

**Garden State CLE presents:**



# **Discovery Warfare: Municipal Court**



**Lesson Plan**

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# Part I

## Entitlement to Discovery – In general

**a. Triggering events for defense entitlement to discovery are:**

**1. A complaint has been filed in municipal court;**

**and**

**2. The State is represented by a prosecutor or private attorney as per Rule 7:8-7(b);**

**and**

**3. A written demand has been made upon the municipal prosecutor.**

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## **b. Responsibility for providing discovery**

**Note that the Rules of Court (Rule 7:7-7(a)), a statute (NJSA 2B:25-5(a)) and the prevailing case law uniformly put responsibility of providing discovery on the municipal prosecutor.**

**State v. Holup, 253 NJ Super. 320 (App. Div. 1992)**  
**State v. Prickett, 240 NJ Super. 139 (App. Div. 1990)**  
**State v. Polasky, 216 NJ Super. 549 (Law Div. 1986)**

## **c. Demand request in writing served upon municipal prosecutor**

### **Rule 7:7-7(a)**

[Note: no more restriction to cases involving consequence of magnitude]

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### **Sent to the prosecutor at the address of the court:**

We do not believe that mail addressed to the municipal prosecutor should necessarily be mailed only to the private office address. To our knowledge, municipal prosecutors are appointed for one-year terms by municipal governing bodies who organize at various times during the year. The standard directory is the *New Jersey Lawyers Diary and Manual*, which is delivered shortly before the beginning of the calendar year and publishes information applicable to the prior year. Thus, any change of the municipal prosecutor early in January is not reflected until the following year's diary. Placing mail addressed to the municipal prosecutor in the mailbox seems a minor task for the municipal court staff and does not involve them in the preparation of the State's case nor does it dilute the municipal prosecutor's responsibility and control over the discovery process in any way. Such arrangements support the practicality of addressing correspondence intended for the municipal prosecutor in care of the municipal court.

State v. Holup, 253 NJ Super. 320, 325 (App. Div. 1992)

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**d. Sample Demand for Discovery:**

**Dear Prosecutor:**

**We have today entered our appearance by mail on behalf of the defendant in the above-captioned matter.**

**Consistent with Rule 7:7-7(g), demand is hereby made for any and all relevant materials subject to discovery under Rule 7:7-7(a) and current New Jersey case law. We have enclosed our check in an amount not to exceed \$ \_\_\_\_\_ to pay for the costs of discovery as provided in Rule 7:7-7(j). In addition, we demand the appearance at trial of any person who will provide testimonial evidence on behalf of the prosecution.**

**We shall anticipate your response to our discovery demand within the next ten (10) days.**

**e. Relevant material (Rule 7:7-7(b))**

**State v. Green, 417 NJ Super. 190, 201 (App. Div. 2000)**

Discovery under *Rule 7:7-7* is not limited to the material the prosecutor intends to use at trial. *State v. Green, 327 N.J. Super. 334, 340-41, 743 A.2d 357 (App.Div.2000)*. Rather, the scope of discovery extends to information and documents that are relevant. *See R. 7:7-7*. “Relevant evidence’ means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action.” *N.J.R.E. 401*.

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**State v. Ford, 240 NJ Super. 44, 49-50 (App. Div. 1990)**

**Although the definition of relevance expressed in *Tull* is accurate, and consistent with the purpose of discovery in criminal cases, it is nonetheless a broad definition that is impractical in the context of quasi-criminal drunk driving cases. “While our system recognizes a defendant's right to have complete discovery, ‘allowing a defendant to forage for evidence without *a reasonable basis* is not an ingredient of either due process or fundamental fairness in the administration of the criminal laws.’ Therefore, the question is how to determine whether there is a “reasonable basis” for a defendant's request for supposedly relevant information. As the court below correctly stated:**

***[Rule 7:7-7]* permits a defendant “to inspect and copy or photograph any relevant” materials on request. The State argues on appeal that much of the requested discovery was not “relevant.” Its position is that only those requests based upon a defendant's actual knowledge of facts supporting defense contentions are relevant. This is incorrect. A defendant, for example, need not *know* flawed procedures were used in giving a breathalyzer test in order to require the State to disclose information about those procedures. That information is relevant because it “(1) concerns an issue involved in the prosecution, and (2) tends, reasonably, to prove a fact material to such an issue.” The State's position would require defendants to discover information favorable to them *before* *[Rule 7:7-7]* discovery could be undertaken. That is not the way our system works.**

