

## Oregon Discovery Charging Research

NACDL was approached by Mae Lee Browning of the Oregon Criminal Defense Lawyers Association (OCDLA), regarding discovery charging practices in Oregon. Oregon's county DA offices direct bill the Office of Public Defense Services (OPDS) for discovery. Ms. Browning inquired whether this was the norm for the rest of the country.

Katherine E. Jensen, Resource Counsel with NACDL was assigned to this Project. She reached out to Public Defenders in all fifty states, with the exception of New York, where she spoke with an Assistant District Attorney. As of this date, one state has yet to respond to Katherine's inquiry: Colorado.

The data suggests that Oregon is an outlier when it comes to discovery charging practices across the country. The majority of states do not charge for discovery. At times, in many states the defense does provide CDs/DVDs/flash drives, paper, etc. Of the states that do charge for discovery, it is a minimal fee and only covers the actual cost of the item used to provide discovery.

Below are summaries of the information received regarding discovery in each state that responded. In addition to these summaries, a spreadsheet has been prepared to include the basic information from each responding state.

**Alabama** – Discovery is received in paper form, on CDs and flash drives. They do not have e-discovery. They do not pay for discovery; nor does anyone in Alabama. Discovery is governed by Rule 16 of the Alabama Rules of Criminal Procedure.

**Alaska** – Discovery is received digitally, through email. The defense files an electronic motion for discovery with the court. The court rules on the motion and then the county attorney forwards the police report electronically. Sometimes defense will pick up a CD for footage from body worn cameras. They do not pay for discovery and are not aware of any rule that says the DA can charge for discovery. Discovery is governed by Rule 16.

**Arizona** – Discovery is received primarily electronically. The prosecutor uploads it to the website and the defense downloads it. They use LawPHX.net/ediscovery. Costs vary depending on the jurisdiction. In some jurisdictions the cost is waived. In Tempe and Mesa, there is a price list of all discovery. There is no charge at the county level. At the municipal level, the court pays the prosecutor's office. The rule says you can be charged for copies. It is believed that the costs are capped in the rule (found in Rules of Criminal Procedure), but the rule number was unknown. There is no additional charge for supplemental discovery. Some defense attorneys charge the DA when reciprocal discovery is provided, but they do not get paid. Discovery is governed by Rule 15.2 – 15.7.

**Arkansas** – Discovery is usually provided on a CD or flash drive. Sometimes they do receive paper discovery. They do not pay for discovery in Arkansas. Local court rules are prohibited in the state of Arkansas. They have Criminal Rules of Procedure.

**California** – Discovery is received in paper form, on CD/DVD/flash drive and via e-discovery. No one pays for discovery in California, but defense occasionally provides thumb drives or pays for the thumb drives provided by the DA. Discovery is governed by California Penal Code 1054.

**Colorado** – No response.

**Connecticut** – There have been recent rule changes that call for e-discovery, but that is just getting off the ground. The defense does not pay for discovery in Connecticut, but they do provide paper or flash drives in certain situations. Discovery is governed by the Connecticut Practice Book, Chapter 40 (40-1 through 40-58). There is a statute that somewhat codifies the rule, but it's not very all encompassing. It really does not govern their day-to-day discovery – the practice book governs their day-to-day discovery. Statute 54.86C is the statute regarding *Brady* and statute 54.86 is the statute regarding depositions, which are allowed where the defendant may be imprisoned for more than one year.

**Delaware** – Discovery is received in paper form and on DVD. The defense does not pay for discovery. Discovery is governed by Delaware Superior Court Rule 16.

**Florida** – Discovery is received in paper form, on CD/DVD/flash drive and via e-discovery. PDs were never billed but they tried to bill private attorneys for reproduction. There have been private attorneys with outstanding balances, but they still received the discovery. Each circuit is different. Some circuits charge for copying or you provide the CD/DVD or thumb drive depending on the amount of discovery.

