



Progress in Criminal Discovery Reform

OVER THE COURSE OF EIGHT months and five meetings in 2017, the VSB's Criminal Discovery Reform Task Force worked on addressing rules for reciprocal disclosure of witness lists and expert witness information, as well as exchanging witness statements, and sharing police reports and witness statements with defense counsel. Proposals have been forwarded to the Judicial Council's Advisory Committee on Rules of Court for consideration at its meeting on April 4, 2018. The task force approved the proposed rule changes without dissent.

Chaired by Court of Appeals Judge Robert J. Humphreys, the task force consisted of the following lawyers: Hampton Commonwealth's Attorney Anton Bell; Fairfax Circuit Court Judge Randy Bellows; defense attorney James Broccoletti; University of Richmond Law Professor Henry L. Chambers; Lynchburg Commonwealth's Attorney Michael Doucette; University of Richmond Law Professor John Douglass; Virginia Indigent Defense Commission Executive Director David Johnson; defense attorney Alex Levay; defense attorney John Lichtenstein; Chesapeake Commonwealth's Attorney Nancy Parr; Alexandria Commonwealth's Attorney Bryan Porter; Capital Defender Doug Ramseur; defense attorney Edward Riley; Henrico Commonwealth's Attorney Shannon Taylor; and Greensville County Commonwealth's Attorney Patricia

Watson. I served as liaison to the task force.

The task force has produced a proposed reform that would expand the scope of the limited discovery currently permitted under Rule 3A:11. The most significant proposal would permit the accused or defense counsel to inspect reports prepared by law enforcement officers. The proposal gives the commonwealth the option of producing copies of the reports or providing them for review and inspection only. The commonwealth may redact and/or restrict dissemination of material produced pursuant to this rule subject to an accused's or counsel's right to file a motion to challenge the redaction or restriction.

The proposed amendments would also require the reciprocal exchange of witness lists by defense counsel and the commonwealth's attorney and require defense counsel to provide expert witness information as required of commonwealth's attorneys under the current rule. Any material or evidence disclosed or discovered pursuant to the amended rule and filed with the clerk of court shall be placed under seal until it is either admitted as an exhibit at a trial or hearing or the court enters an order unsealing specified material or evidence. The proposal adds that a commonwealth's attorney's duty to provide exculpatory and/or impeachment evidence to an accused supercedes any protection or restriction on

discovery provided pursuant to Rule 3A:11.

The task force's proposal does not authorize the discovery or inspection of the commonwealth's attorney's work product to include internal reports, memoranda, correspondence, legal research, or other internal documents made by the commonwealth or its agents in preparation for trial. Also it does not authorize the discovery of the names and/or personal identifying information of confidential informants whom the commonwealth does not intend to call at trial and with regards to whose identity the commonwealth asserts it holds a privilege.

In addition, the task force has proposed significant revisions to Rule 3A:12 for the issuance of subpoenas in criminal matters.

Reform of the rules regarding criminal discovery has been attempted and failed, but not for want of diligent effort. The work product of the VSB Criminal Discovery Reform Task Force is a significant achievement. Members of the task force are to be congratulated for their effort and success in this endeavor, particularly Judge Bob Humphreys who undertook what may have looked like a hopeless task at times. He and the task force have the thanks of the lawyers of Virginia and the Virginia State Bar.

To see a redlined version of the proposed amendments use this link: <http://www.vsb.org/docs/prop-rule-3A11.pdf>