Criminal Discovery in Texas: The Michael Morton Act The Top 22 Things to Know

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HCMJBA
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1. The History

- Sponsored jointly by Senators **Rodney Ellis** (D-Houston) and **Robert Duncan** (R-Lubbock).
- Their staff (especially **Brandon Dudley** (chief of staff and general counsel) and **Megan LaVoie** (general counsel), respectively).

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- **Unanimously** passed both the House and Senate.
- Quickly signed by Governor Perry (the next day) in a public ceremony.
- **Passed at the same time as statutory changes to prosecutors' professional responsibility. A compromise on criminal penalties for prosecutors.**

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- 2. Prosecutors understanding the Act's requirements and ethically and reasonably following its rules.
- 3. **Courts enforcing both the letter of the law and the goals it sought to achieve.**

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- **D should file and serve a separate request for the type of case specific material.**

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- **Segregate the requests between basic and case specific because what is as soon as practicable will vary.**

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- Lawyers should not make prosecutors guess at how the requested items should be produced.
- **39.14 (a) specifically allows that "[t]he state may provide to the defendant electronic duplicates of any documents or other information described by this article."**

6A. What Can Be Requested and What Must Be Produced First Clause of 39.14(a)

- Offense Reports.
- Designated Documents.
- Papers.
- Written or recorded statements of the defendant (see also CCP 38.22 – 20 day requirement) or a witness, including witness statements of law enforcement officers.

6B. What Can Be Requested and What Must Be Produced Final Clause of 39.14(a) – "or"

- Any designated books, accounts, letters, photographs, or objects or other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action . . . .

7. What the State Need Not Disclose

- **The "work product of counsel for the state in the case and their investigators and their notes or report . . . ."**
- **Work product is not defined in the statute.**
- **Look to case law, generally.**
- **But know that what must be expressly produced under the statute trumps old case law on work product.**

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- **Expanded: later portion of 39.14 (a), which provides that "[t]he rights granted to the defendant under this article do not extend to written communications between the state and an agent, representative, or employee of the state."**

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- **Expanded: later portion of 39.14 (a), which provides that "[t]he rights granted to the defendant under this article do not extend to written communications between the state and an agent, representative, or employee of the state."**
- **But, nothing changes the requirements of the Rules of Evidence for production at trial of all statements of any testifying witness.**
- **See Tex. R. Evid. 612 (writing used to refresh memory) and 615 (statement of witnesses in criminal cases).**
- **Tex. R. Evid. 705 (a) trial court's power to require pretrial disclosure of the full underlying facts or data on which a testifying expert may rely.**

8. Exception to the Work Product Exception.

- 39.14 (h) provides that **"[n]otwithstanding any other provision of this article, the state shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged."**

9. Redaction or Withholding of Material under 39.14(c)

- **If only a portion** of the applicable document, item, or information **is subject to discovery under this article,** the state is not required to produce or permit the inspection of the remaining portion that is not subject to discovery and may withhold or redact that portion.
- The state **shall inform the defendant that a portion of the document, item, or information has been withheld or redacted. On request of the defendant, the court shall conduct a hearing to determine whether withholding or redaction is justified under this article or other law.**

9. Redaction or Withholding of Material under 39.14(c)

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- **39.14 only permits a prosecutor not to disclose work product and communication privileged material and child pornography, child abuse videos, and CPS records.**

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- **Even in this instance, exculpatory, impeaching, or mitigating information or evidence must still be disclosed.**

10. Confidentiality of Discovery 39.14 (e) and (f)

- 39.14 (e) is a general provision that applies to any disclosure to third parties of the material received from the State.
- 39.14(f) is an exception to (e) and governs restrictions on disclosure in some instances, of some material, and to some persons on the defense team or witnesses.

10. Confidentiality of Discovery 39.14 (e) and (f)

- **The Defense Team consists of:**

The defendant (under (e) only)

The attorney representing the defendant,

An investigator

Expert

Consulting legal counsel, or

Other agent of the attorney representing the defendant (office staff, for example)

10. Confidentiality of Discovery 39.14 (e)

- **The Defense team:**
- May not disclose to a third party any documents, evidence, materials, or witness statements **received from the state under this article** unless:
- (1) a court orders the disclosure upon a showing of good cause after notice and hearing after considering the security and privacy interests of any victim or witness; or
- (2) the documents, evidence, materials, or witness statements have already been publicly disclosed.

10. Confidentiality of Discovery 39.14 (f)

- **The Defense team (other than the Defendant):**
- May allow a defendant, witness, or prospective witness to view the discovery, but may not allow that person to have copies of the information, other than a copy of the witness's own statement.
- Before allowing that person to view discovery . . . shall redact the address, telephone number, driver's license number, social security number, date of birth, and any bank account or other identifying numbers contained in the document or witness statement.

