

DISCOVERY 16 September 2005

- I. **Historical View – If you didn't know where you've been you can't know where you're going**
 - A. Not at common law (discovery)
 1. First in early Roman Law Civil
 2. Criminal discovery did not surface until 1972 King's Bench, **Rex v Holland**
 - a. Defendant charged with embezzlement requested a review of a government report containing results of witness' examination
 - b. Held: there is no principle or precedent to warrant it [A]n if we were to grant it, it would subvert the whole system of criminal law
 - B. Officially recognized here in **United States v Burr**
 1. Aaron Burr tried for treason when he attempted to create a sovereign nation in an area of the lower Mississippi River
 2. Burr requested pre-trial disclosure of a letter sent to President Jefferson that was in the possession of the U.S. Attorney
 3. **Held:** defendant had no absolute right to discovery – if the letter had evidentiary relevance, or was useful in cross examination of any Government witness – it could not in fairness be withheld from the defendant
 - C. Discovery focused on one side – defense
 1. Rule 16 of the Federal Rules of Criminal Procedure in 1946
 2. Justice William J. Brennan focused the principles of discovery in 1963
 - a. The truth is more likely to come out at a trial if there has been an opportunity for the defense to investigate the evidence in advance
 - D. Michigan always out front
 1. 1859 statute required the prosecution to provide names of witnesses known to him
 2. Continued responsibility statute required
“And at such time before the trial of any case
he shall also endorse thereon the names of such
witnesses as shall then be known to him”
 3. Michigan Supreme Court held
 - a. No mere formality but a substantial right
 - b. Discovery – within the sound discretion of the trial judge

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3rd Circuit Court Judge Criminal Division

- c. Defendant must show that the disclosure was necessary to preparation of his/her defense and in the interest of a fair trial ----- not simply a fishing expedition
- 4. Michigan innovation continued by granting discovery to the prosecution in specific areas
 - a. Alibi, insanity, duress in prison escape, introduction of rape victim's sexual history

E. **People v Lemcool**

- 1. Prosecutorial discovery within the discretion of the trial court – June 1994

F. Prosecutorial discovery statute enacted before **Lemcool** decided

G. Supreme Court Acts

- 1. MCR 6.201 effective January 1, 1995
- 2. Administrative Order 1994 – 10 criminal discovery governed by court rule not MCL 767.94a
- 3. Does not require disclosure of information protected by the constitution, statute or privilege
 - a. Privilege see **People v Stanaway**
 - b. Held: privileged communications, regardless of the nature of the privilege ... if he (defendant) can establish a reasonable probability that the privileged records contain information which is material and necessary to his defense

II. Practice

A. Ask for what you want

- 1. MCR 6.201 is triggered by a request

B. Prepare an order

- 1. I suggest that your order be specific
- 2. List each item separately. In that way the prosecutor can strike any items not agreed to.
 - a. Make items not agreed to subject of a separate motion (timely)

C. Execution

- 1. Serve order on officer in charge or prosecutor
- 2. Timely
- 3. Notify judge if materials requested are not turned over (timely)

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III. Results of Non Compliance

D. Sanctions

1. On a case by case basis
2. Possible sanctions
 - a. Fine
 - b. Contempt L' Affaire Halpern
 - c. Jury instruction
 1. In **People v O. J. Simpson** Judge Ito instructed the jury that it may consider the defense's discovery violation in weighing the witnesses' credibility.
 2. Judge Ito also allowed the prosecutor to reopen her opening statement to penalize the defense for concealing the identities of some witness
 - d. Continuation
 - e. Mistrial
 - f. Dismissal
 1. Sheldon Halpern's case second retrial for failure to disclose
 2. Most severe exclusion of evidence only for the most egregious violations (defense)
 3. For prosecution's violations assess the potential prejudice to the defense
 - a. Exclusion is appropriate only for deliberate violations