

RULE 16. Discovery and Inspection

(A) Purpose, Scope and Reciprocity. This rule is to provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity of the justice system and the rights of defendants, and to protect the well-being of witnesses, victims, and society at large. All duties and remedies are subject to a standard of due diligence, apply to the defense and the prosecution equally, and are intended to be reciprocal. Once discovery is initiated by demand of the defendant, all parties have a continuing duty to supplement their disclosures.

(B) Discovery: Right to Copy or Photograph. Upon receipt of a written demand for discovery by the defendant, and except as provided in division (C), (D), (E), (F), or (J) of this rule, the prosecuting attorney shall provide copies or photographs, or permit counsel for the defendant to copy or photograph, the following items related to the particular case indictment, information, or complaint, and which are material to the preparation of a defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant, within the possession of, or reasonably available to the state, subject to the provisions of this rule:

- (1) Any written or recorded statement by the defendant or a co-defendant, including police summaries of such statements, and including grand jury testimony by either the defendant or co-defendant;
- (2) Criminal records of the defendant, a co-defendant, and the record of prior convictions that could be admissible under Rule 609 of the Ohio Rules of Evidence of a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal;
- (3) Subject to divisions (D)(4) and (E) of this rule, all laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings, or places;
- (4) Subject to division (D)(4) and (E) of this rule, results of physical or mental examinations, experiments or scientific tests;
- (5) Any evidence favorable to the defendant and material to guilt or punishment;
- (6) All reports from peace officers, the Ohio State Highway Patrol, and federal law enforcement agents, provided however, that a document prepared by a person other than the witness testifying will not be considered to be the witness's prior statement for purposes of the cross examination of that particular witness under the Rules of Evidence unless explicitly adopted by the witness;
- (7) Any written or recorded statement by a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal.

(C) Prosecuting Attorney’s Designation of “Counsel Only” Materials. The prosecuting attorney may designate any material subject to disclosure under this rule as “counsel only” by stamping a prominent notice on each page or thing so designated. “Counsel only” material also includes materials ordered disclosed under division (F) of this rule. Except as otherwise provided, “counsel only” material may not be shown to the defendant or any other person, but may be disclosed only to defense counsel, or the agents or employees of defense counsel, and may not otherwise be reproduced, copied or disseminated in any way. Defense counsel may orally communicate the content of the “counsel only” material to the defendant.

(D) Prosecuting Attorney’s Certification of Nondisclosure. If the prosecuting attorney does not disclose materials or portions of materials under this rule, the prosecuting attorney shall certify to the court that the prosecuting attorney is not disclosing material or portions of material otherwise subject to disclosure under this rule for one or more of the following reasons:

- (1) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will compromise the safety of a witness, victim, or third party, or subject them to intimidation or coercion;
- (2) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will subject a witness, victim, or third party to a substantial risk of serious economic harm;
- (3) Disclosure will compromise an ongoing criminal investigation or a confidential law enforcement technique or investigation regardless of whether that investigation involves the pending case or the defendant;
- (4) The statement is of a child victim of sexually oriented offense under the age of thirteen;
- (5) The interests of justice require non-disclosure.

Reasonable, articulable grounds may include, but are not limited to, the nature of the case, the specific course of conduct of one or more parties, threats or prior instances of witness tampering or intimidation, whether or not those instances resulted in criminal charges, whether the defendant is pro se, and any other relevant information.

The prosecuting attorney’s certification shall identify the nondisclosed material.

(E) Right of Inspection in Cases of Sexual Assault.

- (1) In cases of sexual assault, defense counsel, or the agents or employees of defense counsel, shall have the right to inspect photographs, results of physical or mental examinations, or hospital reports, related to the indictment, information, or complaint as described in section (B)(3) or (B)(4) of this rule. Hospital records not related to the information, indictment, or complaint are not subject to inspection or disclosure. Upon

motion by defendant, copies of the photographs, results of physical or mental examinations, or hospital reports, shall be provided to defendant's expert under seal and under protection from unauthorized dissemination pursuant to protective order.

(2) In cases involving a victim of a sexually oriented offense less than thirteen years of age, the court, for good cause shown, may order the child's statement be provided, under seal and pursuant to protective order from unauthorized dissemination, to defense counsel and the defendant's expert. Notwithstanding any provision to the contrary, counsel for the defendant shall be permitted to discuss the content of the statement with the expert.

(F) Review of Prosecuting Attorney's Certification of Non-Disclosure. Upon motion of the defendant, the trial court shall review the prosecuting attorney's decision of nondisclosure or designation of "counsel only" material for abuse of discretion during an *in camera* hearing conducted seven days prior to trial, with counsel participating.

(1) Upon a finding of an abuse of discretion by the prosecuting attorney, the trial court may order disclosure, grant a continuance, or other appropriate relief.

