
Electronic Exchange of Criminal Case Discovery Materials

A Needs Assessment

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alaska judicial council



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Part I Introduction

The Efficiencies Committee of the Criminal Justice Working Group¹ is seeking solutions to the increasing amount of time it takes to resolve a criminal case in court after charges are filed. Members of the committee have identified the discovery process as a potential contributing factor to increased case disposition times. Using funds provided by the Multi-Agency Justice Integration Consortium (MAJIC), the Efficiencies Committee asked the Judicial Council to do a needs assessment to determine whether a system of electronic discovery might help reduce case disposition times. The assessment focused on Anchorage and Fairbanks, the locations with the two largest caseloads in the state.

The Council's executive director interviewed prosecutors, public and private defense attorneys, representatives of state and local law enforcement, and judges. Interviewees were asked about current discovery practices, bottlenecks in the system, resources needed to process discovery, the potential benefits and costs of a system of electronic discovery and how such a system might be administered. The Efficiencies Committee plans to hire a technical expert to map out alternative technological options of implementing a system of electronic discovery.

In short, this assessment concludes that a web-based system under which routine discovery could be accessed by prosecutors and defense attorneys in Anchorage and Fairbanks would significantly reduce discovery-related delay that is a big factor contributing to increases in case disposition times. At the same time, it is important to recognize that a system of electronic discovery will not solve all discovery problems and that there are many other factors that contribute to longer case disposition times.

This report summarizes the interviews conducted for the needs assessment. A brief discussion of case disposition times is offered to provide context for this project. A short discussion of how the criminal justice system operates in Alaska is also provided.

¹The Criminal Justice Working Group ("CJWG") is a group of top policymakers from the executive agencies involved with the criminal justice system in Alaska, top administrators from the Alaska Court System, the Anchorage police chief, the executive director of the Alaska Judicial Council, and the U.S. attorney. The group is co-chaired by Lt. Governor Sean Parnell and Alaska Supreme Court Justice Walter Carpeneti. The group takes a collaborative approach to improving Alaska's criminal justice system. The group has been meeting monthly since January 2008. The Alaska Judicial Council provides staffing.

The CJWG has established two committees. The Prevention-Recidivism Committee, chaired by Department of Corrections Commissioner Joe Schmidt, is presently focused on identifying a legislative packet of evidence-based programs that can protect public safety by reducing recidivism in a more cost-effective way than incarceration. The Efficiencies Committee is chaired by Alaska Court System Deputy Administrator Christine Johnson. As its name suggests, the committee is focused on making improvements that will enable the criminal justice system to operate more smoothly.

Part II Caseloads and Case Disposition Times

A. Caseloads

In FY 07, nearly 37,000 criminal cases were filed statewide in Alaska including 14,008 cases in Anchorage and 4,412 cases in Fairbanks. Criminal case filings increased 135% statewide from 1986-7 to 2007. Since 1999, criminal case filing have increased 82%.²

Most of the increase in criminal case filings since 1986-7 is attributable to a substantial increase in felony filings. Statewide, felony filings more than doubled. In Anchorage, felony case filings nearly tripled with most of the increase occurring since 1999. Fairbanks filings nearly doubled.

In 2007, 21% percent of the criminal cases filed in Anchorage and 15% of the criminal cases filed in Fairbanks were felony charges.³ The following table summarizes felony case filings in Anchorage, Fairbanks, and statewide.

Felony Filings Anchorage, Fairbanks, and Statewide			
	Anchorage	Fairbanks	Statewide
1986-87 (avg.)	1,030	392	2,660
1999	1,163	508	3,429
2007	2,897	675	6,239

Misdemeanor filings statewide increased at a lower rate than felonies. Misdemeanor filings increased 24% from 1986-7 to 2007. Anchorage misdemeanor filings increased at a slightly higher rate (31%) while Fairbanks misdemeanor filings increased at a lower rate (10%).

The following table summarizes the misdemeanor case filings in Anchorage and Fairbanks and statewide.⁴

Misdemeanor Filings Anchorage, Fairbanks, and Statewide			
	Anchorage	Fairbanks	Statewide
1986-87 (avg.)	8,492	3,467	24,499
1999	9,823	3,586	28,443
2007	11,111	3,812	30,368

²It is important to note that case filings do not include petitions to revoke probation and therefore are not a complete indication of the court's workload. There are insufficient data to identify whether petitions to revoke probation have increased over time, but there is a shared perception that they have.

³Court annual report for FY 07.

⁴Data are from Court annual reports for fiscal years 1986, 1987, 1999, and 2007. The statewide misdemeanor cases are from higher volume courts only. Statewide numbers do not include the non-computerized courts.

B. Case Disposition Times

From 1986-7 to 2007, the time needed to resolve felony cases in Anchorage and Fairbanks increased dramatically. The time needed for a no contest or guilty plea nearly doubled. The time needed for a trial nearly quadrupled in Anchorage, and nearly tripled in Fairbanks. The time needed to resolve cases that result in dismissal followed a less clear trend, although these times also increased. The following tables compare the numbers of days needed to resolve felony cases in 1986-7, 1999, and 2007.⁵

Mean Number of Days to Disposition in Anchorage Felony Cases				
	Dismissed	No Contest or Guilty Plea	Trial	All Cases
1986-87 (avg.)	142	90	173	(not available)
1999	74	135	344	131
2007	161	169	669	176

Mean Number of Days to Disposition in Fairbanks Felony Cases				
	Dismissed	No Contest or Guilty Plea	Trial	All Cases
1986-87 (avg.)	65	119	138	(not available)
1999	66	188	287	182
2007	490	207	400	278

Data are not available to do a historical analysis of case disposition times for misdemeanors. The following table summarizes case disposition times for Anchorage and Fairbanks misdemeanor cases.⁶ Mean times to disposition of misdemeanor cases were generally shorter in Fairbanks than in Anchorage for all types of dispositions.

2007 Mean Number of Days to Disposition in Anchorage and Fairbanks Misdemeanor Cases				
	Dismissed	No Contest or Guilty Plea	Trial	All Cases
Anchorage	180	115	219	134
Fairbanks	136	78	212	96

⁵Data for 1986-1987 came from a sample of cases in the prosecutors' files from Anchorage, Fairbanks, Juneau, and Barrow, Bethel, Kotzebue, Nome, Palmer, and Sitka. See page B-8 and Tables B-1 and C-8, ALASKA'S PLEA BARGAINING BAN RE-EVALUATED, Cars & Krause, Alaska Judicial Council, 1991. Data for 1999 came from ALASKA FELONY PROCESS: 1999, Cars, Cohn & Deistic, Alaska Judicial Council, 2004. See Figure 25, page 123. Data for 2007 came from tables provided by the Alaska Court System on July 25, 2008.

⁶Some misdemeanor cases are delayed because felony charges are filed against the same defendant. In those cases, the misdemeanor charge is often scheduled to trail resolution of the felony charge.

C. Comparison of Increase in Felony Case Filings with Increase in Case Disposition Times

- In Anchorage, felony case filings increased 149% from 1999 to 2007 while felony case disposition times increased an average of 34%. Disposition times for dismissed cases increased 118%; for cases resolved by a no contest or guilty plea, the increase was 25%; and time to disposition for cases that went to trial increased 94%.⁷
- In Fairbanks, felony case filings increased 33% from 1999 to 2007 while felony case disposition times increased an average of 53%. Disposition times for dismissed cases increased 642%. The case disposition times for cases resolved by a no contest or guilty plea increased by 10% and time to disposition for cases that went to trial increased by 39%.

D. Summary

Alaska Criminal Rule 45, Alaska's speedy trial rule, provides that a defendant must be tried within 120 days from the time the defendant is served with the charging document. Periods of time are excluded under the rule including time needed to consider motions filed by the defendant or the period of delay resulting from a continuance granted with the defendant's consent. Only a handful of cases are dismissed each year because the defendant was not timely tried under Rule 45. Increasingly long case disposition times demonstrate that Rule 45 dismissals are a very poor indication of how quickly criminal cases are resolved. Among other issues, the number of Rule 45 dismissals does not explain why:

- it took 161 days in Anchorage and 490 days in Fairbanks to resolve felony cases in 2007 that were ultimately dismissed, and why it took so much longer for these cases to resolve in 2007 than it did in 1999.
- it took 669 days to resolve felony cases that went to trial in Anchorage in 2007, nearly twice as long as it did in 1999.
- it took 400 days to resolve felony cases that went to trial in Fairbanks in 2007, a substantial increase over the time needed in 1999.
- it took 180 days in Anchorage and 136 days in Fairbanks to resolve misdemeanor cases that were ultimately dismissed.
- it took 219 days in Anchorage and 212 days in Fairbanks to resolve misdemeanor cases that went to trial.

