**Washington and Lee Law Review Online**

Volume 73 | Issue 1 Article 17

9-23-2016

# Virginia Prosecutors' Response to *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*

Michael R. Doucette
*Commonwealth's Attorney, City of Lynchburg*

# Virginia Prosecutors' Response to *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*

Michael R. Doucette*

*Table of Contents*



In their article, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison,* Professors Turner and Redlich ostensibly compare North Carolina's "open-file" criminal discovery with Virginia's "closed-file" discovery. Based on their survey results, they conclude that open-file discovery is

* Commonwealth's Attorney, City of Lynchburg.

"a better guarantor of informed decisions and efficient process in criminal cases."[1] While we appreciate the authors' justifiable concerns about the relative reliability of criminal convictions between Virginia and North Carolina, we must disagree with their methodology and, as a result, many of their conclusions. Rather than refute line-by-line, I will make a few brief general comments on behalf of Virginia's prosecutors.

## *I. Methodology*

### *A. Perceptions*

Our problem with the article begins with its title. The title of the article claims that this is an "empirical" study, which connotes that the scientific method was used; yet the body of the article proves otherwise. While the authors repeatedly note that prosecutors and defense counsel provided vastly different answers, they also concede that their "survey focuses on the *perceptions* of those involved in discovery and therefore does not directly test the effects of open-file discovery against those of more restrictive discovery."[2] In fact, "[p]articularly when it comes to defense attorneys, perceptions of what is disclosed may, in many situations, be *educated guesses*."[3]

The fault lies in much of the methodology. While the authors include in the appendix the survey given to prosecutors,[4] they do not include the survey given to defense attorneys. The authors do not explain that omission, although they do provide excerpts of the defense attorney's survey in the article. One example is this question: "In felony cases, what types of documents does the prosecutor turn over either as part of the initial discovery package or later, but before a defendant pleads guilty?"[5]

---

1. Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 285, 286 (2016).

2. *Id.* at 315 (emphasis added).

3. *Id.* at 374 (emphasis added).

4. *See id.* at 386–99 (outlining the survey questions the authors asked prosecutors).

5. *Id.* at 324.

Respondents are limited only to the answers, "Never," "Sometimes," or "Always."[6] Interestingly, the types of documents listed include information that almost never appears in the standard felony case, such as statements of non-testifying experts.[7] In another question, the authors ask defense counsel how often prosecutors turn over impeachment evidence in their possession and evidence not in their possession but "requestable."[8] "Requestable" is not defined. By definition, defense counsel would have little to no idea whether such evidence even exists and yet 47.5% of the Virginia respondents and 33% of the North Carolina respondents claim "Never."[9]

As someone who has been a prosecutor in Virginia for thirty-two years, it is not hard for me to conclude that most prosecutors and defense counsel, regardless of where they practice, have very different perceptions from one another about many facets of criminal law and procedure. The truth for many of those facets is probably somewhere in the middle. Rather than being entitled "An Empirical Comparison," the article should be entitled "A Perceptional Comparison."

### *B. Non-Representative Sampling*

There is another more glaring problem with the authors' statistics and one that compounds its reliance on perceptions. This problem is their use of a non-representative convenience sample,[10] which is a form of non-probability sampling.[11]

The authors concede that they did not attempt to collect data from a representative sample of prosecutors or defense

---

6. *Id.*
7. *Id.*
8. *Id.* at 332.
9. *Id.*
10. Professor of Statistics David Freedman warns that "[s]tatistical inference from convenience samples is a risky business." DAVID FREEDMAN, STATISTICAL MODELS AND CAUSAL INFERENCE 40 (David Collier et al. eds., 2009).
11. *See generally* Samuel R. Lucas, *An Inconvenient Dataset: Bias and Inappropriate Inference in the Multilevel Model*, 48 QUALITY & QUANTITY 1619–49 (2014) (explaining sample design features that are required for unbiased estimation of macro-level multilevel model parameters and the use of tools for statistical inference).

attorneys.[12] It appears that the sole qualification that the authors sought from a respondent was that the person was willing and had the time and ability to complete the survey.