(2) Upon a finding by the trial court of an abuse of discretion by the prosecuting attorney, the prosecuting attorney may file an interlocutory appeal pursuant to division (K) of Rule 12 of the Rules of Criminal Procedure.

(3) Unless, for good cause shown, the court orders otherwise, any material disclosed by court order under this section shall be deemed to be "counsel only" material, whether or not it is marked as such.

(4) Notwithstanding the provisions of (E)(2), in the case of a statement by a victim of a sexually oriented offense less than thirteen years of age, where the trial court finds no abuse of discretion, and the prosecuting attorney has not certified for nondisclosure under (D)(1) or (D)(2) of this rule, or has filed for nondisclosure under (D)(1) or (D)(2) of this rule and the court has found an abuse of discretion in doing so, the prosecuting attorney shall permit defense counsel, or the agents or employees of defense counsel to inspect the statement at that time.

(5) If the court finds no abuse of discretion by the prosecuting attorney, a copy of any discoverable material that was not disclosed before trial shall be provided to the defendant no later than commencement of trial. If the court continues the trial after the disclosure, the testimony of any witness shall be perpetuated on motion of the state subject to further cross-examination for good cause shown.

(G) Perpetuation of Testimony. Where a court has ordered disclosure of material certified by the prosecuting attorney under division (F) of this rule, the prosecuting attorney may move the court to perpetuate the testimony of relevant witnesses in a hearing before the court, in which hearing the defendant shall have the right of cross-examination. A record of the witness's

testimony shall be made and shall be admissible at trial as part of the state's case in chief, in the event the witness has become unavailable through no fault of the state.

(H) Discovery: Right to Copy or Photograph. If the defendant serves a written demand for discovery or any other pleading seeking disclosure of evidence on the prosecuting attorney, a reciprocal duty of disclosure by the defendant arises without further demand by the state. The defendant shall provide copies or photographs, or permit the prosecuting attorney to copy or photograph, the following items related to the particular case indictment, information or complaint, and which are material to the innocence or alibi of the defendant, or are intended for use by the defense as evidence at the trial, or were obtained from or belong to the victim, within the possession of, or reasonably available to the defendant, except as provided in division (J) of this rule:

- (1) All laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings or places;
- (2) Results of physical or mental examinations, experiments or scientific tests;
- (3) Any evidence that tends to negate the guilt of the defendant, or is material to punishment, or tends to support an alibi. However, nothing in this rule shall be construed to require the defendant to disclose information that would tend to incriminate that defendant;
- (4) All investigative reports, except as provided in division (J) of this rule;
- (5) Any written or recorded statement by a witness in the defendant's case-in-chief, or any witness that it reasonably anticipates calling as a witness in surrebuttal.

(I) Witness List. Each party shall provide to opposing counsel a written witness list, including names and addresses of any witness it intends to call in its case-in-chief, or reasonably anticipates calling in rebuttal or surrebuttal. The content of the witness list may not be commented upon or disclosed to the jury by opposing counsel, but during argument, the presence or absence of the witness may be commented upon.

(J) Information Not Subject to Disclosure. The following items are not subject to disclosure under this rule:

- (1) Materials subject to the work product protection. Work product includes, but is not limited to, reports, memoranda, or other internal documents made by the prosecuting attorney or defense counsel, or their agents in connection with the investigation or prosecution or defense of the case;
- (2) Transcripts of grand jury testimony, other than transcripts of the testimony of a defendant or co-defendant. Such transcripts are governed by Crim. R. 6;
- (3) Materials that by law are subject to privilege, or confidentiality, or are otherwise prohibited from disclosure.

(K) Expert Witnesses; Reports. An expert witness for either side shall prepare a written report summarizing the expert witness's testimony, findings, analysis, conclusions, or opinion, and shall include a summary of the expert's qualifications. The written report and summary of qualifications shall be subject to disclosure under this rule no later than twenty-one days prior to trial, which period may be modified by the court for good cause shown, which does not prejudice any other party. Failure to disclose the written report to opposing counsel shall preclude the expert's testimony at trial.

(L) Regulation of discovery.

(1) The trial court may make orders regulating discovery not inconsistent with 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 such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.

(2) The trial court specifically may regulate the time, place, and manner of a *pro se* defendant's access to any discoverable material not to exceed the scope of this rule.

(3) In cases in which the attorney-client relationship is terminated prior to trial for any reason, any material that is designated "counsel only", or limited in dissemination by protective order, must be returned to the state. Any work product derived from said material shall not be provided to the defendant.

(M) Time of motions. A defendant shall make his demand for discovery within twenty-one days after arraignment or seven days before the date of trial, whichever is earlier, or at such reasonable time later as the court may permit. A party's motion to compel compliance with this rule shall be made no later than seven days prior to trial, or three days after the opposing party provides discovery, whichever is later. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon showing of cause why such motion would be in the interest of justice.