⁷Cases that went to trial included those in which the defendant pled guilty or no contest after the trial started.

Increased case disposition times are likely affected by the increase in criminal case filings. Criminal agency budgets have not kept pace with the increase in criminal case filings. For example, the number of felony filings in Alaska increased 86% from 1984 to 1999, but Alaska justice system resources to process criminal cases increased by only 21% when adjusted for inflation.⁸ There are more cases and relatively fewer resources to process them.

Interviews for this project indicated that inadequate resources are not the only cause of increased disposition times. Prosecutors and defense attorneys both suggested that judges were increasingly tolerant of dilatory conduct by the other side. Prosecutors perceive that judges need to more carefully scrutinize defense requests for continuances; grant continuances that are only long enough to address the purported need; and impose consequences for abusive discovery requests and late-filed defense motions. Defense attorneys contend that judges need to impose meaningful sanctions when prosecutors fail to timely provide discovery. They believe that increased felony filings are partly attributable to insufficient screening of cases by prosecutors. Judges perceive the need for parties to review files, identify conflicts, adhere to pre-trial orders, resolve discovery issues, and negotiate plea agreements earlier in the case.⁹ Some judges note that summer internships and job sharing arrangements can contribute to delay because cases are handed off to attorneys who need to get up to speed.

Some judges describe a lack of consensus among themselves about how judges should respond to requests for continuances. Some judges are more deferential to the attorneys' timelines for resolving discovery matters while others feel that it is important to adhere to a scheduled trial date.

Reducing case disposition times would benefit defendants and victims. It is also possible that reducing case disposition times would help to reduce recidivism. As cases take longer to resolve, a higher percentage of a defendant's time in custody is spent in pre-trial incarceration. Pre-trial prisoners are high maintenance. They require more frequent access to attorneys and they need to be transported to court hearings. They are ineligible for most programming. To the extent that pre-trial incarceration is a substitute for a sentence, a defendant's recidivism is likely to increase because the defendant received little or no treatment or other programming.

This analysis does not address all of the reasons for longer case disposition times.¹⁰ The focus of this assessment is whether a system of electronic discovery might ease perceived bottlenecks in the discovery process and potentially contribute to shorter case disposition times.

⁸ALASKA FELONY PROCESS: 1999, *supra* note 5, at 99.

⁹Military deployments in recent years may also be having an effect on case disposition times. Anchorage and Fairbanks have significant military populations. When defendants are deployed overseas, cases are continued for a long time. Military deployments are more likely to affect case disposition times in misdemeanor cases because more serious charges need to be resolved before deployment.

¹⁰The CJWG Efficiencies Committee is examining how pre-sentence reports are presently used in felony cases and how the time needed to prepare these reports may be contributing to increased case disposition times.

Part III

Background Information About Criminal Prosecutions in Alaska

It is anticipated that an evaluation of technical alternatives for a system of electronic discovery will be undertaken subsequent to this needs assessment. It may be helpful to provide the technical analyst with a brief background about how criminal cases are prosecuted in Anchorage and Fairbanks.

A. Law Enforcement

In Anchorage, the majority of investigation is done by the Anchorage Police Department (APD). The Fairbanks Police Department (FPD) investigates Fairbanks cases. The Alaska State Troopers (AST), a division within the Alaska Department of Safety, investigate a higher percentage of cases filed in Fairbanks than in Anchorage. Both Anchorage and Fairbanks have other law enforcement agencies that investigate cases including Airport Police, State Park and Fish and Game Officers, and University Police. There is a police department in North Pole that also investigates cases filed in Fairbanks.

B. Prosecution

In Anchorage, about 90% of misdemeanor charges are filed by municipal prosecutors. About 10% are prosecuted by state prosecutors because the crimes were investigated by state law enforcement officers. In Fairbanks, almost all misdemeanor charges are prosecuted by state prosecutors because the Fairbanks municipal code was revised to eliminate offenses that parallel state offenses. Fairbanks municipal prosecutors only handle 200-300 cases a year, mostly very minor offenses like drinking or urinating in public.

C. Defense

Indigent defendants in felony cases and state misdemeanor prosecutions are represented by the Public Defender Agency (PDA). When the PDA has a conflict, the defendant is represented by the Office of Public Advocacy (OPA).

In Anchorage and Fairbanks, OPA has segregated its office. If a conflict of interest occurs in Anchorage involving an Unclassified or Class A offense, the case is referred to a different OPA section that usually handles appeals and other matters. If the conflict is in a case involving a Class B or C felony or a misdemeanor, the case is handled by a third section in the OPA office. If a conflict of interest precludes OPA representation by any of these sections, the case is referred to a private contract attorney. Even then, budget constraints sometimes compel OPA to refer Anchorage conflict cases to OPA staff from outside the Anchorage office.

Similarly, the OPA office in Fairbanks contains a separate section called the Office of Conflict Counsel to which it refers its conflicts. About 15% of OPA cases in Fairbanks are conflicted

out to the Office of Conflict Counsel. More conflicts occur in felony cases. A Fairbanks conflict goes to a private contract attorney if the Office of Conflict Counsel is unable to handle the case.¹¹

Indigent defendants in Anchorage municipal misdemeanor cases are represented by the private law firm of Gorton and Logue (G&L) pursuant to the firm's contract with the municipality. When G&L has a conflict of interest, by contract, the firm transfers the case to Ella Anagick, a private attorney. G&L estimates that it handles about 4,200 new municipal misdemeanor cases per year (and about 1,000 petitions to revoke probation). The firm handles roughly 42% of municipal misdemeanor defendants. In about 95% of cases, the firm is appointed at arraignment. The court sends the firm an order of appointment. In about 5% of cases, the court orders a representation hearing to determine whether the defendant qualifies for public representation. Anchorage Municipal prosecutors estimate that defendants represent themselves in five percent or fewer cases.

There are very few Fairbanks municipal misdemeanor cases. A private attorney, Fleur Roberts, has a contract to represent municipal misdemeanor defendants.

D. Court Process

1. Felonies

In felony cases, a defendant's first appearance in court is commonly referred to as a "Rule 5" hearing. At this hearing, the defendant is advised of the charges but is not required to enter a plea. The judge determines whether the defendant qualifies for public representation. A preliminary hearing or indictment must occur within 10 days for defendants in custody, or within 20 days if the defendant is not in custody. At a preliminary hearing, the state presents evidence to a judge to establish probable cause to charge the defendant. Much more commonly, prosecutors obtain an indictment by presenting the case to a grand jury. Preliminary hearings are extremely unusual in Anchorage and Fairbanks. Almost all felony charges are the product of a grand jury indictment, unless the defendant has waived his or her right to have the case presented to a grand jury.

a. Anchorage

In Anchorage, a pre-indictment hearing is scheduled before the expiration of the 10 or 20 day deadline. If an indictment is issued prior to the pre-indictment hearing, the hearing is cancelled. The pre-indictment hearing is a proceeding that was implemented in Anchorage to afford prosecutors more flexibility in response to a ban on plea bargaining that was in effect from the late 1970s until about 1993.

¹¹In a study of statewide cases filed in 1999, the Alaska Judicial Council found that 80 percent of charged felony defendants were represented by a public attorney including 63 percent represented by the Public Defender Agency, 5 percent represented by OPA staff attorneys, and 12 percent represented by OPA contract attorneys. Privately paid attorneys represented 17 percent of defendants. Three percent of defendants represented themselves. In rural areas, public defenders represented a higher percentage of felony defendants than in other areas of the state. In 1999, most cases assigned to OPA statewide were handled by OPA contractors. ALASKA FELONY PROCESS: 1999, *supra* note 5, at 67. Since then, OPA instituted its office segregation policies and many fewer cases are assigned to private attorneys.

Prior to indictment, the prosecution and the defense may pursue plea negotiations. The defendant may agree to continue the pre-indictment hearing to have more opportunity to negotiate. The defendant must waive time under Rule 45 if the pre-indictment hearing is continued with the defendant's consent. It is not uncommon for pre-indictment hearings to be continued multiple times. Prior to indictment, a case may be dismissed or the defendant may waive indictment and plead no contest or guilty to the original or negotiated charges. There is no pre-trial order that addresses the timing of discovery prior to indictment.

