**Open file goes statewide: Virginia criminal discovery reforms coming July 1**

By: [Peter Vieth](https://valawyersweekly.com/author/peter-vieth/) June 22, 2020; Virginia Lawyers Weekly

Virginia criminal lawyers will be playing with a new rulebook when long-awaited criminal discovery reforms take effect July 1.

Both prosecutors and defense attorneys say the changes in practice will be significant, but how the pretrial routine will change is not yet entirely clear. Judges will need to interpret the new language and commonwealth’s attorney offices will need to establish new policies and practices, lawyers said.

Defense attorneys may have to spend more time preparing for trial, since they’ll have more information about the prosecution’s case, some attorneys said. The goal of the discovery reforms is avoiding what defense lawyers have long branded “trial by ambush.”

The changes in Rules 3A:11 and 3A:12 were approved by the Supreme Court of Virginia in September 2018 with a 2019 effective date, but implementation was delayed a year for assessment of the impact of police body camera evidence.

“Reform of criminal discovery rules is long overdue,” said Chief Justice Donald W. Lemons in a Jan. 29, 2019, statement. Nevertheless, he said citizens benefit when the separate branches of government work together, so the court determined to delay reform for a year.

**‘Watershed moment’**

Advocates hailed the coming transition. “It’s a seminal moment for Virginia,” said Timothy O’Toole, a Washington white collar defense attorney on the board of the Due Process Institute, a national advocate for criminal discovery reform.

“I truly believe it is a watershed moment for criminal justice in Virginia,” said Douglas A. Ramseur of Richmond, a former capital defender who has been giving seminars for Virginia defense lawyers on what to expect.

Ramseur was on the 16-member task force assembled by the Virginia State Bar that hammered out rule changes which finally found favor with the Supreme Court. Other plans advanced by earlier committees foundered under opposition from prosecutors.

Ramseur said prosecutors may see that full disclosure can benefit both sides.

“I’ve often said this is just as good for prosecutors as it is for defense attorneys,” Ramseur said. “If you can show them ahead of time who the witnesses are going to be, what they’re going to say, what the prosecution’s evidence is going to be, they may be more inclined to accept a plea deal,” he said.

Under the rule changes, defense lawyers will be guaranteed access to police reports and witness statements, which are now not shared automatically in some jurisdictions. The amendments also provide for reciprocal exchange of witness lists and include a recommendation that defense lawyers provide expert witness information, now required only of prosecutors.

**Prosecutors most affected**

Prosecutors can expect “a slew of new discovery responsibilities,” said Bryan Porter, the Alexandria commonwealth’s attorney who also served on the VSB task force. Prosecutors will have to arrange access to police reports and provide lists of all expected prosecution witnesses.

“For some offices, this will constitute a sea change. In my office, we have always provided opposing counsel police reports, so the impact of the new rule will be lessened,” Porter said.

Prosecutors need to understand the philosophic basis of the rule, Porter said.

“The thrust of the task force was to level the playing field and to require both sides to be more forthcoming throughout discovery. Prosecutors should err on the side of caution and disclose all evidence to opposing counsel, thereby avoiding *Brady* violations and helping to ensure defense counsel can professionally do their job,” Porter said.

Chesapeake Commonwealth’s Attorney Nancy Parr, another task force member, said June 17 she had just finished drafting a new discovery order for her office.

“We vetted it with the Public Defender and private counsel, and I believe we have resolved our differences regarding the language,” she said.

**Challenges for defense**

Parr said the rule changes will bring a different landscape, not just for prosecutors, but for defense attorneys too.

“They will be required to provide information that they have never been required to provide before now. Both sides will be making adjustments to how discovery has been conducted in Virginia,” Parr said.

With more information flowing from prosecutors’ offices, some defense attorneys may have more to do before trial. If a prosecutor kept the lid on the evidence, a defense lawyer could “just kind of roll in there and see who shows up as witnesses,” Ramseur said.

Knowing more about the state’s case means defense lawyers can better predict what will happen at trial, provide a more realistic assessment for their clients and talk agreement, Ramseur said.

“People can understand the strengths of a case and can negotiate a case ahead of time, if warranted,” he said.

**Judges in the middle**

Judges initially may have to contend with more discovery disputes in unfamiliar territory, lawyers said.

“As more words go into a rule, the number of potential definitions rises exponentially,” Porter cautioned. “The task force intentionally tried to leave trial judges some leeway in deciding how to put the rule into action in individual courts, but until practice is settled, we could see some pretrial litigation over the process,” he said.

It was not clear how much advance preparation judges will have when disputes arise in the new discovery landscape. Ramseur said he had been scheduled to make a presentation at the annual judges’ conference, but the conference was cancelled amid pandemic concerns.

“There are a lot of opportunities where local judges will have a chance to decide what’s right for their jurisdictions,” Ramseur said. Judges have freedom to craft their own standard discovery deadlines and determine what’s right their docket and their schedule, he said.

**Additional changes?**

The rule changes taking effect July 1 were developed by prosecutors, defenders, judges and law professors, but legislators regularly prodded the effort. State Sen. Bill Stanley, a criminal defense lawyer, was among those wielding proposed legislative reform plans.

He said experience with the new rules may show a need for additional changes.

“I think we will have to wait and see how these new discovery rules will operate at the ground level, so I think there may be some tweaks that will need to be made next year,” Stanley said.

Porter agreed.

“While I believe the new rule is a vast improvement, no rule is perfect, and I suspect a year or two after it is promulgated some ‘tweaking’ may be necessary to address unforeseen issues that arise,” Porter said.

Ramseur said he would like to see a requirement that prosecutors actually hand over copies of police reports. Under the coming amendments, prosecutors can simply allow review of police reports without providing paper copies.

“I wish we could have gotten that,” Ramseur said. “It just makes everyone’s life a little easier.”

Parr said she is sure there will be some additional needs that arise.

“I have always expressed concern about the safety of our witnesses,” she said.

Victim and witness safety was a key point for prosecutors throughout the extended study process. They contended innocent crime victims would be exposed to threats and violence under open-file mandates.

The rules allow for prosecutors to seek protective orders as needed.

Ramseur said he did not see a realistic danger of increased intimidation and retaliation. O’Toole agreed.

“I’ve never really seen it,” O’Toole said. “I see it as a talking point quite often, but I don’t see it in practice.”

With the changes to criminal discovery rules, Virginia has moved out of that shrinking pool of states where prosecutors can hide their cards until trial.

“The ranks are thinning,” O’Toole said. “Virginia might be one of the last holdouts.”

“Thank God, we’re now leaving Alabama alone,” Ramseur said.