized database concerned the format in which the data would be released. It was suggested that one of the options under consideration was to release the data in a non-manipulable format such as PDF. That suggestion, in turn, led to a series of objections from the *Committee*. It was noted, for example, that the Alcotest data was currently provided on a CD, in a spreadsheet that could be sorted in a variety of ways. If data from the centralized database were provided only in a non-manipulable PDF format, it would be almost useless to the intended user and would amount to nothing more than a collection of printable papers. As a result, rather than simply accessing a database, defense attorneys would still have to file motions in order to obtain the data in a usable format. It was also noted that providing the data in a PDF format would be contrary to what the *Committee* had previously heard from experts in the field of e-discovery: that electronic data should generally be provided in its native format. It was also suggested that a non-sortable database may not be what the Supreme Court had in mind when it ordered that a database be created in State v. Chun.[25]

[25] The *Committee* later revised both R. 3:13-3(b)(3) and R. 7:7-7(g) to require that, upon request, any Alcotest 7110 data relevant to a particular defendant's case must be provided in a readable digital database format generally available to consumers on the open market. See pages 61-62 and page 107, supra.

Since that meeting, the *Committee* has been advised that the Office of the Attorney General has obtained a State-approved vendor to create the centralized database of statewide Alcotest results. In addition, the data will reportedly be provided in a sortable format. It is expected that the database will be completed during the first quarter of 2012.

APPENDIX A

(Overview of Bergen County Prosecutor's Office's Discovery Scanning System)

OVERVIEW OF THE BERGEN COUNTY PROSECUTOR'S OFFICE'S DISCOVERY SCANNING SYSTEM

The Bergen County Prosecutor's Office's discovery scanning system works as follows: The Prosecutor's Office provides attorneys with free paper copies of the available discovery as part of its PIP (Pre-Indictment Program) Court. However, if a case results in a guilty plea at PIP court, the case file is returned to the Record Room and scanned in its entirety. Cases that result in an indictment are assembled in two color-coded files. All discoverable documents, including the indictment, complaints, investigative reports, a copy of the Miranda form, victim and/or witness statements, lab results, and copies of photographs, are placed in a green folder. Non-discoverable documents, such as court orders, correspondence between the attorneys and the court, prosecutor notes regarding special issues in the case, medical records, intra- or inter-office memos, and presentence reports, are placed in a red folder. Once the Grand Jury returns an indictment, or the defendant agrees to plead guilty to an accusation, the case file is routed to the appropriate section, such as Homicide or Sex Crimes. All documents in the green folder, including the case jacket itself, are scanned. Documents in the red folder are not scanned at that time. In order to keep track of which documents have been scanned, the upper left hand corner of each document is cut diagonally after it has been scanned. In addition, once all of the discovery

has been scanned, office staff writes a capital “D” in green ink next to the defendant’s name on the outside of the Grand Jury jacket.

After it is scanned, the discovery is labeled according to the case’s Grand Jury docket number and loaded into a computer program. The discovery is then available in a read-only format at workstations throughout the Prosecutor’s Office, and assistant prosecutors can also access it from their homes, if necessary. Once a defense attorney requests the discovery, office staff can access it from their workstations and either e-mail it to the attorney (if it is under 75 pages), or download it onto a CD. Attorneys who wish to receive discovery via e-mail can register with the Prosecutor’s Office, and from that point forward, they will automatically receive discovery for all their cases in that fashion. Otherwise, attorneys must e-mail their requests to the Prosecutor’s Office, which will then send them the discovery in a reply e-mail. Upon receiving the discovery, the attorneys must acknowledge, via e-mail, that it has been received. The Prosecutor’s Office then prints the acknowledgment e-mail and places it in the red folder of the case file. If the discovery is provided on a CD, office staff writes the case name, the Grand Jury docket number, and the indictment number on the face of the CD. In addition to the CD, attorneys also receive instructions on how to access the documents.

Once a case is resolved, the case file is prepared for final scanning. It is at this time that any discoverable documents in the green folder that

did not exist earlier are scanned. Those documents are easily identifiable, because the upper left hand corner will not have been diagonally cut. In addition, the non-discoverable documents in the red folder are also scanned at this time. Once final scanning has been completed, the word “SCANNED” is written or stamped in green ink on the front of the case jacket.

APPENDIX B

(Overview of Camden County Prosecutor's Office's Web-Based Discovery System)

OVERVIEW OF THE CAMDEN COUNTY PROSECUTOR'S OFFICE'S WEB-BASED DISCOVERY SYSTEM

The Camden County Prosecutor's Office's web-based discovery system will work as follows: the Prosecutor's Office purchased scanners and provided training for all 37 municipal police departments in Camden County for a DARM-certified document imaging system. Police department staff will scan the documents pertaining to a particular case, such as complaints and police reports, and using a software program specifically designed for the criminal justice community, will upload those documents onto the Camden County Prosecutor's Office's records management system. Once the Prosecutor's Office has reviewed the documents and determined that they are discoverable, it will transfer the documents to its web-based e-discovery portal.

Defense attorneys will be able to access the documents by clicking on a link on the Prosecutor's Office's website and typing in his or her password. Upon logging on to the system, the attorney will see links to each of the cases in which he or she is the attorney of record, organized by case name. If the attorney clicks on one of those links, he or she will find additional links to each of the discoverable documents that are available at that time, organized by the dates that they were posted. Clicking on a particular document will allow the attorney to download it and save it on his or her computer. The document cannot be viewed or printed

otherwise. Also, because the files will be stored as PDF files, attorneys will be able to use a “search” function to locate particular words or strings of words – allowing them to find the most critical parts of statements and police reports more easily.