Indeed, the authors intended that respondents to the survey self-select.[13] Self-selection is a survey bias that inherently produces a non-representative sample and one that exaggerates certain perspectives over others.[14]

Even worse, the survey also suffers from a unique form of convenience sampling called "snowball sampling."[15] Snowball sampling is a non-probability sampling technique that is used by researchers to identify potential subjects in studies where subjects are hard to locate.[16] In this case, the authors asked elected prosecutors in Virginia who were interested in participating to help them identify assistants in their own office who would also participate.[17] We have no idea what method was used, if any, by those elected prosecutors in selecting assistants to participate. But why conduct a snowball sample of public officials? By definition, we should not be hard to locate.

### *C. Low Response Rates*

The authors acknowledge that one of their "methodological caveats" was the low response rate.[18] For Virginia prosecutors, the authors sent out a survey link to the 120 Commonwealth's Attorneys offices, but only thirty-seven offices agreed to participate at all.[19] 185 prosecutors (24% of all Virginia prosecutors) began the survey.[20] However, for reasons that are never explained, only 122 of these completed the survey (16% of

12. Turner & Redlich, *supra* note 1, at 321.

13. *Id.*

14. Alan Beardsworth & Teresa Keil, *The Vegetarian Option: Varieties, Conversions, Motives and Careers*, 40 SOC. REV. 253, 261 (1992).

15. Leo A. Goodman, *Snowball Sampling*, 32 ANNALS OF MATHEMATICAL STAT. 148, 148 (1961).

16. *Id.*

17. *See* Turner & Redlich, *supra* note 1, at 316–19 (describing the process the authors used to identify survey participants).

18. *Id.* at 373.

19. *Id.* at 317.

20. *Id.*

all Virginia prosecutors).[21] In other words, 34%, or more than a third of the participants, withdrew from the survey before completion. We are given no explanation as to why; nor do the authors explain whether their survey, the types of questions, the length of the survey, the format, or technical issues prevented a significant portion of the respondents from responding. Perhaps the survey asked questions that were impossible to answer.

In North Carolina, the numbers were even lower—only 11.5% of prosecutors answered the survey and, again, the authors made no effort to make sure their sample was representative.[22] It appears that the authors were merely interested in having some data, rather than in the quality of that data.

For defense attorneys, the numbers are just as low. 30% of the Virginia private defense counsel who initially responded failed to complete the survey.[23] Only 14.2% of all private defense counsel invited to participate actually participated.[24] In North Carolina, only forty-three of the 284 Public Defenders in the state responded to the survey.[25] Only 7.5% of private counsel responded to the survey.[26]

The low response rates suggest survey flaws but the authors don't seem to accept that explanation. For example, the authors attempt to explain why they could not find more data on formal and informal "discovery waiver" (another undefined term).[27] Rather than admit that their sample was non-representative and therefore invalid, they simply claim "it is likely that discovery waivers—whether formal or informal—are indeed rare."[28] However, the authors' conclusion runs counter to the conclusion reached by the U.S. Supreme Court that such waivers are an integral part of the plea bargaining process, especially in narcotics distribution cases.[29]

---

21. *Id.*

22. *Id.* at 318.

23. *Id.* at 321.

24. *Id.* at 318.

25. *Id.*

26. *Id.* at 321.

27. *See id.* at 346–52 (discussing discovery waivers and the failed expectation that they would be more common in open-file jurisdictions).

28. *Id.* at 351.

29. *See* United States v. Ruiz, 536 U.S. 622, 632 (2002) (noting that the

The problem is not merely the number of respondents but the fact that the authors never assured that their respondents were actually representative of their state. 69% of all Virginia prosecutors' offices did not participate in the survey.[30] If all of those offices engaged in discovery waivers, the quality of the data would be radically different. In addition, the survey failed to represent offices by size and by rural versus suburban versus urban, which the authors admit.[31]

The authors acknowledge that their sample is "non-representative" of attorneys in Virginia and North Carolina.[32] At that point, the question of whether the survey is valid should have been over. However, the authors insist that because their respondents share the same general demographic characteristics of attorneys in Virginia and North Carolina (race, gender, and years of experience), it is appropriate to draw conclusions about the respondents to the survey.[33] There is no factual basis for that conclusion.

### *D. Similarity of Virginia and North Carolina*

The authors state that they "chose Virginia and North Carolina because they are geographically close and have populations of similar size."[34] That is true but one would think that it would be far more important to find states that are *legally* similar but for their discovery rules.

As the article points out, Virginia has 120 elected prosecutors; North Carolina has forty-four.[35] This disparity in

---

Government relies on plea bargaining to resolve 90% of its criminal cases).