**We hold that defendants' discovery in DWI cases is limited to those relevant items, within the limitations of [Rule 7:7-7(a)], which there is a reasonable basis to believe will assist a defendant's defense. [Rule 7:7-7(f)(1)] permits a court for good cause shown to limit discovery even if otherwise discoverable under [Rule 7:7-7]. Determinations regarding the scope of discovery and questions of relevancy are matters best left to the discretion of trial courts where particular facts give rise to a basis for distinguishing the case from the usual or run of the mill DWI case. The task of determining whether a discovery request is relevant or whether it should be limited, or has been properly responded to, may be largely factual and well-suited to the discretion of a trial court. Determinations of relevancy in DWI cases depend in large measure on case law surrounding the admissibility of breathalyzer tests.**

# Part II

## Entitlement to Standard Discovery Items

- Rule 7:7-7(b) Discovery by Defendant. Unless the defendant agrees to more limited discovery, in all cases, the defendant, on written notice to the municipal prosecutor or private prosecutor in a cross complaint case, shall be provided with copies of all relevant material, including, but not limited to, the following:
  - (1) books, tangible objects, papers or documents obtained from or belonging to the defendant, including, but not limited to, writings, drawings, graphs, charts, photographs, video and sound recordings, images, electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, into reasonably usable form;

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- (2) records of statements or confessions, signed or unsigned, by the defendant or copies thereof, and a summary of any admissions or declarations against penal interest made by the defendant that are known to the prosecution but not recorded;

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- (3) grand jury proceedings recorded pursuant to R. 3:6-6;

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- (4) results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the matter or copies of these results or reports, that are within the possession, custody or control of the prosecuting attorney;

[Blood – Urine – Drug – other]

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- (5) reports or records of defendant's prior convictions;

[Motor vehicle abstract & CCH]

**2B:25-5.1. Driving record abstract request**

Whenever a person is charged with a violation of [R.S.39:3-40](#), [R.S.39:4-50](#), section 2 of P.L.1981, c. 512 ([C.39:4-50.4a](#)) or [R.S.39:4-129](#), a municipal prosecutor shall contact the New Jersey Motor Vehicle Commission by electronic or other means, for the purpose of obtaining an abstract of the person's driving record. In every such case, the prosecutor shall:

- a. Determine, on the basis of the record, if the person shall be charged with enhanced penalties as a repeat offender; and**
- b. Transmit the abstract to the appropriate municipal court judge prior to the imposition of sentence.**

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- (6) books, originals or copies of papers and documents, or tangible objects, buildings or places that are within the possession, custody or control of the government, including, but not limited to, writings, drawings, graphs, charts, photographs, video and sound recordings, images, electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, into reasonably usable form;

[Data-downloads, telephone  
Intercepts – other recordings]

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- (7) names and addresses of any persons whom the prosecuting attorney knows to have relevant evidence or information, including a designation by the prosecuting attorney as to which of those persons the prosecuting attorney may call as witnesses;

[Upon proper notice to the State, this should include persons who drew blood and urine samples. See State v. Renshaw, 390 NJ Super. 456 (App. Div. 2007); State v. Kent, 391 NJ Super. 352 (App. Div. 2007).]

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- (8) record of statements, signed or unsigned, by the persons described by subsection (7) of this rule or by co-defendants within the possession, custody or control of the prosecuting attorney, and any relevant record of prior conviction of those persons;

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- (9) police reports that are within the possession, custody or control of the prosecuting attorney;

[xref NJSA 39:4-131 for costs]

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- (10) warrants, that have been completely
- executed, and any papers accompanying them, as described by R. 7:5-1(a).

[Note: this Rule is intended to apply to search warrants and not affidavits of probable cause associated with arrest warrants.]

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- (11) the names and addresses of each person whom the prosecuting attorney expects to call to trial as an expert witness, the expert's qualifications, the subject matter on which the expert is expected to testify, a copy of the report, if any, of the expert witness, or if no report was prepared, a statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. If this information is requested and not furnished, the expert witness may, upon application by the defendant, be barred from testifying at trial.

