Authorities, defense lawyers and others divided on proposals to increase information shared prior to criminal trials

- By FRANK GREEN Richmond Times-Dispatch
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The Virginia Supreme Court has received more than 130 comments from defense lawyers, prosecutors and others on proposals to expand the amount of information the two sides must share prior to criminal trials.

It is the third time in five years that pretrial discovery rule revisions are being considered by the justices. If adopted by the high court, proponents including the governor's office say the changes would bring Virginia more in line with how things are handled in most other states.

A spokeswoman for the Virginia Supreme Court said the advisory committee on rules of the court has conveyed its review of the proposals along with all the comments to the Supreme Court for further consideration.

It is not known when the Supreme Court will reach any decisions. The high court declined to adopt 60 pages of proposed changes to the rules in November 2015.

The current proposals were made by a unanimous Virginia State Bar task force made up of defense lawyers, prosecutors and law professors who worked for eight months on the effort.

Among those who waded in with written comments that were due June 1 were defense lawyers and commonwealth's attorneys and organizations that represent them, state prison inmates, and the Innocence Project.

Efforts to change discovery rules are intended to improve pretrial discovery by cutting down on much of the guesswork in trial preparation, preventing what some defense lawyers complain is "trial by ambush" and enabling defendants who plead guilty to do so with full knowledge of the evidence against them.

Proposed changes include the disclosure of witness lists and expert witness information by both sides and sharing police reports and witness statements with the defense.

Many prosecutors in Virginia already share such information with the defense, but it is not required as it is in many other states.

Some of the most detailed objections sent to the Supreme Court came from Virginia State Police Superintendent Gary Settle in a six-page, June 1 letter that reiterated the department's opposition to the release of criminal investigative files out of concern for the safety of victims and witnesses.

However, on June 11, Settle wrote a follow-up letter saying that as the newly appointed superintendent, he had a new team in place and not all of the team members had a chance to fully consider the proposals. He wrote that he and the team want to re-evaluate the department's previous response.

Settle's boss, Brian Moran, the secretary of public safety and homeland security, strongly supported the proposed changes on behalf of himself and Gov. Ralph Northam.

In a May 11 letter, he wrote, "Virginia is one of two states in the country with the most limited discovery in criminal cases."

"There is no Virginia court rule or law that allows the defendant access to law enforcement reports, list of witnesses, statement of witnesses or notice of expected expert testimony in non-capital cases. In contrast, a majority of states successfully provide for these types of information," he added.

Henrico County Commonwealth's Attorney Shannon Taylor, a member of the task force that drew up the proposed changes, said she recognizes some elected prosecutors might oppose them, but she is strongly in support.

She said both sides gave something up in reaching compromises. Efforts were made to protect victims and witnesses. She added that there are provisions allowing for the inspection but not the copying of some material to prevent sensitive documents from winding up on social media.

Duncan Reid, a prosecutor in Henrico for 35 years and now a defense lawyer, wrote to the justices that "during my years as a prosecutor, whenever suggestions were made to allow discovery of witness names or police reports, I like many prosecutors, reflexively argued that witnesses and victims would be endangered once their identity became known."

"As a defense attorney, I have come to realize how overblown were my fears," Reid wrote. "Rare is the felony defendant who is a violent sociopath capable of cold-blooded retribution or a gang member bent on silencing an adverse witness."

In a six-page letter, the Virginia Association of Commonwealth's Attorneys supported "the concept of reforming Virginia's criminal discovery rules. A substantial majority of Virginia's 120 commonwealth's attorneys' offices already practice some form of 'open file' discovery voluntarily."

Patricia Watson, the Emporia/Greensville County commonwealth's attorney and president of the association, wrote that the group supports in principle "the core of the proposed changes," requiring the disclosure of reports prepared by law enforcement officers.

But she said the association is concerned with extra costs the changes might require and that it would like to see the proposal modified so that it would not require state prosecutors to turn over any reports from federal authorities conducting a concurrent investigation against the same suspect since state prosecutors have no control over them.

Watson also reported that the organization was concerned about the breadth of the revisions happening all at once and suggested an incremental approach would be better.

At least one elected commonwealth's attorney, C. Phillips Ferguson of the city of Suffolk, wrote expressing concerns about many of the changes.

Ferguson said in an eight-page letter that “the changes proposed by the rules would clog the courts, increase the time period between the arrest and trial, adversely affect the rights of the defendants, adversely affect the rights of the citizens and allow for ‘surprise’ at trial to be the rule and not the exception.”

Aside from defense lawyers and such organizations as the Virginia Association of Criminal Defense Lawyers and the National Association of Criminal Defense Lawyers, proponents of the changes include a wrongfully convicted man from Texas and a North Carolina rape victim who wrongfully identified her attacker.

Michael Morton, who spent 25 years in prison for a murder in Texas that he did not commit, wrote that his wrongful conviction could have been prevented and the real killer stopped from harming others if the prosecutor had disclosed evidence favorable to the defense — something already required in Virginia and elsewhere — prior to trial.

Since he was exonerated, Morton wrote, “I am proud to say Texas has since enacted one of the strongest open file discovery laws in the country. I urge the Supreme Court of Virginia to adopt the proposed revisions ... regarding criminal discovery, so that innocent Virginians are better protected from the miscarriage of justice that happened in my case.”

Under the law, called the “Michael Morton Act,” defendants are now entitled to receive much of the information in the state’s possession without a court order.

Jennifer Thompson wrote to the Supreme Court about her mistakenly identifying Ronald Cotton as the man who raped her in North Carolina, leading to his wrongful conviction and more than 10 years in prison before DNA proved him innocent and identified the real rapist.

She urged the court to adopt the changes. She said North Carolina implemented an open-file discovery law in 2004. The Virginia proposal would not be as expansive but would be an important step in the right direction, she said.

She noted that the proposals would safeguard crime victims by allowing prosecutors to redact victims' personal identifying information and to obtain a protective order if there are safety concerns.

Brandon L. Garrett, a former professor at the University of Virginia School of Law who's now at Duke Law and who has researched and written extensively about the wrongful convictions of innocent people, wrote that he strongly favors changing the way business is done.

"Criminal defense lawyers are perceived as unprepared and not adequately developing evidence, while commonwealth's attorneys are perceived as hiding evidence," Garrett wrote.

He said he had studied more than 350 convictions across the country proven by DNA to be wrongful. "Inadequate discovery played a troubling role in those cases, as I detail in my book, 'Convicting the Innocent: Where Criminal Prosecutions Go Wrong.'"

Garrett cited the case of Keith Allen Harward, an innocent man convicted of rape and murder who spent 33 years in prison in Virginia until DNA proved him innocent. In that case, simple blood-typing tests could have shown he was innocent prior to his trial had it been shown to his lawyers.

But in a brief letter, Learned D. Barry, deputy commonwealth's attorney for the city of Richmond and a longtime prosecutor, urges the justices not to change things.

"Urban jurisdictions are difficult places to try cases. Witnesses and their families are put in great peril when they come forward and cooperate with the police. Even jurors, during voir dire, try to avoid jury duty because of their concern for [their] own safety," Barry wrote.

He added: "I will say with all sincerity that over the last 44 years, I have had witnesses killed and I have convicted innocent defendants. I recognize there is a legal balancing act that must occur with discovery. I embrace it, but it can be done [without] putting innocent witnesses in harm's way.

“I would humbly suggest that the current rules of discovery are more than adequate to give the commonwealth and the defense a fair trial in Virginia,” Barry concluded.

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