30. *See supra* note 19 and accompanying text (stating that only thirty-seven of the 120 Virginia prosecutor offices responded to the survey).

31. *See* Turner & Redlich, *supra* note 1, at 376 ("One feature we did not consider is the size of offices (and related to this, whether offices were in rural or urban areas).").

32. *Id.* at 321.

33. *Id.* at 319–20.

34. *Id.* at 316. The two states share a 300+ mile border and have approximate populations of 8.4 million and 10 million respectively. *Population of Virginia in 2016*, POPULATION 2016 (Jan. 13, 2016), http://population2016.com/population-of-virginia-in-2016.html (last visited Aug. 29, 2016) (on file with the Washington and Lee Law Review).

35. Turner & Redlich, *supra* note 1, at 317.

numbers exists because Virginia is unique amongst the states—cities are independent and not part of any county. In Virginia, judges are selected by the legislature,[36] parole has been abolished,[37] juries decide sentences as well as guilt,[38] jury trials are bifurcated between the guilt phase and the sentencing phase with prior criminal records being provided in the latter phase,[39] and bench trials replace jury trials if both the defendant and the Commonwealth waive.[40] In North Carolina, judges are elected directly by citizens,[41] there is a modified parole system,[42] there is judge but not jury sentencing,[43] and the state constitution was only just recently amended to allow defendants (but not the State) to waive a jury trial.[44]

Perhaps one of these differences, or a synergy between several of these differences, has a far more profound impact on the criminal justice systems in these states than different rules of discovery. Unfortunately, the authors do not address the impact of these differences.

### *E. Failure to Define Terms*

#### *1. "Discovery" and "Exculpatory Evidence"*

The article uses these terms interchangeably but we know they have different meanings. A criminal defendant's "right to receive from prosecutors *exculpatory evidence* material is a right that the Constitution provides as part of its basic fair trial guarantee."[45] But at the same time, "[t]here is no general constitutional right to *discovery* in a criminal case."[46]

---

36. VA. CONST., art. VI, § 7.
37. VA. CODE ANN. § 53.1-165.1.
38. VA. CODE ANN. § 19.2-295.1.
39. *Id.*
40. *See generally* Wright v. Commonwealth, 357 S.E.2d 547 (Va. 1987).
41. N.C. CONST., art. IV, § 16.
42. N.C. GEN. STAT. § 15A-81B.
43. N.C. GEN. STAT. § 15A-81.
44. N.C. CONST., art. I, § 24.
45. United States v. Ruiz, 536 U.S. 622, 628 (2002) (citing Brady v. Maryland, 373 U.S. 83, 87 (1963).
46. Weatherford v. Bursey, 429 U.S. 545, 559 (1977).

In addition, the article does not differentiate between a prosecutor's *constitutional duty* to disclose exculpatory evidence and his *ethical duty* under the Rule 3.8 equivalent of his state's Code of Professional Conduct.[47] There are significant differences between each concerning the timing of the disclosure and the extent of responsibility for vicarious knowledge.

### *2. "Open File"*

The article compares Virginia and North Carolina discovery practices with particular focus on "open file" discovery.[48] But the article never tells us what is meant by "open file" discovery. It could mean that the file is handed over to defense counsel with no redactions. It could mean that the file is handed over to defense counsel with redactions of witness personal identifying information, like social security numbers or mobile phone numbers. It could mean that the file is handed over to defense counsel with redactions of the identity of undercover officers or cooperating informants. It could mean that defense counsel is allowed to merely inspect the file. It could mean the prosecutor makes and sends to defense counsel a separate copy of the file.

The article fails to define the term "open file" discovery and with good reason: because there are so many versions of "open file" policies, conducting a general survey that takes those differences into account would have been a herculean task. Rather than separating survey results by jurisdiction according to what kind of "open file" policy was in place, the survey instead lumps Virginia jurisdictions into two categories: "open file" and "closed file."[49]

This failure to define terms becomes important when the authors reveal that North Carolina does not do "open file" discovery for misdemeanors at all.[50] In addition, there is no right

---

47. VA. SUP. CT. R. PT 6 2 RPC 8.3.

48. *See* Turner & Redlich, *supra* note 1, at 286 (noting the different approaches to discovery employed by North Carolina and Virginia).