**[May involve police officer in a u/I marijuana case or drug recognition police officers since opinion that defendant was U/I drugs comes within the field of expert testimony. See State v. Bealor, 187 NJ 574 (2006)]**

**[Will involve laboratory personnel State v. Rehmann, 419 NJ Super. 451 (App. Div. 2011)]**

**[Does not appear to cover rebuttal evidence]**

## **Note on excluding expert testimony:**

In exercising its discretion, the court may consider (1) whether the party who failed to disclose intended to mislead; and (2) whether the aggrieved party was surprised and would be prejudiced by the admission of expert testimony. [\*State v. LaBrutto, supra\*, 114 N.J. at 205, 553 A.2d 335](#); see also Pressler & Verniero, *Current N.J. Court Rules*, Comment to R. 3:13–3 (2011) (“The State's failure to comply with the requirement ... will not preclude the testimony if defendant is not thereby prejudiced.”). “Prejudice” in this context refers not to the impact of the testimony itself, but the aggrieved party's inability to contest the testimony because of late notice.

# **Part III**

## **Entitlement to Non-Standard Discovery Items**

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### **a. Laboratory & Scientific Reports – In general**

#### **1.) Rule 7:7-7(b)(4)**

- **(4) results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the matter or copies of these results or reports, that are within the possession, custody or control of the prosecuting attorney;**

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#### **2.) DWI Blood/Urine Draw Cases:**

- **Certificate of results, Notes, Charts and Graphs**

**State v. Weller, 225 NJ Super. 274 (Law Div. 1986)**

**State v. Berezansky, 386 NJ Super. 84 (App. Div. 2006)**

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### **3.) CDS Analysis**

**NJSA 2C:35-19(c)**

**Whenever a party intends to proffer in a criminal or quasi-criminal proceeding, a certificate executed pursuant to this section, notice of an intent to proffer that certificate and all reports relating to the analysis in question, including a copy of the certificate, shall be conveyed to the opposing party or parties at least 20 days before the proceeding begins. An opposing party who intends to object to the admission into evidence of a certificate shall give notice of objection and the grounds for the objection within 10 days upon receiving the adversary's notice of intent to proffer the certificate.**

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**To harmonize the two deadlines included in section 19c, we conclude that the ten days within which a defendant must object or waive begins to run only after the State has disclosed the supporting data as well as the NOI. *State v. Heisler*, 422 NJ Super. 399, 422 (App. Div. 2011)**

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### **Lab Report Chronology**

- 1. Initial Demand for Discovery to Prosecutor**
  - 2. Response within 10-days [R. 7:7-7(g)]**
  - 3. Notice of Intent to proffer [NJSA 2C:35-19(c)]**
  - 4. Certificate & Laboratory reports (conveyed 20-days before proceeding begins)**
  - 5. Objection (within 10-days of receipt of lab reports & NOI) (*Heisler*, supra at 422)**
  - 6. Hearing on admissibility within 2-days before the beginning of trial.**
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## **b. Chun Discovery:**

### **1. State v. Chun, 194 NJ 54, 153 (2008) (order)**

**C. Produce in discovery the twelve foundation documents identified by the Special Master as follows:**

**(1) New Standard Solution Report of the most recent control test solution change, and the credentials of the operator who performed that change;**

**(2) Certificate of Analysis for the 0.10 percent solution used in that New Solution Report;**

**(3) Draeger Safety Certificate of Accuracy for the Alcotest CU34 Simulator;**

**(4) Draeger Safety Certificate of Accuracy for the Alcotest 7110 Temperature Probe;**

**(5) Draeger Safety Certificate of Accuracy for the Alcotest 7110 Instrument;**

**(6) Calibration Records, including control tests, linearity tests, and the credentials of the coordinator who performed the calibration;**

**(7) Certificate of Analysis for the 0.10 percent solution used in the calibration control test;**

**(8) Certificate of Analysis for the 0.04, 0.08, and 0.16 percent solutions used in the calibration linearity test;**

**(9) New Standard Solution Report, following the most recent calibration;**

**(10) Draeger Safety Certificates of Accuracy for the Simulators used in calibration;**

**(11) Draeger Safety Certificate of Accuracy for the Alcotest 7110 Temperature Probe used in calibration; and**

**(12) Draeger Safety Ertco-Hart Calibration Report; and it is further**

### **3. Data Downloads & Repair Records**

**State v. Maricic, 417 NJ Super. 280 (App. Div. 2010)**

# Part IV

## *Causa Belli*

### a.) Procedure for declaring war in Discovery disputes.

- **Rule 7:7-7 (h) Motions for Discovery.** No motion for discovery shall be made unless the prosecutor and defendant have conferred and attempted to reach agreement on any discovery issues, including any issues pertaining to discovery provided through the use of CD, DVD, e-mail, internet or other electronic means.

