Vermont Rules of Criminal Procedure, Rule 16

RULE 16. DISCOVERY BY DEFENDANT

Currentness

(a) Prosecutor's Obligations. Except as provided in subdivision (d) of this rule for matters not subject to disclosure and in Rule 16.2(d) for protective orders, upon a plea of not guilty the prosecuting attorney shall upon request of the defendant made in writing or in open court at his appearance under Rule 5 or at any time thereafter

(1) Disclose to defendant's attorney as soon as possible the names and addresses of all witnesses then known to him, and permit defendant's attorney to inspect and copy or photograph their relevant written or recorded statements, within the prosecuting attorney's possession or control.

(2) Disclose to defendant's attorney and permit him to inspect and copy or photograph within a reasonable time the following material or information within the prosecuting attorney's possession, custody, or control:

(A) any written or recorded statements and the substance of any oral statements made by the defendant, or made by a co-defendant if the trial is to be a joint one;

(B) the transcript of any grand jury proceedings pertaining to the indictment of the defendant or of any inquest proceedings pertaining to the investigation of the defendant;

(C) any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons;

(D) any books, papers, documents, photographs (including motion pictures and video tapes), or tangible objects, buildings or places or copies or portions thereof, which are material to the preparation of the defense or which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the defendant;

(E) the names and addresses of all witnesses whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with any record of prior criminal convictions of any such witness;

(F) any record of prior criminal convictions of the defendant; and

(G) any other material or information not protected from disclosure under subdivision (d) of this rule that is necessary to the preparation of the defense.

The fact that a witness' name is on a list furnished under subparagraph (2)(E) of this subdivision and that he is not called shall not be commented upon at trial.

If no request is made, the prosecuting attorney shall, at or before the status conference, disclose in writing the foregoing items or state in writing that they do not exist.

(b) Same: Collateral or Exculpatory Matter. The prosecuting attorney shall, as soon as possible, after a plea of not guilty,

(1) Inform defendant's attorney,

(A) if he has any relevant material or information which has been provided by an informant;

(B) if there are any grand jury or inquest proceedings which have not been transcribed; and

(C) if there has been any electronic surveillance (including wiretapping) of conversations to which the defendant was a party or of his premises.

(2) Disclose to defendant's attorney any material or information within his possession or control which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce his punishment therefor.

(c) Same: Scope. The prosecuting attorney's obligations under subdivisions (a) and (b) of this rule extend to material and information in the possession, custody, or control of members of his staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to his office.

(d) Matters Not Subject to Disclosure.

(1) *Work Product.* Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the mental impressions, conclusions, opinions, or legal theories of the prosecuting attorney, members of his legal staff, or other agents of the prosecution, including investigators and police officers.

(2) *Informants.* Disclosure of an informant's identity shall not be required except as provided in Rule 509(c) of the Vermont Rules of Evidence.

(3) *Victim's Residential Address or Place of Employment.* Disclosure shall not be required of a victim's residential address or place of employment unless the court finds, based upon a preponderance of the evidence, that nondisclosure of the information will prejudice the defendant.

(e) Videotapes. A copy of a videotape made of the alleged offense and subsequent processing shall be available for purchase by the defendant directly from the law enforcement agency responsible for initiating the action upon written request and advance payment of a $45.00 fee, except that no fee shall be charged to a defendant whom the court has determined to be indigent. A municipal or county law enforcement agency shall be entitled to all fees it collects for videotapes sold pursuant to this rule. Fees collected by the state for videotapes sold pursuant to this rule shall be deposited in the DUI enforcement special fund created under section 1220a of Title 23. The original videotape may be erased 90 days after:

(1) the entry of final judgment; or

(2) the date the videotape was made, if no civil or criminal action is filed.

Credits

[Amended by 1999, Adj. Sess., No. 160, § 32, eff. July 1, 2000; 2007, Adj. Sess., No. 153, § 2a, eff. July 1, 2008. Amended eff. July 21, 2008. Amended May 10, 2016, eff. July 11, 2016.]

Editors' Notes

REPORTER'S NOTES--2016 AMENDMENT

New subdivision 16(d)(3) provides that the prosecuting attorney is not required to disclose to the defendant information as to the residential address or place of employment of the victim, unless the court finds, based upon a preponderance of the evidence, that nondisclosure of the information will prejudice the defendant. The amendment serves to implement the provisions of 13 V.S.A. § 5310, while expressly reserving the court's authority to order that the state disclose the information where necessary to preserve a defendant's due process and confrontation guarantees. In contrast to Vermont Rule 16, Federal Rule 16 makes no provision for disclosure of the addresses or places of employment of witnesses; the Jencks Act, 18 U.S.C. § 3500, provides for disclosure of certain prior statements of witnesses to the defendant after they have testified, for purposes of cross-examination.

