

Law

Prosecutors, defense bar spar over changes

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The judiciary's rules committee has proposed modifications to the rules of discovery in criminal trials that would expand both what prosecutors must provide to the defense and what the defense must give prosecutors.

After hours of debate Friday, the Standing Committee on Rules of Practice and Procedure voted on the modifications, which the Court of Appeals will consider at a hearing next month.

The proposed changes to the pretrial discovery rules would require the state to give the defense all defendant and witness statements. The changes would also compel the defense to provide prosecutors with the names and addresses of alibi witnesses, character witnesses and witnesses raising an insanity defense. Currently, only the names of alibi witnesses must be given to the state.

The rules committee voted against forcing defendants to provide prosecutors with the identities of all witnesses.

A former president of the Maryland Criminal Defense Attorneys' Association argued that disclosing all witnesses to the state would give police and prosecutors an opportunity to intimidate the witnesses into silence.

Police could "send out a person with a very shiny badge to have a very close conversation" with the witness, Greenbelt lawyer Timothy S. Mitchell said.

Committee vice chairwoman Linda M. Schuett pointed out that the prosecution must disclose the names of all the witnesses it expects to call to testify, which exposes those witnesses to intimidation from the defendant.

"Couldn't the defendant send someone out with a very shiny gun?" she asked.

Committee member Frank M. Kratovil Jr., state's attorney of Queen Anne's County, argued that it is only fair to require the defense to disclose all of its witnesses. It would better "allow the trier of fact to reach a fair and appropriate conclusion," he said.

Criminal defense attorneys, however, said that disclosing all witnesses would give an unfair advantage to the state, which already starts out ahead because of its greater resources.

"I think this tilts the seesaw in a direction that really leans heavily toward the state," said Richard M. Karceski, a criminal defense lawyer and chairman of the criminal subcommittee of the rules committee. The proposal would "give[] [the] state what the defense to the charges is before the bell even rings."

Most of the proposed rule changes follow the American Bar Association's discovery guidelines. One major exception is the rule on defense discovery obligations; the ABA guidelines require the defense to disclose all witnesses before trial.

Karceski said the committee has for "many months going into years" tried to bring the discovery rules more into line with the ABA guidelines. The most recent attempt was in its 158th report to the Court of Appeals, but the court was not satisfied with the proposals and asked the committee to re-examine them.

The new set of proposals will be considered at a hearing at the top court on April 7 at 2 p.m.

Limits on disclosure

Also at Friday's meeting, the committee declined to require prosecutors to disclose the names and addresses of everyone with whom the state has spoken, rather than just those whom the state intends to call as witnesses.

Committee member Ellen L. Hollander, a judge on the Court of Special Appeals and a former prosecutor, said the knowledge that witnesses' names could be given to the defense even if their testimony is unnecessary will further discourage already-reluctant witnesses from speaking with police.

"I think that is very, very broad," Hollander said. "I think it will have a terrible chilling effect. We're putting our heads in the sand to say there isn't a problem with people coming forward."

The committee also defeated a proposal to require prosecutors to give the defense all witness statements that are in any way inconsistent with statements by that witness or another, rather than only the statements that are "materially" inconsistent.

Mitchell advocated for the word "materially" to be deleted because, he said, it will allow the state to determine what inconsistencies are relevant to the case.

But Larry Doan, head of the general trial division in the Baltimore City State's Attorney's Office, said that it's "virtually impossible" to have two statements that are absolutely identical in every detail.

Karczeski argued for keeping "materially."

"I don't think we can do it any other way that makes rational sense," Karczeski said.

There was also a protracted debate on the extent of disclosure of information held by others in the attorney's office. Prosecutors argued unsuccessfully that if some of the proposed disclosure rules, such as the obligation to tell the defense if any state witnesses are facing criminal charges, applied to their entire offices, it would be overly burdensome.

"You're getting ready to go to court, you have a robbery, you have three witnesses," Baltimore County State's Attorney Scott D. Shellenberger said. "Do you have to send an e-mail out to everyone [in the state's attorney's office] saying, 'Does anyone know anything about these guys?'"

The committee also voted to add to the discovery rules that prosecutors must tell the defense if they know of any psychiatric condition on the part of a witness that could impact the witness's ability to testify.

Harford County State's Attorney Joseph I. Cassilly protested the addition, arguing that the defendant could use such information to "embarrass or harass the victim." He also expressed worry that, if the disclosure rules apply to staff of the state's attorney's office, victim-witness assistance workers within the prosecutor's office could be required to talk about their clients' psychiatric conditions.

Mitchell protested that argument.

"What he's saying is, 'Let's err on the side of protecting the person with a medical condition rather than on revealing the truth,'" he said.