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**Note that motions in municipal court are typically made orally and informally:**

**Rule 7:7-2(a)** (Except as otherwise provided by R. 7:5-2 (motion to suppress), motions in the municipal court and answers to motions, if any, shall be made orally, unless the court directs that the motion and answer be in writing. Oral testimony or affidavits in support of or in opposition to the motion may be required by the court in its discretion.

**The better practice is to ask the motion judge to relax Rule 7:7-2(a) as per the general relaxation Rule 1:1-2 and submit a formal motion with a form of order, brief and certification outlining your attempts to resolve the disputed discovery issue. Include the following quote in your brief in support of motion:**

**“Lastly, we are constrained to comment on the effect of [Rule 7:7-2(a)], which permits motions in the municipal courts to be made “orally and informally.” As our municipal courts mature and become responsible for the disposition of more complex, more serious in terms of penal consequence and more communally important cases, more formal practices become essential. We understand that much of the subject matter in controversy in the municipal courts is minor and, in such cases, informal practices should continue, but in the more significant cases, a more careful, thorough procedure is warranted. There is a recognizable difference in the analysis of the discovery in a drunk-driving case as compared to one involving a stop light violation. The mere fact that the Court Rule allows informality does not give broad license to counsel. Motions and supporting documents assist the municipal court judge in making a fair and considered decision. A motion limiting the time for completion of discovery in this case would have ensured notice to the prosecutor and avoided the waste of time by defendant, the expert witness and defense counsel.”**

**State v. Holup, 253 NJ Super. 320, 326 (App. Div. 1992)**

## **b.) Sanctions and Relief for missing or incomplete discovery– In General**

- (i) Continuing Duty to Disclose; Failure to Comply. **There shall be a continuing duty to provide discovery pursuant to this rule. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order that party to provide the discovery of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed or enter such other order as it deems appropriate.**
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**“By way of clarification of the situation where discovery has not been provided, we would also recommend that defense counsel serve a motion, on the papers, with certification similar to *R. 1:6-2*, upon the municipal prosecutor, filing the original with the municipal court seeking an order limiting time for the production of discovery and upon the municipal prosecutor's failure to do so, dismissal of the action. Such an application and the ensuing order would alert the municipal prosecutor and enforcement authorities to their discovery responsibilities and avoid the inconvenience to litigants and witnesses that occurs with such frequency when all parties appear in court for trial.**

**State v. Holup, 253 NJ Super. 320, 325-326 (1992)**

**[Practice tip: best procedure is to request that material not disclosed be barred from evidence.]**

**DONINI & RAMSEY**

**2000 HAMILTON AVENUE**

**HAMILTON, NEW JERSEY 08619**

**(609) 396-7979**

**ATTORNEY FOR DEFENDANT**

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<b>STATE OF NEW JERSEY</b>	<b>:</b>	<b>EWING TOWNSHIP MUNICIPAL</b>
<b>COURT</b>		
<b>Plaintiff</b>	<b>:</b>	<b>MERCER COUNTY</b>
<b>vs.</b>	<b>:</b>	<b>SUMMONS NO. EWG123456</b>
<b>SCOTT A. BROWN</b>	<b>:</b>	<b>QUASI-CRIMINAL ACTION</b>
<b>Defendant</b>	<b>:</b>	<b>NOTICE OF MOTION</b>
		<b>PURSUANT TO <u>RULE 7:7-2(a)</u></b>

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TO: Peter Pan, Municipal Prosecutor  
Ewing Township Municipal Court  
2 Jake Garzio Drive  
Ewing, New Jersey 08628

**PLEASE TAKE NOTICE** that on a date to be set by the Court, unless the results of the laboratory tests have been provided to Defense, the undersigned counsel will move for an Order relaxing the requirements of Rule 7:7-2(a) and barring the State from using any report or opinion related to any substances purportedly found in Defendant's urine sample in connection the above captioned matter.

In support of the within application, the undersigned counsel will rely upon the annexed brief, oral argument and the rule of law established by the Appellate Division in State vs. Holup, 253 N.J.Super 320 (App.Div.1992).