REPORTER'S NOTES--2008 EMERGENCY AMENDMENT

This emergency amendment to Rule 16(e) is made to conform with an amendment 23 V.S.A § 1203(k). See, 2007, No. 153, (Adj. Sess.), § 2a.

REPORTER'S NOTES--1983 AMENDMENT

Rule 16(d)(2) is amended for conformity with Evidence Rule 509 which creates an informant's privilege. The privilege, like the present rule, applies only to matters that are prosecution secrets and does not apply to informants who are to be called as witnesses by the state. The most important exception to the privilege, however, is somewhat broader in scope than the rule, extending under Rule 509(c)(2) to "any issue" in a criminal case. Rule 16(d)(2) was limited to issues where disclosure was compelled by the Constitution--i.e., those essential to the determination of guilt or innocence--or where the informant's identity was itself in issue--e.g., entrapment. See Reporter's Notes to Evidence Rule 509, Criminal Rule 16(d)(2).

REPORTER'S NOTES--1982 AMENDMENT

Rule 16(a) is amended as part of the change from the omnibus hearing to the status conference. See Reporter's Notes--1982 Amendments to Rule 12. The rule formerly required the prosecutor to make certain disclosures at the omnibus hearing unless a request is made earlier. It now requires the disclosures to be in writing and to be made at or before the status conference. Oral disclosures formerly were made in response to the omnibus checklist, a practice that has been eliminated with the shift to the status conference.

REPORTER'S NOTES--1977 AMENDMENT

This amendment is intended to make clear that the list of items which the defendant may discover under Rule 16(a) is not exclusive. For example, defendant should be able to inquire as to any arrangements between the prosecution and its witnesses or any information about the background of prospective jurors which prosecution investigators may have uncovered. The amendment does not specify the matters that are discoverable, but requires that they be outside the protections for work product and informants contained in Rule 16(d) and that they be "necessary to the defense." If the prosecution wishes to resist disclosure of a particular item under this provision, it should move for a protective order under Rule 16.2(d). On that motion the court will decide the question of necessity. Conversely, the defendant can compel compliance with a request under this provision either by a motion for sanctions under Rule 16.2(g) or by successfully resisting a motion for a protective order. Since the amendment applies to either "material or information," it is in effect similar to the interrogatory procedure of civil Rule 33, without the formality and detail of that rule.

REPORTER'S NOTES

This rule must be read with Rules 16.1 and 16.2, which form with it a system of reciprocal discovery. The three rules are in general similar to the ABA Minimum Standards (Discovery and Procedure before Trial) §§ 2.1-4.7 and to the currently proposed amendments to Federal Rule 16, first presented in January 1970, 48 F.R.D. 553, 587 (1970), and transmitted to the Supreme Court with important revisions in November 1972 Proposed Amendments to the Federal Rules of Criminal Procedure (Mimeograph, Admin. Ofc. U.S. Courts, 1972). The rules go further than either source in the breadth of discovery accorded the defendant, however, and extend considerably the defendant's rights under former 13 V.S.A. § 6727, repealed by Act No. 118 of 1973, § 25. The rules also alter Vermont practice significantly by allowing discovery by the prosecution. See Rule 16.1.

Rule 16(a) is based on ABA Minimum Standards § 2.1(a). It provides for disclosure to the defendant of stated matters upon request, which may be made in writing or orally in open court at any time. Under the last sentence of the subdivision, if no request is made, the prosecutor must in any event disclose the items, or state that they do not exist, at the omnibus hearing. The request procedure, adapted from the proposed Federal Rule, is designed to avoid loss of time in needless motions. At the same time the prosecutor is relieved at the burden of automatic disclosure, unnecessary in many routine cases, that ABA Minimum Standards § 2.2 requires. If the prosecution wishes to oppose or limit disclosure, its remedy is a motion for a protective order under Rule 16.2(d). This self-operating feature of discovery practice under the rules, like the deposition procedure under Rule 15(a), is similar to civil practice, where it has worked effectively. See Reporter's Notes to Rule 15(a). Cf. ABA Minimum Standards § 2.2, Commentary.