Some perceive the Anchorage pre-indictment process to be a form of "frontier justice." A case against a defendant is sometimes dismissed after the defendant has spent some time in jail. A charge may be reduced and a sentence imposed that is equivalent to the time the defendant has already served.

If there is an indictment, the defendant is arraigned on the charge(s) in superior court and must enter a plea. At arraignment, the court issues a pre-trial order. The pre-trial order establishes a trial date and a date for a pre-trial hearing to resolve any discovery disputes and to schedule an omnibus hearing at which motions will be considered. The pre-trial order requires prosecutors to provide discovery to the defendant by the 10th day after arraignment. The defense must provide any discovery to the prosecutor by the 22nd day after arraignment. The parties must meet by the 26th day after arraignment to complete a pre-trial hearing order. The pre-trial hearing order requires the parties to certify that discovery was complete noting any specific exceptions. The pre-trial hearing order must be filed with the court by the 31st day after arraignment. No motions relating to discovery are permitted prior to the pre-trial hearing.

For several recent years, the parties have not been completing or filing pre-trial hearing orders, apparently with the consent of the court. Prosecutors and defense attorneys worked with the court to establish a new pre-trial hearing order that went into effect on November 1, 2008. Whether the new pre-trial hearing order will help to resolve discovery disputes and reduce the number of continuances needed to resolve them remains to be seen.

The old pre-trial hearing order required the parties to certify whether discovery was complete and to list any exceptions. Prosecutors were required to note whether they would rely on prior acts or convictions or call expert witnesses. They were supposed to certify whether other discovery materials would be supplied. Defense attorneys were supposed to disclose whether they would rely on certain defenses or call expert witnesses and to specify which motions they intended to file.

The new pre-trial hearing order requires that discovery be completed by the 20th day after arraignment.¹² A major difference between the old pre-trial hearing order and the new one is that both parties must be much more specific when indicating the status of discovery.¹³ The prosecution

¹²This would seem to require an amendment to the pre-trial order which requires the state to provide discovery to the defense within ten days of arraignment.

¹³Prosecutors must list the specific discovery they provided to the defense including police reports of named officers, witness and defendant and 911 recordings, requests for laboratory services, and digitally stored information. Prosecutors must certify that discovery is complete and list specific exceptions if it is not complete. Prosecutors must also report whether they intend to rely on prior convictions, electronic surveillance, or a confidential informant.

must certify that it requested the specific information and materials from law enforcement that the prosecution is required to disclose under Rule 16 and that these materials were provided to the defense. Prosecutors must transmit a completed pre-trial hearing order to the defense within 30 days of arraignment.¹⁴

Under the new order, the defense must specifically list the discovery it has received and provide notice of any additional discovery requests. The defense must specify the date it will file a motion to compel any additional discovery that is not provided. Unlike the old pre-trial hearing order, the new order does not require the defense to list motions that it intends to file. Under the new order, the defense, must certify that it conducted a conflicts check and that no conflicts have been identified.

The parties must indicate whether they will be requesting a new trial date and the reason for such a request. The parties must report whether in camera review will be necessary and whether laboratory testing will be pursued. The defense must return the pre-trial hearing order to the prosecution by the 40th day after arraignment.¹⁵ A pre-trial hearing is held on the 45th day after arraignment.

b. Fairbanks

For purposes of this report, there are important differences between the court processing of Anchorage and Fairbanks felony cases. In Fairbanks, there are no pre-indictment hearings. Prosecutors take cases directly to grand jury. In Fairbanks the pretrial order does not establish a regimen for the exchange of discovery and does not establish a pre-trial hearing date to resolve any outstanding discovery issues. The pre-trial order in Fairbanks sets deadlines for motions and jury instructions to be filed and establishes dates for an omnibus hearing, trial, and a calendar call the week preceding the trial. The pre-trial order simply provides that discovery shall be provided in accordance with Rule 16. In Fairbanks, the parties are not required to complete a pre-trial hearing order that tracks the exchange of discovery or the identification of conflicts of interest.

Fairbanks judges report that discovery problems are dealt with at the omnibus hearing. At the omnibus hearing, judges respond to discovery problems by imposing deadlines for missing discovery and by ordering prosecutors to contact the crime lab, police officers, or evidence custodians as necessary. Judges have been reluctant to require the parties to complete a pre-trial hearing order because they feel that the omnibus hearing provides a more reliable way to resolve discovery disputes.

¹⁴This would also seem to require a change in the pre-trial order that requires prosecutors to transmit the form by the 28th day after arraignment.

¹⁵The pre-trial order requirement that the pre-trial hearing order must be filed within 31 days of arraignment needs to be changed.

2. Misdemeanors

In-custody defendants must appear for an arraignment within 24 hours of their arrest. Out-of-custody defendants are summoned to appear at an arraignment sometime after they are charged. At arraignment, the defendant must enter a plea and the court schedules a trial date and calculates the deadline by which the case must go to trial under the 120 day speedy trial requirement set forth in Alaska Criminal Rule 45. In 2007, 23% of Anchorage and 51% of Fairbanks misdemeanor no contest or guilty pleas occurred at arraignment.¹⁶

At arraignment, the court determines whether the defendant qualifies for public representation. In a small percentage of cases, the court may schedule a representation hearing to determine whether the defendant is eligible for public representation. If a conflict is evident, the court appoints conflict counsel at arraignment. Once assigned, defense counsel are responsible for screening their cases to determine if less obvious conflicts exist.

a. Anchorage

In Anchorage, there is a pre-trial order that imposes mandatory deadlines. The order states that the court will impose sanctions for failure to comply with the order. The district court amended the pre-trial order in June 2008 because of persistent discovery issues. The old order simply required the prosecution to provide discovery within 20 days of arraignment. Judges found that it was common for defense attorneys to recite lists of missing discovery at pre-trial proceedings and often as late as trial call. Prosecutors frequently were not aware that the discovery was missing or they simply had not provided the discovery.

The new order requires that Rule 16 discovery be disclosed to the defendant by the 10th day after arraignment for police reports and by the 20th day after arraignment for all other discovery. Within 30 days after arraignment, the defendant must review the discovery to determine if there may be any missing discovery. Defense counsel must meet with the defendant during this time. If discovery is missing, the defense must forward a written request to the prosecutor. A fax or e-mail will suffice.

At arraignment, the court schedules a pre-trial conference about four to six weeks after arraignment. The pre-trial conference is a new procedure implemented by the court in June 2008 to help resolve issues prior to trial. Judges perceived that as late as trial call, some defense attorneys had not yet talked to their clients or the prosecutor. The pre-trial order requires the prosecutor and defense counsel to meet before the pre-trial conference. Pro per defendants are not required to meet with the prosecutor. The parties must discuss discovery issues and conduct any plea negotiations. The order “anticipates” that prosecutors will designate a weekly time to be available to meet with defense attorneys for these purposes. The Anchorage District Attorney’s office reports that it designates Tuesday afternoons for this purpose. All motions (except for protective orders) are to be filed prior to the pre-trial conference. At the pre-trial hearing, the court schedules a trial call for the week prior to trial to ascertain whether the case will proceed to trial as scheduled. Before the new pre-trial order, trial dates were scheduled at arraignment.

¹⁶Alaska Court System case disposition data, July 2008.

If the parties have not met before the pre-trial conference, they must show cause why they have not met. If discovery is not complete, the parties must show cause why it is not complete. The court is supposed to schedule additional pre-trial conferences only if “good cause” is found.

The court intended the new pre-trial order to encourage communication between the parties earlier in the case and to limit court involvement in that communication. Judges perceive that almost all of the delay in misdemeanor cases stems from problems with discovery. Occasionally, there are other causes of delay such as an unavailable witness.

There are differences of opinion as to whether the new pre-trial order has improved case disposition times. Some judges report that the number of pending cases dropped substantially after the new pre-trial order was implemented. They observed that there are many fewer missing discovery materials reported at pre-trial hearings. However, some perceived improvements, such as scheduled meeting times, were not institutionalized. Judges were uneven in holding attorneys to the new requirements. The number of pending cases reportedly increased. Some attorneys report that the requirement that they meet with opposing counsel presents scheduling difficulties given their heavy caseloads. Some attorneys report that the pretrial conference is typically continued and that trials are often continued because of discovery issues.