**DONINI & RAMSEY**

**ROBERT RAMSEY**

Dated: October 21, 2011

DONINI & RAMSEY

**2000 HAMILTON AVENUE**

**HAMILTON, NEW JERSEY 08619**

**(609) 396-7979**

**ATTORNEY FOR DEFENDANT**

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<b>STATE OF NEW JERSEY</b>	<b>:</b>	<b>EWING TOWNSHIP MUNICIPAL</b>
<b>COURT</b>		
<b>Plaintiff</b>	<b>:</b>	<b>MERCER COUNTY</b>
<b>vs.</b>	<b>:</b>	<b>SUMMONS NO. EWG123456</b>
<b>SCOTT A. BROWN</b>	<b>:</b>	<b>QUASI-CRIMINAL ACTION</b>
<b>Defendant</b>	<b>:</b>	<b>ORDER</b>

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**THIS MATTER** having been opened to the Court upon the application of Donini & Ramsey, Esquires, Robert Ramsey, Esquire, appearing, and the Court having considered the arguments of counsel and other good cause having been shown;

**IT IS ON THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2011;**

**ORDERED** that the requirements of Rule 7:7-2(a) be relaxed to the extent that the Court will consider written submissions in support of this motion; and it is further

**ORDERED** that any report or opinion related to any substances found in Defendant's urine be barred as evidence in the trial of the above matter.

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Judge Dredd, J.M.C.

**DONINI & RAMSEY**

**2000 HAMILTON AVENUE**

**HAMILTON, NEW JERSEY 08619**

**(609) 396-7979**

**ATTORNEY FOR DEFENDANT**

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**STATE OF NEW JERSEY : EWING TOWNSHIP MUNICIPAL  
COURT**

**Plaintiff : MERCER COUNTY**

**vs. : SUMMONS NO. EWG123456**

**SCOTT A. BROWN : QUASI-CRIMINAL ACTION**

**Defendant : Certification**

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**I, Robert Ramsey, of full age, do certify the following to be true:**

- 1. I am counsel of record in the above-captioned matter.**
- 2. On July 12<sup>th</sup>, August 22<sup>nd</sup> and September 30<sup>th</sup> of this year, I made written and in person, oral demands upon the municipal prosecutor to produce the results of any and all laboratory analysis of a urine sample taken from the body of my client when he was arrested on June 6, 2011.**
- 3. To date, despite my attempts to receive this discovery, the prosecutor has not provided it to me.**
- 4. I have attempted to resolve this matter in good faith with the prosecutor consistent with Rule 7:7-7(h).**
- 5. Without the foregoing discovery, I will not be able to properly defend my client or provide him with meaningful legal advice.**

**[Certification as per rule 1:4-4(b)]**

## **c.) Discovery Costs – In general**

**1.) Electronic discovery and non-printed materials are generally to be provided free of charge.**

- (i) Discovery Fees.
  - (1) Standard Fees. The municipal prosecutor, or a private prosecutor in a cross-complaint case, may charge a fee for a copy or copies of discovery. The fee assessed for discovery embodied in the form of printed matter shall be \$0.05 per letter size page or smaller, and \$0.07 per legal size page or larger. From time to time, as necessary, these rates may be revised pursuant to a schedule promulgated by the Administrative Director of the Courts. If the prosecutor can demonstrate that the actual costs for copying discovery exceed the foregoing rates, the prosecutor shall be permitted to charge a reasonable amount equal to the actual costs of copying. The actual copying costs shall be the costs of materials and supplies used to copy the discovery, but shall not include the costs of labor or other overhead expenses associated with making the copies, except as provided for in paragraph (i)(2) of this rule. Electronic records and non-printed materials shall be provided free of charge, but the prosecutor may charge for the actual costs of any needed supplies such as computer discs.

**(See also OPRA - NJSA 47:1A-5(b))**

## **2.) Accident Reports – NJSA 39:4-131**

**Such written reports required to be forwarded by law enforcement officers and the information contained therein shall not be privileged or held confidential. Every citizen of this State shall have the right, during regular business hours and under supervision, to inspect and copy such reports and shall also have the right in person to purchase copies of the reports at the same fee established by section 6 of [P.L.2001, c. 404 \(C.47:1A-5\)](#). If copies of reports are requested other than in person, an additional fee of up to \$5.00 may be added to cover the administrative costs of the report. Upon request, a police department shall send an accident report to a person through the mail or via fax as defined in section 2 of P.L.1976, c. 23 ([C.19:59-2](#)). The police department may require the person requesting the report to provide a completed request form and the appropriate fee prior to faxing or mailing the report. The police department shall provide the person requesting the report with the option of submitting the form and providing the appropriate fee either in person, through the mail, or via fax as defined in section 2 of P.L.1976, c. 23 ([C.19:59-2](#)).**

### 3.) Cost Disputes May Be Contested under either under

- Rule 7:7-7(e) Reasonableness of Cost. Upon motion of any party, the court may consider the reasonableness of the cost of discovery ordered by the court to be disseminated to the parties. If the court finds that the cost charged for discovery is unreasonable, the court may order the cost reduced or make such other order as is appropriate.

