

**Rule 9. Discovery in Felony, Gross Misdemeanor, and Misdemeanor Cases****9.01 Prosecution Disclosure in Felony and Gross Misdemeanor Cases**

**Subd. 1. Prosecution Disclosure Without Court Order.** The prosecutor must, at the defense's request and before the Rule 11 Omnibus Hearing, allow access at any reasonable time to all matters within the prosecutor's possession or control that relate to the case, except as provided in Rule 9.01, subd. 3, and make the following disclosures:

(1) Trial Witnesses; Other Persons; Grand Jury Witnesses.

(a) Trial Witnesses. The names and addresses of witnesses who may be called at trial, along with their record of convictions, if any, within the prosecutor's actual knowledge. The defense must not make any comment in the jury's presence that a name is on a witness list furnished by the prosecutor.

(b) Other Persons. The names and addresses of anyone else with information relating to the case.

(c) Grand Jury Witnesses. If the defendant has been charged by indictment, the names and addresses of the grand jury witnesses.

(2) Statements. Any of the following known to the prosecutor that relate to the case:

- (a) written or recorded statements;
- (b) written summaries of oral statements;
- (c) the substance of oral statements.

The obligation to disclose the preceding types of statements applies whether or not the person who made the statement is listed as a witness.

(3) Documents and Tangible Objects. Any of the following that relate to the case:

- (a) books, papers, documents;
- (b) photographs;
- (c) law enforcement officer reports;
- (d) tangible objects;
- (e) the location of buildings and places;
- (f) grand jury transcripts;
- (g) reports on prospective jurors.

(4) Reports of Examinations and Tests.

(a) The results or reports of physical or mental examinations, scientific tests, experiments, or comparisons made that relate to the case.

(b) In addition, the prosecutor must allow the defendant to conduct reasonable tests. If a test or experiment, other than those conducted under Minnesota Statutes, chapter 169A, might preclude any further tests or experiments, the prosecutor must give reasonable notice and opportunity to the defense so that a qualified expert may observe the test or experiment.

(c) A person who will testify as an expert but who created no results or reports in connection with the case must provide to the prosecutor for disclosure to the defense a written summary of the subject matter of the expert's testimony, along with any findings, opinions, or conclusions the expert will give, the basis for them, and the expert's qualifications.

(5) Criminal Records of Defendant and Defense Witnesses. The conviction records of the defendant and of any defense witnesses disclosed under Rule 9.02, subd. 1(3) and (8) that are known to the prosecutor, provided the defense informs the prosecutor of any of these records known to the defendant.

(6) Exculpatory Information. Material or information in the prosecutor's possession and control that tends to negate or reduce the defendant's guilt.

(7) Evidence Relating to Aggravated Sentence. Evidence the prosecutor may rely on in seeking an aggravated sentence.

**Subd. 1a. Scope of Prosecutor's Obligations; Inspection, Reproduction, and Documentation.**

(1) Scope of Prosecutor's Obligations. The prosecutor's obligations under this rule extend to material and information in the possession or control of members of the prosecution staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to the prosecutor's office.

(2) Inspection, Reproduction, and Documentation. The prosecutor must allow the defendant to inspect and reproduce any information required to be disclosed under this rule, as well as to inspect and photograph any object, place, or building required to be disclosed under this rule.

**Subd. 2. Discretionary Disclosure By Court Order.**

(1) Matters Possessed by Other Governmental Agencies. On the defendant's motion, the court for good cause must require the prosecutor, except as provided by Rule 9.01, subd. 3, to assist the defendant in seeking access to specified matters relating to the case that are within the possession or control of an official or employee of any governmental agency, but not within the prosecutor's control.

The prosecutor must use diligent good faith efforts to cause the official or employee to allow the defense reasonable access to inspect, photograph, copy, or have reasonable tests made.

(2) Nontestimonial Evidence from Defendant on Defendant's Motion. On the defendant's motion, the court for good cause may require the prosecutor to permit the defendant to participate in a lineup, to speak for identification by witnesses, or to participate in other procedures.

(3) Other Relevant Material. On the defendant's motion, the trial court at any time before trial may, in its discretion, require the prosecutor to disclose to defense counsel and to permit the inspection, reproduction, or testing of any relevant material and information not subject to disclosure without order of court under Rule 9.01, subd. 1, provided, however, a showing is made that the information may relate to the guilt or innocence of the defendant or negate guilt or reduce the culpability of the defendant as to the offense charged. If the motion is denied, the court upon application of the defendant must inspect and preserve any relevant material and information.

