

An abstract graphic featuring a teal wireframe mesh that forms a series of overlapping, curved shapes resembling a sphere or a complex wave. The mesh is composed of thin lines that create a grid-like pattern. Scattered throughout the background are small, light-colored numbers (0-9) in a sans-serif font, some appearing to be part of the wireframe structure and others floating in the space.

6. PRE-TRIAL CRIMINAL

Section 6.2 Pre-Trial Discovery

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6.2.1 Introduction

This portion of the Bench Book, addressing general rules of discovery, consists of three parts:

- 6.2.2 General rules of discovery and inspection, which can vary from state to state.
- 6.2.3 When discovery motions need to be filed by either statute or court rule.
- 6.2.4 The types of discovery provided.

A trial judge should be aware that while many jurisdictions have discovery rules that are similar in scope and design, there are differences and nuances that the judge needs to be aware of in using this Bench Book. For uniformity's sake, this section largely tracks the federal rules. Each judge needs to follow the rules of his or her own jurisdiction.

For a sampling of Discovery Orders, see *Appendix 2*.

6.2.2 General

“Discovery” is a term used to refer to the legal process by which parties in litigation obtain information from each other. In criminal cases, discovery is generally much more limited than in civil cases. Most states recognize a “clear legal right” to pretrial discovery by statute, but there is no federal constitutional right to discovery.¹ Discovery emphasizes the defendant’s right of access to evidence necessary to prepare a defense, which is not constitutional. Disclosure, on the other hand, emphasizes the state’s duty to disclose exculpatory evidence to a defendant, and may be constitutional as decided on a case-by-case basis.

Federal criminal discovery is generally governed by Rule 16 of the Federal Rules of Criminal Procedure (“FRCP”) and Supreme Court cases governing evidence that materially exonerates the defendant. Under FRCP Rule 16, once a defendant makes



a demand for discovery on the government, the government is required to produce items such as the defendant's oral, written, and recorded statements, criminal record, reports of examinations and tests, documents or other physical objects the government intends to introduce at trial, expert witnesses, and more. In state prosecutions, limited discovery and inspection is generally provided for by state statutes and/or court rules.

A prosecutor has no constitutional duty to routinely allow the inspection of or deliver the entire prosecution file to defense counsel.²

Some jurisdictions have a standing order on pretrial discovery requiring government disclosure of all material covered by the discovery rules, statutes, and state and federal constitutions, called an "Open File Policy."³ Under that policy, the government would disclose, without defense motion, all information and materials listed in FRCP 16(a)(1)(A), (B), (C), (D), (E), and (F). That includes the defendant's oral, written, and recorded statements, prior criminal record, reports of examinations and tests, and documents or other physical objects that is in the government's possession, custody or control and that the government intends to introduce at trial. Unless these items include exculpatory material, open file materials do not ordinarily include material under FRCP 16(a)(1)(G) (which governs written summaries of expert witnesses), government attorney work product and opinions, privileged materials, material identifying confidential informants, or reports of witnesses who will not be called in the government's case-in-chief and grand jury transcripts. The government retains authority to redact from the open file material anything that is:

1. Not exculpatory
2. Not relevant to the prosecution
3. Would jeopardize safety of someone other than defendant
4. Would jeopardize an ongoing criminal investigation.

In all jurisdictions, regardless of whether an open file policy is in place or not, disclosure is required as a matter of due process, when evidence is in exclusive possession of state, and:

1. Such evidence is favorable to the accused;⁴ and,
2. Such evidence is material to either guilt or punishment for purposes of trial.⁵

The *Brady* rule concerning exculpatory evidence is inapplicable at the guilty plea stage.⁶ Evidence that goes to the credibility of state's witnesses is considered exculpatory under *Brady*.⁷ The *Brady* rule also includes impeachment evidence.⁸ This includes evidence known to the police, even if not known by the prosecutor.⁹ The *Brady* rule includes *in camera* inspection of confidential records by the trial judge to determine whether potential evidence contains exculpatory information.¹⁰ The duty of the state to disclose applies whether defendant makes no request for exculpatory information, a general request, or a specific request, and the state is not the arbiter of weight, credibility, and exculpatory nature of the evidence.¹¹ Exculpatory evidence must be made available to defense in time to make reasonable use of it.¹²