Rule 16(a)(1), requiring disclosure of all witnesses known to the prosecution and access to their statements, whether the witnesses are to be used at trial or not, is broader than either ABA Minimum Standards § 2.1 or the proposed Federal Rule. The Vermont rule in effect makes available to the defendant the prosecution's full investigative resources on the theory that justice is best served and speedy disposition of cases is encouraged if both sides have equal access to sources of potential evidence. Because knowledge of the existence of witnesses is essential in the preparation of defendant's case this disclosure must be made "as soon as possible" after request, rather than "within a reasonable time," as is provided for disclosures under Rule 16(a)(2). The breadth of disclosure required under this rule is, of course, subject to the limitations as to work product and informants provided by Rule 16(d). The prosecution may resist disclosure on such grounds by motion for protective order under Rule 16.2(d). Although disclosure under Rule 16(a)(1) is required only upon request, the obligation of the prosecution to reveal the existence of informant's evidence and to disclose exculpatory evidence without request under Rule 16(b) will, where applicable, supersede the procedure of Rule 16(a)(1).

The items enumerated in Rule 16(a)(2) are essentially those as to which disclosure is required under ABA Minimum Standards § 2.1(a). See Commentary to that section. The provision of subparagraph (A) for inspection of codefendants' statements goes beyond the discovery allowed under former 13 V.S.A. § 6727, supra. See State v. Anair, 123 Vt. 80, 181 A.2d 61 (1962). Such

disclosure is desirable to give defendant advance notice of possible grounds for severance in a joint trial situation under Rule 14(b)(2)(B). See Reporter's Notes to that rule and ABA Minimum Standards § 2.1(a)(ii), Commentary.

Subparagraph (B) goes beyond ABA Minimum Standards § 2.1(a)(iii), which requires disclosure only of the defendant's own grand jury testimony and relevant testimony of witnesses to be called at trial. Proposed Federal Rules 16(a)(1)(A), (3), apply only to testimony of the defendant and officers of a corporate defendant, except as further disclosure may be permitted under Federal Rule 6(e). Cf. Reporter's Notes to Rule 6. The Vermont rule is also a significant departure from prior Vermont practice under which disclosure of grand jury and inquest testimony was allowed in the court's discretion only upon a showing of genuine need. See State v. Alexander, 130 Vt. 54, 286 A.2d 262 (1971); State v. Oakes, 129 Vt. 241, 276 A.2d 18, cert. denied 404 U.S. 965 [92 S.Ct. 340] (1971); State v. Miner, 128 Vt. 55, 258 A.2d 815 (1969). The complete disclosure required under the rule is intended to equalize the investigative advantage which the grand jury and inquest procedures give the prosecution and to eliminate time-consuming disputes over questions of relevance and need. The prosecution must seek a protective order if disclosure will imperil the secrecy of the grand jury or inquest.

Subparagraphs (C)-(F) require disclosure that would presumably have been permissible under former 13 V.S.A. § 6727, supra. See State v. Miner, supra, 128 Vt. at 71-73 [258 A.2d at 824-26]. Those provisions all are consistent with the general goal of equalizing investigative advantages and eliminating surprise at trial, and all are of course subject to the prosecution's right to a protective order. See ABA Minimum Standards § 2.1(a)(i), (iv)-(vi), Commentary. Proposed Federal Rule 16(a)(1)(B)-(E) provides for similar disclosure. The requirement of subparagraph (E) that witnesses to be used at trial be disclosed must be complied with even after a general disclosure of witnesses is made under Rule 16(a)(1). Disclosure of trial witnesses is an aid in planning trial strategy. The broader disclosure is for investigative purposes. Statements of trial witnesses are not specifically referred to in subparagraph (E), but such statements either will have been made available under Rule 16(a)(1) or must be disclosed under the continuing duty to implement that rule imposed by Rule 16.2(b). The provision prohibiting comment on the prosecution's failure to call a listed witness is intended to protect the prosecution from an unfair implication that might be drawn from a tactical step. The prohibition is only against commenting upon the fact that the witness was previously listed; it does not bar comment generally upon the prosecution's failure to call the witness. See Federal Advisory Committee's Note, 48 F.R.D. 553, 606.