49. In fact, the Justice & Professionalism Committee of the Virginia Association of Commonwealth's Attorneys has just begun compiling what material is disclosed by the various Virginia offices that do "open file "discovery.

50. *See* Turner & Redlich, *supra* note 1, at 378 n.377 (referencing a case and an article both affirming the superior court original jurisdiction

to discovery in district court at all and the right to "open file" only begins if a case has original jurisdiction in superior court.[51] If a case is resolved in district court, the defendant never has a right to discover at all.

However, many Virginia jurisdictions have "open file" policies that include misdemeanors and felonies that are pending in district court. In that way, Virginia discovery can be far broader than North Carolina discovery because a substantial number of felony cases are resolved in district court and defendants have a discovery right in district court.[52] This fact should have been a significant discussion in the survey and in the article, but instead is given only a footnote.

### *3. "Turn Over"*

The article also fails to define the term "turn over." For example, it compares Virginia and North Carolina on whether the government must "turn over" a search warrant. In Virginia, a search warrant and its affidavit are public records per se without any action or participation by the prosecutor unless the prosecutor obtains special permission to temporarily seal the warrant and affidavit.[53] The answer, therefore, for all Virginia jurisdictions should be that prosecutors always "turn over" search warrants and affidavits. However, the authors' survey reports 46.2% of Virginia prosecutors answer "never" or "sometimes."[54]

"Turn over" is also confusing in this survey because it conflates putting a document in a file with assuring that defense counsel actually looks at or receives the document. It has been my experience over the years that defense counsel often misses the significance of particular material (or perhaps do not read it at all) contained in the discovery file and then later claim that it was never disclosed.

In addition, does "turn over" mean producing a document itself or the information contained therein? According to the

---

requirement for the North Carolina open file discovery rule to apply).

51. *Id.*

52. VA. SUP. CT. R. 7C:5; VA. SUP. CT. R. 8:15.

53. VA. CODE ANN. § 19.2-54.

54. Turner & Redlich, *supra* note 1, at 323.

survey, 3.7% of Virginia defense counsel report that prosecutors "never" turn over a defendant's criminal record, with a further 13.2% reporting "sometimes." Because this result is completely contrary to existing Virginia law, it is unclear what the respondents possibly could have meant. It could mean they did not receive the actual printout from the state and national police databases[55] but only received a written summary from the prosecutor.

### *F. Apparent Bias*

Repeatedly, when their data was in conflict, the authors suggest that prosecutors provided misleading responses and therefore discount some of the data collected by their survey. The authors, however, never make similar accusations of defense counsel. That suggests to us that the authors carry an inherent bias.

One instance where the authors suggest prosecutors are misleading is when the survey data fell into conflict regarding whether prosecutors disclose *Brady* evidence.[56] The authors write that, in light of the fact that their survey coincided with public debate over discovery reform in Virginia, "consciously or unconsciously, some Virginia prosecutors may have been eager to show that they are disclosing *Brady* material at high rates and that there is no pressing need for reforming the rules."[57]

However, the authors never, at any point, consider that defense counsel might have consciously or unconsciously been eager to show that they are not receiving *Brady* material in an effort to demonstrate a pressing need to reform the rules. That suggests that the authors conclude only prosecutors are prone to falsify answers for political gain.

The authors demonstrate a predetermined bias in favor of their proposed hypothesis to the exclusion of any contradictory

---

55. These databases are the National Crime Information Center (NCIC) and Virginia Criminal Information Center (VCIN).

56. *See* Turner & Redlich, *supra* note 1, at 331 (acknowledging the unexpectedly different results of prosecutors from Virginia).

57. *Id.* at 337.

data.[58] For example, the authors attempt to explain away data that is contradictory and claim it supports their hypothesis.[59] In North Carolina, prosecutors reported significantly lower rates of disclosure than Virginia prosecutors. However, in North Carolina, defense attorneys reported significantly higher rates of disclosure than Virginia defense attorneys.[60] Thus, the data could support either of two conclusions—that the authors' hypothesis is correct or that it is incorrect. Instead, the authors decided to conclude that the defenders were accurate in their responses and the prosecutors were inaccurate, and the authors found that the data supported their conclusion "that open-file discovery produces more consistent disclosure of *Brady* material."[61]

Most shockingly, the authors openly dismiss reports from prosecutors as being false.[62] The authors conclude that "open-file discovery does not increase the risk of witness intimidation."[63] However, Virginia and North Carolina prosecutors detail several concrete, factual instances where open-file discovery actually endangered witnesses.[64] In one instance, a prosecutor described how information provided in open-file discovery led to the murder of a witness and the witness's wife.[65] The authors apparently dismiss these reports as being inaccurate.

