

If Pre-Indictment early disposition programs are to operate properly, full discovery to the defense counsel is essential.

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There are very sound reasons supporting pre-indictment disposition programs. In some counties, cases are placed on a Superior Court calendar, pre-indictment, and prosecutors and defense attorneys attempt to resolve them before the prosecutor invests time and effort to present the case to a grand jury. Depending on the county, this type of program is known as the Early Disposition Court (EDC), the Pre-Disposition Court (PDC) or the Pre-Indictment Program (PIP Court). Such programs benefit prosecutors, who can dispose of relatively simple cases without the need to present them to the grand jury, and benefit the defendant, who frequently is offered a more favorable disposition in exchange for resolving the case early.

For the defense attorney, one of the most important factors to consider in advising a client regarding a plea offer that includes an indictable conviction is the strength of the available State's evidence. It is precisely for this reason that Rule 3:13-3(a) requires that "where the prosecutor has made a pre-indictment plea offer, the prosecutor shall upon request permit defense counsel to inspect and copy or photograph any relevant material which would be discoverable following an indictment".

The Monitor has encountered several cases around the State in which prosecutors are extending pre-indictment plea offers, but refuse to supply the defense attorney with all available discovery, particularly copies of recordings, such as recorded witness and defendant statements, surveillance footage and copies of mobile video recorder (MVR) footage from police cars. Clearly, such recordings would be discoverable post-indictment, and, therefore, a defendant provided with a pre-indictment plea offer must be permitted to review them as well.

Indeed, a proposed amendment to Rule 3:13-3(a) would provide that:

where the prosecutor determines that physical or electronic delivery of the discoverable material would impose an unreasonable administrative burden on the prosecutor's office given the nature, format, manner of collation or volume of discoverable material, the prosecutor may in his or her discretion make discovery available by permitting defense counsel to inspect and copy or photograph such material at the prosecutor's office.

In recommending adoption of the rule changes to Rule 3:13-3(a), the Supreme Court committee observed the need for defense counsel to review all available evidence to evaluate a pre-indictment plea offer:

The proposed amendments would require that unless the defendant agrees to more limited discovery, the prosecutor must provide defense counsel with all available discoverable material at the time a pre-indictment plea offer is made. Since no competent defense counsel would allow his or her client to plead guilty without first having seen the discovery, it makes sense that the prosecutor offering the plea should also provide all available discovery.

Pre-indictment programs move quickly, and prosecutors have to manage a large volume of cases. Even so, prosecutors are obligated to comply with the pre-indictment discovery rule. Providing defense attorneys with access to electronically recorded evidence is absolutely essential.

Attorney

- Darren M. Gelber

Practice

- Criminal Defense