



**House  
Legislative  
Analysis  
Section**

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## PROSECUTORIAL DISCOVERY

House Bill 4227 with committee  
amendments  
First Analysis (2-1-94)

Sponsor: Rep. Leon Stille  
Committee: Judiciary

### ***THE APPARENT PROBLEM:***

In criminal cases, the prosecution is required to disclose certain information, including police reports and witnesses' names, to the defendant before trial. However, statute makes similar "discovery" available to the prosecution only in a limited number of situations: when the defense plans to present an alibi, when insanity or diminished capacity is to be claimed, or when a defense of duress in a prison escape is to be presented. In other situations, the prosecutor cannot demand advance information about a planned defense, but rather often must wait until such things are revealed in the course of courtroom proceedings. Many believe that this is unfair to the prosecutor, who may be surprised by an unexpected defense or evidence that cannot be countered without advance preparation. To remedy this situation, statutory amendments have been proposed to require defendants to provide certain discovery to the prosecution.

### ***THE CONTENT OF THE BILL:***

The bill would amend the Revised Judicature Act to generally require a defendant to disclose the following to the prosecutor upon request:

- the name and last known address of each witness other than the defendant whom the defendant intended to call at trial;
- any report or statement by an expert concerning a mental or physical examination, or any other test, experiment, or comparison that the defendant intended to offer in evidence, or that was prepared by a person who the defendant intended to call as a witness, if the report or statement related to the testimony to be offered;
- a list of exhibits that the defense intended to offer in evidence or that related to the testimony of a planned defense witness.

Where court rule provided otherwise, the disclosures would not be required.

If a defendant failed to disclose evidence as required, that evidence could only be offered at trial if the court found good cause to do so and allowed the evidence. A motion to offer such evidence could be made before or during trial.

MCL 767.94a

### ***FISCAL IMPLICATIONS:***

With regard to a similar Senate bill (Senate Bill 198, which proposes a wider range of disclosures), the Senate Fiscal Agency said that the bill could result in administrative savings to local prosecuting attorneys. (4-7-93)

### ***ARGUMENTS:***

#### ***For:***

Although criminal trials are adversarial proceedings, the interests of justice are not served when a prosecutor is unfairly surprised by an unexpected defense or unanticipated evidence. Through pretrial discovery, however, defense attorneys are able to familiarize themselves with the prosecutor's case and prepare to defend against it. The bill would balance this advantage for the defense with reasonably limited prosecutorial discovery. While some may claim that prosecutorial resources far outstrip the defense's, the fact is that most police departments and prosecutor's offices are heavily burdened and operating under severe fiscal constraints. In reality, the bill's discovery provisions would help to put prosecutors on an equal footing with the defense in preparing for trial. Prosecutorial discovery, combined with the defense discovery which already exists, would improve the administration of justice by minimizing the role of

courtroom gamesmanship and facilitating the search for the truth.

***Against:***

The bill would not balance the advantages between the defense and the prosecution, but rather would tip the balance in favor of the prosecution, which already has the superior power and resources of the government behind it. Most defendants are indigent and are represented by public defenders that may be overextended or inexperienced. The investigatory capabilities of the defense simply do not compare with those of the prosecution. Moreover, indigent defendants often view court-appointed attorneys with suspicion, perceiving them to be part of the prosecutorial system; to require defense attorneys to turn over information to the prosecution would be to worsen the difficulties that many court-appointed attorneys have in gaining the trust of their clients. And, there is a sense in which the bill would put defense counsel to work for the prosecution, by giving the prosecution advance notice of defense witnesses and exhibits. Defenses often develop along unanticipated lines, but the bill would raise barriers to presenting witnesses or exhibits that were not on the list given to the prosecution, and leave the decision on admission to the uncertain exercise of broad judicial discretion. The bill would not favor the discovery of the truth, but rather would favor the prosecution.

***Against:***

In People v. Lemcool (200 Mich App 77), the court of appeals held that in the absence of specific authority granted by statute or court rule, a trial court may not permit discovery by the prosecution. The supreme court heard oral arguments on the case only a few weeks ago, on January 11, 1994. The question of what is appropriate regarding prosecutorial discovery is best left to the supreme court to decide, particularly as it involves a matter of procedure, which falls within the constitutionally-designated purview of the court.

***Against:***

The bill should extend more in the way of discovery to prosecutors, at least when a defense involving scientific or technical matters is planned. If, for example, the defense plans to argue in a vehicular homicide case that a vehicle's engineering was responsible, testimony from expert witnesses could be pivotal, and the prosecution should have the opportunity to find experts who might rebut the defendant's.

***Response:***

The prosecution should be able to determine whether expert witnesses were planned by reviewing the list of witnesses that the defense would have to provide under the bill. To require the defense to reveal more would be to risk constitutional problems.

***POSITIONS:***

The Department of State Police supports the bill. (1-26-94)

The Prosecuting Attorneys Association of Michigan supports the bill, but would prefer that it also provide for disclosure of technical defenses for which expert testimony would be required. (1-25-94)

The American Civil Liberties Union of Michigan opposes the bill. (1-25-94)

The Michigan Council on Crime and Delinquency opposes the bill. (1-26-94)

The State Appellate Defender's Office opposes the bill on the grounds that such matters are best left to the supreme court which has recently heard oral arguments on the matter. (1-31-94)