**Subd. 3. Non-Discoverable Information.** The following information is not discoverable by the defendant:

(1) Work Product.

(a) Opinions, Theories, or Conclusions. Unless otherwise provided by these rules, legal research, records, correspondence, reports, or memoranda to the extent they contain the opinions, theories, or conclusions of the prosecutor, the prosecutor's staff or officials, or official agencies participating in the prosecution.

(b) Reports. Except as provided in Rule 9.01, subd. 1(1) to (7), reports, memoranda, or internal documents made by the prosecutor or members of the prosecutor's staff, or by prosecution agents in connection with the investigation or prosecution of the case against the defendant.

(2) Prosecution Witnesses Under Prosecutor's Certificate. The information concerning the witnesses and other persons described in Rule 9.01, subd. 1(1) and (2) is not subject to disclosure if the prosecutor files a written certificate with the trial court that to do so may endanger the integrity of a continuing investigation or subject witnesses or other persons to physical harm or coercion. Non-disclosure under this rule must not extend beyond the time the witnesses or persons are sworn to testify at the trial.

## 9.02 Defendant's Disclosure in Felony and Gross Misdemeanor Cases

**Subd. 1. Information Subject to Discovery Without Court Order.** The defendant must, at the prosecutor's request and before the Rule 11 Omnibus Hearing, make the following disclosures and permit the prosecutor to inspect and reproduce them:

(1) Documents and Tangible Objects. Any of the following the defense intends to introduce at trial:

(a) books, papers, documents;

(b) photographs;

(c) tangible objects;

(d) the locations of buildings and places concerning which the defendant intends to offer evidence. As to this disclosure, the defense must also permit photographing;

(e) without regard to use at trial, any reports on prospective jurors.

(2) Reports of Examinations and Tests.

(a) Any of the following results or reports the defense intends to introduce at trial that were made in connection with the case and are within the defense's possession or control, or were prepared by a witness the defense intends to call at trial, when the results and reports are of:

(i) physical or mental examinations;

(ii) scientific tests, experiments, or comparisons.

(b) In addition, a person who will testify as an expert but who created no results or reports in connection with the case must provide to the defense for disclosure to the prosecutor a written summary of the subject matter of the expert's testimony, along with any findings, opinions, or conclusions the expert will give, the basis for them, and the expert's qualifications.

(3) Notice of Defense Witnesses. The defendant must disclose the names and addresses of witnesses who may be called at trial, along with their record of convictions, if any, within the defendant's actual knowledge.

The prosecutor must not make any comment in the jury's presence that a name is on a witness list furnished by the defendant.

(4) Statements of Defense and Prosecution Witnesses. The defendant must disclose:

(a) Relevant written or recorded statements of the persons the defendant intends to call at trial;

(b) Statements of prosecution witnesses obtained by the defendant, defense counsel, or persons participating in the defense within the defendant's possession or control;

(c) Written summaries known to the defense of the substance of any oral statements made by prosecution witnesses to defense counsel or persons participating in the defense, or obtained by the defendant at the defense counsel's direction;

(d) The substance of any oral statements that relate to the case made by persons the defendant intends to call as witnesses at trial, and that were made to defense counsel or persons participating in the defense;

(e) The defendant is not required to disclose statements made by the defendant to defense counsel or agents of defense counsel that are protected by the attorney-client privilege or by state or federal constitutional guarantees.

(5) Notice of defense.

The defense must inform the prosecutor in writing of any defense, other than not guilty, that the defendant intends to assert, including but not limited to:

(a) self-defense;

(b) entrapment;

(c) mental illness or cognitive impairment;

(d) duress;

(e) alibi;

(f) double jeopardy;

(g) statute of limitations;

(h) collateral estoppel;

(i) defense under Minnesota Statutes, section 609.035;

(j) intoxication.

A defendant who gives notice of intent to assert the defense of mental illness or cognitive impairment must also notify the prosecutor of any intent to also assert the defense of not guilty.

(6) Entrapment.