Judges perceive that municipal prosecutions involving APD have presented many fewer problems than state cases, particularly state cases involving law enforcement agencies other than APD. Many more municipal cases are resolved at arraignment compared to state misdemeanor prosecutions. Judges observe that municipal prosecutors are much more likely to have discovery available at arraignment. Judges report that municipal arraignments are handled by more experienced prosecutors who are more adept at resolving cases at arraignment. They are able to tender offers to defendants and they are able to make decisions about deferring prosecution.¹⁷ State prosecutors in Anchorage perceive that the new pre-trial order has substantially reduced discovery disputes at the pre-trial conference and that misdemeanor cases seem to be resolving more quickly.

b. Fairbanks

Fairbanks also has a pre-trial order governing misdemeanor cases, but the order is somewhat different than the pre-trial order in Anchorage misdemeanors. The pre-trial order in Fairbanks requires the parties to exchange all Rule 16 discovery within 20 days. Material which later comes to into the possession or control of the parties must be disclosed without the necessity of a request or further order of the court. The defense must disclose any intention to rely on an alibi, insanity, or diminished capacity defense. The order stresses that sanctions may be imposed for failure to comply with the order without good cause. The order establishes a calendar call the week before trial. Unlike in Anchorage, the pre-trial order does not schedule a pre-trial conference and does not require the parties to meet to resolve pre-trial issues.

¹⁷The percentage of guilty or no contest pleas that occur at arraignment in Fairbanks is much higher than the percentage of guilty or no contest pleas that occur in Anchorage. In Fairbanks, the vast majority of misdemeanor cases are prosecuted by the state.

From the court's perspective, most misdemeanor discovery is exchanged in a timely fashion. However, the timely production by law enforcement of digital evidence such as audio, photo, and video evidence, is a substantial problem. Other delays occur in cases involving pro per defendants. The court estimates that there are 15-20 DUI cases a year in which the defendant requested an independent blood test which results in delay while the crime lab conducts its analysis. From the court's perspective, delay in retrieving evidence from law enforcement is a much greater factor contributing to longer case disposition times than a lack of expeditious communication between prosecutors and defense attorneys.

In felony cases, judges identify two major areas where discovery is an issue. The biggest problem involves the disclosure of digital evidence. Judges note that digital evidence is more prevalent than in the past. For example, communications between dispatchers and police officers are recorded that were not recorded in the past. At pre-trial proceedings, defense attorneys may suspect or have some indication that photos or recordings or other evidence exist. Cases are continued while prosecutors contact law enforcement to determine whether the evidence exists. Often the evidence does not exist and the continuance is a waste of time. Some judges have suggested that police reports be amended to require officers to affirmatively list whether the officer took photos, make an audio or video recording, or collected other types of evidence, and to list whether other officers were involved in the investigation.

Judges perceive that the second biggest discovery problem in felony cases is that crime lab evidence is typically not available until just before trial. Judges perceive that the delay occurs at the crime lab and not because prosecutors fail to forward the reports.

Part IV Scope of Discovery

Alaska Criminal Rule 16(a) provides that “discovery prior to trial should be as full and free as possible consistent with protection of persons, effective law enforcement, and the adversary system.” Subsection (b) requires the prosecution to disclose the following information:¹⁸

- The names and addresses of persons known by the government to have knowledge of relevant facts and their written or recorded statements.
- Any written or recorded statements and summaries of statements and the substance of any oral statements made by the accused or a codefendant.
- Any books, papers, documents, photographs, or tangible objects, which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the accused.
- Any record of prior criminal convictions of the defendant and of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial.
- The names and addresses of any expert witnesses performing work in connection with the case, copies of reports or written statements by these experts, a curriculum vitae for each expert, and a written summary of any proposed testimony and the basis for that testimony.

There are some restrictions on the disclosure of information between the parties. Subsection (d)(3) requires certain discoverable materials and information to remain in the exclusive possession of the defense attorney including the criminal history, medical and other records, or pre-sentence reports involving a witness or victim. In addition, a defense attorney may not disclose to a defendant the address or phone number of a victim or witness. Either party may seek court permission to restrict discovery by asking the court to conduct an *in camera ex parte* review. *In camera ex parte* review is very uncommon. The materials and information most likely to be the subject of *in camera* review include medical or psychological records, personnel records, and information pertaining to an ongoing investigation.

¹⁸Subsection (c) imposes many fewer obligations on the defense to make disclosures to the prosecution than vice versa. A defendant may be required to submit to non-testimonial identification procedures. The defense must provide information about expert witnesses it is likely to call at trial. The defense must inform the prosecutor of the defendant’s intent to rely upon a defense of alibi, justification, duress, entrapment, or other statutory or affirmative defense or notice of a defense based on insanity or diminished capacity. Untimely disclosures by the defense can delay case disposition. However, the vast majority of the discovery in a criminal case flows from prosecution to the defense, so improving the process for communicating these materials and information was the focus of this assessment.

Part VI Present Discovery Practice

A. Law Enforcement

1. Anchorage Police Department (APD)

There are about 450 APD officers. Patrol officers have been equipped with laptop computers for about three and a half years. Officers write their reports on their laptops using Packetwriter software. From their patrol cars, or from a substation or the main police station, officers upload their reports into Tiburon, APD's record management system. This enables patrol officers to prepare reports and make them available on Tiburon very quickly. Police detectives write their reports on their desktop computers and upload them onto Tiburon. Tiburon tracks the date and time that reports are uploaded. At first, some patrol officers were resistant to the use of laptop computers to prepare police reports but now feel that they "can't live without them." Typing tests are required at the time of hire. Officers must possess data entry skills.

When a defendant is arrested, the officer prepares a complaint. Hard copies of complaints and police reports are delivered to the prosecutors by station clerks twice a day on weekdays and once a day on weekends. Supervisors review complaints and electronic reports before they are entered in Tiburon. When an arrest is made, law enforcement assigns an APD case number.¹⁹

The APD evidence unit maintains digital and physical evidence. APD estimates that 10% of its cases involve evidence that is sent to the crime lab for analysis. Crime lab reports are returned to APD. The reports are supposed to be forwarded to prosecutors, but there are occasional problems. The crime lab typically does not provide bench notes and other background materials unless specifically asked to do so.

When audio records are completed, officers upload the evidence to a digital library on an APD server. Officers give the APD photo librarian a memory stick from which their photos are uploaded. APD is instituting a new system that will expedite the entry of photo and video evidence by allowing officers to upload the evidence directly at a station. Except in DUI cases, digital evidence is not automatically sent to prosecutors. Prosecutors send an e-mail to APD to request digital evidence. APD maintains the e-mail requests in case they are needed to resolve a discovery dispute. Prosecutors use the APD case number to request the evidence. In the past, prosecutors requested recordings, photos, and other physical evidence by fax or phone. DUI digital audios are delivered via courier to prosecutors once a week. Other digital audios are delivered daily. They are not e-mailed due to the size and number of files.

APD staff listen to audio tapes to make sure that everything was captured. Reproduction of video takes longer. If a video is 30 minutes long, it takes 30 minutes to reproduce. APD estimates that about 60% of digital discovery goes to municipal prosecutors and 40% goes to state prosecutors.

¹⁹Usually, law enforcement also assigns an Arrest Tracking Number (ATN). An ATN is used as a uniform means to communicate criminal justice information between agencies. The same ATN can apply to a string of offenses. Prosecutors are able to assign an ATN when law enforcement has not done so. The police case number is the more important identifier for discovery purposes.

APD reports that requests for digital discovery have increased. APD reports that they are able to respond almost immediately to these requests. APD estimates that it makes 700 digital CDs per week pursuant to requests from prosecutors. One clerical person works full-time making CDs for discovery. The cost of staff time is estimated to be \$60,000. Other than staff time, costs are negligible, about \$133 per month for recordable discs.

Prosecutors have direct access to Tiburon. Eventually, the plan is to provide prosecutors with direct access to APD's library of digital evidence. Tiburon does not track prosecutor access nor does it log which prosecutor has been assigned to the case. Notice is not sent to prosecutors when new discovery is added in a case. APD reports that they never communicate with prosecutors about a need to redact some discovery because of ongoing investigations or other factors.

2. Fairbanks Police Department (FPD)

There are 44 officers in the Fairbanks Police Department. Fairbanks police officers write their reports in the field and at the station. They send their reports electronically to a supervisor. At first, FPD officers were reluctant to enter their police reports electronically. Now, they appreciate the benefits of having records more readily available.

A complaint is prepared, entered into the FPD case management system, and forwarded to the district attorney's office. FPD assigns a case number. If FPD makes an arrest, the complaint is forwarded the same day with a police report to follow as soon as practicable. Supervisors track the preparation of discovery. When a supervisor approves a police report, it is entered into the records management system. A paper copy is printed and forwarded to the district attorney's office. Discovery is generally available in a couple of days, perhaps longer if there is an intervening weekend.