Since the authors are not practicing lawyers and have no experience in law enforcement, their apparent bias causes them to make similarly biased conclusions that are not based in fact or evidence. For example, when addressing "open file" discovery in misdemeanor cases, they allege "misdemeanor cases are less likely to raise issues of witness safety than felony cases."[66] Many prosecutors and law enforcement officers, and probably defense counsel, would take issue with this blanket statement,

---

58. *See id.* at 331 (stating the hypothesis that "open file produces better disclosure of exculpatory evidence").

59. *Id.* at 331.

60. *Id.*

61. *Id.*

62. *See infra* Part II.C (discussing how victim and witness safety are important concerns in the open0file discovery).

63. *Id.* at 360.

64. *Id.* at 359–60.

65. *Id.* at 359.

66. *Id.* at 379 n. 378.

especially prosecutors who handle domestic and family violence cases.

### *II. Thoughts on Where We Are and Where We Are Going*

As noted in the Article, on December 2, 2014, the Virginia Supreme Court Special Committee on Criminal Discovery Rules issued its report recommending "broader and earlier discovery."[67] I happened to serve on that committee. The twenty-nine-member committee consisted of judges, prosecutors, defense attorneys, and others involved throughout the criminal justice system. Unfortunately, at no point during the committee meetings was there ever any discussion whether rules modifications in Virginia were necessary in the first place.

On November 13, 2015, the Virginia Supreme Court issued the following order:

> On December 2, 2014 came the Special Committee on Criminal Discovery Rules and submitted its final report, which included proposed revisions to [the rules of criminal discovery]. Having considered the Committee's report and the public comments submitted in response thereto, the Court declines to adopt the Committee's recommendations.[68]

A few days later, Chief Justice Donald Lemons told the Richmond Times-Dispatch that a "more incremental approach would be more palatable to the Court." [69] He also said that it was:

> [A]pparent that the proposals are the result of 'trade-offs' in the negotiations between interest groups. It would be difficult for the Court to accept some of the proposals and not all of them as a package because the Court cannot be certain about the interdependent nature of the compromises.[70]

---

67. *Id.* at 337, n. 210.

68. Frank Green, *Justices Reject Recommendations on Pretrial Discovery in Criminal Cases*, RICHMOND TIMES (Nov. 26, 2015), http://www.richmond.com/news/article_a7518ce0-3e7c-5696-8cc2-0dda708dd9b1.html (last visited Aug. 13, 2016) (on file with the Washington and Lee Law Review). The order is available online at http://www.courts.state.va.us/courts/scv/amendments/2015_1113_discovery_order.pdf.

69. Green, *supra* note 68.

70. *Id.*

Having engaged in those negotiations, let me comment on some of my basic considerations during the process.

### *A. Distinguishing Discovery from Exculpatory Evidence*

From the start, it is absolutely critical to distinguish between statute/rule-based discovery and constitutionally-mandated exculpatory evidence. "*Brady* is 'a disclosure rule, not a discovery rule.' Indeed, '[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one.'"[71]

Unfortunately, far too often these terms are used interchangeably. During the dialogue of the past few years, proponents of modifying Virginia's discovery rules have cited examples of wrongful convictions allegedly gained by discovery rule violations. When pressed for specific examples, they invariably cite cases where the violation was a failure to disclose exculpatory evidence. For that reason, I concluded that these were "discovery" answers in search of an "exculpatory evidence" problem.

Please do not misunderstand me. I am as opposed to wrongful convictions based on exculpatory evidence violations as anyone. But I find it odd that these proponents are arguing for a change to Rule 3A:11 of the Rules of the Supreme Court of Virginia to mandate the disclosure of evidence which the Bill of Rights already guarantees. It is almost as if they are saying the Rule is more important than the Constitution.