(a) If the defendant intends to offer evidence of entrapment, the defendant must inform the prosecutor of the facts supporting the defense, and elect to submit the defense to the court or jury.

(b) The entrapment defense may be submitted to the court only if the defendant waives a jury trial on that issue as provided in Rule 26.01, subd. 1(2).

(c) If the defendant submits entrapment to the court, the hearing on entrapment must be included in the Omnibus Hearing under Rule 11 or in the evidentiary hearing under Rule 12. The court must make findings of fact and conclusions of law on the record supporting its decision.

(7) Alibi. If the defendant intends to offer evidence of an alibi, the defendant must inform the prosecutor of:

(a) the specific place or places where the defendant was when the alleged offense occurred;

(b) the names and addresses of the witnesses the defendant intends to call at the trial in support of the alibi.

As soon as practicable, the prosecutor must then inform the defendant of the names and addresses of the witnesses the prosecutor intends to call at trial to rebut the testimony of any of the defendant's alibi witnesses.

(8) Criminal Record. The defendant must inform the prosecutor of any convictions the defendant has, provided the prosecutor informs the defense of the defendant's record of convictions known to the prosecutor.

### **Subd. 2. Discovery by Court Order.**

(1) Disclosures Permitted. On the prosecutor's motion, with notice to the defense and a showing that one or more of the discovery procedures described below will materially aid in determining whether the defendant committed the offense charged, the court before trial may, subject to constitutional limitations, order a defendant to:

(a) Appear in a lineup;

(b) Speak for the purpose of voice identification or for taking voice prints;

(c) Permit finger, palm, or foot-printing;

(d) Permit body measurements;

(e) Pose for photographs not involving re-enactment of a scene;

(f) Permit the taking of blood, hair, saliva, urine, or samples of other bodily materials that do not involve unreasonable intrusion, but the court must not permit a blood sample to be taken except on a showing of probable cause to believe that the test will aid in establishing the defendant's guilt;

(g) Provide specimens of the defendant's handwriting; and

(h) Submit to reasonable physical or medical inspection.

(2) Notice of Time and Place of Disclosures. The prosecutor must give the defense reasonable notice of the time and place the defendant must appear for any discovery purpose listed above.

(3) Medical Supervision. Blood tests must be conducted under medical supervision. The court may require medical supervision for any other test ordered under this rule. On the defendant's motion, the court may delay the defendant's appearance for a reasonable time, or may order that it take place at the defendant's residence, or some other convenient place.

(4) Notice of Results of Disclosure. The prosecutor must tell the defense the results of the procedures within five days of learning the result, unless the court orders otherwise.

(5) Other Methods Not Excluded. The discovery procedures provided in this rule do not exclude other lawful methods available for obtaining the evidence discoverable under this rule.

**Subd. 3. Information Not Subject to Disclosure by Defendant; Work Product.** Unless these rules direct otherwise, legal research, records, correspondence, reports, or memoranda, to the extent they contain the opinions, theories, or conclusions of the defendant or defense counsel or persons participating in the defense, are not subject to disclosure.

(Amended effective September 1, 2018.)

### 9.03 Regulation of Discovery

**Subd. 1. Investigations Not to be Impeded.** Counsel for the parties and other prosecution or defense personnel must not tell anyone with relevant information (except the accused) not to discuss the case with opposing counsel, or not to show opposing counsel relevant material, or otherwise impede opposing counsel's investigation of the case.

This rule does not apply to matters not subject to discovery under this rule or that are covered by a protective order.

#### **Subd. 2. Timely Disclosure and Continuing Duty to Disclose.**

(a) All material and information to which a party is entitled must be disclosed in time to afford counsel the opportunity to make beneficial use of it.

(b) If, after compliance with any discovery rules or orders, a party discovers additional material, information, or witnesses subject to disclosure, that party must promptly notify the other party of what it has discovered and disclose it.

(c) Each party has a continuing duty of disclosure before and during trial.

**Subd. 3. Time, Place, and Manner of Discovery and Inspection.** A court granting discovery must specify the time, place, and manner of discovery, and may impose reasonable terms and conditions.

**Subd. 4. Custody of Materials.** Materials furnished to a party under discovery rules or orders must remain in the party's custody and be used by the party only to conduct that attorney's side of the case, and may be subject to other conditions the court orders.

**Subd. 5. Protective Orders.** The court may order disclosures restricted, deferred, or made subject to other conditions.

