

**SUPPLEMENTAL
REPORT
OF THE
SUPREME COURT COMMITTEE
ON
CRIMINAL PRACTICE
2023 – 2025 TERM**

March 20, 2025

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I. Referral Related to eDiscovery Exchange in Criminal Matters and eDiscovery Access for Incarcerated and Detained Defendants

By way of letter dated October 2, 2024, the Administrative Director of the Courts, on behalf of the Judicial Council, sent a referral to the Criminal Practice Committee outlining concerns related to delays in criminal proceedings caused by issues in preparing, exchanging, and reviewing discovery—in particular digital and video discovery. Identified concerns included the inability to access and view digital discovery, at times related to the incompatibility between devices and the systems used to view files; the reviewing and editing requirements of the Attorney General’s Office which, when coupled with the overwhelming volume of discovery, require substantial time to edit and review recordings; policies that restrict access to external viewing devices brought by attorneys to detention facilities; time constraints imposed on detained or incarcerated defendants that limit the ability to fully view discovery; the distant locations of some detention facilities; and more.

In considering the referral, the Committee determined that the issues could be divided into three general categories: (1) pre-exchange discovery issues; (2) post-exchange discovery issues; and (3) access issues for incarcerated and detained clients. The Committee created three subcommittees, each chaired by a judge member, to address each category of issues. At the time of publication of the Criminal Practice Committee’s 2023-2025 Term Report, the subcommittees had not

completed their work. The work of the subcommittees has since concluded, and their charges, findings, and the final recommendations of the Criminal Practice Committee are summarized below.

A. Subcommittee on the Pre-Exchange Phase of eDiscovery and Video Discovery

The Subcommittee on the Pre-Exchange Phase of eDiscovery and Video Discovery was charged with evaluating whether to amend the Court Rules or make any non-Rule recommendations to support the processes before the prosecutor and defense counsel have exchanged discovery, in an effort to expedite the process. This can include, but is not limited to, the preparation of lengthy digital and video discovery, such as body-worn camera (BWC) footage or data extraction from an electronic device, such as a cellular phone.

After convening, the subcommittee made no proposed recommendations for the larger Criminal Practice Committee to consider. In coming to this conclusion, the subcommittee gathered and reviewed information regarding statewide pre-exchange discovery practices. Members determined that most surveyed counties opted to redact BWC footage within the County Prosecutors' Offices and distribute that discovery using Axon, Evidence.com, or NJeDiscovery.com—software applications that deliver discovery through an online cloud platform. The minority of responding counties release unredacted BWC and video footage with companion consent orders that limit the copying or redistribution of the discovery.

The subcommittee collected and reviewed consent orders currently utilized across the state in consideration of developing a model order for use statewide. After review and discussion, members determined that any proposed order could be seen as encouraging the use of consent orders, a practice a subcommittee member noted has resulted in an increase in litigation, and another member anticipated would likely result in objection, litigation, and undue delay. Ultimately, subcommittee members recommended against pursuit of a model consent order, agreeing that such a proposal would encourage their continued use and potentially frustrate a more appropriate statewide movement towards electronic discovery systems. Upon presentation, the larger Criminal Practice Committee agreed.

Finally, the subcommittee reported to the Criminal Practice Committee that they had identified and discussed the most common issue related to pre-exchange discovery delays—local disagreements as to which law enforcement agency (the arresting or the prosecuting agency) is responsible for redacting digital or video discovery. After discussion, the subcommittee determined that because the crux of this issue is one of resource allocation among law enforcement agencies, it is internal to law enforcement. Implementation of a uniform statewide process for redaction was discussed and similarly determined to be internal in nature. The subcommittee agreed that because of this, neither should be addressed by recommendation from the subcommittee or Criminal Practice Committee.

B. Subcommittee on the Post-Exchange Phase of eDiscovery and Video Discovery

The Subcommittee on the Post-Exchange Phase of eDiscovery and Video Discovery was tasked with evaluating whether to amend the Court Rules or make any non-Rule recommendations in support of the processes utilized after the prosecutor and defense counsel have exchanged discovery. This can include, but is not limited to, issues related to ensuring compatibility to be able to access lengthy digital and video discovery, such as requiring standardized media formats or prohibiting proprietary software, and/or establishing timeframes for reviewing discovery or making further demands for discovery after initial receipt.