There is no duty for a state (absent a local rule) to preserve specimen samples, even if useful to the defendant

6.2.3 Timing of Statutory or Court Rule Discovery Motions

Specific deadlines for discovery demand and discovery motions depend on the jurisdiction. They are set by statute, court rule, or local rule, and may be different for felonies and misdemeanors. They will often be included in the trial court's scheduling order. Generally, discovery demands must be made before trial, with the court setting the deadline at or shortly after the arraignment for parties to make pretrial motions. The court may extend time for filing motions, but if a party does not meet the deadline for filing pretrial motion for discovery, the motion is considered untimely. The motion may be considered by the court if good cause is shown.



6.2.4 Types of Statutory or Court Rule Discovery Provided

6.2.4.1 *Discovery Allowed*

The government has a duty to disclose to defendant, upon request, within reasonable time before trial if within possession, custody, or control of the government, the following:

1. The substance of any relevant oral statement made by defendant.¹³
2. Any written or recorded statement by defendant.¹⁴
3. Depending on the rules for each jurisdiction, any written summaries of all oral statements of defendant intended to be used at trial and names of witnesses to those statements.
4. Defendant's prior criminal record.¹⁵
5. Depending on the rules for each jurisdiction, a list of all witnesses and their addresses, except those to be called for impeachment or rebuttal.
6. Depending on the rules for your jurisdiction, any relevant or recorded statements of witnesses to be called at trial.¹⁶
7. Permit defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof if:
 - a. the item is material to the defense;
 - b. state intends to use in case-in-chief, or
 - c. was obtained from or belongs to defendant.¹⁷
8. There is no duty for state (absent a local rule) to preserve specimen samples, even if useful to defendant, unless defendant shows:
 - a. bad faith destruction by state,

- b. evidence had apparent exculpatory value prior to its destruction, and
 - c. no comparable evidence on same subject matter is available to defendant.¹⁸
- 9. Permit defendant to inspect and copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:
 - a. item is within state's possession, custody, or control;
 - b. the attorney for state knows or should have known of the item exists; and
 - c. item is material to defense or state intends to use item in case-in-chief.¹⁹
- 10. Written summary of any expert testimony state intends to use at trial during its case in chief under rules of evidence, and must include the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.²⁰
 - a. Witness who is qualified as an expert by knowledge, skill, experience, training, or education may give opinion testimony if:
 - i. expert's scientific, technical, or other specialized knowledge will assist trier of fact;
 - ii. testimony is based on sufficient facts or data;
 - iii. testimony is product of reliable principles and methods; and,
 - iv. expert has reliably applied the principles and methods to the facts of the case.²¹
 - b. Expert opinion may be based on facts or data in the case that the expert has been made aware of or personally observed.



- i. Facts or data need not be admissible for opinion to be admitted if reasonably relied upon by expert in forming opinion;
- ii. If facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if probative value substantially outweighs their prejudicial effect; and,
- iii. Unless court orders otherwise, an expert may state an opinion, including the reasons for it, without first testifying to the underlying facts or data, but may be required to disclose those facts or data on cross-examination.²²

6.2.4.2 Reciprocal Discovery

The defendant has a reciprocal duty to the state within a reasonable time before trial, to permit state to inspect and copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions thereof, if the item is within the defendant's possession, custody, or control, and the defendant intends to use the item in defendant's case-in-chief at trial.²³

The defendant is also required to permit the state to inspect and copy or photograph the results or reports of any physical or mental exam and of any scientific test or experiment, if the item is within the defendant's possession, custody, or control; and the defendant intends to use the item in defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.²⁴

Defendant must, upon request, give to the state a written summary of the expert testimony the defendant intends to use at trial, and must include the expert witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.²⁵

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may give opinion testimony if:

1. expert's scientific, technical, or other specialized knowledge will assist trier of fact;

2. testimony is based on sufficient facts or data;
3. testimony is product of reliable principles and methods; and,
4. expert has reliably applied the principles and methods to the facts of the case.²⁶

Depending on the jurisdiction, defendant may be required to produce a list of all witness to be used in the defendant's case-in-chief, which may include any relevant written or recorded statements of a witness, and the criminal record of any defense witness.