**Subd. 6. In Camera Proceedings.** On any party's motion, with notice to the other parties, the court for good cause may order a discovery motion to be made in camera. A record must be made. The entire record of the motion must be sealed and preserved in the court's records, and be available to reviewing courts. Any materials submitted to the court for in camera review must be submitted in accordance with Rule 14.06 of the General Rules of Practice for the District Courts.

**Subd. 7. Excision.** When parts of materials are discoverable under these rules and other parts are not, the discoverable portions must be disclosed. Material excised under judicial order must be sealed and be made available to reviewing courts.

**Subd. 8. Sanctions.** If a party fails to comply with a discovery rule or order, the court may, on notice and motion, order the party to permit the discovery, grant a continuance, or enter any order it deems just in the circumstances. Any person who willfully disobeys a court's discovery order may be held in contempt.

**Subd. 9. Filing.** Unless the court directs otherwise, discovery disclosures made under Rule 9 are not subject to the filing requirements in Rule 33.04. The party making disclosures must prepare an itemized descriptive list identifying the disclosures but without disclosing their contents, and must file the list as provided by Rule 33.04.

**Subd. 10. Reproduction.** When an obligation exists to permit reproduction of a report, statement, document, or other tangible thing discoverable under this rule, it may be satisfied by any method that provides an exact reproduction, including any electronic means available to both parties.

(Amended effective July 1, 2015; amended October 1, 2016.)

#### **9.04 Discovery in Misdemeanor Cases**

In misdemeanor cases, before arraignment or at any time before trial the prosecutor must, on request and without a court order, permit the defendant or defense counsel to inspect the police investigatory reports.

Upon request, the prosecutor must also disclose any material or information within the prosecutor's possession and control that tends to negate or reduce the guilt of the accused as to the offense charged.

After arraignment and on request, the defendant or defense counsel must be provided a copy of the police investigatory reports.

Any other discovery must be by consent of the parties or by motion to the court.

The obligation to provide discovery after arraignment may be satisfied by any method that provides the defendant or defense counsel a copy of the reports, including any electronic means available to both parties.

(Amended effective February 11, 2010; amended effective July 1, 2015.)

#### **9.05 Charges and Exemptions for Reproduction of Discovery in All Cases**

A reasonable charge may be made to cover the actual costs of reproduction, but no charges may be assessed to a defendant who is:

(1) represented by the public defender or by an attorney working for a public defense corporation under Minnesota Statutes, section 611.216; or

(2) determined by the court under Rule 5.04 to be financially unable to obtain counsel.

#### ***Comment - Rule 9***

*Rule 9, with Rules 7.01, 19.04, subd. 6, and 18.04, subs. 1 and 2 (recorded testimony of grand jury witnesses), provide a comprehensive method of discovery of the prosecution (Rule 9.01) and defense (Rule 9.02) cases. The rules are intended to give the parties complete discovery subject to constitutional limitations.*

*The object of the rules is to complete discovery procedures so far as possible by the Omnibus Hearing under Rule 11, which will be held within 42 days after the defendant's first appearance in court following a complaint under Rule 5, where the Rule 5 and Rule 8 appearances are not consolidated, or within seven days after the first appearance in district court following an indictment (Rule 19.04), and that all issues arising from the discovery process, including the need for additional discovery, will be resolved at the Omnibus Hearing (Rules 11.04; 9.01, subd. 2; 9.03, subd. 8).*

*Rule 9.01, subd. 1 provides generally for access by defense counsel to unprotected materials in the prosecution file, and also for numerous specific disclosures that must be made by the prosecutor on defense request. The general "open file" policy established by the rule is based on Unif.R.Crim.P. 421(a) (1987). Of course, this "open file" policy does not require the prosecuting attorney to give defense counsel access to any information that would be deemed non-discoverable under Rule 9.01, subd. 3.*

*Rule 9.01 does not require any specific form of request. It is anticipated that the discovery provided for by Rule 9.01, subd. 1, as well as the disclosures required of the defense by Rule 9.02 without order of court, will be accomplished informally between the prosecutor and defense counsel.*

*Rule 9.01, subd. 1(1)(a), forbidding comment to the jury on the fact that a person was named on the list of prosecution witnesses, is not intended to affect any right defense counsel may have under existing law to comment concerning the prosecution's failure to call a particular witness, but prevents defense counsel from commenting that the witness was on the prosecution's list.*