Or

### 7:7-5. Pretrial Procedure

- (a) Pretrial Conference. At any time after the filing of the complaint, the court may order one or more conferences with the parties to consider the results of negotiations between them relating to a proposed plea, discovery, or to other matters that will promote a fair and expeditious disposition or trial. With the consent of the parties or counsel for the parties, the court may permit any pretrial conference to be conducted by means of telephone or video link.

**4.) Note that in extraordinary cases, a special service charge may be assessed following notice and an opportunity to object under Rule 7:7-7(i)(2) (printed matter) or Rule 7:7-7(i)(3) (electronic records).**

**Sample Contested Cost Issues – Data downloads from State Police, costs of CD and DVD.**

## **d.) Missing Videotape in DWI Cases**

**1.) Relevant on the issue of under the influence and p/c to arrest only. Not necessary to rebut accuracy of BAC. (State v. Alex, 257 NJ Super. 16, 17 (App. Div. 1992)).**

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**Subject to the three-part test outlined in State v. Colasurdo, 214 NJ Super. 185, 189 (1986).**

- (1) whether there was bad faith or connivance on the part of the government;**
  - (2) whether the evidence suppressed, lost or destroyed was sufficiently material to the defense; and**
  - (3) whether defendant was prejudiced by the loss or destruction of the evidence.**
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**See generally State v. Mustaro, 411 NJ Super. 91 (App. Div. 2009).**

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**Note – On failure to videotape defendant, the government is under no obligation to tape or otherwise create specific evidence of guilt. State v. Gordon, 261 NJ Super. 462 (App. Div. 1993).**

## **e.) Accountability**

**Rule 7:7-7(g) - If any discoverable materials known to a party have not been supplied, the party obligated with providing that discovery shall also provide the opposing party with a listing of the materials that are missing and explain why they have not been supplied. Unless otherwise ordered by the judge, the parties may provide [exchange] discovery pursuant to paragraphs (a), (b), (c) and (f) of this rule through the use of e-mail, internet or other electronic means. sections (a), (b), (c) and (f) of this rule through the use of CD, DVD, e-mail, internet or other electronic means.**

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**Rule 7:7-7(i) - There shall be a continuing duty to provide discovery pursuant to this rule.**

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**Open issues related to data-downloads from State Police web site.**

## **f.) Alcotest & Electronic Discovery**





**Rule 7:7-7(g)**



**Documents provided through electronic means shall be in PDF format. All other discovery shall be provided in an open, publicly available (non-proprietary) format that is compatible with any standard operating computer. If discovery is not provided in a PDF or open, publicly available format, the transmitting party shall include a self-extracting computer program that will enable the recipient to access and view the files that have been provided. Upon motion of the recipient, and for good cause shown, the court shall order that discovery be provided in the format in which the transmitting party originally received it. In all cases in which an Alcotest device is used, any Alcotest data shall, upon request, be provided for any Alcotest 7110 relevant to a particular defendant's case in a readable digital database format generally available to consumers in the open market. In all cases in which discovery is provided through electronic means, the transmitting party shall also include a list of the materials that were provided and, in the case of multiple disks, the disk on which they can be located.**

# Part V

## Appendix

### 7:7-7. Discovery and Inspection

- (a) Scope. If the government is represented by the municipal prosecutor or a private prosecutor in a cross complaint case, discovery shall be available to the parties only as provided by this rule, unless the court otherwise orders. All discovery requests by defendant shall be served on the municipal prosecutor, who shall be responsible for making government discovery available to the defendant. If the matter is, however, not being prosecuted by the municipal prosecutor, the municipal prosecutor shall transmit defendant's discovery requests to the private prosecutor in a cross complaint case, pursuant to R. 7:8-7(b).
- (b) Discovery by Defendant. Unless the defendant agrees to more limited discovery, in all cases, the defendant, on written notice to the municipal prosecutor or private prosecutor in a cross complaint case, shall be provided with copies of all relevant material, including, but not limited to, the following:
  - (1) books, tangible objects, papers or documents obtained from or belonging to the defendant, including, but not limited to, writings, drawings, graphs, charts, photographs, video and sound recordings, images, electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, into reasonably usable form;