For this reason, I disagreed with the Committee's conclusion that a new subsection requiring the disclosure of exculpatory evidence should have been added to Rule 3A:11 dealing with criminal discovery. The Bill of Rights already requires that a prosecutor disclose material exculpatory evidence to the defense "in time for it to be used effectively by the defendant."[72] Rule 3.8(d) of the Rules of Professional Conduct already requires that a prosecutor "make timely disclosure . . . of the existence of evidence which the prosecutor knows tends to negate the guilt of

71. Commonwealth v. Tuma, 740 S.E.2d 14, 18 (Va. 2013) (citations omitted).

72. Bramblett v. Commonwealth, 513 S.E.2d 400, 409 (Va. 1999).

the accused."[73] At best, the new subsection would have been redundant; at worst, the timing of the disclosure ran contrary to the Constitution and the Rules of Professional Conduct.

### *B. Avoiding Trial by Ambush through Reciprocity*

> The aim of trials is to find the truth. Uncovering the truth is the paramount goal of the adversary system. All the rules of decorum, ethics, and procedure are meant to aid the truth-finding process. Ambush, trickery, stealth, gamesmanship, one-upmanship, surprise have no legitimate role to play in a properly conducted trial. This is so whether the gamesman is the defendant or the Commonwealth.[74]

If there is any justification for modifying the discovery requirements of Rule 3A:11, it should be to uncover the truth and avoid "trial by ambush." That goes for both the prosecution and the defense. For this reason, I advocated in the Committee for as much reciprocal discovery as is constitutionally permitted.

I realized that under the proposed rule change the prosecution would be disclosing far more non-expert material than the defense. But I also realized that the prosecution probably has a lot more information in its file than the defense has. The proposed changes would have gone a long way towards promoting the truth-finding function of trial, especially in the areas of expert testimony and witness lists.

### *C. Safeguarding Personal Information of Victims and Witnesses*

Of grave concern to the prosecutors and law enforcement officials on the Committee was how to provide enhanced discovery while safeguarding personal information about victims and witnesses to crimes. This problem has grown in significance over the past few years as the availability of personal digital devices has grown exponentially.

For a long time, a significant number of prosecutors in the Commonwealth have complied with their duty to disclose

---

73. VA. RULES OF PROF'L CONDUCT R. 3.8(d).

74. Bennett v. Commonwealth, 374 S.E.2d 303, 311 (Va. 1988).

exculpatory evidence and discovery through an informal "open file" policy. Under this policy, defense counsel is free to come to the prosecutor's office to read and review the contents of the prosecution file but is not given a separate hard copy of that file to take back to the defendant. Counsel is free to make all the notes they wanted and, in some instances, dictate relevant portions of the file for subsequent transcription by counsel's legal assistant. There was little opportunity for abuse as counsel would seldom take the extra time needed to record information such as social security numbers, home addresses, or mobile phone numbers.

That opportunity for abuse all changed with the advent of "smart" technology and Internet social media. With such technology, the prosecution file could be scanned or photographed in its entirety. The file then walked out of the prosecutor's office along with defense counsel. Absent agreements such as those discussed in Legal Ethics Opinion 1864,[75] this digital file belonged to the defendant—if not before trial then certainly at the termination of the representation.[76] Exact copies of police reports with witnesses' names, addresses, telephone numbers, social security numbers, and other personal information came directly into the hands of criminal defendants. Many of these defendants have no qualms about posting these police reports on Facebook or other social media, hoping to intimidate witnesses from cooperating with law enforcement now or in the future.

With this danger in mind, the prosecutors and law enforcement officials on the Committee insisted that victim and witness safety had to be a central facet of any proposed rule change. For this reason, a new subsection to Rule 3A:11 was proposed. The proposal would have allowed the party in possession of sensitive information to redact it before the issuance of any court order to do so. The party wishing to receive such information would then need to file a motion in court. The thought here was one of long-term judicial economy; within a short period of time, both prosecutors and defense counsel would

---

75. *See* VA. ST. B. STANDING COMM. ON LEGAL ETHICS, LEGAL ETHICS OPINION 1864 (Oct. 24, 2012), http://www.vsb.org/docs/LEO/1864.pdf (considering the legality of a defense attorney agreeing not to provide certain information about witnesses to his or her client).

76. VA. RULES OF PROF'L CONDUCT R. 1.16(e).

have a good idea what information a court would and would not order disclosed and the number of motions would go down.[77]

However, not all law enforcement officials felt that the proposed subsection provided adequate protection. Thus, the only minority report attached to the Committee's report dealt with this topic.