*Rule 9.01, subd. 1(3)(f) permits the defendant to obtain grand jury transcripts possessed by the prosecutor. If the defendant wants portions of the grand jury record not yet transcribed or possessed by the prosecutor, a request must be made under Rule 18.04.*

*Rule 9.01, subd. 1(4) permits discovery of reports of examinations and tests. If a test or experiment done by the prosecution does not destroy the evidence and preclude further tests or experiments, it is not necessary under this rule to notify the defendant or to allow a defense expert to observe the test or experiment.*

*Rule 9.01, subd. 1(5) provides for the reciprocal discovery of the criminal records of any defense witness disclosed to the prosecution under Rule 9.02, subd. 1(3). Under Rule 9.03, subd. 2, a continuing duty exists to disclose this information through trial. If the prosecutor intends to impeach the defendant or any defense witnesses with evidence of prior convictions the prosecutor is required by *State v. Wenberg*, 289 N.W.2d 503, 504-05 (Minn. 1980) to request a pretrial hearing on the admissibility of this evidence under the Rules of Evidence. The pretrial hearing may be made a part of the Omnibus Hearing under Rule 11 or the pretrial conference under Rule 12.*

*Rule 9.01, subd. 1(7) requires the prosecutor to disclose to the defendant or defense counsel all evidence not otherwise disclosed on which the prosecutor intends to rely in seeking an aggravated sentence under *Blakely v. Washington*, 542 U.S. 296 (2004).*

*The requirement under Rule 9.02, subd. 1(1)(e) to disclose reports on prospective jurors does not require disclosure of opinions or conclusions concerning jurors given by persons assisting counsel on the case. Such material would be protected as work product under Rule 9.02, subd. 3.*

*The provision in Rule 9.02, subd. 1(4)(d) that defense counsel and the defendant disclose the substance of any oral statements obtained from persons whom the defendant intends to call at the trial is not intended to support a claim that if counsel or the defendant interviewed the witness without a third party present that defense counsel can be disqualified in order to permit counsel to testify to any discrepancy between the oral statement disclosed and the witness's trial testimony, or that if the defendant declines to testify to the discrepancy that the witness's testimony should be stricken. Other solutions should be sought, such as stipulating that in the interview that counsel or the defendant conducted, the witness made the statement the prosecutor now seeks to impeach.*

*Rule 9.02, subd. 1(5) requires written notice of any defense - other than not guilty - on which the defendant intends to rely at the trial, along with the names and addresses of the witnesses the defendant intends to call at the trial. The defendant is not required to indicate the witnesses intended to be used for each defense except for the defense of alibi (Rule 9.02, subd. 1(7)).*



*Rule 9.02, subd. 2 regulates orders for nontestimonial identification or other procedures. This rule applies after a defendant has been charged. Precharging nontestimonial procedures are usually accomplished by search warrant.*

*Following the charging of a felony or gross misdemeanor, the order may be obtained at the first appearance of the defendant under Rule 4.02, subd. 5(1), and Rule 5, or at or before the Omnibus Hearing under Rule 11. The order may be obtained from the district court at any time before trial, but preferably at or before the Omnibus Hearing.*

*In making protective orders under Rule 9.03, subd. 5 or in ruling on motions to compel discovery under Rules 9.01, subd. 2, and 9.03, subd. 8, the court may avail itself of Rule 9.03, subds. 6 and 7 authorizing in camera proceedings and excision.*

*Under Rule 9.04 the prosecutor should reveal not only the reports physically in the prosecutor's possession, but also those concerning the case that are in the possession of the police.*

*In those rare cases where additional discovery is considered necessary by either party, it shall be by consent of the parties or by motion to the court. In such cases it is expected that the parties and the court will be guided by the extensive discovery provisions of these rules. Rule 9 provides guidelines for deciding any such motions, but they are not mandatory and the decision is within the discretion of the district court judge. State v. Davis, 592 N.W.2d 457, 459 (Minn. 1999).*

*Under Rule 9.05, the provision of the rule permitting free copies to public defenders and attorneys working for a public defense corporation under Minnesota Statutes, section 611.216, is in accord with Minnesota Statutes, section 611.271.*