- (2) records of statements or confessions, signed or unsigned, by the defendant or copies thereof, and a summary of any admissions or declarations against penal interest made by the defendant that are known to the prosecution but not recorded;
- (3) grand jury proceedings recorded pursuant to R. 3:6-6;
- (4) results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the matter or copies of these results or reports, that are within the possession, custody or control of the prosecuting attorney;
- (5) reports or records of defendant's prior convictions;
- (6) books, originals or copies of papers and documents, or tangible objects, buildings or places that are within the possession, custody or control of the government, including, but not limited to, writings, drawings, graphs, charts, photographs, video and sound recordings, images, electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, into reasonably usable form;
- (7) names and addresses of any persons whom the prosecuting attorney knows to have relevant evidence or information, including a designation by the prosecuting attorney as to which of those persons the prosecuting attorney may call as witnesses;
- (8) record of statements, signed or unsigned, by the persons described by subsection (7) of this rule or by co-defendants within the possession, custody or control of the prosecuting attorney, and any relevant record of prior conviction of those persons;

- (9) police reports that are within the possession, custody or control of the prosecuting attorney;
- (10) warrants, that have been completely executed, and any papers accompanying them, as described by R. 7:5-1(a).
- (11) the names and addresses of each person whom the prosecuting attorney expects to call to trial as an expert witness, the expert's qualifications, the subject matter on which the expert is expected to testify, a copy of the report, if any, of the expert witness, or if no report was prepared, a statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. If this information is requested and not furnished, the expert witness may, upon application by the defendant, be barred from testifying at trial.
- (c) Discovery by the State. In all cases, the municipal prosecutor or the private prosecutor in a cross complaint case, on written notice to the defendant, shall be provided with copies of all relevant material, including, but not limited to, the following:
  - (1) results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the matter or copies of these results or reports within the possession, custody or control of the defendant or defense counsel;
  - (2) any relevant books, originals or copies of papers and other documents or tangible objects, buildings or places within the possession, custody or control of the defendant or defense counsel, including, but not limited to, writings, drawings, graphs, charts, photographs, video and sound recordings, images, electronically stored information, and any other data or data compilations stored in any medium from which

- information can be obtained and translated, if necessary, into reasonably usable form;
- (3) the names and addresses of those persons known to defendant who may be called as witnesses at trial and their written statements, if any, including memoranda reporting or summarizing their oral statements;
  - (4) written statements, if any, including any memoranda reporting or summarizing the oral statements, made by any witnesses whom the government may call as a witness at trial; and
  - (5) the names and addresses of each person whom the defense expects to call to trial as an expert witness, the expert's qualifications, the subject matter on which the expert is expected to testify, and a copy of the report, if any, of such expert witness, or if no report is prepared, a statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. If this information is requested and not furnished, the expert may, upon application by the prosecuting attorney, be barred from testifying at trial.
- (d) Documents Not Subject to Discovery. This rule does not require discovery of a party's work product, consisting of internal reports, memoranda or documents made by that party or by that party's attorney or agents, in connection with the investigation, prosecution or defense of the matter. Nor does it require discovery by the government of records or statements, signed or unsigned, by defendant made to defendant's attorney or agents.
  - (e) Reasonableness of Cost. Upon motion of any party, the court may consider the reasonableness of the cost of discovery ordered by the court to be disseminated to the parties. If the court finds that the cost charged for discovery is unreasonable, the court may order the cost reduced or make such other order as is appropriate.

