

3:13-5. Discovery Fees

(a) Standard Fees. The prosecutor 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 section (b) 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.

(b) 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. 3:10-1, defense counsel shall have the opportunity to review and object to the charge prior to it being incurred.

(c) **Special Service Charge for Electronic Records.** If defense counsel 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 the cost for any extensive use of information technology, or for 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 both. Pursuant to R. 3:10-1, defense counsel shall have the opportunity to review and object to the charge prior to it being incurred.

NOTE: Adopted _____ to be effective _____.

COMMENTARY

R. 3:13-5 is a new rule designed to set standard discovery fees. The proposed rule was modeled after N.J.S.A. 47:1A-5(b) – (d), one of the statutes that comprise the “Open Public Records Act” (OPRA). See also Directive #15-05, issued on October 14, 2010 by Acting Administrative Director Glenn A. Grant, advising that the Supreme Court had adopted a fee structure for Judiciary records that mirrors the copy fees provided for in OPRA even though OPRA does not apply to the Judiciary.¹⁴ During the course of the *Committee’s* discussions, the Office of the Public Defender provided a chart that showed a huge variation in the amount that the different county prosecutors charged that office for discovery, both generally and for different pieces of discovery. For example, some prosecutor’s offices did not charge the Public Defender’s Office for discovery, or charged only a nominal fee, while others charged much higher amounts. The total amounts charged by various county prosecutors for the one-year period from February 2009 to February 2010 ranged from zero to just under \$58,000. The prices for individual items also varied greatly. Some counties, for example, did not charge the Public Defender for CDs or DVDs, while others charged \$25 and \$50, respectively, for

¹⁴ The Directive also provided that the Judiciary’s usual fees charged for copies of court records would be waived when federal, state or local governmental entities request a small number of copies of documents. The rationale for this was that other governmental agencies are presumptively functioning in the public interest. The *Committee* did not reach the issue of whether this same rationale would apply to discovery fees.

those items. Similar disparities existed in the fees charged for paper copies, videotapes, audiotapes and photos.

Initially, it was suggested that the issue of uniform discovery fees might more appropriately be a matter for the Legislature or the Executive branch to examine. However, given the Appellate Division's opinion in Constantine v. Twp. of Bass River, 406 N.J. Super. 305 (App. Div. 2009), the *Committee* believed that it was within its authority to address this inconsistency in discovery charges across the state. In Constantine, the plaintiff, who had paid twenty dollars for three pages of discovery related to a speeding summons, filed a class action complaint against the Township of Bass River, as well as several other municipalities, alleging that those towns charged excessive fees for written discovery. The Appellate Division affirmed the trial court's dismissal of the plaintiff's complaint, but referred the discovery fee issue to the Attorney General, noting that the Attorney General had the power, absent specific legislation, to direct municipal prosecutors regarding the discovery fees that they may appropriately charge.¹⁵ Id. at 329. The court also invited the Legislature to address the issue of discovery fees¹⁶, and, while offering no opinion on whether the Supreme Court should set a fee schedule, noted that the

¹⁵ The *Committee* subsequently contacted a representative from the Attorney General's Division of Criminal Justice, who reported that the Attorney General's Office did not plan to develop a fee schedule for Municipal Court discovery, as that was viewed as a Legislative matter.

¹⁶ The *Committee* also contacted the AOC's Director of Professional and Governmental Services, who oversees the Judiciary's Legislative Services Unit. He was not aware of any pending legislation that would set uniform discovery fees.

Court had the Constitutional authority to "make rules governing the administration of all courts, as well as "the practice and procedure in all such courts." *Id.* at 329-330.

As Constantine made it clear that it was within the Court's rule-making authority to set fees for discovery, the *Committee* decided to look more closely at that issue. Thus, this rule is designed to set standard, reasonable costs for discovery, to allow exceptions in certain instances, and to allow defense counsel to object to those charges that it deems to be excessive.

Paragraph (a) – Standard Fees

This paragraph specifically provides that prosecutors may charge a fee for copies of discovery, and sets the standard fee for discovery in the form of printed matter at \$0.05 per letter size page and \$0.07 per legal size page. Electronic records and non-printed materials are to be provided free of charge, but the prosecutor may charge for the actual costs of any necessary supplies, such as computer disks. These are the same fees that may be charged under OPRA, pursuant to N.J.S.A. 47:1A-5(b), for government records. This paragraph also provides that these rates may be revised from time to time pursuant to a schedule promulgated by the Administrative Director of the Courts. In addition, if the prosecutor can show that the actual copying costs exceeded those rates, he or she may charge a reasonable amount equal to those costs. That amount, however,

may only be for the costs of materials and supplies used in copying the discovery, and may not, in most cases, include the costs for labor and overhead.

Paragraph (b) – Special Service Charge for Printed Copies

Paragraph (b) allows the prosecutor to charge a reasonable special service charge in cases in which the copying cannot be accomplished by ordinary copying equipment, or in which copying would involve an extraordinary expenditure of time and effort. In those instances, the prosecutor may charge an amount equal to the actual direct costs of copying. Defense counsel, however, would be provided an opportunity to review and object to the charge prior to it being incurred.

Paragraph (c) – Special Service Charge for Electronic Records

Similar to paragraph (b), paragraph (c) allows the prosecutor to charge a reasonable special charge in certain instances for the production of electronic records. Specifically, if defense counsel 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 an amount based on the cost of any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred or attributable to the programming, clerical, and supervisory assistance

required, or both. Also, similar to paragraph (b), defense counsel would be provided an opportunity to review and object to the charge prior to it being incurred.