This subcommittee also made no proposed recommendations for the larger Criminal Practice Committee to consider. After convening, the subcommittee determined that the bulk of post-exchange issues were user-related, generally due to counsel's lack of familiarity with the process or software, and were all addressed between the parties or, if needed, under the impartial management of the trial judge. When the subcommittee reported to the full Criminal Practice Committee, members discussed potentially developing minimum standards among the various agencies that would bridge the technology gap between those agencies and defense counsel attempting to navigate the many different ways of obtaining discovery. Ultimately, this proposal was not pursued, based on the subcommittee and Committee's determination that the identified issues were not systemic.

C. Subcommittee on Access Issues for Incarcerated or Detained Clients

The Subcommittee on Access Issues for Incarcerated or Detained Clients was responsible for evaluating whether to amend the Court Rules or make any non-Rule recommendations in support of the discovery process for incarcerated or detained clients at the jails, prisons, or other custodial facilities (“custodial facilities”). The subcommittee benefited from the participation of external stakeholders, including County Jail Administrators and representatives from the Department of Corrections.

The initial work of the subcommittee included presentation to the Criminal Practice Committee of a list of identified issues relating to incarcerated and detained clients’ access to discovery. Significant topics included questions surrounding attorney visitation; restrictions on the methods an attorney may provide discovery to clients; logistical and time constraints related to attorney-client review of discovery at the facilities; client access to review electronic discovery without counsel present; and the means of delivering and processing mailed paper discovery at the custodial facility. After review and modification of that list by the larger Criminal Practice Committee, the list was converted into a survey that was distributed to all County Jail Administrators and the Department of Corrections. With the assistance of the subcommittee’s external stakeholders, a response was provided by each custodial facility within the State.

Upon review of survey responses, the subcommittee proposed, and the Committee developed, the below recommendations. These recommendations do not include proposed changes to the Rules and are made acknowledging the genuine efforts made by County Jail Administrators and the Department of Corrections in striving to meet the needs of incarcerated and detained defendants and their defense counsel, while balancing security concerns and staffing issues within each facility. The Committee underscores that the recommendations are not offered as mere administrative convenience to defense counsel or to avoid adjournments—but are intended to guarantee that fundamental constitutional principles and our Rules of Professional Conduct are scrupulously honored. More specifically, the recommendations are intended to facilitate the fundamental necessity that clients meet and confer with counsel for purposes of effectively preparing a defense, which inevitably includes a careful review and analysis of discovery.

“Because the Constitution requires the assistance of counsel and not merely his physical presence, counsel must be effective as well as available.” State v. Sugar, 84 N.J. 1, 17 (1980) (internal citations omitted). In that regard, both the United States and New Jersey Constitution guarantee to criminal defendants the right to counsel. U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defen[s]e.”); N.J. Const. art. I, ¶ 10 (“In all criminal prosecutions the accused shall have the right . . .

to have the assistance of counsel in his defense.”). This guarantee includes the right to the effective assistance of counsel, Strickland v. Washington, 466 U.S. 668 (1984); State v. Fritz, 105 N.J. 42 (1987). This fundamental right is “meaningless if the defendant [is] not able to communicate freely and fully with [defense counsel].” State v. Miller, 216 N.J. 40, 63-64 (2013) (quoting State v. Land, 73 N.J. 24, 30 (1977) (quoting M. Freedman, Lawyers’ Ethics in An Adversary System 8 (1975)). With these constitutional guideposts in mind, commensurate with applying the relevant Rules of Professional Conduct,¹ recommendations of the Criminal Practice Committee related to access issues confronting incarcerated or detained clients follow.

Recommendation 1: Custodial facilities should provide for expanded in-person visits, including evenings and weekends.

The Committee agreed that perhaps the most important recommendation the group makes, and addressing the most common complaints member-judges receive

¹ See RPC 1.2(a) (defense counsel “shall consult with the client and, following consultation, shall abide by the client’s decision on the plea to be entered, jury trial, and whether the client will testify.”); RPC 1.3 (defense counsel “shall act with reasonable diligence and promptness in representing a client.”); RPC 1.4(b) (defense counsel “shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.”); RPC 1.4(c) (defense counsel “shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”)

from defense counsel, is that all custodial facilities should provide an avenue for counsel to have more time to meet with their clients. This should extend beyond regular business hours—during which attorneys can reasonably expect to be in court—and should include evenings and weekends with or without the need for an appointment. The Committee is aware of the individual challenges that each facility may face by adopting this recommendation and that a uniform statewide approach may not be practical.