[Effective: July 1, 1973; amended effective July 1, 2010.]

Staff Notes (July 1, 2010 Amendments)

Division (A): Purpose, Scope and Reciprocity

The purpose of the revisions to Criminal Rule 16 is to provide for a just determination of criminal proceedings and to secure the fair, impartial, and speedy administration of justice through the expanded scope of materials to be exchanged between the parties. Nothing in this rule shall inhibit the parties from exchanging greater discovery beyond the scope of this rule. The rule accelerates the timing of the exchange of materials, and expands the reciprocal duties in the exchange of materials. The limitations on disclosure permitted under this rule are believed to apply to the minority of criminal cases.

The new rule balances a defendant's constitutional rights with the community's compelling interest in a thorough, effective, and just prosecution of criminal acts.

The Ohio criminal defense bar, by and through the Ohio Association of Criminal Defense Lawyers and prosecutors, by and through the Ohio Prosecuting Attorneys Association, jointly drafted the rule and submitted committee notes to the Commission on the Rules of Practice and Procedure. The Commission on the Rules of Practice and Procedure discussed, modified, and adopted the notes submitted in developing these staff notes.

Division (B): Discovery: Right To Copy or Photograph

This division expands the State's duty to disclose materials and information beyond what was required under the prior rule. All disclosures must be made prior to trial. This division also requires the materials to be copied or photographed as opposed to inspection as permitted under the prior rule. Subject to several exceptions, the State must provide pretrial disclosure of all materials as listed in the enumerated divisions.

Division (C): Prosecuting Attorney's Designation of "Counsel Only" Materials

The State is empowered to limit dissemination of sensitive materials to defense counsel and agents thereof in certain instances. Documents marked as "Counsel Only" may be orally interpreted to the Defendant, or to counsel's agents and employees, but not shown or disseminated to other persons. The rule recognizes that defense counsel bears a duty as an officer of the court to physically retain "Counsel Only" material, and to limit its dissemination. Counsel's duty to the client is not implicated, since the rule expressly allows oral communication of the nature of the "Counsel Only" material.

Division (D): Prosecuting Attorney's Certification of Nondisclosure

This division provides a means to prevent disclosure of items or materials for limited reasons. The prosecution must be able to place reasonable limits on dissemination to preserve testimony and evidence from tampering or intimidation, and certain other enumerated purposes. The new rule explicitly recognizes that it is the prosecution's duty to assess the danger to witnesses and victims, and the need to protect those witnesses and victims by controlling the early disclosure of certain material, subject to judicial review.

A nondisclosure must be for one of the reasons enumerated in the rule, and must be certified in writing to the court. The certification need not disclose the contents or meaning of the nondisclosed material, but must describe it with sufficient particularity to identify it during judicial review as described in division (F).

The certification process recognizes the unique nature of sex crimes against children. In the event of a certification of nondisclosure, defense counsel will have the right to inspect the statement no later than the seven-day review hearing provided in subsection (F), which is an improvement from the prior Criminal Rule 16(B)(1)(g).

Finally, the rule recognizes that not every eventuality can be anticipated in the text of a rule, and allows nondisclosure in the interest of justice.

Division (E): Right of Inspection in Cases of Sexual Assault

This division recognizes the intensely personal nature of a sexual assault, and provides a special mechanism for discovery in such cases. It represents an exception to division (B).

The compromise between the interests in the privacy and dignity of the victim are balanced against the right of the defendant to a thorough review of the State's evidence by permitting inspection, but not copying, of certain materials. Upon motion of the defendant, the court may, in its discretion, permit these materials to be provided under seal to defense counsel and the defendant's expert.

In cases involving the sexual abuse of a child under the age of 13, upon motion and for good cause shown, the trial court may order dissemination of the child's statement under seal and pursuant to protective order to defense counsel and the defendant's expert. This provision facilitates meaningful communication between defense counsel and the defense expert, and to permit timely compliance with division (K) of the rule.

Division (E)(2) is intended to give sufficient time for an expert to evaluate the statement, and also to permit defense counsel to consult with the expert on the content of the statement and issues related to it. This division is designed to provide an exception to the nondisclosure procedure sufficient to permit the expert and defense counsel to effectively evaluate the statement. The protective order shall apply to defense counsel and defendant's experts and agents.

Division (F): Review of Prosecuting Attorney's Certification of Non-Disclosure

This division provides for judicial review at the trial court level of a prosecutor's certification of nondisclosure. As in many other executive branch decisions the standard for review, subject to constitutional protections, is an abuse of discretion – that is, was the prosecutor's decision unreasonable, arbitrary or capricious? The prosecution of a case is an executive function. The rule's nondisclosure provision is a tool to ensure the prosecutor is able to fulfill that executive function.

