



November 12, 2013

2013-R-0433

## **CRIMINAL DISCOVERY RULES**

By: Christopher Reinhart, Chief Attorney

You asked for a summary of the discovery rules governing the sharing of information between prosecutors and defendants in state criminal proceedings.

### **SUMMARY**

Discovery is the process by which opposing parties in a lawsuit obtain documents, information, and other evidence from each other prior to trial. In criminal cases, the opposing parties are prosecutors and defense attorneys (or the defendants themselves if they are not represented by counsel). Court rules generally govern the discovery process. A few statutes also apply, such as those governing privileged communications between certain people (for example, communications between attorneys and their clients and psychiatrists and their patients). Constitutional rights may also affect the disclosure of information during discovery. This report focuses on disclosures in criminal cases required during discovery under court rules. References to the "defendant" include defense counsel.

Under court rules, if the defendant requests it, the prosecutor must disclose to the defendant the existence of a number of items, provide copies of them, or allow the defendant to inspect and copy them. This includes (1) exculpatory (favorable to the defendant) information and certain reports and statements; (2) names and addresses of witness for trial; and (3) law enforcement reports, affidavits, and statements. Certain

---

Sandra Norman-Eady, Director  
Phone (860) 240-8400  
FAX (860) 240-8881  
<http://www.cga.ct.gov/olr>

**Connecticut General Assembly**  
Office of Legislative Research

Room 5300  
Legislative Office Building  
Hartford, CT 06106-1591  
[Olr@cga.ct.gov](mailto:Olr@cga.ct.gov)

information is not subject to disclosure, such as internal prosecutorial or law enforcement documents, legal research, and records identifying the prosecutor's opinions or theories.

If the prosecutor requests it, the rules require the defendant to disclose to the prosecutor the existence of certain items in writing and make them available for examination and copying. This includes (1) items the defendant intends to offer as evidence and (2) expert reports or statements that will be used as evidence or are related to a witness' testimony. On request, defendants must also disclose whether they will raise certain defenses or alibis and provide witness' names, addresses, and statements.

On a motion by the prosecutor, the court can order a defendant to undergo a psychiatric examination or provide nontestimonial evidence. Nontestimonial evidence includes asking the defendant to move or speak in a lineup or submit to fingerprinting. The prosecutor or defendant can also seek a court subpoena to depose certain witnesses.

The rules require the prosecutor and defendant to make good faith efforts to secure documents or objects that are the subject of discovery orders (Conn. Practice Book (CPB) §§ 40-2 and -5). They must notify the other party and the court if additional material that must be disclosed is discovered (CPB § 40-3). But a prosecutor or defendant can object to, and a court can deny, disclosure of an item. The court can also grant a protective order to deny or restrict disclosure.

## **DISCLOSURE BY PROSECUTORS AND DEFENSE ATTORNEYS**

Table 1 compares the information, documents, and items that the prosecutor and defense attorneys must disclose to each other under the criminal discovery rules. Generally, one party must make a request in writing and the opposing party must respond by disclosing the existence of the relevant information or items in writing and provide an opportunity for inspection and copying.

**Table 1: Disclosures under the Criminal Discovery Rules**

<i>Type of Disclosure</i>	<i>From Prosecutors to Defendants</i>	<i>From Defendants to Prosecutors</i>
<p>Required Disclosures (CPB § 40-11)</p>	<ul style="list-style-type: none"> <li>• Information or materials favorable to the defendant (exculpatory)</li> <li>• Books, tangible objects, papers, photographs, or documents within a government agency's possession, custody, or control that (1) the prosecutor intends to offer as evidence, (2) are material to the preparation of the defense, or (3) were obtained from or purportedly belong to the defendant</li> <li>• Copies of the defendant's prior criminal record, if any, which are known or could be known by the prosecutor and are within the prosecutor's possession, custody, or control</li> <li>• Experts' reports or statements related to the charged offense including results of physical and mental examinations and scientific tests, experiments, or comparisons which are material to the preparation of the defense or the prosecution intends to use at trial</li> <li>• Arrest or search and seizure warrants related to the charged offense</li> <li>• Written, recorded, or oral statements concerning the offense made by the defendant or a codefendant, before or after arrest, to a law enforcement officer or person directed by or cooperating with an officer</li> <li>• Relevant statements of coconspirators the prosecutor intends to offer in evidence at any trial or hearing</li> </ul>	<ul style="list-style-type: none"> <li>• Books, papers, documents, photographs, or tangible objects the defendant intends to offer as evidence at trial except for any communications from the defendant</li> <li>• Experts' reports or statements made in connection with the case, including results of physical or mental examinations and scientific tests, experiments, or comparisons (1) the defendant intends to offer as evidence at trial or (2) relating to the anticipated testimony of a person the defendant intends to call as a witness</li> </ul>
<p>Witnesses (CPB §§ 40-10 and -13)</p>	<ul style="list-style-type: none"> <li>• Names and addresses of people the prosecutor intends to call as witnesses</li> <li>• Records of their felony convictions or pending criminal charges known to the prosecutor</li> </ul> <p>(The rules limit disclosures (1) to non-represented defendants and (2) of police or correction officer's personal residential addresses and other addresses under certain circumstances)</p>	<ul style="list-style-type: none"> <li>• Names and addresses of people the defendant intends to call as witnesses</li> <li>• Any witness statements, other than the defendant's, the defense or their agents possess if the statements relate to the witness' testimony</li> </ul>

Table 1 (continued)