**Georgia** – Discovery is received in paper form, and on CD/DVD/flash drive. Defense is not charged for discovery in Georgia. Discovery is governed by OCGA 17-16-4.

**Hawaii** – Discovery is mainly received via e-discovery, but on occasion they will receive CDs/DVDs. They are charged for discovery, but it is minimal. For instance, 911 recordings, photos and body cam videos are a flat fee of .50. Those are usually placed on a DVD and then they are charged .50 for the DVD that contains the photos or body cam videos. If they send photos and body cam videos, they will go on two separate discs for a total of \$1. If they are sending documents, it's .10/page. If a thumb drive is needed, the defense will provide it. The charging practices are different among the islands. The defense does not charge the DA for reciprocal discovery. Discovery is governed by Hawaii Rules of Penal Procedure, Rule 16.

**Idaho** – Discovery is received via e-discovery (evidence.com). If it's a massive file, they may receive it on CD or thumb drive. The defense is not charged for discovery in Idaho.

**Illinois** – The bulk of discovery is received via e-discovery. Most is received by email. Whatever is too large to send by email is provided on DVD or thumb drive. The defense provides the DVDs and thumb drives to the DA because they are only required to make the materials available to defense to review. It is unknown if this is the practice throughout the state. Discovery is governed by the Illinois Supreme Court Rules.

**Indiana** – Discovery is provided via e-discovery. No one pays for discovery in Indiana. Discovery is governed by Local Rules – Court Rule 107. Indiana does not have a statewide PD system – it's county by county.

**Iowa** – Discovery is received in paper form, on CD/DVD/flash drive and via e-discovery. Costs vary depending on the jurisdiction. Some counties don't charge at all and some charge for a CD – if they give you a CD, they want you to replace the CD. Some counties charge for almost everything. There is some legislation hopefully about to pass limiting charges to \$10 for each request for everything except e-discovery which would be free. The costs are not uniform. Most jurisdictions simply say give us a CD for the one we just gave you. The legislation that may pass soon would allow for charges in reciprocal discovery. There is no rule nor statute that governs the cost of discovery. Discovery is governed by the Rules of Criminal Procedure, but the exact rule number was not known.

**Kansas** – The vast majority of counties receive discovery on CD/DVD/flash drive. The larger counties are moving to e-discovery. They have 105 counties but only 5 of them are major contributors to the criminal cases they see. They generally don't pay for discovery. Occasionally, they have to ask for special documents and may have to pay for random copies from the police department. The biggest problem has been the infrastructure cost of participating in e-discovery due to server space and process. It's not a fee but it is the salary of an employee. Defense funding is always lagging where the prosecutor's is not. There is a statute that deals with a general overview of discovery, and there's a bit of case law. There are a lot of local rules for the individual counties. Discovery charging practices and production vary county by county, but most counties have adopted the "if we are paying" it's a nominal fee for the actual memory stick or copies for particular items, depending on the circumstances.

**Kentucky** – Discovery is usually received in paper form, often accompanied by a disc. For particularly voluminous things, the prosecutor will ask for a flash drive, put the items on the flash drive and send it back to defense counsel. Other than providing a flash drive here and there, there is no cost for discovery in Kentucky. Discovery procedure is governed by Court Rule RCR 7.24 and RCR 7.26. They also have a bill of particulars rule – RCR 6.22. Every district in Kentucky has local rules which can also address the issue but don't supplant the RCRs.

**Louisiana** – Discovery is received in paper form, and on CD/DVD/flash drive. There is no charge for discovery in Louisiana, but for digital discovery, the defense does provide a jump drive. The discovery procedure is governed by statute, but the statute number was not known.

**Maine** – Discovery is mostly received via e-discovery. In some instances, it may be provided on disc supplied by the prosecutor. The defense is not charged for discovery in Maine. Discovery is governed by Court Rule 16.

**Maryland** – Discovery is mostly received electronically, but sometimes it is received on CD or paper. The defense is not charged for discovery in Maryland. Discovery procedure is governed by Maryland Rules for Circuit Court, Rule 4263.