The attorney-client privilege and work-product doctrine limit states' rights to reciprocal discovery.²⁷ However, requiring disclosure of a defense investigator's report before allowing the investigator to testify to impeach a prosecution witness does not violate the Fifth or Sixth Amendments nor the work product rule.²⁸

6.2.5 Protective Order

At any time, upon motion of either party, the court may, for good cause, order that discovery, inspection, or the listing of witnesses be denied, restricted, or deferred. The court may permit a party to show good cause by a written statement to be inspected by the court *ex parte*. If relief is granted, the court must preserve the entire text of the party's statement under seal.²⁹ If a party fails to comply with the rules, the court may order that party to permit the discovery or inspection, grant a continuance, prohibit that party from introducing the undisclosed evidence, or enter any other order that is just under the circumstances.³⁰ The court may exclude any witness not listed or evidence not presented for inspection or copying that is required unless good cause is shown for failure to comply.³¹ The Court may also advise the jury of any failure or refusal to disclose by way of jury instruction.³²

6.2.6. Continuing Duty to Disclose

If before or during trial, a party discovers additional material or the names of additional witnesses which are subject to discovery, inspection, or production, that party shall promptly notify the other party of its existence.³³



6.2.7 Endnotes

1. *Weatherford v. Bursey*, 429 U.S. 545 (1977).
2. *Arizona v. Youngblood*, 488 U.S. 51 (1988); *United States v. Agurs*, 427 U.S. 97, 106 (1976).
3. *See, e.g.*, United States District Court for the Eastern District of Wisconsin Local Rule 16(a), as amended September 9, 2015.
4. *Agurs*, 427 U.S. at 112-113. (Prosecution must affirmatively ascertain).
5. *Brady v. Maryland*, 373 U.S. 83 (1963).
6. *United States v. Vonn*, 535 U.S. 55 (2002).
7. *Giglio v. U.S.*, 405 U.S. 150 (1972).
8. *United States v. Bagley*, 473 U.S. 667 (1985).
9. *Youngblood v. West Virginia*, 547 U.S. 867 (2006).
10. *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987)
11. *Kyles v. Whitley*, 514 U.S. 419 (1995).
12. *U.S. v. Pollack*, 534 F.2d 964 (D.C. Cir. 1976).
13. *Compare* Fed. R. Civ. P. 16(a)(1)(A).
14. *Compare* Fed. R. Civ. P. 16(a)(1)(B).
15. *Compare* Fed. R. Civ. P. 16(a)(1)(D).
16. *But see* 18 U.S.C §3500, for federal rule that disclosure is not required until the witness has testified on direct examination.
17. *Compare* Fed. R. Civ. P. 16(a)(1)(E).
18. *California v. Trombetta*, 467 U.S. 479 (1984).
19. *Compare* Fed. R. Civ. P. 16(a)(1)(E).
20. *Compare* Fed. R. Civ. P. 16(a)(1)(G).
21. *See* Section 7. *Trial*.
22. *Id.*

23. *Compare* Fed. R. Civ. P. 16(b)(1)(A).
24. *Compare* Fed. R. Civ. P. 16(b)(1)(B).
25. *Compare* Fed. R. Civ. P. 16(b)(1)(C).
26. *See* Section 7. *Trial*.
27. *Upjohn Co. v. United States*, 449 U.S. 383 (1981).
28. *United States v. Nobles*, 422 U.S. 225 (1975).
29. *Compare* Fed. R. Civ. P. 16(d)(1).
30. *Compare* Fed. R. Civ. P. 16(d)(2).
31. *Taylor v. Illinois*, 484 U.S. 400 (1988).
32. *Id.*
33. *Compare* Fed. R. Civ. P. 16(c).