10. Confidentiality of Discovery 39.14 (f) -- Comments

- **In some instances, such as when a particular location or person's identity may be a central case issue, it may be necessary that some material be shared with witnesses in order to effectively prepare for trial. Nothing in 39.14 prohibits (or could constitutionally prohibit) such basic case work.**

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- **There may be some instances in which disclosure of this restricted information is necessary to fulfill a lawyer's ethical and constitutional obligations – for example, disclosure of an address or date of birth to a witness to confirm or rebut the accuracy of some case related issue. While 39.14 contains no specific remedy for such situations, no statute may abrogate the constitutional right to effective assistance of counsel. The instances in which this may occur and when such disclosure may be necessary to provide effective assistance of counsel will not be common.**

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- **Consider a sealed ex parte motion to the court seeking judicial authority to make the disclosure. Because the potential good cause for the disclosure will necessarily involve disclosure of case related strategy issues, as it does with _Ake_ motions, the motion should be ex parte and under seal. If the court grants permission, which it has the inherent authority to do -- the statute notwithstanding – to ensure that the statute does not become unconstitutional as applied, the lawyer will have both legal and ethical protection.**

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- **Lawyers should be very reluctant to make the decision on their own and ought to seek advance court approval. Though a lawyer's unilateral decision may ultimately prove defensible, it may also come with some serious pain in defending the decision. Caution is warranted.**

11. Ethical Obligations Exception 39.14 (g)

- **Allows a lawyer to make any communication within the scope of the Texas Disciplinary Rules of Professional Conduct, except for the communication of information identifying any victim or witness, including name, except as provided in Subsections (e) and (f), and the other listed personal information and identifiers.**

11A. Making a Complaint

- Nothing in this subsection (g) shall prohibit the disclosure of identifying information to an administrative, law enforcement, regulatory, or licensing agency for the purposes of making a good faith complaint.

12. Pro Se Defendants: Old Rules

- 39.14 (d) provides, "[i]n the case of a pro se defendant, if the court orders the state to produce and permit the inspection of a document, item, or information under this subsection, the state shall permit the pro se defendant to inspect and review the document, item, or information but is not required to allow electronic duplication as described by Subsection (a)."

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- **In those rare instances where payment of costs by the defense may be appropriate (a court is not required to order payment of costs – the permissive "may" allows a court to determine on a case-by-case basis whether it is appropriate), the court cannot order any amount in excess of what would be allowed under the Texas Public Information Act (TPIA). As a general rule, copy costs are limited to ten cents a page, though there may be other costs as well.**

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- **(i) The state shall electronically record or otherwise document any document, item, or other information provided to the defendant under this article.**
- **(j) Before accepting a plea of guilty or nolo contendere, or before trial, each party shall acknowledge in writing or on the record in open court the disclosure, receipt, and list of all documents, items, and information provided to the defendant under this article.**

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- **Defense organizations, prosecutors' offices, and some courts have developed forms that will comply with this statute. Both prosecutors and defense lawyers should obtain and keep a copy of any written record of the discovery.**

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- **The degree of detail will depend on the specific item, but all need to keep in mind that if it ever gets looked at, the degree of detail will be directly proportional to the degree of protection provided to the party who needs the records. Lack of detail will make it difficult, if not impossible, for the party needing protection to achieve it. Last, but not least, if the writing is hand written, it needs to be legible.**

14. Documenting Discovery Comments

- **Defense lawyers should not sign any form that contains recitations of attorney client communications.**
- **The advice a lawyer gives a D is privileged and confidential.**
- **A lawyer's knowledge of what the D knows, was advised, and understands is privileged and confidential.**
- **It is bad form and violates the disciplinary rules to make such disclosures of confidential and privileged communications.**
- **Just because there is a form, does not mean it has to be signed.**

14. Documenting Discovery Comments

- **Defense lawyers should initial the receipt of specific discovery.**
- **Defense lawyers should not sign broad statements with blanks open on a form until the case is being tried or pled.**

15. Brady and The Statutory Brady-like Obligations

- Lawyers must be familiar with the requirements of ***Brady v, Maryland,*** which provides that due process requires the State to turn over any exculpatory, impeaching, and mitigating evidence.