One staff person at FPD spends about 95% of his or her staff time processing discovery. The staff cost to FPD to process discovery, at \$24 per hour, is about \$50,000 plus benefits. FPD runs criminal histories on the defendant and witnesses unlike in Anchorage where prosecutors have that responsibility. The same process is used for felonies and misdemeanors.

FPD does not routinely forward digital evidence. Defense attorneys must request digital evidence through the district attorney's office. They receive about 20 to 35 requests per week. FPD requires that the requests go through the district attorney's office to insure that prosecutors and defense attorneys have been given the same discovery. In the past, defense attorneys sometimes requested the evidence directly from FPD but did not pick it up. Digital evidence is maintained on a server at FPD

The case management system generates an evidence log. Sometimes the evidence log is not printed at the same time as other discovery. This can lead to late disclosure.

FPD estimates that about 10% of their cases involve the crime lab or medical examiner, not including DUI cases. The crime lab is involved in a higher percentage of DUI cases when defendants request independent blood samples. Analysis of DUI evidence takes one week to one month. There is no medical examiner in Fairbanks. When an autopsy is needed, the body is sent to Anchorage.

FPD perceives that the homicide rate in Fairbanks is probably higher than reported because of the absence of a medical examiner in Fairbanks.

3. Alaska State Troopers (AST)

There are five detachments of the Alaska State Troopers statewide including detachments in Anchorage and Fairbanks.²⁰ AST notes that about 90% of their police reports do not result in criminal prosecutions. Examples of non-criminal matters investigated by AST include automobile crashes, missing person reports, and runaway children. Most criminal cases start with arrests and the vast majority involve misdemeanor offenses.

Troopers prepare their police reports on a desktop computer. Unlike APD and FPD, AST does not maintain an electronic repository of discovery information and materials. Reports are printed and a copy is made for prosecutors. If the defendant is in custody, the reports are done before arraignment. When a defendant is in custody, Troopers attempt to get the police report to prosecutors within 30 days. In felonies, Troopers aim to get discovery to prosecutors within a week or ten days and certainly before grand jury. Supervisors must approve reports before they are provided to prosecutors. This provides quality control but slows down the process. Troopers do not provide prosecutors with criminal histories as prosecutors have access to that information.

AST maintains an Excel spreadsheet to track cases it has forwarded to prosecutors. The spreadsheet includes defendant names, charges, and case numbers. The spreadsheet does not include particular descriptions of the discovery that has been provided or the number of pages. When supplemental discovery is prepared, a hard copy is placed in the investigative file and a copy is sent to prosecutors.

Digital evidence is stored on a CD or DVD. Unlike at APD or FPD, digital evidence is not stored on a server. Like the other law enforcement agencies, AST does not disclose digital evidence unless it is requested. When digital evidence is requested, staff or Troopers themselves must make copies of the CDs or DVDs. It usually takes at least several days to respond to requests for digital evidence.

If the defendant is not in custody, responding to calls for service is prioritized over preparation of police reports. Analysis of crime lab evidence takes at least 30 days.

AST is presently issuing a request for proposals to design and implement an electronic records management system. The hope is that a system can be put in place within one year. This would depend on whether AST is provided with the resources to purchase the necessary hardware. The system will enable AST to maintain reports and digital evidence electronically.

²⁰The Anchorage detachment serves Anchorage, Aniak, Bethel, Dillingham, Emmonak, Iliamna, King Salmon, Kodiak, Kotzebue, McGrath, Nome, Saint Mary's, and Unalakleet. The Fairbanks detachment serves Fairbanks, Barrow, Cantwell, Delta Junction, Galena, Healy, Nenana, Northway, and Tok.

B. Prosecutors

1. Municipal Prosecutors

Anchorage municipal prosecutors estimate that they handle about 10,000 cases per year, not including traffic cases.²¹ All municipal cases are investigated by APD.

APD delivers discovery to Anchorage Municipal Prosecutors twice a day. The discovery consists of written police reports, charging documents, and forms that assign ATN numbers to each case.

The Municipality enters the case into its case management system. When defendants are in custody, the case is entered within four hours. For other defendants, the case is entered into the case management system within one or two days.

Municipal prosecutors have access to APSIN, the state criminal records database, and NCIC, the national criminal records database. The intake unit runs criminal histories on defendants, witnesses, and victims. DMV records are searched if the case involves a driving offense. The unit downloads 911 dispatches from APD if applicable. When applicable, the unit seeks victim medical records. These records can take longer to obtain because they require a release from the victim. The intake unit requires one person to work full-time, seven days a week.

Prosecutors estimate that they receive about 20 pages of initial discovery, principally police reports, per case. Materials generated by the intake unit, principally criminal histories, generate about 10 additional pages per case. Fifty-five to 60 percent of cases have no additional discovery.

Municipal prosecutors have access to Tiburon, the records management system in which APD posts its investigative reports. Clerks within the office examine Tiburon to determine whether additional discovery has been posted for each case. Discovery is then copied. The office uses six clerks to screen Tiburon for additional discovery and to copy all discovery for defense counsel. Prosecutors conservatively estimate that it takes 15 minutes per case just to process paper discovery. Unlike state prosecutors, municipal prosecutors do not apply a Bate Stamp or other identifying information on individual pages of written discovery. The office contacts defense counsel to advise them to pick up the discovery. Attorneys must sign for the discovery upon pickup. Municipal prosecutors do not charge defense counsel for paper copies.

Prosecutors do not routinely provide digital evidence to defense counsel unless requested to do so. When the evidence is requested, APD prepares two CDs, one for the prosecution and one for the defense. Defense attorneys may examine evidence recorded on a CD at the prosecutor's office or pay ten dollars per CD to obtain their own copy. Prosecutors estimate that they receive about \$10,500 per year from defense counsel for CDs containing digital evidence.

²¹The Anchorage District Attorney's office estimates that it handles 4,500 misdemeanor cases per year (see below). A total of the state and municipal misdemeanor caseload estimates is in excess of 3,000 cases more than the annual court report shows were filed in Anchorage in FY07. State and municipal estimates are likely based on misdemeanor referrals from law enforcement as opposed to cases filed in court.

2. State Prosecutors

a. Anchorage District Attorney's Office

About 8,000 cases per year are referred to the Anchorage District Attorney's Office including about 3,500 felonies and 4,500 misdemeanors. The office reports that felony case dispositions include 1,800 pre-indictment changes of plea and 300 post-indictment changes of plea. The district attorney's office estimates that only 800-900 cases per year go to grand jury.

The district attorney's office receives a police report when the case is referred by law enforcement. Ninety-five percent of the office's referrals are from APD. By noon on the day following an arrest, the office receives a paper copy of the discovery needed to screen a case for a charging decision. APD sends the reports to the district attorney's office via courier. The charging document has an ATN number provided by the arresting agency 95% of the time. More than 95% of charging documents come with police reports, but some do not, including some of the most serious offenses.

The office does not maintain a log of what discovery it receives or when the discovery was provided by law enforcement. About 90% of felony cases have some additional discovery. Paralegals review discovery and identify additional discovery that is needed. The office has access to Tiburon.

If a case is not resolved sooner, paralegals run the APD case number in the system to search for additional discovery. This usually occurs within two weeks of the case filing. Digital evidence is not routinely requested unless it is evident that the case will proceed to trial or the evidence is germane to negotiations. If discovery appears to be missing, e-mails are sent to police officers. The office screens for missing discovery before it takes a case to grand jury.

Discovery is copied and provided to each defendant. The district attorney's office applies a Bate stamp. A copy of the discovery is maintained in the district attorney's hard file. The office calls private defense counsel to advise them that discovery is available. Public attorneys routinely pick up discovery twice a day. The office has the defense sign a receipt when discovery is picked up. The receipt also indicates when the office notified the defense that the discovery was available for pick up. The district attorney's office often must make additional copies of discovery for conflict counsel when the first defense counsel fails to forward discovery.

In Anchorage, 20 law office assistants spend at least 20% of their time on discovery-related tasks. Nine paralegals help to process discovery. Law office assistants are typically Range 11 employees with a starting salary of \$33,108. The starting salaries for Range 14 and 15 paralegals are \$39,840 and \$42,624 respectively. A conservative estimate of the annual cost of employing staff to obtain, process, and copy discovery materials in Anchorage would exceed \$200,000 not including benefits. Defense attorneys must reimburse the district attorney's office for discovery. For Anchorage cases, the office estimates that it receives \$50,000 per year from the PDA and \$21,000 from OPA. Reimbursement from private attorneys is not tracked.