**Massachusetts** – Discovery is provided in paper form, on CD/DVD/flash drive, and via e-discovery. The defense does not pay for discovery in Massachusetts. When a flash drive is needed, the defense will provide one to the DA. Discovery is governed by Rule 14 of the Mass. Rules of Crim Pro.

**Michigan** – Discovery is provided in paper form, on CD/DVD/flash drive and via e-discovery. The defense does not pay for discovery in Michigan. The Michigan demand for discovery is governed by MCR 6.201.

**Minnesota** – Discovery is provided in various forms, depending on the jurisdiction. The jurisdiction I spoke with (Hibbing) receives it via e-discovery. The PD does not pay for discovery in Minnesota, but the Minnesota Rules of Criminal Procedure state that you cannot charge for discovery that is served on a client who is represented by a PD and if the person is represented by a private attorney, a reasonable charge may be made to cover the cost of reproduction. Rule 9.05 of the MN Rules of Criminal Procedure governs discovery procedures.

**Mississippi** - Discovery is usually provided in paper form and on CD/flash drive. The defense is not charged for discovery in Mississippi. Discovery procedure is governed by the Mississippi Rules of Criminal Procedure, Rule 17.2.

**Missouri** – Discovery is provided via CD/thumb drives and via e-discovery. The defense is not charged for discovery, but they do provide CDs/thumb drives to the prosecution.

**Montana** – Discovery is provided in paper form, and on CD/DVD/flash drive. Defense is not charged for discovery but may provide the CD/DVD/flash drive.

**Nebraska** – Discovery is provided via email and CD. The defense does not pay for discovery. Discovery procedure is governed by statute – Nebraska Revised Statute 29-1912.

**Nevada** – Discovery is provided in paper form, on CD/DVD/flash drive, and via e-discovery. The defense does not pay for discovery in Nevada. Discovery is governed by case law.

**New Hampshire** – Discovery is mostly provided via e-discovery. On occasion, it will be on CD and via hard copy. The defense does not pay for Discovery. Discovery is governed by Rule 12 of Rules of Criminal Procedure.

**New Jersey** – Discovery is provided usually via e-discovery. Sometimes, discovery containing media will be provided on flash drive or DVD. The defense does not pay for discovery. Prior to the rule changing, discovery was provided in paper form and defense would be billed, but that is no longer the situation. Discovery is governed by Rule 3:13-3 of the Rules Governing Criminal Procedure.

**New Mexico** – Discovery is provided in various forms and it's different in each district. They have 13 districts. They are trying to move to paperless. Sometimes they receive discovery via e-discovery. They do not pay for discovery. Discovery procedure is governed by Rule 5501 of the New Mexico Rules Annotated.

**New York** – Discovery is provided via Microsoft One Drive. The defense does not pay for discovery. Discovery procedures are governed by Statute CPL 245.

**North Carolina** – Discovery is provided in paper form, and on CD/DVD/flash drive. Most will come in the form of data transmitted on the state discovery system. Some will come on flash drive and CD/DVD. The defense does not pay for discovery. Discovery is governed by statute, Chapter 15A.

**North Dakota** – Discovery is provided in paper form, on CD/DVD/flash drive and via e-discovery. The defense does not pay for discovery. North Dakota adopted the Federal Rules of Criminal Procedure, so they follow those as far as discovery with a few small nuances.

**Ohio** – Initial discovery is provided on CD or flash drive depending on the size. Supplemental discovery usually is provided in paper form. The defense does not pay for discovery. Discovery is governed by Criminal Rule 16.

**Oklahoma** – Discovery is provided in paper form, via email, and on CD/DVD/flash drive. The defense does not pay for discovery, but they do provide the CDs/DVDs/flash drives to the DA. Discovery is governed by Code Title 22 section 2001 and 2002. Under 2002(s), the DA can obtain reasonable costs of duplication from the party requesting discovery, but the PD is never charged.