Recommendation 2: Custodial facilities should provide virtual attorney appointments/visitations.

The Committee commends the many custodial facilities that provide virtual appointments and encourages those that do not to pursue offering virtual appointments for counsel as soon as practicable. This will significantly increase incarcerated defendants' ability to meaningfully confer with counsel and effectively participate in their defense.

Recommendation 3: Custodial facilities are encouraged to maintain sufficient computer facilities to meet the needs of their incarcerated or detained populations.

While many facilities have law libraries and computers or laptops for incarcerated or detained defendants to utilize, it was clear to the Committee that there are not enough computers statewide to allow those defendants to have easy, ready access to review electronic discovery and actively participate in their defense. To that end, the Committee recommends that all custodial facilities make best efforts

to maintain sufficient computer facilities to cover the needs of their individual populations.

Recommendation 4: Custodial facilities should provide incarcerated or detained defendants with reasonable time to review eDiscovery.

While many custodial facilities have law libraries or computers and strive to provide incarcerated or detained defendants with access to review eDiscovery, the Committee was made aware of complaints regarding incarcerated or detained defendants either receiving insufficient time to review eDiscovery or being unable to view eDiscovery at all. The Committee again emphasizes the importance of incarcerated or detained defendants being provided both the means and the time needed to review eDiscovery, which can be at times voluminous, to effectively participate in their defense with counsel.

Recommendation 5: A document detailing visitation and discovery rules at each custodial facility should be maintained and widely shared with defense counsel.

The Committee circulated a survey that included questions related to attorney visitation procedures at detention facilities through resource members representing the Department of Corrections and New Jersey County Jails. The survey results were gathered and summarized by staff in a document distributed to Committee members. This informational document provides, in one location, useful information regarding visiting hours for custodial facilities, whether virtual visits are available, scheduling requirements (if any), and rules surrounding how discovery can be reviewed and

provided to incarcerated clients. While the Committee does not wish to make recommendations as to the visitation and discovery methodology used by each custodial facility, the Committee agrees that the defense bar would benefit tremendously from knowing the unique rules of each facility. Therefore, as a final recommendation, the Criminal Practice Committee suggests that this document be maintained and updated annually by an appropriate bar association and widely disseminated to the criminal bar.

Committee Members and Staff

Hon. Benjamin C. Telsey, A.J.S.C.
Hon. Peter J. Tober, P.J.Cr.
Jeffrey J. Barile, Esq.
Bradley D. Billhimer, Esq.
Raymond M. Brown, Esq.
Narline Casimir, Esq.
Claudia Joy Demitro, Esq.
Frank J. Ducoat, Esq.
Jason E. Foy, Esq.
Laura M. Gambardello, Esq.
Hon. J. Christopher Gibson, J.S.C.
Hon. Robert J. Gilson, J.A.D.
John J. Harrison, CDM
Carol M. Henderson, Esq.
Sarah Hunt, Esq.
Hon. Pedro Jimenez, Jr., J.S.C.
Marissa Koblitz Kingman, Esq.
Van Lane, Esq.
Hon. Marc C. Lemieux, A.J.S.C.

Jessica Lyons, Esq.
Laura Magnone, Esq.
Joseph M. Mazraani, Esq.
Hon. Edward J. McBride, Jr., P.J.Cr. (ret)
Charles B. McKenna, Esq.
Deirdre McMahan, Esq.
John K. McNamara, Esq.
Hon. Stuart A. Minkowitz, A.J.S.C.
Angelo J. Onofri, Esq.
Elizabeth Parvin, Esq.
Kenneth Ralph, Esq.
Hon. Christopher S. Romanyshyn, J.S.C.
Michael R. Rosas, Esq.
Joseph J. Russo, Esq.
Hon. James X. Sattely, J.S.C.
Jeffrey H. Sutherland, Esq.
Hon. Stephen J. Taylor, P.J.Cr.
Donna Westhoven, Assistant Director

Committee Staff:

Luanh L. D'Mello, Esq.
Justin M. Patterson Moles, Esq.

Respectfully submitted,

Benjamin C. Telsey, AJSC

Hon. Benjamin C. Telsey, A.J.S.C., Chair

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