The district attorney's office reports that it rarely has conflicts with defense attorneys about the scope of discovery prior to indictment. The office describes an "unspoken agreement" that it will provide "standard" discovery, that is, discovery that is reasonably needed by the defense to negotiate.

Prosecutors generally take their most serious cases to grand jury without negotiation. In other felony cases, they respond to defense requests for additional discovery subject to the defendant's consent to a continuance of the pre-indictment hearing and a waiver of time under Rule 45.

The office reports that discovery problems persist. There are times when defense attorneys could have identified missing discovery sooner had they reviewed their files sooner. When discovery is missing, it is usually because prosecutors did not receive the discovery from APD. Sometimes case numbers are transposed or the discovery was not uploaded into the system.

b. Fairbanks District Attorney's Office

The Fairbanks District Attorney's office handles about 6,000 referred cases per year including 2,000 felonies. The Fairbanks office handles state prosecutions throughout the Fourth Judicial District but 90% of the cases handled by the Fairbanks office involve Fairbanks prosecutions.²²

In Fairbanks, when the district attorney's office receives written discovery materials from law enforcement, it applies Bate stamps and makes a copy for the defense. The office does not maintain a log of whether and when it received discovery from law enforcement. The district attorney's office in Fairbanks tags misdemeanor files for review 20 days after arraignment, the pre-trial order deadline for producing discovery. When a defense attorney files an entry of appearance, the district attorney's office prepares the discovery for pick up without waiting for a request from the defense. Defense attorneys perceive that the office waits until the 20th day to copy the discovery even when the office is aware of an attorney's appointment or notice of appearance at a sooner time. (See below.) In felony cases, unlike in Anchorage, prosecutors provide discovery to defense attorneys at arraignment, after indictment. The defense must sign a receipt when it picks up discovery. After felony arraignment, paralegals in the district attorney's office request all digital and video evidence as well as handwritten notes. In misdemeanors, prosecutors do not seek to obtain these items unless the defense requests them.

The Fairbanks district attorney's office estimates that 40% of misdemeanor cases and 80 to 90% of felony cases have supplemental police reports including reports from multiple officers involved in the same prosecution. More than 70% of this supplemental discovery is the result of ongoing investigation, the other 30% is discovery that could have been produced earlier. They report that the delivery of written supplemental discovery materials from FPD is uneven. Sometimes reports are not done until officers return from leave. State prosecutors often have to ask FPD for missing discovery that their paralegals have identified or that the defense has requested. Prosecutors report that they experience frequent delays in obtaining audio/visual digital evidence from FPD. Sometimes it takes weeks for prosecutors to obtain this discovery. They also note that they have experienced delays in having law enforcement forward crime lab reports. They estimate that 70% of felonies have a crime lab report which can take six months to a year to receive. Six months is a routine amount of time to receive results of DNA testing. Law enforcement is supposed to maintain a log of evidence that it has gathered. Prosecutors report that AST sometimes does not update the log.

²²The Fairbanks district attorney's office estimates that it handles about 1,800 Fairbanks felony cases per year while the court report for FY 07 shows 675 felony filings in Fairbanks. If these figures are accurate, it would suggest that most Fairbanks felony referrals do not result in felony prosecutions.

In Fairbanks, five law office assistants spend about 50-60% of their time processing discovery. Four paralegals spend about 30-40% of their time reviewing discovery and procuring supplemental materials. A conservative estimate of the annual cost of employing staff to obtain, process, and copy discovery materials in Fairbanks would exceed \$150,000 not including benefits.

Fairbanks prosecutors estimate that 10 to 15% of misdemeanor cases have discovery problems at calendar call and that 10 to 15% of felony cases have discovery problems at the omnibus hearing.

C. Defense Attorneys

1. Public Defender Agency (PDA)

When the PDA is assigned to a criminal case, the attorney for the case sends a letter to prosecutors requesting Rule 16 discovery. Attorneys send letters despite their view that prosecutors have an obligation to provide the discovery absent request. Agency attorneys send letters to establish a record of having requested the discovery. In their experience, judges will run Rule 45 time against the defendant if the defendant asks to be provided with discovery that the defendant has not previously requested.

Discovery is picked up from the district attorney's office by a courier every day. It is logged in by clerical staff. Staff enter the date that the discovery was received and the Bates stamp numbers of the discovery materials as applied by the district attorney's office. All discovery materials must be read by staff to identify the names of co-defendants, witnesses and other identifying information. This information is entered into a database. Law office management software is used to determine whether the PDA has a conflict of interest in representing the defendant. If a potential conflict is identified, a paralegal reviews all related files.

If a review of discovery reveals a conflict of interest, the file, including the discovery, is copied by the PDA and delivered to OPA. If a review of discovery reveals no conflicts of interest, staff make at least five copies of discovery materials. Copies are provided to the attorney assigned to the case, a paralegal, and an investigator. Using a marker, staff redact a fourth copy so that the discovery can be provided to the defendant. To avoid the possibility that the defendant could decipher the redacted information, staff make a photocopy of the redacted copy. The redacted photocopy is then mailed to the defendant. The PDA's goal is to complete a conflicts check and to copy all of the discovery within 24 hours. Due to staffing issues, the task can take as long as two weeks.

The PDA reimburses DOL for discovery. In Anchorage, the approximate cost to the PDA is \$50,000. In Fairbanks, the amount of reimbursement is about \$12,000. Statewide, the PDA reimburses DOL about \$115,000 per year for discovery. In addition, the PDA must reimburse law enforcement agencies for copies of digital discovery.

The PDA has 10 to 12 clerical staff in Anchorage and 4 clerical staff in Fairbanks. Clerical staff are paid at Range 9 to 11 in the state's payroll system. The starting salary for a Range 10 employee is \$33,108. It is estimated that 50 to 75 percent of clerical staff time is dedicated to processing discovery. A conservative estimate of the annual cost of employing staff to process and

copy written discovery materials in Anchorage and Fairbanks would exceed \$300,000 not including benefit costs.

The PDA can independently check in-state criminal histories through APSIN. Presently, the PDA does not have independent access to NCIC which contains out-of-state records.

In Anchorage, agency attorneys report that some district court judges require defense attorneys to meet with prosecutors to review discovery in the prosecutor's possession before they will entertain a request for discovery. Attorneys note that this requirement is time-consuming and that scheduling conflicts cause further delays.

In Anchorage, public defenders report that they almost never receive discovery in state misdemeanor cases prior to the pre-trial conference. In contrast, untimely discovery in municipal misdemeanor cases defended by Gorton and Logue is much less of a problem. (See below.) Discovery is typically provided at or after the conference. Typically, lab reports or materials prepared during subsequent investigation have not yet been disclosed. They note that they cannot prepare pre-trial motions without all of the discovery. The PDA perceives that almost all continuances in state misdemeanor cases are related to delays in receiving discovery and that most pre-trial litigation in these cases relates to discovery issues.

All cases considered, Anchorage attorneys report that they receive late discovery in 75% of their cases. It is not uncommon for attorneys to receive some new discovery during jury selection or even later. They perceive that discovery issues are the most common reason that cases are continued.

In Fairbanks, PDA attorneys report that they routinely get discovery only a few days before calendar call in state misdemeanor cases, or approximately six weeks or more after the case has been filed. They perceive that the district attorney's office waits until the 20th day after arraignment, the deadline for providing discovery in misdemeanor cases, to review the file. As a result, defense attorneys almost always ask for a continuance at calendar call. They stress that they need to review police reports before they can ask to review digital and other evidence. Judges typically continue cases for one month at calendar call, and note that it is common for misdemeanor calendar calls to be continued more than once.

Fairbanks PDA attorneys report that the initial discovery process operates more efficiently in felony cases than in misdemeanor cases. The PDA is usually appointed shortly before indictment. At arraignment, the state provides an initial round of discovery. Attorneys advise that they have a very difficult time when requesting additional discovery such as audio and video digital evidence. This evidence can be very useful in helping to convince clients that they ought to consider a plea. The PDA can request digital evidence directly from AST but must tender requests for digital evidence gathered by FPD through the district attorney's office. Defense attorneys used to be able to request digital evidence directly from FPD, but the district attorney's office reported that FPD did not always provide prosecutors with copies, so requests must now be routed through the district attorney's office.

Attorneys at the Fairbanks PDA advise that discovery is still a problem at the omnibus hearing in about half the felony cases. Late crime lab reports in drug cases are very common. Judges

usually respond by imposing further deadlines on prosecutors to produce discovery. Judges usually do not schedule another omnibus hearing.

