

**CAP SESSION
SEPTEMBER 30, 2016**

SUPPLEMENTAL DISCOVERY

1. The best discovery is the discovery you get on your own, without help from the police or the prosecutor.

At the beginning of your case, consider Googling everybody. Google your judge, your prosecutor, and of course, the key witnesses in your case. I have included a two page cheat sheet and three pages from a marvelous website called "The Google Guide." Spend time with the Google Guide and learn its features. It will help you greatly.

2. Things you should do first:

- A. Send litigation hold and preservation letters as soon as you are retained or assigned. Consider hiring an investigator, or requesting a court appointed investigator to help you in your quest for discovery. Some items are time sensitive, and if you do not move quickly, you risk losing perhaps the best proof of your defense. Among the things you need to obtain quickly can be:

1. In-dash car video or audio evidence from police cars.
2. 911 tapes.
3. Booking room video.

- B. Who do I serve?

For police departments, of course, you serve the department itself. I would also consider serving the officer in charge. If a business has documents or other materials you want preserved, you should serve the registered agent.

Michigan has a department called the Department of Licensing and Regulatory Affairs (LARA). LARA's corporations division supports online a business entity search that is easy to use. Though it, you can identify the registered agent for every corporation licensed to do business in Michigan. Its website is: http://www.dleg.state.mi.us/bcs_corp/sr_corp.asp.

You should also consider utilizing the county clerk's office and run the

names of various persons you are interested in through their dba search index if you have the name of a business that is not incorporated but not the name of its owner. You also should serve the registered agent with your subpoenas.

C. The basics. MCR 6.201

(A) Mandatory Disclosure. In addition to disclosures required by provisions of law other than MCL 767.94a, a party upon request must provide all other parties:

- (1) the names and addresses of all lay and expert witnesses whom the party may call at trial; in the alternative, a party may provide the name of the witness and make the witness available to the other party for interview; the witness list may be amended without leave of the court no later than 28 days before trial;
- (2) any written or recorded statement, including electronically recorded statements, pertaining to the case by a lay witness whom the party may call at trial, except that a defendant is not obliged to provide the defendant's own statement;
- (3) the curriculum vitae of an expert the party may call at trial and either a report by the expert or a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion;
- (4) any criminal record that the party may use at trial to impeach a witness;
- (5) a description or list of criminal convictions, known to the defense attorney or prosecuting attorney, of any witness whom the party may call at trial; and
- (6) a description of and an opportunity to inspect any tangible physical evidence that the party may introduce at trial, including any document, photograph, or other paper, with copies to be provided on request. A party may request a hearing regarding any question of costs of reproduction, including the cost of providing copies of electronically recorded statements. On good cause shown, the court

may order that a party be given the opportunity to test without destruction any tangible physical evidence.

(B) Discovery of Information Known to the Prosecuting Attorney. Upon request, the prosecuting attorney must provide each defendant:

- (1) any exculpatory information or evidence known to the prosecuting attorney;
- (2) any police report and interrogation records concerning the case, except so much of a report as concerns a continuing investigation;
- (3) any written or recorded statements, including electronically recorded statements, by a defendant, co-defendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial;
- (4) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and
- (5) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case.

(C) Prohibited Discovery.

- (1) Notwithstanding any other provision of this rule, there is no right to discover information or evidence that is protected from disclosure by constitution, statute, or privilege, including information or evidence protected by a defendant's right against self-incrimination, except as provided in subrule (2).
- (2) If a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the trial court shall conduct an in camera inspection of the records.
 - (a) If the privilege is absolute, and the privilege holder refuses to waive the privilege to permit an in camera inspection, the trial court shall suppress or strike the privilege holder's testimony.

- (b) If the court is satisfied, following an in camera inspection, that the records reveal evidence necessary to the defense, the court shall direct that such evidence as is necessary to the defense be made available to defense counsel. If the privilege is absolute and the privilege holder refuses to waive the privilege to permit disclosure, the trial court shall suppress or strike the privilege holder's testimony.
 - (c) Regardless of whether the court determines that the records should be made available to the defense, the court shall make findings sufficient to facilitate meaningful appellate review.
 - (d) The court shall seal and preserve the records for review in the event of an appeal
 - (i) by the defendant, on an interlocutory basis or following conviction, if the court determines that the records should not be made available to the defense, or
 - (ii) by the prosecution, on an interlocutory basis, if the court determines that the records should be made available to the defense.
 - (e) Records disclosed under this rule shall remain in the exclusive custody of counsel for the parties, shall be used only for the limited purpose approved by the court, and shall be subject to such other terms and conditions as the court may provide.
- (D) Excision. When some parts of material or information are discoverable and other parts are not discoverable, the party must disclose the discoverable parts and may excise the remainder. The party must inform the other party that non-discoverable information has been excised and withheld. On motion, the court must conduct a hearing in camera to determine whether the reasons for excision are justifiable. If the court upholds the excision, it must seal and preserve the record of the hearing for review in the event of an appeal.
- (E) Protective Orders. On motion and a showing of good cause, the court may enter an appropriate protective order. In considering

whether good cause exists, the court shall consider the parties' interests in a fair trial; the risk to any person of harm, undue annoyance, intimidation, embarrassment, or threats; the risk that evidence will be fabricated; and the need for secrecy regarding the identity of informants or other law enforcement matters. On motion, with notice to the other party, the court may permit the showing of good cause for a protective order to be made in camera. If the court grants a protective order, it must seal and preserve the record of the hearing for review in the event of an appeal.