Rule 16(b) is taken from ABA Minimum Standards § 2.1(b), (c). It imposes an absolute obligation upon the prosecution to disclose matters pertaining to certain collateral procedural and constitutional issues susceptible of preliminary determination, as well as exculpatory matters. The provision as to informants in subparagraph (A) was eliminated in an amendment to ABA Minimum Standards § 2.1(b) (Supp.1970) on the theory that the point was adequately covered by the provision for exculpatory matter and by other procedural devices. The informant clause has been retained in the rule, however, because of issues, such as search and seizure, to which such matter may pertain, that are not strictly speaking within the exculpatory clause, and because of the desirability of giving the defendant prompt access to matter pertaining to preliminary issues. Subparagraph (B) implements Rule 16(a)(2)(B) by making routine transcription of grand jury and inquest proceedings unnecessary. If fully apprised of the contents of such proceedings, defendant presumably will not request transcripts of no value to him. Rule 16(b)(2) is intended to implement the constitutional requirement of disclosure of exculpatory material imposed by Brady v. Maryland, 373 U.S. 83 [83 S.Ct. 1194] (1963). See ABA Minimum Standards § 2.1(c), Commentary.

Rule 16(c), taken from ABA Minimum Standards § 2.1(d), makes clear that the prosecution's obligations extend not only to material in the hands of the prosecutor's immediate staff but to that possessed or controlled by others, such as police officers, involved in the investigation of the case under the prosecutor's direction. Excluded from the obligations of Rule 16 are employees or officers of other governmental agencies who may be involved with the matter in question but have no working connection with the prosecution. Although the rules do not require it, as a matter of good practice prosecutors should follow the guidelines of ABA Minimum Standards § 2.4 in seeking to make available upon defendant's request material that is under the control of other agencies of the State. If the prosecution fails in such efforts, the defendant has available the subpoena duces tecum under Rule 17(c) to compel production of such material. See Reporter's Notes to Rule 17(c).

The standard of "possession, custody or control" found in Rule 16(a) is further defined by Rule 16(c). The same language in Federal Rule 16 and Civil Rule 34 may be looked to for interpretive guidance. "Control" should be so construed that the prosecution will not be able to avoid discovery by declining possession or custody of material which normally should be in its files. Moreover, although the rule does not contain the language of Federal Rule 16(a), which applies to matter "the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government," such a due diligence requirement should be read into the rule, consistent with the continuing duty to disclose imposed by Rule 16.2(b). The better practice is that delineated in ABA Minimum Standards § 2.2(c): "The prosecuting Attorney should ensure that a flow of information is maintained between the various investigative personnel and his office sufficient to place within his possession or control all material and information relevant to the accused and the offense charged." See id., Commentary.

Rule 16(d) is taken from ABA Minimum Standards § 2.6(a), (b). Objections to disclosure based upon it should be made by motion for protective order under Rule 16.2(d). Rule 16(d)(1) is similar in language and effect to Civil Rule 26(b)(3). The limitation in the rule to work product provides a narrower protection than that accorded government agents under Federal Rule 16(a). The Vermont rule is more protective than ABA Minimum Standards § 2.6(a), however. That section only covers members of the prosecutor's "legal staff." In view of the broad protection accorded by the rule, the courts should interpret "mental impressions, conclusions, opinions, or legal theories" narrowly to achieve the basic purpose of the rule to protect the adversary process from intrusion. See ABA Minimum Standards § 2.6(a), Commentary. Such a narrow interpretation is particularly called for where reports of nonlawyers are involved, if the general purpose of Rule 16 to give the defendant access to the basic information concerning the case in the prosecution's hands is not to be defeated. Of course, even the work product exception may give way where there is a constitutional duty to disclose, as in the case of exculpatory matter. See discussion of Rule 16(b)(2) above. Where a work product objection is legitimately made, its impact upon the defendant's right of access may be limited by the excision of the challenged matter under Rule 16.2(e).

Rule 16(d)(2) bars disclosure of an informer's identity over prosecution objection unless constitutionally compelled, unless shown by the defendant to be a fact essential to a defense such as entrapment, or unless the informer's identity will in any event be revealed by his testifying at trial. The essential-fact exception may also express a constitutional compulsion. See Roviaro v. United States, 353 U.S. 53 [77 S.Ct. 623] (1957). Revelation may also be constitutionally compelled when the basis of an arrest or search is challenged on Fourth Amendment grounds and there is doubt as to the credibility of the affiant or the informant. See McCray v. Illinois, 386 U.S. 300 [87 S.Ct. 1056] (1967); People v. Verrecchio, 23 N.Y.2d 489, [297 N.Y.S.2d 573] 245 N.E.2d 222 (1969).

Rules Crim. Proc., Rule 16, VT R RCRP Rule 16
State court rules are current with amendments received through June 1, 2022.