Fairbanks attorneys note that they request discovery items many times before they file a motion to compel discovery. They estimate that the state does not contest its obligation to produce discovery that is the subject of 80% of their motions to compel. Attorneys advise that judges inquire into how many times defense counsel has reminded prosecutors about missing discovery. They are concerned that judges shift responsibility to them instead of pressing prosecutors to produce the discovery. They note that untimely discovery is sometimes attributable to law enforcement but that timely production of discovery does not appear to be a priority for prosecutors.

2. Office of Public Advocacy (OPA)

Most cases assigned to OPA are the result of a conflict of interest revealed through a review of discoverable materials by the PDA. In those cases, the PDA usually makes a copy of the file, including discovery and provides the file to OPA.

If discovery is not present in the PDA file or if the case was directly assigned to OPA, the attorney for the case sends a letter to prosecutors requesting Rule 16 discovery for the same reasons that the PDA sends a letter requesting discovery. In Anchorage, OPA sends a courier to the district attorney's office daily to retrieve discovery. In Fairbanks, most discovery is sent to OPA from the district attorney's office by courier. OPA must sign a receipt for the discovery. When OPA receives discovery, it is logged in and reviewed for conflicts as in the PDA. OPA uses law office management software to identify conflicts of interest. If a potential conflict is identified, a paralegal reviews all related files. Conflict screening is usually done within 24 hours. Conflicts are resolved in most cases prior to arraignment in felony cases. "Late arriving witnesses" require subsequent checks for conflicts.

When the PDA withdraws due to a conflict of interest, OPA usually gets previously produced discovery directly from the PDA although sometimes difficulties occur. In those cases, prosecutors sometimes send the discovery to the wrong office.

OPA staff make three copies of discovery including a redacted copy for the defendant. It is OPA's goal to process discovery with 24 to 48 hours of its receipt. In practice, it sometimes takes as much as one week. In Anchorage, four Range 14 paralegals spend about 90 percent of their combined time processing discovery. The starting salary of a Range 14 paralegal is \$39,840 per year plus benefits. Four Range 10 OPA staff spend between 20 and 50 percent of their time on discovery-related tasks. In Fairbanks, two paralegals spent about half their time processing discovery and checking for conflicts. A conservative estimate of the annual cost of employing OPA staff to process and copy written discovery materials in Anchorage and Fairbanks would be \$300,000.

Like the PDA, OPA must reimburse DOL for discovery. In Anchorage, the approximate cost to OPA is \$50,000. Statewide, OPA reimburses DOL nearly \$107,000 per year for discovery. In addition, the PDA must reimburse law enforcement agencies for copies of digital discovery.

Fairbanks attorneys report that they receive basic discovery in misdemeanor cases within a few weeks. About one-third of misdemeanor cases have discovery issues at calendar call. In those

situations, cases are typically continued for 30 days. They report that discovery is almost always a problem at the omnibus hearing in felonies. Sometimes judges schedule a subsequent omnibus hearing. If discovery issues are not resolved between the omnibus hearing and calendar call, defense attorneys file a motion to compel. Attorneys report that Fairbanks judges encourage defense counsel to file motions to compel missing discovery. Attorneys perceive that judges grant continuances that are much longer than necessary to address discovery problems.

Supplemental police reports and audio/visual recordings present the most problems. The state does not routinely produce digital evidence but will do so upon request. Timely disclosure of digital recordings is more problematic when the evidence was gathered by FPD. To obtain copies of digital evidence from FPD, attorneys must file a request through the district attorney's office. To obtain copies of digital evidence from AST, attorneys contact the AST records custodian. Attorneys usually receive digital evidence from AST within a week.

Sometimes the crime lab is a source of considerable delay. The crime lab is involved in almost every case involving a drug or sex offense. A crime lab report tends to be more important in the resolution of sex cases rather than drug cases. Prosecutors note that they cannot make the crime lab work more quickly. Defense attorneys perceive that judges rarely require the state to go forward without crime lab evidence. Attorneys cited a recent case in which they received a crime lab report on the eve of trial, several weeks after the date on the report. The defense needed time to have the report reviewed by its expert.

3. Gorton and Logue (G&L)

Gorton and Logue receives a written order from the court when the firm is appointed to represent a defendant. The office does not employ a computerized system to check for conflicts of interest. The office maintains a written list of cases. The firm reports that most of its attorneys have been working there for a long time and rely on their experience with past clientele to identify potential conflicts.

G&L advises that discovery is delivered to the firm by the municipal prosecutor's office. If the defendant is in custody, G&L receives discovery within two or three days. If the defendant is out of custody, G&L receives discovery within two weeks. In most cases, there is no additional discovery after the initial disclosure. The average case has about 20 pages of discovery. DUI cases generate the most materials. Subsequent discovery is more prevalent in DUI cases, in part because the testing officer is usually different than the arresting officer.

Attorneys at G&L do not routinely provide copies of discovery materials to their clients. They provide copies only if the client requests them which is less than 10% of the time. They estimate that they would need to make 80,000 copies if they routinely provided discovery materials to clients. They note that additional staff time would be needed to redact restricted information from the discovery materials given to clients.

G&L reports that they rarely have disputes with municipal prosecutors about discovery. In most cases, G&L have received discovery by the pre-trial conference. G&L attorneys have heard other private attorneys complain at pre-trial conferences about not having received digital evidence. G&L attorneys observe that prosecutors promptly provide the evidence if they are asked. They note

that they do not often request continuances at trial call but that continuances in cases handled by other attorneys are common. They note that trial judges perceive that appellate court decisions have limited their authority to require the prosecution to go to trial when the prosecution is not prepared to do so.

G&L handles about 20 state criminal cases per year. They note that it takes the state a lot longer to disclose the same kind of discovery that municipal prosecutors provide. G&L typically do not have discovery by the pre-trial conference in a state misdemeanor case.

D. Summary of Discovery Problems

As the inconsistencies in the interviews demonstrated, there are different perspectives about how often discovery is a problem and who is to blame when problems occur. These interviews produced conflicting perspectives that judges hear on a daily basis. The point of this assessment is not to assign responsibility for problems. There is a consensus among those interviewed that there is considerable room for improvement. The following problems are evident:

- The delivery of initial police reports from law enforcement to prosecutors usually occurs promptly, although not always.
- The timely delivery of supplemental paper discovery is frequently a problem.
- The reproduction of digital evidence commonly causes cases to be continued.
- It is time-consuming, expensive, and labor intensive to reproduce paper discovery and digital evidence.
- There are inadequate means to track the receipt of discovery leading to disputes about whether and when discovery was provided.

Part VI

Exchanging Discovery Electronically

A. Introduction

A system of electronic exchange of discovery would require law enforcement to enter police reports into a central computer system. A comprehensive system would also include a library of digital evidence including photos, videos, and audios. The Anchorage and Fairbanks Police Departments already enter their police reports electronically and maintain libraries of digital evidence. Other paper evidence, such as drawings, medical records, expert and crime lab reports, and officer notes could be scanned onto the server electronically.

In Anchorage, state and municipal prosecutors are already able to access police reports electronically but discovery problems persist, in large measure because there is no mechanism for granting access to the defense. The discovery process could operate more quickly if both prosecutors and defense attorneys could access discovery materials over the Internet. Defense attorneys could be given a password that would restrict their access to materials relevant to a specific case. The system would record the date that materials were posted. Attorneys could check the system daily. If feasible, the system could alert attorneys via e-mail that new material had been posted in a case.

B. Benefits

A web-based system of electronic exchange of discovery would provide the following benefits:

- A significant source of delay contributing to longer case disposition times could be eliminated.
- Staff time could be put to better use. Instead of copying materials, staff could organize case files and summarize witness statements. This would substantially reduce the time needed by attorneys to prepare cases, enable investigations to commence more promptly, and facilitate earlier preparation of expert reports.
- Hundreds of thousand of dollars would be saved by substantially reducing staff costs and paper and courier expenses. The defense would still need to copy discovery for defendants and attorneys might still need some paper copies for use in court.
- Searchable electronic documents would reduce the time needed to identify conflicts of interest. Staff could match the names of defendants and witnesses against names maintained in attorney databases. This would reduce the number of mistakes made by staff reviewing written materials.
- Similarly, searchable electronic discovery would be a significant benefit to attorneys preparing for motion practice or trial, particularly in serious cases involving large amounts of discovery. Rather than spending time combing through file boxes to find specific information, attorneys could do a word search.