**Pennsylvania** – Discovery is provided in paper form, on CD/DVD/flash drive and via e-discovery. A clerk in the DA's office posts all discovery to a mutually shared drive and then the PD can print or look at the discovery. Videos are provided on a CD or flash drive usually. The defense does not pay for discovery. Discovery procedures are governed by PA Rule of Criminal Procedure 573.

**Rhode Island** – Discovery is provided in paper form and via e-discovery. The defense is not charged for discovery, but they sometimes provide thumb drives. Discovery is governed by Rule 16 and Rule 26.1.

**South Carolina** – Discovery is provided in paper form, on CD/DVD/flash drive and via e-discovery. The defense does not pay for discovery, but when they try to obtain records that are produced outside of the solicitor's office, they usually are charged a fee. Discovery is governed by Rule 5 of the South Carolina Rules of Criminal Procedure.

**South Dakota** – Discovery is provided in paper form, on CD and via e-discovery. They are a unique county (Deadwood) because they share an IT department with the DA. They have a server that is designed for the DA to upload discovery so defense can download it and place it in their own files. The defense does not pay for discovery. Discovery is governed primarily by court rule, SDCL Chapter 23A-13 1-18.

**Tennessee** – Discovery is provided in paper form, on DVD/flash drive and via e-discovery. The defense does not pay for discovery. Discovery is governed by Tennessee Supreme Court Rule 16.

**Texas** – Discovery is provided in paper form, on CD/DVD/flash drive, and via e-discovery. The defense does not pay for discovery but sometimes is asked to provide thumb drives or external hard drives. Discovery is governed by statute in Texas, but the number was not known.

**Utah** – Discovery is provided via e-discovery and sometimes on CD/flash drive. The defense does not pay for discovery, but sometimes is asked to provide a thumb drive. Utah Criminal Rule of Procedure 16 governs discovery.

**Vermont** – Discovery is provided in paper form, on CD/DVD/flash drive and via e-discovery. The defense does not pay for discovery. Discovery is governed by the Vermont Rules of Criminal Procedure, specifically, Rules 16.1, 16.2, 15 and 17.

**Virginia** – Discovery is provided in paper form, on CD/DVD, and some on evidence.com. It varies by jurisdiction. No one is charged for discovery in Virginia, but defense at times will provide paper or CDs/DVDs. Discovery is governed by Rule 3A:11.

**Washington** – Discovery is provided electronically. Defense receives an email with a dropbox and the discovery is downloaded and printed. The prosecutor sends a link to a shared storage space, and it is downloaded from there. The link is only valid for 2 weeks. Defense is not charged for discovery, but they bear the cost of printing, flash drives/CDs. They receive a budget from the county commissioners to purchase paper and other supplies. Discovery is governed by court rule, Criminal Rule 4.7 (CrR 4.7) and Superior Court by CrLJ 4.7.

**West Virginia** – Discovery is provided via email, and on CD/flash drive. The defense does not pay for discovery. Discovery is governed by Rule 16 of the WV Rules of Criminal Procedure.

**Wisconsin** – Discovery is provided in paper form, on CD/DVD/flash drive, and via e-discovery. Wisconsin has a statewide system with administrative rules regarding cost of discovery. The rule can be found in the Wisconsin Admin Code, Public Defender section. The maximum charge for a disc is \$5, and .20 is the maximum charge per copy. Defense tried to charge the DA for reciprocal discovery, but it was too much of a burden. Not every county charges for discovery, but most do. If there is a big case, the AG generally steps in to prosecute and only charge for copies. Discovery is governed by statute, WI 973.23.

**Wyoming** – Discovery is provided in paper form, on CD/DVD/flash drive, via email and via e-discovery. Defense does not pay for discovery but on occasion does provide a thumb drive. Discovery is governed by Rules 16 and 26.2 of the Wyoming Rules of Criminal Procedure.