In order to address security and chain-of-custody concerns, documents will be given a “Bates number” (an identifying number used to label and identify documents as they are scanned or processed) before they can be accessed, and will then be “locked” so they cannot be changed. The documents will also be encoded, and the system will contain a program that can authenticate documents based on those codes.

The Prosecutor’s Office will not charge attorneys for downloading the discovery and saving it on their computers. For paper discovery, the fee is 25 cents per page for private attorneys and 10 cents per page for the Public Defender’s Office.

Dissent 1

Filed by Joseph D. Rotella, Esq.

(Representing the Association of Criminal Defense Lawyers of New Jersey)

February 20, 2012

Dear Mr. Hagins:

Joseph Rotella, Esq. has requested that I, as President of the Association of Criminal Defense Attorneys of New Jersey, personally advise the Committee that our Association is concerned with and objects to the last amendments to the proposed rules concerning discovery, which amendments affect not only pre-Indictment but also post-Indictment prosecutorial obligations. Kindly forward this letter as an objection to the proposed changes.

With regard to the amendments proposed to R. 3:13-3(a), although the most recently added language, to the effect that the State will tell the defense when it has provided only partial discovery, at least alerts the defense counsel to the fact that some discovery has not been provided, we continue to be extremely concerned about the discretion to be vested in the State without judicial supervision. This amendment gives the State the sole right to decide for itself whether to provide all of the discovery, part of the discovery, and if part of the discovery, then what part of the discovery. There is nothing in the proposed rule to ensure that the State's discretion will be exercised wisely or according to the spirit of the amendments proposed.

The State should be required to move before the court for an order allowing them to provide only partial discovery. Only a court should decide such important matters. Rule 3:13-3(f) (protective orders) already allows for a procedure to address the State's concerns directly and under the control of the judge by reference to objective criteria:

R. 3:13-3(f) Protective Orders.

(1) Grounds. Upon motion and for good cause shown the court may at any time order that the discovery or inspection sought pursuant to this rule be denied, restricted, or deferred or make such other order as is appropriate. In determining the motion, the court may consider the following: protection of witnesses and others from physical harm, threats of harm, bribes, economic reprisals and other intimidation; maintenance of such secrecy regarding informants as is required for effective investigation of criminal activity; confidential information recognized by law, including

protection of confidential relationships and privileges; or any other relevant considerations.

Importantly, it is difficult to imagine any case in which defense counsel does not violate the common standard of professional responsibility by recommending that his or her client accept a plea offer before having reviewed all of the discovery. Where the purpose of pre-Indictment plea offers is to dispose of cases before Indictment, and when defendants are frequently penalized for refusing to accept an offer made by the State at any stage of the proceedings, these cases should be few and far between, and should be carefully scrutinized by a more neutral party – the Court.

Similar concerns attach to the proposed amendments to R. 3:13-3(a)(2) and R.3:13-3(b)(1), to the extent that this allows the State sole discretion in its decision to require the defense to inspect and copy at the prosecutor's office rather than "providing" a copy of all discovery. Where there is already a cost-shifting provision in place, we feel this is not necessary. Any case where the burden of obtaining the discovery is shifted onto the defense is a case where early disposition is made more difficult and even more unlikely. Most importantly, there is no judicial review of the State's exercise of discretion.

For these reasons, the Association of Criminal Defense Lawyers of New Jersey respectfully objects to these two amendments to the proposed changes.

Thank you for the opportunity to be heard and considered.

Respectfully submitted,

Leslie Stolbof Sinemus, Esquire
President, Association of Criminal
Defense Lawyers – New Jersey

Dissent 2
Filed by Jeffrey E. Gold, Esq.

(Representing the New Jersey State Bar Association, Municipal Court Practice Section)

Vance,

I must respectfully dissent from the last amendments. Although I appreciate the added language to the effect that the state will tell the defense when they have limited the discovery, I continue to be concerned about the unprecedented discretion to be vested in the State without express judicial supervision especially as it pertains to post indictment matters. The post indictment provision does not simply define what matters are exceptional but further gives the state to right to decide this for itself. If the matter is truly exceptional, going to a court, especially post indictment, is the least we should require. Giving the state the power to decide itself post indictment whether the make the discovery process more difficult for a defendant is tantamount to giving the state unfettered power to deny discovery in effect. Only a court should decides such important matters based upon a balancing of factors.

The AG's position is based upon the concept that certain defendants should not have discovery in their possession because they could then turn that over to other co-defendants in sensitive cases. That position was voted down originally, I believe, because the right to inspect and copy has the same effect. It is just more burdensome. There has been nothing voiced in the amendment discussions that with other justification for the reconsideration.

In short, (1)The State should not be given the broad discretion to decide which defendants get discovery and which do not.(2) Defendants are free to waive or bargain away their rights to discovery if the State is making an offer worth it.(3) There is no difference between "providing" and "allowing an inspection and copying" except to make the process of discovery more burdensome on defendants. That is not a legitimate method of addressing the State's concern for the sensitivity of some files, and (4) Rule 3:13-3(f) (protective orders) already allows for a procedure to address the State's concerns directly and under the control of the judge by reference to objective criteria. We need not re-invent the wheel.

"R. 3:13-3(f) Protective Orders.

> *(1) Grounds. Upon motion and for good cause shown the court may at any time order that the discovery or inspection sought pursuant to this rule be denied, restricted, or deferred or make such other order as is appropriate. In determining the motion, the court may consider the following: protection of witnesses and others from physical harm, threats of harm,*

bribes, economic reprisals and other intimidation; maintenance of such secrecy regarding informants as is required for effective investigation of criminal activity; confidential information recognized by law, including protection of confidential relationships and privileges; or any other relevant considerations."

Jeff Gold, N.J.S.B.A