- (f) Protective Orders.
  - (1) Grounds. Upon motion and for good cause shown, the court may at any time order that the discovery sought pursuant to this rule be denied, restricted, or deferred or make such other order as is appropriate. In determining the motion, the court may consider the following: protection of witnesses and others from physical harm, threats of harm, bribes, economic reprisals and other intimidation; maintenance of such secrecy regarding informants as is required for effective investigation of criminal activity; protection of confidential relationships and privileges recognized by law; and any other relevant considerations.
  - (2) Procedures. The court may permit the showing of good cause to be made, in whole or in part, in the form of a written statement to be inspected by the court alone. If the court enters a protective order, the entire text of the statement shall be sealed and preserved in the court's records, to be made available only to the appellate court in the event of an appeal.
- (g) Time and Procedure. A defense request for discovery shall be made contemporaneously with the entry of appearance by the defendant's attorney, who shall submit a copy of the appearance and demand for discovery directly to the municipal prosecutor. If the defendant is not represented, any requests for discovery shall be made in writing and submitted by the defendant directly to the municipal prosecutor. The municipal prosecutor shall respond to the discovery request in accordance with paragraph (b) of this rule within 10 days after receiving the request. Unless otherwise ordered by the judge, the defendant shall provide the prosecutor with discovery, as provided by paragraph (c) of this rule, within 20 days of the prosecuting attorney's compliance with the defendant's discovery request. If any discoverable materials known

to a party have not been supplied, the party obligated with providing that discovery shall also provide the opposing party with a listing of the materials that are missing and explain why they have not been supplied. Unless otherwise ordered by the judge, the parties may provide discovery pursuant to paragraphs (a), (b), (c), and (h) of this rule through the use of CD, DVD, e-mail, internet or other electronic means. Documents provided through electronic means shall be in PDF format. All other discovery shall be provided in an open, publicly available (non-proprietary) format that is compatible with any standard operating computer. If discovery is not provided in a PDF or open, publicly available format, the transmitting party shall include a self-extracting computer program that will enable the recipient to access and view the files that have been provided. Upon motion of the recipient, and for good cause shown, the court shall order that discovery be provided in the format in which the transmitting party originally received it. In all cases in which an Alcotest device is used, any Alcotest data shall, upon request, be provided for any Alcotest 7110 relevant to a particular defendant's case in a readable digital database format generally available to consumers in the open market. In all cases in which discovery is provided through electronic means, the transmitting party shall also include a list of the materials that were provided and, in the case of multiple disks, the specific disk on which they can be located.

- (h) Motions for Discovery. No motion for discovery shall be made unless the prosecutor and defendant have conferred and attempted to reach agreement on any discovery issues, including any issues pertaining to discovery provided through the use of CD, DVD, e-mail, internet or other electronic means.
- (i) Discovery Fees.
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- (1) Standard Fees. The municipal prosecutor, or a private prosecutor in a cross-complaint case, may charge a fee for a copy or copies of discovery. The fee assessed for discovery embodied in the form of printed matter shall be \$0.05 per letter size page or smaller, and \$0.07 per legal size page or larger. From time to time, as necessary, these rates may be revised pursuant to a schedule promulgated by the Administrative Director of the Courts. If the prosecutor can demonstrate that the actual costs for copying discovery exceed the foregoing rates, the prosecutor shall be permitted to charge a reasonable amount equal to the actual costs of copying. The actual copying costs shall be the costs of materials and supplies used to copy the discovery, but shall not include the costs of labor or other overhead expenses associated with making the copies, except as provided for in paragraph (i)(2) of this rule. Electronic records and non-printed materials shall be provided free of charge, but the prosecutor may charge for the actual costs of any needed supplies such as computer discs.
- (2) Special Service Charge for Printed Copies. Whenever the nature, format, manner of collation, or volume of discovery embodied in the form of printed matter to be copied is such that the discovery cannot be reproduced by ordinary document copying equipment in ordinary business size, or is such that it would involve an extraordinary expenditure of time and effort to copy, the prosecutor may charge, in addition to the actual copying costs, a special service charge that shall be reasonable and shall be based upon the actual direct costs of providing the copy or copies. Pursuant to R. 7:7-1, the defendant shall have the opportunity to review and object to the charge prior to it being incurred.

- (3) Special Service Charge for Electronic Records. If the defendant requests an electronic record: (1) in a medium or format not routinely used by the prosecutor; (2) not routinely developed or maintained by the prosecutor; or (3) requiring a substantial amount of manipulation or programming of information technology, the prosecutor may charge, in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be based on (1) the cost for any extensive use of information technology, or (2) the labor cost of personnel providing the service that is actually incurred by the prosecutor or attributable to the prosecutor for the programming, clerical, and supervisory assistance required, or (3) both. Pursuant to R. 7:7-1, the defendant shall have the opportunity to review and object to the charge prior to it being incurred.
- (i) Continuing Duty to Disclose; Failure to Comply. There shall be a continuing duty to provide discovery pursuant to this rule. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order that party to provide the discovery of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed or enter such other order as it deems appropriate.