<i>Type of Disclosure</i>	<i>From Prosecutors to Defendants</i>	<i>From Defendants to Prosecutors</i>
Law Enforcement Reports, Affidavits, and Statements (CPB §§ 40-10 and -13A)	<ul style="list-style-type: none"> <li>Copies of all statements, law enforcement reports, and affidavits regarding the charged offense within the possession of the prosecutor and his or her agents (including law enforcement officers)</li> </ul> (The rules limit the use and further disclosure of this information)	No obligation
Derivative Evidence (CPB § 40-28)	Copies of experts' reports derived from or based on the prosecution's examination of materials the defendant provided the prosecution during discovery	No obligation
Discretionary Disclosure (CPB §§ 40-12 and -27)	Other relevant material and information required to be disclosed by the court for good cause	Same
Information Not Subject to Disclosure (CPB §§ 40-14 and -31)	<ul style="list-style-type: none"> <li>Reports, memoranda, or other internal documents made by a prosecutor or law enforcement officer in connection with the investigation or prosecution of the case</li> <li>Legal research</li> <li>Records, correspondence, reports, or memoranda to the extent they contain a prosecutor's opinions, theories, or conclusions</li> </ul> (These provisions do not shield exculpatory material, witness identities, or law enforcement records that must be disclosed)	<ul style="list-style-type: none"> <li>Reports, memoranda, or other internal defense documents made by the defendant, the defendant's counsel, or any person employed by the defendant in connection with the investigation or defense of the case</li> <li>Legal research</li> <li>Records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the defendant, the defendant's counsel, or any other person employed by the defendant in connection with the investigation or defense of the case</li> </ul> (These provisions do not shield the required disclosures about witnesses and scientific and medical reports)

Table 1 (continued)

<i>Type of Disclosure</i>	<i>From Prosecutors to Defendants</i>	<i>From Defendants to Prosecutors</i>
Certain Defenses and Related Documents (CPB §§ 40-17 and -18)	No obligation	<ul style="list-style-type: none"> <li>• Notice of intent to raise an affirmative defense of mental disease or defect or of extreme emotional disturbance at the time of the alleged offense</li> <li>• Notice of intent to introduce expert testimony related to one of these defenses or another condition related to whether the defendant had the mental state required for the charged offense</li> <li>• Copies of reports of physical or mental examinations of the defendant prepared by an expert that the defendant intends to call as a witness</li> </ul>
Alibi Disclosures (CPB §§ 40-21 to -24)	If the defendant files a notice of alibi defense, the prosecutor must file a notice stating the names and addresses of the witnesses it will use to (1) establish the defendant's presence at the scene of the offense and (2) rebut the defendant's witnesses	Notice regarding an alibi defense, where the defendant claims to have been at the time of the alleged offense, and the names and addresses of the witnesses the defendant will use to establish the alibi

**OTHER TYPES OF EVIDENCE AND DISCLOSURE**

***Requested Psychiatric Examinations***

The rules allow the court, on a prosecutor's motion, to order the defendant to submit to a psychiatric examination by a psychiatrist designated by the prosecutor. Statements made by the defendant during such an examination cannot be used as evidence of his or her guilt. The defendant must receive a copy of the psychiatric examination report (CPB § 40-19).

***Nontestimonial Evidence***

On a motion by the prosecutor, the court can order a defendant to participate in a reasonably conducted procedure to obtain nontestimonial evidence if there is probable cause to believe the evidence sought (1) may be of material aid in determining whether the defendant committed the offense charged and (2) cannot practicably be obtained from other sources. Nontestimonial evidence includes asking the defendant to move or speak in a lineup, wear particular clothing, provide

handwriting samples, submit to photographs or fingerprinting, submit hair or blood samples, or have a physical exam. Any evidence obtained by the prosecutor from the defendant may be used only with respect to the charged or a related offense. The prosecutor must give the defendant a report of the procedure's results (CPB §§ 40-32 to -38).

On a motion by the defendant and if the results could contribute to an adequate defense, the court can order the prosecutor to:

1. arrange for the defendant's participation in one the above-described procedures or
2. have a scientific comparison made between two similar items of nontestimonial evidence the prosecutor possesses or controls (CPB §§ 40-38 and -39).

### ***Depositions***

In felony cases, on request of a party, the court can issue a subpoena requiring a person to appear for a deposition if the person's testimony may be required at trial and it appears the person:

1. will, because of physical or mental illness or infirmity, be unable to be present to testify at any trial or hearing;
2. resides outside of Connecticut, and his or her presence cannot be compelled;
3. will otherwise be unable to be present to testify at any trial or hearing; or
4. is an expert who examined a defendant regarding a defense of mental disease or defect or extreme emotional disturbance and has failed to file a written report as required by the rules.

Any statement by a potential deponent in the possession of the prosecutor or defendant must be disclosed at the deposition if disclosure would be required at trial (CPB § 40-44 et seq.).

CGS § 54-86 also addresses depositions but the court rule applies more broadly.

## **OBJECTION TO DISCLOSURE AND PROTECTIVE ORDERS**

### ***Objections***

The prosecutor or defendant can object in writing to disclosure of any information or item if the objecting party (1) believes there is good cause an item or information should not be disclosed or (2) reasonably believes a protective order is warranted. The court, after a hearing, determines whether the information or items are disclosed (CPB § 40-8).

### ***Protective Orders***

After a hearing on a motion for a protective order, the court can deny or restrict disclosure or inspection; defer disclosure; or place reasonable conditions on inspecting, photographing, copying, or testing the items to protect their evidentiary value.

In deciding on the motion, the court can consider:

1. the motion's timeliness;
2. protecting witnesses and others from physical harm, threats, bribes, economic reprisals, and intimidation;
3. maintaining informants' secrecy for the effective investigation of criminal activity;
4. protecting confidential relationships, privileges, and communications recognized by law; and
5. any other relevant facts or factors (CPB §§ 40-29 and -40 et seq.).

CR:ro