- (F) Timing of Discovery. Unless otherwise ordered by the court, the prosecuting attorney must comply with the requirements of this rule within 21 days of a request under this rule and a defendant must comply with the requirements of this rule within 21 days of a request under this rule.
- (G) Copies. Except as ordered by the court on good cause shown, a party's obligation to provide a photograph or paper of any kind is satisfied by providing a clear copy.
- (H) Continuing Duty to Disclose. If at any time a party discovers additional information or material subject to disclosure under this rule, the party, without further request, must promptly notify the other party.
- (I) Modification. On good cause shown, the court may order a modification of the requirements and prohibitions of this rule.
- (J) Violation. If a party fails to comply with this rule, the court, in its discretion, may order the party to provide the discovery or permit the inspection 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 just under the circumstances. Parties are encouraged to bring questions of noncompliance before the court at the earliest opportunity. Wilful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court. An order of the court under this section is reviewable only for abuse of discretion.
- (K) Except as otherwise provided in MCR 2.302(B)(6), electronic materials are to be treated in the same manner as non-electronic materials under this rule. Nothing in this rule shall be construed

to conflict with MCL 600.2163a.

- (L) Freedom of Information Act Request. The Freedom of Information Act (FOIA) is found at MCL 15.231 *et seq.* A detailed examination of this very beneficial law is beyond the scope of this presentation. However, even when you know you might be requesting something that the municipality will refuse to provide because of one or more stated exclusions, sending a FOIA letter with appropriate litigation hold language can be most helpful in preserving the evidence while you pursue your motion to produce. Many sample motions and other documents are presented for your review.

- 3. Why discovery in the first place? “First, fairness to the defendant and an adequate opportunity to prepare a defense, including preparation for cross-examination of witnesses, requires that the defendant be given access to all relevant information. It has been held that statements made by the defendant to the police are discoverable for that reason. ***People v. Johnson***, 356 Mich. 619, 97 N.W.2d 739 (1959). Statements by the police officers have also been made available. (***People v. Dellabonda***, 265 Mich. 486, 251 NW 594 (1933)). It goes without saying that statements made by other witnesses are equally important for trial preparation. This is particularly true, as in the case at bar, where the question of credibility may be preeminent. Any inconsistent or conflicting statements may have considerable impact upon the determination of the credibility of the parties and witnesses and may therefore be determinative of the outcome of this prosecution. Also, without an examination of the requested information, it is impossible to see if such information would be relevant and whether its suppression would lead to a failure of justice.”
People v Walton, 71 Mich App 478, 484 (1976).

- 4. How do I ask?

Consider bringing a motion for supplemental discovery and ask the court to allow you to use the subpoena power typically allowed in Chapter 2 of the MCR. A notice of deposition for records only with a subpoena included is the way that most businesses are accustomed to providing information. This is often an “easy sell,” especially when you advise the APA that you will do all of the work and you are not asking his office or the OIC to do anything for you. Nearly all corporations have registered agents, some businesses are licensed. You can do a corporation division business entity search on line through the Department of Licensing and Regulatory Affairs (LARA). Once you find out who the registered agent is, serving the subpoena becomes easy.

5. What are some of the things you can ask for?
- A. Medical records of the complainant. If your client is charged with an assaultive crime, and the prosecutor claims the victim sought medical attention, then medical records are relevant. Many times a stipulated order for production is all that you need. Samples are provided. When you mail your order to a hospital, consider including a reference to MCR 2.314(D). Hospital records custodians are familiar with this rule, and it is easier for them to simply provide you with photocopies along with a sworn certificate.
- (1) What if the prosecutor objects to the release of medical records claiming medical patient privilege? If your client is charged with an assaultive offense, it is likely that the officer in charge has obtained one or more medical records from the complainant's treating doctors or hospitals. In Detroit, for example, the DPD officer in charge will often list as an exhibit the complainant's hospital medical chart. It is clearly settled law in Michigan that once otherwise privileged information is disclosed to a third party by the person who holds the privilege, or if otherwise confidential communication is necessarily intended to be disclosed to a third party, the privilege no longer exists. See ***Oakland County Prosecutor v Department of Corrections***, 222 Mich App 654 (1997); ***Landelius v Sackellares***, 453 Mich 470 (1996).
- B. Psychological records or therapy records. See ***People v Stanaway***, 446 Mich 643 (1994). You will be expected to show that you are on more than a simple fishing expedition. I have included with my materials a motion that was successful in the Oakland Circuit Court when I requested school records and therapy records when the complainant (my client's niece) falsely claimed that her uncle committed second degree CSC.
- C. School records.
- D. Employment records.
- E. Presentence reports of testifying co-defendants. ***People v Rohn***, 98 Mich App 593 (1980).
- F. Police personnel files and citizens complaints. ***People v Walton***, 71 Mich App 478 (1976).