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- **39.14 (h) provides that "[n]otwithstanding any other provision of this article, the state shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged."**

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- **Imposed on this requirement is the basic requirement of 39.14 (a) that disclosures shall be "as soon as practicable." This requirement eliminates the game playing from withholding impeaching information unless and until a trial occurs.**

15. Brady and The Statutory Brady-like Obligations: Comments

- **Impeaching information may include information or documents about an officer's professional status, pending investigations, unavailability, and sustained grievances.**
- **It also clearly includes inconsistent statements from witnesses, at least to the extent that they go to a material issue, which includes credibility.**

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- Whether a particular inconsistency might tend to negate the guilt of the defendant will vary from case-to-case, but a prudent prosecutor should make disclosure of all inconsistencies, and let the chips fall where they may, lest they later be accused of hiding and failing to disclose information required to be disclosed under the statute.
- **Given that the entire purpose of SB 1611 was to require complete disclosure of anything even remotely relevant or favorable and to prevent hiding of such evidence, lawyers on both sides and the courts should remain acutely aware of the significant responsibilities of prosecutors to err on the side of disclosure.**

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- **It provides, "[i]f at any time before, during, or after trial the state discovers any additional document, item, or information required to be disclosed under Subsection (h), the state shall promptly disclose the existence of the document, item, or information to the defendant or the court."**

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- It provides, "[this article does not prohibit the parties from agreeing to discovery and documentation requirements <u>equal to or greater than</u> those required under this article."
- **Importantly, it does not allow for agreements that in any way lessen the statutory requirements – only those agreements equal to or greater than those required" by the statute. Gone are the days when prosecutors could condition discovery on an agreement to forego other discovery, discovery motions, or other statutory notice requirements.**

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- Withdrawing discovery requests ought to be accompanied by a representation that an effort has been made to locate and produce everything responsive to existing requests.
- **Waivers or agreements that require the D to waive other statutory notices are contrary to the statute.**

17. Interaction with Public Information Act

- **Some prosecutors, and more frequently other government agency lawyers, assert claims that provisions of the Texas Public Information Act (TPIA) make information confidential and not subject to discovery. Aside from the fact that the TPIA expressly provides that its provisions only apply to public information act requests, 39.14 (m) makes this argument untenable by expressing providing that "[t]o the extent of any conflict, this article prevails over Chapter 552, Government Code."**

18. Important Exemptions from 39.14 Discovery

- There are two significant situations in which a copy of discovery may not be obtained.
- 39.14 (a) expressly provides that the discovery rights under 39.14 are, "[s]ubject to the restrictions provided by Section 264.408, Family Code, and Article 39.15 of this code . . . ."

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- **Tex. Fam. Code § 264.408 provides the same restrictions to child abuse videotape interviews. In such circumstances, 39.15 (d) provides that "property or material is considered to be reasonably available to the defendant if, at a facility under the control of the state, the state provides ample opportunity for the inspection, viewing, and examination of the property or material by the defendant, the defendant's attorney, and any individual the defendant seeks to qualify to provide expert testimony at trial."**

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- **However, if the material at issue contains material that is exculpatory, impeaching or mitigating to punishment, full disclosure (production of a copy) is still required because the Brady-like requirements of the statute trump all limitations in the statute. The court may issue impose a protective order.**

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- **Though potential sanctions (against both sides) were proposed and discussed in the formulation of the legislation, it was ultimately decided that such matters were better not specifically addressed. Frankly, both prosecutors and defense lawyers were leery about the application of express sanction. In the end, the consensus was that since courts already possess the inherent power to order remedial and sometime punitive (non monetary) sanctions, it was best left to the remedies that already existed rather than trying to write a set of rules or guidelines that could produce unintended consequences for both sides.**

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- **Example: standard blood discovery order.**
- **Example: HIPAA compliant orders required by federal law for medical records.**
- **Example: state and federally required court orders for disclosure of criminal history.**
- **Example: orders for disclosure of CPS records.**

21. Material Otherwise Obtained

- Only those things obtained pursuant to 39.14 are governed by 39.14.
- If the defense lawyer gets it on his/her own, it is not governed by 39.14. The Public information Act is a powerful tool.
- Court orders shift the burden of production to the party ordered to produce the documents (example: lab and medical records).
- It relieves the prosecutor of the work and time burden.
- It is more efficient.

22. Experts Designations by State

- Request by D or State under 39.14(b) not less than 30 days before trial.
- Requires production of name and address of any witness who may be used to present evidence under TRE 702, 703, 705 (experts) not less than 20 days before trial.
- No motion to or order from the court is required.

The End

- No ethical prosecutors or ethical defense lawyers were harmed in the passage of this new legislation.
- All prosecutors and defense lawyers who follow the law will be protected, professionally and otherwise.
- Any prosecutor or defense lawyer who does not follow the law will face potential professional harm and adverse affects on that side's case.