The prosecutor should possess extensive knowledge about a case, including matters not properly admissible in evidence but highly relevant to the safety of the victim, witnesses, or community. Accordingly, the rule vests in the prosecutor the authority for seeking protection by the nondisclosure, and deference when making a good faith decision about unpredictable prospective human behavior.

The review is conducted *in camera* on the objective criteria set out in division (D), seven days prior to trial, with defense counsel participating. If the Court finds an abuse of discretion, the material must be immediately disclosed to defense counsel. If the Court does not find an abuse of discretion, the material must nonetheless be disclosed no later than the commencement of trial. Further judicial review is provided by giving the prosecutor a right to an interlocutory appeal of an order of disclosure as provided for in Criminal Rule 12(K), which is amended to accommodate that process.

Upon motion of the State, the certification of nondisclosure or "Counsel Only" designation is reviewable by the trial judge in the *in camera* proceeding. The preferred practice is to record or transcribe the *in camera* review to preserve any issues for appeal and sealed to preserve the confidential nature of the information.

The *in camera* review is set seven days prior to trial so that it is, in essence, the end of the trial preparation stage. There was substantial debate regarding the time for this review. Seven days provides adequate opportunity for the defense to prepare for trial and respond to the content of any nondisclosed material. The protective purpose of this process would be destroyed if courts routinely granted continuances of a trial date after conducting the seven-day nondisclosure review. The Commission anticipated that continuances of trial dates would occur only in limited circumstances.

Division (F)(4) seeks to protect victims of sexual assault who are still in their tender years.

Division (G): Perpetuation of Testimony

This division provides that if after judicial review the Court orders disclosure of evidence, the prosecutor upon motion to the Court is given a right to perpetuate testimony in a pretrial hearing as set forth in the subsection.

Division (H): Discovery: Right to Copy or Photograph

The previous rule allowed for disclosure of specified relevant evidence in the possession of defense counsel to the State upon the State's motion. This division expands defense counsel's duty to disclose materials and information beyond what was required under the prior rule. In this division a reciprocal duty of disclosure now arises upon defense counsel's motion for discovery without further demand from the State. This division requires the materials to be copied or photographed, as opposed to the prior rule that only allowed for inspection by the State. Subject to several exceptions covered in division (J), defense counsel must provide pretrial disclosure of materials as listed in the enumerated subsections. This division seeks to define the defense counsel's reciprocal duty of disclosure while respecting the constitutional and ethical obligations required in representing a client.

For the first time, defense counsel has a duty to provide the State with evidence that tends to support innocence or alibi. This allows the State to properly assess its case, and re-evaluate the prosecution. The Commission believes this provision will facilitate meaningful plea negotiation and just resolution.

Division (I): Witness List

This division imposes an equal duty on each party to disclose the list of witnesses that will be called at trial. It prohibits counsel from commenting on the witness lists but does not prohibit the commenting upon the absence or presence of a witness relevant to the proceeding. See, *State v. Hannah*, 54 Ohio St.2d 84, 374 N.E.2d 1359 (1978).

Division (J): Information Not Subject to Disclosure

This division clarifies what information is not subject to disclosure by either party for reasons of confidentiality, privilege, or due to their classification as documents determined to be work product. This division also references that the disclosure or nondisclosure of grand jury testimony is governed by Rule 6 of the Rules of Criminal Procedure.

Division (K): Expert Witnesses; Reports

The division requires disclosure of the expert witness's written report as detailed in the division no later than twenty-one days prior to trial. Failure to comply with the rule precludes the expert witness from testifying during trial. This prevents either party from avoiding pretrial disclosure of the substance of expert witness's testimony by not requesting a written report from the expert, or not seeking introduction of a report. This division does not require written reports of consulting experts who are not being called as witnesses.

Division (L): Regulation of Discovery

The trial court continues to retain discretion to ensure that the provisions of the rule are followed. This discretion protects the integrity of the criminal justice process while protecting the rights of the defendants, witnesses, victims, and society at large.

In cases in which a defendant initially proceeds *pro se*, the trial court may regulate the exchange of discoverable material to accommodate the absence of defense counsel. Said exchange must be consistent with and is not to exceed the scope of the rule. In cases in which the attorney-client relationship is terminated prior to trial for any purpose, any material designated "Counsel Only" or limited in dissemination by protective order must be returned to the State. Any work product derived from such material shall not be provided to the defendant.

The provisions of (L)(2) and (L)(3) are designed to give the court greater authority to regulate discovery in cases of a *pro se* defendant and addresses the problems that could arise if a defendant terminates the employment of his attorney and then demands everything in the attorney's file. This could frustrate the protections built into the rule to avoid release of material directly to the defendant in some cases.

Section (M): Time of Motions

This division requires timely compliance with all provisions of this rule subject to judicial review. Adherence to the requirements of this division will help to ensure the fair administration of justice.