- Claims of ineffective assistance of counsel might be less common. Meaningful discussions between defense counsel and the defendant cannot occur until defense counsel and the defendant have reviewed discovery. Delay contributes to a defendant's perception that defense counsel is not working diligently. Investigation delayed by a lack of discovery can result in missed opportunities. Defendants become more difficult. Plea negotiations become more agitated. Some defendants request new counsel or to represent themselves. Even after a case is resolved, lingering resentment about the quality of representation can make a petition for post-conviction relief more likely. These petitions are often a time-consuming and expensive burden for prosecutors, defense attorneys, and the court.
- A system of electronic discovery would provide a record of when discovery was available for review. It would eliminate most disputes about whether and when disclosures were made. Court time now needed to resolve these disputes could be put to better use.
- Defendants would have fewer reasons to waive time under Rule 45. These waivers reduce the incentive for more expeditious disclosures and contribute to longer case disposition times.
- A system of electronic discovery would be most beneficial in misdemeanor cases. There are more misdemeanor cases than felonies. Most misdemeanors do not involve followup investigation or crime lab analysis that can cause cases to be delayed under any system of discovery.
- Hosting electronic records on a server would provide other benefits to law enforcement such as enabling more efficient responses to public requests for information and facilitating redactions to the information before its release.

C. Costs

It is very likely that the costs of implementing a web-based system of electronic discovery would be small in comparison to the potential benefits. In Anchorage and Fairbanks, much of the cost of a system that would enable discovery to be exchanged electronically has been incurred or is currently budgeted or anticipated, irrespective of whether e-discovery is implemented. APD and FPD already enter and store discovery electronically. The APD case management system is already accessible to prosecutors. AST has funds for designing an electronic records management system. Unbudgeted costs to include other law enforcement agencies, integrate systems, design security measures, and to provide training are likely to be low in comparison to the savings that a web-based discovery system would provide. Such a system would substantially reduce the costs associated with processing, copying, and redacting paper discovery.

Prosecutors, the PDA, and OPA do not foresee any significant costs to implement a system of e-discovery. The agencies have computer systems that are presently capable of storing e-discovery and sharing it with their respective staffs. Additional programming or software might be required to access discovery electronically from other agencies.

Gorton and Logue estimate that they would need to hire at least one staff person at a cost of \$40-60,000 per year to make printed copies of electronic discovery that they now receive from the

municipality at no cost to G&L. They note that they would need a new copy machine and that they would have to purchase more paper. But it is not clear why G&L could not limit their costs by preparing their cases using electronic discovery when possible.

D. Hosting

There is some disagreement as to who should host a web-based system of discovery. Most defense attorneys and the chief of the state's criminal division envision a system of electronic discovery hosted by law enforcement. Some defense attorneys express a "philosophical" problem with law enforcement being principally responsible for making discovery available. APD notes that it has the capability to host a web-based system in Anchorage.

AST, FPD, and district attorneys' offices in Anchorage and Fairbanks prefer a system hosted by prosecutors. They perceive that is the prosecution's role to serve as a "gateway" for discovery. Prosecutors cite their responsibility for insuring that full disclosure has been made. Law enforcement is concerned that some discovery needs to be screened by prosecutors to determine whether there are sufficient grounds to restrict disclosure to the defense.

Among these two possibilities, a web-based system hosted by law enforcement has the greatest potential for reducing unnecessary pre-trial delay. For such a system to work, a number of concerns would have to be addressed:

- The biggest problem with having law enforcement host a web-based system is that there are multiple law enforcement agencies. Most cases in Anchorage and Fairbanks are investigated by the municipal police department but there are other law enforcement agencies in each location, including AST. The vast majority of cases are investigated by a single law enforcement agency, but some cases involve multiple agencies. A technical analyst may consider different possibilities, including having each law enforcement agency host its own records. Prosecutors and defense attorneys would require some sort of notice of which agencies are involved in specific cases. Having each law enforcement agency host its own electronic records appears to be the most feasible alternative. Alternatively, all law enforcement records would need to be uploaded to a single location.
- Exacting security measures must be employed to prevent defense attorneys from "shopping around." Access to discovery materials would have to be case specific. Attorney access would end when the case is resolved or when the attorney withdraws from the case, whichever comes first.
- Law enforcement would need to be able to segregate information or materials that might be subject to in camera review such as information that would jeopardize an ongoing investigation. There was a consensus among those interviewed that the need to restrict discovery is very rare and that in camera review is needed on very few occasions. Were this not true, a more compelling case could be made for having prosecutors host a web-based system.
- Law enforcement agencies would need standardized software to enter information so that attorneys would not experience equipment compatibility issues.

- Presently, some criminal background checks are run by law enforcement. Others are run by prosecutors. To reduce confusion, it would be better to have the investigating law enforcement agency post all relevant criminal records along with other Criminal Rule 16 discovery.

E. Limitations

There are limitations on the potential impact of a system of web-based electronic discovery. It is important to recognize what such a system of web-based electronic discovery cannot do.

- Electronic discovery will not solve problems caused by a lack of resources. When law enforcement lacks adequate staffing, officers must attend to calls rather than write reports. The speed at which discovery is transferred is not that important if preparation of discovery by law enforcement is significantly delayed. No system of discovery can make an overburdened crime lab analyze evidence faster. A system of electronic discovery will make evidence accessible sooner, but it does not insure that attorneys will review it sooner. Understaffing will continue to compromise attorneys' ability to review all materials promptly.
- It may not be possible to grant pro per defendants access to a web-based system, especially if the system is hosted by law enforcement. Granting pro per defendants access would likely pose enhanced security risks. Discovery must be redacted before it is provided to pro per defendants. Those redactions should be made by prosecutors. Many pro per defendants do not have computers.
- Some attorneys may not be computer literate although the number of these attorneys is probably diminishing because some types of evidence, such as photos and recordings, are only presently available in digital format. Initially, it may not be possible to require that a web-based system be the exclusive means to access Rule 16 discovery materials and information. Electronic exchange of Rule 16 discovery should be mandatory for government agencies and should be a condition of any contract that the agencies enter into with private counsel. By taking a firm stand on discovery-related continuances, judges might be able to encourage those few private attorneys who require paper discovery to reconsider.
- Transmitting discovery electronically might be more problematic in rural communities where the technology may not be available, where law enforcement staffing issues are most severe, and where available bandwidth may not be sufficient.
- A web-based system should focus on electronic discovery of routine Rule 16 materials and information. It would not be feasible to respond electronically to defense requests for Intoximeter calibration records, officer personnel records, instruction manuals, log books, etc. Nor will any system of discovery resolve conflicts as to whether prosecutors must produce these types of materials.
- Law enforcement would benefit from electronic communications from prosecutors about case dispositions. Law enforcement needs to know how long to maintain evidence.

F. Outcome Measures

A cost-benefit analysis would compare the cost of implementing and maintaining a system of e-discovery versus the cost of maintaining the present process. Such an analysis would have to consider that many of the costs related to moving to a web-based system of discovery have already been incurred or budgeted.

Several outcome measures could be used to analyze benefits. It is anticipated that the numbers of motions filed and the numbers of continuances granted for discovery-related reasons would go down but data are probably lacking to track these measures effectively. Many cases are continued by stipulation where there is no record of the reason for the stipulation. Going forward, courts could require parties to indicate whether continuances were discovery-related, but there would be no reliable data for a baseline comparison. A reduction in claims of ineffective assistance of counsel might be expected.

Until a system of e-discovery is implemented, PDA and OPA can track the time between case assignments and receipt of Rule 16 discovery. This information could serve as a baseline to measure the time it takes to make discovery available to the defense using electronic discovery.

It is anticipated that electronic discovery would reduce case disposition times. However, because so many factors contribute to case disposition times, it would be difficult to attribute a change to any single factor. Among the many factors that could affect case disposition times are the numbers of cases filed, the staffing of prosecution and defense agencies, and the number of judges. Followup interviews with stakeholders would provide useful information about whether e-discovery reduced delay.

Part VII Conclusion

A web-based system under which routine Rule 16 discovery could be accessed by prosecutors and defense attorneys would significantly reduce discovery-related delay that contributes to longer case disposition times. The greatest potential benefit would come from a system hosted by law enforcement. A system of electronic discovery will not solve all discovery problems. While electronic discovery should help to resolve cases more quickly, there are many other factors that contribute to longer case disposition times.

If this project proceeds, it will be important to select a project manager who is IT savvy and capable of recommending alternatives that are economical and efficient. The project manager must be adept at resolving compatibility issues between agencies and between new and existing technology.