- G. Prior records of prosecution witnesses. In *People v Nickson*, 120 Mich App 681 (1982), it was held to be ineffective assistance of counsel where defense counsel failed to inquire. We recognize that the State of Michigan law on this issue is not good. However, we have to keep on fighting.

Consider this language:

"Although we sympathize with trial counsel, who assumed that he could rely upon the initial representation of the police, a defendant is entitled to a more complete investigation into matters directly related to the credibility of prosecution witnesses. As appellate counsel's investigation has demonstrated, discovery of the prior convictions was not a difficult matter. Moreover, had at least a motion for discovery been made, the onus of verifying the witnesses' records might have been placed on the police." *People v Nickson*, 120 Mich App 681, 685 (1982)

- H. Statements of all witnesses, lay and expert. What is a statement? See *People v Holtzman*, 234 Mich App 166 (1999) and MCR 2.302(B)(3)(c).
6. Items that should be requested in a motion for supplemental discovery from the Wayne County Prosecutor's office in every case:
- A. The defendant's booking papers, documents, and mug shot.
 - B. The daily activity log.
7. Phone records and cell phone records.

More and more often, cell phone records are critical in our cases. I have included in my materials an updated version of a paper entitled "How to Obtain and Introduce Into Evidence Phone Records When All You Have is the Phone Number." Included with that paper is a sample subpoena to a phone provider (in this case Verizon Wireless) and a sample records custodian certificate. Please refer to that.

If your motion for supplemental discovery is granted and you are allowed to subpoena documents in advance of trial you **MUST** serve a copy of your subpoena on all attorneys of record in your case, including the prosecutor. Failure to do so is misconduct and a lawyer can be suspended for not complying with this requirement. I have included in the materials Cheryl Carpenter's Motion in Limine to Preclude the Prosecutor from Using Information Obtained when the Wayne County Prosecutor's office violated

both the letter and spirit of Michigan's discovery rules by secretly subpoenaing documents relating to her client's case without the courtesy of advising her that this occurred. If a prosecutor does this in your case, or if a police officer does this in your case, I urge you to file a grievance. If you are not willing to do so, contact me and I will happily do it for you. Police and prosecutors should have to follow the same rules that we follow.

8. Social media.

In more and more cases, postings on Facebook, Twitter, and other internet sites become crucial in properly defending our clients. So do a Facebook search. But be careful! It is unethical for a lawyer or an employee of a lawfirm to "friend" a potential witness on Facebook by using a false identity or a false premise. And have a conversation with your client. You can tell your client to take down his website or his Facebook page, but you **CANNOT** tell him to delete anything. If you do and he follows your advice, you could be on the receiving end of a very serious request for investigation from the Attorney Grievance Commission, or worse.

9. Restaurants/Stores/Business Security Tapes.

More and more often, as the cost of video equipment continues to decrease, businesses have security cameras. In fact, the City of Detroit recently announced that partnership with Comcast to help expand the City of Detroit's Project Green Light program. We also know from previous news stories that Dan Gilbert is actively buying properties in the City of Detroit and equipping them with security cameras. We need to be in a position to be able to obtain this video. How do we do this? I am not sure. The article I have included suggests that the Detroit Police Department has a "real time crime center". And Dan Gilbert has a Quicken Security Command Center in Downtown Detroit as well. One of his companies, called "Bedrock Real Estate Services" also maintains the security cameras. This writer has not yet had occasion to need to obtain any footage from the security cameras Bedrock has installed around Downtown Detroit. If any of you have been successful in doing so, please share.

10. Key SCOTUS cases you must know:

- A. ***Brady v Maryland***, 373 US 83 (1963).
- B. ***Giglio v United States***, 405 US 150 (1972).
- C. ***United States v Agurs***, 427 US 97 (1976).

- D. ***United States v Bagley***, 473 US 667 (1985).
- E. ***Kyles v Whitley***, 514 US 419 (1995).

See also the outline provided by Carol Brook, Executive Director of the Federal Defender Program in Chicago, entitled ***Brady v Maryland - Sword or Shield?***

I hope this has been helpful. Please share your motions with others. Good luck!

Thomas M. Loeb
32000 Northwestern Hwy., Ste. 170
Farmington Hills, MI 48334
248-851-2020
tmloeb@mich.com