### *D. Minimizing Costs, Burdens, and Delays*

This was my most significant concern during the committee deliberation process. The changes proposed to Rule 3A:11 would have significantly added time and financial burdens to all prosecutors' offices. It would be one thing if each prosecutor in the Commonwealth carried only one felony prosecution at a time; it is a totally different prospect when you consider the reality that, nationally, most prosecutors carry caseloads of 100–200 felonies at a time.[78]

Even without a change to Rule 3A:11, prosecutors are facing greatly increasing discovery demands. With modern technology, law enforcement generates far greater discoverable information. Dash-mounted camera video, body worn camera video, and jailhouse telephone audio are just a few examples of this new technology. One individual traffic stop could generate several hours of video and audio evidence.

When you added the impact of the proposed changes, workload and financial costs would have gone up dramatically. In order to redact the protected personal information contained in paper reports, a prosecutor would have to make a photocopy of every page of every report. Every page with protected material would then need to be marked out with a felt-tip marker. In order to keep this information protected from someone who will simply hold that page up to a light bulb, the prosecutor would then need

---

77. *See* SUPREME COURT OF VA., REP. OF THE SPEC. COMM. ON CRIMINAL DISCOVERY RULES TO THE CHIEF JUSTICES & JUSTICES OF THE SUPREME COURT OF VA. MINORITY COMMENTS 55–56 (Dec. 2, 2014) (discussing the intimidation of witnesses and costs associated with reforms).

78. *See generally* Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Caseloads Harm Criminal Defendants,* 105 NW. U. L. REV. 261 (2011) (noting the incredibly large case load prosecutors have to handle).

to make a second photocopy of that redacted page. The huge costs in paper, ink cartridges, and felt-tip pens would pale in comparison to the personnel expenses associated with the time involved.

If we are going to expand the scope of criminal discovery in Virginia, we have to find the proper time and resource-efficient method to get this information from law enforcement and see that all properly discoverable information is delivered to defense counsel in a timely fashion. Otherwise, we will need to drastically modify our criminal justice process, potentially plea- bargaining a greater number of cases just to keep the criminal dockets manageable.[79]

That resource-efficient method is digital prosecutorial case-management systems. These systems would need to be compatible with law enforcement record management and evidence systems. A prosecutor sitting at a desk could quickly retrieve case history reports and law enforcement evidence. The reports could be quickly read for sensitive information and a digital copy created with such information redacted by a "click" and "drag." The digital file appropriate for discovery could then be electronically transmitted to defense counsel with a digital record or receipt of exactly what information was transmitted and when. No paper, no ink cartridges, and theoretically no traveling to or from the office would be needed in order to provide or receive discovery.

The problem is that currently very few prosecutors have such a case-management system and the costs of such systems are prohibitive for many offices. The Executive Summary of the Committee's Report highlighted how crucial electronic or "e-discovery" would be to the Committee's proposal and advocated not only for a "statewide standard for filing and storage of case information," but that any such effort should "make accommodation to allow for existing investments in technology."[80]

Finally, let me conclude by stressing the Committee's final thoughts on the subject from its Executive Summary. "It is

---

79. This is why the discussion in Part I.D of the legal dissimilarities between Virginia and North Carolina is critical.

80. SUPREME COURT OF VA., REP. OF THE SPEC. COMM. ON CRIMINAL DISCOVERY RULES TO THE CHIEF JUSTICES & JUSTICES OF THE SUPREME COURT OF VA., at vi (Dec. 2, 2014).

emphasized that use of electronic document management is a key to avoiding unnecessary costs, burdens and delays, as well as to avoid misuse or abuse resulting from providing the accused or the public inadvertent access to sensitive material."[81]

## *III. Conclusion*

We are sympathetic to the authors' plight. They wanted to collect statewide data from two diverse and complicated jurisdictions, Virginia and North Carolina, and collect it from busy attorneys who have little free time to help a couple of professors who are curious about the actual practice of law. The authors are clearly devoted to their hypothesis and firmly believe it to be true. That does not, however, make their conclusions valid, especially when based on unrepresentative samples and unjustified interpretations of data.

As Chief Justice Lemons said, changes, if they are going to come, are going to come incrementally in Virginia.[82] Advents in technology, especially electronic discovery, will help ease that incremental process.

---

81. *Id.*

82. *See* Green, *supra* note 68 ("Justice Donald W. Lemons said he did not presume to speak for the other justices, but he felt that a more incremental approach would be more palatable to the court.").